Kentucky Planning and Land Use Control Enabling Legislation: An Analysis of the 1966 Revision of K. R. S. Chapter 100

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INTRODUCTION

In 1966 the Kentucky General Assembly revised Kentucky Revised Statutes (hereinafter referred to as KRS) Chapter 100, creating, for the first time, uniform legislation for land use planning and controls. This revision was long overdue since the previous enabling legislation, applicable to different classes of cities, was a maze of confusing statutory provisions which, at best, can be described as a haphazard accretion of specific responses to a series of ad hoc needs. The prior legislation did not attempt to assess the development problems that the state was facing, and will face, nor did it permit a wide and effective variety of local responses to the problems stemming from the increased competition for land. The purpose of this article is to analyze the new enabling legislation in light of present environmental problems facing the state according to the following.

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1 The new legislation is still not entirely uniform because Jefferson County was able to secure several special provisions. The most notable is the fiscal court's power to enact zoning regulations for fifth and sixth class cities. Ky. Rev. Stat. § 100.137(2) (1966) [hereinafter cited as KRS]. The power of the General Assembly to withdraw the zoning power from these cities was sustained in Fiscal Court of Jefferson County v. City of Anchorage, 393 S.W.2d 608 (Ky. 1965). This is a rational method of dealing with defensive incorporations, but there is no reason why it should not be applied to other metropolitan areas which need it, such as the Kentucky portion of the Greater Cincinnati Area.

2 For a detailed description of the previous enabling legislation, see LEGISLATIVE RESEARCH COMMISSION, PLANNING AND ZONING IN KENTUCKY, RESEARCH REPORT No. 12 (1962).
to what extent does the legislation reflect concepts of land use planning and control which are responsive to contemporary environmental problems, and will the legislation permit lawyers and planners to operate free from uncertainty with respect to the meaning and scope of its provisions. The new legislation represents a major improvement over the previous enacting legislation, for now the provisions apply uniformly, with few exceptions, to all classes of cities; grants of authority are spelled out with greater clarity, thus removing many of the doubts which have impeded the use of land use controls; and the creation of more functional planning units is encouraged.

To appreciate the variety of problems faced by the state it is first necessary to outline briefly the population and land use patterns in Kentucky. According to the 1960 census, 44.5 per cent of Kentucky's population was classified as urban and the remaining 55.5 per cent as rural. At this time, Kentucky had two dominant population patterns—a continual shift of residents from less to more populous areas of the state, and high out-of-state migration which practically cancelled the growth from natural population increases. The net gain between 1950 and 1960 was only 93,000 persons, contrasted with a natural increase of 483,000. Since 1960, the out-migration trend has been substantially curtailed. This is due, in part, to the vigorous and successful campaign to induce industrial expansion and location within the state.

According to recent census studies, Kentucky's population is presently growing about twice as fast as it was ten years ago. The

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3 The American Society of Planning Officials suggests that the following inquiries be made to evaluate planning legislation: (1) consideration of planning principles; (2) examination of legal nomenclature; (3) evaluation of whether a workable intergovernmental relationship exists; (4) determination of whether impact on development is proper and sufficient. Henrickson, State Enabling Legislation, 1964 Planning 215, 216.


5 Id. at 12.

6 Kentucky is a major user of industrial revenue bonds to finance new plants. This type of financing is authorized by KRS §§ 103.200-.280 (1966). See generally Note, The "Public Purpose" and Municipal Financing for Industrial Development, 70 Yale L. J. 789 (1961). A local development agency may also apply to the state Industrial Development Finance Authority for a loan not in excess of forty per cent of the cost of the building if financing can not be obtained from private sources. KRS § 154.080 (1962).

Commonwealth's population may increase to 3,717,000 by 1980 according to the study. This rapid growth is due largely to a substantial reduction of out-migration, which is likely to continue. However, the same studies indicate that the movement from rural to urban areas will be accelerated and that significant population growth will generally be confined to the relatively few counties which are presently urbanized, e.g., Jefferson, Fayette, Kenton, Boone, Davies, Warren, McCracken, Christian, Bullitt, Meade, and Boyd. Nevertheless, rural counties will still be faced with the problems of rapid population increase. The location of a major industry in a sparsely populated area will generate the same types of growth problems as those found in a rapidly urbanizing area.

Kentucky land use difficulties cover the full range of national problems. The downtown areas of its cities, which have seen little development since World War II, are prime targets for urban renewal. Almost all of the growth occurring in metropolitan areas has been on the fringe of the cities; thus, all of the aesthetic and economic problems of suburban sprawl can be found, especially in Louisville and Covington which are permeated with defensive incorporations. Further, Louisville and Lexington may find themselves at the bottom of a megalopolistic triangle extending from Chicago to Louisville-Lexington to Cleveland and back across the Great Lakes. This means the state must encourage the integration of rural and urban land use planning in order to prevent continuing urban sprawl from destroying the open space areas which will be necessary for future use in recreation and agriculture.

It has been common to associate the problems of land use planning solely with the problems of rapid ex-urban growth or the deterioration of the central city in relation to its burgeoning

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8 See generally Editors of Fortune, The Exploding Metropolis (1956); W. Whyte, Urban Sprawl 115 (1957); Advisory Commission on Intergovernmental Relations, Metropolitan Social and Economic Disparities; Implications for Intergovernmental Relations in Central Cities and Suburbs (1965).

9 The magnitude of the problems which such a megalopolis will generate is suggested in J. Cottman, Megalopolis: The Urbanized Northwestern seaboard of the United States (1961).

10 Vermont recently considered legislation to protect scenic corridors in its rural areas. See Fonoroff, Proposed Legislation For Highway Corridor Protection, 1968 Urban Law Annual 128.
suburbs. Although there is a great need for zoning and land use controls in cities and counties experiencing an economic and population decline, comparatively little attention has been focused on the problems of such areas. Greater planning is required for areas with limited resources, and land, which is at a premium, must be preserved. Controls must be exercised in such places to prevent deterioration of commercial areas or waste of resources. Zoning and other land use controls can aid in reserving land by discouraging development of sparsely settled areas until such time when a complete, self-contained area can be developed. At the same time, development should be encouraged in areas already being used. Land use controls will be a major step toward the implementation of state policies concerned with the utilization of currently undeveloped land and other natural resources, such as water and coal. For example, if Eastern Kentucky is to be developed as a major recreation area for the East and Midwest, zoning can be used to preserve timber lands and recreation sites and to control strip mining. Land use planning is necessary to prevent land adjacent to large, multipurpose reservoirs from being haphazardly developed and resulting in a rural slum, thus inhibiting the full utilization of the reservoir's recreation potential.

As an alternative to the continued megalopolistic sprawl which engulfs a large part of our population, it has been proposed that

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11 A good discussion of the use of land use controls in areas of declining or stable population is found in H. Smith, THE CITIZEN'S GUIDE TO PLANNING AND ZONING 132 (1963).

12 See H. Caudill, NIGHT COMES TO THE CUMBERLANDS 376 (1962). There is no more confused area of the law of land use planning than that of the public's power to regulate the extraction of earth products. There is little doubt, however, that the zoning power may be used to prohibit the extraction of earth products especially if such extraction threatens personal safety or public health. See Coldblatt v. Town of Hempsted, 369 U.S. 590 (1962); Consolidated Rock Products v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 368, appeal dismissed, 371 U.S. 36 (1962); Village of Spillertown v. Frewitt, 171 N.W.2d 582 (Ill. 1961) (city may prohibit strip mining within its corporate limits); Bancett v. Montgomery, 398 S.W.2d 887 (Ky. 1965) (city may prohibit extraction of oil within its corporate limits). But cf., Midland Elec. Corp. v. Knox County, 115 N.E.2d 275 (Ill. 1953) (county can not limit strip mining to ten per cent of county area). A constitutional justification for the regulation of strip mining is suggested in Brooks, STRIP MINE RECLAMATION AND ECONOMIC ANALYSIS, 6 NAT. RESOURCES J. 13 (1966).

The Attorney General has ruled, by implication, that KRS §§ 350.010-.990 regulating strip mining and reclamation do not preempt the regulation of strip mining by cities and counties. 1966 Op. ATTy GEN. 95.

the federal government adopt a policy of decentralizing urban development to relieve the pressures on the big cities. This is based on the assumption that the cultural, economic, and social advantages of the large urban center can be duplicated in small-scale communities or new towns. To a large extent many expanding industries have unilaterally adopted this policy, stimulating the growth of many small communities and creating the demand for new urban facilities. Kentucky, a major beneficiary of these new industrial expansions because of its proximity to the major markets of the East and Midwest, would probably benefit equally from a federal decentralization policy such as the location of major scientific facilities outside large urban centers. Thus, the demand for new urban facilities would be further intensified. Indeed, the state has already begun to plan on the assumption that, at a minimum, industry will continue its policy of locating plants in rural and small urban areas.

Industrial development, produced by the operation of the free market, will not provide enough of the economic relief Kentucky needs for its chronically depressed areas. The population of Eastern Kentucky is scattered throughout the landscape in small clusters and this fragmentation makes it impossible to achieve the concentration of labor, capital, and education necessary to induce industrial location and thus provide a stable and prosperous economy. The state will have to develop new urban areas to provide a base for industry. A state-sponsored new town program which combines private investment with government subsidy must be formulated.

I. CREATION OF PLANNING UNITS

The provisions of the new enabling legislation for the formation of planning units are designed to encourage the creation of functional planning jurisdictions. A continuing criticism of city planning is that land use controls are being exercised by governmental units whose jurisdictions do not correspond to the

geographic areas faced with common physical environmental problems. The enabling legislation does not attempt to abolish the belief, a century and a half old, in the moral superiority of smaller units of government, but it does encourage units confronted with common problems to unite voluntarily to seek solutions. Those seeking a balance of power between central, state, and local governments should realize that the answer lies in creating more powerful units of local and state government rather than in attempting to effect a blanket circumscription of higher authority.

Section 100.113 of the new enabling legislation permits the formation of three types of planning units: 1) an independent planning unit, which is defined in Section 100.111 (14) as a unit comprised of a city or county engaged in planning operations; 2) joint city-county planning units; and 3) regional planning units comprised of groups of counties and their cities.

1. Independent Planning Units

Section 100.117 provides that an independent planning unit can be formed only after the required procedure for the establishment of a joint planning unit is unsuccessful. A city desiring to establish a planning unit must first interrogate, in writing, the county and every other city in the county "to determine whether they desire to enter into an agreement to form a joint planning unit." Each subdivision interrogated has sixty days in which to respond. If they fail to respond, or respond in the negative, the city may proceed to establish an independent planning unit. If the county responds affirmatively, a joint planning unit is created and all other cities in the county are precluded from forming an independent unit. Other cities in the county have the option to join the unit after it has been organized. A county may also initiate a joint planning unit although the statute is somewhat unclear about the procedure it must follow. Section 100.121 (2) provides: "A county shall interrogate every incorporated city within its boundaries and otherwise be subject to the following procedure established for independent planning operations." Pre-

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sumably this section means that if the county and one city in the county agree to enter into a joint planning unit, all other cities are precluded from creating an independent unit.

2. Joint Planning Units

Section 100.121 makes clear what is implied in Section 100.117, i.e., the legislative body of cities together with the county fiscal court,\textsuperscript{18} may enter into a voluntary agreement to form a joint planning unit.\textsuperscript{19} Section 100.121 (2) contains one of the few special provisions in the legislation. It states that if a joint city-county planning unit is formed in a county with a city of the first class, all other cities in the county shall be parts of the unit.\textsuperscript{20} This is a desirable provision for it insures that a unified planning unit exists for the state's largest metropolitan area, Jefferson County and Louisville, and it begins to eliminate the problems caused by the fragmentation of municipal units in Jefferson County.\textsuperscript{21}

The legislation does not expressly provide a procedure for withdrawing from a joint planning unit, but the intent of the Legislature was that either the city or the county may unilaterally withdraw from the agreement at any time.\textsuperscript{22} However, the legislation severely limits any withdrawal by requiring that if a city withdraws it must follow the interrogation procedure set out in Section 100.117 for establishment of an independent planning unit. Thus, a county can force the city to either stay in the planning unit or forego planning operations by threatening to respond affirmatively to the city's required interrogation. Presumably, the same "club" is available to the city under Section 100.117 (2) if the county threatens to withdraw from the unit.

\textsuperscript{18}The power of the fiscal courts is now co-extensive with that of cities. KRS § 100.331 (1966).
\textsuperscript{19}KRS § 100.127 (1966) specifies the formal requisites for an agreement and its implementation. It must be in writing and "contain all details which are necessary for the establishing and administration of the planning unit in regard to the planning commission organization, preparation of plans, and aids to plan implementation."
\textsuperscript{20}See KRS § 100.137 which details the special provisions applicable to Louisville and Jefferson County.
\textsuperscript{21}Jefferson County had, on October 5, 1967, 62 municipalities. There were 51 sixth class cities, 7 fifth class cities, 3 fourth class cities, and 1 first class city. The latest mini-city, Meadow Vale, took in an area of 933 square feet. Great oaks from little acorns grow.
\textsuperscript{22}KRS § 100.127(2) (1966) provides that the agreement for the planning unit shall be in existence as long as two of the original signatories are operating under it, despite the fact that other signatories have withdrawn.
This section should be successful in keeping the unit together in the face of short term disagreements between the city and county over a controversial planning commission decision. The right to withdraw unilaterally from a unit will impede planning if withdrawals are simple and thus become common. The section could be amended to prohibit dissolution only after the legislative bodies of all participating units have agreed to it, but this is probably not desirable. Once a minimum consensus among participating units dissolves, planning verges on chaos with the private land owner losing out in the ensuing power struggle due to delays and irrational decisions. Thus, it is better to give up the game once a player decides he doesn't want to play any more.

3. Regional Planning Units

Section 100.123 permits the formation of regional planning units when the legislative bodies of the cities and counties, comprising two or more adjacent planning units, voluntarily agree to its formation. The combined territory of these units must form a logical functioning area, or portion thereof, by reasons of physical, economic, or social features. The standards for transferring planning functions from the existing units to the regional unit are extremely flexible, for the former may continue in existence and transfer some functions to the regional unit, or the regional unit may replace all existing planning units and their duties. The only requirement is a written agreement which spells out the division of functions between the joint and regional units and the financial contribution each legislative unit is to make to the regional planning unit.

The purpose of these sections is to encourage the formation of functional units, so that planning will not be prescribed by artificial political boundaries but will extend to a geographical area with common problems capable of physical solutions. The statute is partly successful in encouraging the formation of functional units, because it continues to permit the formation of fragmented city-county units. Section 100.121 provides that "combinations may include any combination of the cities with

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23 This is perhaps an improvement over the previous enabling legislation which required gubernatorial approval of a regional planning commission. KRS § 147.130 (1964), repealed by KRS § 100.991(3) (1986).
their counties or their parts thereof. . . ." Under this section, the county could agree to exclude portions of the county from the planning unit. There will probably be considerable pressure to do just that in rural areas, for most farmers feel threatened by zoning. This provision is unfortunate for it may inhibit counties from using land use controls to enhance agricultural and recreational potential. The General Assembly should require that if a joint city-county planning unit is created, its jurisdiction must be county-wide except for self-excluded incorporated cities. Another possibility is that the small cities in the county may exclude the larger city or cities from participation in a planning unit. For example, if a small city initiates the interrogation procedure and only the county responds affirmatively, the largest city in the county will be forced to join the unit or abstain from creating a planning unit. If the largest city elects to abstain, the joint city-county planning unit created will lack jurisdiction over the area in which the major land use problems are concentrated. The practical impact of this section will be to force the larger city to join the unit. To avoid the possibility of exclusion, the Legislature should make participation of all cities in a joint city-county planning unit mandatory once any city in the county has agreed to its creation.

The encouragement of the creation of regional planning units is commendable but may prove to be ineffective in the face of the historic unwillingness of metropolitan areas with common problems to unite until forced to do so. However, a considerable spur to regional planning has been given by the federal government which requires regional planning as a pre-condition to participation in many federal programs. Still more direct intervention by state government may be necessary. Kentucky, at present, has chosen only to delegate authority to the local units of government to establish regional planning commissions. If they fail to take the initiative, which seems likely, the state may have to either designate regional planning units and require the affected cities

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25 See Subcommittee on Intergovernmental Relations of the Committee on Government Operations, The Effectiveness of Metropolitan Planning, 88th Cong., 2nd Sess. (1963). This print was prepared by the Harvard-MIT Joint Center for Urban Studies. For a discussion of recent legislative innovations, see Grove, supra note 24, at 91-93.
and counties to enter into a regional planning commission, delegate this authority to the executive, or create an administrative body to make these decisions, if the objectives to be gained by regional planning are to be achieved.26

4. Interstate Regional Planning

A major deficiency in this portion of the enabling legislation is failure to deal with the problems of interstate regional planning. This is especially important in Kentucky since most of the state's population is clustered along the Ohio River.27 Henderson, Owensboro, Louisville, Covington-Newport, and Ashland all face common interstate problems with adjacent urban areas in Indiana, Ohio and West Virginia. Interstate inter-governmental cooperation can formally be achieved by two methods: 1) the elected officials of cities and counties within a metropolitan area, together with officials from other public bodies, may voluntarily agree to form some sort of institution for regional cooperation and planning; 2) the legislatures of the two states may enter into a compact under art. I, sec. 10, cl. 3 of the United States Constitution to transfer certain area-wide functions and services to an interstate authority.

Metropolitan councils of government have been growing since the first was formed in 1954 in the greater Detroit area.28 Their importance was raised considerably in 1965 when the federal government announced that the councils were eligible to administer federal urban planning grants under the 701 program.29 Chapter 100 of KRS provides no specific authorization for the formation of metropolitan councils, but such authority is not absolutely necessary since the requisite legal status to qualify for 701 (g) funds can be obtained through the formation of a non-


27 Four of the twenty-six standard statistical interstate metropolitan areas lie partly within Kentucky. They are: (1) Evansville, Ind.—Henderson, Ky.; (2) Louisville, Ky.—New Albany, Ind.; (3) Cincinnati, Ohio—Northern Kentucky; and (4) Huntington, West Va.—Ashland, Ky.—Ironton, Ohio. This last area has the delightful problem of dealing with three HUD regional offices for interstate projects.


profit corporation under existing state law. The disadvantage of forcing cities to choose this method is that the state has no control over the composition of, or powers and duties assumed by, the council. The scope of the councils ranges from being merely a communication vehicle for local government officials to being a super-planning agency for the region, but in all cases their capacity has remained advisory.

The ultimate purpose of such councils should be to study the feasibility of compacts creating interstate authorities to undertake those functions and provide those services which can be most effectively performed on an area-wide basis. The practical problems of securing agreements among the feudal barons of local government has severely limited the use of the compact, but there is a growing awareness on the part of politicians that the physical problems of the metropolitan area can only be solved on a joint basis, regardless of state political boundaries. For example, the states of Missouri and Illinois entered into a compact to create a Bi-State Metropolitan Development District for the greater St. Louis area to: provide bridge, tunnel, airport, and terminal facilities; to plan and establish policies for sewerage and drainage facilities; and, to submit plans to the individual communities for the coordination of street systems, water supply and waste disposal works, recreation areas and general land use patterns.30

The Supreme Court held in Dyer v. Sims31 that the compact clause permits the states to delegate powers and functions to interstate agencies for the solution of common problems, but the Court has not yet ruled on the authority of a state to delegate powers that are inconsistent with its constitution. The issue was raised in Dyer but Justice Frankfurter, writing for the majority, avoided it in characteristic fashion by deciding that there was, in fact, no conflict, while Justices Reed and Jackson concurred, attempting to explain the majority opinion. The major significance

30Compact between Missouri and Illinois creating Bi-State Development Authority and Bi-State Metropolitan District, Mo. Stat. § 70.370-.440 (1949). See also, Advisory Committee on Intergovernmental Relations, Governmental Structure, Organization and Planning in Metropolitan Areas, 16–17 (1961).

of the decision is the holding that the existence of a conflict between a compact and a state constitution is a federal question, because the interests of other states are involved. The case probably also stands for the proposition that a state cannot delegate powers inconsistent with its constitution. Justice Frankfurter's statement that "what that obligation is, and whether it conflicts with a disability of a State to undertake it is quite another . . . question. . . .,"\textsuperscript{32} implies that he considered state constitutions as a limitation on the state's power to join a compact.

The General Assembly should come to grips with the problems of interstate metropolitan areas by providing specific grants of authority for cities, counties, and other units of local government, such as special districts, to enter into metropolitan councils of government. The legislation should provide for their establishment, membership, financing, staffing, and powers and duties. It should specify that one of their functions is to explore the feasibility of performing certain urban services through interstate compacts.

II. Extraterritorial Land Use Controls

Section 100.131 gives independent city planning units power to control the development of territory outside their corporate limits but within the county.\textsuperscript{33} The extraterritorial exercise of land use controls has traditionally been urged on the grounds that cities must be able to control development of areas which will probably be annexed into the city within the foreseeable future, so that use patterns will be consistent.\textsuperscript{34} Section 100.131 permits an independent planning unit\textsuperscript{35} to exercise extraterritorial juris-


\textsuperscript{33} Chapter 100 does not expressly give cities the power to plan in relation to territory outside their corporate limits. This defect should be remedied by the General Assembly.


\textsuperscript{35} Presumably a city can not exercise extraterritorial jurisdiction when it becomes a member of a joint planning unit, but this prohibition is not expressly stated in the statute.
diction for the purposes of subdivision regulations up to five miles from all points on the city's boundary, but not beyond the county line. If the boundaries of two planning units overlap, the boundary of their jurisdiction is midway between them. This power does not apply to an incorporated city which is not a member of the planning unit. If the consent of the fiscal court is obtained, the city may exercise extraterritorial jurisdiction for the purposes of zoning and official map ordinances. Courts have traditionally been reluctant to sanction the exercise of extraterritorial jurisdiction in the absence of express statutory authority. Thus, Section 100.131 removes a barrier to control of fringe development.

Historically, there has been considerable doubt about the constitutionality of extraterritorial land use controls. It has been argued that these controls constitute a violation of the property owner's right to due process of law, because he does not vote for the officials who regulate him and he receives no benefits from the city which controls him. It is the modern variant of the "taxation without representation" argument. Courts that have recently passed on these constitutional arguments have held that there is no violation of the property owner's right to due process. The reason given is that the state legislature has absolute control over the powers and boundaries of municipalities and counties and, thus, it may delegate to a city the power, which the state could exercise, to control land outside their corporate limits. The property owner's right to due process is preserved through his right to seek relief from the state legislature. This is an empty, although perhaps useful, fiction, given the many problems of fringe development. Due process objections to Section 100.131 should be met by Section 100.133 (2), which allows the county judge of each affected county to appoint a member to the planning

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37 For an analysis of the relationship between the municipalities' power to tax and zone extraterritorially, see Bartlet, Extraterritorial Zoning, 32 Notre Dame L. Rev. 367, 381–86 (1957).


39 Fiscal Court of Jefferson County v. City of Anchorage, 393 S.W.2d 603 (Ky. 1965) upheld the power of the Legislature to withdraw the zoning power from fifth and sixth class cities in Jefferson County. See also Southeastern Displays, Inc. v. Ward, 414 S.W.2d 573 (Ky. 1967) (state may delegate power to regulate billboards to Department of Highways).
unit exercising extraterritorial jurisdiction, "in addition to the number of members specified for that planning commission."

Another accepted rationale is that both the persons residing within and beyond the city limits may be subjected to additional expenditures of public monies and a reduced level of services and amenities if the city does not have the power to control adjacent areas which may be annexed in the foreseeable future. This rationale, however, circumscribes the function of extraterritorial land use controls and raises the possibility that, while a grant of jurisdiction may be constitutional, the regulation may be unconstitutional as applied. If the courts attribute this rather narrow purpose to Section 100.131, then a burden may be imposed on the city to prove that the area may become annexed in the foreseeable future.

Two Kentucky cases which have considered the problem suggest that this burden is constitutionally required. In *Smeltzer v. Messer*, a fourth class city in the Greater Cincinnati Area attempted to zone land in an adjacent city located in a different county. The Court of Appeals held that if the city does not have the power to annex it cannot zone, and since the city could not annex territory in an adjacent county, it could not zone extraterritorially. This case can be read as holding merely that a city cannot exercise extraterritorial powers absent express statutory authorization. However, the Court added some very significant dictum suggesting that there are constitutional limitations on the exercise of extraterritorial land use controls. Doubt was cast on its validity: "The city's action, if sustained, seriously impairs the rights of persons owning property beyond its limits who have no voice in its legislative policies, and who receive no logical recognizable benefit to such property from the city government."  

A subsequent case, *American Sign Co. v. Fowler*, suggests that this dictum has been adopted by the Court of Appeals as a constitutional standard for extraterritorial land use controls. The facts of *American Sign* are unclear, but it appears that the fiscal court refused to grant a requested zoning change from agricultural uses to a classification permitting amusement activities, *i.e.*, drive-

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40 311 Ky. 692, 225 S.W.2d 96 (1949).
41 Id. at 693-94, 225 S.W.2d at 97-98.
42 276 S.W.2d 651 (Ky. 1955).
in theaters, and failed to assign any territory in the county for such uses. The Court held that the fiscal court had no authority to zone county-wide (a point which is now moot for those counties with a joint city-county planning commission) and invalidated the city's attempt to zone areas outside its corporate limits if they were within the "municipal area," which the Court defined as that which bore a relationship to the planning and zoning of the city. This, the Court found, was a conclusion of law and concluded that although the area was related economically, commercially, and socially to the city it was not within the "municipal area" of the city because there was no proof that it would be annexed in the future. Thus, the requisite showing of a relationship between the property and the planning and zoning of the city had not been made.

The decision seems to be a clear example of judicial hostility toward rural land use controls. The relevant question for the Court was the power of the city and county to exclude a lawful business from the county. The Court might well have concluded that the exclusion was unwarranted but that if the use was permitted the city could regulate it through extraterritorial controls. This holding might have been justified on the theory that a city adjacent to the Blue Grass area, whose economic base depends in part on the aesthetic qualities of its famed horse farms, ought to be able to control land uses outside its corporate limits in order to preserve the integrity of what is generally recognized as a fine example of a privately created greenbelt.

The constitutional standard apparently adopted by American Sign does not appear to be required either by the due process or equal protection clauses of the Constitution. The property owner's rights are not automatically violated when the state delegates to a city the power to control the development of land outside its corporate limits. The uncoordinated development of fringe areas can adversely affect the city even if it will not be annexed to the city in the foreseeable future. This is especially true if the city has a policy of refusing to undertake involuntary annexations. For

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these reasons the foreseeable annexation standard adopted in *American Sign* should not be followed.

The need for judicial review of the application of Section 100.131 remains. The five mile permissible radius of jurisdiction is the most liberal in the United States, and provides small cities with the possibility of creating instant empires over the surrounding countryside. Moreover, the problem at present will be confined to smaller cities, since the two largest cities in the state—Louisville and Lexington—have a city-county planning commission. The inherent conservatism of local politicians and the necessity to obtain consent of the fiscal court will, in most cases, operate as an effective curb on potential abuses, but the possibility remains very real. Courts should read the words, "up to five miles," as requiring them to review the application of extra-territorial land use controls. The traditional standards of "reasonableness" for administrative review do not furnish an adequate guide, and the standard suggested by *American Sign* is too narrow.

One possible solution might be to place the burden of proof on the city to show that the proposed regulation is necessary to implement its comprehensive plan. Once the city introduces evidence that the regulation is necessary in light of its comprehensive plan, the burden of going forward should shift to the aggrieved land owner. For example, if the city sought to impose subdivision controls on a small development outside the city limits—and not in an area of potential annexation—and justified it on the grounds that it was the city's policy to control residential development throughout the county by imposing uniform standards on city and county development to encourage the orderly timing of the development of land adjacent to the city, the regulation should be sustained. There is no need for the courts to engage in a detailed examination of the relationship between the city and the area sought to be controlled, as in *American Sign*. The function of judicial review, under Section 100.131, should be to prevent flagrant abuses of the power, such as attempts to control land which is spatially remote from the city and lacks the traditional ties of commercial and social intercourse.

44 The former Kentucky statutory standard was approved in Becker, supra note 34, at 54.
Courts are becoming more attuned to abuse and are increasingly willing to scrutinize the object for which the regulation is enacted and to define the exact nature of legitimate purposes. For example, politicians should not be permitted to use the threat of regulation to coerce the land owner into a course of action desired by local politicians. Courts have a variety of doctrines, such as improper purpose, false classifications, and spurious motives, to support a decision invalidating abuses of the power to control land outside the city's corporate limits.\[45\]

III. PLANNING COMMISSION ADMINISTRATION

The sections regulating planning commission administration contain two new provisions designed to upgrade the quality of commission members. Section 100.153 allows reimbursement for expenses and compensation for citizen members and permits public officials and employees of participating cities to be compensated. Section 100.157 provides that, in addition to neglect of duty and malfeasance, a planning commission member may be removed for a conflict of interest. These changes are important since land use controls often fail to achieve their objectives because they are either administered in a haphazard manner by laymen ignorant of basic planning concepts or they are used for personal gain at the expense of the community. These faults are especially prevalent in a state like Kentucky where entrenched

\[45\] This analysis is suggested in Hagman, Book Review, 94 U. Chic. L. Rev. 469, 474-79 (1967). Professor Hagman lists nine examples of common abuses of the zoning power which courts are increasingly willing to curb by defining with more precision the legitimate functions of land use controls. They are: (1) zoning for an improper purpose; (2) failure of legislators to follow designated standards; (3) bribery and corruption; (4) municipalities ignoring their own precedents; (5) municipal disregard of court decisions; (6) regulations which constitute takings but which are not so held; (7) false classification cases; (8) spurious motives given for a decision; (9) test cases brought by municipalities which are not subsequently evenly applied.

Recent examples of this kind of analysis include Fogg v. City of South Miami, 183 So. 2d 219 (Fla. 1966) in which the court held that drive-up retail businesses could not be excluded from downtown solely to force people out of their cars and on to the streets where they would be more likely to make impulse purchases; De Sena v. Gulde, 24 App. Div. 2d 165, 265 N.Y.S.2d 289 (1965) where it was generally conceded that the highest and best use of the land was for an industrial park but it was reclassified residential because it was adjacent to a negro area in order to head off threats of violence and boycotts to local businessmen; and City of Ashland v. Hecks, Inc., 407 S.W.2d 421 (Ky. 1966) where the Court of Appeals held that a discount house which was singled out for enforcement of the Sunday Closing Laws was denied equal protection of the laws when established businesses repeatedly violated them but were not prosecuted.
interests tend to dominate all levels of government. Of course, no enabling legislation can deal with the corruption and influence peddling which plagues municipal government, but all steps needed to encourage the participation of disinterested and informed citizens in the planning process should be taken.

1. Necessity For Commission

Before a planning unit can undertake planning studies and enact regulations, a planning commission must be established. The commission must consist of from five to fifteen members. Section 100.141 provides that members are appointed by either the county judge or the mayor of the city depending on the type of planning unit created. If the commission is joint, the membership ratio is fixed pursuant to a written agreement between the members of the unit, but if only one county joins with one city, Section 100.133 (2) requires equal representation. Two-thirds of the members must be citizen members rather than elected public officials.

2. Term of Office of Members

Section 100.143 fixes the term of office for citizen members at four years, but public officials serve for a period co-extensive with their elected term. When the commission is initially appointed the terms must be staggered, according to regulation or agreement, so that a proportionate number of the members serve one, two, or three year terms thus insuring that the appointing authority can put new blood on the commission at regular intervals. This pattern must be continued for reappointments and new appointments.

Section 100.147 requires that a vacancy must be filled within sixty days by the appropriate appointing authority, i.e., the mayor or county judge, but if no appointment is made, the vacancy can be filled by the planning commission. This is an attempt to minimize the possibility that planning operations will be halted by a political in-fight. For example, if the county judge and planning commission are feuding, the county judge could delay planning operations by holding up an appointment until favorable concessions were extracted from commission members. The sixty day limitation is a decent compromise between giving the ap-
pointing authority adequate power to conduct a search for a qualified replacement and preventing him from using the time period as a club against the planning commission.

3. Quorum Rules

Section 100.171 provides the quorum rules. A simple majority of the total commission membership constitutes a quorum for any official business except that a vote of a simple majority of the total membership shall be necessary to adopt or amend the commission's bylaws or for elements of the comprehensive plan or regulations. This last phrase "or regulations" is extremely ambiguous. A regulation is defined in Section 100.111 (18) as "any enactment by the legislative body of a city whether it is an ordinance, resolution, or an order and shall include regulations for the subdivision of land." But the Legislature seems to have intended that only regulations which depart from the comprehensive plan must be adopted by a simple majority of the total membership. However, it could be argued that because there is a comma separating "or for elements of the comprehensive plan or regulations" from the rest of the sentence, Section 100.171 means that all regulations must be adopted by a simple majority of the total membership since, in theory, all regulations are enacted to implement the comprehensive plan. Legislative revision of this section is necessary to clarify this ambiguity.

Any member of the planning commission who has a direct or indirect financial interest in the outcome of any question before the commission must disqualify himself from voting and cannot be counted for purpose of a quorum. Section 100.171 reverses Sims v. Bradley which held that a member who disqualified himself from voting could still be counted for purposes of a quorum. Section 100.167 requires that the commission hold at least six meetings a year, but it may agree on a greater number. Special meetings may be called by the chairman if he gives at least seven days notice to the other members.

46 If a member of the commission is present but abstains from voting, he will be counted as an affirmative vote. Pierson-Trapp Co. v. Knippenberg, 387 S.W.2d 587 (Ky. 1965).
47 309 Ky. 626, 218 S.W.2d 641 (Ky. 1949).
4. **Staff Assistance**

Section 100.173 authorizes the planning commission to employ a technical planning staff or to contract with consultants in order to carry out the provisions of Chapter 100. Since most Kentucky cities and counties receive their technical planning assistance from the state, this provision will not be used often. This assistance is provided by the Division of Community Planning and Development of the Department of Commerce. The Division is currently divided into five sections to formulate programs of state-wide significance. These are: (1) state planning, (2) workable program, (3) fiscal, (4) codes, and (5) design. The Division also maintains fourteen staff offices throughout the state to serve local communities which cannot support a full-time planner. If the community is large enough to require a full-time planner, the state will supply a full-time staff consisting of a planner, secretary, and draftsman. These planners function as employees of the city or county. It is probable that the current state administration will reorganize the Department of Commerce, but it is unlikely that the state will cease giving technical assistance to the majority of Kentucky cities and counties.

5. **Removal of Members for Conflict of Interest**

The most important addition to the Kentucky statute is the provision for removing planning commission members in case of a conflict of interest. The previous enabling legislation limited removal to inefficiency, neglect of duty, malfeasance, or improper conduct. Section 100.157 permits the appointing authority to remove a planning commission member for a conflict of interest and Section 100.217 (8) subjects members of the board of adjustment to removal for the same reasons. Commission members are required by Section 100.171 to disclose any “direct or indirect” financial interest in the outcome of any question and, if such interest is present, to refrain from voting. However, the statute does not provide a procedure which would permit applicants to

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48 The structure of state planning assistance is taken from a brochure prepared for the Honorable Hubert H. Humphrey, Vice President of the United States (on file with the Kentucky Law Journal). It is beyond the scope of this paper to study the impact of technical assistance provided by state rather than local employees.
institute removal proceedings. Thus, removal rests in the discretion of the appointing authority. Nevertheless, Sections 100.157 and .171 should provide a standard for judicial review, permitting a court to invalidate a planning commission or board of adjustment decision in which one or more members had a conflict of interest. Both the applicant and the public suffer when the commission's or board's decisions are colored by the prospect of financial gain to its members. If these sections are going to have any impact on the quality of zoning administration in Kentucky, the Court of Appeals must begin to set rigorous standards or these sections will stand for nothing more than an empty gesture toward good government.

In the nineteenth century the courts began to develop a common law conflict of interest based on the biblical injunction that a man cannot serve two masters.\textsuperscript{49} Public officials were analogized to the trustee of a cestui que trust and found to have a fiduciary duty to the public to refrain from engaging in decision-making for personal gain and from placing themselves in a position where they would be tempted to do so. Having erected this formidable doctrine to keep public officials pure and above the squalor of money politics, courts began to erode it by holding that the doctrine of separation of powers forbade review of decisions based on an alleged conflict of interest. Cooley put it very neatly:

\begin{quote}
The same presumption that legislative action has been devised and adopted on adequate information, and not under the influence of corrupt motives, will be applied to the discretionary action of municipal bodies and of a state legislature, and will preclude in the one case as in all others, all collateral attacks.\textsuperscript{50}
\end{quote}

Kentucky appears to have taken this position in \textit{Adams v. City of Richmond}.\textsuperscript{51} That case involved a claim that a planning commission decision should be invalidated because certain members of the commission had made up their minds before the meeting. This would seem to be a gentle method of alleging a conflict of interest. The Court refused to admit evidence of statements made

\textsuperscript{49} The President & Trustees of the City of San Diego v. San Diego & L. A. R.R., 44 Cal. 106 (1872). "The general principle is that no man can faithfully serve two masters, whose interests are or may be in conflict."


\textsuperscript{51} 340 S.W.2d 204, 208 (Ky. 1960). See also Tharp v. Urban Renewal and Community Dev. Auth., 389 S.W.2d 453 (Ky. 1965).
by members outside the meeting and dismissed the argument with the sweeping observation: "whether or not the deliberation was extensive and open-minded is of no concern." Let the good times roll.

The traditional argument in favor of separation of powers, i.e., judicial inquiry into the motives of legislators will hamstring the efficient operation of government, must be refined much more than it has been before it can be applied to the land planning decisions of cities and counties. The difficulty of finding a conflict of interest might properly dissuade a court from inquiring into the motives of state or national legislators, but it should not deter an inquiry into conflicts of interest among members of a planning commission. Planning commissions are not large decision-making bodies; so it will be much easier to find a causal relationship between the conflict and the decision.\[^5\] The problem is one of defining the scope of legislative discretion necessary for the efficient functioning of local government. Unless one is willing to argue that conflicts of interest and the resulting graft and corruption are necessary for government to operate, there is no sound reason for the blanket refusal of the courts to circumscribe legislative action by carefully drawn standards of impartiality. The courts must extricate themselves from the conceptual trap into which they have fallen. A recent federal district court decision from the District of Columbia, \textit{Jarrott v. Schriever},\[^5\] suggests that the problem need not be conceptualized as one of reviewing legislative motives, but rather it should be viewed as one of guaranteeing the applicant's right to procedural due process. In \textit{Jarrott} a parcel of property next to the plaintiff's was purchased for the Russian embassy, and the proposed use required a special permit from the Board of Zoning Adjustment. The purchase was opposed by adjoining property owners. The board members, in the words of the court, were subject to "soft," but "secret," "covert," and "ex parte" persuasion to grant the change by high

\[^{5}\text{See Mills v. Town Planning \\& Zoning Comm'n, 134 A.2d 250 (Conn. 1960). Courts have always been dissatisfied with the immunity given to corrupt public officials by the separation of powers doctrine. Initial inroads in the doctrine were made by classifying decisions such as those of a board of adjustment as quasi-judicial and thus subject to judicial review. The same classification was not generally extended to map amendments. The cases are collected and analyzed in Note, 57 Mich. L. Rev. 453 (1958).} \[^{5}\text{225 F. Supp. 827 (D.D.C. 1964).} \]
federal officials, including the Department of State. The board could not refuse to do their patriotic duty, and the change was granted. The district court reversed, finding that there was an intent to influence the board and reasoning that the protestants were deprived of a fair and impartial hearing.54

The Kentucky statute has three sections dealing with conflict of interest, but none define it clearly. Sections 100.157 and .217 (8) provide for removal for "conflict of interest," and Section 100.171 requires the disclosure of "any direct or indirect financial interest in the outcome of any question before the body. . . ." Presumably, this "definition" would be used in applying Sections 100.157 and .217 (8). A more complete definition is given by the New York City Bar Association, and it should serve as an amplification of Section 100.171. A conflict of interest situation is there defined as involving the

interest of a government official in the proper administration of his office, and the official's interest in his private economic affairs. A conflict does not necessarily presuppose that the action of an official favoring one of these interests will in fact resolve the conflict to his own personal advantage. If a man is in a position of conflicting interests he is subject to the temptation however he resolves the issues.55

This definition requires that two inquiries be made in deciding if a decision should be invalidated because a conflict of interest situation exists. First it must be determined that the individual stood to gain financially as a result of his decision. This is required by Section 100.171 which defines conflict of interest as "any direct or indirect financial interest in the outcome of any question. . . ." The second inquiry focuses on the causal relationship between the alleged conflict of interest and the individual's decision. The individual need not actually profit from his decision. The emphasis should not be on the actual gain realized but on the situation in which the individual placed himself. The aim of the statute is to eliminate the temptation to profit at the expense of the public, and thus a decision should be invalidated

54 Id. at 834. The court relied on WKAT, Inc. v. FCC, 296 F.2d 375 (D.C. Cir. 1962) which suggested that surreptitious evidence of attempts to influence public officials was a violation of the applicant's right to procedural due process in an administrative hearing.
if it is reasonable to infer that action adverse to the public interest might have been taken. As stated in a leading case:

The evil lies not in influence improperly exercised but rather in the creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights which the property owner must always feel assured will exist in the exercise of the zoning power.\footnote{\textit{Daly v. Town Planning and Zoning Comm'n}, 191 A.2d 250, 252 (Conn. 1963). See also \textit{Mills v. Town Planning and Zoning Commn}, 134 A.2d 250 (Conn. 1957).} The courts task in applying Section 100.171 will be to walk
fused to invalidate the decision because the connection was "indirect and remote." The definition in Section 100.171 should require an opposite result to be reached in Kentucky and quite properly so. *Coffin* illustrates the kind of situation where a planning commission member will be sorely tempted to vote against the public interest, and for this reason he should be disqualified from voting. As in the concept of a credible witness in the law of wills, the amount of potential gain should be irrelevant.

IV. THE COMPREHENSIVE PLAN

1. What is Planning

Sections 100.187-.197 constitute one of the most significant features of the new legislation since they detail with considerable specificity the planning process which must be undertaken before cities and counties can regulate the use of land. The long range purpose of these sections is to force the cities and counties to rely on planning in the implementation of land use controls. Planning is a process by which a geographic area's problems are identified and goals formulated, alternative solutions examined, and implementation strategies proposed. Planning requires first the identification of the various sub-systems which constitute the ecology of the area.61 These include: (1) physiography, (2) structures, (3) demographic patterns, (4) production and distribution patterns, (5) consumption patterns, (6) land uses, (7) communicative patterns, (8) urban design, (9) land ownership patterns, (10) structural organization of the various units of local governments, (11) accessibility, (12) urban interaction, and (13) land and improvement values.

Thus, the first stage of the planning process is the collection of an optimum amount of data. The second stage is the identification of the problems of an area and the formulation of a series of goals which should be achieved in their solution. This involves the threshold decision that it is necessary to intervene in the market process, followed by a thorough consideration of all alternative approaches which can be taken to the problem. The third stage is the formulation of a series of implementation strategies based on the impact of the proposed solutions on each of the sub-systems.

2. Requirement of a Comprehensive Plan

Section 100.183 requires that the planning commission of each unit prepare a comprehensive plan to serve as a guide for public and private decisions. The previous planning and enabling legislation spoke of a master plan and a comprehensive plan, but defined neither. In practice, very little planning was done, and in most cases only a land use map and supporting studies, basically descriptive of existing land use and population patterns, were produced. The city or county legislative bodies were not required to follow the recommendations of the planning commission which were characterized by the Court of Appeals as "merely advisory." 62

3. Minimum Requirements of a Comprehensive Plan

Section 100.187 sets out four minimum requirements for the comprehensive plan. The first is "a statement of goals and objectives, principal policies and standards to serve as a guide for the physical development and economic social well-being of the planning unit." The second is a land use plan, covering all types of land use, which shows

proposals for the most appropriate, economic, desirable and feasible patterns for the general location and character, extent and interrelationship of the manner in which the community should use its public and private land at specified times as far into the future as it is reasonable to foresee.

Thirdly, a transportation plan is required. The fourth requirement is a community facilities plan which shows proposals "for the most desirable, appropriate economic and feasible pattern for the general location, and character and the extent of public and semi-public buildings, land and facilities for specified times as far into the future as it is reasonable to foresee." The statute suggests that the comprehensive plan contain proposals for community renewal, flood and pollution, control conservation, and natural resources, but these elements are not mandatory. The emphasis in these sections is on location criteria and long range projections.

To insure that the plan does not become merely descriptive of

62 The previous enabling legislation for second class cities was much more liberal. It permitted the commission to grant a map amendment without a showing of changed conditions or mistake. They merely had to state that they had changed their minds. Shemwell v. Speck, 265 S.W.2d 468 (Ky. 1954).
existing community land use patterns and characteristics, Section 100.191 requires that all elements of the comprehensive plan be based on a specified research process. As far as it is reasonably possible, the plan must contain: (1) an analysis of the general distribution characteristics of the past and the present population and a forecast of the extent and character of future population; (2) an economic survey and analysis of major existing public and private business activities and a forecast of future economic levels or conditions; (3) research and analysis as to the nature, extent, and adequacy of existing land and building use, transportation, and community facilities in terms of their general location, character, and extent; (4) any additional information and research which the planning commission decides will be useful. Moreover, Section 100.193 requires the planning commission to prepare a statement of objectives and principles to be adopted by the legislative bodies which will act as a guide for the preparation of a continuing series of plans and implementation aids.

4. Adoption of Plans by Planning Commission

One of the most frequent criticisms of the land use controls decision-making process is that planning commissions, which are generally local lay bodies, ignore the advice of their professional staffs. In an attempt to focus the planning commission's attention on the comprehensive plan, Section 100.197 requires that it be adopted after a public hearing. The elements may be adopted individually when they are completed or as a whole. A simple majority of the commission is required for adoption. There is also a requirement that the comprehensive plan and the commission's research data be reviewed from time to time in light of social, economic, technical, and physical advances or changes.

V. The Power to Zone

1. Zoning Authorized

Section 100.201 authorizes cities and counties which are members of a planning unit and have adopted at least the objectives of

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63 The Section does not indicate if a public hearing must be held each time an element of the comprehensive plan is adopted or if only one hearing is required for all elements. Because the elements will probably be adopted separately, a separate public hearing for each element should be held to insure maximum citizen participation in the planning process.
the land use plan to enact an interim or permanent zoning ordinance. This section, zoning with the usual police power boiler plate, also provides:

[Z]oning may be employed to provide for vehicle parking and loading space as well as to facilitate fire and police protection, and to prevent the overcrowding of land, blight, danger, and congestion in the circulation of people and commodities, and the loss of life, health, or property from fire, flood and other dangers. Zoning may also be employed to protect airports, highways and other transportation facilities, public facilities, including schools and public grounds, historical districts, central business districts, natural resources, and other specific areas of planning units which need special protection by the planning unit.

Section 100.203 requires both a text and a zoning map, and it specifies the following mandatory requirement for the contents of the text:

(1) A text, which shall list the types of zones which may be used, and the regulations which may be imposed in each zone, which must be uniform throughout the zone. In addition, the text shall make provisions for the granting of dimensional variances, conditional use permits, and for nonconforming use of land and structures, and any other provisions which are necessary to implement the zoning regulation. The city or county may regulate: (a) The activity on the land, in-

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64 Control of the land surrounding an airport is shared by the Kentucky Airport Zoning Commission and local planning units. The Commission was created in 1960 to preempt partially local control of the land surrounding publicly owned airports. The local planning units still maintain complete control over the lands surrounding privately owned airports. KRS 183.867 provides that the Commission shall have exclusive jurisdiction for purposes of land use regulations in all matters pertaining "to the safe and proper maneuvering of aircraft and the safe and proper use of the airport involved. The local zoning body may retain jurisdiction of zoning in such areas as to all other matters." The power to enact airport land regulations is broader than that given to local units by KRS § 183.750-.758 (1954). Local units will be restricted to the elimination of safety hazards, and the Court of Appeals has indicated a willingness to review legislative determinations of the nexus between the regulation and airport safety. See Banks v. Fayette County Bd. of Airport Zoning Appeals, 313 S.W.2d 416 (Ky. 1958). See generally Note, Airport Zoning and the Land Surrounding It in the Jet Age, 48 Ky. L. J. 273 (1960).

There is a need to further clarify the division between state and local jurisdiction. The emphasis in the jet age will increasingly shift from the elimination of safety hazards to the harmonization of uses of the surrounding area with the airport. More particularly experiments with zoning to decrease noise levels for the benefit of surrounding suburbanites crowding against airport runways will increase. KRS 183.687 does not clearly allocate responsibility between the state and local units for noise prevention.
cluding filling or excavation of land, and the removal of natural resources, and the use of water courses, and other bodies of water, as well as land subject to flooding; (b) The size, width, height, bulk, location of structures, buildings and signs; (c) Minimum or maximum areas or percentages of areas, courts, yards, or other open spaces or bodies of water which are to be left unoccupied, and minimum distance requirements between buildings or other structures; (d) Intensity of use and density of population floor area to ground area ratios, or other means; (e) Districts of special interest to the proper development of the community, including, but not limited to, exclusive use districts, historical districts, planned business districts, planned industrial districts, renewal, rehabilitation, and conservation districts; planned neighborhood and group housing districts; (f) Fringe areas of each district, by imposing requirements which will make it compatible with neighboring districts; (g) The activities and structures on the land at or near major thoroughfares, their intersections, and interchanges, and transportation arteries, natural or artificial bodies of water, public buildings and public grounds, aircraft, helicopter, rocket and spacecraft facilities, places having unique interest or value, flood plain areas, and other places having a special character or use affecting or affected by their surroundings.

2. Enactment of Zoning Regulations

Zoning regulations are passed by the legislative bodies of the cities and the fiscal courts where the city and county are members of a joint planning unit. Section 100.207 requires that when a zoning ordinance is initially enacted, the planning commission must prepare the text and map of all zoning regulations and hold at least one public hearing as required by KRS ch. 424. The planning commission must then submit the proposed ordinance to the appropriate city legislative bodies and fiscal courts for adoption or denial. The ultimate authority to pass or reject the zoning rests with various legislative bodies or fiscal courts, but if they desire to pass an ordinance which contains “any changes or departures” from the zoning regulation as proposed by the planning commission, a majority of the entire legislative body or fiscal court must favor the change. Any proposed changes or departures initiated by the legislative bodies or the fiscal court must be referred back to the planning commission for its recommendation. The use of the sweeping language “any changes or departures” is
an attempt to restrict the legislative body's discretion to override the planning commission recommendations, since those recommendations are presumably based on the advice of professional planners. Section 100.207 seems to apply even to the most minor wording and technical changes, and while a simple standard to apply, it may prove to be unduly restrictive.

A major problem from the practitioner's point of view is that the enabling legislation fails to clearly define the term "zoning regulation." It is defined in Section 100.111 (17) as "any enactment by the legislative body of the city or county whether it is an ordinance, resolution or other order and shall include regulations for the subdivision of land adopted by the planning commission."

A zoning ordinance consists of two parts—a text and a map. The text lists the use districts, the restrictions imposed, and matters of local procedure, and the map delineates the location of these districts within the boundaries of the planning jurisdiction. The most frequent regulation will be an amendment to the map ordinance, but it is not clear if the term "regulation" includes both text and map amendments. Moreover, the legislation appears somewhat contradictory. Section 100.211 requires that, regardless of the origin of an amendment to "any zoning regulation," it must be referred to the planning commission before adoption. That section is apparently complemented by Section 100.321 which is located in the midst of the sections dealing with subdivision regulation and official mapping, and requires that any change in the zoning regulation or official map regulation be referred to the planning commission before it can be adopted. This section adds the requirement that the commission must either approve or disapprove the proposed change within sixty days after receipt. Both sections provide that a majority of the entire legislative body or fiscal court is required to override the recommendation of the planning commission, but it is not clear if the term "regulation," in these sections, refers to both a text and a map amendment. Section 100.321 has been held by at least one trial court to refer only to a text amendment although, apparently, the Legislature, in Section 100.207, has defined a zoning regulation to include both the text and the map. The Legislature

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65 Sexton v. Thompson, No. 19480 (Fayette Circuit Ct., Fayette County, Ky., Nov. 11, 1966).
should clarify this confusion, but in the absence of corrective legislation, the courts should construe the term "regulation" as commonly understood—an amendment including either a text or a map amendment unless otherwise specified.

3. Standards for Amending a Zoning Ordinance

The amendment procedures have considerably altered the traditional balance of authority between the planning commission and the legislative bodies. The commission has been strengthened at the expense of the city and county legislative bodies. The theory behind these changes, which are discussed in detail below, is the necessity to force the local legislative bodies to rely more on the advice of professional planners. Land use controls have moved from their original and narrow regulatory objectives to a means of substantially modifying the environment. For example, objectives aimed at the control of population densities and prevention of suburban sprawl now include the establishment of buffer zones in the central city to prevent the rapid deterioration of an area through the rapid spread of incompatible uses and the regulation of the timing of suburban growth. As the objectives have broadened, zoning administration has become increasingly chaotic. Decisions have often been made in total disregard of any rational theory of planning. This lack of a rational planning theory is due to a variety of reasons ranging from straight-out personal gain on the part of local "public" officials to less articulated notions such as the desire not to frighten industry away or the simplistic notion that any change automatically spells progress. One frequently reads of a planner charging that a decision to re-zone an area ruins the twenty-year master plan or that two hundred per cent more land is zoned for industry than will be needed over the next twenty-five years. While originally the function of the plan was advisory only, more recent planning theories have attempted to control the chaos resulting in making zoning decisions by tying the legislative body to plans prepared by professional planners. This provides for, at least, the possibility of a rational basis for decision-making.

There are two major difficulties with this approach. The first is that one must still distinguish between the planning commission,

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which is a lay body, and its professional staff. The staff serves in an advisory capacity only, and frequently the planning commission disregards its own staff's advice. When this is the case, attempting to give the planning commission more control over the decision-making process will not increase the reliance on professional planning advice. The second difficulty is that often the planning commission and its staff are not actually engaging in planning to any meaningful extent but are merely disguising preconceived value judgments without seriously considering alternative solutions or the justification for attempting to attain the stated goal. The new enabling legislation strengthens the hand of the planning commission by allowing a veto over map amendments in certain situations.

An amendment may originate with a property owner, the planning commission, or a local legislative body. Section 100.211 requires that any amendment must be referred to the planning commission before it may be adopted. The same requirement is contained in Section 100.321. The only difference in the two sections is that Section 100.211 requires that the planning commission hold a public hearing, while Section 100.321 requires that the commission approve or disapprove "any change in the zoning regulation" within sixty days of its receipt. Both sections require that "a majority of the entire membership of the referring legislative body shall be required to override the disapproval by the planning commission." As previously mentioned, one trial court has held that Section 100.321 refers only to a text amendment. It could be argued that the General Assembly intended to require a public hearing only in the case of map amendments because the former are more important and should be publicly discussed. It seems more rational to assume, however, that the Legislature intended to provide a uniform procedure for all types of amendments to a zoning regulation since both a text and map amendment can have a substantial impact on the comprehensive plan and the individual property owner. The two sections are confusing and poorly spaced in the text and should be consolidated and clarified.

Section 100.213 is the crucial card in the planning commissioner's hand. Its origin has been shrouded in mystery and its present application is the subject of intense controversy. The key
sentence reads: “Before any map amendment is granted, the planning commission and the legislative body or fiscal court must find that the map amendment is in agreement with the community’s comprehensive plan, or, in the absence of such a finding, that one or more of the following apply . . .”: (1) The original zoning classification was inappropriate and improper; (2) There have been major changes of an economic, physical, or social nature within the area involved which were not anticipated in the community’s comprehensive plan and which have substantially altered the basic character of the area. The importance of Section 100.213 lies in the fact that both the commission and the fiscal court must make the required findings. Thus, Section 100.213 makes the planning commission co-equal with the Legislative body when a map amendment is sought. The inclusion of the word “and” is the subject of considerable controversy. It is argued that the word was carefully chosen, while others maintain that it is a typographical error and the word “or” was intended. The former interpretation appears the most rational but the section appears doomed to be amended by the General Assembly.

This section has already been the subject of litigation in Fayette County. A large industrial park was proposed outside the presently designated urban service area adjacent to Interstate 75. The planning commission found that the amendment would not be in accordance with the county’s land use plan and that neither of the exceptions in Section 100.213 applied. However, the fiscal court, to promote industrial growth, made contrary findings. The Fayette County circuit court ruled that the amendment had not been adopted because Section 100.213 was to be interpreted literally, i.e., both sides had to make the same findings.

The standards set forth in Section 100.213 seem to be taken from the “change or mistake” rule developed in Maryland. It

67 “Inherent in the formulation of planning policy are notions that some form of suspensive veto over legislative (elective) prerogatives may be appropriate as a device for encouraging the “long range” view and subvert “short range” political expediens.” Henrickson, State Enabling Legislation, 1964 Planning 215, 216–17 (1964).

68 Legislation has been introduced in the 1968 Kentucky General Assembly to provide that a map amendment may be granted if only the legislative body makes the required findings. S.B. 97, 1968 Ky. General Assembly.

69 Sexton v. Thompson, No. 19480 (Fayette Circuit Ct., Fayette County, Ky., Nov. 11, 1966).

70 See Note, Validity of a Rezoning Ordinance in Maryland, 13 Md. L. Rev. 242 (1953).
could be argued that they are too rigid and thus fail to give decision-making bodies the flexibility necessary to accommodate new use demands. However, this author believes that greater rigidity and less flexibility is needed if the comprehensive plan is to serve as a meaningful guide for the planning unit's zoning policy. It is necessary to limit the discretion of the commission and local legislative body in order to force the commission to view the plan as establishing the structure for future zoning decisions. The planning unit still remains free to amend the plan and thus justify the map amendment. But, more public scrutiny may be brought to bear on a proposed amendment to the comprehensive plan than on a single map amendment; thus, there is a greater chance that the integrity of the plan will be preserved.

Perhaps the General Assembly should eliminate the planning commission. Citizen bodies attempting to make decisions which require expertise beyond that of most of its members have recently come under more frequent attack. One recent writer concludes: "It has become clear that the planning commission concept has failed to produce good local planning; it has led to a subversion of the public interest." He proposes that the local legislative body establish a set of standards to be administered by a professional staff. This remedy finds support in Babcock's recent exposé, *The Zoning Game*. Babcock, a lawyer, recommends this route because "The professional, in planning or politics, has our respect, if not always our sympathy. We know what his benchmarks are likely to be. We understand the risks he must constantly weigh, the alternatives he must balance. He may disagree with us and defeat us, but generally we know why we were rejected. The same cannot be said of the inscrutable commissioners in their role as decisionmakers." The spectre of a zoning czar may initially repel most lawyers and developers, but the idea should be considered as a realistic alternative to the present state of chaos. Perhaps this proposal would tend to insure greater public participation in the planning process for which the planners are always crying. If interested elements of the community knew that the comprehensive plan would definitely serve as a guide for future

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land use decisions, they might debate and study the plan prior to adoption much more intensively than is now the case.

4. The Use of the Comprehensive Plan as a New Standard for Judicial Review.

The statute is relatively clear on the planning process to be followed, but it is evasive about the consequences of failure to follow the comprehensive plan when regulations are enacted pursuant to it. The statute and decisions of the Court of Appeals would seem to indicate that, at present, the consequences are minimal. First, Section 100.201 permits a city to enact a permanent zoning ordinance after adoption of only the objectives of the comprehensive plan.\(^\text{73}\) There is no requirement that the remaining required elements be completed except that Sections 100.277 and .293 forbid the adoption of subdivision regulations and an official map unless the required elements of the comprehensive plan have been completed and adopted by the planning commission. This will prove a practical sanction to compel completion and adoption of the plan in most cases. However, Section 100.207 should be amended to permit only interim zoning prior to completion of the required elements of the comprehensive plan; otherwise, Section 100.207 renders Section 100.187 theoretically worthless. Section 100.197 contains a requirement that the elements be reviewed at least once every five years and then renders this meaningless by providing “but no comprehensive plan shall be declared invalid on the grounds that the review was not performed.”

Courts have long been urged to enforce the requirement that zoning be in accordance with the comprehensive plan.\(^\text{74}\) Originally, the comprehensive plan was to serve only as a private guide for the planning commission. The plan was not to be adopted and the planning commission was to have no obligation to use it as a basis

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\(^\text{73}\) KRS § 100.201 (1966) permits the adoption of an interim ordinance. If an interim ordinance is allowed to expire prior to the passage of a permanent ordinance, the ordinance is considered repealed. Higdon v. Campbell County Fiscal Ct., 374 S.W.2d 511 (Ky. 1964) (trailer park permitted after expiration of interim ordinance).

\(^\text{74}\) See Haar, In Accordance With A Comprehensive Plan, 68 HARV. L. REV. 1154 (1955). Considerable confusion still exists between the meaning of comprehensive planning and comprehensive zoning. The Supreme Court of Washington recently held after extensive citation to Professor Haar’s article that while a comprehensive zoning ordinance was required, a comprehensive plan was not a pre-condition to the enactment of a valid zoning ordinance. Shelton v. City of Bellevue, 435 P.2d 949 (Wash. 1968).
for recommending zoning and other land use regulations. Sections 100.187-.197 contemplate that the comprehensive plan will be considerably more than advisory, if the planning commission elects to adopt it in whole or in part. For example, if the planning commission adopts the land use plan element, the plan becomes the basis for all future decisions to deny or grant a map amendment. The property owner desiring the map amendment must prove that one of two conditions exist: (1) the proposed use is contemplated in the land use plan element; or, (2) the plan is inapplicable because of either of the two factors specified in Section 100.213. If neither of these conditions exist, the planning commission must deny the map amendment. The plan will still remain advisory in practice, however, because Section 100.213 gives the commission wide latitude in granting map amendments, but over the long run the plan should provide a more rational structure for decision-making.

Planning theory specifies that studies are to be prepared for legislative adoption. They will then provide the basis for defining the public interest as applied to a series of the land use decisions proposed by the private sector. In short, land use controls will be used to implement a series of rational public decisions. Rather than endless study, action is the object of the comprehensive plan. Kentucky's new planning act meets the first requirement. Sections 100.183 and .197 incorporate the theory that plans are to be prepared for legislative adoption, although there does not appear to be a formal sanction for failure to adopt the plans. The most important question is, however, will the definition of the comprehensive plan contained in Sections 100.187, .191, and .193 produce the kind of plans which can be adapted to the above idealized model of the decision-making process. Based on a reading of the comprehensive plan for Lexington-Fayette County, the answer is probably not. The plans adopted by the City-County Planning Commission are an excellent example of what Constance Perin has labeled obsessive planning. The plans endlessly digest data and seldom come to a conclusion. The comprehensive plan consists of some twenty-three reports. Aside from containing pages of data,

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the comprehensive plan proposes criteria for the location of regional shopping centers and informs local residents that in 1965 only 48.2 per cent of the airline passengers flying in and out of Lexington used the local airport instead of those in Louisville and Cincinnati. This means that Lexington needs more direct flights to New York, Chicago, and St. Louis. The range of topics covered by the plan means that courts will have little inclination to look to it as a standard for reviewing zoning and other planning decisions. If the plans are to serve as a standard, the lawyer must take the initiative and winnow through the plans to apply them to his client's property. If this is not done, statutory requirements for a comprehensive plan will only result in a stack of designs to dress up planning commission waiting rooms.

There is a compelling need for the Court to formulate new standards of judicial review for zoning and other planning decisions. Planners and lawyers are often operating in a legal vacuum because judicial participation has been minimal. There is increasing controversy about the purposes for which zoning can be used. Increasing dissatisfaction exists among lawyers and developers because the lack of standards to guide planning commissions and local legislative bodies turns the decision-making process into a series of incomprehensible ad hoc decisions. The public interest is never clearly defined and thus it becomes increasingly difficult, not to say unfair, to ask the property owner to forego profitable alternatives in the name of the public good. The courts incant constantly that decisions cannot be arbitrarily or capriciously made, but all they mean is that the litigant has a right to procedural due process. A litigant may be treated irrationally as long as it is done with style. The few substantive constitutional standards which the courts have devised, such as spot zoning, only begin to confront the problems. The failure of the judiciary to participate more actively in the process contributes to a vicious circle. Decisions which should be substantively reviewed are not; disrespect for land planning is generated, and the com-

78 See City-County Planning Commission, Lexington-Fayette County, Kentucky, Air Transportation in Fayette County, Ky. (1967).
community emerges the loser because of the increased difficulty in using zoning to promote the rational development of the community. Those courts which continue to invoke the doctrine of separation of powers and pretend that zoning is always rational are simply unwilling to face the fact that in a significant number of instances, zoning has gotten out of hand and needs to be checked more carefully than it has been in the past. This is not a plea for a return to the selective substantive review which characterized pre-New Deal judicial review, nor does it imply that utter chaos prevails. It is simply a recognition that many of the important questions about the use of zoning are not being analyzed by the courts to provide the necessary guidelines for those engaged in planning and zoning.

The Court of Appeals can break the circle by using the comprehensive plan as a standard to test the validity of important land use planning decisions. The Court must make the following inquiries:

1) What are the value assumptions behind the comprehensive plan? There is a need to begin to separate the real from the illusory. Planners, planning commissioners, and cities are becoming increasingly sophisticated in packaging important social and economic values in traditional, soothing planning language. The courts must match this process by defining with more precision the relevant issues at stake. For example, an ordinance which bans all drive-up businesses from suburban downtown areas involves other considerations than traffic circulation. It is up to the Court to discover and point these out.

2) What is the scope and purpose of the zoning power? New constitutional standards must be formulated and more precise interpretations of statutory definitions of the zoning power must be made. For example, the Court must decide if the exclusion of an activity by county A raises equal protection problems if it is permitted in county B. It must decide if Section 100.201 which provides that zoning can be used to protect the central business district, means that a map amendment for a regional shopping center can be denied to exclude suburban competitors.

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(3) Are the criteria employed in the comprehensive plan a reasonable method of achieving the goals of the plan? The role of the Court in making the inquiry will be limited, but it should have the salutary impact on the planning process of forcing planners to think in terms of specific programs and methods of implementing broad objectives.

(4) Was a given decision based on the criteria set forth in the adopted plan for the location of the use? This is the crux of the Court's power to set new standards. If the plan is prepared for adoption by legislative bodies, it should be followed by them. This inquiry cannot be overly rigid because the primary decision about how the criteria should be formulated properly rests with the local legislatures. It can, however, serve to curb clear cases of abuse and thus minimize irrational decisions. By focusing on the criteria employed in the plan, the Court can begin to structure the planning decision-making process by confining the participants to discussion of the relevant issues.

Has the Court of Appeals done this? Not really, but they should. The Court made a brilliant start in Fritts v. City of Ashland in 1960. Prior to Fritts, the Court virtually refused to review planning decisions except where there was a taking of property without just compensation, a violation of the applicant's right

81 348 S.W.2d 712 (Ky. 1961). Fritts was followed and amplified in Hodge v. Luckett, 357 S.W.2d 303 (Ky. 1962). There, 18½ acres were rezoned from residential to light industrial. The tract was surrounded by residentially zoned property, but the decision was supported because of special drainage problems. The trial court upheld the classification, but the Court of Appeals reversed. The Court listed three conditions which must be met in order for rezoning which would ordinarily be struck down as spot zoning to be valid: (1) there must be substantial change in the vicinity, (2) the rezoning must be pursuant to the city's comprehensive plan, or (3) the rezoning must reflect a difference between the tract and the surrounding property. The first two were found to be inapplicable and the third was also found inapplicable for the following reasons:

Under the rule we have here announced, where the sole basis for change is that the property is different in condition or character from the surrounding property in the same zoning classification, a finding to the effect that a rezoning would promote the welfare of the community as a whole... must be supported by evidence not only proving the difference in situation, but also negating in clear and convincing fashion the probability of substantial resulting detriment to other property likely to be affected. In this case there was no substantial proof to the latter effect; on the contrary, from the evidence introduced there is very little doubt that the residential property in the community would be adversely affected, and probably to a material degree. Id. at 306.

82 See, e.g., The Hamilton Co. v. Louisville & Jefferson County Planning and Zoning Comm'n, 287 S.W.2d 434 (Ky. 1955).
to procedural due process,\textsuperscript{83} or a flagrant case of spot zoning.\textsuperscript{84} The Court generally deferred to the judgment of the local legislative body and would not be classified as a restrictive court.\textsuperscript{85} \textit{Fritts} can be properly characterized as a spot zoning case, but the Court's opinion went beyond the traditional equal protection rationale and began to trace a link between planning and its implementation through zoning. The applicant in \textit{Fritts} secured a map amendment for a four acre tract from residential to light industrial by threatening to leave the city if it was not granted. In reversing, the Court found that the amendment had no relation to the city's current or projected land use plan and thus was invalid. The following guidelines were laid down for future decisions:

We feel impelled to express briefly our view of the proper theory of zoning as it relates to the making of changes in an original comprehensive ordinance. We think the theory is that after the enactment of the original ordinance there should be a continuous or periodic study of the development of property uses, the nature of population trends, and the commercial and industrial growth, both actual and prospective. On the basis of such study changes may be made intelligently, systematically, and according to a coordinated plan designed to promote zoning objectives. An examination of the multitude of zoning cases that have reached this court leads us to the conclusion that the common practice of zoning

\textsuperscript{83} See, e.g., City of Somerset v. Weise, 263 S.W.2d 921 (Ky. 1954) (zoning ordinance enacted prior to appointment of zoning commission void).

\textsuperscript{84} Spot zoning was originally used to curb clear cases of special interest legislation where a single lot received a benefit which was not related to the general welfare of the community and detrimental to those residing around the rezoned area. A typical case is Polk v. Axton, 306 Ky. 498, 208 S.W.2d 497 (1948). Defendant owned a lot in an area zoned for duplexes which he succeeded in having rezoned to allow a four unit apartment house. The Court invalidated the rezoning because it was found to benefit only the individual property owner and not the general public. \textit{See also} Parker v. Rash, 286 S.W.2d 687 (Ky. 1951). The Court extended its analysis of spot zoning to larger tracts in \textit{Mathis} v. Hannan, 306 S.W.2d 278 (Ky. 1956).

The force of the prohibition of spot zoning has declined as the use of planning has increased. Courts are tending to defer to the judgment of local legislative bodies even in the case of the rezoning of a single lot, if it allegedly was done in accordance with a comprehensive plan, regardless of whether it in fact was. \textit{See, e.g.,} Penn v. Metropolitan Plan. Comm'n of Marion County, 228 N.E.2d 25 (Ind. 1967); Ellicott v. Mayor & City of Baltimore, 180 Md. 176, 23 A.2d 649 (1942).

\textsuperscript{85} See, e.g., Byrn v. Beachwood Village, 253 S.W.2d 395 (Ky. 1952) (city can create buffer zones between commercial and single family residential areas); City of Richlawn v. McMakin, 313 Ky. 265, 230 S.W.2d 902 (1950), \textit{cert. denied}, 340 U.S. 945 (1951) (ordinance for sixth class city in the suburbs of Louisville which provided for only two zones—agricultural and residential—was valid). \textit{See also} Fried v. Louisville and Jefferson County Planning Comm'n, 258 S.W.2d 468 (Ky. 1953).
agencies, after the adoption of an original ordinance, is simply to wait until some property owner finds an opportunity to acquire a financial advantage by devoting his property to a use other than that for which it is zoned, and then struggle with the question of whether some excuse can be found for complying with his request for a rezoning. The result has been that in most of the re-zoning cases reaching the courts there actually has been spot zoning and the courts have upheld or invalidated the change according to how flagrant the violation of true zoning principles has been. It is to be hoped that in the future zoning authorities will give recognition to the fact that an essential feature of zoning is planning.\textsuperscript{86}

The Court recently had occasion to further define the relationship between planning and zoning. In \textit{Ward v. Knippenberg},\textsuperscript{87} a case which was clearly not a spot zoning problem, it was argued that a map amendment was inconsistent with the city's comprehensive plan. Property was purchased in 1958 for a shopping center because the community plan at that time specified that the property was reserved for a shopping center. In 1962, the plan was amended and the shopping center for that area was put in a different location. In 1966, a map amendment for a shopping center was granted for the 1958 location. The Court rejected the argument of neighboring property owners that the re-zoning was not in accordance with a comprehensive plan. The Court showed little concern for the comprehensive plan:

With respect to the first proposition, it seems clear that a zoning agency is not bound to follow every detail of a land use plan. As we understand it, such a plan is simply a basic scheme generally outlining planning and zoning objectives in an extensive area. It is in no sense a final plan and is continually subject to modification in the light of actual land use development. It serves as a guide rather than a strait-jacket. In fact the Commission recommended, and the Fiscal Court

\textsuperscript{86}Fritts v. City of Ashland, 348 S.W.2d 712, 714-15 (Ky. 1961). The comprehensive plan has been used as a basis to deny a map amendment in a major unreported circuit court case in Lexington, Kentucky. The City-County Planning Commission adopted a land use plan which attempted to control the timing and location of suburban development by dividing the city and county into two service districts. The purpose of the two districts was to preserve the horse farms which serve as a natural greenbelt around the city. The Planning Commission denied a map amendment for high density residential development of a farm which lay in both districts. The circuit court upheld the denial because the action was in furtherance of the commission's adopted plan. Provincial Dev. Co. v. Webb, No. 7973 (Fayette Circuit Court, Fayette County, Ky., Jan. 3, 1961).

\textsuperscript{87}416 S.W.2d 745 (Ky. 1967).
adopted the shopping center location in exactly the same spot where it was shown on the 1958 land use plan. We know of no reason why the Commission could not, in the light of the latest developments, decide which of two different locations in the same subdivision area would best serve immediate requirements.\textsuperscript{88}

It was alleged that another shopping center was only 1,500 feet away, but the Court concluded that this "is not in itself sufficient to indicate arbitrary action." The Court incorrectly framed the issue, for it should have examined the location criteria and, if found reasonable, determined whether they had been followed in this case. The disturbing aspect of this opinion is not its result but the Court's reluctance to examine the relationship between the plan and the map amendment. The Court did not have to abolish the comprehensive plan as it appears to have done. It is correct in saying that the location should have been determined by the planning commission, but the function of the Court should be to examine in detail the criteria the plan formulates for the location of these types of shopping centers to decide if the decision was in accord with the adopted criteria. The plan will generally contain location criteria such as: (1) the area should not abut similar commercial concentrations; and (2) neighborhood shopping centers should be located centrally within the residential neighborhood which they serve. If the comprehensive plan is adopted, the inquiries cease to be ones of reasonableness based on general theories of proper location, as in this case, and become inquiries based on the reasonableness of the location with regard to the specific criteria adopted by the planning commission.

5. Special Uses of Zoning

The Kentucky Court of Appeals held zoning constitutional in 1928\textsuperscript{89} and did not greatly interfere with the process as long as it was restricted to the simple function of segregating incompatible uses. But, as the use of zoning shifted from an essentially negative to a positive function, the Court became less receptive to new

\textsuperscript{88} Id. at 748.
\textsuperscript{89} Fowler v. Obier, 224 Ky. 742, 7 S.W.2d 219 (Ky. 1928).
forms of zoning. The failure to recognize new uses of zoning has made planners and cities hesitant to try to encourage the use of new concepts because of doubt as to their validity. Sections 100.201 and .203 are designed to encourage the use of more imaginative forms of zoning by expressly authorizing a variety of relatively new concepts. Planned unit developments and historic zones merit special attention.

Section 100.203 (1) (e) gives the planning unit the opportunity to experiment with new forms of zoning, including exclusive use districts. The section reverses Pierson Trapp Co. v. Peak, which invalidated a planned shopping center district on the grounds that the previous enabling legislation did not permit the creation of single use districts. This decision cast doubt on Court approval of a number of new zoning concepts.

(a) Planned Unit Developments—There has been much recent dissatisfaction with the quality of design and site planning produced by Euclidean zoning. Rather than relying on the grid pattern produced by the usual height, bulk, and setback requirements, planned unit development ordinances seek to encourage architectural innovation and a higher level of amenity by massing densities and open space patterns. The new enabling legislation appears to authorize planned unit development ordinances but leaves their content entirely up to individual planning units. Section 100.203 (1) (c) and (d) permit the unit to locate structures with regard to living space, open space, and recreation space ratios. Section 100.203 (1) (e) permits the location of planned neighborhood and group housing districts, making explicit what was implied in Section 100.203 (1) (e) and (d). The planning unit has been expressly given three important powers which are necessary to implement planned unit developments: (1) it may require a development plan as a condition precedent to a map amend-

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90 S. W. 2d 459, 459 (Ky. 1960).
92 In Central Kentucky Dev. Co. v. Knippenberg, 418 S. W. 2d 745 (Ky. 1967), it was argued that the planning commission could not require a development plan because it would constitute an unauthorized use of contract or conditional zoning. The Court refused to pass on this issue and held only that the commission had the power to require a development plan under former KRS § 100.350 (1958).

Most jurisdictions except New York originally held contract or conditional zoning invalid. See cases cited in Sylvania Elec. Prod. Co. v. City of Newtown, (Continued on next page)
ment; the unit to adopt a procedure for preliminary approval of subdivision plots, enabling the developer to obtain some form of assurance from the city that his project will be approved in the early stages of financing and promotion; (3) Section 100.281 (4) allows the unit to require subdivision performance bonds in order to insure the proper completion of physical improvements. Despite these sections there is still confusion in Section 100.203. Subsection (1) reiterates the traditional requirement that the regulations imposed must be uniform throughout the zone. The purpose of planned unit development is to permit departures from the rigid requirements of uniformity, according to standards administered by the planning commission. Proposed state planned unit enabling legislation expressly abrogates the requirement of uniformity, but this was not incorporated into the revision of Chapter 100. The Court need not wait for legislation to clarify this ambiguity in order to validate a planned unit ordinance, for it could find that subsections (c)-(e) expressly supercede the uniformity requirement or that the requirement is satisfied because the standards are uniform although their application to the individual developer may vary.

The planning unit may require a development plan as a condition precedent to granting any map amendment under Section 100.203 (2). The unit may also require that “substantial construction” be initiated within one year after the permit is granted. However, the planning unit must hold a public hearing before the zoning change reverts to its original designation. The fact that a development plan can be required with any request for a map amendment gives the planning commission power to dis-

(Footnote continued from preceding page)

344 Mass. 428, 183 N.E. 2d 118 (1962). Recent cases have abandoned their former rigid attitude and have begun to evaluate the particular situation and restrictions imposed in light of their contribution toward implementation of the comprehensive plan. In Sylvania Electric, supra, at 122, the court approached the problem indirectly by upholding a concession extracted by the city in return for a map amendment because they were “the induced, voluntary action of Sylvania, not the vote of the council.” The moral is bargain in chambers. A more forthright approach was taken in Hudson Oil Co. v. City of Wichita, 193 Kan. 623, 396 P.2d 271 (1964) where the court held that a requirement that revised subdivision plat must be filed as a precondition to receipt of a map amendment was reasonable. See also State ex rel. Myhre v. City of Spokane, 422 P.2d 790 (Wash. 1967). See generally Trager, Contract Zoning, 23 Md. L. Rev. 121 (1963).

courage zoning changes, since the cost of its preparation will deter many small property owners from seeking a zoning change. In addition, the normal procedure of staff review may unduly prolong the time needed by the applicant to obtain a commission determination. Such a broad grant of power may have introduced unnecessary rigidity into zoning procedure. While a development plan should be required for major new developments, it does not seem necessary for minor adjustments of the zoning map. The objectives of Section 100.203 (2) could be achieved if an acreage limitation were imposed as a condition precedent to the requirement of a development plan.

(b) Preservation of Historic Areas—Special use districts may be established “to protect ... historical districts. . .” The power to create historic districts will be useful to many towns in Kentucky whose history dates from the end of the eighteenth century and which are interested in preserving areas containing outstanding examples of the various types of pre-Civil War architecture. The Lexington zoning ordinance is illustrative of one method of historic district zoning.

Historic zoning originated, and is still most widely used, in areas such as Nantucket, old Charleston, old Santa Fe, and the Vieux Carre in New Orleans whose economies, in large part, are based on the camera-clutching tourist desperately trying to capture forever the image of bygone eras. These ordinances have been justified on the ground that they are merely performing their

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94 The Court of Appeals has never directly passed on the validity of historic zoning, but strong support for its validity can be found in Moore v. Ward, 377 S.W.2d 881 (Ky. 1964) in which the Court held that "promotion of scenic beauty" was a relevant factor for the Legislature to consider in passing a bill board control law. The Court, however, still preferred to mix aesthetic considerations with more traditional justifications such as highway safety. Equally important is Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964) which held that a junk yard control act whose principal objective was the promotion of aesthetics was constitutional. See generally J. Morrison, Historic Preservation Law (1957).

95 An old and historic district may be superimposed on an existing district. No exterior alteration or demolition of a building within the district can be undertaken until a certificate of appropriateness has been obtained from a board of architectural review. If the board refuses to issue a certificate, the applicant may appeal to the planning commission. The board is limited to exterior considerations as its function is to insure that the work proposal is not "obviously incongruous to the old historic aspects of the surroundings." Lexington, Ky., Ordinance 20-53 (1965). The constitutional validity of this standard is discussed in Note, The Police Power, Eminent Domain, and the Preservation of Historic Property, 63 Colum. L. Rev. 708, 717-21 (1963).
traditional function, i.e., protecting property values.96 Today, however, much historic preservation is justified on such intangible grounds as the necessity of preserving a link with a past heritage.97 Many proponents of preservation are reluctant to face the economic issues. Yet if historic preservation is to be constitutionally sanctioned and achieve permanent results, “economically feasible uses must be found for most noteworthy old structures.”98 There is a limit to the number of mini-museums a city can support as there are only so many compulsive museum-goers.

The most difficult question under the historic zoning ordinance is the constitutionality of the power to prohibit the demolition of a building. The Lexington ordinance provides that if the board recommends disapproval of a permit to demolish the building the planning commission may refuse to issue the permit. After a six month period “the permit may be issued by the Zoning Enforcement Officer, provided that the application meets the requirements of other sections of this Ordinance-Resolution.” This is a variant of the Richmond, Virginia, historic district ordinance which provides that if the permit is denied, the city shall have six months to determine if it wishes to acquire the structure by eminent domain or purchase. The Lexington ordinance does not clearly specify that issuance of the permit is mandatory after the six month period has expired, although it could be so construed. If the ordinance is not construed to make issuance of a permit manda-

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97 For a discussion of the recent cases involving aesthetics and the police power, see Fonoroff, Proposed Legislation For Highway Corridor Protection, 1 Urban Law Annual 128 (1968).
98 Department of City Planning, Preserving Norfolk’s Heritage, Proposed Zoning for Historical and Cultural Conservation (City of Norfolk, Va. 1965). Most planning for historic preservation has failed to answer this hard question. For example, the Lexington-Fayette County City-County Planning Commission, Design Plan for Downtown (19 ), in discussing the “near north side” which is Lexington’s oldest section and contains a number of fine old houses in a variety of architectural styles, notes only that “[T]his area has been the residence of many leaders of Lexington and the Blue Grass area. In recent years, however, many other prestige locations for fine homes have become popular in the city and county.” Nonetheless with no further analysis of the type of personality which will seek housing in this district, the demand for this type of housing, the quality of public schools in the area, the Commission concludes, “the general concept of planning proposals assumes that there is now and will continue to be a need for fine homes and apartments near the downtown area.” No other alternative uses of the property are considered.
tory, this is an excellent case for an application of Dunham's theory that the property owner is being compelled to confer a benefit on the public for which he should be compensated.\(^9\) This section therefore should be declared unconstitutional.

VI. ELIMINATION OF NONCONFORMITIES

1. The Power to Eliminate

According to the principles of Euclidean zoning, the nonconforming use was to wither away.\(^{100}\) Instead, the opposite has occurred, and we now have deteriorating buildings which cannot be expanded or renovated and which contribute to the spread of urban blight whenever the owner refuses to move or lacks sufficient capital to salvage the structures.\(^{101}\) Thus, the nonconforming use continues to flourish as a legally protected monopoly. The sad fact is that zoning arrived too late to contribute significantly to the improvement of the city core. In light of this, the General Assembly had a number of alternatives in drafting a new nonconforming use section. It could have attempted to work within the Euclidean framework by giving the cities constitutionally sanctioned powers to eliminate nonconforming uses. It could have abandoned reliance on the Euclidean concept that categories of uses are incompatible per se and directed cities to formulate performance standards which can be used to determine incompatible uses\(^{102}\) or it could have, as it did, merely patched up

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\(^9\) Dunham, *A Legal and Economic Basis For City Planning*, 58 COLUM. L. REV. 650 (1958). It has been suggested that prohibiting demolition can be justified under the Dunham theory if the building proposed to be razed forms such an integral part of the "charm" of an area that surrounding property values will be adversely affected. Note, *supra* note 95, at 720-21. This reasoning might apply to the center of a city whose economic base rests on its quaintness and charm, but it should not be applied to historic areas being preserved for more intangible reasons. There is some evidence that courts will look at the purpose of the historic preservation in setting the limits of the police power. For example, New York upheld a law which forbids exterior alterations or demolition of buildings designated as historic landmarks as long as the owner is guaranteed a reasonable return on his property. Manhattan Club v. Landmarks Preservation Comm'n of New York, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Sup. Ct. 1966).

\(^{100}\) J. METZENBAUM, *ZONING* 238 (1930).


\(^{102}\) Performance standards attempt to quantify the extent of permissible interference with the enjoyment of surrounding property. For example, noise levels might be fixed in terms of permissible decibels and pitch in relation to the location of the noise-production use. *See Progress in Performance Standards for (Continued on next page)*
the old statute, tightened it a little, and generally failed to come
to grips with the problems caused by the persistence of the non-
conforming use.

The nonconforming use has had a varied history in Ken-
tucky.\textsuperscript{103} Prior to 1948, the Court of Appeals tried to consistently
follow the policy that survival of the nonconforming use should
be discouraged. However, in 1948, the General Assembly made it
extremely difficult to eliminate a nonconforming use by providing
that it could be changed to a use within the same or more re-
strictive classification and that it could be extended, altered, and
reconstructed. The Court of Appeals had no choice but to follow
suit.\textsuperscript{104}

Section 100.253 now provides that a use existing at the time of
the adoption of the zoning ordinance may continue except under
the following circumstances: 1) the Board of Adjustment may not
permit the extension of a nonconforming use beyond the scope
and area of its operation at the time the ordinance made its use
nonconforming.\textsuperscript{105} (Thus, the previous law has been strengthened
by prohibiting the right to extend the nonconforming use, con-
sequently forcing the owner who wishes to expand his use to re-
locate in the district where the use would be permitted.) 2) The
use of the property may be changed only if the new use is in the
same or a more restrictive classification. Most states prohibit any
change, but Kentucky retains the previous exception.

(Footnote continued from preceding page)
Zoning, 1954 Planning 160-70. See generally Bair, Is Zoning A Mistake?:
Thoughts on Performance Standards for Non-Euclidian Non-Zoning, 14 Zoning
Digest 249 (1962); Salzenstein, Industrial Performance Standards: Do They
\textsuperscript{103} See Note, Elimination of the Nonconforming Use in Kentucky, 49 Ky.
L. J. 142 (1960).
\textsuperscript{104} Id. at 148-51. See Butlet v. Louisville and Jefferson County Bd. of Ad-
justment and Appeals, 311 Ky. 663, 224 S.W.2d 658 (1949).
\textsuperscript{105} A frequently litigated problem is the attempted expansion of the use of
a lot which is only partially occupied at the time the ordinance is adopted. The
leading case is Franklin Planning and Zoning Comm'n v. Simpson County Lumber
Co., 394 S.W.2d 593 (Ky. 1965). Plaintiff used his lot for storing bricks and
lumber prior to the passage of the ordinance which classified the property as
residential. After passage of the ordinance he graded the back portion of his lot
and used it to store logs. Photographs indicated that the logs were stacked higher
than the bricks but the Court upheld the chancellor's finding that there was
no expansion of a nonconforming use because it could not be said the logs were
"unsightly, obnoxious, or a health hazard." See also Sillman v. Falls City Stone
Co., 305 S.W.2d 322 (Ky. 1957). Cf. Township of Commerce v. Rayburr, 147
N.W.2d 453 (Mich. 1967) (junk yard restricted to portion of lot used prior to the
(Ohio 1967).
2. Change and Expansion of Use

The legislation does not define the “same or a more restrictive” classification. The Court of Appeals has interpreted it to mean that a use may be changed to any other use which is no more objectionable in the degree of nonconformity than the previous use. Objectionability, apparently, is a mixed conclusion of law and fact and thus will be determined by the Court—presumably on the traditional hierarchy of preferred uses running from the traditional single family bastion to heavy industry. In *Smith v. Howard*, 106 decided in 1966, the Court of Appeals held that a change from a plumbing and tractor business to screw manufacturing was a permissible change, and indicated that Section 100.253 gives the property owner considerable flexibility in changing the character of his nonconforming use. If Kentucky is serious about eliminating nonconforming uses, this provision should be amended to prohibit change of use.

Most zoning ordinances provide that the nonconforming use must be terminated if it is discontinued for a period of time—generally one year. The new enabling legislation does not authorize this procedure, but the Court of Appeals has never invalidated these ordinance provisions. Thus, it can be assumed that the power to require termination upon discontinuance is implied in Section 100.253. Analogizing from the common law concept, the Court has required an abandonment of the premises. In *Attorney General v. Johnson*, 107 the Court found an abandonment when a nonconforming grocery store was leased for four years to the University of Kentucky Newman Club, reasoning that the intent to abandon could be implied from “a considerable lapse of time in the discontinuance of the use...” 108 However, the Court’s hard line against continuance of nonconforming uses has been softened in other cases by its definitions of intent. In *Smith v. Howard*, 109 the Court held that discontinuance for the period specified in the ordinance did not constitute an abandonment because the nonuse resulted from the owner’s inability to lease

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106 407 S.W.2d 139 (Ky. 1966). Compare City of Bowling Green v. Miller, 335 S.W.2d 893 (Ky. 1960) (change from furnace storage to plumbing and sheet metal business prohibited).
107 355 S.W.2d 305 (Ky. 1962).
108 Id. at 308.
109 407 S.W.2d 139 (Ky. 1966).
the property. The Court held that since the owner exercised "due diligence to lease his property," there was no abandonment because intent had not been shown. The two cases can be distinguished on the basis of voluntary versus involuntary abandonment. But, as long as the owner subjectively intends to continue the use and makes some effort to do so, the standard followed in Smith will make it difficult to terminate a nonconforming use even if the cessation lasts beyond the period permitted in the ordinance.

3. Suggestions for Further Reform

The most controversial proposal for the elimination of nonconforming uses is amortization. Solicitous for the property owner, the General Assembly has foreclosed this alternative to Kentucky planning units. The pros and cons of this technique as well as its administration have been extensively discussed by the commentators and will not be covered here. The constitutionality of amortization was upheld in the leading case of City of Los Angeles v. Gage, which has been followed by most courts that have considered the problem. The question raised by Section 100.253 is whether the state or the local planning unit should make the decision to use amortization. The choice should be left to the local planning unit instead of being foreclosed by the state. The enabling legislation should give the units of local government maximum choice in choosing techniques to implement land planning policy decisions in order to encourage the cities and counties to take the initiative to formulate imaginative programs for the improvement of the physical environment.

110 127 Cal. App. 2d 442, 274 P.2d 34 (1954). Kentucky's first class cities had this power between 1942 and 1948, but the Court of Appeals did not pass on its constitutionality. KRS § 100.071 (1942). Precedent for the restoration of this power might be found in a 1785 Lexington ordinance which provided "all persons having cabins, cow pens, hog pens, and other inclosures whatever within the main streets of Lexington" must remove them within sixty days. R. WADE, THE URBAN FRONTIER 88 (1959).

111 The recent cases involving the constitutionality of an amortization ordinance are summarized and a new legislative scheme based on balancing the irrecoverable costs against the noxiousness of the uses is proposed in Graham, Legislative Techniques for the Amortization of the Nonconforming Use: A Suggested Formula, 12 WAYNE L. REV. 435 (1966). Considerable doubts about the traditional constitutional rationale are raised by Professor Michaelman's recent foray into the morass of the police power versus taking dichotomy. See Michaelman, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law, 80 HARV. L. REV. 1165 (1967).
A word should be said about Section 100.365, which appears at the end of the Chapter, but has nothing to do with a comprehensive reform of a state enabling statute. Rather, it is an affirmation that Kentucky has not lost the spirit of Daniel Boone. The Section prevents a planning unit from declaring that a noncommercial dog kennel is a nonconforming use when operated adjacent to a lot occupied by its owner or his tenant. This is a clear example of special interest legislation. More importantly, it involves the General Assembly in precisely the kinds of questions which the rest of the Chapter delegates to local units of government. It is the function of the cities and counties, not the General Assembly, to decide which uses are compatible and incompatible. Presumably a noncommercial dog kennel can still be enjoined as a nuisance although Section 100.365 would require a court to rule that it is not a nuisance per se.

The vagueness of the statutory standards will make it difficult for owners of a lawful nonconforming use to decide if an expansion or change of use will be permitted. The problem will be confounded if, as frequently happens, several public officials give inconsistent answers. Ashland Lumber Co. v. Williams illustrates these hazards and clarifies the correct procedure for a person seeking to expand a lawful nonconforming use. Defendant owned a factory (which was lawful) and desired to erect another building on the premises. He obtained assurances from the city manager and attorney that his new building would be "a mere continuation of the nonconforming use" and a building permit was issued. When the building was ninety per cent completed, adjoining land owners brought an action before the Board of Adjustment to revoke the permit, which it did. The circuit court and Court of Appeals affirmed. The defendant argued that the Board had no jurisdiction to revoke the permit because they could not issue one. The Court agreed but held it was irrelevant because the circuit court had jurisdiction over an independent action brought by the neighbors to hold that the building was in violation of the ordinance. Defendant then argued that he

112 A noncommercial dog kennel is defined as "a kennel, in at or adjoining a private residence where hunting, or other dogs are kept for the hobby of the householder in using them in hunting or practice tracking trials or for exhibiting them in dog shows or field or obedience trials or for guarding or protecting the householder's property." Occasional sales are also permitted.

113 411 S.W.2d 909 (Ky. 1966).
was entitled to rely on the city manager, attorney, and building inspector but the Court held that neither of these parties had the power to decide if the use was nonconforming. The Board of Adjustment may determine if an applicant is entitled to a variance or a conditional use permit, but the circuit court is the body with the power to decide if the proposed change in permitted nonconforming use will be lawful.

The defendant's next line of attack was an attempt to bootstrap himself to "a vested" nonconforming use by arguing that the city and the neighbors were estopped from bringing suit because of his good faith reliance on advice which subsequently turned out to be bad. This is a severe problem for cities trying to enforce the nonconforming use provisions of their ordinances. The applicant obtains a building permit in violation of the ordinance and then cries "vested right" when the city tries to enjoin the use of the completed structure. The Court rejected these arguments saying that "[i]f an inspector issues a permit for a use which violates the zoning regulations the permit is no protection and its issuance does not estop the city from enforcing the regulations."\(^\text{1}\) The Court also tightened the definition of good faith reliance, saying that "[t]he argument that the appellants acted in good faith is not convincing since they choose to ignore the zoning officials who did have authority in the matter, and instead depended on two people with no authority in the matter ... and one person with mere ministerial functions, the building inspector."\(^\text{2}\)

The opinion is an indication that the Court will now focus more on defendant's knowledge and use of the applicable zoning procedure and less on the amount of expenditure in determining if his right is "vested."\(^\text{3}\)

VII. THE BOARD OF ADJUSTMENT

The success or failure of a zoning ordinance to implement the objectives of the community plan depends in part on the manner in which it is administered by the board of adjustment. The

\(^{1}\) Id. at 910. The Court also held that the neighbors were not estopped from bringing an independent action because it was not apparent in the early stages of construction that a complete building was going up and the neighbors organized a month after the court found defendant's plans became apparent.

\(^{2}\) Id.

\(^{3}\) Cf. Hobbs v. Markey, 398 S.W.2d 54 (Ky. 1966).
board was originally conceived as a necessary safeguard to immunize the ordinance against attacks of unconstitutionality. Its function was conceptualized as primarily judicial; it was to grant variances from the application of the ordinance "where the literal enforcement of the regulation [would] result in practical difficulty or unnecessary hardship to the applicant..." Legislatures generally made the grant of a variance conditional on a showing of unnecessary hardship. The courts, at least in theory, have consistently emphasized that the applicant must prove that the literal enforcement of the ordinance will impose a severe hardship on the individual landowner because of the uniqueness of his lot, rather than merely a decrease in maximum potential profit from a projected use of his land. However, as Professor Dukeminier's study of the Lexington Board of Adjustment indicates, the old division between judicial and legislative functions does not reflect the board's conception of their role. Instead of merely adjudicating cases of severe hardship, boards tend to grant variances on a simple showing of inconvenience to the individual lot owner. Board members are basically unconvinced about the wisdom of strict enforcement of zoning ordinances. This gives them considerable control over the implementation of community plans which is often detrimental to the plan's inherent values. Chapter 100 retains the board of adjustment but attempts to redraw the division between judicial and legislative functions by defining the board's powers with more precision and by imposing a more rigid procedure on its work.

1. Appointment of Members

Section 100.217 requires the appointment of a board of adjustment before a zoning regulation can be enforced. All members of the board must be citizen members in line with Bassett's warning "that local legislators should not be appointed." In the case of a joint unit, members are appointed by the mayor and county judge, as provided in the agreement, subject to approval by their respective legislative bodies. An important in-

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117 E. Bassett, Zoning 123 (1940).
119 Id. at 337-39.
120 KRS § 100.217(2). Bassett, supra note 117, at 117.
novation is that compensation is now authorized for members. One of the chief criticisms has been that its members are too closely tied to the local business community to impartially perform their functions. Section 100.217 (7) provides a means to make them more independent. Kentucky might well follow the example of Baltimore which paid its board members a salary equal to that of a Supreme Court Justice at the time the board was established.\(^1\)

Section 100.223 allows the Board to employ planners or to contract with other persons to carry out its assigned functions, but the section does not make this mandatory. In practice, the boards generally request the advice of the planning commission staff although they are not noted for their reliance on it.

2. Powers of the Board

The board of adjustment has the power to grant two forms of relief from the literal enforcement of the zoning ordinance. It may grant a conditional use permit and subject it to reasonable requirements if the use is authorized in the district by the zoning ordinance. No showing of hardship is required.\(^2\) It may grant a dimensional variance which permits the lot owner to depart from the requirements for the height or width of buildings and yard sizes. A dimensional variance runs with the land. Section 100.251 provides that it may be transferred to a subsequent owner of the land, but the holder cannot transfer it to another parcel of land. Section 100.247 expressly prohibits the board from granting use variances. A use variance is one which would allow a use not permitted in the district by the ordinance. Kentucky cases were once unclear on the power of the board to grant these types of variances, but this ambiguity is now resolved.\(^3\) A lot owner may change his use only by obtaining a map amendment or by

\(^{1}\) H. DELFONS, LAND USE CONTROLS IN THE UNITED STATES 58 (1962). This suggestion is financially impractical for all planning units which do not encompass a substantial metropolitan area. However, it does serve to indicate that it will be necessary to pay for high quality zoning administration. Perhaps, the answer for small cities and rural areas lies in the creation of regional or state-wide boards of adjustment. This would permit appeals to be heard by full-time board members assisted by a technical staff.

\(^{2}\) Schmidt v. Craig, 354 S.W.2d 292 (Ky. 1962).

\(^{3}\) Arrow Transp. Co. v. Planning and Zoning Comm'n of Paducah, 299 S.W.2d 95 (Ky. 1957).
obtaining a conditional use permit as authorized by the zoning ordinance.

It is increasingly urged that the planning commission should try to improve the quality of building design and site planning. One technique for fostering greater quality control is to give the planning commission the power to require a development plan submitted by the lot owner as a condition precedent to granting the conditional use permit or variance. This device gives the commission a fulcrum with which to bargain with the builder for design and site improvements. It would seem, however, that this power is not available to the planning commission because the Legislature has delegated to the board of adjustment the exclusive power to require development plans except in the case of a map amendment. Section 100.203 (2) allows the commission to require a development plan as a precondition to granting a map amendment but does not expressly authorize it in other situations. In Franklin County v. Webster, the Frankfort Planning and Zoning Commission was authorized by the zoning ordinance to allow specified institutional uses in residential districts by special permit. The commission granted a permit for a nursing home in a new subdivision. Construing Chapter 147, the Court of Appeals held that the commission could not grant the permit because the Legislature had delegated to the board of adjustment the exclusive authority to authorize uses by special permit. The requirement that a development plan be approved by the planning commission as a precondition to the allowance of a use authorized in the zoning ordinance should be construed as the functional equivalent of allowing the use subject to obtaining a special permit. In both instances, the planning unit must make the decision that the use can only be integrated with the surrounding uses if standards higher than those set by the uniform terms of the ordinance are imposed. It is probable that the Court of Appeals will apply Franklin County to Sections 100.203 and .237, and hold that the power to require a development plan for uses authorized in the ordinance has been delegated to the board of adjustment rather than the planning commission.

Planners may decry this construction because it gives the

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124 400 S.W.2d 693 (Ky. 1966).
power to control design and site planning to the lay body which has been historically the most unresponsive to professional advice. They would prefer that this function be delegated to the planning commission because it is more responsive to professional advice and more experienced in applying planning considerations. This would be a useful device in cases such as a petition by an educational or religious institution for a conditional use permit to locate in a residential area. Some quality control is, of course, now imposed by the zoning officer and the board of adjustment but the chances are greater that the use can be made to harmonize with surrounding uses if the power to require a development plan for certain uses is also delegated to the planning commission.

The Board's function is tightly circumscribed by Section 100.243. A variance can only be granted if all of the following findings are made:

1. The specific conditions in detail which are unique to the applicant's land and do not exist on other land in the same zone.
2. The manner in which the strict application of the provisions of the regulation would deprive the applicant of a reasonable use of the land in the manner equivalent to the use permitted other landowners in the same zone.
3. That the unique conditions and circumstances are not the result of actions of the applicant taken subsequent to the adoption of the zoning regulation.

Section 100.243 is designed to control the indiscriminate granting of variances. It is unlikely that it will have a great deal of influence because any decision can be packaged to meet the statutory standards and thus be immunized from judicial review. The standards set out in Section 100.243 can be used to frustrate the property owner wishing to appeal an adverse decision unless the court is willing to supervise the board's decision making process. The first step is to insure that the applicant is told precisely why the standards were applied to his property instead of handing him a conclusionary statement that reveals little or nothing of the board's reasoning. A recent Rhode Island decision, Coderre v. Zoning Board of Review of Pawtucket, did this by reserving the denial of a variance when the applicant received what the

court described as an all-purpose, fill-in-the-blank form, reasoning that the applicant had a right to factual rather than conclusionary findings. The Court of Appeals should reach the same decision.

The board's power to grant conditional use permits is extensive and gives it a fulcrum to bargain with a landowner for favorable concessions in return for the issuance of a permit. No finding of hardship must be made. The board may approve a permit subject to compliance with conditions it is empowered to impose. Section 100.237 (1) provides that "it may attach necessary conditions such as time limitations, requirements that one or more things be done before the request can be initiated, or conditions of a continuing nature." The phrase "time limitation" is ambiguous because it can either refer to the duration of the permit or to the time in which it must be exercised. Section 100.237 (3) indicates that it includes at least a time during which the permit must be exercised, and the Court could construe this to be the definition of "time limitations."

The permit holder must exercise his permit within one year after its issuance or the property will revert to its original designation, although two safeguards are provided for the permit holder. The board must hold a public hearing before the permit can revert and a liberal definition of "exercised" has been provided. The board may revoke a permit after it has been exercised if the holder fails to comply with its conditions. The administrative officer is required to inspect the property at least once a year to determine if there is compliance with the permit. If he believes the property owner is not complying, the officer must submit a report of his findings to the board. The board must then furnish the property owner with a copy of the report and hold a hearing. The board has the discretion to revoke the permit if they find no steps have been taken to comply with the conditions between the date of the report and the hearing. The board has the power to compel the property owner to bear the cost of removing the offending structures. The board "may impose any reasonable conditions or restrictions" on any variance it decides to grant. Section 100.237, which is titled Conditional Use Permits, slips in the authority to revoke a variance for noncompliance with conditions imposed by the board.
VIII. SUBDIVISION REGULATION

1. Definition of Subdivision

The new enabling legislation contains expanded provisions for subdivision regulation. Section 100.273 provides: "Any planning commission which has completed the objectives, land use plan, transportation plan, and community facilities elements of a comprehensive plan may adopt regulations for the subdivision of land within its boundaries." The power to approve the subdivision regulations has been delegated under Section 100.281 (1) to the planning commission, which, in turn may delegate to its secretary, or any other officer or employee, the authority to approve plans in accordance with the commission's adopted requirements. The first major change in the subdivision regulation is in the definition of a subdivision. Section 100.111 (22) defines subdivision as:

the division of a parcel of land into two or more lots or tracts for the purpose, whether immediate or future, of sale, lease, or building development, or if a new street is involved, any division of a parcel of land. An exception is that a division of land for agricultural purposes into lots of five acres or more not involving a new street shall not be deemed a subdivision. The term includes re-subdivision and when appropriate to the context, shall relate to the process of subdivision or land subdivided.

Under the previous enabling legislation, the subdivision regulations were frequently avoided by leasing, rather than selling, the land. The new definition closes that loophole, but it will cause a host of new problems and will be difficult to administer. For example, the rental of a room over a detached garage could qualify as a subdivision and a plat would be required. This technical reading of the definition serves no useful planning purpose, and thus the definition will have to be administered so that an unnecessary hardship will not be imposed on those whose expanded use of land does not alter the existing use and movement systems in the area or require additional municipal services.

2. Approval of Plat as a Precondition to Recording

Section 100.277 (1) requires that no person or his agent shall subdivide land without having obtained final approval of the plat from the planning commission and without having recorded it. This requirement is enforced by providing that no plat of a subdivision of land within the planning unit jurisdiction may be recorded by the county clerk until commission approval has been obtained. Section 100.277 (2) provides that any instrument of transfer, sale, or contract made with reference to a subdivision plat which has not received commission approval shall be void. However, it then provides that "all rights of such purchaser to damages are hereby preserved." The wording of the statute and the remedy provided for the purchaser are inconsistent. As a matter of traditional remedies law, a void contract is one which technically has never been executed and, therefore, neither party is entitled to specific performance or damages. But Section 100.272 (2) apparently attempts to provide that the subdivision regulations are meant only to force the developer to comply with them and are not intended to deprive an innocent purchaser of an action for damages. Thus, from a conceptual point of view, the statute should be read to mean that transfer is voidable at the option of the innocent third party, but his remedy is restricted to damages for breach of a land sale contract. He may not, therefore, obtain specific performance. This would be consistent with Section 100.291 which gives the planning commission the right to seek an injunction against any developer or subsequent transferee who seeks to build in violation of the subdivision regulations. The denial of specific performance to the innocent vendee is necessary to ensure that subsequent purchasers and the other residents in the tract will not be burdened by the results of an illegally constructed subdivision; however, no purpose is served by denying damages to innocent third party purchasers.\(^\text{127}\)

The diligent practitioner who skips to the sections dealing with the official map act will eventually find Section 100.341 which deals with the transfer of lands in violation of the subdivision regulations, which violation is not discovered in time to be enjoined under Section 100.291. Under Section 100.341 the new owner

must file a plat and "the land shall be governed by the subdivision regulations both prior to and after the platting of the land . . . as if the plat had been filed in accordance with the provisions of this chapter pertaining to subdivision regulations."

Section 100.281 gives discretion to the planning commission to formulate a review and approval procedure for subdivision plats. Most subdivision regulations provide for the filing of a preliminary plat and after the developer and the commission have negotiated proposed modifications, a final plat is to be submitted. The commission must approve all plats, either preliminary or final, within ninety days after submission. It has been held in other jurisdictions that a failure to disapprove within the specified time limit results in an automatic approval unless, of course, the developer consents to an extension of time. The same result should be reached in Kentucky. Sections 100.283 and .344 require that all final plats approved by the planning commission must be recorded at the expense of the applicant in the office of the clerk of the county court.

3. Dedication and Reservation Powers Granted to Planning Commissions

The enabling legislation contains no statement of the purpose of subdivision regulation as does Wisconsin's, which provides that the intent of the legislation is to promote the "orderly layout and use of land, to prevent the overcrowding of land, to avoid the undue concentration of population, to facilitate adequate provision for transportation, water, sewage, schools, parks, playgrounds and other public requirements. . . ." Section 100.281 (3) merely specifies that for all forms of land use the planning commission may provide "requirements for the design of streets, blocks, lots, utilities, recreation areas, other facilities, hazardous areas, and areas subject to flooding." Section 100.281 (4) provides that the planning commission may require that the developer either install or dedicate as conditions precedent to approval of any plat, "streets, utilities, and other facilities. . . ." Section 100.281 (5) states that "[t]he planning commission may require a
reservation not to exceed two years, for parks, open space, school and other public uses" as a condition precedent to approval of subdivision plats.

A major problem faced by rapidly growing areas is the provision of land for public facilities in the face of spiraling costs. Cities have been reluctant or financially unable to purchase land in advance of their needs while legislatures and courts have been hesitant to allow excess condemnation. Cities use two principal techniques to hold down future acquisition costs. The city may require a dedication of land from a subdivider for public purposes such as school and recreation facilities. The beauty of the compulsory dedication is that the entire cost of the land for the public facility can be shifted to the residents of the new subdivision. The city may also require the subdivider to reserve land for a period of years for public improvements. The reservation power has been historically limited to public street extensions, but in recent years it has been applied to school and park sites. When land is reserved, the city is, in effect, given an option to purchase it within a specified period at its value as unimproved land at the date of purchase. Some states have tried to freeze the value at the date of designation, but this has been held unconstitutional.\(^\text{130}\)

Thus, the city cannot totally freeze land values under the reservation power but it can insure that the purchase price or condemnation award does not reflect the value of improvements which might have been made during the period between designation and purchase. The owner may still receive the increment representing the natural increase in the value of his land for its use at the time the reservation was created. Both of these techniques are authorized by Section 100.281 and .293-.317, although their scope remains unclear and substantial constitutional questions remain.

Sections 100.284 (4) and (5) raise two important construction problems and a major constitutional question: (1) is the power to compel dedications restricted to property which falls within subsection (4); (2) are the dedication and reservation powers exclusive or complementary; and, (3) are compulsory dedications and reservations a taking of private property without due process of law. It appears that the Legislature, unable to make up its

\(^{130}\) State ex rel. Willey v. Griggs, 89 Ariz. 70, 358 P.2d 174 (1960).
mind about the scope of compulsory dedication, chose to cloud the issue. A New Jersey court, construing a similar statute, held that the legislature had established two mutually exclusive schemes for the provision of subdivision improvements. The court reasoned that the power to compel dedication was restricted to improvements necessary to provide access and services to the buildings constructed in the subdivisions. Parks and schools could only be acquired by reservation. The court reached its result by a familiar application of *ejusdem generis*. This result will probably be applied to subsections (4) and (5), although not necessarily. The words "and other facilities," in subsection (4) could be construed to include schools and parks. In *Jordan v. Village of Menomonee Falls*, the Wisconsin court allowed compulsory dedications for school and park sites even though they were not expressly authorized in the statute. The court reasoned that the broad statement of intent meant that the legislature wanted the statute broadly construed and thus *ejusdem generis* was not applicable. The absence of a general statement of intent would be a reason for not following *Jordan* in Kentucky. The option is open to the Court of Appeals, however, if they want to give maximum powers to cities and counties. But the problem is really one for the Legislature. They must decide if cities and counties should be given the maximum constitutional power to control land use. There is no reason why local units should be precluded from using available techniques. The problems of abuse are great when compulsory dedications are required, but the answer lies with the courts and the legislatures. These bodies should set more precise standards for their exercise instead of prohibiting their use as appears to be the case with compulsory dedications for school and park purposes.

Compulsory dedications fall into two categories: (1) improvements made necessary by the subdivision, and (2) improvements designed to shift part of the cost of enlarging existing public facilities, generated by the subdivision, from the general public to the residents of the new area. These include payments for larger drainage systems and land or fees for school and recreation sites. Courts have found no constitutional problems with the first

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132 28 Wis. 2d 608, 137 N.W.2d 442 (1965).
category.\textsuperscript{133} The rationale has been that these are analogous to special assessments. The city has the choice of either installing the facilities and financing them through a special assessment, or requiring the developer to install them, allowing him to recoup from the residents through increased property price. Thus, there will be no constitutional problems with most of the dedications which will be required under Section 100.281 (4).

It has been urged that the special assessment analogy defines the constitutional limits of the power to compel dedications,\textsuperscript{134} but not all courts have accepted this argument.\textsuperscript{135} The cases extending the dedication power have viewed it as simply another aspect of the police power, and focus on the benefit to both the individual lot owner and the general community. From this perspective, dedications which benefit both the lot owner and the community are not categorically unconstitutional. Heymen and Gilhool argue correctly that exactions such as school and park sites are not unconstitutional as long as the amount of the exactions is related to the increased municipal costs generated by the development.\textsuperscript{136} They further suggest that cost-accounting techniques can be used to determine accurately the capital costs generated by subdivision development.\textsuperscript{137} The most recent cases which have considered the problem have sustained compulsory dedications of school and park facilities or lieu fees on the ground that the exactions were reasonably related to the community costs generated by the subdivision.\textsuperscript{138} The General Assembly has failed to grant local planning units the full scope of constitutional devices available to control the development of new land. This deficiency should be corrected by amending Section 100.281 to expressly permit the dedication of school and park sites.

More substantial constitutional questions remain with the

\textsuperscript{133} See Johnson, Constitutionality of Subdivision Control Exactions: The Quest for a Rationale, 52 CORNELL L. Q. 871, 889-903 (1967).
\textsuperscript{134} Reps & Smith, Control of Urban Land Subdivision, 14 SYRACUSE L. REV. 405, 407-08 (1963).
\textsuperscript{135} See Jenad, Inc. v. Village of Scarsdale, 38 Misc. 2d 658, 238 N.Y.S.2d 156 (Sup. Ct. 1963); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965).
\textsuperscript{136} Heyman & Gilhool, The Constitutionality of Imposing Increased Community Costs on New Subdivision Residents Through Subdivision Exactions, 73 YALE L. J. 1119 (1964).
\textsuperscript{137} Id. at 1141 - 46.
\textsuperscript{138} See Jenad, Inc. v. Village of Scarsdale, 38 Misc. 2d 658, 238 N.Y.S.2d 156 (Sup. Ct. 1963); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965).
use of the reservation power. In *Miller v. City of Beaver Falls*,\textsuperscript{139} the city enacted an ordinance requiring a three year reservation of land for possible purchase as a park. The Supreme Court of Pennsylvania held the ordinance unconstitutional, reasoning in part that the property owner was prohibited from developing his land even though there was no certainty that the city would purchase the property during the reservation period. Section 100.-281 (5) does not contain a provision for a hardship variance and thus will probably be held unconstitutional under *Miller v. Beaver*.\textsuperscript{140} The enabling legislation does provide another method of reserving land for public facilities by the adoption of an official map. The constitutionality of these reservations must be evaluated in this context.

**IX. The Official Map**

1. Map Authorized

Section 100.293 allows the preparation of an official map. This device should be more widely used. The official map allows the city to reserve land, in advance of its need, for streets and other public facilities. It also allows the individual to proceed in reliance that a given course of government action will follow. The official map has been historically used for street extensions, but Section 100.297 (1) extends its use to "parks and playgrounds, public schools and building sites, and other public facilities needs," in addition to public streets and rights of way. The map cannot be prepared until all of the required components of the

\textsuperscript{139} 368 Pa. 189, 82 A.2d 34 (1951).

\textsuperscript{140} The court could, however, find that the two year period is "reasonable" and thus uphold the constitutionality of the reservation. In *Metro Realty Co. v. County of El Drad*, 222 Cal. App. 2d 508, 35 Cal. Rptr. 480 (1963), the court upheld a three year interim zoning ordinance which was designed to limit development around a potential U.S. Bureau of Reclamation reservoir site. The court found that the ordinance was reasonable because "no evidence in this case points to any loss impelling us to hold that the limits of the police power have been exceeded." There was no loss, so the court argued, because the announcement of the project, rather than the ordinance, caused the alleged drop in resource acquisition rather than regulation. See Sax, *Takings and the Police Power*, 74 *Yale L. J.* 36, 73 (1964).
comprehensive plan have been prepared and a public facilities improvement program adopted.

After these have been completed, the planning unit prepares an official map which may designate "the location and extent of existing and proposed public streets, including rights of way, water courses, parks and playgrounds, public schools and building sites, and other public facilities needs." Thus, the enabling legislation goes far beyond most official mapping statutes. The passage of the ordinance does not obligate the city to open a street or purchase a facility, but no structure may be built within the lines of a designated street or public facility unless a building permit from the enforcement officer is obtained. If the permit is denied "no person shall recover any damages for the taking for public use of any structure or improvement constructed within the lines shown on the map" and may be compelled to remove the offending structure at his own expense.

A public hearing, with notice, pursuant to KRS Chapter 424 is required prior to the adoption of the official map and for subsequent amendments. However, public facilities "which have been approved under subdivision regulations provided in this chapter" may be posted on the official map without a public hearing. This presumably means facilities located within the boundaries of a subdivision plat approved by the planning unit and that a public hearing is still required for the mapping of land outside a subdivision.

2. Constitutionality

Section 100.307 provides the traditional saving clause to immunize the official map against claims of unconstitutionality. The owner who is denied a building permit may appeal to the board of adjustments for a permit "if the land shown on the official map is not yielding a fair return. . . ." The board is directed to grant a permit for a building "which will, as little as practicable, increase the cost of future acquisition" and it may impose "reasonable requirements as a condition of granting such per-
mits." The permit shall not be granted if "the applicant will not be substantially damaged by placing his building outside the boundary lines of the proposed facility." The section is typical of official map saving clauses and does little to clarify the standards that the board of adjustments must follow. In the first sentence the board is directed to look at only the mapped portion of the land to determine if denial of the permit will not yield fair return, while the last sentence indicates that the proper frame of reference is the tract as a whole. The confusion stems from Bassett and Williams's rejection of the tract as a whole as a proper standard. The focus on the portion of the tract within the map was added because of substantial doubts about the constitutionality of the official map and this standard was thought to be the least objectionable. These constitutional doubts do not exist today. Thus, the Court of Appeals should interpret Section 100.307 to require a permit only where the tract as a whole is not yielding a fair return.

The official map's attempt to reduce the risk of the public's failure to purchase the property disturbed the court in Miller v. City of Beaver Falls. If the planning unit wants to adopt the official map, it must adopt a program. Section 100.317 provides that no public facilities may be placed on the map unless they are included in the short term capital improvements budget. The short range capital improvement program projects needs and costs over a five or six year period, but the first year of the short term capital improvements budget must automatically become part of the city or county's current operating budget. Section 100.311 does not appear to obligate the city or county to purchase the property because "for purpose of year to year budget revision and updating, the long term capital improvements program may be reviewed and revised at any time in keeping with the review and revision of the comprehensive community development plans."

The Court has three models to choose from in deciding the constitutionality of the official map sections. It could follow the cases upholding the constitutionality of official street maps or it could follow those holding that a zoning ordinance can not be

\(^{144}\) Id. at 198.
\(^{145}\) Headley v. City of Rochester, 272 N.Y. 197, 5 N.E.2d 198 (1936); State ex rel. Miller v. Manders, 2 Wis. 2d 365, 86 N.W. 2d 469 (1957).
\(^{146}\) 368 Pa. 189, 82 A.2d 34 (1951).
used to prevent interim development, thus reducing future acquisition costs. The first analogy should be followed, however, since discriminatory treatment of the individual property owner which characterizes the zoning cases is, in theory, absent because Section 100.307 requires that a permit be granted if the land shown on the official map is not yielding a fair return. A third alternative is also open to the Court. Note (1) 90, the severance provision of Chapter 100, could be used to uphold the provisions for the mapping of streets and rights of way while holding the power to reserve other public facilities unconstitutional.

Even if the Court of Appeals upholds the constitutionality of the official map, it will not be very effective to reserve land for public facilities such as schools and parks. If the area surrounding the reservation develops faster than the city or county's acquisition program, an excellent case for a variance will be made since it can be shown that the vacant land cannot be put to reasonably profitable use compared to the surrounding property. The map will succeed in reserving land only in outlying undeveloped areas where the land would probably still be vacant, regardless of the map, when the city decided to purchase it. The map may have the effect of forcing the city or county to become more farsighted in the acquisition of land for public facilities, but this is not likely to occur in most cities or counties. A new technique is needed to reserve land for public facilities. The Legislature should consider a system which combines the hardship permit with compulsory purchase. An example of this system would be to allow any owner who was restricted by the reservation to serve a notice to purchase on the city or county. The governmental unit would have a period of time to make the decision to purchase and if they chose not to, then issuance of a permit would be mandatory. One such scheme is discussed below in connection with Section 100.287.

See, e.g., Wital Corp. v. Township of Denville, 93 N.J. Sup. 107, 225 A.2d 139 (1966); and cases cited in Mandelker, Planning the Freeway: Interim Controls or Highway Programs, 1964 Duke L. J. 499, n.54. See Mandelker, supra note 147, at 455-58. See generally Krasnowiecki & Paul, The Preservation of Open Space in Metropolitan Areas, 110 Pa. L. Rev. 179 (1961); Mandelker, supra note 147, at 472-76.
3. Coordination of Subdivision Development and Highway Location

A major land use problem of recent vintage has been the spread of the superhighway across the countryside. There has been little coordination between subdivision development and the timing of route selection and construction. This forces the state to condemn recently developed land and this, in turn, increases the cost of highway construction. Section 100.287 attempts to provide a procedure for the voluntary coordination of subdivision development and the construction of state highways by granting each planning unit subdivision controls. The state Department of Highways may file a map of land within one mile on either or both sides of a proposed highway. After this is received, no preliminary plats may be approved until one copy has been sent to the Highway Department for review. The Department has no power to compel the planning unit to reject or modify the plat but may communicate its recommendations within fifteen days after its receipt.

The statute is a helpful but timid step toward meeting the problem. The state should consider adopting a statute drafted by Professor Mandelker for the protection of future highway right of ways. This proposal blends American and English land use control techniques and grants the state highway commission power to designate highway control zones. The commission retains the power to control development in these zones, although it may delegate this function to local planning units if the state considers their land use control program adequate. Within the highway control zone, development is prohibited except by special permit. The commission may either prohibit or condition development depending on its impact upon the proposed highway. The English technique of compulsory purchase has been adapted to give hardship relief, thus alleviating the major constitutional objections of such a statute. Three forms of relief are authorized: (1) the highway commission may purchase the property if certain hardship conditions are found to exist; (2) it may allow the development or amend its original conditions; (3) it

may acquire a negative easement in the development of the property by awarding the property owner interest until the time when the property is purchased for highway purposes.

The subdivider will generally seek to enhance the value of his development through the use of restrictive covenants. As the subdivision ages, problems between the restrictions imposed in the covenants and inconsistent zoning ordinances may arise. Section 100.349 codifies the common law rule that in case of such a conflict the covenant controls if it imposes a higher standard than the zoning ordinance.151 The restrictions can be removed only through an application of the doctrine of changed conditions.152 The zoning ordinance is not irrelevant, for the Court of Appeals has indicated that the ordinance is evidence that the conditions have, in fact, substantially changed since the restrictions were imposed.153 However, this fact alone will not meet the burden of proof imposed on the party trying to invoke the doctrine.

X. APPEALS TO CIRCUIT COURT

1. Appeals Authorized From Final Action

The legislation provides a uniform procedure for appeals to the circuit court. The previous enabling legislation ran the gambit from a trial de novo in Louisville and Jefferson County to the absence of a procedure outlining how an appeal should be taken in cities of the third through sixth class and counties containing them.154 Section 100.347 provides that "[a]ny person claiming to be injured or aggrieved by any final action of the planning commission or boards of adjustment" may appeal to the circuit court of the county in which the land lies thirty days after any final action of the commission or board. The requirement of a final action is a codification of the principle that the litigant must exhaust his administrative remedies before he is eligible for

152 See, e.g., Fortner v. Gulf Refining Co., 316 S.W.2d 65 (Ky. 1958).
153 Annes v. Freeman, 294 S.W.2d 77 (Ky. 1956).
judicial relief.\textsuperscript{155} The legislation does not attempt to define final action but, obviously, it means that the issue must have been considered and decided by the body with the power to implement its decision.\textsuperscript{156} This is made clear by Section 100.347 (1) which specifies that “[f]inal action shall not include the commission’s recommendations to other governmental bodies.” For example, in the case of a map amendment, a final action results only after the city approves or disapproves the commission’s recommendation.

2. Final Action Defined

A final action is determined both by Chapter 100 and local procedure. The legislation provides only that the issue be taken to the body with the power to decide and implement its decision. This merely defines the level to which an appeal must be taken before a final action can be obtained; it does not inform the litigant which decisions of the various bodies will be considered final. This is to be determined by the procedures and practices of the appropriate local ordinance and body. A good example of this can be found in a recent Kansas case, \textit{Arkenberg v. City of Topeka}.\textsuperscript{157} In October, 1964, plaintiff church requested a map amendment to construct a low income housing project. The planning commission disapproved the request and in December, 1964, forwarded its recommendation to the city commission which referred the application back to the planning commission for further study in January, 1965. In March, the Church amended its petition and both the planning commission and the city subsequently approved. The residents of the neighborhood carried their appeal to the courts and argued that the city approval was invalid because the local ordinance forbade the filing of more than one zoning application within one year following a previous application for the same plot. The court rejected this argument on the ground that no final action had been taken because “the ordinance contemplates a finality of action by the governing body . . . the immediate return of the application for reconsideration of

\textsuperscript{155} Kentucky recognizes the major exceptions to the exhaustion requirement. There is no need to exhaust if the administrative remedy is inadequate or the statute as a whole is alleged to be unconstitutional. Louisville and Jefferson County Planning and Zoning Comm’n v. Stocker, 259 S.W.2d 443 (Ky. 1953); Goodwin v. City of Louisville, 300 Ky. 11, 215 S.W.2d 557 (Ky. 1948).

\textsuperscript{156} See Thomas v. Barnett, 297 S.W.2d 781 (Ky. 1966).

\textsuperscript{157} 421 P.2d 213 (Kan. 1966).
the new design did not constitute denial of the application but it remained in the process of consideration, and until the city commission either accepted or denied the application there was no final action as contemplated by the ordinance."\textsuperscript{158}

The following briefly summarizes the levels required to obtain a final action for the various types of relief permitted in Chapter 100 and the time permitted if different from Section 100.347:

A. Map Amendment: The planning commission's opinion must be obtained and the city legislative body or the fiscal court must have approved or disapproved the recommendation;

B. Approval or Denial of a Subdivision Plat: The request must be referred to the planning commission which will usually delegate the initial consideration to a subcommittee and the commission staff as authorized in Section 100.281 (20). The planning commission has the final power to approve or disapprove the plat;

C. Adoption of Official Map: The procedure is the same as for a map amendment;

D. Amendment of the Official Map: The procedure is the same as for a map amendment;

E. Conditional Use Permit: The board of adjustment has the power to hear and decide applications;\textsuperscript{159}

F. Dimensional Variance: The procedure is the same as for a conditional use permit;

\textsuperscript{158} Id. at 217.

\textsuperscript{159} In the case of the board of adjustments, it is difficult to say whether an action is final at the time when the board actually votes on the matter, when this information is transmitted officially to the enforcement official, or when the minutes of the meeting are officially approved. An official record of the minutes of each meeting should be maintained by the secretary of the board, and it would not be wise to consider any action as being final until the official record is prepared. There is too much opportunity for confusion and error during the course of a board meeting since they are often informal. The official minute record may not be approved until the next meeting, so that a period of thirty to sixty days may elapse between the time of the action and the time of minute approval. The most logical act which could be considered a final action by the board would be the transmittal to the enforcement officer of a notice of the action of the board. This will generally be prepared by the secretary after the minutes of the board meeting have been reviewed, thus minimizing any chance of error. Since the enforcement official acts in accordance with this notice, this would seem to be the point in time when the action of the board would become final. Only on rare occasions are there corrections required in properly prepared minutes, and these are generally of a minor nature and do not substantially affect the action taken by the enforcement official. It is suggested, however, that minutes should be carefully prepared, and that, if possible, a tape recorder be used.
G. Denial of a Building Permit Because the Proposed Construction is not in Conformity With the Literal Terms of the Zoning Ordinance: The board of adjustment has the power under Section 100.257 to hear and decide these cases. The applicant has sixty days to appeal after the decision is rendered. The statute does not specify the event which starts the running of the sixty day period. Section 100.261, which deals with appeals by aggrieved parties, provides that the appeal must be taken after the party or his agent receives notice of the action. It is assumed that the General Assembly meant that an appeal under Section 100.257 must be taken within sixty days after notice of the adverse decision. Otherwise the applicant would be denied procedural due process. An appeal by an aggrieved non-applicant must be taken within thirty days after receipt of notice of the decision.

XI. CONCLUSION

This paper has attempted to examine one aspect of the decision making structure designed to control the development of land. Chapter 100 is a vast improvement over the previous legislation, but it should not be viewed as the total solution to the many land development problems Kentucky is facing and will face in the near future. It must be viewed in the context of other statutory systems which affect the physical environment. A recent study conducted by students at the University of Kentucky College of Law indicates that the annexation laws have failed to facilitate the functional consolidation of metropolitan Lexington and thus are in need of comprehensive reform. It is hoped that the revision of Chapter 100 will be the first in a series of badly needed reforms of many areas of Kentucky local government law.

Little effort has been made to explore the consequences of the fragmentation of power between different governmental units. The revision of Chapter 100 does not radically alter existing

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160 Section 100.271 permits the city or county to designate an administrative official, usually the building inspector, to administer the ordinance. The official is directed to issue a building permit only if the proposed construction is in conformity with the "literal" term of the zoning regulation.

161 If no building permit is issued and the builder commences or continues to build, a restraining order may be obtained and lack of a building permit will constitute a prima facie case for its issuance. The section does not specify who shall obtain the order but presumably it will be the zoning officer as provided in Section 100.271.
distributions of power. These divisions should not, however, be viewed as permanent, and increasing attention must be given to new structures and allocations of power. There will be increasing pressures to do so as federal and state programs and grants become more and more conditioned on regional approaches common to several jurisdictions. This may require the consolidation of the power to plan, acquire land, and implement a land use control system into new institutions structured to solve regional problems. Such a radical restructuring is not visionary, for example; it is essential if Kentucky is to solve the problems of economic stagnation which plague many parts of the state. The Corps of Engineers has recently announced that it will not continue to build multipurpose reservoirs in Eastern Kentucky authorized under the elastic definition of expansion benefits authorized under the Appalachian Regional Development Act unless the state formulates a program to develop the land which will be freed from floods. It is unrealistic to expect rural cities and counties to cope with the problems such a program will generate. Thus, it will be necessary for the state to create new institutions which can plan and implement a comprehensive land development program.

A recent historical study of Kentucky, Dr. Thomas D. Clark's *Kentucky: Land of Contrasts*, points out that Kentucky is losing whatever individuality it once had and is falling into the mold of national mediocrity. A drive around Louisville indicates the truth of this thesis. One can risk one's life making a left hand turn to eat the same tasteless pizza obtainable in Chicago or Los Angeles. However, Kentucky now has adequate enabling legislation to cope with many of the pressing problems of land development. Its success, like that of any other statute, will depend on the manner it functions to rationalize the decision making process.

At this point, one can hope it will be administered to accomplish this end.\[^{162}\]

\[^{162}\] Planning units have until June 16, 1971, to begin operations under the new statute, KRS 100.397 (1966), and thus many of the kinks can be ironed out before it becomes uniformly applicable. Several amendments were proposed during the 1968 session of the General Assembly. An article in the fourth issue of the Kentucky Law Journal will discuss the changes made during this session.