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Large Lot Zoning Note

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Twenty years ago the typical new metropolitan dwelling was an apartment or a house built on a small lot. Even in prestigious suburbs, the well-to-do often placed their expensive homes on lots much smaller than one half acre.[1] Today, on most undeveloped land around large cities, minimum lot-size zoning prohibits all development save single-family dwellings on lots that are very large by traditional standards.[2] Even by 1960, of the vacant land zoned for residential use within fifty miles of Times Square, eighty per cent was off limits to apartments or houses on lots of less than one half acre. More than half was zoned for single-family dwellings on lots of not less than one acre, and minimum required lot sizes ranged up to five acres.[3]

For a metropolis as large as New York, large lot zoning has meant that several million fewer people can live in the suburbs closer to the city. Bidding up housing prices wherever they go, those excluded further crowd the central city or move to the outer edges of the commuter belt where zoning is typically more lenient. They consume land much faster than they would under free market conditions;[4] and their dispersion increases expenditures on expressways and reduces the

1. REGIONAL PLAN ASSOCIATION, SPREAD CITY 13 (1962) [hereinafter cited as SPREAD CITY]. Past development in Connecticut accommodated approximately three families per residential acre. AMERICAN SOCIETY OF PLANNING OFFICIALS, NEW DIRECTIONS IN CONNECTICUT PLANNING LEGISLATION 186 (1967) [hereinafter cited as ASPO]. Subdivisions built in the late forties and early fifties typically placed 5 dwellings on each acre. SPREAD CITY 44; ASPO 185 n.1. In the late forties, zoning for lot sizes bigger than one acre was extremely rare. Urban Land Institute, *The Effects of Large Lot Site Zoning on Residential Development*, 32 TECH. BULL. 7 (1958).

2. *See* SPREAD CITY 11-15; ASPO 184-92; Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1059-62 (1963).

3. These figures are derived from data for 1960 contained in SPREAD CITY at 40, for the "inner" and "intermediate" ring of suburbs, including roughly those within fifty miles of Times Square. Data was not provided for the central city, but vacant land there is scarce. *Id.* at 9.

The fraction of this suburban land zoned for one acre or more may now be over two thirds, since widespread, substantial increases in lot size requirements have been reported since 1960. N.Y. Times, May 29, 1967, at 1, col. 3. *See also* ASPO 191, 197; 3 NATIONAL COMMISSION ON URBAN PROBLEMS, Report I-43 (prelim. ed. 1968) [this report of the commission chaired by former Senator Paul Douglas is hereinafter cited as DOUGLAS]. Moreover, more leniently zoned land gets developed at a much faster rate. SPREAD CITY 15.

In Connecticut in 1966, of the undeveloped land zoned for a minimum lot size, approximately 70% had acreage requirements of more than one acre, while less than 5% was zoned for one third of an acre or less. ASPO 186-87. Data on areas other than Connecticut and the New York metropolitan region suggests an only slightly less advanced trend toward large lot zoning. 3 DOUGLAS I-43 to I-44.

4. Assuming that, in the New York City region, population grows by 40% and present zoning remains unchanged from its 1960 level, "[w]e would use up in the next twenty-five years more land than we have developed in the 336 years since Manhattan was purchased from the Indians." *Id.* at I-21.

feasibility of mass transportation. Many observers see the results as a bifurcated society, aesthetic atrocities,[5] and an inexcusable waste of resources.

An inquiry into the desirability of curbing large lot zoning presents grave difficulties because complex and often intangible factors must be considered. Economic analysis can refine the debate by isolating those factors reducible to dollar terms and by determining whether a new policy's dollar benefits exceed its dollar costs. A reform in large lot zoning would be "efficient" if the dollar value placed upon the change by those whom it would benefit exceeds the negative dollar value placed upon the change by those whom it would harm.[6]

Changes in acreage requirements cause dollar gains and losses chiefly by altering the characteristics of residences and neighborhoods. Residents of the metropolis reduce such effects to dollar terms when they shop for an apartment or home. Precisely how they would value various minimum lot size requirements is unknown, but enough can be surmised to suggest that substantial reductions in lot size requirements would often be efficient. The purpose of this Note is to show the conditions under which such a reform would be efficient, and then to propose an approach to lot-size zoning which can lead to more efficient use of metropolitan residential land.

I. Is Large Lot Zoning Efficient?

We begin by hypothesizing a suburb with a substantial amount of undeveloped land on the market for which the suburb will choose a single minimum lot size. The analysis will consider the dollar costs and benefits to three groups—present suburban residents ("homeowners"[7]), potential suburban residents ("homebuyers"), and other residents of the city ("citydwellers").[8]

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5. *Cf.* W.H. WHYTE, THE LAST LANDSCAPE 16-17, 199ff. (1968).

6. Because of non-monetizable considerations, a reform is not necessarily desirable simply because it is economically efficient. *See* pp. 1430-31 *infra*.

7. Use of the term "homeowners" does not imply an assumption that all suburban residents own their own homes. The relevant interests of those who now rent their residences are alike in nature, if not in degree, to the interests of those who actually own homes. Therefore it is not misleading in the analysis of efficiency to treat *all* residents of the suburb as "homeowners."

8. The analysis treats the question of a reform's efficiency in terms of the comparative interests of these three classes. But any policy change, in zoning or otherwise, affects a multitude of interests in the economy. For instance, a reform will have some small impact on the prices of roof shingles and tar by altering somewhat the proportion of apartment buildings and single family dwellings constructed. To treat all these effects separately would bury in impossible complications any attempts to fathom the economy. A comprehensible analysis is possible through the technique of "partial equilibrium

Present law authorizes suburbs to zone, and homeowners alone con-
trol the suburb's decisions.[9] Thus one may expect that, absent judicial
intervention,[10] the zoning decisions of the suburb will reflect only the
homeowners' interests.[11] These interests involve the *numbers* and the
sorts of people who will move to the suburbs. Fewer new neighbors
mean less noise, less traffic, and more open space. By increasing the
distance between new homes and existing ones, larger lot size zoning
gives the homeowners many of the advantages of their owning larger
lots without the attendant cost. Many homeowners also want to exclude
families of an economic status lower than their own, perhaps on the
assumption that poorer or darker-skinned neighbors will hinder the
education of their children, commit more crime, or make living in

analysis." The idea is to isolate that part of the economic system where the most sig-
nificant consequences of the phenomenon to be studied take place, and to treat everything
else as "remaining equal." The primary justification for this *ceteribus paribus* assump-
tion is that the relatively small consequences of any change tend to balance each other
out. Therefore, in a partial equilibrium analysis one may disregard some of the
consequences of a policy where there is good reason to believe that they either are small,
or are large but in fact balance each other out.

Large lot zoning affects people within the metropolis in ways connected with their
dwelling places—*e.g.,* the rent or purchase price, the expense of ground maintenance
and commutation, the amenity of the neighborhood. Lot size zoning also affects people
in other connections; for example, by altering the distribution of purchasing power
between city and suburb, it will enhance one retailer's sales at the expense of another's.
But it does not affect significantly the total spent; one man's gain is likely to equal
another's loss, and therefore neither requires consideration. It seems reasonable to sup-
pose that all non-residence-connected, quantifiable effects either are of this character or
are too small to be considered. The question of relative efficiency, then, boils down to
that of whether the residence-connected benefits of a change in large lot zoning will out-
weigh its residence-connected costs. It is for this reason that the three categories used
in the analysis are defined in terms of common residence-connected interests.

9. Homeowners (including renters, see note 7 *supra*) may own so much vacant land
that they will vote their interests as landowners rather than their interests as home-
owners. The interests of landowners are generally opposed to those of homeowners, see
note 20 *infra*. But, because voting is per head and not per acre, and because the typical
undeveloped lot is far larger than the typical developed lot, non-landowning home-
owners will constitute a majority well before the suburb is half developed. That farmer-
landowners are a substantial voting bloc in outer areas may help explain why these
areas tend to zone for smaller lot sizes than the inner, more developed suburbs.

10. The possibility and circumstances of judicial intervention are discussed at pp. 1433-
37 *infra*.

11. Some communities do, however, bargain with developers. *See* ASPO, *supra* note
1, at 198. In exchange for a relaxation of lot size minima, the developer may make design
modifications, provide community facilities, or build more expensive homes. James
Rouse, the developer of Columbia new town, got Howard County, Maryland, to relax
its zoning by offering to provide a wide variety of amenities and facilities. But since
subdivision requirements and building codes already allow the suburb to demand much
of what the developer has to give in exchange, the scope for bargaining is limited unless
the development is large or unusual.

The use by the municipality of professional planners also may influence the zoning
choices of the suburb. But to the extent that professional planning ideals conflict with
homeowner interests, they will generally be rejected. *See* Comment, *Parochialism on the
Bay: An Analysis of Land Use Planning in the San Francisco Bay Area,* 55 CAL. L. REV.
836, 847 (1967). In any event, "most [planning staff members interviewed felt] that their
job is to plan, not for the region, but for the jurisdiction which employs them." *Id.* Thus
the notion that homeowners pursue only their interests is a simplification of the process
but not the result.

the suburbs less prestigious. Large lot zoning serves this exclusionary purpose by making residency in the suburb more expensive.[12]

Another frequently cited motive for large lot zoning is that of keeping down the suburb's tax rate. Low and moderate priced single-family dwellings do not return in taxes what they add to the municipal budget, particularly the cost of education. Large lot zoning is partly an effort to "export" these tax-loss homebuyers to other parts of the region.[13]

By making the suburb more desired, an increase in the acreage requirement enhances the market value of the owners' homes. Increased property value is thus both a cause and an effect of the desire for a rich, white, low-density town. But whether aesthetics, status, or the dollar is at the root of large lot zoning, it is sufficient, for the purpose of examining the efficiency of a change in the lot size minimum, to observe that the change it causes in the aggregate market value of the homeowners' property reasonably approximates the change in the dollar value that they would put on the choice of lot size requirements.[14]

The market value of each homeowner's property will rise as the lot size minimum is increased, but beyond a certain point each zoning increase will bring a smaller gain to the homeowners. This effect arises from two sources. First, each unit increase in any one *determinant* of market value—*e.g.*, open space—will have a lesser impact on the property's market value than the previous unit increase, because one's desire for any commodity lessens as he acquires more of it. This effect is known as "diminishing marginal returns." Second, each unit increase in the *lot size* will bring a lesser increase in each determinant of market

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12. The effect of large lot zoning on the cost of housing in the suburb is discussed at note 32 *infra*.

13. *See* SPREAD CITY, *supra* note 1, at 31. This "gain" for homeowners, however, is more than offset by losses to others; to provide the same level of services, the total expenditures of all municipalities in the metropolis will be greater with large lot zoning than with smaller average lot sizes. This is so because the prime determinants of local government expenditures are the number of people and the size of the area to be served. Large lot zoning does not decrease the total metropolitan population, but forces government to provide sewerage, water, and local roads over a wider area. Moreover, large lot zoning causes developers to "leapfrog" strictly zoned areas and build on the remote but more leniently zoned sections. "[T]he cost of extending utilities to the outlying development—which must include sewers, water lines, and streets large enough to serve the intervening area when that develops—increases the public costs enormously . . . ." ASPO, *supra* note 1, at 196. Since the net impact on the metropolitan fisc is negative, the analysis of large lot zoning may ignore these local budgetary considerations, remembering, however, that they strengthen the argument that large lot zoning is inefficient.

14. The dollar value that a homeowner would put on the satisfaction he derives from his home will be no lower than the home's market value. Otherwise, he would sell. Because changes in the lot size requirement will have similar effects on a home's market value and on the satisfaction that it produces for its occupant, market value is used here as a convenient proxy for the satisfaction that a homeowner gets from his home.

value; *e.g.*, an increase from two to three acres creates less additional open space than an increase from one to two acres. Thus, each unit increase in lot size will create less of the desired amenity, and each unit increase in the desired amenity will bring less additional satisfaction to the homeowner.

In addition, the marginal increase in market value will drop rather sharply when the zoning requirement passes the lot size of existing homes, because prohibiting lot sizes smaller than those existing will usually satisfy the desire to exclude families of lower status. When the lot size becomes very large, the returns will be further diminished by positive disadvantages, including increased isolation and a greater need for automobiles and chauffeuring of children.[15] Thus the aggregate market value of homeowners' property may actually begin to decline.
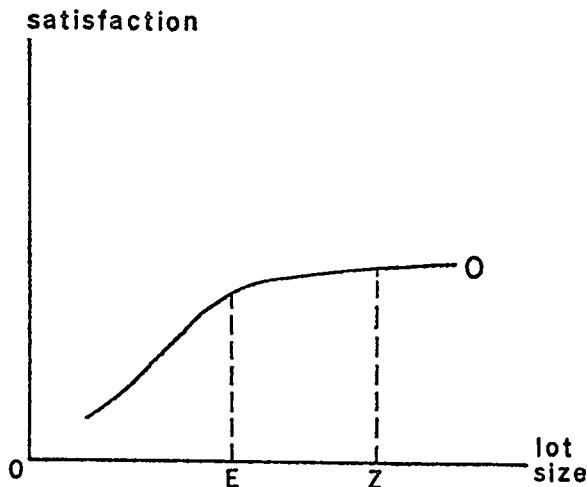

FIGURE 1

Figure 1 represents graphically an estimation of the impact on the aggregate value of homeowners' property of applying various acreage requirements to the suburb's presently undeveloped land.[16] Curve *O*

15. Under present zoning, the average lot is so large that the vast majority of residents necessarily will live beyond walking distance of schools, shopping, churches, and friends. Trips for such everyday purposes will be predominantly by auto. In the new spread-city, pedestrians and school children on bicycles will be scarce indeed. SPREAD CITY, *supra* note 1, at 21.

16. The curves drawn in Figures 1-3 are only graphical illustrations of the directions in which, and the rates at which, the total satisfaction of the various groups can be expected to vary with given changes in the minimum lot size requirement of the hypothetical suburb. The exact contours and height of the curves shown do not purport to represent any real situation, or to be verifiable by existing empirical data.

rises to the right, reflecting the increased value to homeowners of larger lot size requirements. It is concave toward the horizontal axis, reflecting the diminishing returns to homeowners from increases in the minimum permissible lot size.[17] Point E on the horizontal axis marks the average lot size of existing homes. The suburb at the behest of homeowners will want to increase the lot size requirement as long as curve O continues to rise, but will be limited at some point by the threat of judicial intervention. This point, represented by Z in Figure 1, will be larger than the lot size of existing homes (point E), given present judicial standards in zoning challenge cases.[18] The suburb will zone for minimum lot size Z in preference to any smaller size.

The choice of a lot size requirement also affects the satisfaction that the zoned land produces for homebuyers.[19] An increase in the minimum lot size will bring more satisfaction to each purchaser of a suburban lot, by increasing both the size of the lot itself and the size of

17. Curve O simplifies the homeowners' interest near the far left side of the graph. Below some very small lot size requirement, homeowners will care little about further decreases in the lot size requirements because such decreases will have little impact on the density of construction. That is, a point will come where almost all individuals buying homes will want lots bigger than those called for in the ordinance. The flattening effect that this would have on curve O, and all the other curves in figures 1-3, is omitted because it occurs at much smaller lot sizes than those under discussion.

18. Judicial remedies for parties aggrieved by large lot zoning, and the standards applied by the courts, are discussed at pp. 1433-37 *infra*.

19. Although the "homebuyer" category includes all those in the market for suburban homes, the analysis equates the change in total satisfaction of all homebuyers with the change in satisfaction only of those homebuyers who will occupy the zoned land after the change in minimum lot sizes. This ignores the change in total satisfaction of those homebuyers who will occupy land in other parts of the metropolis, a change produced by the shift in population, in the case of a lot size decrease, from those other parts to the suburbs. An analysis of the efficiency of the zoning change can ignore these effects only on the assumption that the land left by the homebuyers will produce satisfaction for others as great or almost as great as the satisfaction it previously produced for the now-departed homebuyers.

Many uses will compete for this land. First, homebuyers who do not get into the suburb will now occupy land with a lower density population. Second, citydwellers will be able to move into some of this abandoned land. The only effects on citydwellers discussed in the text, p. 1428 *infra*, derive from their having fewer homebuyer neighbors, not from their moving into new, more desirable residences. Third, commercial, industrial, and farming uses will also compete for some of the abandoned land.

Normally, we would not expect these users to gain as much satisfaction from this land as the homebuyers previously did. Otherwise, they would have outbid the homebuyers for its use in the first place. This assumes, however, that the market works well, allocating each parcel to its most productive use. But as to this land, there are good reasons for believing that the market has not worked well. First, segregation within the city keeps poorer citydwellers from many homebuyer-occupied areas although the citydwellers could outbid the homebuyers if given a chance. Second, it will be shown (see note 23 *infra*) that *fewer* residents on a densely populated piece of land can sometimes result in *more* total satisfaction from its use, because the market has ignored people's concerns about crowding.

Thus, after a curb in large lot zoning, the land which homebuyers abandon in moving to the suburbs may well find an equally productive use. Therefore, in arguing that smaller lot size requirements would be efficient, it is assumed that the gain to homebuyers will not be diminished by a decrease in the productivity of non-suburban land.

those that surround it.[20] As the lot size increases, however, the home-buyer will derive diminishing marginal returns both from being sur-rounded by increasingly large lots and from owning a larger lot him-self. Thus the dollar value that an individual homebuyer places on a lot of the minimum allowed size rises with each increase in the zoning requirement, but by a smaller amount each time.

While bringing increased satisfaction to each individual purchaser, an increase in the minimum lot size also reduces the number of lots and hence the number of homebuyers who can live in the suburb. Only those homebuyers who are successful in purchasing a lot will derive satisfaction from the suburb's land,[21] and at some point decreas-ing *numbers* of successful homebuyers will begin to have a bigger im-pact on the satisfaction of homebuyers as a class than will the increased satisfaction of each *individual* homebuyer who succeeds in purchasing a larger lot.[22] This point is represented by lot size M in Figure 2.[23] Curve B, an estimation of how total homebuyer satisfaction varies with changes in the lot size requirement, reaches a peak at point M. Lot size increases beyond M will have increasingly negative effects on home-

20. The homebuyer will share part of his satisfaction with the owner of the vacant land through the purchase price of his lot. The price level does not affect the total satisfac-tion produced by the land for the parties to the sale, but it does affect how they divide it between themselves. The landowner's gross revenue is dependent upon the size of the dollar value placed upon the land by the homebuyer. His interests are therefore con-current with, and are treated as subsumed under, the homebuyer's satisfaction. The analysis of homebuyer interests as including those of landowners eliminates from the graphical presentation in Figure 2 any effects of a change in lot size requirements upon the distribution of income between landowners and homebuyers. *See* note 8 *supra*. One such effect, however, is considered at p. 1426 *infra*.

21. *But see* note 20 *supra*.

22. Of course, some homebuyers will prefer two-acre zoning, and will not move into a suburb zoned at one acre. Since the efficiency analysis deals only with *total* satisfac-tion, it is irrelevant that the satisfaction goes to different members of the group; *aggregate* satisfaction, not its distribution, is the economic variable at issue. *Cf.* note 8 *supra*.

23. Although homebuyers could legally choose lots of size M when the acreage re-quirement is less than M, they will not do so, and hence curve B is not horizontal from point M to the vertical axis. The reason is that, without zoning, homebuyers acting individually will not choose lots of a size that they collectively want. Each homebuyer wants others to buy large lots but knows that the amount of land that they buy will be independent of the amount of land he buys. Therefore, with land bringing diminish-ing returns to him, he will buy a lot so large that the worth to himself alone of buying an additional fraction of an acre is just less than its cost. However, his buying that extra fraction of an acre is worth something to other homebuyers, so that its worth to all of them together exceeds its price to the individual homebuyer. Thus, all home-buyers would be better off if they could pay each other to buy more land, or if they could agree among themselves to do so. Zoning, by accomplishing the same thing as such agreements without cost, benefits the homebuyers so long as the minimum lot size does not go above that collectively desired. For a similar argument often made to justify urban renewal, see J. ROTHENBERG, ECONOMIC EVALUATION OF URBAN RENEWAL 40-42 (1967).

Zoning also benefits the homebuyers by removing from their real estate investment the risk that the surrounding land will be developed more densely than expected.
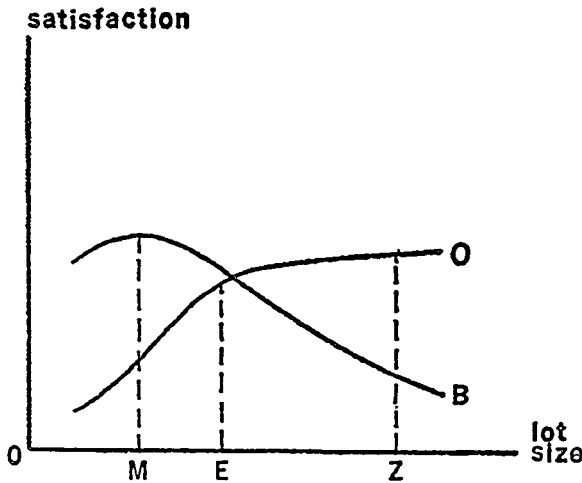
satisfaction

FIGURE 2

buyer satisfaction, as the effect of decreasing numbers of available lots outweighs the effect of declining marginal increases in satisfaction to each individual homebuyer.[24]

Data on the impact of large lot zoning upon land values is consistent with this conclusion. In some suburbs, minimal lots in an area zoned for a given acreage are priced almost as high and sometimes higher than minimal lots in areas zoned for twice the acreage.[25]

The lot size at which total homebuyer satisfaction is maximized will be considerably smaller than the minimum lot size which homeowners want and get. In fact, lot size M is likely to be smaller than the average lot size of existing homes (point E) which, as previously noted,[26] is smaller than the homeowners' preferred zoning requirement Z. Even if existing homes were built so long ago that developers were not forced to choose lot sizes larger than those most profitable, and hence those which maximized satisfaction to homebuyers, population growth and transportation improvement in most metropolitan areas will have increased the demand for and desirability of suburban

24. Curve B will reverse the direction of its curve as the lot size requirement becomes very large. The curve will never cross the horizontal axis, since the land will always produce some satisfaction for at least one homebuyer or landowner (whose interests are subsumed under those of homebuyers, see note 20 supra).

25. Cf. South Western Regional Planning Association, Housing, 6 TECH. REP. 69-70 (on Connecticut); ASPO, supra note 1, at 214-15; 3 DOUGLAS, supra note 3, at I-39.

The South Western Regional Planning Association asserts that part of the reason for the smaller lots being worth more per square foot is their being located closer to community facilities. But it is large lot zoning that produces the scarcity of community facilities in what are now the more remote sections of these towns.

26. See p. 1423 supra.

land, and thus have heightened the most profitable density of the land.[27]

The loss which zoning at lot size Z rather than at M imposes on homebuyers is measured by the decline in curve B between M and Z. Likewise, the amount by which homeowners benefit from zoning at Z rather than M is measured by the rise in curve O between M and Z. Regardless of whether the benefit to homeowners exceeds the loss to homebuyers, the decision is the homeowners', and they will choose Z.

That the hypothetical suburb competes with others impels it to make full use of its powers to raise the minimum lot size. The suburb that falls behind in the zoning race may quickly become a target for mass developers catering to the less wealthy spectrum of the homebuying market, thus burdening it with unusually fast development and a loss of relative prestige.[28] If *all* suburbs, however, were forced to zone for smaller lot sizes, the otherwise excluded homebuyers would distribute themselves more evenly, and no one suburb would suffer a great loss of relative prestige or desirability.[29] Therefore, by removing much of the incentive for large lot zoning, a curb on all suburbs rather than only one would entail a much smaller cost to the homeowners of the hypothetical suburb.

Homebuyers too are interested in the relative status afforded by a suburban residence. A minimum lot will produce more satisfaction for the homebuyer where all suburbs have the same minimum than where other suburbs continue to zone for large lot sizes. A curb on all suburbs, therefore, would increase the total satisfaction derived by homebuyers from the hypothetical suburb's land more than would a curb on the hypothetical suburb alone. The curb on all suburbs will also increase the total supply of developable lots, reducing the price of the land and hence increasing the homebuyers' satisfaction per dollar paid.[30] One measure of the importance of this distributional effect is that over a twenty year period, during which exclusionary zoning spread

27. R. VERNON, METROPOLIS 1985, at 181-86 (1963).
28. *See* R. VERNON, THE MYTH AND REALITY OF OUR URBAN PROBLEMS 64 (1962); R. WOOD, 1400 GOVERNMENTS 112 (1961).
29. It is the social status of the residents and the cost of housing, not the density of development, that determines the prestige of an area. BABCOCK & BOSSELMAN, *supra* note 2, at 1068-69 (1963). In the past, medium density suburbs had "the reputation of being of the best character ...." *Id.* at 1068 n.197.
30. The satisfaction of homebuyers "per dollar paid" implies an effect upon income distribution between homebuyers and landowners, and is thus not reflected in curve B. *See* note 20 *supra*.

rapidly, the raw land component in the price of new housing more than doubled.[31]

The impact of large lot zoning extends beyond the boundaries of the suburb itself. By increasing the cost of living in the suburb[32] and reducing the number of building sites, large lot zoning decreases the number of homebuyers that can reside in the suburbs. Of those excluded, some want and can afford a home in the more distant areas that do not yet have tough zoning ordinances. Upon arrival, however, they will press for their own large lot zoning. They will pay a price for their displacement, a price which is reflected in the homebuyer curve for the hypothetical suburb.[33] Some will have to limit their choice of jobs to the suburbs. Others, who continue to work downtown, will devote more time and money to commuting, including the tolls and gasoline taxes that pay for the necessarily larger expressways.[34]

Most excluded homebuyers, however, will probably live in the central city. This higher density of city population puts a cost on people who would not move to the suburb under any form of zoning, people whom we have termed "citydwellers." An analysis of the efficiency of

31. Over a twenty year period, land costs rose from between 8 and 12 percent to 20 per cent of the total cost of a home. URBAN LAND INSTITUTE, NEW APPROACHES TO RESIDENTIAL LAND DEVELOPMENT, 4 TECH. BULL. (1961).

32. Large lot zoning raises housing costs in various ways, including: (1) *Transportation*. By spreading out travel destinations and making mass transportation less feasible, large lot zoning increases the need for second and third cars. Assuming that keeping and running an automobile costs $1,000 per year, a pattern of development which causes one to purchase an extra car would entail a cost more than equal to a $10,000 increase in the purchase price of the home. *Cf.* ASPO, *supra* note 1, at 213. (2) *Maintenance*. Large lot zoning increases the size of the grounds to be cared for, and may convert what could be an enjoyable pastime into a contract with a gardening firm. (3) *Property taxes*. Whatever its impact on the tax *rate*, large lot zoning increases each new resident's tax *base*, and hence his tax bill, by forcing him to buy more land. (4) *Raw land*. Large lot zoning of course forces homebuyers to purchase more land for their residence. The measure of the increased expenditure entailed thereby is not simply the difference in cost between a small lot and a larger lot in a town with varied lot sizes; by reducing the absolute number of lots available, large lot zoning generally inflates land prices. (5) *Building and site development costs*. Although the point is not undisputed, there is some evidence to indicate that larger lot sizes cause significantly increased expenditures on home construction and site development. *See* 3 DOUGLAS, *supra* note 3, at I-40, I-42.

33. The dollar value that a homebuyer puts on a lot in the hypothetical suburb reflects the desirability and cost of lots elsewhere. Since a lot in a more distant area is one of his alternatives, the price of such a lot is reflected in the dollar value measured by curve *B*.

34. Even a small percentage savings on this score would be significant where, in the New York region, over $5,000 per additional household must be spent for expressways to accommodate projected 1960-1985 growth patterns under present zoning. SPREAD CITY, *supra* note 1, at 26. To the extent that user taxes do not suffice to pay for expressways, their cost will be borne by the public generally.

large lot zoning must take into account the interests of this group to the extent that those interests are reducible to dollar terms.

A larger city population has several consequences of importance which cannot enter into the question of efficiency. It produces a higher level of demand for housing, which results in higher rents. Increasing rent levels in the city will have a regressive impact upon the distribution of income between landlords and tenants. Since the tenants' loss is the landlords' gain, however, rent levels are not a factor which can enter the efficiency analysis.[35] Second, excluding homebuyers from the suburbs forcibly slows the exodus of the middle class from the city. The resulting ramifications in terms of racial integration and distribution of political power in the city may be considered good or bad, but they are not usually thought of in dollar terms, and so must be excluded from the economic analysis.

In shopping for apartments or houses in the city, however, city-dwellers do put a dollar value on the amenity of the neighborhood, and a price tag on this aspect of population density in the city is therefore realistic. Although it may be possible that some citydwellers will place a higher value on city dwellings when substantial numbers of middle class homebuyers remain in the city, it is likely that city-dwellers as a class will prefer the effects of a greater exodus from the city, at least as it affects those interests that are reducible to dollar terms. A denser population decreases the attractiveness of a city dwelling by creating less open space, more traffic—causing noise and danger to children—, more pollution, and more risk of fire. A reasonable function of how this valuation is affected by the suburb's choice of lot size zoning is illustrated by curve C in Figure 3, which declines steadily as the suburban lot size increases.[36] As a point of reference, curve C is set at zero dollars at lot size M.

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35. *See* note 8 *supra.*

36. The shape of curve C will be determined by two competing factors. First, each unit increase in the lot size minimum will have a smaller impact on the density of the city population. For example, in a suburb with sixty acres of vacant land, an increase in the lot size requirement from one to two acres reduces by thirty the number of home-buyers who can move into that suburb; a further increase from two to three acres, however, reduces the number only by ten. Thus one would expect that curve C would decline to the right but at a decreasing rate. As the lot size increases, however, the impact on citydweller satisfaction will reflect the converse of diminishing marginal returns— or alternatively stated, citydwellers will receive diminishing marginal returns from each *reduction* in the minimum lot size. This effect will tend to counterbalance the lessening impact on city density of each unit increase in the suburban lot size.

For lack of any available data indicating which of these effects is stronger at any given lot size, and because the actual degree of curvature can have only a very small impact upon the conclusion, curve C assumes that the effects exactly counterbalance each other for every lot size increase.
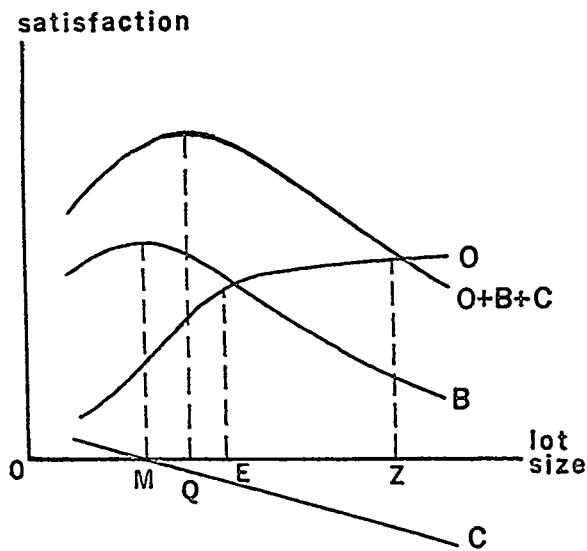
satisfaction

FIGURE 3

The most efficient suburban acreage requirement is that lot size at which the total dollar satisfaction of all groups is maximized. The total satisfaction produced by suburban land zoned for a given lot size is measured by the sum of the satisfaction of homeowners, home-buyers and citydwellers at that lot size. Curve $O + B + C$ in Figure 3 represents the total satisfaction of these groups as it is affected by the changing lot size minima. Total satisfaction is maximized at lot size Q, the point at which curve $O + B + C$ reaches its greatest height. Any move from Q in either direction will yield larger losses for some groups than gains for others, and thus Q is the most efficient lot size for the hypothetical suburb. The most efficient acreage requirement will, of course, vary among different suburbs.[37]

The most efficient minimum lot size (Q) will be smaller than the lot size requirment which suburbs now choose (Z) if at some point prior to lot size Z the combined satisfaction of homebuyers and city-dwellers begins to fall more rapidly than the rise in the satisfaction of homeowners. This will be the case in the usual suburb if, as previously argued, Z is larger than E and E larger than M; curve O rises only slowly beyond E; and curve B dips quickly beyond M while curve C declines over the entire range of lot size requirements. The argument

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37. The economic analysis excluded a number of considerations difficult to deal with in dollar terms. Some of these considerations are outlined at p. 1431 *infra*.

that large lot zoning is inefficient is even stronger where the suburb is largely undeveloped or where the zoned land includes a large vacant tract. In these cases, a zoning change will have a bigger impact upon the number of homebuyers who can live in the suburb. Moreover, the interests of homeowners in a larger zoning requirement will be smaller, because their interests are partly a function of the number of homeowners affected by the zoning of any one parcel and their proximity to the land involved.

The most conservative conclusion which follows from the foregoing analysis is that the existing zoning mechanism provides no assurance that it will not produce major inefficiencies. Even this timid conclusion, however, supports a demand for change in the existing zoning mechanism. Large lot zoning profoundly affects housing, transportation and employment throughout the metropolis. Even a relatively small error is a multimillion dollar waste where, for instance, the New York metropolitan area will spend ninety billion dollars for housing and highways alone over the next twenty-five years.[38] Too much is at stake to assume that suburbs will fortuitously produce efficient zoning.

II. Is Large Lot Zoning Desirable?

Even economists do not perceive efficiency as the talisman of public policy.[39] A finding that to reduce lot size requirements would be efficient is no more than a description of the fact that homebuyers and citydwellers would pay more to achieve it than homeowners would pay to prevent it. That a change would be efficient does not in itself imply that the change would produce greater total happiness without a further, and arbitrary, assumption that a dollar brings the same satisfaction to all men. One may support a change that imposes a loss on one man that he values at two dollars in order to give to another a benefit that he values at one dollar, if, for instance, the one who receives the benefit is poorer.[40] Resolving the question of efficiency, however, aids the policy-maker by reducing a very complex problem to two value-bound considerations: the distribution of income and the non-economic consequences of the reform. If the nonmonetizable

38. SPREAD CITY, *supra* note 1, at 26-27.
39. *See, e.g.,* J. ROTHENBERG, ECONOMIC EVALUATION OF URBAN RENEWAL 20-22 (1967); Comment, *The General Welfare, Welfare Economics and Zoning Variances,* 38 S. CAL. L. REV. 548, 566 (1965).
40. For the contrary position, see W. BLUM & H. KALVEN, THE UNEASY CASE FOR PROGRESSIVE TAXATION *passim* (1954).

effects of a proposed zoning reform are thought to be beneficial, or if these effects are thought adverse but are outweighed by the advantages of the reform in terms of efficiency, then the proposed reform is desirable.[41]

Important income distribution and non-economic considerations greatly strengthen the case for reductions in lot size requirements. As to income distribution, a reform's most profound impact would be to benefit homebuyers and citydwellers at the expense of the generally wealthier homeowners. The reform would entail a more even distribution not of cash but of living space, which government intervention via zoning has distributed even more regressively than would the free market. Ironically, then, the redistribution would be consistent both with the view that has sustained government programs for the more equal distribution of essentials, and with the view that the distribution produced by the free market is morally right.[42]

The probable non-economic consequences of a curb on large lot zoning also on balance militate in favor of the change. By barring lower middle-income families, large lot zoning helps maintain the homogeneous composition of the suburbs, thereby contributing to segregation by class and color. The population dispersal caused by large lot zoning forces a greater reliance on the automobile in place of walking or mass transportation,[43] narrows the choice of friends and recreation within a given travel time, and rapidly consumes what little countryside still exists within a reasonable distance from the central city. Higher density development produced by a reduction in the level of lot size zoning, moreover, would not necessarily bring a reduction in the values associated with greenery and open space. On the contrary, by committing less land to large, private lawns, lower acreage

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41. *See* I.M.D. LITTLE, A CRITIQUE OF WELFARE ECONOMICS (2d ed. 1957). Little outlines the criteria of welfare economics for a desirable economic change, summarized thus:
> [A]n economic change is desirable if (a) it would result in a good redistribution of wealth, and if (b) the potential losers could not profitably bribe the potential gainers to oppose the change. Two value judgments are presupposed by this criterion. The first is that an individual becomes better off if he is enabled to reach a position higher up on his order of choice. The second is that the community is better off if one individual becomes better off, and none worse off.

Id. at 275-76 (footnote omitted). He notes that this criterion assumes no adverse non-economic changes. *Id.* at 276 n.1. A desirable change to a policymaker must of course take account of non-economic considerations, and for this purpose a third criterion might be added to those of Little where the non-economic effects of a change are likely to be significant, as in the case of a change in lot size zoning. A change which is found undesirable by Little's criteria might nevertheless be a good change if the significance of non-economic benefits is judged to outweigh the negative economic consequences.

42. For an example of this position as applied to zoning, *Cf.* Dunham, *City Planning: An Analysis of the Content of the Master Plan*, 1 J. LAW & ECON. 170 (1958).

43. *See* note 15 *supra*.

requirements would leave more land for other uses, including publicly accessible open space provided through parks or cluster zoning.

III. Alternatives to Homeowner Control

Opinions will differ on the desirability of large lot zoning's effects upon income distribution and non-economic interests. Ideally, society resolves disputes over such governmental policies in arenas where all concerned have a voice. In suburban zoning decisions, however, there is only one effective voice, that of homeowners. This license makes suburbs unreliable allocators of living space. In choosing how much of the benefits of zoning to take for themselves, homeowners are largely free from the discipline of the market place because they do not pay the full cost of producing what they consume. And even if intersuburban competition did not render unfeasible any charitable concern for homebuyers and citydwellers, individual suburbs lack the competence and motivation to allocate rationally the living space of the metropolis. In sum,

> land use planning in any comprehensive sense really does not exist in our larger urban areas. What does exist is a complex game of chess among localities, each attempting to palm off the undesired applicants for space upon their neighboring communities. This is warfare, not planning.[44]

Abolition of lot size zoning would return the choice of residential density to the market place. The market cannot, however, produce decisions which give full attention to the respective interests of all groups concerned. Without lot size requirements, homebuyers and landowners will choose the size of building sites without regard to the interests of homeowners or citydwellers. Moreover, the homebuyers will fail to maximize their *own* satisfaction. Each will choose his lot size without regard to the desire of neighboring homebuyers that he buy more land. Therefore, acting individually, homebuyers will tend to chose lots of a size smaller than the one which they collectively desire (lot size M in Figure 2).[45] Unhindered by zoning, the market will produce a residential density higher than that desired by either homeowners or homebuyers.

Two factors, however, suggest that the free market may allocate land better than does the present system of lot size zoning. First, every

44. R. VERNON, THE MYTH AND REALITY OF OUR URBAN PROBLEMS 64 (1962).
45. *See* p. 1424 *supra.*

reduction in suburban lot sizes benefits citydwellers,[46] and these benefits would tend to offset the losses to homeowners and home-buyers caused by higher density development. Second, market control would greatly alleviate the income distributional and non-economic consequences now produced by large lot zoning, including racial and economic segregation. Thus, free market allocation might well produce, on the average, a reasonable approximation of the most desirable suburban densities, while there are strong a priori reasons to believe that homeowner control will not.

But, however desirable its results on the average, abolishing lot size zoning would substitute haphazard for reason in the case of individual parcels and would confound planning of public facilities.[47] Better than the abolition of controls would be to invest control in a governmental process designed to consider all interests in the metropolis and to coordinate land use controls with transportation, public facility and other intertwined areas of decision-making.[48] Such a system would entail substantial changes in the structure and relationship of local, state, and federal governments. The establishment of comprehensive metropolitan planning, unfortunately, runs strongly—only slightly less so than the abolition of lot size zoning altogether—against political currents and parochial sympathies. For the near future, it is not a realistic possibility.

There are, however, methods of regulating the suburbs' control of residential density which involve less drastic revisions in current political institutions, while holding potential for achieving an approximation of the efficient and sensible land use patterns which might be expected from metropolitan planning. The remainder of this Note will consider judicial, legislative, and administrative alternatives, and suggest one system of control that will give to all groups concerned reasonably full and competent attention to their respective interests.

Judicial intervention is the only existing limitation upon a suburb's power to zone for any lot size it pleases, and the courts are often looked to for the enforcement of sensible limitations on strict home-owner control. In a suit by a party aggrieved by a particular lot size zoning ordinance, the courts may afford relief by striking down

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46. *See* p. 1428 *supra*.

47. *See* 3 DOUGLAS, *supra* note 3, at I-20.

48. The history and theory of metropolitan planning are traced in Friedmann, *The Concept of a Planning Region—The Evolution of an Idea in the United States*, REGIONAL DEVELOPMENT AND PLANNING 497 (Friedmann & Alonso eds. 1964).

the ordinance as it affects the plaintiff. In *Euclid v. Ambler Realty*,[49] the Supreme Court suggested that judicial power should limit suburban zoning in the interest of all those whom it affects, forecasting "cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[50]

Euclid, however, promised more than the courts proved able to deliver. From the outset, the lack of any serviceable standard against which to measure the validity of an ordinance frustrates judicial control of large lot zoning. Statutes which authorize suburbs to zone typically require only that an ordinance serve "the public interest" or some equally vague purpose.[51] Without an unusually broad reading, the equal protection clause also hardly confines the suburbs' power to regulate residential density.[52] Only the fifth amendment's injunction against the taking of property without compensation, a notoriously clumsy tool,[53] has proved a realistic vehicle by which to test the validity of large lot zoning ordinances.

A rational relationship between the ordinance and the "health, safety, and general welfare" of the populace will distinguish a "valid police power regulation" from a "taking without compensation."[54] Insofar as the suburb in zoning acts as an agent of the state, the fifth

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49. *Id.* at 390. *See also* Simon v. Town of Needham, 311 Mass. 560, 565-66, 42 N.E.2d 516, 519 (1942).

50. 272 U.S. 365 (1926).

51. *See, e.g.*, U.S. DEPT. OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (1926), *reprinted in* C. RATHKOPF, LAW OF ZONING AND PLANNING 547 (2d ed. 1949):

Section 1. Grant of Power.—For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of building, structures, and land for trade, industry, residence or other purposes.

. . . .

Sec. 3. Purposes in View.—Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

52. *Compare* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 785 (1969).

53. *See* Michelman, *Property, Utility, and Fairness*, 80 HARV. L. REV. 1165, 1183-1201 (1967).

54. Vickers v. Gloucester, 37 N.J. 232, 252, 181 A.2d 129, 140 (1962) (dissenting opinion), *cert. denied*, 371 U.S. 233 (1963); R. BABCOCK, THE ZONING GAME 108 (1966); *cf.* Haar, *Regionalism and Realism in Land Use Planning*, 105 U. PA. L. REV. 515 (1957).

amendment would appear to compel the "health, safety, and general welfare" to be that of the state, not the suburb. If so, the fifth amendment could lead to a kind of rough balancing of the interests of all the concerned groups. The courts, however, lack the time and expertise needed to fathom zoning's metropolis-wide implications. Confining the scope of review to the scope of their ability, judges read "health, safety, and general welfare" to mean only that of the municipality.[55]

Although it ignores the magnitude of harm to homebuyers and city-dwellers, this approach could at least insure that a lot size requirement produce some legitimate, substantial benefit for homeowners. The courts, however, have quite unnecessarily failed effectively to apply even this modest control on the suburb.

First, the courts have not insisted that the suburb point to a precise, legitimate purpose for its ordinance.[56] Accepted justifications have included such catch-alls as "avoiding congestion of the land,"[57] or that "a superior residential district would be the most appropriate use of this unspoiled district."[58] Most objectionable is the justification of "maintaining property values."[59] To maintain property values is only to

55. Courts do not so much disclaim an interest in the region as ignore it. E.g., Zygmont v. Greenwich, 152 Conn. 550, 210 A.2d 172 (1965) (4-acre minimum upheld for area near moderate density housing, industry, and shopping); Flora Realty and Inv. Co. v. Ladue, 246 S.W.2d 771 (Mo. 1952) (upholding 3-acre minimum); State ex rel. Grant v. Kiefaber, 114 Ohio App. 279, 181 N.E.2d 905 (1965) (2-acre zoning justified because, inter alia, the proposed half-acre use differed from existing local standards); Bilbar Const. Co. v. Easttown Bd. of Adjmt., 393 Pa. 62, 68-69, 141 A.2d 851, 855 (1958). With prodding, some courts have in recent years begun to take a wider view. E.g., National Land and Inv. Co. v. Easttown Bd. of Adjmt., 419 Pa. 504, 215 A.2d 597 (1965) (4-acre zoning unconstitutional); Board of Supervisors v. Carper, 200 Va. 653, 107 S.E. 390 (1959) (2 acres unconstitutional). Both these latter cases relied upon the exclusionary purpose of the ordinance. See also Haar, supra note 54, at 524-31.

56. For example, in Bilbar Const. Co. v. Easttown Bd. of Adjmt., 393 Pa. 62, 75, 141 A.2d 851, 856-57 (1958), the court held that the "general welfare" must be regarded as a valid purpose of zoning, because otherwise the municipality would be too constricted in its allowable purposes. See generally Babcock, Mr. Commissioner, Are You Prepared for Cross Examination?, PROCEEDINGS OF THE 1962 INSTITUTE ON PLANNING AND ZONING 155.

57. See the proposed Standard Act of the U.S. Dept. of Commerce, supra note 51. But see J. GOTTMANN, MEGALOPOLIS 179 (1961): "[T]he notion of 'crowding' and the 'feelings' about it appear as an entirely subjective matter."

58. Senior v. New Canaan, 146 Conn. 531, 535, 153 A.2d 415, 417-18 (1959), appeal dismissed, 363 U.S. 143 (1960). The court felt that it could appropriately consider, in deciding the constitutionality of the zoning ordinance, the fact that the town had the highest per capita income in the United States.

59. See, e.g., Flora Realty and Inv. Co. v. Ladue, 246 S.W.2d 771, 779 (Mo. 1952); Vickers v. Gloucester, 37 N.J. 232, 248, 181 A.2d 129, 138 (1962); Standard Act quoted note 51 supra. For strong criticism of this justification, see Williams, Planning Law and Democratic Living, 20 LAW & CONTEMP. PROB. 317, 334 (1955).

No less pernicious is the argument that the town does not have the requisite public facilities to accommodate more newcomers. See Babcock & Bosselman, supra note 2, at 1081. Courts often accept this argument, even when advanced by a rich suburb, without a showing why the town cannot provide the facilities or why necessary provision for those excluded should fall upon some other town. See, e.g., Zygmont v. Greenwich, 152 Conn. 550, 553, 210 A.2d 172, 174 (1965); Queen Anne's County v. Miles, 246 Md. 355, 372, 228 A.2d 450, 459 (1967). But see National Land and Inv. Co. v. Easttown Bd. of Adjmt., 419 Pa. 504, 533, 215 A.2d 597, 612 (1965).

satisfy the desires of potential purchasers of the homeowners' property, which may include keeping out poor or black homebuyers. Where an ordinance really does enhance property values via some legitimate public purpose, the suburb can, and should be made to, justify its zoning in terms of that purpose rather than in terms of its effect on the real estate market.

The suburb may also hide the lack of a proper purpose behind the hefty presumption of validity with which courts endow its ordinances.[60] The suburb has expertise in judging the impact of a zoning ordinance, but can offer no assurance that it has used this expertise impartially. Unlike zoning cases of purely local concern, where a court has some reason to say that the local government is "presumably representing a majority of the inhabitants and voicing their will,"[61] the suburb in zoning for minimum lot sizes represents only a tiny fraction of the population whose interests are affected by the ordinance. Without sitting in judgment on the efficacy of a local government in reflecting the will of its constituents, courts can distinguish large lot zoning cases, where the suburb deserves no more credence than any private litigant, from the usual legislative and administrative reviews by the absence of any pretense that the suburb in its lot size zoning function represents even a majority of those concerned.[62]

The gentle treatment of large lot zoning results partly from courts' misconception of what is at stake. The adversary process brings before the judge a suburb and a developer or land speculator, not the homebuyers or citydwellers. Thus judicial opinions, understandably, observe that a decision in favor of the suburb would promote values associated with decent housing, while a decision in favor of the developer would yield only a quick, windfall profit.[63] Although this

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60. The burden of proof put on plaintiffs in zoning challenge cases is a major obstacle to effective judicial review of large lot zoning ordinances.
   [T]he factual information needed to show [the] significance of exclusionary practices simply does not exist in most areas and the cost to a private litigant of obtaining it would prove prohibitive. . . . The result of all these factors is that even some of the most outrageous exclusionary practices go unchecked by any institution outside the local government itself.
3 DOUGLAS, *supra* note 3, at I-50 to I-51. *See also* Vickers v. Gloucester, 37 N.J. 232, 257-58, 181 A.2d 129, 143 (1962) (dissenting opinion).
   61. Euclid v. Ambler Realty, 272 U.S. 365, 389 (1926).
   62. Another argument for withholding any presumption of validity is that large lot zoning involves questions of economic and racial discrimination as well as economic regulation. *See* Sager, *supra* note 52, at 785.
   63. *See, e.g.,* Senior v. New Canaan, 146 Conn. 531, 535, 153 A.2d 415, 417 (1959); State *ex rel.* Grant v. Kiefaber, 114 Ohio App. 279, 290, 181 N.E.2d 905, 913 (1960). "The dispute is viewed as a dialogue between two parties, in which the developer is pictured as a money-grubbing baron (as he may be) and the village as the exclusive repository of the public interest." Babcock & Bosselman, *supra* note 2, at 1084. *See also,* BABCOCK, THE ZONING GAME 108-109 (1966); 3 DOUGLAS, *supra* note 3, at 1-50.
   Some courts, however, take a broader view. National Land & Inv. Co. v. Easttown Bd. of Adjmt., 419 Pa. 504, 215 A.2d 597 (1966).

benefit to the developer is true in the individual case, the general application of stricter standards on review would actually have the effect of making decent housing cheaper and more widely available.

These limitations on the efficacy of judicial control do not mean that courts give suburbs a *carte blanche.* An unspoken rule of reason appears to have emerged. Courts seem to look upon an acreage requirement with particular suspicion where it greatly exceeds the lot size of nearby homes.[64] Where an ordinance pertains to relatively undeveloped sections, so that no nearby homes provide a standard of comparison, judges often compare its severity with the larger lot size minima prevailing in similar areas in the state.[65] As inter-suburban competition results in upzoning to the fuzzy borders of legality, however, the lot size minima which serve the courts as a standard of comparison continue to increase.

Although the courts could have a more beneficial impact than they now do, their lack of time and expertise will always foreclose them from providing more than the grossest of checks on suburban control of minimum acreage zoning,[66] and in the absence of legislative action it is likely that the suburbs will continue their largely unfettered zoning discretion. It cannot be said, however, that the legislatures that established the existing decision-making process in the 1920's and 30's intended the suburbs to make regional policy through large lot zoning, where even in the·following decade one acre zoning was rare.[67]

Recognizing the inability of courts to control large lot zoning, critics have focused on two alternate devices: a statutory ceiling on lot size zoning, and the establishment of a "zoning review board" as an administrative subsidiary of the state. While each of these measures would help to check the existing virtually unrestrained tendencies of the suburbs, neither alone is fully satisfactory.

64. *See, e.g.,* Hamer v. Ross, 59 Cal.2d 776, 382 P.2d 375, 31 Cal. Rptr. 335 (1963); LaSalle Nat. Bank v. Cook County, 28 Ill.2d 497, 500, 192 N.E.2d 909, 911 (1963); LaSalle Nat. Bank v. Highland Park, 27 Ill.2d 350, 351-52, 189 N.E.2d 302, 304 (1963); Aronson v. Sharon, 346 Mass. 598, 599, 195 N.E.2d 341, 342 (1964). *But see* Zygmont v. Greenwich, 152 Conn. 550, 210 A.2d 172 (1965).

As a corollary, courts appear to look upon lot size minima with favor when they are comparable to neighboring development or the zoning on neighboring land. *See, e.g.,* Flora Realty & Inv. Co. v. Ladue, 246 S.W.2d 771, 776 (Mo. 1952); Fischer v. Bedminster Twp., 11 N.J. 194, 198, 93 A.2d 378, 383 (1952); State *ex. rel.* Grant v. Kiefaber, 114 Ohio App. 279, 294, 181 N.E.2d 905, 915-16 (1960).

65. *See, e.g.,* Fischer v. Bedminster Twp., 11 N.J. 194, 198, 93 A.2d 378, 383 (1952); Simon v. Needham, 311 Mass. 560, 564, 42 N.E.2d 516, 518 (1942).

66. Another difficulty with depending upon courts to hold suburbs in check is that suburbs' decisions, made by "scattered groups of lay decision-makers," have been little affected by judicial precedent: "One of the most significant results of this fractured decision-making process is that the injunctions of the judiciary have only nominal impact upon the decision makers." R. BABCOCK, THE ZONING GAME 13 (1966).

67. Urban Land Institute, *supra* note 1, at 7.

By establishing a statutory ceiling on lot size zoning, the legislature would impose essentially a single lot size requirement on all suburban land, despite a wide variation in the most desirable residential density among suburban areas. Given the motivations of homeowners, suburbs would zone to the maximum permissible lot size, and the probable tendency of courts to take the ceiling as a legislatively imposed level of "reasonableness" could negate the possibility of effective judicial control. And it is unlikely that a state legislature would impose a ceiling low enough to affect any but the most egregious of existing lot size minima, thus continuing to permit the exclusion of moderate income homebuyers.

A statewide review board would replace trial level courts in the procedure for challenging zoning ordinances. With proper staffing, its specialization would give it the expertise that courts lack.[68] But unless the legislature sets standards for resolving the conflicts between the interests of the suburbs and the interests of the rest of the metropolis, the board would devolve its own standards piecemeal in a series of cases each of which lacks the apparent significance and full representation of affected parties necessary to achieve a proper balancing of interests. In this ad hoc, sub silentio process, homeowners would exert an influence disproportionate to the importance of their interests. Especially where critical policy decisions are of such low visibility, regulatory agencies naturally tend to see the "public interest" through glass clouded by the interests of those best organized to press their cause. In any given case, the review board would have the choice of accommodating several thousand wealthy homeowners represented by the local government, or a few—albeit rich—landowners and perhaps millions of unorganized homebuyers and citydwellers each of whom has a miniscule stake in the outcome of that one case.

It is far better that the state legislature set standards in a single, high-visibility proceeding. Striking the balance between the competing interests requires dealing with large lot zoning's income distributional and non-economic dimensions, value questions traditionally reserved for the political process. With the zoning of all land at stake, the interests of suburb and city will appear clearly, and the various affected groups can press their case through political representation.

Rather than establishing an inflexible statutory ceiling, however, the legislature might combine the best features of both the legislative

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68. Existing municipal boards of zoning appeals have been justifiably criticized as ill-equipped to produce farsighted decisions. *See* Note, *Administrative Discretion in Zoning*, 82 HARV. L. REV. 668, 673-76 (1969).

and administrative processes by itself establishing a single lot size as a benchmark from which individual suburbs, supervised by a zoning review board, could deviate in accordance with prescribed standards. The benchmark (of, say, one acre) would set an upper limit on lot size requirements, but suburbs would be permitted to petition the review board for authorization to set a higher requirement in certain areas. The board would grant or deny such a petition by applying to the particular circumstances general guidelines provided by the legislature. On the other hand, individuals aggrieved by an ordinance requiring one acre or less could petition the review board for a reduction in the lot size requirement for a particular parcel. This petition would also be considered on the basis of general legislative guidelines describing the considerations which should dictate zoning for less than one acre.[69]

By allowing controlled flexibility in either direction, the legislature could set its benchmark lower than the level of any single statutory ceiling that it would be willing to enact. In addition, by allowing administrative rather than cumbersome and ineffective judicial review, a realistic possibility would exist in many instances for securing lot size requirements lower than the benchmark. Such a process could therefore be expected significantly to increase the number and heterogeneity of homebuyers who can live in the suburbs.

The most difficult task would be to formulate the guidelines to be used by the review board. Since the ceiling set by the legislature would represent the desired lot size for all areas *on the average,* the function of standards guiding administrative authorization of higher or lower lot size ordinances is to identify not *how much,* but *which* land is suited to either lower or higher density than that called for by the ceiling. With the overall balancing of economic, non-economic and distributional considerations included in the ceiling, the standards would focus only on characteristics that distinguish one area from others. For example, the standards would not include the effect of smaller lots on the town's tax rate, because houses on small lots, wherever located, are tax losers.[70] The town which feels itself deserving of lot size zoning higher than that prevailing elsewhere

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69. Haar suggests that the priorities to be applied by a zoning review board be worked out via a regional planning body. Haar, *supra* note 54, at 533-35. He does not suggest, however, what technical criteria an expert body could apply to resolve the many essentially political conflicts between the interested groups. Babcock suggests that the state legislature set forth criteria much more detailed than those found in the usual zoning enabling act, and that a commission should enforce the application of those criteria. R. BABCOCK, THE ZONING GAME 159-73 (1966).

70. *See* p. 1421 *supra.*

"should be required to show why, among all the towns of the region, it deserves to be set aside as a low-density reservation."[71]

In order to be granted authorization for a lot size ordinance above the one-acre benchmark level, a suburb should be required to demonstrate at least (1) that the area to be zoned includes only land already highly developed; (2) that the proposed lot size requirement does not exceed the average lot size of *existing* homes in the area;[72] and (3) that zoning within the one-acre ceiling would reduce the market value of existing homes substantially below their value at the time the ceiling was set by the legislature.[73]

A large-lot suburb which is nearly fully developed prior to enactment of the statutory ceiling, with scattered undeveloped parcels some distance from the town center, might easily justify a lot size requirement higher than one acre. And for such a town, the higher requirement may actually more closely approximate the most efficient lot size, since the homeowners' interests will be strong and the home-buyers and citydwellers little affected by the ordinance.

On the other hand, the considerations which call for the review board's ordering a lot size requirement *less* than the ceiling would be (1) existence of large undeveloped parcels in the area to be zoned; (2) a relatively small average lot size of existing homes; (3) the absence of evidence that smaller lot size zoning will cause a significant decrease in the market value of existing homes; (4) easy access to shopping, mass transportation and centers of employment;[74] and (5) the absence of topographical features making construction of higher density housing unusually expensive.

The latter two considerations are relevant to the attractiveness of the land to lower-income homebuyers. In an area which meets these

71. Babcock & Bosselman, *supra* note 2, at 1081.

72. The benefit to homeowners from increases in the lot size requirement will grow much more slowly when the requirement passes the average lot size of existing homes. *See* p. 1422 *supra*.

73. In determining whether zoning within the ceiling will substantially diminish the market value of existing homes, the review board should consider the effect upon market value of zoning at very high densities as well as the effect of zoning at the benchmark level. A suburb should not be allowed to justify zoning at three acres on the basis of avoiding a substantial loss in market value where by zoning for very high density or for multi-family uses the suburb could actually increase the market value of existing property.

74. For a similar suggestion, see 3 DOUGLAS, *supra* note 3, at II-25 to II-26. This standard would serve as a counter measure to the suburbs' practice of "fiscal zoning," *i.e.* the use of zoning powers to attract tax profit-makers, such as industrial and commercial uses, and to exclude tax losers such as poor families. Fiscal zoning is undesirable because it misallocates resources and leads to an unconscionable disparity in tax rates among various municipalities in the metropolis. The standard would make the town that wants the tax profit-makers to take the tax losers as well.

criteria, the satisfaction produced by the land for homebuyers will be relatively greater than the satisfaction produced by land in areas less accessible or less suitable for construction of moderate priced homes. When the review board finds that high density development is appropriate, it should have the option of requiring zoning that permits town houses or apartments as well as houses on small lots. This would allow homebuyers who so desire to avoid the extra construction costs of a given sized dwelling unit in a single-family form. In addition, the open space otherwise consumed in the narrow corridors between houses on small lots could be used for larger front or back yards.

Even if the legislature and the review board seek expert advice, limitations on our knowledge of the urban economy would make the initial drafting of the ceiling and standards partly a matter of guesswork. Despite the legislative guesswork, however, this approach would lessen zoning's unsettling effect on the land market because the board's specialization, the ceiling, and the statutory standards would make for more consistent and more predictable decisions than courts now produce. Control by the suburbs alone, of course, requires no guesswork, but only because it makes no attempt to apply what knowledge society does have toward the realization of what society collectively wants.

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