

# Protection of Highways and Feeder Streets Through Subdivision Controls

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● ECONOMIC suffocation of our highways is costly in human lives and dollars. The time for vigorous coordinated action to cut these costs has long since come.

There are those who would solve all problems of highway protection by using the power of eminent domain to purchase sufficiently broad rights-of-way. This paper discusses a less-expensive measure of police power. But subdivision control is just one police-power tool; it needs to be integrated with others like zoning, limited-access laws, setback laws as such, official map laws, roadside obstruction laws and others, for effective results.

## SUBDIVISION CONTROL

Subdivision control typically requires one who wishes to divide his land for sale or building development to have the land accurately surveyed and mapped and the map, usually called a "plat," approved by one or more official bodies before it can be publicly filed or recorded by the keeper of real-estate records. The number and kind of conditions that will be tied to the approval vary with the particular state enabling statute, the local ordinance, if any, and the efficiency and awareness of the public officials.

## WAYS IN WHICH SUBDIVISION CONTROLS CAN BE USED BY HIGHWAY OFFICIALS

It is the thesis of this paper that some highway officials have not taken sufficient advantage of the subdivision-control tool. When raw land is being platted for development, the power to

approve or disapprove the plat can be used to (1) require permanent setbacks and planting strips; (2) assure access protection even on nonlimited-access highways; (3) assure space for off-street parking; (4) control the angles at which side streets enter the main highway; and (5) assure adequate drainage, grading, and surfacing of streets within the subdivision. In addition, some have not been aware of the possibilities that this device offers for saving taxpayers a lot of money by requiring the subdivider to dedicate free of charge right of way strips not only for new streets but also for the widening of existing roads.

## EXTENT OF USE OF SUBDIVISION CONTROLS

The *Municipal Yearbook for 1953* reports that of the 1,347 cities in the country with populations in excess of 10,000 at least 509 have adopted comprehensive subdivision-control ordinances governing the layout of streets, blocks, lots, and utilities. This is to be compared with 791 cities that have comprehensive zoning ordinances. Of these cities, 196 report that the counties in which they are located also have subdivision control ordinances. All states except Vermont have some kind of enabling act for subdivision control. Fourteen states are said to authorize subdivision controls out in the open country, either in all counties or just in those having more than a specified minimum number of inhabitants. There are several regional and city-county planning bodies with subdivision approval

authority, and at least three states (Michigan, New York, Wisconsin) require approval at the state level in some instances.

There is a marked tendency for state legislatures to extend subdivision approval authority out beyond the city limits. In 1952, according to the *Municipal Yearbook*, 143 cities had such extra-territorial power for distances ranging from  $\frac{1}{2}$  to 6 miles beyond the city boundaries, with 3 to 5 miles being the favorite distances. Zoning authority of cities is not usually extended in this way, so it becomes especially important to make fullest possible use of plat approvals in these fringe areas, especially for highway-protection purposes. Otherwise highway and land-use planners are likely to find structures built on newly platted lots right across proposed major thoroughfares or commercial development choking existing highways. Incidentally, some cities now require subdividers of land in these fringe areas to impose restrictions on the land which limits the use of the new lots in much the way a zoning ordinance would limit them if one were in force.

#### HOW INTENSIVE IS SUBDIVISION CONTROL?

There is an increasing tendency to require the subdivider to grade streets, or to grade and surface them, and to install sidewalks, water mains, sanitary and storm sewers, and to plant street trees. For example, of the 91 ordinances adopted or extensively revised since 1950, 41 require at least five and 51 at least four of the improvements just listed.

Today in many places in this country the following illustration would not be considered extreme.

Landowner Green wishes to divide 25 acres of raw land on the fringe of a city for purposes of building development and sale. Here are some of the regulatory hurdles he may be facing:

#### *Surveying and Mapping Requirements*

(1) A survey meeting high accuracy and detailed monumenting requirements; (2) a map drawn to elaborate specifications giving detailed information about street and lot dimensions, location of monuments, etc.; and (3) the filing of this map with the county recorder or register of deeds, but only after it has been approved as indicated below;

#### *Community Planning Requirements*

Approval of the map by one or more public bodies (I can think of a situation in Wisconsin where eight approvals from as many governmental units must be obtained). The public approval is forthcoming we will assume only if the officials are satisfied that: (1) the subdivision layout, street pattern, street widths, and lot size meet the requirements of the community's master plan, official street map, zoning ordinance or official judgment as applied in the particular subdivision; (2) 20 to 25 percent of the land has been given to the public for streets and perhaps an additional 10 percent for park, playground, or school purposes; (3) sanitary and storm sewers, water mains, sidewalks, electric and gas utilities, street lighting and street signs have been installed or their installation guaranteed by deposit of a surety bond or cash; (4) drainage has been adequately provided for and that none of the lots are too low for human habitation; (5) adequate land for off-street parking has been provided; (6) the land has been restricted with deed restrictions to protect the area until a zoning ordinance has been adopted or to give additional protections not possible under an existing zoning ordinance; (7) building lines, often called setbacks, are satisfactory and adequate service streets and planting strips have been provided to protect a state high-

way; (8) a strip along the abutting state highway has been dedicated for future widening purposes; and (9) all real estate taxes and special assessments have been paid.

This is not a complete list and it ignores the fact that the landowner may have to meet additional conditions, particularly as to deed restrictions and layout in order to get site approval from the Federal Housing Administration so that the lots or houses can be eligible for FHA mortgage insurance.

#### BACKGROUND AND HISTORY OF SUBDIVISION CONTROLS

Whence comes this kind of intensive regulation in midcentury America? Very early in our history legislatures passed measures intended to assure accurate maps of subdivisions and to compel the public recording or filing of these maps so that the boundaries of lots could be easily ascertained. Another type of early subdivision control was exercised through the adoption of official maps of existing and projected streets setting building lines. Then anyone who built beyond the established line took the risk that he would not be compensated for his structure in case of later eminent domain proceedings. Such maps were prepared for New York City, the Village of Brooklyn, and Baltimore under the impetus given city planning by L'Enfant's plan for our national capital. Pennsylvania cities used the device even before L'Enfant's day. At first courts were friendly to official map statutes, but by 1920 only the Pennsylvania and Connecticut courts were sustaining them. Since the Euclid case upheld zoning in 1926, it is common to accomplish such setback control directly through the zoning power.

A few states began providing for municipal approval of subdivision plats in

the 1870's, usually without setting up any approval standards. At the same time Uncle Sam was permitting the laying out of literally hundreds of town-sites on the public domain without any quality requirements.

Subdivision boom followed subdivision boom with the land developers able in most places to get away with murder—and murder the permanent land-use pattern of thousands of communities many of them did. The boom that finally busted free-and-easy subdividing wide open was that of the early 1920's. Suddenly the consequences of excessive and poorly planned subdivisions in terms of municipal costs, blighted neighborhoods, disillusioned homebuilders, narrow, inadequate streets that didn't mesh with older streets, became evident to many of our public officials. Several excellent studies in the late 20's and early 30's helped make us all aware of what had been happening on the fringes of most of our American cities. For example, Ernest Fisher reported in 1923 that for the metropolitan region of Grand Rapids, Michigan, with a population of less than 22,000, the total investment in vacant lots and public improvements for these lots was in excess of \$26 million. (Fisher, Ernest M., *Land Subdividing and Rate of Utilization* (1932).

Now we have come a long way since the California Real Estate Association reported in 1928 that "out of the 48 states investigated, the committee found frank recognition of subdivision control only in . . . Michigan, New York, Ohio, Wisconsin, and Texas, and Maryland so far as the Washington metropolitan district is concerned." (Rush, Guy M., and Holbrook, Sumner W., "Subdivision Control Methods—A Nation Wide Survey," *National Real Estate Journal*, July 23, 1928, pp. 42-45)

## STATE ENABLING ACTS AND MUNICIPAL ACTION

As already indicated, today all states except Vermont have some kind of a subdivision statute on the books. An excellent note in 28 Indiana Law Journal 544 (1952) indicates that in 16 states the enabling authority extends to the street pattern only. In the other states one is met by a confusing diversity of enabling authority empowering local communities to impose a variety of quality controls as a condition to plat approval. Sometimes these statutes require the municipalities to control the subdividing of land, sometimes they merely permit such control. Often before subdivision controls can be imposed, the state statute requires that a community master plan first be adopted. Technically, of course, a city, village, county, town, or township has no more subdivision power than is delegated to it by the particular state legislature.

But it is one of the peculiarities of regulation in this field that communities sometimes extensively control land developers without benefit either of enabling authority or comprehensive ordinances under them. Thus, the 1953 edition of *Municipal Yearbook* shows that at least 59 cities, which had no comprehensive subdivision ordinances in force, nevertheless require subdividers to install one or more major improvements. In a recent survey we made in Wisconsin, we found that of the 30 cities checked, only six had subdivision-control ordinances. Yet all under a mandate in the state enabling statute were presuming to check and approve, or disapprove, subdivision plats. A city may say to a developer, "All right, if you want us to take over the streets of your development and maintain them, or if you want us to extend water and sewer or other mu-

nicipal services, then meet the following conditions—one through eighteen."

## HOW HAVE SUBDIVISION CONTROLS FAIRED IN THE COURTS?

Unlike zoning, which affects numerous landowners at once, subdivision controls affect only the relatively few who desire to divide their land for sale or building development. Besides, the subdivider often finds it imperative to keep the good will of municipal officials for later developments. Or the expense of meeting the publicly imposed requirements can be passed on to the buyer of the lot or house. In any event there have been, as compared with zoning, a mere handful of subdivision control cases in the appellate courts. Most of them are summarized in two notes: 11 ALR (2d) 524 (1950) and 65 Harvard Law Review 1226 (1952). See also Melli, Marygold, Subdivision Control in Wisconsin, 1953 Wisconsin Law Review 389, 397.

By and large American judges have been friendly to subdivision controls, though occasionally a municipal action has been annulled as going beyond the power delegated by the state enabling statute. These controls have been upheld on a variety of grounds, the most important of which I shall now try to summarize. The older cases placed considerable reliance upon the state's power to condition the filing or recordation of the subdivision plat in the public records. Several other cases have urged the community's power to condition its acceptance of the dedication of streets or other public open spaces. Ridden to its logical extreme, each of these reasons means that any condition imposed for recordation or acceptance of a dedication, no matter how unreasonable, would be upheld. That the courts would ever go that far is most improbable. Rather, the more-recent cases make it

more and more evident that the basic police-power limitation of reasonableness applies in this area of regulation as in zoning and other regulatory fields. In fact, it is becoming evident that the true basis for subdivision control is the same as for zoning: the state's power to regulate in the interests of public health, morals, safety, general welfare, amenities, finances.

Cases have upheld as reasonable, requirements that streets be much wider than the adjoining portions of the same streets, that park areas be dedicated, that land be dedicated to widen abutting streets, that improvements such as grading of streets and installation of utilities be made, that a bond be filed to guarantee improvements, and that fees be paid to cover the cost of examining and checking the plat. Three of these cases relating to widening abutting streets will be summarized later.

But the courts still have a long way to go to establish, by the gradual process of judicial decision, specific formulas by which to determine which conditions required of the subdivider are reasonable and which are not. How much land is it reasonable to require the subdivider to dedicate for streets or other public open spaces? Suppose it is proposed to run a 204-foot superhighway through the plat. Is it reasonable to insist that he give all this land for nothing? How far can the community go in imposing its ideas about layout? Is it reasonable to insist on dedication for playgrounds, parks, and school grounds? What if a small sewer main would adequately serve the new neighborhood viewed alone, but the city is insisting upon the installation of a much larger main to take care of future development farther out? How much land is it reasonable to demand for future widening of abutting streets or high-

ways? These and many other questions have not been precisely answered by the courts.

#### EFFECTIVE USE OF SUBDIVISION CONTROLS BY HIGHWAY OFFICIALS

Now how can highway people make more effective use of the subdivision control tools? Let me try to approach an answer to this question first by referring to three state-supreme-court cases: one from Arkansas, another from California, and a third from Michigan. Then I would like to make specific reference to what highway officials are doing in this field of subdivision controls in Michigan and Wisconsin. Finally I'll conclude with a couple of suggestions that have occurred to me, making particular reference to vexing problems of so-called metes-and-bounds real-estate transfers.

The Arkansas case *Newton v. American Securities Co.*, 201 Ark. 943, 148 S.W. (2d) 311 (1941), goes like this: A landowner wanted to subdivide some land which abutted on two county roads, one to the west and the other to the south. One of the two roads was an important connecting road between US 70 and US 167; the other was an important farm-to-market road. The county planning commission refused to approve the proposed plat unless the land owner dedicated a 10-foot strip along  $\frac{1}{4}$  mile of each of these county roads so as to permit an ultimate widening from a present 40-foot width to an ultimate 60-foot width according to the county's master plan. The Arkansas Supreme Court said there was nothing arbitrary about the requirements.

The California case *Ayres v. Los Angeles*, 34 Cal. (2d) 31, 207 P. (2d) 1, 11 ALR (2d) 503 (1949), is even more instructive. Upheld for a 13-acre subdivision were conditions that a 10-foot strip, 2,400 feet along an important

traffic artery, be dedicated; that an additional 10-foot strip along this same street be reserved for trees and shrubs to assure lack of access to the artery; that an 80-foot rather than a 60-foot width be dedicated for a new street crossing to the subdivision; and that a triangular-shaped parcel  $12\frac{1}{2}$  by 75 feet be dedicated to eliminate a traffic hazard. Possibly this case sets a modern trend in upholding these conditions, even though they were not expressly authorized in the state enabling statute or the local ordinance. The court held such conditions are valid so long as not inconsistent with either the state act or the local ordinance and so long as reasonably required by the subdivision type, local planning, and traffic conditions.

The Michigan case *Ridgefill Land Co. v. Detroit*, 241 Mich. 468, 217 N.W. 58 (1928), is the earliest of the three. Here Detroit's master plan contemplated an 86-foot width for Pembroke Avenue on the north of the proposed subdivision and 120 feet for Livernois Avenue on the east. The subdivider refused to dedicate half of each of these proposed widths and, instead, offered only 33 feet on each street. The court upheld the city's insistence that the dedications meet half the master-plan widths. In short, here is strong judicial authority for requiring dedications or easements to protect or permit the widening of existing highway abutting the subdivision. As already indicated, there is also authority upholding requirements of street dedications, street grading and surfacing, and setbacks within the subdivision as such.

#### SUBDIVISION CONTROL BY HIGHWAY OFFICIALS IN MICHIGAN AND WISCONSIN

Now we turn to the experience of Michigan and Wisconsin highway officials. Under Michigan's plat act, county

road commissioners must approve all plats of lands outside incorporated villages and cities. These commissioners may require that all streets, alleys, and private roads in the subdivision be surfaced with gravel, slag, crushed stone, or other suitable material at least 6 inches thick and that there be proper drainage, bridges, and culverts. In the May 1953 issue of *Highways and Byways* of the Michigan County Road Association you will find statements by six county road engineers from as many counties, both urban and rural, about the actual operation of this law. These statements are worth attention, because they demonstrate that, at least in most of the counties reporting, subdivision streets are pretty adequately built before they are accepted into the county road system, thus reducing maintenance costs.

At the state level in Michigan, the highway commissioner must approve all plats which include land on state trunk-line or federal aid roads. The commissioner may require widths and locations as shown by plans on file; adequate provision for traffic safety in laying out drives which enter state trunk or federal-aid highways; and grading and surfacing in accordance with Michigan Highway Department specifications "insofar as they connect with and lie within the right of way of state trunk line or federal-aid highways."

A letter from Elmer J. Hanna, administrative assistant to the Michigan highway commissioner, dated December 17, 1953, reports on the operation of this law. He reports that some subdividers are ducking the requirements of this law by filing so-called supervisor's or assessor's plats. But he says, in general:

We have not had any problem in connection with gratuitous dedications of rights-of-way or protective steps that make adequate provision for traffic safety. As I mentioned above,

these plats are carefully reviewed in the field by the district traffic and maintenance engineers, and their findings and suggestions are transmitted to the Department, and final approval is not given until proper provisions are incorporated in the plat.

On limited-access highways, service drives are mandatory. On other highways, we obtain necessary width of right-of-way by holding up plat approval until the proprietor conforms by executing a highway easement release, a copy of which is enclosed. Platters almost invariably agree.

In Wisconsin the state highway commission must approve all plats of land bordering on state trunk highways or on connecting streets. ("Connecting streets" are marked routes of state trunks through villages and cities having a population of 2,500 or more.)

Typical of what this approval authority means in Wisconsin is this actual case. A landowner divided his land into 23 lots strung out along a state trunk highway. The town board quickly approved the plat, even though it was perfectly evident that when the lots were all built on there would be 23 separate private drives out onto the highway. When the plat reached the commission for approval, it induced the owner to provide a service road, and now the householders on those lots have access to the highway at only two points instead of 23. William F. Steuber, assistant engineer of the Wisconsin commission, wrote me in mid-December of 1953:

Our Wisconsin Commission uses its plat approval authority mostly for the purpose of providing a measure of highway safety through orderly control of traffic, particularly in matters of entrance and egress from the highway. Location and arrangement of entrances are the chief concern. . . . In a few cases, also, Commission suggestions have resulted in footings dedication for street purposes where existing right of way was not ample for ultimate development. The Commission has also suggested and has had incorporated into plats, service roads parallel to and adjoining the highway, and sometimes parking lots.

Since 1949 the Wisconsin commission has reviewed and approved about 150 plats.

#### SOME SUGGESTIONS TO HIGHWAY OFFICIALS

Highway officials can profitably become more active in the subdivision-control picture. This activity may reflect itself in a variety of ways. As in Wisconsin and Michigan it may take the form of formal plat-approval authority. Perhaps I'm prejudiced by the surroundings in which I live, but I think it is not too much to ask a subdivider to wait the relatively few days it takes to get his plat reviewed through the state commission's district office. After all, he is about to impose upon the community a land-use pattern that will promote, or blight, the area for generations to come. And the Michigan and Wisconsin experience suggest that such review is well worth the effort.

The highway officials role in the subdivision picture may also be informal. He can arrange to see plats in an advisory capacity before they are approved by the local plan commission or other body. As a member or advisor of a local planning commission he can insist that the special problems of the highway be kept in mind. Or he can participate periodically in working out and amending the community's master plan and thus set highway and street standards for the guidance of future plat approvers.

The big difficulty in most states, though, is the failure of the legislature to extend subdivision controls out into rural areas—out into areas where economic suffocation of our highways proceeds at an even faster pace. The term "urban fringe" is becoming ever more meaningless as more and more nonfarm people settle far out into the open country and as urban-type communities crowd our lakes and streams. Between 1930 and 1950 the nonfarm population living in the open country increased by some 87.6 percent!

In addition to the problems of settlement of nonfarm people far from urban centers are the problems of hit or miss development of recreation regions in many states—developments that not only blight promising summer colonies but also blight and choke the highways near them. Some kind of regional, or state review is imperative. Highway commissions with their district offices located within reasonable distance from the land to be platted seem ideally suited to make such a review at least of those features of the plat having direct highway implications.

Our Wisconsin survey showed a good deal of local laxity in connection with plat approvals even in sizeable communities. And in most rural towns our best information indicated that the only check made by most town boards was one to determine if the streets met the minimum width required of town roads.

I am one of those who is not willing to take from our rural people all power to control the future development of their localities. But protection of our highways has become such a critical problem in terms of costs in human lives and dollars, that we simply cannot afford to wait on the slow-moving, crazy-quilt pattern of local action. Besides, in the field of subdivision control, the problems posed are mostly for experts, particularly for engineering experts. So I think that, in spite of informal participation in local city planning by highway officials, most states would do well to follow the example of Wisconsin and Michigan and require state approval of all plats wherever they border on state highways, whether close in or far out in the country.

But in this field of regulation, as in others, you will find that with attempted control comes inventive avoidance and evasion. Witness the super-

visor's and assessor's plats in Michigan. Space does not permit development of this intensely practical subject. But I do want to point out at least this: Under most state statutes, the definition of "subdivision" is sufficiently loose so that there will be a good deal of avoidance of platting controls through individual metes-and-bounds sales without benefit of recorded plat.

What good does it do to have latent power to protect highways by requiring service streets, setbacks, off-street parking, etc., as a condition to plat approval, only to have literally dozens of parcels along a short strip of vital highway escape such controls by the metes and bounds dodge?

Every division of land (except those for agricultural purposes) along main arteries of traffic should be made subject to platting and plat-approval requirements. Steps should be taken to reduce the costs of this platting as much as possible for the fellow who is selling off only one or two parcels or, more accurately, the fellow who has only one or two parcels to sell. Until this particular millenium is reached, it may be that statewide laws requiring building permits for all structures abutting on important highways will be needed.

We have been discussing such a proposal in Wisconsin. Under it the highway commission would set up setback and other highway protection standards for state highways. Counties would have a specified period of time, say one year, within which to provide these protections through a zoning ordinance including building permit features. If such an ordinance is passed the state will make a grant-in-aid to help finance its administration, the grant being measured by the number of miles of state highway protected and the number of registered vehicles in the county.



If no ordinance is passed within the time specified the commission may, by commission order, impose controls (including building permits) to be administered by county clerks on a fee basis.

Let me conclude this summary piece by urging you to take a fresh look at subdivision controls in your state. Is your state enabling act adequate as to (1) its geographical scope and (2) the quality controls it permits, particularly as they relate to highway protection? Should there be direct power in county

or state highway officials to approve plats before they can be recorded, at least where the land borders principal traffic arteries? If so, the experience in Michigan and Wisconsin should stand you in good stead. Until your enabling statute is amended, how can you more effectively work with planning commissions and municipal councils in connection with plat approvals? And what steps do you need to take, legislative or otherwise to control metes-and-bounds transfers?