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To the Graduate Council:

I am submitting herewith a thesis written by Ewing Matherly Johnson, Jr., entitled "The Rezoning Process: Babcock's Players in a Real-World Setting." I recommend that it be accepted for nine quarter hours of credit in partial fulfillment of the requirements for the degree of Master of Science in Planning.

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THE REZONING PROCESS: BABCOCK'S PLAYERS IN A REAL-WORLD SETTING

A Thesis

Presented to

the Graduate Council of

The University of Tennessee

In Partial Fulfillment

of the Requirements for the Degree

Master of Science in Planning

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by

Ewing Matherly Johnson, Jr.

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ABSTRACT

The purpose of this thesis was to provide a better understanding of the rezoning process and its potential to malfunction in relation to public developmental policy. The data collected from the research were to provide some insight into the process of amending the Memphis zoning ordinance and to indicate possible areas for evaluation and improvement.

To implement the thesis effort a generalized description, based primarily on Richard Babcock's The Zoning Game, was constructed to list the principal participants in the process and to identify their responsibilities with respect to rezoning. The description also identified to some extent the relationships between the participants and how each one, according to Babcock, views the rezoning process.

Two comparisons with the generalized description were provided. First, the description was compared to the rezoning process as it should be practiced, the "ideal" amending process. The description was then compared to the comments of several "real-life" participants as they participated in actual case studies in Memphis, Tennessee.

It was determined from the comparisons that the situation in Memphis, like the rezoning process across the United States, is in need of reform. Although Babcock's generalized description disagreed in some respects with the Memphis rezoning process, the overall picture still revealed areas of major concern: the attitude that some participants have toward the developer; the position of the planning commission in

the process; and the overall condition of the rezoning process. These should all be topics for serious consideration and evaluation.

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CHAPTER I

INTRODUCTION

A. Problem to Which the Thesis Will Be Addressed

Norman Williams, in his book The Structure of Urban Zoning, makes the following observation:

> . . . zoning regulations are formulated by the public authorities, and make it possible to indicate in advance the proper use of land over large areas. Moreover, zoning regulations can be related to the land needs of various uses, and are potentially of considerable value in regulating future leads on public facilities. Zoning thus represents one of the considerable creative advances in modern American law.[1]

In the above statement, one of the purposes of zoning as a land-use control is revealed; the guidance of development toward the fulfillment of an adopted plan or public policy. Such was the intent expressed earlier in the Standard State Zoning Enabling Act, first published in 1922 by the U. S. Department of Commerce. In its attempt to establish model land-use regulations, the Act stated that zoning regulations must be in "accordance with a comprehensive plan".[2] Thus, zoning was seen initially by many of its advocates as a developmental tool, one which could lead to the realization of a city plan.

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[1]Norman Williams, The Structure of Urban Zoning (New York: Buttenheim Publishing Company, 1966), p. 23.

[2]U. S. Department of Commerce Advisory Committee on Zoning, A Standard State Zoning Enabling Act (Rev. ed., 1926), Sec. 3.

However, zoning commentators have concluded that the zoning process frequently has not functioned in the ways described by Norman Williams and the Standard Act.[3] This has been held particularly true with regard to the process of rezoning. There are situations in which rezoning is accomplished for reasons unrelated to any rational planning and decision-making process. At times such as these, strong vested interests may overshadow meaningful planning principles and politics may take the place of sound developmental policy.

The Purpose

Many zoning experts have contributed much to the overall analysis of land-use control. Their contributions have appeared in books, magazine articles, and professional pamphlets, and have covered a wide array of topics, including those related to the amendment process. In

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[3]Several periodicals and journals have included informative articles on some of the problems encountered in the zoning process. Carl Feiss, in "Planning Absorbs Zoning" (Journal of the American Institute of Planners, XXVII, May, 1961, pp. 121-126), discusses the problems of zoning in the context of its inability to act as a tool for planning and states that planning is really a tool of zoning. Other articles include "Zoning, the National Peril", by Robert E. Michalski and "A Plea for the Eventual Abolition of Planning Boards", by David Craig, both in the American Society of Planning Officials' publication, Planning 1963. In addition, the ASPO Planning Advisory Service Information Report No. 115, "Amending the Zoning Ordinance" (October, 1958), defines the various problems associated with zoning administration.

spite of this abundance of research and written material, not much has been done on a case-by-case basis beyond the stage of general commentary.[4]

The purpose of this thesis is to add to the body of land-use control knowledge. This is done by investigating the process of rezoning as it actually functions in case situations. It is hoped that by reviewing the issues and the actions of the participants in each case something more can be learned about rezoning as an amending procedure and its tendency to malfunction.

The Method

To implement this effort, a generalized description identifying the major functional roles in rezoning is constructed. Relying primarily on the commentary of Richard Babcock and his book, The Zoning Game, the description lists and characterizes the participants and how they function in actual rezoning cases. This list of participants includes the planner, the planning commissioner, the attorney, the elected city official, the private developer, and the affected neighboring property owner.

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[4] Two of the more familiar works are: Decisions in Syracuse, by Roscoe C. Martin, Frank Munger, and others (Bloomington: Indiana University Press, 1961) and The Zoning Dilemma, by Daniel Mandelker (Indianapolis: Bobbs-Merrill Co., Inc., 1971). These two works tend to concentrate on the overall developmental decision-making process, with little treatment of the different participants and their relationships to each other in the rezoning process.

Two comparisons involving the generalized description form the basis for the thesis. First, the generalized description is contrasted with the "idealized" rezoning process, or how the rezoning process is supposed to function. Commentary from several sources provides material for the discussion of the rezoning process as it should be practiced.

The generalized description is then compared with the actions of the participants as examined in several rezoning case histories in Memphis.[5] Each case history selected for review is different from the standpoint of the issues and the facts affecting the final decisions. A chronology of the events in each case is also provided. Thus, by comparing and contrasting the generalized description with "real life" situations, an understanding can be achieved of how the process actually departs from the idealized procedures set forth in the literature.

B. A Brief History of Zoning as A Land-Use Control in the United States

Even in the most unsophisticated form, the regulation of the use of land and buildings has probably been in existence for a long time. According to one writer,

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[5]These cases are not cases associated with court litigations, in which some rezonings are appealed and decided. The cases, or case histories, deal only with the issues and events surrounding the decisions made by the local legislative body.

> . . . regulations that have some of the features of zoning have existed since as long as land and buildings in cities have been regulated, which means that zoning started with the growth of cities.[6]

It would be difficult to determine the actual point at which man began controlling the land and its uses.

In the United States the earliest examples of zoning, or land-use control, were based on the idea that certain uses, because of their potential harm to the public welfare, should be regulated or prohibited in certain districts. Furthermore, on the individual merits of each case, the courts usually ruled in favor of this restriction of property rights. For example, in San Francisco a law was enacted that restricted the location of Chinese laundries. After several court tests, including a Supreme Court review, these rather discriminatory regulations were found valid because they controlled what were considered public nuisances.[7] An ordinance which restricted the height of buildings on streets of varying dimensions was passed in Boston and later ruled as a legal exercise of the control of a potentially harmful condition.[8] And finally, one of the more prominent of the early ordinances, and cases, involved the exclusion of brick yards from certain sections of

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[6]Donald G. Hagman, Urban Planning and Land Development Control Law (St. Paul: West Publishing Co., 1971), p. 67.

[7]John Delafons, Land-Use Controls in the United States (2nd ed., Cambridge: The M.I.T. Press, 1969), p. 67.

[8]Welch V. Swasey, 214 U. S. 91, 29 Sup. Ct. 567 (1909).

Los Angeles. In this case the court ruled in favor of nuisance law.[9] These early forms of "zoning", using the police power to control public nuisances, were clearly an accepted legal practice.

Three Major Zoning Events

In spite of this early acceptance of the use of the police power to control land uses that were considered harmful to the public welfare, zoning didn't become "zoning" until the early part of the twentieth century. During this period there occurred several events which allowed zoning to be officially accepted by local, state, and federal officials and officially sanctioned by the country's highest court.

The first such event was the passage of the New York City Zoning Ordinance of 1916. In an attempt to regulate the "nuisance uses" brought on by New York City's almost unrestricted growth, this particular piece of local legislation was enacted, partly on the recommendation of the Commission on the Height of Buildings. Under the leadership of Edward Bassett, the Commission studied the land-use conflicts and other urban problems and came to the following conclusion:

> . . . the present almost unrestricted power to build to any height, over any proportion of the lot, for any desired use and in any part of the city, has resulted in injury to real estate and business interests, and to the health, safety, and general welfare of the city.[10]

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[9]Hadecheck V. Sebastian, 239 U. S. 394, 36 Sup. Ct. 143 (1918).

[10]Delafons, Land-Use Controls, p. 22.

As a result of this study, the New York Ordinance was passed, and the country had its first comprehensive zoning regulation.

The second major event which helped to establish the regulation of land uses resulted from the efforts of the federal government. By the early 1920's, approximately 50 cities had adopted ordinances similar to the New York law, and the number was growing.[11] Realizing this popularity and the success of the New York Ordinance, Commerce Secretary Herbert Hoover created the Advisory Committee on Zoning in September of 1921. The purpose of the Committee was to develop a set of guidelines by which land-use control programs (with primary attention given to zoning) could be established on the local level.[12]

In August of 1922, the Committee published the first Standard State Zoning Enabling Act, and later, revised editions in 1923, 1924, and 1926.[13] The Act and revisions included enactment, administrative, and enforcement procedures, and provisions for appeal and judicial review. By 1925 the Standard Act was followed, at least in part, by 19 states, and by 1926, 425 municipal governments had adopted zoning ordinances.[14]

Thus, the federal government had given support to the use of zoning and had recognized its value and importance in protecting the public

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[11]Philip P. Green, Jr., Cases and Material on Planning Law and Administration (Chapel Hill: Institute of Government, University of North Carolina, 1962), p. XII-2.

[12]Ibid.

[13]Ibid.

[14]Ibid.

welfare. Secretary Hoover, in a Preface to the 1926 Standard Act, made the following summary observation:

> The discovery that it is practical by city zoning to carry out reasonable neighborly agreements as to the use of land has made an almost instant appeal to the American people.[15]

In spite of the obvious enthusiasm for zoning, and its overall acceptance by the people, the constitutionality of the practice was still questioned. There were those who thought that the right to the free use of one's property should not be infringed upon, regardless of the circumstances. Until the 1920's the courts had ruled in several cases that zoning ordinances were in fact invalid when nonnuisance uses were prohibited.[16] Although scattered comprehensive ordinances had been ruled legal, no real precedent had been set on the state and federal court levels, and the future of zoning remained uncertain.[17]

Before 1919 the Supreme Court had reviewed and heard several cases and had supported the right of government to control height limits and other near-nuisance uses in certain situations.[18] However, the test of comprehensive zoning and the use of the police power did not come until the landmark case of Village of Euclid V. Ambler Realty Co., in 1926. In its decision the Court, although drawing on the "nuisance" question,

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[15]Delafons, Land-Use Controls, p. 25.

[16]Hagman, Urban Planning, p. 68.

[17]Green, Planning Law and Administration, p. XII-2.

[18]Delafons, Land-Use Controls, p. 26.

held that comprehensive zoning did not violate constitutional principles.[19] Zoning advocate, Alfred Bettman, in presenting an amicus curiae brief before the Court, stated that

> . . . zoning represents no radically new type of property regulation, but merely a new application of sanctioned traditional methods for sanctioned traditional purposes.[20]

This testimony added emphasis to the final court approval of zoning as a legal use of the police power to protect the public welfare.

Zoning to the Present

After the significant first twenty-five years of this century, zoning enjoyed wide-spread popularity. States and municipalities came to realize that zoning provided a means by which urban stability could be insured. Not only was it possible to maintain the identity of neighborhoods, but public officials could also provide for adequate municipal growth through more efficient allocation of resources. Furthermore, zoning, in many cases, provided a means by which community plans could be implemented.

However, in many respects, the condition of the zoning process is anything but healthy today. In the opinion of many lawyers, zoning has often been tarnished by the political influence of powerful self-interests. In the words of one attorney, "its [zoning] good name as a

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[19] Ibid.

[20] Village of Euclid V. Ambler Realty Co., 272 U. S. 365, 47 Sup. Ct. 114 (1926).

way of controlling the environment has led to a bad name of misuse and bribery".[21] Faulty zoning administration and under-the-table compromises are all too common experiences.

Furthermore, several planners have become disillusioned with what was once considered an effective planning implement. The Standard State Zoning Enabling Act and subsequent revisions emphasized the necessary relationship between the municipal plan and the zoning ordinance, but this has not always been present.[22] One writer has observed that

> . . . American land-use controls, in effect, were designed to promote private property interests which may have little to do with what planners regard as a desirable pattern of living.[23]

Zoning was a transition from nuisance theory and for this was seen by many observers as a progressive step forward in the development of land-use controls. The regulation of nuisance uses tended to treat individual situations and was applied to "prohibit" or to avoid conflicting uses in certain districts. Zoning, on the other hand, was more positive because it tended to suggest uses which might be included within a district and which might foster harmonious land-use relationships. Furthermore, zoning was applied in a comprehensive manner for the purpose of regulating many land uses and implementing a community plan.

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[21] Hagman, Urban Planning, p. 72.

[22] U. S. Department of Commerce, A Standard State Zoning Enabling Act, Sec. 3.

[23] Delafons, Land-Use Controls, p. 33.

The idea of preserving private property, which zoning was originally intended to do in controlling nuisance areas, does not necessarily coincide with sound developmental policy, or provide for the public welfare. He concludes:

> Zoning developed its own philosophy, but it tended to emphasize the distinctions between uses rather than the relationships which tie them together. It is largely for this reason that many planners regard zoning as more of a hindrance than a help in city planning.[24]

C. Mechanisms for Changing the Application of the Zoning Ordinance

There are several methods which can lead to a change in the application of a zoning ordinance. On the one hand, the ordinance may be amended, causing a direct change in the manner in which the regulation is applied. This process will serve as the subject area of this thesis. On the other hand, the strict terms of the ordinance may be waived by the application of one of several forms of relief provided by the enabling legislation. This section focuses attention on the purpose and function of several of these procedures with the intent of providing a better understanding of the particular role played by rezoning. It must be understood that these procedures are not alternative courses of action to the use of the zoning amendment, but are several means for changing the application of the zoning ordinance.

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[24] Ibid., pp. 33-34.

The Variance

Although there are several ways a developer can seek relief from a restrictive zoning ordinance, a common recourse is to appeal to an administrative agency of the city, such as the "board of adjustment". As a part of its responsibility, the board can grant a "variance", which is a widely used device that can greatly change the application of the ordinance.

Under Section 7., which concerns the structure and duties of the board of adjustment, the 1926 Standard State Zoning Enabling Act detailed the powers the board can exercise in granting a variance to an ordinance. It stated the following:

> 3. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will be contrary to the public interest, where owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.[25]

Thus, a variance may be granted when evidence clearly indicates that a developer, because of the character of his property (usually a lot and not the entire tract), suffers from the strict interpretation of the ordinance. One author gives the following definition of the purpose of the variance:

> A variance is granted to tender justice in unique and individual cases of practical difficulties or unnecessary hardship resulting from a literal application of the zoning

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[25]U. S. Department of Commerce, A Standard State Zoning Enabling Act, Sec. 7.

ordinance. It is designed to correct maladjustments and inequities in the operation of general regulations.[26]

If a developer cannot use his property in a manner in which he can "secure a reasonable return from", or "make any reasonable use of", then he may seek relief from the ordinance.[27] However, the developer must show that the granting of the variance will not have an adverse effect on the public, or his neighbors, and that he himself will not receive extra benefits that the other landowners in his district may not enjoy.[28]

Concerning procedure, the variance is granted by the board of adjustment after the developer has been denied a building permit from the administrative official. This "administrative official", who in some cases is the city building inspector, is designated by the city government to strictly enforce the ordinance.[29] Then, if the developer feels he is handicapped by an unnecessary hardship, he may appeal to the board, which may then grant the relief.[30]

The Special Exception

Another form of relief is the "special exception", or "special permit", which can be granted by the board of adjustment or other

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[26]Anderson, American Law of Zoning, II, 593.

[27]Mary McLean, ed., Local Planning Administration, (Washington; International City Managers' Association, 1959), p. 343.

[28]Hagman, Urban Planning, pp. 196-206.

[29]American Society of Planning Officials, The Text of A Model Zoning Ordinance, (3rd. ed., Chicago: American Society of Planning Officials, 1966), p. 40.

[30]Ibid., p. 58.

administrative agency charged with the enforcement of the zoning ordinance.[31] It too "permits" the developer, or landowner, to make use of his property in a manner different from that generally prescribed by the ordinance.

When a city is initially zoned, provision should be made for those "certain uses that are necessary in some types of districts but which may be extremely detrimental to their neighborhoods if proper safeguards are not taken".[32] An example of this would be the location of a public utility station within a residential neighborhood.[33] In this and similar cases, the board of adjustment must approve the permitted use after it has concluded that the use, with appropriate "conditions", does not conflict with the harmony of the neighborhood.[34] Usually, the request for an exception is made on appeal to the board regarding an initial request denied by the administrative official who enforces the ordinance.

Although a special exception, by its application, is similar to a variance, there is one critical difference between the two. In applying for a variance, the landowner must show that his property suffers from

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[31]Anderson, American Law of Zoning, III, 84.

[32]William I. Goodman, ed., Principals and Practice of Urban Planning (Washington: International City Managers' Association, 1968), p. 439.

[33]Ibid.

[34]American Society of Planning Officials, Model Zoning Ordinance, p. 51.

"practical difficulties or unnecessary hardship". Furthermore, the variance causes a deviation from the literal interpretation of the ordinance.[35] The landowner could very well make use of his land in a manner not designated under the zoning classification.

A special exception, on the other hand, "authorizes a use which is permitted by the zoning regulations, subject to the issuance of such a permit".[36] Another author puts it this way:

> It permits the inclusion [of the exception] in the zoning pattern of uses by the legislative body to be essentially desirable to the community, but which because of the nature there of militate against their existence in every location in a zone.[37]

Thus, a special exception may be listed as a "permitted use" under the terms of the ordinance. The landowner does not have to show hardship, but needs only to apply for the exception.

Judicial Review

The variance and the special exception are two devices that can give relief to a landowner from the conditions of a restrictive zoning ordinance. These are examples of administrative action, since they are both granted by an administrative agency. This section will consider the judicial forms of relief that are available to landowners and developers.

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[35]Anderson, American Law of Zoning, III, 87.

[36]Ibid.

[37]E. C. Yokely, Zoning Law and Practice, (3rd. ed., Charlottesville, Va.: The Mitchie Co., 1965), I, 320.

Since 1928 the United States Supreme Court has not ruled upon any cases that have dealt with zoning or its application to the control of land uses.[38] It was pointed out earlier in this chapter that administrative forms of relief have been more popular among landowners and developers, especially when their properties suffer from characteristics of hardship. However, many cases have been decided on lower court levels, particularly the state courts, where developers have had some success. For example, the landowner can challenge the constitutionality of the particular ordinance (although the constitutionality of zoning itself has already been established); he can attack the regulation if it is not enacted according to correct procedure; or he can question the legislative authority to enact such an ordinance.[39]

Summary

The above paragraphs have described several ways that one can seek and obtain relief from existing zoning ordinances. Another means of obtaining relief is to have the ordinance amended by legislative action of the local government. The process of rezoning, because it is the subject of this thesis, is discussed in detail in the next chapter. The chapter affords a look at its intended function in relationship to what zoning commentators have concluded is the actual case.

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[38]Hagman, Urban Planning, p. 69.

[39]Anderson, American Law of Zoning, II, 591-592. Judicial relief, in most situations, will occur only if and when a decision, made by the local legislative body, is contested by the landowner or developer.

CHAPTER II

THE REZONING PROCESS: IDEALIZED AND REAL-WORLD VIEWS

A. Introduction

This chapter focuses, first of all, on the process of rezoning and how it changes the application of an adopted zoning ordinance. The purpose of rezoning, when it should be used, and the mechanics of the process are discussed. Next, a generalized description identifying the principal characters in the amendment process is presented. This description relies on the commentary of Richard Babcock as expressed in his book, The Zoning Game, with supplementary comments from other zoning experts. It will thus be seen that the idealized view of how the rezoning process is supposed to function differs substantially from Babcock's generalized description.

B. The Rezoning Process: Its Intended Function

Several courses of action that are available to the landowner and which allow him to seek relief from a zoning ordinance were mentioned in Chapter I. The variance and the special exception, which are granted by municipal agencies and commissions, and review before the courts can all lead to change in the application of a land-use regulation. However, what might be considered as a more direct way to change an ordinance is to amend the zoning ordinance map and/or the ordinance text. This legislative process is commonly referred to as "rezoning".

The Purpose of Rezoning

Rezoning can be defined, according to Donald Hagman, as "a change in the ordinance, enacted by the legislative authority of the municipality".[1] Such was the provision made in the Standard State Zoning Enabling Act as the authors realized the necessity for local governments periodically to amend zoning ordinances.

> It is obvious that provision must be made for changing the regulations as conditions change or new conditions arise. Otherwise zoning would be a 'straitjacket' and a detriment to a community instead of an asset.[2]

The ability to rezone provided one more recourse, along with administrative and judicial devices, by which the impact of a regulation could be changed.

In distinguishing the zoning amendment from the other forms of relief previously mentioned, two important points should be made. First, the process of rezoning changes the ordinance, whereas the variance, the special exception, and court review procedures only give relief from the literal interpretation of the regulation.[3] Secondly, only the legislative body has the authority to amend the ordinance. This is very important since faulty application of the variance, which allows a different use for a parcel of land, may in fact be termed rezoning by

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[1]Hagman, Urban Planning, p. 599.

[2]U. S. Department of Commerce, A Standard State Zoning Enabling Act.

[3]Hagman, Urban Planning, pp. 599-600.

the courts.[4] These particular distinctions should be kept in mind when discussing the ways the application of an ordinance can be changed.

Reasons for Amending the Ordinance

Although a private developer can seek relief from an ordinance through the amendment process, he is not the only one who makes use of this device. As for variances, special exceptions, and court litigations, these are almost exclusively at the disposal of the aggrieved property owner. The situation differs in regard to rezoning, for it can also be initiated by those municipalities which attempt to maintain workable and effective regulations.

Basically, only two reasons have been recognized for initiating a zoning change. First, whether this be done by the municipality or the developer, property may be rezoned only in response to changing local conditions, a process that may involve changing not only the map, but the ordinance text as well.

> No matter how well we might feel that we have planned for the city's orderly growth, and regardless of the feeling we may have that our comprehensive zoning ordinance is sound and workable, there nevertheless comes the time in every city when changing conditions, of necessity, require a change in the law.[5]

The "change" rule has been expanded to include not only rezonings brought about due to "physical" change, but amendments resulting from change in

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[4] Yokely, Zoning Law and Practice, I, 298.

[5] Ibid., p. 315.

prevailing zoning concepts. In MacDonald v. Board of Commissioners, the dissenting opinion stated that rezonings should also be based on changing philosophies of zoning and its relationship to a community's plan. Changes in physical conditions may not necessarily be the primary factors for consideration affecting a particular rezoning decision.[6]

Secondly, the zoning ordinance may be amended to correct mistakes made when the ordinance was first prepared and adopted, or when a previous amendment was enacted. These corrections usually concern an incorrectly drawn boundary line on the zoning map, or a mistake in the text.[7] In any of these situations, local governments have made appropiate use of the rezoning process.

The Rezoning Process

With regard to the process itself, the application for rezoning is, of course, acted upon by the municipal council or local governing body. In addition, most states have made provision for proposed amendments to be reviewed by the planning commission, who then report to the council with recommendations as to the merits of the particular case.[8] These recommendations result from a study of the technical aspects of the application by the professional planning staff who makes its own recommendation to the Commission.

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[6]MacDonald v. Board of Commissioners, 238 Md. 549, 210 A. 2d 325 (1965).

[7]Hagman, Urban Planning, pp. 191-193.

[8]Anderson, American Law of Zoning, III, 331.

As a part of this process, most enabling acts stipulate the need for public hearings before the council and, in most states, before the planning commission.[9] This affords the opportunity for those who oppose and those who support the rezoning application to meet face to face and to offer arguments before the commissioners and councilmen. To insure that all interested parties are informed of these hearings, adequate notice is usually called for by the enabling legislation.[10]

During the hearing before the council, the arguments that were presented before the planning commission may be heard again. The council, after considering the application during at least one regularly scheduled meeting, votes to approve or reject the rezoning amendment. A simple majority is usually all that is necessary for passage or failure, but this varies with the state and the municipality.[11] Furthermore, some state enabling acts provide for a "20 percent protest" which permits at least 20 percent of the residents from adjacent and nearby properties to petition the council for rejection of the rezoning bid. This calls for at least a three-fourths vote of the council for approval of the amendment, a provision which assures a modest form of veto for the neighboring property owners.[12]

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[9]Goodman, Principles and Practice, p. 421.

[10]U. S. Department of Commerce, A Standard State Zoning Enabling Act, Sec. 4.

[11]Anderson, American Law of Zoning, I, 184-185, 200.

[12]U. S. Department of Commerce, A Standard State Zoning Enabling Act, Sec. 5.

C. Babcock's Generalized Description of the Rezoning Process: Its Actual Function

Introduction

The preceding section presented a short essay on the intended function of the amendment process. Among other things, the essay commented on the purpose of rezoning, when rezoning should be used, and the mechanics of procedure. More importantly, however, the major theme of the discussion was that rezoning is a vital component in a rational and efficient developmental control process.

However, this "ideal" amending process does not always function as it should. One source mentions the fact that, "commentators have long been aware that amendments can easily be arbitrary".[13] This same reference continues by saying that proposed changes are "often dominated by politics and personalities; and far too frequently the decisions are downright unfair".[14] The evidence may lead one to believe that rezoning is not necessarily an "ideal" process and that this condition occurs in more situations than one would like to admit.

This section deals with the atmosphere of the "real world" situation that often surrounds the rezoning process. The previously mentioned generalized description will be used in this effort, and its purpose will be to provide some insight into the actions between the participants

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[13] American Society of Planning Officials, Planning Advisory Service Information Report No. 115, Amending the Zoning Ordinance (Chicago: American Society of Planning Officials, 1958), p. 1.

[14] Ibid., pp. 1-2.

and the resulting problems that may and often do result. The description focuses attention on the roles of the planner, the private developer, the attorney, the public-decision-maker, and the affected neighboring property owner.

Reasons for Using the Generalized Description

Before the actual generalized description of the rezoning process is presented, some explanation should be given as to why this particular concept was chosen to implement this thesis effort. First, it was felt that a generalized description would allow for a simple, understanding of the rezoning process without having to rely on a detailed explanation. Second, from the standpoint of convenience and ease, the generalized description found application in this study of the rezoning process, where phenomena are often quite complex.

It must be pointed out that the above qualities of the generalized description are present in the "descriptive model", another useful analytical tool. However, the descriptive model, unlike the generalized description, emphasizes in greater detail the interactions between variables. More specifically,

> a descriptive model indicates that there are certain variables, then, characterizes them in some way, and states that they interact in some way. This type of model is an aid in identifying a set of phenomena or relations among phenomena, which are indeterminately (so far as the model is concerned) interrelated.[15]

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[15]Robert T. Golembiewski, William A. Welsh, and William T. Crotty, A Methodological Primer for the Political Scientist (Chicago: Rand McNally and Co., 1969), p. 444.

Since the generalized description simply provides a characterization of the rezoning process it is more appropriate in this thesis effort.

The Generalized Description

As stated earlier in the thesis, the generalized description, which is based on Richard Babcock's The Zoning Game, offers a close look at the actions of the participants in the amendment process. Providing some insight as to how each of the players relates to the interworkings of the process, the description reveals the attitudes of the planner, the private developer, the public decision-maker as planning commissioner, the public decision-maker as councilman, the attorney and the affected neighboring property owner. Then, in the conclusion to this section, a short discussion of the implications of the generalized description as they relate to the case studies takes place.

It must be pointed out that The Zoning Game is a widely discussed analysis of the rezoning process and the actions, strategies, and attitudes of its participants. As such, the book focuses upon Babcock's experience in central city--suburban land-use control, and, consequently, his comments take on a similar emphasis. This thesis may show the applicability of the generalized description in other situations and contexts as well.

The planner. With respect to the rezoning process, the planner plays a very important role. He is responsible for the technical review of all rezoning applications that come before the commission, which is one of the designated functions of an agency's "current" or "short-range"

planning program. This technical review includes such considerations as the compatability of the proposed rezoning with the adjacent area, any effect the request might have on utilities, its relationship to an efficient pattern of traffic circulation, and other planning factors. The relationship of the rezoning proposal to the community's overall plan (if there is one) is also an important consideration. The planner, based upon these criteria, is then able to make a recommendation before the lay commission and thus provide the professional expertise necessary for sound decisions on each rezoning request.[16]

However, in the real world, the planner possesses little professional identity. Babcock cites four reasons for this condition. First, the planner considers zoning as a "dull, ineffective instrument".[17] For years he has increasingly realized that zoning hinders progress in the planning field and that developmental plans are not smoothly implemented by the use of zoning land-use controls as was once believed. Ironically, zoning is exactly what the planner spends most of his time doing. In fact, it is not unusual for the layman, who may know very little about land-use controls, to define planning as zoning.[18]

Second, if the planner does happen to enjoy his work with zoning, he must still be regarded as one who knows what he is talking about,

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[16]Goodman, Principles and Practice, p. 541.

[17]Richard Babcock, The Zoning Game (Madison, Milwaukee, and London: The University of Wisconsin Press, 1964), p. 62.

[18]Ibid., p. 63.

something which may be easier said than done. In attempting to deal with those he serves, the planner experiences difficulty in presenting himself as an expert, regardless of his training or competence. And when compared to the members of other professions, the planner loses even more in the way of stature. According to Babcock, "unlike his counterparts in law, medicine, and engineering, the planner has no sanctions by which to enforce his opinions".[19]

This problem is especially evident when the other participants in the rezoning process--specifically the public officials--consider themselves just as qualified as the planner to judge on the criteria affecting zoning decisions. In the words of Babcock,

> . . . not only does the planner's client believe he is equally qualified to interpret the tea leaves, but he is also comforted by the knowledge that in mid-twentieth century America he can flee his suburban or urban nest if the planner's predictions of rot come to pass.[20]

The planner faces the unenviable task of making for himself a respected place alongside the planning commissioner, the elected city official, and others in the rezoning process.

Third, the planner also has a difficult time of defining his scope of responsibility, often finding himself in a very precarious position. As Babcock explains, "the planner is not happy with his ambiguous posture in planning administration, a condition which is underscored

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[19] Ibid., p. 64.

[20] Ibid., p. 65.

when the community has a lay planning commission".[21] He continues by saying that

> . . . in this country many staff planners are increasingly disturbed by the frequent conflict between their responsibility to the plan commission and their ultimate responsibility to the elected officials.[22]

Consequently, the planner may find himself with more than one loyalty to satisfy, a situation that does not enhance his role in the rezoning process.

Finally, the planner often finds himself in conflict with other professionals. One reason for this is that "the planner really is not sure what he is or what he wants to be".[23] He has no particular identification, which the lawyer, the doctor, and the engineer are able to enjoy. Because he is a technician with a general knowledge of many subjects, he is a practitioner of an "inconsistent" and "open-ended" discipline.[24] As Babcock states, the planner is denied "the sense of apartness which is a major factor in the confidence of other professions".[25] Consequently, when he attempts to express his knowledge of design, he experiences the "indifference of the architect"; when he comments on the economic consequences of a particular land-use proposal, he is challenged by the real-estate developer; and when he offers an

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[21] Ibid., p. 70.

[22] Ibid.

[23] Ibid., p. 79.

[24] Ibid., pp. 79-80.

[25] Ibid., p. 80.

opinion on the legal aspects of an ordinance, he is attacked by the attorney.[26] It is no small wonder that the planner probably considers himself a very insecure and ineffective participant in the process to rezone land.

The private developer. Concerning the private developer, Babcock states that "despite the multitude of rules which limit his action, the private citizen--developer, entrepreneur,--is still the catalyst of most changes in the landscape".[27] The author further states that, "the public can plan and zone to its hearts content but unless some investor is willing to build according to the plan there will be no building".[28] The "laymen as private decision-maker", as Babcock describes him, provides the development initiative in urban areas, regardless of what the public sector says or does.

Furthermore, because the success or failure of his venture partly depends upon the final decision of the legislative body, the private developer is probably the central figure in most rezoning hearings. As was stated earlier in this chapter, most applications for changes in land-use districts are made by the property owners, or land developers, who wish to make profitable use of their real estate holdings. Depending on the temper of his participation, the private developer has much to gain, or much to lose, in the overall amendment process.

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[26] Ibid., pp. 80-81.

[27] Ibid., p. 41.

[28] Ibid.

In spite of the fact that the developer is the focal point in most rezoning cases, he is not a very popular figure in the minds of some of the other participants. One reason for the feeling that the developer is an "undesirable", is his performance record in the residential building industry. In the 1920's and 1930's and in the days immediately following World War II, the developer was a speculator who was notorious for covering the landscape with "box" or "ranch" style houses and making handsome profits from what he sold. He continued this trend into the fifties which brought on the wrath of aesthetically-minded planners and architects.[29]

Today, the residential developer, although he is still motivated by profits, is a different breed of builder producing a different quality of product. For example, Babcock states that the modern developer is more interested in such things as federal mortgage policy, the ebb and flow of the nation's economy, and the latest advances in housing technology and materials.[30] Furthermore, it is not uncommon for the developer to be the president of a large company which concentrates on large volume production. With regard to what he produces, the developer attempts to express the changing life styles of many Americans in the housing units he produces and places on the market. Garden apartments, mixtures of low, medium, and high density housing, smaller lots,

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[29] Ibid., pp. 44-46.

[30] Ibid., p. 43.

townhouses, and other new and sometimes revolutionary concepts are now the foci of his attention.[31] The residential developer has made serious attempts to change his image as an "undesirable".

However, the developer, in spite of well-meaning efforts, has not been able to change the attitudes of the local officials and single-family homeowners. These people are still leary of what he proposes. It is ironical, as Babcock clearly points out, that those who criticized his product of the 30's, 40's, and 50's--the architect and the planner--now respond more favorably to what the developer has to offer. The criticism, as Babcock points out, comes instead from those who bought the "box" and "ranch" styles he produced in profusion years before. As the residential developer has become more socially concerned, the single-family homeowner, has resisted the intrusion of multifamily units, garden apartments, and the higher density conditions he left behind in the central city. Erosion of the tax base and the threat to neighborhood identity and security are common arguments against this invasion, and in response to these fears, municipal councils have enacted very protective ordinances.[32]

The suspicious attitude against the developer is not altogether unwarranted. He does present himself as a "wheeler-dealer" at the planning commission hearings which one author characterizes as nothing

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[31] Ibid., pp. 46-48.

[32] Ibid., pp. 50-52.

short of an "oriental bazaar".[33] The fact that he considers himself knowledgeable in planning principles and techniques can provide him with a strong argument supporting his development proposal. If the developer's resources--competent technical and legal advisors--outweigh those of an undermanned and often underpaid planning commission staff, then his case is further strengthened and may not be invalidated by the most rational of zoning principles.

In spite of this myriad of opposition to the developer, there generally exists a positive attitude when the developer proposes a "nonresidential" development. For instance, when an application is made for commercial or industrial rezoning, the municipality tends to be more receptive to the proposal, more so than if the application called for change to high density, residential usage. As a result, according to Babcock, "the municipality throws itself at the developer's feet, offering, if not gold, at least the equivalent in land, tax relief, and financing of the plant".[34] Furthermore, the topics of discussion before the planning commission and council are different, as the "issues relate to the design of the building, the plot plan, the landscaping, the impact on vehicular traffic, and the appropriate 'buffers' to protect any residential development".[35] Babcock continues by saying that the

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[33]Robert Michalski, "Zoning . . . the National Peril", Planning 1963 (Chicago: American Society of Planning Officials, 1963), p. 64.

[34]Babcock, The Zoning Game, p. 56.

[35]Ibid.

> circumstance contributes to a more rational dialogue than in the cases of the proposals for residential development, if that is saying much. In place of highly charged exchanges over schools, children, transients, and 'character', as is the custom on residential proposals, the industrial developer will more often find himself faced with demand that he redesign the layout of his site to provide greater amenity.[36]

Thus, the developer's popularity among the other participants in the rezoning process may depend to some extent on whether he is a "residential" developer, or whether he proposes to develop a "nonresidential" land-use activity.

The public decision-maker: the planning commissioner. One of the two public decision-makers involved in the rezoning process is the planning commissioner. As a member of an appointed lay board, which acts in an advisory capacity to the city council, he is given much responsibility in the preparation of community plans and land-use control regulations in many municipalities. Furthermore, the planning commissioner is granted authority which is exercised during the amendment process and which allows him to make recommendations on the merits of requested zoning changes.[37]

The value of lay planning commissioners has been widely debated. On the one hand, the planning commission has been seen by several proponents as an effective mechanism for supervising the planning function

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[36] Ibid.

[37] Goodman, Principles and Practice, p. 526.

of local governments. One such proponent, the late Dennis O'Harrow, states that in addition to its responsibilities for preparing land-use regulations and community plans, the planning commission "can serve as an objective body to coordinate the actions of overlapping governments".[38] But more important is the fact that an independent lay planning commission, answering neither to the local legislative body, nor the chief executive (the mayor), can project an unbiased viewpoint with regard to planning and land-use control decisions.[39] It is argued that the planning commission can make decisions apart from the influence of politics.

Then there are those who argue that the planning commission has not performed in the best interests of community planning. One of the more ardent opponents of the planning commission's role in making developmental decisions has been Robert Walker who wrote the much quoted work, The Planning Function in Urban Government. Walker's argument maintains that "citizen boards tend to shun controversy, to act as watchdogs in their relations with other public agencies, to be biased toward conservatism, and to be uninformed".[40] Furthermore, "they have

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[38]Dennis O'Harrow, "The Planning Commission", American Society of Planning Officials Newsletter, July, 1961, quoted in Philip Green, Cases and Materials on Planning Law and Administration (Chapel Hill, N.C.: Institute of Government, University of North Carolina, 1962), p. II-22.

[39]Ibid., p. II-23.

[40]Robert Walker, The Planning Function in Government, 1st ed. (Chicago: University of Chicago Press, 1941), quoted in Alan A. Altshuler, The City Planning Process: A Political Analysis (Ithaca and London: Cornell University Press, 1965), p. 384.

neither the capacity nor the will to impose 'an overall point of view' on the work of government".[41] The planning commission has received much criticism for its ineffectiveness while occupying a position of responsibility in the decision-making process.

Babcock continues this criticism by questioning the role of the planning commissioner on two important points. First, the lay commissioner may regard himself just as competent as the professional planner to judge on matters pertaining to land-use control. One author expresses it this way:

> Regardless of the complexity or simplicity of regulations, another drawback to land-use administration by laymen is that most people feel expert on land-use and urban problems simply because they live in a city and own land, or at least rent a house . . . .[42]

The above statement lends some testimony to the fact that the planning commissioner may consider himself more knowledgeable about the principles of the regulation of land uses than he really is, and thus urban development may suffer.

Second, the planning commissioner occupies what some consider to be an unnecessary position between the professional planner and the politician. For instance, he is not the professional the planner is, or should be, and he is not politically responsible to an electorate, a

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[41] Ibid., p. 385.

[42] American Society of Planning Officials, Research Report No. 2, "Problems of Zoning and Land-Use Control", (Washington: American Society of Planning Officials, 1968), p. 38.

distinction reserved for the elected city official. This situation may not lend itself to an effective amendment process. One reason for this is offered by Babcock:

> Now, you have to give elected politicians credit for being reasonably responsible politically, otherwise they're not going to survive. This does not follow for the planning commission and when it gets in a position of yielding to political pressures and overriding the technical judgments of (what we hope to be) a trained planner you've got a body which is neither fish, flesh, nor fowl.[43]

In summary the planning commissioner as Richard Babcock expresses it, "is the principal deterrent to more meaningful communication between the professional planner and the politically responsible decision-maker".[44]

The public decision-maker: the city councilman. The second public decision-maker in the amendment process is the city councilman. Because he is elected by the people to serve on the community's legislative body, the councilman has the responsibility for the enactment of the local zoning ordinance (as well as other city codes and regulations) and the amendment of that ordinance when it is deemed necessary.[45] Clearly, the councilman has the principal decision-making role in the amendment process, for it is he who actually rezones the property.

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[43] Babcock, The Zoning Game, p. 39.

[44] Ibid., p. 40.

[45] Phipps v. Chicago, 339 Ill. 315, 171 N.E. 289 (1930).

When a councilman considers the rezoning of property, he takes into consideration several factors. First, he considers the recommendation of the planning commissioner, who in turn has hopefully acted wisely on the advice of the staff planner. Next, he listens to the rezoning proposal as presented by the private developer or whomever has initiated the request. And finally, he ponders the arguments, if any, of those affected by the rezoning change, the neighboring property owners who may oppose or support the petition.[46]

Yet, with regard to the councilman's functional responsibilities and his relationship to the other participants in the process, he joins the planning commissioner in being criticized by observers of the land-use control process and for basically the same reason. Often there are times when the councilman feels that he is well qualified to make technical, and objective, planning and land-use control judgments with little if any consideration given to the professional expertise of the staff planner.[47]

More than this, however, because the councilman is an elected city official, he is placed in a position of responsibility to the people who put him in office and is often influenced by their opinions and attitudes. Unlike the planning commissioner who should be free of political pressures, yet is not, the councilman must face periodic reelection, and

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[46]See supra, p. 19.

[47]American Society of Planning Officials, Research Report No. 2.

knowing this, he may bend to the temptation of pleasing a powerful neighborhood association or the interests of an influential developer.[48]

The attorney. Since the beginning of this century, members of the legal profession have played a very prominent (if not the principal) role in the creation of a land-use control and regulatory theory in this country. The Englishman, John Delafons, makes the following observation:

> All the great luminaries of the early days of zoning were lawyers--Edward Bassett, Alfred Bettman, James Metzenbaum, F. B. Williams. Given the nature of American institutions and attitudes, it may have been inevitable that lawyers rather than architects or professional planners should have been the successful pioneers of land-use controls.[49]

Attorneys, because of their obvious legal interest in the control of man's property rights, provided the guiding light for the enactment of early land-use control legislation and the defense of that legislation before the courts.

The attorney, today, maintains his legal interest by his participation in the rezoning process. Actually, he may participate in the process in one of two capacities. On the one hand, he may function as an "official legal advisor" to the planning commission or city council, providing "legal direction and advice" when such opinions are requested. On the other hand, he may act in a more familiar role,

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[48]Roy N. Clayton, "Planning Commissioners' Session", Planning 1953 (Chicago: American Society of Planning Officials, 1953), p. 211.

[49]Delafons, Land-Use Controls, p. 19.

as counsel for either an applicant for a rezoning request, or any opponents to such a request. In these situations, he will make certain that his client's viewpoints are expressed before the planning commission and city council.[50]

In spite of some early enthusiasm on the part of the legal profession and its presence in the rezoning process, Babcock remarks that zoning is now looked upon somewhat suspiciously and unfavorably by many attorneys. This feeling was once a feeling of boredom, when in the period from 1930 to 1950 the legal profession paid little if any attention to land-use control and "regarded zoning as a piddling bother".[51] As they became more involved in zoning litigation and as they began to recognize zoning as a permanent concept in law, their attitude eventually became one of outright distaste and dislike.

Several reasons for this distasteful attitude can be given. One reason is that some lawyers are, as Babcock explains, "against any efforts by the community to limit the choices available to the landowner".[52] Except for the control of junkyards and other nuisances, the attorney may feel that the property owner has the right to use his property in any manner in which he sees fit. Only the interference with the public welfare would stand in the way of this otherwise unrestricted privilege.

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[50]Herbert H. Smith, The Citizen's Guide to Zoning (New York: Chandler-Davis Publishing Co., 1965), pp. 110-111.

[51]Babcock, The Zoning Game, p. 87.

[52]Ibid., p. 89.

Other lawyers, who do see the need for the regulation and wise use of land, are disturbed by the fact "that zoning administration in its modern dress seriously impinges upon procedural due process".[53] Lengthy hearings before the planning commission and city council and procedures that are complicated and difficult to understand are common arguments against the rezoning process as it now functions. As Babcock states, these are merely "hypocritical devices set up to exhaust the potential developer and force him to come to terms with the arbitrary wishes of the local leaders . . .".[54]

Then, there are those lawyers who feel that the original purpose of zoning, and especially rezoning, is not followed by those who exercise zoning administrative responsibilities. Instead, zoning and rezoning have been used by the powerful and the influential to accomplish goals that are sometimes selfish. Furthermore, the decisions of the planning commission and other zoning bodies are often handed down, not because they necessarily follow logical procedure or good policy, but because they are popular and self-rewarding. The ground rules of zoning are thus abused, and as a result, almost "any applicant" can gain "any relief" from the terms of a strict ordinance.[55] In both situations, the intentions of those in the decision-making process may bear no relationship to the public welfare.

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[53] Ibid., p. 90.

[54] Ibid.

[55] Ibid., p. 89.

A large number of attorneys show a general concern over what Babcock describes as "the accumulating evidence that the device is being used as a technique to keep out all but the elect".[56] The existing ordinances, with the explicit regulations concerning density, type of structure, setback, and other controls, can be very prohibitive. The objective of these ordinances, according to those who oppose zoning amendments, is to protect the local tax base. As a result, developers are either kept from implementing their proposals, or they are subjected to expensive development costs, which only the larger real estate development firms are able to pay.[57] The single-family, middle-class neighborhood is thus protected and preserved.

And finally, some members of the legal profession express a general dislike for the presence of the staff planner, a sentiment that further encourages the distasteful attitude that lawyers have for the rezoning process. For one, the attorney shows an "inability or unwillingness to understand the planner's value judgments", a condition which places effective planning principles in jeopardy.[58] Moreover, according to Babcock,

> . . . the lawyer insults the planner by his assumption that he is nothing more than an etheral real estate appraiser who thinks in terms of 'highest and best use' and whose

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[56] Ibid., p. 92.

[57] Ibid., p. 93.

[58] Ibid., p. 99.

> judgment must be based upon the dollar consequence of alternative uses for the subject property.[59]

The result of this is that an open line of communication between the legal expert and the planning and land-use expert may not exist, a condition which may lend harm to the overall effectiveness of the amendment process.

The affected neighboring property owner. Although the private developer is the most important figure in the majority of rezoning cases, the most vocal is probably the neighboring property owner who will be affected by the zoning change. In attendance at most planning commission and city council meetings to oppose or support a rezoning application, he may represent his own particular interests, or he may voice the opinion of a large neighborhood civic association. He may also have the representation of an attorney, something which could help his cause if his counsel is eloquent and knowledgeable in matters of land-use control. Regardless of the situation, the participation of the neighboring property owner is protected by the mandatory public hearing required by most state enabling acts which assures his participation in the rezoning process.

In the role of the opposition, the neighbor occupies what Babcock terms a "tenuous legal position", as he is opposing the grant of the right to develop one's property. If he were reacting against poor

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[59] Ibid.

quality of the schools or inefficient garbage pickup service, he would be standing on firm ground as a taxpayer. However, when arguing against a new apartment complex or shopping center, the neighbor's rights become secondary in importance.[60]

In spite of the neighbor's flimsy position as an interested party, planning commissions and city councils still give much weight to the arguments he presents at the public hearings. In the words of Babcock, "it is a rare municipal legislature that will reject what it believes to be the wishes of the neighbors".[61] This often occurs to the extent that municipal decision-makers relegate their powers to demanding and vocal neighboring property owners, causing an improper rezoning procedure to exist. One planning publication expresses it this way:

> Too often decisions are not based on facts or master plans, but on pressures of bitterly complaining or opposing neighborhood improvement associations who are coming out from every rock, packing council chambers and snowing commissions with petitions.[62]

The interests of the neighbor go much further than simple protection against common law nuisances. The neighborhood association will often insist on the "uniformity of housing design and housing type, simply for the sake of uniformity".[63] Fears are also expressed as to the

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[60] Ibid., p. 140.

[61] Ibid., p. 141.

[62] Michalski, "Zoning . . . the National Peril", p. 64.

[63] Babcock, The Zoning Game, pp. 141-144.

intrusion of certain undesirable commercial land uses which could threaten the stability of a neighborhood of predominantly single-family homes.[64] These arguments may overshadow the consideration of effective planning and zoning principles as emotional and self-interested neighboring property owners present their case before the decision-makers of the community.

D. Conclusion

Babcock's generalized description thus presents a rather stark contrast between what ideally should happen and what actually does happen in the rezoning process. It is clear that the participants have particular roles to play and special functions to perform and that the end result would be a rational decision-making process leading to a sound land-use control program if the roles anticipated by the "founding fathers" are observed. However, it may be that just the opposite is true and that what really takes place is an enactment of the political process. The remaining chapters provide some indication as to what actually takes place and the apparent consequences.

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[64] Ibid.

CHAPTER III

THE REZONING PROCESS: SPECIFIC CHARACTERISTICS OF FUNCTION

A. Introduction

In the last chapter, a general characterization of the rezoning process as it functions in the United States was presented with a generalized description of the participants and their roles. The attention of this chapter is focused on specific situations with consideration given to the rezoning process observed in several case histories in Memphis, Tennessee. This effort will allow a comparison between the generalized description and the actions of the participants and their behavior in specific real-world circumstances.

This chapter begins with the presentation of some background material which will provide the basis for the understanding of the case histories. The sources of authority for the zoning and rezoning of land in Memphis and Shelby County is briefly discussed, along with an examination of the procedure used. Finally, a survey of three rezoning case histories is made, with an identification of the issues leading to the final decisions.

Zoning and Rezoning in Memphis, Tennessee

The authority to classify land uses in the municipalities and urban areas of Tennessee is based on power granted by state legislation. The original Memphis ordinance, which was passed in 1922, obtained its

authority from this particular source. However, the authority for the present Memphis and Shelby County ordinances is derived from a series of private acts passed by the state legislature and dating from 1931.[1] These acts articulate provisions similar to those specified in the public laws.

The private acts provide for amendment procedures when changes in the ordinance are deemed necessary. When the rezoning is requested, an application for amending the ordinance is made to the Memphis and Shelby County Planning Commission at least 35 days prior to the required public hearing. These hearings are held on the first and third Thursdays of every month. For adequate notification of the hearing, notices are mailed to all property owners within a five hundred foot radius of the subject property. After a review by the professional staff and by the zoning committee of the Commission, the proposal is placed before the full Commission for its consideration at the public hearing.[2]

A recommendation is made and then submitted to the legislative body within 10 days after the public hearing. Although the Planning Commission makes the actual recommendation, the staff director presents the recommendation before the City Council for legislative action. This may place him in an awkward position if he and his staff professionals

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[1]Tennessee, Private Acts of Shelby County (1931), Chap. 613.

[2]Memphis, Tennessee, Code of Ordinances (Tallahassee, Fla.: Municipal Code Corporation, 1967), Sec. 28-24.

disagree with the rationale of the Commission's recommendation. The Council then deliberates over the proposed amendment and makes a decision at a public hearing, which is the third of three public readings of the ordinance.[3] This final hearing before the City Council provides an additional opportunity for further discussion of the issues in each case.

B. The Rezoning Process: The Case Histories

To allow for a comparison with Babcock's generalized description, three rezoning case histories in Memphis are investigated. These cases do not represent an examination of court litigation, or case law. Rather, a chronology of those events that surround the rezoning of property--the application for rezoning, the review by the Planning Commission, the actions of proponents and opponents, and the final decision of the legislative body--is the focus of this discussion.

With respect to content, the three cases differ as to the issues and the conditions affecting the final decisions. The first case study involves the attempt of a large land development company and a local industrial corporation to have a former country club site rezoned for a large commercial and office park. In the second study, two cases are reviewed, each one involving rezoning efforts on two adjacent pieces of property with similar characteristics and both in a predominantly single-family neighborhood. Proposals for these properties called for multi-

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[3]Memphis, Tennessee, Code of Ordinances, Sec. 28-111.

family usage. The third case study, unlike the first two cases, can be characterized as a routine and noncontroversial application. The case concerns the effort of a small property owner to rezone his parcel with the intention of reselling the property for use by a retail fence company.

The Ridgeway Country Club Rezoning Case History

The events of this case centered around a former Country Club site and its attractiveness for redevelopment. The property is located in the fast-growing East Memphis area and is situated in a direct line of urban expansion. Because of its former purpose, the site is rather large, measuring approximately 154 acres. It is one of the largest pieces of vacant property in the city, ranking with the large regional parks and other country clubs in the area. Furthermore, the site is adjacent to the city's major circumferential expressway, I-240, on the west and to a major thoroughfare, Poplar Avenue, on the south. Needless to say, the development potential of Ridgeway Country Club site is very real.

The history of the case began in July of 1968 when the officers and membership of Ridgeway voted to sell the present club property and move to a new location in a less developed section of the Memphis urban area. Before this time, several offers had been made for the property and all had been rejected, including a combined offer by one of the city's largest real estate and development firms, The Boyle Investment Company,

and Cook Industries, Inc., a diversified corporation.[4] However, in July of the next year and after much negotiation, the Club reconsidered the offer from the Boyle-Cook partnership and transferred the property to the group for approximately $2.8 million.[5] Almost immediately, Club officials unveiled plans for a new club facility to be located on a 220 acre site eight miles east of the old location. The new Ridgeway Country Club was finished and occupied in mid-1971.[6]

During the negotiations with the Club and its membership, Boyle and Cook announced their intention to build a $40 million office park on the site, a proposal which called for the rezoning of almost two-thirds of the 154 acres from residential to office and commercial usage.[7] Thus, the stage was set for a lengthy, complicated, and emotion-filled process which, from the submitting of the application to the final decision of the City Council, took almost a full year.

The plan. Hailed by one Boyle official as ". . . a viable and unique plan fitted to the economic needs of Memphis, [the] topography of the site and the environmental characteristics of the exclusive East Memphis residential neighborhood to the north and east," the Ridgeway

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[4]Memphis Press-Scimitar, July 22, 1968, p. 18.

[5]Louis Silver, The Commerical Appeal (Memphis), July 8, 1970, p. 28.

[6]Memphis Press-Scimitar, January 1, 1970, p. 22.

[7]Memphis Press-Scimitar, June 8, 1970.

plan was unveiled with much enthusiasm.[8] In presenting the plan, the developers cited several convincing reasons why the proposal should be approved by the Planning Commission. First, the development of Ridgeway would enhance the competitive stance of Memphis in emerging as a "national and regional headquarters city for many corporations". Second, it would be an ideal complement to other office facilities in the city, such as the downtown complex of financial and business activities and similar developments near the airport and in other suburban sections of the city. And finally, the construction of an office complex in the suburbs would be quite attractive, not only from the standpoint of the economic feasibility associated with computer activities (which many of the park's firms would use), but also by the fact that executives living in nearby residential areas would be situated near their places of employment.[9]

The attractiveness of the plan's physical aspects was also emphasized. The plan revolved around the development of office facilities in a park-like setting. Low, medium and high-rise structures providing space for a variety of office functions and activities formed the core of the park with the total complex being situated in the midst of man-made lakes and a tree-lined and rolling terrain. Commercial

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[8] Ibid.

[9] Edward Sapinsley, Ned W. Cook, Jr., and J. Bayard Boyle, interview, July 7, 1970, pp. 1-2, (interview by a reporter of the Memphis Press-Scimitar).

support facilities such as banks, brokerage houses, retail shops, a hotel and restaurants were included in the plan to provide needed services for those utilizing the office structures. Convenient parking lots, landscaped to blend with the total setting, were also provided.[10]

However, the unique feature of the Ridgeway scheme was the provision of athletic and recreational facilities. A nine-hole golf course, jogging trails and an athletic club housing a pro-shop, a swimming pool, handball and tennis courts, an exercise room, and dining areas would be developed to provide leisure-time activities for the park employees.[11]

These were the principal features of the proposal which, according to the developers, took many months of planning by a team of architects, planning and recreation consultants, traffic engineers, and members of the Boyle Staff.[12] Consequently, the plan had the appearance of a well-reasoned proposal, a characteristic which lent support to the developer's cause in the different phases of the rezoning process.

The process. At the time the proposal for the executive office park was revealed by Boyle and Cook officials, application was made with the Planning Commission for the rezoning of the approximately 100 acres

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[10] Ibid.

[11] Ibid.

[12] The development team included: Harland Bartholomew and Associates (traffic engineering and planning); Roy Harrover and Associates (architects); Hammer, Greene and Siler and Associates (economic consultants); Al Zikorus (golf course consultant); and the Boyle staff.

needed for the implementation of the plan. In the application (Figure 1), the developers requested the rezoning of nineteen acres from residential (R) to commercial (C-1) on parcel one, forty-three acres from residential (R) to commercial (C-3) on parcel two, and twenty-nine acres from residential (R) to office (O-2) on parcel three.[13] The application was submitted to the staff for its review and recommendation, and the public hearing was set for July 16, 1970, at which time the Planning Commission was expected to make a decision.[14]

However, the staff expressed a negative reaction to the application and in its recommendation report to the Commission cited several reasons for denial of the application. For one, the construction of the park would "have a major impact upon the character and residential stability of the neighborhood immediately adjacent to the site", and "it would destroy the residential area as an effective neighborhood unit". Secondly, the new park would generate more traffic than the major thoroughfare to the south and the local residential street to the east were originally designed to accommodate. And finally, the development of the park would help to erode the Commission's "multiple-centers" plan (1966), a plan which involved the concentration of office and commercial

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[13]See Tables I, II, and III in the Appendix for further explanation of the zoning ordinance classification system.

[14]Memphis and Shelby County Planning Commission, Case No. Z-1635 (unpublished recommendation report, August 28, 1970), p. 1.

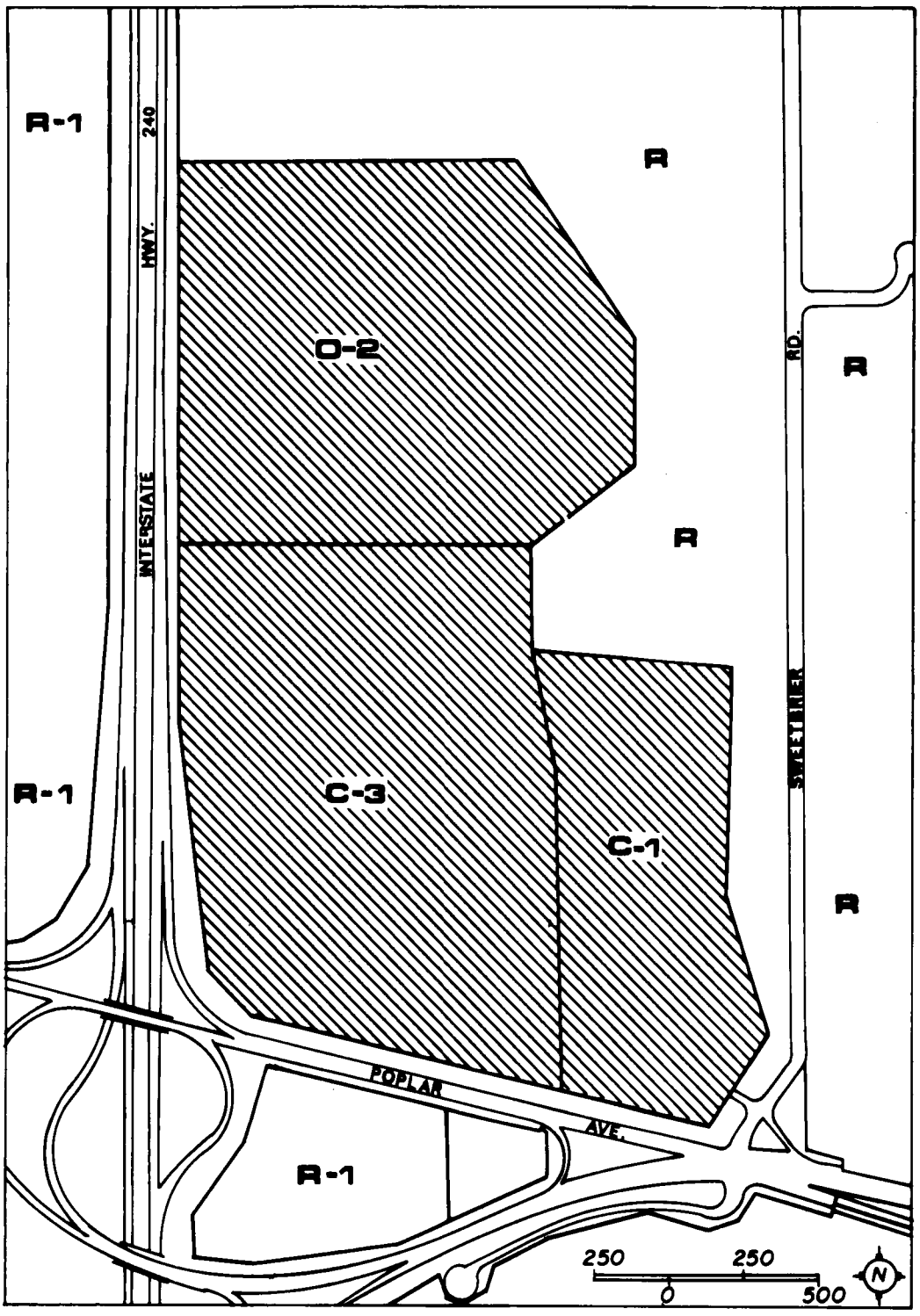


Figure 1. The original Ridgeway rezoning proposal.

Source: Memphis and Shelby County Planning Commission.

uses in certain locations (Figure 2). The location of this project on the Ridgeway site would not conform to this concept.[15]

Consequently, it came as no surprise when the staff recommended the rejection of the proposal as submitted. However, in making this recommendation, the staff made the following additional recommendations:[16]

1. No development of the site be permitted which would create a volume of traffic exceeding the design capacity of U. S. Highway 70 (to the south) or Sweetbriar Road (to the east).
2. No commercial zoning be granted.
3. The entire area contained in the application be developed in a single zone under a unified site plan which shows in detail the development plans of the

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[15]Memphis and Shelby County Planning Commission, Staff Report on the Rezoning Application Known as the Ridgeway Office Park Proposal (unpublished report, August 5, 1970), pp. 1-14. The "multiple centers" concept (The 1966 Land Use Plan for Memphis and Shelby County) was proposed by the staff and approved by the Planning Commission in 1966, as a general guideline for the future growth of Memphis and Shelby County. The plan called for the development of "high density centers serving well-defined communities, with corresponding public services and transportation systems. The centers would contain high density residential uses, public service subcenters and educational and cultural activity subcenters". Community and neighborhood centers would supplement the multiple centers by serving correspondingly smaller areas.

[16]Ibid., pp. 13-14.

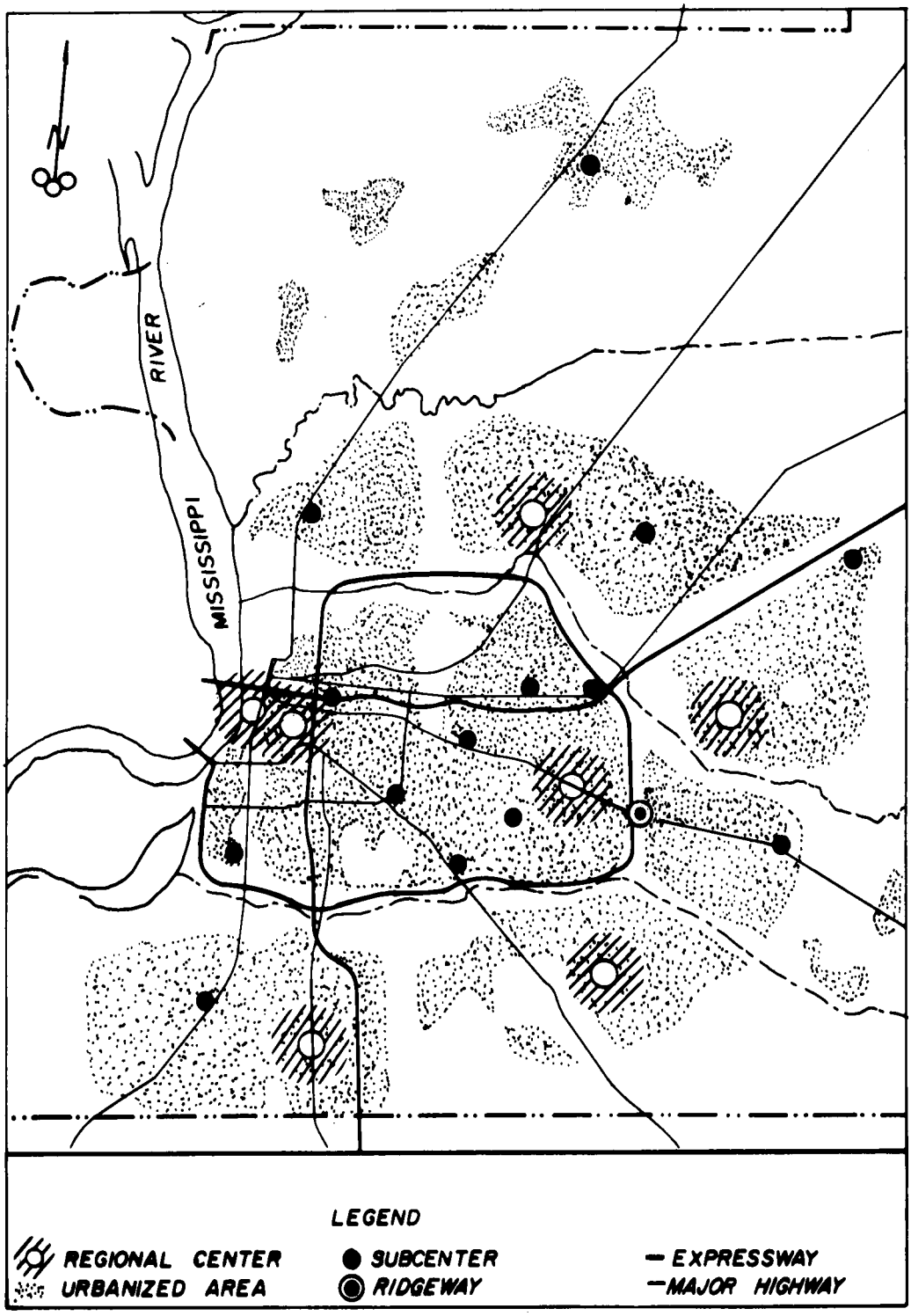


Figure 2. The "multiple centers" plan for Memphis.

Source: Memphis and Shelby County Planning Commission.

applicant, and which will be considered an integral part of the application.

4. The existing tree cover and golf course (outside of the permitted buildable area) be protected either through the dedication of the necessary permanent easements of other binding agreements which assures adequate protection.

5. The office zone (O-2) be recommended by the Planning Commission.

6. That the cost of any improvements needed to redesign, reconstruct or widen that portion of Poplar Pike which abuts the southern edge of the Ridgeway site or which is necessary to provide adequate ingress or egress to the site should be borne by the developer.

By submitting this list of conditions, the staff felt that the Boyle-Cook proposal could be reconciled to the multiple centers plan.

Because of the nature of the proposal, the Commission decided to hold the application under advisement and did so again at its next public hearing on August 6. At a special meeting on Augst 11, the Commission conceded to the recommendation of the staff and rejected the application as submitted. However, the Commission directed the Staff to meet with the developers in hopes that major disagreements could be worked out.[17]

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[17]Planning Commission, Case No. Z-1635, p. 2.

On August 20, in response to a letter from the developers stating that the differences with the staff could not be resolved, the Commission voted to rescind its earlier disapproval and recommended that the plan, with certain modifications, be approved. Instead of approving parcel two for forty-three acres of C-3, the Commission recommended approximately twelve acres for C-3. The remaining seven acres of parcel two and parcels one and three were recommended for O-2 zoning (Figure 3). Furthermore, the Commission directed the staff to revise the zoning ordinance for an O-3 district and a "planned unit development".[18] These regulations would provide for more effective control over this and similar developments in the future.

The rezoning application as originally presented by the developers came before City Council on September 8, for the first required reading, and again on September 15, for the second. Then, on September 22, the Council began hearing final arguments from those opposing and those supporting the proposal.[19] These included discussions on the original applicant site plan and the Planning Commission's version, and protests from a very vocal group of neighboring property owners. This meeting was continued on October 13 when additional arguments and comments were

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[18] Ibid. It was later revealed by one of the planning commissioners that the Planning Commission never really disapproved of the Ridgeway plan and that it was felt that some sort of compromise between the original proposal and the staff recommendations would be in order.

[19] Clark Porteous, Memphis Press-Scimitar, October 14, 1970, p. 33.

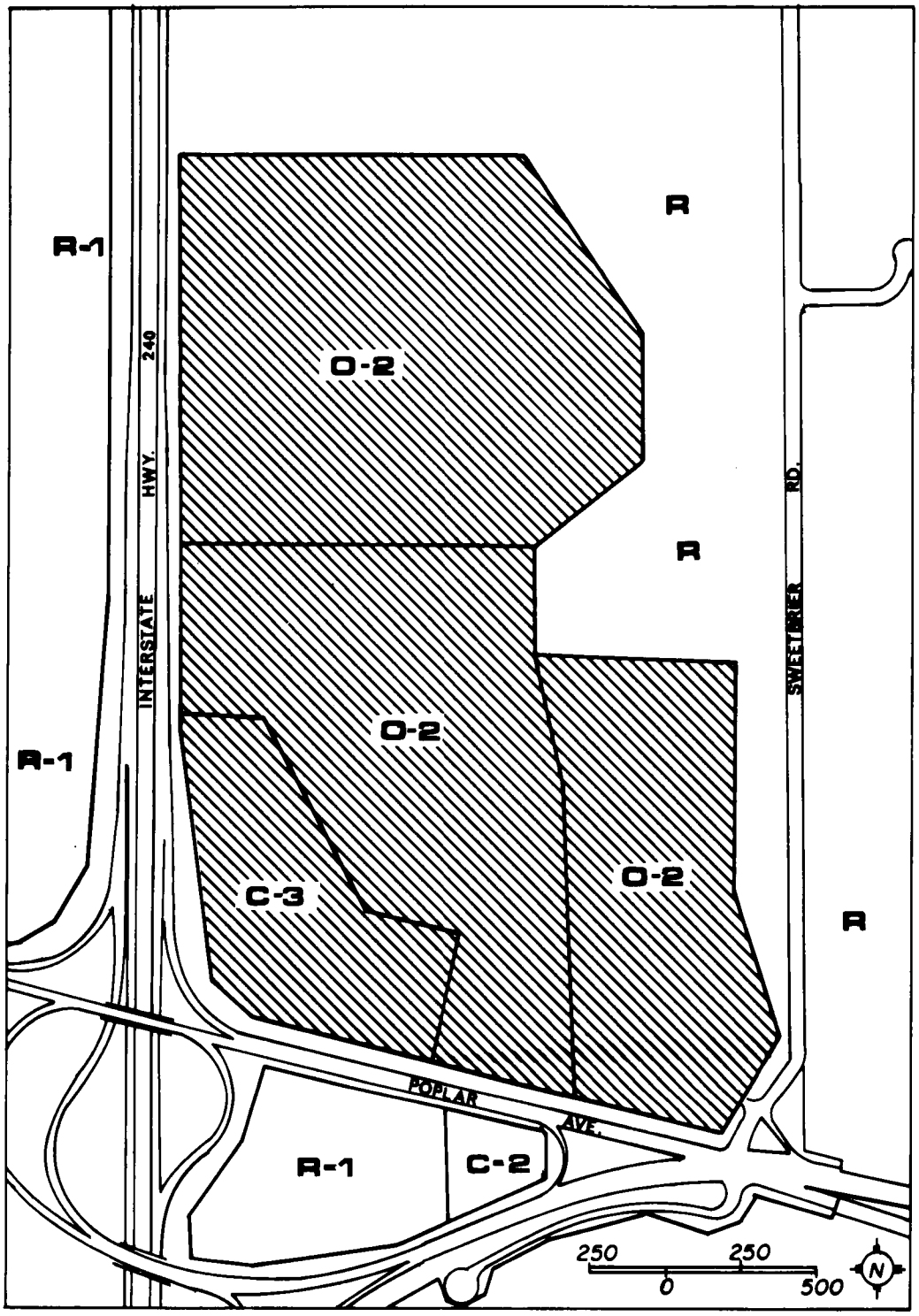


Figure 3. The Planning Commission's version of the Ridgeway rezoning proposal.

Source: Memphis and Shelby County Planning Commission.

made. However, the Council, because of the significance of this amendment decision, deferred a decision until the next scheduled Council meeting.[20]

Then on October 20, the Council voted to refer the application back to the Planning Commission for the initiation of a "planned unit development" ordinance. It was felt by many members that a P.U.D. regulation would be needed to insure the proper controls over the development throughout its implementation. Furthermore, there existed many skeptical minds concerning potential traffic problems and possible abuse of height limitations. Consequently, the Council suspended final rezoning procedures until the P.U.D. ordinance could be prepared.[21]

After receiving their charge, the Planning Commission and staff set up the necessary machinery for obtaining the state enabling legislation necessary for the passage of the P.U.D. ordinance. A special Commission committee was established and staff assistance in the drafting of the ordinance was provided. However, as time passed, the process in drafting and passing the legislation became "bogged down", with little if any progress resulting.[22]

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[20]Clark Porteous, Memphis Press-Scimitar, October 21, 1970, p. 18.

[21]Clark Porteous, Memphis Press-Scimitar, June 30, 1971, p. 33.

[22]In a memorandum dated April 19, 1971, John Griesbaum, Director of Planning, related to the City Council the situation with regard to the pending P.U.D. legislation. He stated that although a P.U.D. ordinance would be good, he did not feel that it would be legal under the existing enabling legislation. Secondly, the ordinance would have to be approved by public referendum, a process which would take a long time. Finally, administratively, the ordinance would be difficult to handle although it would benefit the Memphis urban area from a planning standpoint.

This particular turn of events forced the attorney for Boyle and Cook to ask the Council for a rehearing of the case. This occurred in May of 1972, some 6-1/2 months after the Council had referred the application to the Commission for the P.U.D. recommendation. Because the Planning Commission had not made any progress with the enabling legislation, the developers felt that this legislation would not be passed in time for effective implementation of their plan. Prospective tenants for the park were getting impatient, a problem which the developers, of course, needed to remedy.[23]

Furthermore, the developers had revised their original plan, which was actually a revision of the Commission proposal, whose concepts they were willing to accept. These modifications came about as a result of several meetings with neighborhood opponents at which time various contested aspects of the plan were compromised.[24] Although this effort at plan revision did not completely satisfy all of the neighboring property owners, several objectors did become supporters of the Boyle-Cook Ridgeway proposal.

Then, on May 11, 1971, the Ridgeway rezoning application came before the Council, and a second round of public hearings, discussions, and debates began. The council heard the new proposal again on May 18, and scheduled a third hearing on May 25. However, the Council Chairman,

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[23]Letter from Walter Armstrong, attorney, Memphis, April 19, 1971.

[24]Letter from Walter Armstrong, attorney, Memphis, April 13, 1971.

after consultation with the attorneys for the developers and the opponents, agreed to a postponement until June 8.[25]

Based primarily on the Planning Commission's revised plan, the new Boyle-Cook proposal retained the request for the reclassification of some of the property to Commercial (C-3) and office (O-2) districts, with the C-3 zones confined to two parcels in the southern portion of the property. However, several significant changes were made which greatly altered the scope of the Ridgeway scheme. First of all, instead of maintaining the nine-hole golf course in the northern and eastern portions of the property, the new proposal called for the retention of the residential (R) district for single-family dwelling use. Second, townhouse (R-TH) and apartment (R-4-P) were requested for parts of the property which were originally proposed for the O-2 classification (Figure 4). This reduced the O-2 acreage by more than half, to approximately 45 acres. The R-4-P districts were proposed to provide parking areas for users of the commercial districts. Finally, instead of the two entrances to the site, only one was requested, at Poplar and Sweetbriar, which would allow Sweetbriar to remain a two lane, local street.[26]

Needless to say, these revisions represented concessions to the neighbors, for many were strongly opposed to the plan as originally presented by the developers. For the most part, the intensity of

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[25] The Commercial Appeal (Memphis), May 25, 1971, p. 25.

[26] Ibid.

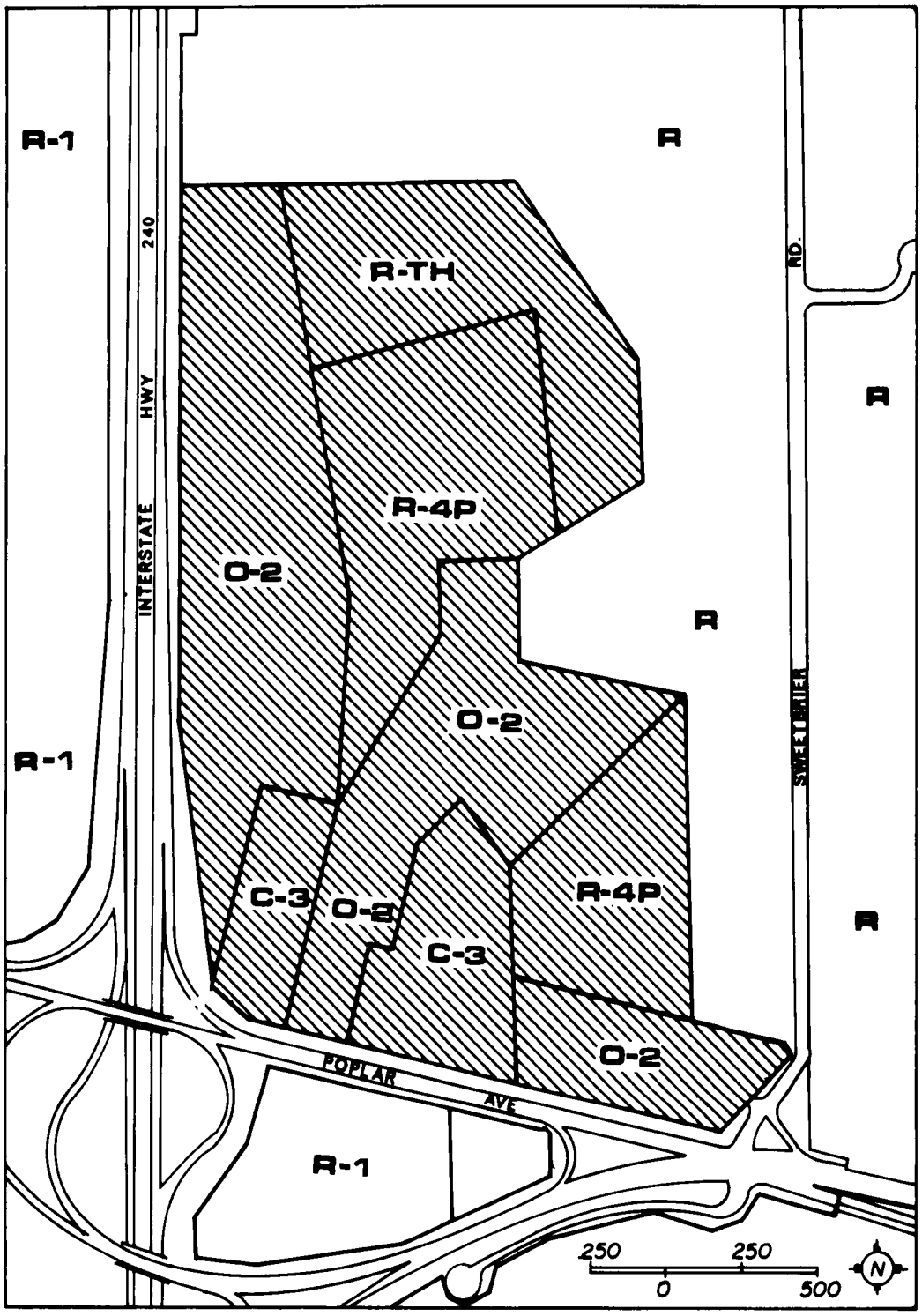


Figure 4. The approved Ridgeway rezoning proposal.

Source: Memphis and Shelby County Planning Commission.

commercial development had been lessened and the neighbors to the east and north of the site were assured that residential units would abut or face their lots. However, the big issue in the case had not been satisfactorily resolved--traffic congestion. Since the first planning commission hearing, at which time the opposing neighbors and their attorneys had objected to the plans to widen Sweetbriar and build an overpass at Poplar, the opponents felt that an increase in traffic flow would adversely affect the serenity of their neighborhood. At various times throughout the process, they had emphasized this point with the help of expert testimony and felt certain that the council would agree with their position when a final decision was made.[27]

On June 8, the rezoning hearing continued, with three and one half hours of additional testimony given by both sides.[28] Then, on June 29, after another long and emotional session, the Council voted 9 to 3 to approve the amended version of the Ridgeway proposal. The usual arguments as to the economic benefits and accessibility of the park were countered by opposing arguments that the project would disrupt the neighborhood and would result in traffic-clogged streets. In addition, approximately 200 area residents were present to offer final protest to the rezoning request.[29]

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[27]Porteous, Memphis Press-Scimitar, June 30, 1971, p. 33. The testimony was provided by two professors from Memphis State University: Dr. Kenneth Hall (Civil Engineering) and Dr. Robert Dean (Economics).

[28]Properties, when they are situated in the flood plain, are subclassified with a "Flood" classification.

[29]Ibid.

The Fogelman-Brandon Rezoning Case History

In the Ridgeway rezoning case study, an attempt was made to portray a situation involving a large real-estate development company and its relationship to the rezoning process in a large and controversial proposal. The Fogelman-Brandon case, in contrast, contributed some insight into the efforts of two small development firms, and their individual proposals for the development of adjacent and quite similar pieces of property.

The two properties in question are situated in a middle to upper-middle-class neighborhood of Northeast Memphis. Both parcels are bounded on the west and south by local residential streets and on the north and east by the I-240 circumferential expressway, the same thoroughfare that borders the Ridgeway site. In total size, the area measures approximately 62 acres, which was classified under the residential (R-1-A Flood and R-2 Flood) zoning district before the rezoning case.[30] These characteristics provided for a well-defined and clearly identifiable site for development.

The plans. The Fogelman rezoning plan was the first of the two applications considered by the Planning Commission and staff. It was a simple plan (Figure 5), requesting the reclassification of the 6.5 acre parcel from the existing residential (R-1-A Flood) to townhouse (R-TH). The location of this parcel, upon which a small number of townhouses

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[30] The Commercial Appeal (Memphis), June 30, 1971, p. 21.

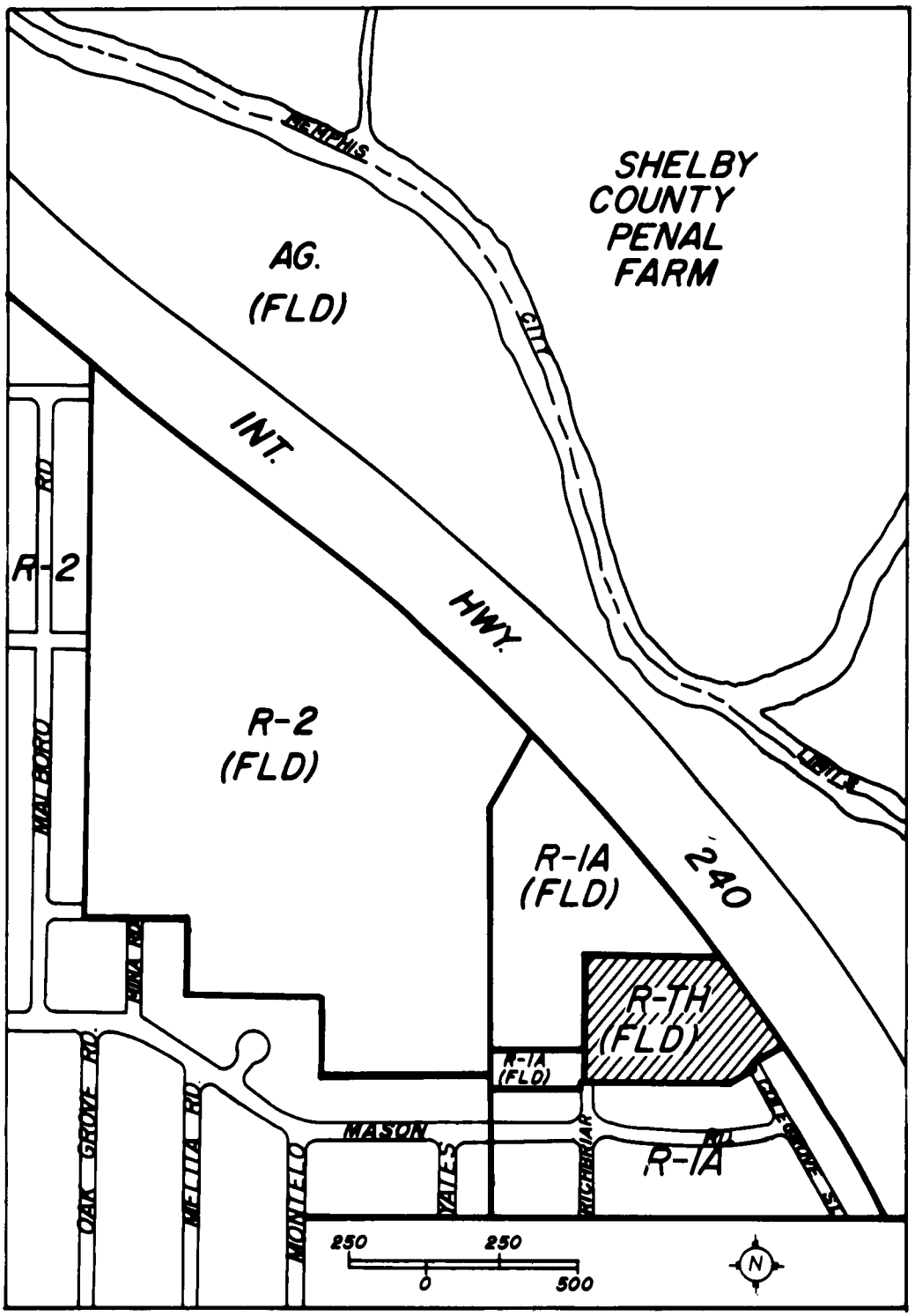


Figure 5. The Fogelman rezoning proposal.

Source: Memphis and Shelby County Planning Commission.

was proposed for construction, is located in the extreme southeast portion of the total Brandon-Fogelman property.[31]

Several reasons were given by the developer for the rezoning request and the proposed project. One dealt with the developer's contention that it would not be economically feasible to develop single family units on the R-1-A zoned property and that another use, such as townhouse, would be more appropriate. In a letter from the developer's attorney, it was stated that the site would require necessary and extensive earth fill and that the cost could not be borne by the construction and sale of single family residential units.[32] Cost estimates were later provided to support this claim.[33]

A second reason concerned the potential hazards existing due to the physical condition of the property. The undeveloped site provided breeding places for mosquitoes, and reptiles, an ever-present danger to the neighborhood children and older residents. It would be far more worthwhile to improve these unsafe conditions through some type of development than to let them remain.[34]

Finally, the proposed townhouse project would provide "additional ingress and egress" for heavily traveled sections of the neighborhood.

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[31]Memphis and Shelby County Planning Commission, Case No. Z-1775 (unpublished recommendation report, March 18, 1971), p. 1.

[32]Letter from Hunter Lane, Jr., attorney, Memphis, February 10, 1971.

[33]Computed figures were provided by Allen and Hoshall, Consulting Engineers, a Memphis firm (March 17, 1971).

[34]Lane, February 10, 1971.

The streets serving the project would be connected to the existing street network, thus allowing a smoother and less congested flow for automobile traffic.[35]

The Brandon scheme, similar to the Fogelman plan, also proposed townhouse development on most of the area's remaining 55 acres. In addition, a group of residential (R-3-A) units, or garden apartments, was suggested for development along the expressway. The townhouse units would lie to the west and south of this triangle, providing a "buffer" between the single family residences of the larger neighborhood and the multifamily apartment units.[36]

In justifying their proposal, the Brandon property developers also emphasized the problem of costly land fill necessary for the adequate development of single-family residences. Relying on cost estimates for the earth fill, they maintained it would be more economically prudent to develop either a townhouse, or multifamily project on the property than to pursue the construction of single family units.[37] With regard to the other Fogelman arguments, the Brandon developers relegated these to secondary importance, though both parcels were characterized by almost identical features and problems.[38]

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[35] Ibid.

[36] Memphis and Shelby County Planning Commission, Case No. Z-1924 (unpublished recommendation report, November 18, 1971), pp. 1-2.

[37] Computed figures were provided by Lehmen-Roberts Company, Inc., a Memphis construction firm (August 19, 1971).

[38] Planning Commission, Case No. Z-1924.

The process: the first Fogelman application. The first rezoning application filed by the Fogelman developers was submitted to the Planning Commission in early February of 1971. The public hearing of the case was placed on the March 18 Commission agenda at which time arguments would be presented.[39]

During the month before the Planning Commission hearing, the Staff reviewed the application and from the available data, in addition to established planning policy, made a recommendation to reject the proposal. Reasons for this rejection appeared later in the final Planning Commission report:[40]

1. No significant changes in the area warrant the proposed rezoning of the subject property.
2. The site has access by only minor residential streets and through the adjacent single family neighborhood.
3. The approval of this application, which has no natural boundaries, would foster attempts to rezone adjoining parcels.
4. Any development of townhouses would be out of character with the adjacent neighborhoods, which would be adversely affected by the proposed development.

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[39]Planning Commission, Case No. Z-1775, p. 2.

[40]Ibid.

Relying heavily on the staff recommendation, and considering an enthusiastic argument from the opponents' attorney, who presented convincing testimony on the traffic issue, the Planning Commission voted to reject the Fogelman rezoning application. This recommendation was then sent to the City Council for its review, but was withdrawn on March 30, at the request of the developer's attorney.[41] Apparently, the developer felt there was too much opposition to the proposed townhouse project to warrant Council consideration.

The process: the Brandon application. In spite of the Planning Commission's negative recommendation on the Fogelman application some eight months before, the Brandon developers filed their rezoning request in early October of the same year. The application (Figure 6), which called for the rezoning of 30 acres of the R-1 classified property to apartment (R-3-A) and 25 acres (in two parcels) to townhouse (R-TH), was reviewed by the Staff and placed on the Commission calendar for public hearing on November 5.[42]

When no one was present to oppose or support the proposal, the Planning Commission postponed consideration of the case until November 18.[43] Those present at the November 18 hearing included both

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[41] Ibid.

[42] Planning Commission, Case No. Z-1924.

[43] Ibid. With regard to potentially controversial applications, it is the Planning Commission's procedure to postpone the public hearings of a case when the proponent, or any opponents are not present to defend their positions.

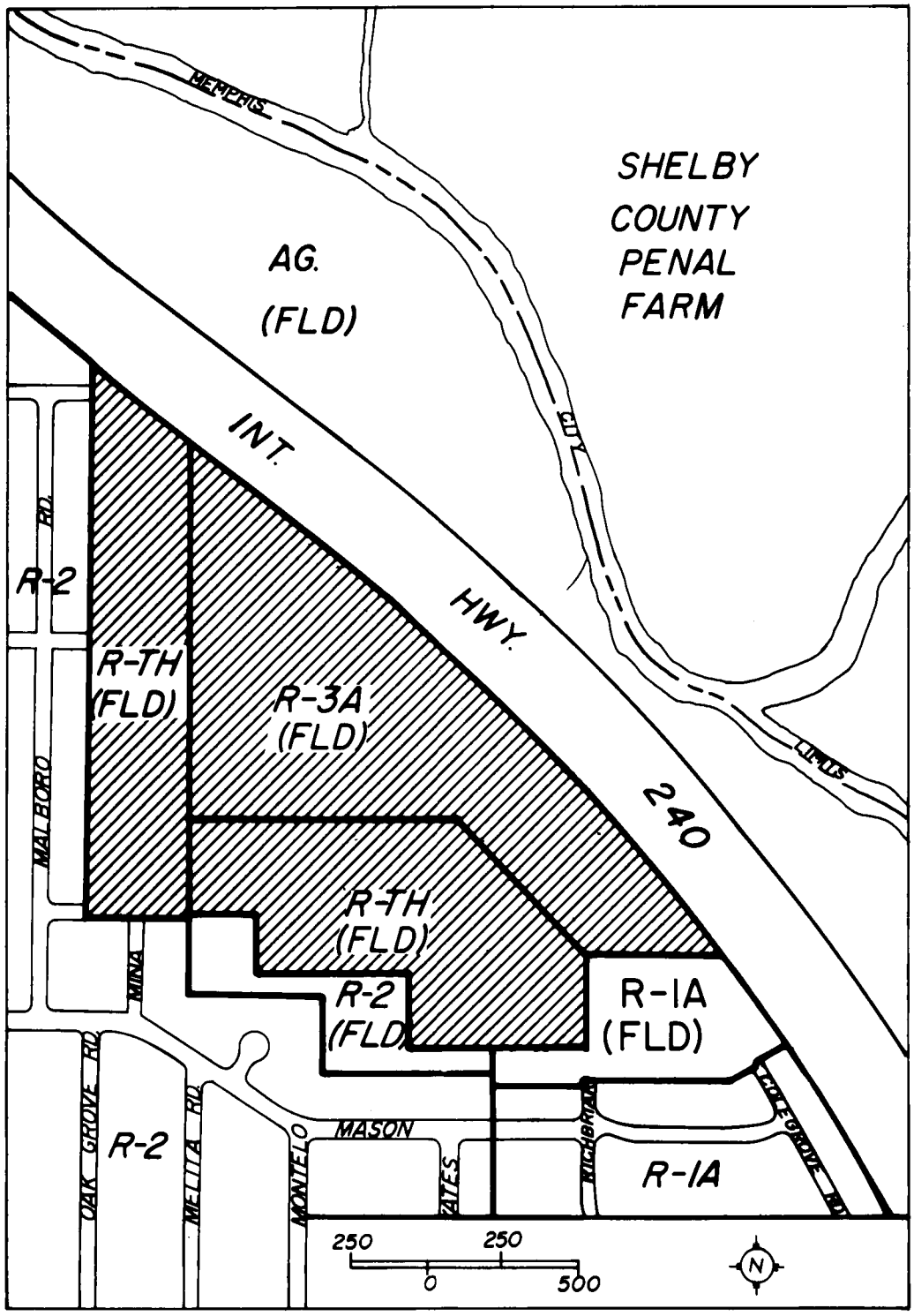


Figure 6. The original Brandon rezoning proposal.

Source: Memphis and Shelby County Planning Commission.

the proponents and the opponents of the rezoning request. Speaking for the developer, an architect and the developer's attorney provided the major portion of testimony supporting the application, with each one detailing various aspects of design, site considerations, and traffic movement.[44]

The opponents in turn were represented by the same attorney who had been successful in blocking the Fogelman rezoning application. He again pressed the traffic question and the adverse effects it would have on the neighborhood. Also present was a small group of area residents, who represented a larger group of some 300 property owners who had signed petitions against the application.[45]

The Commission considered all of the arguments and then voted to approve the application. The Commission's recommendation was based on the following rationale:[46]

> Unlike past applications for apartment and townhouse zoning in this area, the request has access points which are adequate to relieve possible traffic pressure on the development. A buffer strip of townhouses will abut single-family residences, separating them from apartment development along the I-240 right-of-way. The property is extremely low in elevation and will require extensive fill prior to construction of any permanent buildings.

The planning staff on the other hand maintained the same opposition they had expressed with respect to the Fogelman request.

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[44] Ibid.

[45] Planning Commission, Case No. Z-1924.

[46] Ibid., p. 2.

Council hearings of the Brandon application began in December and culminated with the final reading and a decision on December 21. At this meeting, a long, and sometimes heated, debate between the developers and opposing neighborhood residents took place.[47] Arguments from both sides were very similar to those of previous Planning Commission hearings on this and the Fogelman case.

The principal issue dealt with the effect that any additional traffic might have on the existing neighborhood. In an apparent move to gain support for the proposal and to lessen the concern over increased vehicular movement, the attorney for the developer suggested that the application be amended to include only the development of townhouses on the site, with a buffer of R-2 dwelling units in the westernmost portion (Figure 7). Then the traffic consultant provided supporting testimony which stated that the existing street system could adequately handle increased traffic flows if the application were reduced in scope.[48]

This did not appease the neighbors, or their attorney, who countered by presenting basically the same arguments presented during the Commission hearing. The attorney dwelt on both the traffic issue and whether or not it was feasible to construct single-family units on the site,

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[47]Memphis City Council, minutes of City Council Meeting, meeting of December 21, 1971 (recorded).

[48]Ibid.

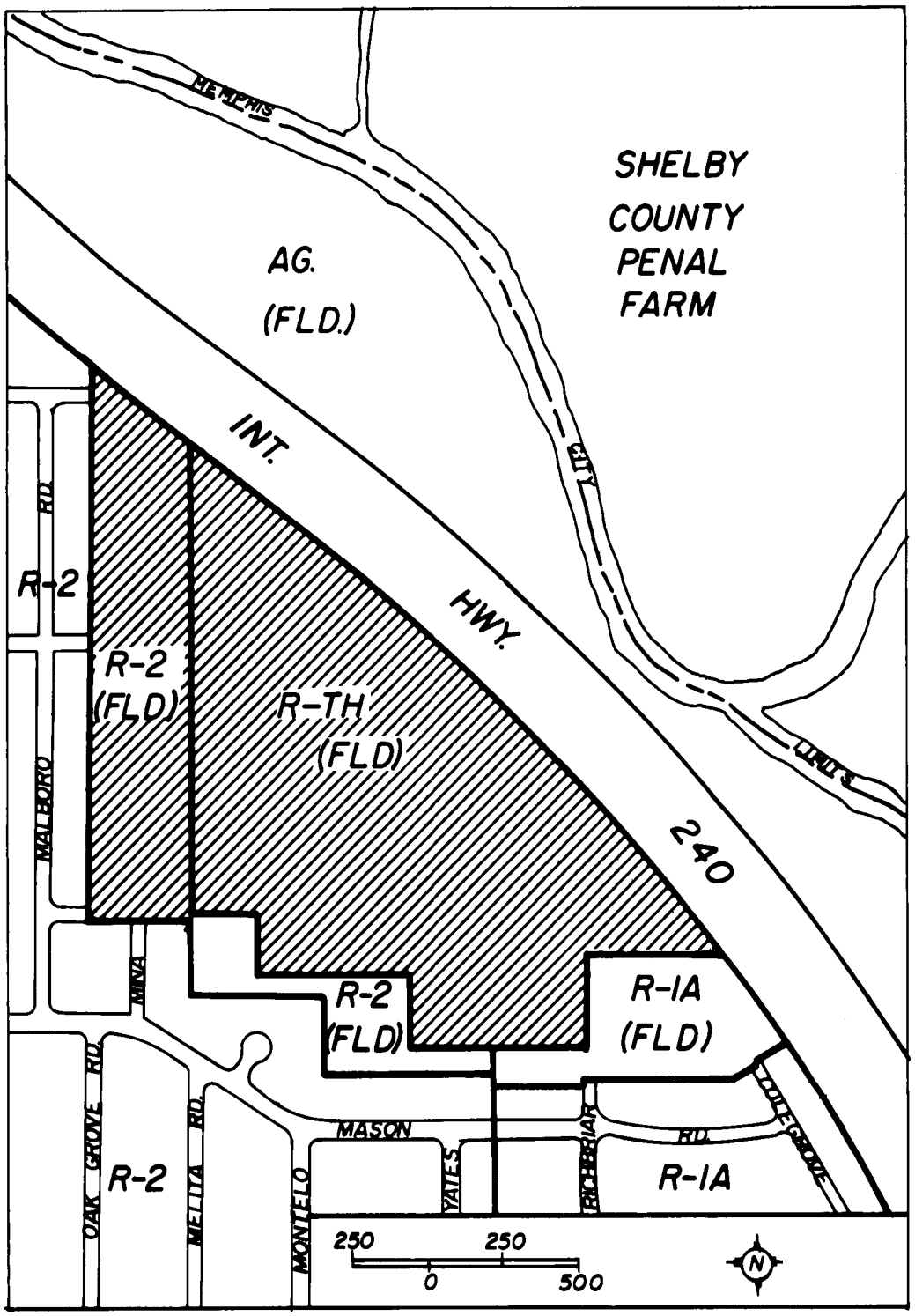


Figure 7. The approved Brandon rezoning proposal.

Source: Memphis and Shelby County Planning Commission.

which the developers claimed it was not. The opposing attorney also tried unsuccessfully to have a 4/5 petition approved, a move which would have put the Council in a position of passing on the application with a better than majority vote.[49] In spite of these objections, the modifications of the developer persuaded the Council, and they voted to approve the amendment and the rezoning.[50]

The process: the second Fogelman application. Because of the approval of the Brandon application by the Planning Commission and the City Council, a second opportunity arose for the reconsideration and possible acceptance of the Fogelman proposal. An attempt had been made earlier by the Fogelman developers to have their property included in the Brandon rezoning, but this was unsuccessful because the proposal was made too late for proper Commission review.[51] However, because of the similarities of the two cases--the characteristics of the property, the rezonings requested--a fresh look at what the Fogelman developers had to offer was warranted.

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[49]The "4/5 petition" is similar to the "20 percent protest" mentioned in Chapter II. It permits the signing of a petition by at least 20 percent of the property owners who face the subject property to the front or to the rear of the property. The petition is presented to the City Council and must be approved by the City Attorney. If approved the Council must pass on the rezoning application by a 4/5 vote of all Council members, and not just those who are present at the public hearing. Memphis, Tennessee, Code of Ordinances (Tallahassee, Fla.: Municipal Code Corporation, 1967), Sec. 28-111.

[50]Memphis City Council minutes, December 21, 1971.

[51]Letter from Hunter Lane, Jr., attorney, Memphis, October 6, 1971.

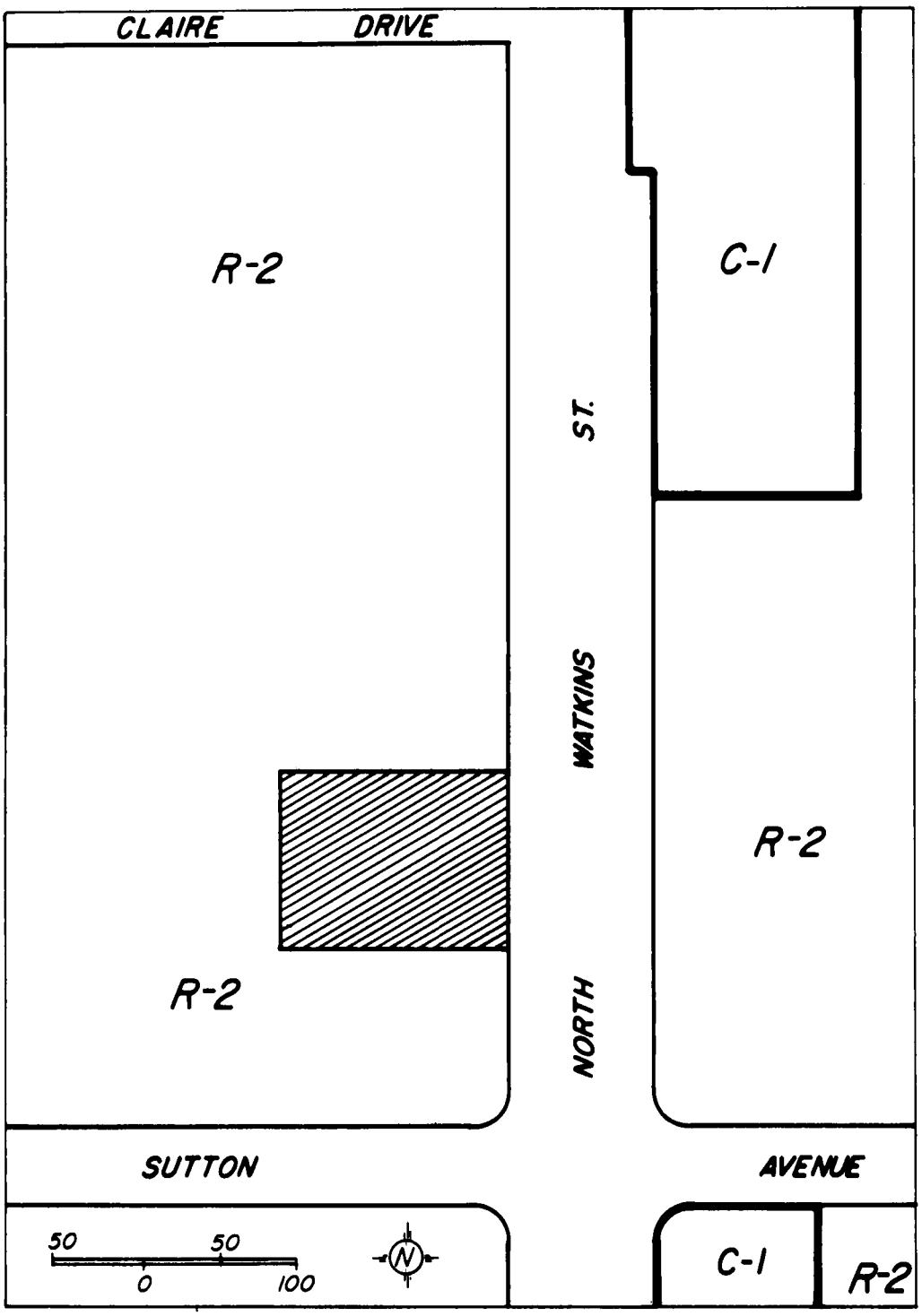


Figure 8. The Yopp rezoning proposal.

Source: Memphis and Shelby County Planning Commission.

He was negotiating a sale with a prospective buyer who wished to construct a small retail fence facility on the property's one-half acre. The property is located on a major thoroughfare in a predominantly residential neighborhood of North Memphis. Other neighboring property uses include a church situated immediately to the north, and two small commercial districts, one to the northeast and one to the southeast, neither of which border the subject property. The remaining properties are zoned for residential use and are adjacent to the property on the east, south, and west.[54]

In August of 1971, the owner through his attorney, made an application for rezoning with the Planning Commission and a public hearing was set for the second week in October. Notices were mailed in the usual manner to the affected neighboring property owners informing them of the proposed change and the time and place of the hearing. The planning staff, in addition to meeting with the developer's attorney, also made a study of the application as a part of its normal procedure.[55]

From the findings of the planning staff, the Commission unanimously rejected the proposal on the grounds that it constituted "spot zoning" and would be an unfair application of the amendment process. The rationale for the decision was based on the fact that "an incongruous

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[54]Memphis and Shelby County Planning Commission, Case No. Z-1898 (unpublished recommendation report, October 8, 1971), pp. 1-2.

[55]Jerry Cook, interview, March 5, 1973.

land use in a coherent neighborhood" would result if the application were approved.

> On one side of the subject property is a single family residence, on the other side a church. To the rear are block upon block of single family homes within the R-2 district. The neighborhood is stable and approval to rezone this parcel will rent its fabric.[56]

The recommendation was referred to the City Council on October 12 and the rezoning was rejected at the regularly scheduled meeting one week later.[57]

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[56]Planning Commission, Case No. Z-1898, pp. 1-2.

[57]Memphis City Council, minutes of City Council Meeting, meeting of October 12, 1972 (typewritten).

CHAPTER IV

PARTICIPANT COMMENTS AND THEIR COMPARISON WITH BABCOCK'S GENERALIZED DESCRIPTION

A. Introduction

This chapter includes an investigation of the roles of the different participants, with particular attention given to their attitudes, their strategies, and their actions concerning the amendment of the local zoning ordinance. Two points of inquiry form the basis of a comparison with the generalized description of the rezoning in Chapter II. First, general comments of the participants are presented, these comments providing some insight into the everyday experiences in the rezoning process. Second, comments of a more specific nature are presented to reveal the character of the participants' roles in each of the case studies.

B. The Participants and Their Comments

The Planner[1]

General participation. Comments of the two planners interviewed revealed both agreement and disagreement with Babcock's characterization

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[1]Planners interviewed were Robert Miller, Principal Planner in charge of the Current Planning (zoning and subdivision regulations) section and Mr. B. Thomas Moore, Principal Planner in charge of the

of the planner and the contention that he lack's a professional identity. First, the planners disagreed between themselves on the stance of the planner. One was of the opinion that he had been trained to do a certain job and, by that fact, was an expert who gave expert advice. Furthermore, those whom he served--the Planning Commission, the City Council, etc.--could simply take that advice, or leave it. In contrast, the other planner felt that he was more of an "artist" than an expert, and that he had the ability to gather information, consult with other participants in the process, and create land development policy through the zoning and land-use plans he developed. In addition, he felt that cooperation with developers and community leaders was very important in the amendment process.

Second, the two planners felt that they were more knowledgeable about planning and development principles than any of the other participants and that they held a "respected place" within the rezoning process. The developers tended to talk about real estate, and the attorneys were too concerned with presenting convincing arguments for their clients and protecting their legal interests. However, the process broke down when the Planning Commission and the City Council placed more emphasis

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Long Range Planning section of the Planning Commission staff. Mr. Miller, with twenty years of experience, has a Bachelor's degree in Real Estate from Memphis State University, while Mr. Moore, with six years of experience, has a Master's degree in Planning from the University of Tennessee.

on the testimony of these "nonexperts" (they often did and still do) than on the technical advice of the planning staff.

The planners did agree with Babcock on the planners' dislike of zoning and his perception of his responsibility. They felt that zoning, with specific reference to Memphis, had become too rigid, and the ordinance itself had become too antiquated. Furthermore, only piecemeal efforts had been made to revise the regulations which often led to crisis situations (such as the Ridgeway case, in which an attempt was made to enact a P.U.D. ordinance). Finally, zoning was too "negative" because it tended to support the "single-family" house as a sacred institution, and was not adjusting to changing tastes in the housing market.

Specific participation. With respect to specific rezoning cases, the two planners expressed common viewpoints in discussing their roles in making planning decisions. The three rezoning case histories all presented situations that called for decisions which, in some cases, differend from those expressed by others in the amendment process. Furthermore, it will become quite obvious that the planner's rationale for making a recommendation was not always accepted by those with decision-making authority.

Throughout the course of the Ridgeway case, the two planners were never convinced that the plan for the executive park as presented by the developers was a good plan, good enough at least to warrant amending the zoning ordinance. The Planning Commission did approve an amended

version of the proposal which called for a less intensive use of the Ridgeway site. However, the planners felt that several problems existed which could not be resolved if the plan were implemented in either its original or modified form.

For one, the potential traffic load was a constant concern of the planners because of the office park's proposed location at the juncture of a minor residential street and a major thoroughfare. The planners could offer no factual evidence which would support this intuition; yet they were convinced that both of these arteries could not be adequately redesigned to handle the predicted peak-hour traffic flows.[2] The developers, on the other hand, felt that the movement of traffic could be efficiently accommodated and were willing to go to great expense to provide the necessary improvements, including a grade-separated interchange. The traffic engineering consultants on the development team were very thorough in presenting figures that substantiated these contentions.[3]

Second, the Planning Commission's adopted "multiple-centers" concept would be adversely affected by the development of the office park on the country club site. The concept was developed so that existing growth

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[2]In a letter from the city traffic engineer to the Planning Commission (June 25, 1971), it was suggested that a need existed for two separate entrances to the project. If these additions were not made, then the plan should be dropped, or reduced in scope.

[3]See n. 12, Chapter III.

trends could be shaped into a pattern of high density commercial-residential centers. Lower density uses would be situated away from these centers, permitting an orderly structuring of residential and commercial activities. The Ridgeway office park would greatly throw this pattern out of balance by establishing a potential growth center in an unplanned location.

Yet the City Council did not perceive the full impact of these objections (if they perceived them at all) because of the Planning Commission's decision to reverse its earlier disapproval of the application. The rationale behind the Commission's decision gave no hint of any staff reservations, but instead implied staff approval. Not only was the planner's technical expertise not relied upon any more than it was, but the planner's ultimate responsibility to good community planning, as he saw it, was secondary to his responsibility to the Commission.

In the Fogelman and Brandon cases, the planners expressed very similar opinions with regard to the traffic and the effect the townhouse development would have on the stability of the neighborhood. On traffic, the planners took the opposite view from the developers, stating that the minor residential streets could not handle additional peak-hour flows and thus could not accommodate both the neighborhood and townhouse development. Again, the planners did not prepare any traffic count figures to support their rationale.[4] And the incompatibility of

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[4]Computations were provided by the opposition in both cases.

townhouses in a single-family neighborhood would not be appropriate land-use policy, because it would help to reverse the trend of single-family development in this section of Memphis.

Using these arguments, the staff was able to persuade the Commission to reject the first Fogelman application. However, the staff was not so successful in the Brandon case and was again placed in the rather uncomfortable position of supporting the application and disregarding its own stated opinions. But what could the planning staff do when this was the standard practice under Commission procedure?

Because of the characteristics of the property and the type of rezoning requested by the developer, the planners favored rejection of the Yopp application. The property was in the midst of an expanding residential area and the development of an incompatible land-use would adversely affect the coherence of the neighborhood. Strictly speaking, it would have been an illegal use of rezoning, the "spot zoning" of property. This attitude was maintained in spite of the fact that, throughout the process, none of Mr. Yopp's neighbors raised any serious objections to the application, although no rousing support was voiced for it either.

The Private Developer[5]

General participation. As was the case in the interviews with the planners, the comments of the developers revealed some agreement with

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[5]Developers interviewed were: Russell Bloodworth, Robert Fogelman, Edward Sapinsley, William Watson, and Mansell Yopp.

the description and Babcock's characterization of the private decision-maker. Developers in the four rezoning case studies all had definite ideas about the rezoning process and the relationships between the different people involved. Consequently, some disagreement with the description was also prevalent.

First of all, the developers, in opposition to Babcock's claim of an "antideveloper" feeling, voiced a common opinion that the reputation of the developer was based more on the quality of the product than the type of product. In other words, the fact that the developer helped to perpetuate sprawling residential development in the 40's and 50's was of no consequence to present-day home owners and city officials. Furthermore, it made no difference whether he was a "residential", or a "non-residential" builder, as Babcock stated. Rather, it was his reputation as a good and dependable developer that was of prime importance.

However, the developer of the office park did agree with Babcock and his contention that single-family home owners did not favor significant changes in built-up neighborhoods and for this reason, they looked with disfavor on multifamily developments, such as apartment or townhouse complexes. As revealed in the characterization, these are the types of residential units the developer is now producing and putting on the market. He also stated that the provisions of the ordinance and how they were applied probably mirrored this feeling, that neighborhood stability should be protected against any and all change. One consequence of this, he observed, was that real estate companies were not able to develop within the central city, but were being forced to

concentrate their activities in undeveloped suburban areas of the county. This, he concluded, has contributed to urban sprawl.

Second, with respect to the process, the developers felt that the manner in which an ordinance was amended was a workable procedure. Overall, hearings before the Planning Commission and City Council were impartial and decisions were made on a fair basis. However, one developer emphasized what he considered to be a severe shortcoming of the planner's role in the procedure. He felt that although the planning staff maintained a basically cooperative attitude, a really effective working relationship was lacking. The staff always appeared to play an adversary role, telling the developers what was wrong with a plan and never suggesting what might be done to improve the proposal. To him the ironing out of plan details in a free exchange of ideas was a very important, yet missing, ingredient to the developmental decision-making process.[6]

Specific participation. Because the process was lengthy and quite complicated, the developers in the Ridgeway case experienced great difficulty in obtaining property reclassification, although the final zoning amendment was not what was originally requested. Consequently, the Boyle-Cook developers held some reservations about the rezoning process and expressed discontent over the planning rationale used to make developmental decisions.

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[6]This provides an interesting contrast to the comments of the two planners, who both felt that the staff was very cooperative with developers.

As would be expected, they both felt that the plan for Ridgeway was a feasible plan, proposed the best use for the property, and would contribute to the economy of the entire urban area. Furthermore, the use of the property would offer a unique working environment which could not be found in the immediate Memphis area (although several office facilities were in existence or in various stages of development at the time the application was made). Finally, the developers were of the opinion that any problems resulting from the construction of the office park, such as additional traffic, could be solved. Consultants hired by the Boyle-Cook group stated that if the traffic load were increased above the design capacity of the existing street pattern (which they said would not happen), then the street could be improved to accommodate the traffic.[7] This would include the construction of a new separated grade interchange at Poplar and Sweetbriar, plus any other improvements that might be called for. The developers furthermore, expressed a complete willingness to pay for these improvements if the city could not afford to do so.

In the Fogelman and Brandon cases, the process of rezoning was not as long, nor quite as complicated as in the Ridgeway case. Testimony supporting or opposing the applications and decisions was made in relatively short order and with little difficulty. However, the sequence of events did present some interesting situations about which the developers in both cases had some definite and enlightening opinions.

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[7]See n. 12, Chapter III.

The developer of the Fogelman property was very confident that his seven-acre parcel would be rezoned for the proposed townhouse development. He felt that the rezoning was justified and that a townhouse complex, properly developed and situated, could fit within the fabric of the neighborhood. Nevertheless, a strong argument from opposing neighbors, coupled with a negative Planning Commission recommendation, resulted in a vote of rejection by the City Council on the first attempt.

As in the Ridgeway case, a principal issue was traffic and how any additional movement generated by the townhouse development would affect the neighborhood streets. The opposing attorney presented a strong argument in recognizing this potential hazard and offered well-reasoned testimony to support his claims. The Fogelman attorney on the other hand, stated that the street pattern within the townhouse complex itself could tie-in with the existing system without any undue stress on the local streets. However, this argument, along with the claim that it would not be feasible to develop the property under single-family zoning, was presented to no avail.[8]

Although he was confronted with similar arguments, the Brandon developer was more fortunate in his rezoning efforts. This may have been due to the fact that he presented a better defense of his project plans and was better prepared (thanks to the lessons of the Fogelman case) to meet any neighborhood challenge. To counter the traffic argument, the Brandon property developer obtained the services of a local traffic

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[8]The planning staff presented no factual evidence to refute the Fogelman claims (nor were they provided in the Brandon case).

engineering firm. The consultant, in presenting some very convincing testimony, stated that the streets in the neighborhood, even though they were residential by design, could adequately and safely accommodate peak-hour traffic loads, including that generated by the townhouses.[9] The opposing attorney, with an over-extended and sometimes belligerent argument, could not match the consultant's expertise in this matter. Thus, the decision was made to grant the rezoning and the way was paved for the second and more successful Fogelman rezoning effort.

The developer in the Yopp case was the least experienced of those interviewed. He was not a land developer by profession, or avocation, and had no plans to develop the property himself. The developer had planned to sell it to one who wanted to construct a retail fence company on the site.

The Planning Commission, based on a staff recommendation that the rezoning would constitute "spot" zoning, rejected the proposal, a decision which surprised Mr. Yopp. At the hearing no one came forward to object, and no one came to him to voice their objections on a more informal basis. Furthermore, commercial uses had established themselves not too far from the subject property, and the developer was confident that his commercial rezoning would be approved. However, the staff had maintained opposition to the proposal and in prehearing discussions with Mr. Yopp's attorney had stated that the neighborhood was too coherent to allow the invasion of an incompatible commercial land use.

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[9]The consultant is a partner in the firm of William S. Pollard, Consultants, a Memphis planning and traffic engineering firm.

The Public Decision-Maker: The Planning Commissioner[10]

General participation. Probably the most interesting interviews for this thesis were conducted with members of the Memphis and Shelby County Planning Commission and the City Council, the two governmental bodies responsible for making local developmental decisions. In their respective advisory and legislative capacities, these appointed and elected lay citizens establish policies which help to guide the community's future development and growth. Consequently, Commissioners and Councilmen have been able to formulate some general, but very strong, opinions about the rezoning process, the parts they play, and how the process affects the overall public welfare.

As was the case with other participants, the interview comments of the Commissioners revealed some interesting comparisons with the description. According to their responses, the Commissioners did express an overall attitude of superiority to the planner and his professional abilities. However, this evidence of superiority was seen in the fact that the Commissioners were concerned more with presenting a "practical" viewpoint that would balance the "idealistic" viewpoint of the planner. The Commissioners felt that as citizens of the community, their overall responsibility was to view each rezoning application from a broad perspective, taking into consideration the viewpoints of all those concerned,

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[10]Commissioners interviewed were: Frank Ahlgren, retired newspaper editor; William Beatty, architect; Mrs. Louise McRae, housewife and wife of a Federal judge; and Elder Shearon, businessman.

including the planner. Babcock's contention, that the planning commissioner felt superior in planning knowledge to the planner, is basically correct; but it should be explained further to account for the commissioner's apparent sense of objectivity in his review of the issues of a rezoning request.

Although one Commissioner believed in retaining this responsibility, the Commissioner was still in favor of improving the overall system. At the time of these cases, the Planning Commission, not the staff, always made a recommendation on a rezoning request directly to the City Council. Regardless of how the staff planners felt in any situation, the rationale of the Planning Commission's recommendation to City Council gave the impression that the staff always agreed with the Commission. This particular Commissioner felt that it would be more appropriate, from a professional standpoint, for the planning staff to present "technical" opinions before the Council in addition to the full recommendation of the Commission. This would allow the legislative body to consider both the "realistic" and "idealistic" sides to any rezoning question, with the Commission retaining its advisory functions.

With regard to the relationship between the Commission, the planning staff and the City Council, it was quite clear that the Commissioners felt the necessity for their contribution to the decision-making process. As was mentioned above, they felt that the technical expertise of the planner should be tempered by the practicality of the lay Planning Commission. Furthermore, if the Commission is to function properly and effectively, they felt it should have more power to make decisions that

could not be easily overruled by the Council or the Board of Adjustment. Thus, in opposition to Babcock's suggestion that the Planning Commission occupies an unnecessary position between the planning staff and the City Council, the Commissioners interviewed felt that their role in the rezoning process should be strengthened, rather than weakened or eliminated.

However, one Commissioner did remark that the Planning Commission public hearings were not always free of the conflicts of interests which often lead to politically motivated decisions.[11] These decisions, reflecting no real planning rationale in many cases, would please those Commissioners, who were biased toward the efforts of developers, or who were connected in some way to the real estate business, and who could be affected by the development of a new apartment complex. The Commissioner, providing no real proof to support these statements, was sure that such decisions were many and that they may have bordered on the unethical.

Specific participation. The general attitudes were reflected somewhat in the specific comments on the three case histories. In the Ridgeway case the Commissioners, with the exception of one, supported the application. They felt that an office park on the Ridgeway site

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[11] This was an interesting comment in light of the fact that the Commissioner was a cousin of the attorney representing the developers in the Ridgeway case. The Commissioner also owned some stock in Cook Industries (although the Commissioner was recused when critical decisions were made by the Commission).

would be an excellent and wise use of the property, providing economic benefits to the city. Because the park would be tailored to office-type functions, with only supporting commercial uses, the Commissioners felt that the Ridgeway proposal did not conflict with the "multiple centers" plan. Secondly, the park, because of location and design factors, offered a unique development not found in other sections of the urban area. And finally, any problems associated with traffic, or the park's proximity to the surrounding neighborhood, could be alleviated to provide safe and adequate service to the area.

These attitudes, for the most part, were repeated in the Fogelman and Brandon cases, except that the Commissioners made a strong case for the developer's inability to develop the property under single-family housing. Newly generated traffic could be adequately accommodated by the existing streets and streets proposed with the construction of the townhouses and apartments. Furthermore, the proposed developments would place once idle property on the municipal tax roles and create additional city revenue.

Regarding the Yopp case, the Commissioners were not able to recall sufficient information to respond to interview questions because of the routine nature of the application and the total lack of public attention surrounding the case. However, the Planning Commission recommendation report stated that the proposal was clearly an attempt at "spot zoning" and could not be permitted under the terms of the Memphis ordinance.

The Public Decision-Maker: The City Councilman

General participation. With respect to their general participation, several members of the City Council provided responses similar to those of the Planning Commissioners.[12] These elected community leaders felt that their concern in rezoning cases lay with their responsibility to consider each case on its own merits and not to base decisions on any one set of facts, or criteria. The planner gave his advice, and it was reviewed with close attention. But the Councilman had more to consider and wanted to decide on each application for what it had to offer.

Yet, while the Council members maintained this rather objective attitude, they were generally in favor of property owners having the right to develop their property to suit their own needs, as long as they did not infringe upon the rights of others. If any participant had the advantage in the rezoning process, it was the developer who should be able to exercise his privilege of ownership. It was up to the planner, the neighboring property owner, and other participants to prove the developer's proposal unworthy of Council approval.

These comments held special interest in light of the fact that the legislative body, since it is politically accountable to the people, is faced by constant outside pressure. The Councilmen related several instances in which the decisions they made were quite unpopular and

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[12]Councilmen interviewed were: Mrs. Gwen Awsumb, housewife; Billy Hyman, businessman; and Thomas Todd, businessman.

which probably resulted in a loss of some constituent loyalty. However, they felt that all sides should be given equal consideration, regardless of how vocal neighborhood residents were, or how influential a powerful developer was.

Specific participation. In commenting on their participation in specific situations, the Council members again provided responses similar to those of the Commissioners. Some familiar opinions were that the Ridgeway proposal would be a sound economic investment; the major traffic problems could be alleviated; and the character of the neighborhood would be enhanced, rather than destroyed, by the development. Furthermore, two of them agreed that an executive office park was not the same as a "multiple center" and, would not conflict with this adopted concept. Judging from newspaper accounts and official records, other council members revealed similar attitudes about the plan for Ridgeway and were more in favor of its approval as the case progressed.

One Councilman did oppose the application throughout the entire process. She felt that the idea for an executive office complex was good and that the concept had potential. However, she sympathized with the opposing neighboring property owners, who deserved protection from the proposed land use. To her, the principal issue was the park's location, which would not be suited to a former country club site in the midst of an upper income residential neighborhood.

In recalling the Fogelman and Brandon cases, the three Councilmen found it rather difficult to remember the issues as easily as they did in the Ridgeway case. However, one Councilman was able to state very

clearly his position during both rezonings and provided some insight into both situations. For one, he revealed a practical attitude when he remarked that the property classified under some high or medium density residential zoning would be more practical, than if it were developed under the single-family units on the property. Furthermore, he didn't think that the additional traffic presented any problem and felt that the townhouse complex would not contribute to the overloading of the neighborhood streets to any great extent.

The remaining Councilmen, also finding it difficult to remember the sequence of events, held rather moderate views on what they could recall concerning the cases. They did vote against the Brandon application, although both expressed no real reason to support or oppose the plan. If any one issue did infouence their negative votes, it was the traffic situation. Unlike their colleague, the two Councilmen were not convinced that additional traffic could be accommodated by the existing street system. Based on the approval of the Brandon request, all three Councilmen voted in the affirmative for the second Fogelman application.

The Councilmen were not successful in recalling the specifics of the Yopp case. As a result of this lack of recall, it was assumed from a review of Council and Commission records that they were not in favor of the application, and were not willing to approve what would have amounted to "spot zoning". The proposed ordinance was read in public session on only two occasions and withdrawn by the applicant before a final decision could be made.

The Attorney[13]

General participation. Because of the very confidential attorney client relationship, the attempt to conduct informative interviews with the lawyers in each of the three rezoning case studies proved to be a very difficult task. This was especially true from the standpoint of trying to obtain the types of information that would be of benefit to this thesis, or to any thorough examination of the rezoning process. Consequently, most of the data resulting from the interview questions was of a general nature, due to the fact that specific situations, or cases, could not be discussed. However, relationships between the attorney's general comments and their documented performance--as recorded in newspapers, Planning Commission reports, and through observations of the other participants--were very apparent.

With regard to their participation in the amendment process in Memphis, the attorneys made comments quite similar to several of those expressed in the description. However, they also expounded on the good features of zoning and rezoning, offering an interesting contrast between the description and the actual roles of those who practice land-use control law.

For one, the lawyers agreed that the property owner possesses a "constitutional right" to develop his property "in the manner in which he sees fit", unless that right interferes with the "public welfare".

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[13]Attorneys interviewed were: Walter Armstrong, Henry Beatty, William Farris, Hershel Feibelman, Hunter Lane, Jr., and Irvin Bogatin.

They, as practitioners of the law, felt their principal function in the rezoning process was to protect this privilege and to insure proper representation of the developer's interests. However, the attorneys also felt that some regulations were necessary and that zoning best fit the need for compatible and well-ordered land development.

Secondly, the lawyers were concerned, as was Babcock, about poor administrative performance of some of the public officials. Procedural due process was not always guaranteed during Planning Commission and City Council public hearings, and as a result arbitrary decisions were often made by Commissioners and Councilmen. Consequently, they saw their role as legal counselor sufficient justification for their participation in the rezoning process.

Only one attorney revealed strong discontent with what was described in the model as the willingness of the Planning Commission and City Council to make decisions based on "popularity", rather than "good policy". Because of the close association of some members of the City Council and the Planning Commission with building and real estate interests, he felt conflicts of interest permeated the public hearings, allowing the developers to maintain the upper hand in any rezoning hearing. It was interesting to note that this attorney represented the losing opposition in the Brandon case.

The attorneys expressed a consensus of opinion when they differed with Babcock's contention that the attorney has contempt for the advisory role of planner and for his professional capabilities. The attorneys felt that the planner was an invaluable part of the rezoning process and

that his advice was always respected. On many occasions when representing a developer-client, they had worked closely with the local planning staff and were pleased with the resulting cooperation. In fact, some wished they could work more closely with the staff in all phases of the decision-making process.

The same attorney who expressed discontent over the atmosphere surrounding the Commission and Council public hearings went so far as to suggest that the role of public officials be reduced and that the planning staff be allowed to make land-use control decisions. The staff was composed of professional people who had the competence and expertise to select courses of action with respect to the proper use of urban land. But more importantly, the attorney remarked that these people are in a position that requires their objectivity, something which a Commissioner, or Councilman, cannot maintain if he has relations with any segment of the real estate business.

In concluding this section, it must be stated that the overall attitude of the attorneys, with respect to rezoning in Memphis, was one of favor, rather than "distaste" as stated by Babcock. Certainly, it was quite evident that they were concerned about such things as the mechanics of the process, correct procedure, and proper administrative performance. And they felt that the ordinance was in bad need of repair. However, they also felt that zoning was, and is, the best available method for controlling land uses in Memphis and that the overall process functioned in an atmosphere of remarkable cooperation among all who

participated, allowing for some measure of fairness and equality in the manner in which final decisions were made.

Specific participation. Whether they represented enterprising developers, or spoke for opposing neighborhood residents, the attorneys played significant parts in each of the three rezoning cases. In these roles, the members of the legal profession contributed much during the entire process, especially during the public hearings before the Planning Commission and the City Council and in development plan discussions with members of the planning staff. By their actions and comments, a comparison with the statements made in the previous section on general participation is possible.

First, the attorneys in both the Ridgeway and Fogelman-Brandon cases appeared to hold the constitutional rights of private property in very high regard. The Boyle-Cook attorney, judging from his attempts at compromise with community officials, planners, and neighboring property owners, was very concerned that his client's property might not be developed under any type of suitable zoning.[14] Because of continued opposition and numerous delays, the attorney was forced to make concessions as to the type of zoning requested and to guarantee the implementation of necessary traffic improvements.[15] The attorney was expanding his role of spokesman for the developer to one of deciding on the strategy to obtain rezoning for the property.

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[14]See Chapter III.

[15]Letter from Walter Armstrong, attorney, Memphis, April 19, 1971.

The same held true for the Brandon attorney, who made extensive efforts to insure some success for his client's venture and who appeared to also act in a strategy role for the developer. Though he was confident that traffic would not overload the streets, he modified the original request to include only townhouse units, thus allowing a decrease in predicted traffic flow. As was stated before, the Fogelman attorney was not so successful, even though he presented similar arguments with considerable emphasis on the hardships in constructing single-family units on the site.[16] He, too, argued that the traffic would not be a problem, but this did not convince the Planning Commissioners.

The attorney representing the opponents of both the Fogelman and Brandon applications was just as sincere in his condemnation of the proposals as his counterparts were in their efforts to successfully represent the developers. To him, the rights of neighboring residents were just as important as those of the property owner and deserved equal protection. Using his own calculations, the attorney vigorously attacked the contention that the development of single-family houses on the subject parcels would be financially burdensome, claiming instead that single-family units could be built without imposing financial hardships on the developer. Furthermore, he too was not convinced that additional traffic would not overburden the surrounding streets and would tend to

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[16]Letter from Hunter Lane, Jr., attorney, Memphis, October 6, 1971.

create unsafe conditions for the neighborhood residents.[17] However, the arguments of the developer's traffic consultant proved to be more convincing.

Secondly, both the Boyle-Cook and Brandon attorneys maintained a close working relationship with professional planners, from the Commission Staff and from a private consulting firm. In fact, one of the country's well-known consultant firms prepared the basic plans for the Ridgeway Office Park and remained an important participant in this development effort, advising the developers and attorneys on important matters related to land-use and traffic.[18] The Brandon attorney depended, to a great extent, on the expertise of a local planning-engineering firm for the basis of the attorney's presentation. On the other hand, the attorney representing the developer in the Fogelman case did not depend on outside professional planning advice other than for basic information from the Planning Commission staff. Due, in part, to this lack of professional planning advice, his efforts may have been hampered in obtaining his client's requested zoning change.

The attorney for Mr. Yopp felt as the others that it was his obligation to protect the legal and property rights of his client in

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[17]One Councilman commented that the opposing attorney became quite belligerent in his attack of the Brandon plan. This, coupled with an over-extended argument, may have swayed, according to the Councilman, some of his colleagues to vote for the application's approval.

[18]See n. 12, Chapter III.

the rezoning process. He had discussed his client's position with the planning staff, but the two sides could not reach an acceptable compromise. He thus disregarded the Planning Commission recommendation against the application, maintaining that the property was suitable for commercial zoning and that it should be granted.

The Affected Neighboring Property Owner[19]

General participation. From a review of the remarks of the neighboring property owners interviewed, it was apparent that their comments tended to be more specific than general. This can be explained by the fact that, with the exception of their involvement in the particular case, the neighboring property owners probably had not been exposed enough to the rezoning process to provide any general comments on rezoning. Consequently, comments were based on their responses to interview questions and their actions in the rezoning cases.

In response to the questions, the property owners generally disagreed with the description which stated that their arguments greatly influenced which way the commission or council voted on a zoning change. To the contrary, they felt that the developer held the upper hand and their own testimony, regardless of validity, did not have much impact on any final decisions. As a result, the process did not allow for fair consideration of both sides in any rezoning case hearing.

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[19]Those interviewed were G. C. Jones, Berkley Kalin, the Rev. Charles Lindamood, and R. C. Wiggins, Jr.

Furthermore, the property owners were of the opinion that members of the Planning Commission (and to some degree, the City Council) were not qualified to make zoning decisions which were too technical for lay citizens to make. Too often the decisions were made, not according to a preconceived plan or a firm planning policy, but based on the political and financial influence of the developer. Consequently, rezonings often lacked a sound planning rationale and were not representative of sound land-use control or good community planning.

However, one affected neighbor (for the Yopp Case) did agree with the principles of the Babcock description. He felt that the rezoning process tended to favor (if anyone was favored) the opponents of the zoning change and that the property owner was often handicapped in his efforts to develop his property. Yet, this was the only fault that he could find with what he considered to be a basically fair and workable process.

Specific participation. Because of the significance of the Ridgeway and the Fogelman-Brandon cases, the neighborhood residents contributed much in the way of vocal opposition. Their remarks, on the whole, displayed a remarkable similarity to the description and to Babcock's concepts, in spite of some apparent inconsistencies.

First, the protesting property owners argued against any change in neighborhood stability resulting from the construction of the proposed projects. In the Ridgeway case, it was the office park, which included commercial and multifamily residential uses. In the Fogelman and Brandon cases, the townhouse and apartment complex provided the focus

for concern and apprehension. In both situations, the opposing neighbors wanted to maintain the character of their single-family residential areas, something which they were willing to protect at all costs.

Second, they argued that the requested rezoning changes would generate additional traffic flow, something which they felt would overtax the existing residential street system and create unsafe driving conditions. These protests persisted in spite of the willingness of the developers to make the necessary street improvements, if these were to be deemed necessary by the Planning Commission and City Council.

With regard to the Yopp rezoning case, a much different situation existed. Throughout the process, no one came forth to offer any argument against the proposal to rezone the Yopp property from residential to commercial usage. In fact, the minister of a church situated to the south of the Yopp property knew of no one who opposed the rezoning or who felt that rezoning residential property in this immediate area to commercial was at all bad. Mr. Yopp was, to say the least, quite surprised when the Planning Commission voted to reject the application.

CHAPTER V

CONCLUSIONS

This final chapter, first of all, includes a discussion of conclusions and observations based on the findings of the thesis research, with particular attention given to the participants interviewed and their comments on the roles they play in the process. Second, an evaluation of the generalized description and its utility in an analysis of the rezoning process is presented. Major topics to be discussed are the generalized description's functional aspects and its purpose as revealed in the thesis.

A. Babcock's Generalized Description Versus Real-Life Situations--Some Conclusions

In providing some insight into rezoning, this thesis was able to indicate several general conclusions about the amendment process in Memphis, Tennessee. Listed below, these conclusions are discussed in detail, with the intention that such discussion will expose some areas of the amendment process which call for serious consideration and which may require improvement.

The Condition of the Rezoning Process

First, judging from the comments of those interviewed, it would appear that the amendment process is not in such poor condition, as

described by Babcock in his narrative. Most of the remarks made were favorable toward zoning and rezoning and reflected a confidence that these processes were performing effectively, efficiently, and equitably. The attorneys, the developers, and the public decision-makers all reacted positively when asked what they thought about the overall existing land-use control structure.

Yet, as some of the participants (the planners providing the most criticism) pointed out, various aspects of the process, especially the "mechanics", are in need of some type of innovative rejuvination. For example, several participants expressed the desire for a P.U.D. regulation (planned unit development) to be included in the Memphis ordinance.[1] This would help to revitalize old machinery and, at the same time, provide a fresh and more flexible approach to the whole process of ordering land-use priorities.

Furthermore, there exists the need to make the Memphis ordinance more responsive to balanced land control throughout the Memphis urban area. The remark that the ordinance was helping to perpetuate urban sprawl sheds some light on the fact that the single-family house on the half-acre lot is still sacred to many homeowners. As a consequence, highly intensive land uses--apartments, shopping centers--are developing in haphazard fashion in areas removed from the city where land is cheap

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[1]The Tennessee General Assembly, at the writing of this thesis, was considering two bills which would establish the necessary enabling legislation for "planned unit developments" in Tennessee.

and people are few. Thus, it becomes unprofitable to develop in the central city, in the transitional and slum areas where such activity is vital and necessary.

A Reevaluation of the Role of the Planning Commissioner in the Developmental Decision-Making Process

In some degree, all of the participants received criticism, with some receiving more than others. However, the interview responses revealed that the criticism of the planning commissioner was by far the most frequent. For one, several of the participants (including one commissioner) felt that effective planning was not enhanced by the position occupied by the Planning Commission in the land-use control process. Because several of its members considered themselves sufficiently well-versed to make proper rezoning decisions, the Commission all too often disregarded the advice of its own professional staff. Staff disapproval of any application never appeared in the Planning Commission's recommendation.

Furthermore, the commissioners placed great faith in their ability to be objective in considering the pertinent issues in each rezoning case. However, several participants expressed the opinion that the Planning Commission, with several members having ties with developers and realtors, was anything but objective. To them, visible conflicts of interest were too numerous to guarantee any form of rational decision-making.

With this in mind, it would be most beneficial to reexamine the functional role of the Planning Commission and to redefine its position

in the decision-making process. One approach would be to strengthen the role of the professional by allowing the planning staff to have more direct contact with the City Council. This could be done by having the staff present its own recommendation, in addition to the recommendation of the Planning Commission.[2] Both the "practical" and the "idealistic" aspects of each rezoning application could then be given equal consideration. Furthermore, a more professional relationship would be established between the planner and the elected public decision-maker, with the Planning Commission retaining its advisory role.

The Private Developer--Friend or Foe?

Finally, what about the long standing attitude of some people that the developer is more concerned with realizing quick monetary profits than he is with producing a good product for the housing market? The respondents frequently alluded to this condition and remarked that they knew of several situations in which the developer appeared to have conducted business in such fashion. However, should this be considered a blanket indictment of all developers? Do they all nourish this "get rich quick" attitude, paying little attention to the quality of their product?

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[2]On October 16, 1972, the City Council and the County Court, in a joint resolution, requested that the planning staff begin submitting a report listing the pros and cons on each rezoning application. The old Memphis City Commission had passed a similar resolution in October of 1967, but the practice of presenting staff pro and con statements was abandoned when the city reverted to the "council" form of government in 1968. The pro and con statements would be presented in addition to the regular Planning Commission recommendation report.

Judging from the interviews with the councilmen and planning commissioners, and the developers, it would appear that the present-day private developer is not necessarily the bad character he once was. There is certainly no argument with the fact that he was unpopular in the 1940's and 50's and that his reputation was based upon very poor performance. However, much of what was said about the private developer in the past cannot be said of him today.

For instance, he has introduced new housing types--garden apartments, townhouses--which have been responsive to changing tastes and preferences. He is also making more extensive use of the advice of consultants--planners, traffic experts, economic analysts, architects--in the preparation of his developmental plans and site designs. And he has established more direct communication with the public planner, as well as other city technical experts. The opportunity thus presents itself for the developer to be used more effectively in the effort to achieve quality land development.

B. Babcock's Generalized Description and Its Utility in an Analysis of the Rezoning Process

Functional Aspects of the Generalized Description

The generalized description revealed both good and bad features with respect to its effectiveness as an analytical tool. For the most part, the convenience of the description's basic framework, which listed the participants in the rezoning process and defined both their intended and actual roles, fostered a close look at the relationships between

those involved in the making of developmental decisions. In addition, the generalized description clearly expressed the problems that the participants continually encounter as they try to fulfill their particular responsibilities in the process.

But more important, the use of Babcock's generalized description made for good comparisons with the real-world situations depicted in Chapter IV. Admittedly, the description is simple and does nothing more than describe the rezoning process as it does function. Nevertheless, a clear picture is drawn giving some indication of how Babcock views the state of amending the zoning ordinance.

Interviews conducted on the basis of the generalized description were not entirely successful. Standardized questions were prepared, some of which were designed for all of the participants and others which were asked according to the participant's particular function in the process. During an interview, a participant might answer a question to such an extent that he would touch upon questions that had not been asked. Consequently, most of the interviews were conducted in a conversational-type manner, with several topics being discussed at one time. Much valuable information was obtained from these interviews which proved useful to the thesis.

Second, it must be pointed out that some of the subjects discussed, because of their nature, did not allow for complete or adequate answers. For instance, the Yopp case was so insignificant compared to the other three cases that those participants interviewed had difficulty recalling the pertinent issues and events. Thus, their answers provided little in

the way of vital information, and written records from various sources had to supply, if possible, the conclusive data.

The Purpose of the Generalized Description

Overall, the generalized description provided a fairly accurate picture of the rezoning process in Memphis. The description pinpointed several areas of the rezoning process which Babcock insists are in need of reevaluation and possible improvement. The various aspects of the ordinance machinery, the unpopular stance of the planning commissioner, and the "strained" relationships between some of the participants were all indicated as areas for consideration.

Of course, specific situations may not correspond to the generalized description, and many of Babcock's concerns may not exist. For example, in Memphis there was no indication that the "residential-nonresidential" bias exists with regard to the developer and his reputation, which arises from the much larger conflict between central city and suburban dwellers. Neither was there an unfriendly relationship between the attorney and the planner, at least on a professional basis. Yet, the theme of the generalized description, and of The Zoning Game, is universal and can be applied to other situations and contexts as well.

It is clear that the generalized description captures the flavor of the rezoning process as presently practiced in the United States. But of greater importance is the fact that Babcock, in his description and in The Zoning Game, is sounding the call for reform of many facets of the land-use control process. There are many problems and they must be

alleviated if zoning (and rezoning) is to be a viable and effective instrument in the developmental decision-making process.

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APPENDIX

TABLE I

SUMMARY OF RESIDENTIAL ZONING DISTRICTS
FOR MEMPHIS, TENNESSEE*

Zoning Districts	Use Regulations	Lot Area Per Family
R	Single-family residences, churches, libraries, museums, parks, country clubs, etc.	15,000 sq. ft.
R-1	Single-family residences, churches, libraries, museums, parks, country clubs, etc.	10,000 sq. ft.
R-1-A	Single-family residences, churches, libraries, museums, parks, country clubs, etc.	8,500 sq. ft.
R-2	Single-family residences, churches, libraries, museums, parks, country clubs, etc.	6,000 sq. ft.
R-3	Duplexes	6,000 sq. ft.
R-TH	Townhouses	3,500 sq. ft.
R-3-A	Garden-type apartments, day-care nurseries, etc.	9,000 sq. ft. for 3 unit bl. plus 2,500 sq. ft. ea. additional unit
R-4-A	Multiple dwellings, day-care nurseries, etc.	9,000 sq. ft. for 3 unit bl. plus 1.750 sq. ft. ea. additional unit 1-2-3 story
R-4	Multiple dwellings, beauty shops, clubs, institutions, nursing homes, hospitals, etc.	9,000 sq. ft. for 3 unit bl. plus 1,200 sq. ft. ea. additional unit

TABLE I (continued)

Zoning Districts	Use Regulations	Lot Area Per Family
R-4-P	Same as R-4, plus customer parking	9,000 sq. ft. for 3 unit bl. plus 1,200 sq. ft. ea. additional unit
R-5	High density multiple dwellings	9,000 sq. ft. for first 3 units plus 500 sq. ft. ea. additional unit
R-5-P	Same as R-5, plus customer parking	9,000 sq. ft. for first 3 units plus 500 sq. ft. ea. additional unit
Community Unit Plan	Planned residential (10 acre minimum)	Same as for any zoning district

*From the Memphis and Shelby County Zoning Regulations.

TABLE II

SUMMARY OF COMMERCIAL ZONING DISTRICTS
FOR MEMPHIS, TENNESSEE*

Zoning Districts	Use Regulations
SC-1	Planned shopping center--retail stores, offices, hotels, motels, service stations, etc.
C-1	Neighborhood shopping--retail stores, offices, service stations, etc.
C-2	General retailing and service facilities
C-3	General retailing and service facilities
C-4	Central business district--commercial and light industrial

*From the Memphis and Shelby County Zoning Regulations.

TABLE III

SUMMARY OF OFFICE ZONING DISTRICTS
FOR MEMPHIS, TENNESSEE*

Zoning Districts	Use Regulations
O-1	Single office
O-2	Offices, banks, barber and beauty shops, business schools, etc.

*From the Memphis and Shelby County Zoning Regulations.

VITA

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