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Contents

Basketball season is over, but the memory lingers on. This month's cover shot shows the Tar Heel pep band at the ACC tournament in the Greensboro Coliseum. Photo by Carson Graves.

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The Role of State Government in Regionalizing Water Supplies

By Milton S. Heath, Jr.

. . . 1,782 known "public water supplies" (a supply providing potable water to 10 or more residences or businesses).

. . . Only 18 of these public water supplies serving populations greater than 25,000 each (and 1,450 of them serving less than 1,000 persons each).

. . . Very small water supplies increasing at the rate of 24 per month during the past four years to meet demands of suburban growth and population clusters, such as mobile home parks.

This is a thumbnail description of the public water supply situation in this state as of June 1, 1970, and it is very much like the situation in much of the United States. It is a source of growing concern for water supply experts.

Why Regionalize?

The problems associated with too many small water supply systems were summarized in a recent report of the North Carolina Legislative Research Commission:

(1) Small supplies are often inferior to supplies serving larger communities with regard to adequacy of source, facilities, and quality. Few small systems provide treatment. Most have too few customers to be able to afford a qualified operator.

(2) Small systems are installed mainly for domestic use, usually without thought of adequate fire protection or further extension into surrounding areas. Most small systems have limited capacity, and distribution lines are restricted to small pipe sizes. Thus, these systems cannot be easily expanded to meet the demands of population growth or assimilated into neighboring regional systems.

(3) The continued proliferation of small supplies makes it exceedingly difficult for state regulatory agencies to maintain adequate surveillance over service and the quality and quantity of water supplies.

(4) Lack of ample source and storage facilities make small supplies particularly vulnerable to water shortages.

(5) Small communities must pay considerably more per capita for limited service because they build and operate on a small scale and because their financial resources and ability to borrow are limited.

(6) Ownership of many small systems is in the hands of real estate developers, whose interest terminates with the sale of lots served by the system, with no assured permanent responsibility. Closely related is the problem of water supplies for mobile home parks, whose owners may be tempted to spend as little as possible on the system, and whose supplies are often inadequate and of poor quality.

Many of these chickens have been coming home to roost lately. Some have even landed on the shoulders of politicians. Legislators and executive officials are hearing many complaints from irate homeowners and mobile home residents about their drinking water.

A paper delivered at a seminar on regional water supply in Harrisburg, Pennsylvania, November 18, 1970, sponsored by the Pennsylvania Department of Health. The author would like to recognize the contributions of Marshall Staton and John Faulkner of the State Board of Health, and Dan McDonald of the State Department of Water and Air Resources to the ideas expressed in this paper.

The author, the Institute's associate director, works extensively in the field of water resources.

Preliminary Action

Thus, official North Carolina is coming to recognize that there is a problem—to wit, we have many too many small and ineffective water supply systems and too few large, efficient systems that are truly regional in scope. Having recognized it, we have started doing some things about the situation.

At the planning and operating level in state and local government, some action has already been taken. Thus, one small county (Anson) has already established a working county water system, and others are seriously considering doing so. Some of the larger cities—such as Charlotte, Winston-Salem, Greensboro, and Asheville—have worked in various ways with outlying areas and county governments for coordination or integration of water supply and distribution facilities. An important study made by private consultants with federal and state assistance in the Appalachian region has produced a plan for "corridor development" of water and related utility systems. A substantial conference has been sponsored by the UNC Water Resources Research Institute to explore problems of small water systems. Interagency studies on local and regional water supplies have been under way for at least a year among the affected state agencies (primarily the Department of Water and Air Resources, the State Board of Health, and the State Utilities Commission).

The Department of Water and Air Resources has worked diligently for years to exploit federal resources, primarily by building water supply storage into multipurpose federal reservoir projects. It has simultaneously promoted the necessary local and state cooperation in these measures, including the adoption of necessary implementing state legislation. The Division of Sanitary Engineering of the State Board of Health has set as major long-range program goals the strengthening of regional water supply systems and the effective control of small local systems. Several research projects are under way at the University of North Carolina at Chapel Hill concerning the planning and management of regional water and sewer systems. And finally, a study of the subject by an interim legislation research committee was initiated early this year. The committee has held its hearings, in which it heard from a good cross-section of the affected group, and just recently completed its report with recommended legislation.

Findings and Recommendations

The North Carolina legislative study group reports three basic findings:

- First, the number of existing systems and the rate of increase of small systems must be brought under control in order to have proper planning and management of water supply systems and to make adequate state surveillance of such systems feasible.
- Second, the other side of the coin is that we must build up more regional water supplies, with adequate interconnections. This does not mean the end of all local systems. It simply means that our traditional concept of local autonomy in public water supply development should give way to a concept of regional development through cooperative local efforts. The initial step toward developing more regional systems will of course be a new emphasis on regional *planning*.
- Third, state leadership and financial support will be required to help regional water supply systems.

To carry out these findings, the study group has recommended to the 1971 legislature the enactment of four bills.

Bill number 1 would carry out the recommendations to control the proliferation of inadequate small systems and set minimum standards for all systems. To do this, the bill would give the State Board of Health the authority to require stricter design standards, including pipe sizes large enough to interconnect with regional systems; disinfection of all supplies (which indirectly requires a certified water plant operator); preparation of system plans by a licensed engineer; arrangements, such as a performance bond, to insure developer responsibility; and coordination of all small systems with nearby large systems and with land-use plans.

Bill number 2 would establish the framework for the state's role in encouraging the development of more large regional systems. The forepart of this bill would allocate the state functions involving regionalization among the several state departments that are concerned with the subject. (This is no easy task, but so far North Carolina has had fairly good luck in arriving at a consensus.) The remainder of this bill relates to state financial assistance to localities to encourage regionalization of water systems. As a starter, a state revolving fund is being proposed to assist local and regional governments with comprehensive planning for regional systems, through advance loans for planning and engineering costs, repayable only if the system proves feasible.

Bill number 3 is an appropriations bill to provide initial funding for the new program. (Actually, it is divided into two bills—an $800,000 appropriation to the revolving fund and a quarter-million-dollar appropriation to provide the additional state staffing that will be immediately needed to enter upon the new regionalization efforts. In the near future these personnel will be involved mainly in identifying areas for regional systems, in coordinating local activities, and in reviewing applications for planning advances.)

Bill number 4 is addressed to the subject of diversion of water between river basins or watersheds. This bill would authorize the Board of Water and Air Resources to grant administrative approval for transbasin diversions under appropriate safeguards to *any* public

water supply system serving regional needs. Without this statutory authorization, such diversions might be subject to question at common law. (This proposed bill would not make new policy, however, but would merely extend existing policy that permits diversions to be administratively approved for water authorities and joint systems of two or more cities or counties.)

It is possible that another bill will be developed dealing with some legal tag ends, such as ensuring that all public water supply agencies have all necessary authority to furnish "outside service" and to maintain water system facilities outside their boundaries. (Since this is a question of interest mainly to bond counsel, the study committee has simply asked them to offer their suggestions on this score.)

Another legal issue that the study committee dipped into is the matter of ensuring that water supply agencies can obtain access to developed reservoirs. North Carolina, like many states, has some case law that precludes recondemnation of land that was previously acquired by eminent domain, including reservoir lands owned by electric power companies. This has proved to be an obstacle to some municipalities in bargaining with power companies for access to their reservoirs. The study group wanted to see what power company reaction might be, so it put out a feeler on the subject in the report. What it got might be called a mixed or "muffled" response, and the study group has put this question on the list for future study.

Prospects

The prospects for most of this legislative package appear to be good. The proposals have been thoroughly screened by a legislative study subcommittee on regional water supplies, then by the parent Committee on Water and Air Resources, and finally the Legislative Research Commission. The affected state, local, and private interests have had a crack at the package. And, generally, we have going in North Carolina a good momentum for environmental management and conservation legislation.

Some aspects of the program may provoke legislative debate. For example, as the study commission hearings show, the diversion issue and the related matter of access to developed watercourses for public water supplies may be contentious. For one thing, legislation on these subjects has the potential for affecting the location of regional economic development. (An effort has been made to meet this issue in the proposed bill by limiting the diversions that may be approved to diversions of stored waters.) For another, we lack adequate institutions and processes for meshing the *private* development of water power or steam electric generating sites in conjunction with other purposes, such as water supply. The Federal Power Commission has made some progress on this "joint use" problem with respect to new license applications. But procedures are lacking with respect to the many existing licensed water power projects, and neither FPC nor any other agency has jurisdiction over steam electric cooling ponds. This is a problem that would profit by attention, and not only in North Carolina. Also, objections have been raised to the small-system bill by some developers.

Broader Questions

Leaving the North Carolina experience, I should like to move on to some broader and larger questions.

North Carolina is a fairly large state in area but is only moderately developed in population, typified by small and medium-sized cities and towns. It does not have the full range of problems of more heavily developed regions—or even of a state that has just one major metropolis.

The difference between North Carolina's situation and that of the more developed areas is illustrated by two excerpts from a report by the late Gordon Fair, who was dean of the faculty of engineering at Harvard, on the subject of regional water supply in Europe.

First, a passage concerning England:

"By 1944, England and Wales had been provided with no less than 1226 waterworks. After contending with the many insufficiencies of this multiplicity of works during the Second World War, Sir George McNaughton (1893-1966), then Chief Engineer of the Ministry of Health and later also of the Ministry of Housing and Local Government, advised his Minister to seek the regrouping of these supplies into more nearly optimal units. On the basis of a *White Paper* entitled 'A National Water Policy,' which had the support of the engineering profession and the water industry, it was suggested that existing works which were then serving average populations of only 40,000 be combined into more nearly optimal service areas of 300,000 people or more. By 1966, regrouping had almost been completed. The number of works had been reduced to 322 not only inherently more economic units but units also capable of providing piped water to large numbers of additional dwellings and industries brought within reach of regional water mains. Primarily responsible for this areally more intensive and extensive service capability was the tying together and general integration of formerly separate, though neighboring, networks. In percentage of population provided with piped water, the United Kingdom, as a result, approached the 98.2% figure soon to be set also by the Netherlands.

"Understandably, the regrouping of water-supply systems in England and Wales was bound to present opportunities for better as well as more economic waterworks management while strengthening safeguards against water shortages, systems outages, and water-quality

deterioration. As a part of a national water policy, moreover, regrouping opened the way for the long-range planning of river and groundwater basin developments and for the long-distance transmission of water supplies through existing natural as well as added engineered channels. As a part of an overall national plan, finally, the regrouping of waterworks facilitated a long-range determination of (1) where the natural beauty of normally water-rich and scenic areas of considerable size could be conserved more effectively for recreation, (2) where residential amenities could best be protected, and (3) where commercial and industrial complexes could most economically maintain or seek out favorable location or relocation."[1]

Next, a passage concerning Holland.

"The regional water supply of the Province of Friesland is of interest for its technological as well as its social innovations. Among pioneering accomplishments in the construction, operation, and management of the works are (1) the use of large-diameter plastic pipes and the conjoining and bending of full-length plastic *sag pipes* (or inverted siphons) in the pipe yard and their transport to points of laying, a requirement of common occurrence in a countryside replete with drainage canals; (2) the replacement of hand operations such as the starting of pumps and turning of valves; (3) the instrumentation of transmission lines and networks for the monitoring and recording of flows at central command posts; and (4) the economic combination of mechanization and instrumentation in effecting the fullest possible automation of a regional waterworks system. It can be said with truth that today Friesland so operates its supply that waterworks operatives, rather than tending individual pumps, strategic valves, and other pieces of equipment in large numbers and at widely separated locations, instead issue required commands from central control points by push-button. Machines and monitoring instruments replace large numbers of men, while men in small numbers operate the machines and instruments, and replace or repair those control devices that on occasion malfunction.

"Interesting social innovations of the Frisian complex are (1) the elaboration of the system in such fashion that the goal of *piped water for all* can be reached and justified economically and (2) the introduction on the off-shore Frisian islands of off-peak charges for water drawn during the night hours, when rates of demand are normally low, and stored for use during the day, when rates of demand are normally high."[2]

These European illustrations open new dimensions concerning regional water supply systems. One obvious dimension is temporal, a time dimension: England, for example, when it *began* its regrouping effort after the war, was probably more regionalized than an area like North Carolina will be after it has had some years of experience under its proposed regime. Another dimension is *political:* the developed European nations have long since passed the time when a single local government—even a major metropolis—could handle its own supply and transmission facilities independently. The authorities and districts that we in North Carolina rejoice in avoiding are an established fact of life and serve valuable purposes to supplement the municipal distribution operations. The European experience points to the necessity, in developed areas, of interregional, interprovincial, and even international arrangements and institutions to facilitate water supplies.

A great deal of thought is being given in professional circles to various approaches to the provision of water, and it merits the consideration of those who are planning for the needs of the largest metropolis or the development of a state. One idea, once discarded but now gaining favor, is a dual system, providing drinking water and water for other purposes.

Another political dimension raised by Fair is the question of the respective roles of state and national governments in such matters as protecting residential amenities and conserving areas of natural beauty. These are issues that surely need to be explored in depth in the comprehensive plans of state governments in a developed area—or even a developing area.

In conclusion, the North Carolina experience suggests that all or most state governments may appropriately undertake certain functions to facilitate regionalization, to wit:

1. The state may attempt to set standards that will help to control the spread of too many small and inefficient systems.

2. The state may move positively to encourage regionalization of water supplies in a variety of ways. These might include:

(a) Participation by state agencies in planning for regionalization—for example, by identifying appropriate areas for regional systems, and by providing planning assistance to localities. If the state agencies are not staffed for this purpose, this of course requires that staffs be secured.

(b) State coordination of local planning and development.

(c) State financial aid to localities for planning, engineering, and developing regional systems.

(d) State review of its legal structure for the purpose of eliminating or reducing legal barriers to regional enterprises. The diversion and access issues that I have mentioned are examples in point. (Of course as one moves into more advanced stages of regionalization, other such issues will emerge—such

(Continued on Page 8)

1. Gordon M. Fair, "A Study of Regional Water Supply in Western Europe" (unpublished manuscript, Harvard University, 1969), pp. 7-8.

2. *Id.* at 12-13.

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John Doe Goes to the Small-Claims Court

By Donald W. Stephens

If someone owes you $50 and refuses to pay, although he has the means to do so, what will you do? Keeping in mind the usual legal fee[1] required to have an attorney handle this matter, will you classify it as an expensive but educational experience and forget it, or will you take legal action to enforce your rights? By using the small-claims procedure, you could obtain judicial relief quickly and inexpensively. The notion that people do not use this device to enforce their right to trifling sums is largely disspelled by a recent report[2] of North Carolina's Administrative Office of the Courts. To the contrary, over half of the civil cases handled by the district court division of the General Court of Justice are "small claims." In 1969, 20,692 civil cases were brought to final disposition in the superior court division and 93,734 in the district court division.[3] Of these, 46,869 were "small claim" actions disposed of by a magistrate, which indicates that over 40 per cent of the civil cases in this state involve matters of less than $300 and that the small-claims magistrate tries more civil cases than any other judicial official.

A small-claim action is defined by the General Statutes[4] as a civil action wherein: (1) the amount in controversy does not exceed $300; (2) the only principal relief sought is monetary, or the recovery of specific personal property, or summary ejectment, or a combination of these; and (3) the plaintiff has requested assignment to a magistrate.

FOLLOW WITH ME, if you will, a typical small-claim action. Our plaintiff will be a merchant, E-Z Credit Retail Store, since merchants tend to use the small-claim procedure more than others. Our defendant will be John Doe, a lower middle-class North Carolinian.[5] Mr. Doe takes advantage of the easy credit that the plaintiff offers, though its merchandise is of doubtful quality, and often buys various household items and toys for his children there. E-Z Credit keeps an account of Mr. Doe's purchases and allows him to pay monthly as little as 10 per cent of the current balance of the account. Caught in the middle of spiraling inflation and emergency medical treatment for one of his children, Mr. Doe becomes delinquent in making payments on his account, the current balance of which is $50. E-Z Credit will probably take the following course of action.

1. North Carolina Bar Association, **Advisory Handbook on Office Management and Fees** (1970), recommends a fee of at least $25 to collect a $50 debt through a small-claim action.

2. **Annual Report**—1969, Administrative Office of the Courts—Judicial Department, State of North Carolina; submitted to the Chief Justice pursuant to N.C. G.S. 7A-343.

3 The statistical data for civil cases in the District Court Division covers only those 83 counties under the new district court system during 1969. See N.C. Gen. Stat. §§7A-131, -133.

4. N.C. Gen. Stat. §7A-210. The law relating to small-claim actions is found in Article 19, Chapter 7A of the General Statutes.

5. The mythical Mr. Doe recently viewed the criminal side of the District Court Division in an article by District Court Judge Phil Carlton entitled "John Doe Through the Looking Glass; or A Journey Through The District Court System," **Popular Government** (October, 1970).

Filing the Small-Claim Action. After unsuccessfully coaxing Mr. Doe to satisfy his obligation, E-Z Credit will attempt to hold him to his bargain through court action, using the small-claim procedure, since it is swift[6] and inexpensive[7] and will not require an attorney's services. If E-Z Credit has gone through this process before, it will no doubt have blank copies of the necessary forms[8] available through the office of the clerk of superior court. Since the clerk of superior court serves as the clerk of the district court, all civil actions in either division must be filed in his office before the action is begun. E-Z Credit files its complaint in the clerk's office. The clerk, normally under authority of a written order from the chief district judge, assigns the action to a magistrate for trial and issues the magistrate's summons. The action must be assigned to a magistrate who is a resident of the county where the defendant lives.[9] E-Z Credit, after paying advance court costs of $5, will carry the complaint and summons to the county's sheriff, to whom it pays a $2 service of process fee. The sheriff thereafter serves the copy of the plaintiff's complaint and the magistrate's summons on the defendant, if he can be found within the county.[10] When process is served[11] on the defendant, E-Z Credit will receive notice of the time and date of the trial, as will the magistrate. If personal service cannot be made, the action will normally be dismissed.

The Defendant's Response. The law does not require that Mr. Doe make any response to the allegations of the complaint, nor must he be present at trial in order for his rights to be protected.[12] If Mr. Doe chooses not to make any written answer, his silence is deemed a general denial of the complaint's allegations. This means that E-Z Credit must appear at the appointed day and hour and prove them; default judgments are not authorized. If E-Z Credit fails to show up for the trial, or fails to establish that Mr. Doe owes $50, the magistrate will dismiss the case.

6. N.C. Gen. Stat. §7A-214 requires that the trial take place "not later than 30 days after the action is commenced."

7. N.C. Gen. Stat. §7A-305(1) sets the facilities fee for cases heard by a magistrate at $2.00. The facilities fee for civil cases heard by judges of the trial divisions is $5.00.

8. The Administrative Office of the Courts supplies the clerks with forms that comply with those set out in G.S. 7A-232.

9. N.C. Gen. Stat. §§7A-211, -213.

10. Article 28, Chapter 7A of the General Statutes, sets uniform costs and fees statewide.

11. G.S. 7A-217 requires either personal service or service by certified mail, return receipt requested. In summary ejectment cases service as authorized by G.S. 42-29 is permitted. This often results in "service by nail," by which a copy of the complaint and summons is simply tacked to the leased premises by the sheriff.

12. N.C. Gen. Stat. §§7A-218, -222.

The pleading of either party (complaint and answer) is not required to be in any particular form. It need only enable a person of common understanding to know the nature of the claim or of the defense.[13]

The Trial. The trier of fact in a small-claim action is the magistrate, a judicial officer of the district court division. He has been nominated for office by the clerk of superior court of the county of his residence and appointed to his two-year term of office by the senior regular resident superior court judge of his district.[14] In addition to his civil functions, a magistrate issues search and arrest warrants, accepts guilty pleas to some traffic offenses and minor misdemeanors, and performs other quasi-judicial functions assigned to him by the chief district judge.

At this point in our hypothetical case, the complaint has been filed, the action assigned, and the summons issued and served on the defendant. The magistrate has notice of the nature of the claim and the time set for trial. If a written answer has been filed, all are aware of its contents. If Mr. Doe chooses, he may pay the debt before trial, along with court costs that E-Z Credit has paid in advance, and the case will be dismissed. If not, the case comes on for trial. The trial before the magistrate is without a jury. The rules of evidence applicable to the trial of civil actions generally apply.[15] The plaintiff presents its evidence, which in our case would be a copy of its records indicating a balance of $50 due on the account of John Doe. Normally someone familiar with the business's accounting records, probably the bookkeeper, would testify that the copy offered into evidence is an accurate statement of the amount owed by the defendant. The defendant is allowed to cross-examine the plaintiff's witnesses, as Mr. Doe would no doubt do to challenge the accuracy of the account if he denied owing $50. After the plaintiff's evidence has been presented, if he has failed to establish a prima facie case, the magistrate may dismiss the action. If there is no dismissal, the defendant will present his evidence. After he has done so and the plaintiff has had an opportunity to cross-examine, the magistrate will weigh the evidence presented and render a judgment. He may, in his discretion pursuant to G.S. 7A-222, reserve judgment for ten days. This is

13. N.C. Gen. Stat. §§7A-216, -218.

14. N.C. Gen. Stat. §7A-171. See G.S. 7A-273 and G.S. 7A-292 for functions of the magistrate other than trying small-claim actions.

15. N.C. Gen. Stat. §7A-222.

normally done when the magistrate is uncertain on a point of law and needs more time for legal research.

Judgment and Appeal. The magistrate's judgment has the same force and effect as any other civil judgment of a trial division. Pursuant to G.S. 7A-224, the clerk of court records and indexes this judgment with all other judgments of the trial divisions. The judgment can be executed upon immediately, whether or not one of the parties appeals. In our case, if a money judgment of $50 was rendered by the magistrate in favor of E-Z Credit and John Doe did not pay the amount of the judgment, E-Z Credit could execute upon the judgment by having the sheriff seize some of John Doe's property, sell it at public sale, and satisfy the judgment from the proceeds of the sale. If John Doe wishes to appeal the decision of the magistrate, he may do so; however, in order to keep the plaintiff from executing on the judgment during the period of appeal, he must give an appeal bond.[16]

G.S. 7A-228 authorizes either party to appeal the judgment of the magistrate for a new trial in the district court. Notice of appeal must be filed within ten days after entry of judgment. Either party may request a jury for the new trial in the district court.

FROM THE FOREGOING SAGA of John Doe, the small-claims court may appear to be a collection agency for rental agents, merchants, and other commercial institutions. It is not. Available to all, this small-claim procedure favors the public in general. It can be used as a sword or a shield by consumer and merchant alike. The philosophy behind establishment of the small-claim procedure is to enable members of the public to settle minor civil matters without the added time and expense of the normal trial. If this system did not exist, often many of these disputes would never reach any settlement.

When consumers become aware of the possibilities of this procedure, they will no doubt use it more as a method of consumer protection. For example, suppose our John Doe had purchased a new television set on credit from E-Z Credit and the set after a few weeks failed to work at all. Mr. Doe could simply refuse to continue payments. If E-Z Credit sues via the small-claim procedure, Mr. Doe can present his affirmative defenses of failure of consideration and breach of implied warranty at the trial. There is no longer any mechanism by which the plaintiff could acquire a judgment against Mr. Doe without first giving Mr. Doe an opportunity to be heard by a judicial officer.[17] If Mr. Doe had paid cash, the set did not work, and E-Z Credit refused to fix it or replace it, he could use the small-claim procedure to sue E-Z Credit for breach of contract.

FOUR TYPES OF ACTIONS may be brought before the magistrate for disposition: contract, tort, summary ejectment, and actions for possession of personal property. Usually an attorney is involved in less than 10 per cent of these cases, and two out of five defendants will probably fail to appear. Over 85 per cent of the defendants are likely to suffer an adverse judgment, regardless of whether they appear.[18]

Contract Actions. Statewide, approximately 45 per cent of the small-claim actions brought are likely to be actions to enforce payment on a past-due account, to enforce a contract for goods sold and delivered or services rendered, or to enforce a contract for money lent and not repaid.

Tort Actions. Statewide, only about 3 per cent of the small-claim actions are likely to be brought to enforce principles of tort law. Normally these will be either minor automobile negligence cases in which the property damage does not exceed the deductible limits of the parties' insurance policies or cases involving conversion of personal property.

Summary Ejectment. Statewide, approximately 35 per cent of the small-claim actions are likely to be brought by landlords to have their tenants evicted for failure to pay rent, for holding over after the term of the lease has expired, or for breach of some condition of the lease.[19] If the action is for failure to pay rent and the tenant pays the past-due

16. N.C. Gen. Stat. §§7A-225, -226, -227. An appeal bond terminates the plaintiff's right to immediately execute the magistrate's judgment. However, the bond is a guarantee by the surety of the defendant that should the plaintiff suffer damages because he was unable to execute upon the judgment immediately and should the plaintiff prevail on appeal, then the surety will accept liability for the damages.

17. G.S. 7A-176 abolishes the magistrate's predecessor, the justice of the peace. The initials "JP" had often been synonymous with "Judgment for the Plaintiff."

18. These statistics come from an empirical study undertaken by the writer in 1969 to gather information on how the small-claim procedure was working. An eight-page questionnaire was mailed to 330 magistrates in the 83 counties where the district court had been established; 240 questionnaires were returned. The results of the study were reported to the North Carolina Courts Commission in May of 1969.

19. N.C. Gen. Stat. §§42-3, -26, et seq.

amount and court costs before the trial, the action will normally be dismissed. The number of summary ejectment cases varies according to the population density and geographic composition of the county. Several more-populated counties and those with urban areas having many rental units report that summary ejectment cases may constitute as much as 60 per cent of the small-claim actions brought within the county. Some rural counties report that summary ejectment actions comprise as little as 16 per cent of their small-claim actions.

Actions for Possession of Chattel. Statewide, approximately 17 per cent of all small-claim actions are likely to be brought for possession of personal property. Normally these consist of two types. One type normally arise out of the wrongful taking of the property of another. The person whose property has been wrongfully taken has a common law right to sue the wrongdoer for the return of the property. The other type of action is based on a statutory right. G.S. 25-9-503 entitles a seller, who takes a chattel mortgage on the property sold, to repossess the property upon the buyer's default in payment of the mortgage debt.[20]

IN AN ERA when merchants have greatly increased the sale of goods and services and expanded marketing concepts as well, and also in a day of emphasis on consumer protection, the court structure has not fallen behind in its obligation to the public. It has provided a system that both merchant and consumer need and demand. The small-claim procedure provides the merchant with a swift, inexpensive, and efficient means of enforcing against his customers those legal rights which the law entitles him to enforce, but it also gives the consumer a mechanism through which he can protect himself against shoddy merchandise and illegal business practices of merchants. The system is likewise open to any other citizen who has some civil claim which he seeks to have resolved under sanction of law.

Though the merchant may currently utilize this system more than any other class of citizens, he will find it increasingly difficult to take advantage of any "informed" consumer by simply filing a small-claim action. The system's safeguards spring up immediately to block the path of anyone attempting to abuse its processes. A defendant will not suffer a final adverse judgment except: upon notice by personal service and opportunity to answer; a trial in which the plaintiff must prove his allegations regardless of the absence of the defendant; and an opportunity to appeal the magistrate's judgment within ten days for a new trial, this time by a jury. The protections afforded a defendant under this small-claim article far exceed that protection afforded a defendant in a normal civil action in either of the trial divisions.

20. Both types of actions are often termed "Claim and Deliveries" by the magistrates, because the actions are likely to be accompanied by the ancillary remedy of Claim and Delivery authorized by G.S. 1-472, et seq., allowing the plaintiff to recover possession of the property before the trial.

Regionalizing Water Supplies *(Continued from Page 4)*

as the legal barriers to *regrouping* of systems that occurred in England.)

Looking beyond this minimum shared role for the states, there are some further possibilities for the more developed states and in due time for the less matured states.

(a) *First,* there may be a place for the state itself to undertake regional enterprises. Documentation for this is available: New York, with its Pure Waters Authority (recently renamed the Environmental Facilities Corporation); the Ohio Water Development Authority; the Maryland Environmental Services Act; and Pennsylvania's proposed State and Regional Water and Wastes Authorities Act. The mere names of some of these entities also point to the need for state action in helping to devise better regional institutions.

(b) *Second,* the state may have a place in helping its major population centers negotiate with other states and their local governments with respect to interstate ventures.

(c) *Third,* the state might indulge in some creative thinking about new processes and new approaches. The dual water system is an example in point.

(d) *Fourth,* and finally, there is a role for the state in relating regionalization of water supply to other and broader considerations. An obvious example, of course is regional sewerage and waste treatment and disposal—a subject that I have not even mentioned. Other examples include protection of residential amenities and conservation of natural beauty—which, if you prefer, could be subsumed under the broader topic of land-use planning.

HIGHER EDUCATION —AND— DUE PROCESS OF LAW

By Robert E. Phay

Until very recently higher education occupied a sanctified position in our society. Its procedures and actions were largely unquestioned by the courts. As a recent court decision put it, "Historically, the academic community has been unique in having its own standards, rewards, and punishments. Its members have been allowed to go about their business of teaching and learning largely free of outside interferences."

This remarkable position has changed rather drastically since World War II—largely because of increasingly frequent application of the due process clause of the Fourteenth Amendment to the United States Constitution to the university's procedures and actions. Before examining due process of law as it relates to problems of student discipline, let us look at the general question of the changing position of the university with respect to judicial scrutiny.

LEGAL SCRUTINY OF UNIVERSITY PROCEDURES

The impact and consequences of close judicial scrutiny have been viewed differently by various elements of the academic profession. Some have seen it as healthy and necessary; others have viewed it with alarm. The position of the critics who see the change as detrimental to institutions of higher education has probably been set forth most clearly by Dr. James A. Perkins, former president of Cornell University. In a 1967 address entitled "The University and Due Process," before the New England Association of Colleges and Secondary Schools, President Perkins said that he views "with some alarm the specter . . . of a rash of court cases challenging decisions in areas that were once considered the educational world's peculiar province. The filing of these cases seems to suggest that judicial processes can be substituted for academic processes."

Examples of litigation that has subjected the processes of the university system to court review include the following recent cases:

1. A suit in Iowa against a state university to forbid it from imposing higher tuition rates on out-of-state students on the basis that higher rates discriminated against nonresidents in violation of the Fourteenth Amendment's equal protection requirement.

2. A suit by Parsons College against the North Central Association of Colleges and Secondary Schools to force reinstatement of the college's accreditation. Although the suit was denied, the court accepted the position that the basis for accreditation was subject to judicial review.

3. A suit by a legal scholar against the *Rutgers Law Review* for rejecting an article submitted for publication. The author argued that the student editors had been so indoctrinated by a liberal law school faculty that they could not view his conservative article objectively. The contention was that by refusing to print it, they had violated his right of free speech under the First Amendment.

4. A suit filed by student leaders at Long Island University in which a temporary restraining order was obtained to prevent the appointment of a new chancellor on the basis that the students had not been consulted as promised by the board of trustees.

Similar cases abound, but these serve as adequate examples of the new judicial scrutiny of the university's processes. Student suits involving dismissal or suspension will be discussed in more detail later.

President Perkins concludes from the litigation that the time may not be far off when "the granting of diplomas and degrees, the marking of papers and awarding of grades, indeed, almost every aspect of academic affairs will be open to the legal challenge that it conform to judicial standards."

Perkins lists four reasons why he thinks this development has come about and why the once inviolate academic decisions have now become so vulnerable to judicial review. He cites first the ubiquitous financial support of federal and state government that has recently been well documented by Jacques Barzun in his book *The American University*. Public support brings public scrutiny of how the money is spent and how the product turns out. When conflicts arise, courts traditionally have been the institution that has reconciled the dispute and defined the extent of the state's power to control private and institutional interests. In this conflict, Perkins thinks that public rather than institutional standards will prevail.

A second reason Perkins gives for increasing court scrutiny of academic matters is the strong egalitarian drive for higher education since World War II. Equality, as a legal concept, means equality of treatment, which often conflicts with the academic procedures. Before the academic bar, students are not all equal.

Third, civil rights protection by public authority has been extended into many areas once considered purely private. Courts, under expanded due process and equal protection concepts, will protect an individual from discrimination in housing, job opportunity, and access to public facilities. Perkins fears that there is no stopping point and that this "protection" of the individual may be extended to educational institutions, so that such things as admission practices (in which freshman classes are deliberately designed to contain appropriate mixtures of students), scholarship rules, and designation of holidays may be prohibited because they violate individual civil rights.

Four, an erosion has occurred in disciplinary supervision of the young by the family, public school, and college. One result of the far wider freedom for the under-30 generation has been a willingness to question the educational institution in court. The successful suit brought by student body leaders at Chapel Hill and several members of the faculty to have the North Carolina speaker-ban law declared unconstitutional is an indication of the willingness of students and faculty to challenge state educational policy in the court. Although this new freedom of youth may be a reason why the university is in court more often, most people will agree that the greater willingness to question is also a very healthy change in the student of today.

This changed position of higher education with respect to judicial review, Dr. Perkins concludes, is threatening the existence of our institutions as a place where free inquiry can be made. The substitution of civil for academic rule creates two major problems for the academic community. One is the prospect that the academic institution may be prevented from making qualitative decisions about human talent. The other is that the institution's ability to protect academic freedom may be sacrificed. This, he says, we cannot let happen.[1] Incidentally, the public school people are concerned about the same problem, and fear that the courts are becoming super-school boards as they make educational decisions that as an institution they are not structured or competent to do. The decision of Judge Skelly Wright in *Hobson v. Hansen*, in which he knocked down the "track system" in the District of Columbia, is cited as an example.

Five months after President Perkins' broadside against the encroachment of due process concepts into higher education, Professor Clark Byse, past president of the American Association of University Professors and professor of law at Harvard University delivered a speech entitled "The University and Due Process: A Somewhat Different View" to the 1968 annual meeting of the AAUP. Byse said that he did not share President Perkins' fears that judicial review of institutional decisions will lead to a situation in which "almost every aspect of academic affairs will be open to legal challenge," in which the university will spend its "lifetime on the witness stand," in which qualitative academic decisions will be replaced by "wrangling over technicalities," and in which "civil jurisdiction over intellectual inquiry would be complete." Byse says that he does not blanch at the prospect of judicial review because to him due process is not a legal octopus about to strangle the academic community with its tentacles of insensitivity, expense, and delay; it is not an enemy but an old friend.

The Fourteenth Amendment's due process clause provides that no person shall be deprived of life, liberty, or property without due process of law. The North Carolina Constitution has a comparable provision in the "law of the land" clause of Article I, section 17. The ideal of due process was described by Justice Frankfurter in the following words:

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1. President Perkins spells these objections out in some greater detail by listing some of the consequences of these two problems. One consequence is that the process of matching institution and program with individual interests and capabilities—which involves admissions, guidance, testing, grading, and counseling—will result in permanent damage to the academic processes for judging quality and to quality itself. Another consequence is loss of institutional autonomy through constant legal interference as every move and conversation becomes liable to replay in the courtroom. Still another result is delay in getting decisions. The judicial system is overloaded, and its decisions take time. Parties may wait months and even years for court action while academic careers and the institutions grind to a standstill. Finally, the spark between the student and the teacher will die if each constantly faces the prospect of having to testify against the other. See the address by Dr. James Perkins to the New England Association of Colleges and Secondary Schools in Boston, December 8, 1967, *The University and Due Process* (Washington: American Council of Education, 1967), pp. 7-8.

> [D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment, inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process. . . . The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment [of whether due process has been afforded].[2]

As Frankfurter's statement indicates, the requirement of due process varies with the conditions and circumstances of each individual case, and requires a minimum standard of fairness rather than the best possible procedure. As one court has observed, if the rudimentary elements of fair play are followed, the requirements of due process will have been fulfilled.[3]

After stating his disagreement with Perkins' fear of due process, which he attributes to a "misunderstanding of the flexible and functional character of the concept," Byse expresses some different concerns about judicial scrutiny of the processes of higher education. One is that the adjudicated cases leave gaps in procedural due process, particularly in the private sector. He also says that if judicial review of academic processes were extensive, some administrators would not exercise their independent judgment. They would find it easier to yield to demands made of them than to face the judicial review that might follow a refusal to acquiesce to the demands. Others, he thinks, would leave the hard decisions to the courts. Some evidence of the latter result is seen in the public schools, where some administrators, rather than simply comply with the law and desegregate their schools, have left it to the courts to make the decision for them. Still another adverse consequence of constant judicial review is that it shifts the "focus of inquiry from that which is desirable or wise to that which is constitutional or legal." In other words, it fosters legalism.[4]

Byse concludes, however, that while there is danger in judicial review, Perkins has overstated the case. On balance, he says, judicial review clearly should and will continue to play a role in higher education.

DUE PROCESS AND STUDENT DISCIPLINE

Most of the challenges made to university procedures in the area of student discipline have come from student suits challenging a suspension or expulsion or a refusal by an institution to grant a degree. Ten years ago most of these suits were dismissed on one of the following three bases:

1. *The right/privilege distinction.* College attendance was considered a privilege, not a right.[5] The institution was not obligated to accept any student seeking admission or to permit an individual to remain a student. If college attendance is but a privilege, then due process of law—which applies only to a deprivation of life, liberty, or property—does not apply.

2. *In loco parentis.* This legal concept viewed the student as a child under the jurisdiction of the college, the college standing in the place of the parent. The parent college was given almost complete authority over the actions of the student.[6]

3. *Contract theory.* The idea was that when the student enters college, he enters into a contract with the institution, agreeing to abide by the rules and regulations set down by the college, usually as set forth in the college catalogue.[7]

All three of these theories were devices used by the courts to avoid interference in the operation of the college community; they have now been either repudiated or greatly modified. The ever increasing importance of education has resulted in the right/privilege distinction's being substantially undercut and

2. Frankfurter, J., Concurring in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162-63 (1951).

3. Dixon v. Alabama State Board of Education, 294 F.2d 150, 159 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

4. Byse quotes with approval the following observation by Professor Lon L. Fuller on the implications of judicial review to the university:

> It inevitably means a projection of "legalism" into the internal administration of the university. The university, to be sure its decisions will stand up on review by the courts, must itself adopt the modes of thought and action characteristic of courts of law. It must formalize its standards of decisions, it must emphasize the outward act and its conformity or non-conformity to rule, instead of looking to the essential meaning of the act and the compatibility of that meaning with educational objectives. All of this means inevitably some loss in the sense of commitment to educational aims, some diversion of energy toward secondary objectives. Fuller, "Two Principles of Human Association" 16 (mimeo., 1967).

5. *See, e.g.*, Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928).

6. *See, e.g.*, Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1925).

7. *See, e.g.*, North v. Board of Trustees of Univ. of Illinois, 137 Ill. 296, 27 N.E. 54 (1891).

at times rejected.[8] The in loco parentis concept has been specifically repudiated by several cases as courts recognize that today's colleges have more students over 30 than under 18.[9] The contract theory has come to be viewed as a misrepresentation of the parties' intentions. Neither administrators nor students view their day-to-day relations as governed by a formal contract, and the theory has been restricted primarily to suits against private institutions, which are not subject to the Fourteenth Amendment's due process and equal protection clause unless state action can be found.[10]

With these self-created restraints largely removed, courts have begun to define the minimum standards and procedures that a university must observe to avoid constitutional infringement. This examination has centered around the due process clause. This amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law. . . ."

Two types of due process—substantive and procedural—emerge from this clause. Substantive due process refers to the rights of an individual to engage in certain types of conduct without restraint by the state—rights to free speech, assembly, expression, press, and association are examples. Procedural due process refers to the procedures and methods employed in the enforcement of laws and regulations, e.g., proper notice, right to appeal, and cross-examination. Let us first look at substantive due process—the types of conduct the university may or may not constitutionally prohibit—and then consider procedural due process—that procedure which an institution must observe before it suspends or expels a student for violating university rules or regulations.

SUBSTANTIVE DUE PROCESS

Freedom of Speech and Assembly

The First Amendment right of speech and assembly extends to the state university campus through the due process clause of the Fourteenth Amendment. Thus the right to speak, criticize, distribute literature, and picket are guaranteed rights of the university community. As the Supreme Court said nearly thirty years ago, the student does not leave his constitutional rights at the schoolhouse door.[11]

At the same time, however, the rights of speech and assembly are not absolute. They can be curtailed if they materially and substantially interfere with the operation of the school.[12] As the California Supreme Court points out in a case arising from the Berkeley filthy-speech movement:

> An individual cannot escape from social constraint merely by asserting that he is engaged in political talk or action. . . . Thus, reasonable restrictions on the freedoms of speech and assembly are recognized in relation to public agencies that have a valid interest in maintaining good order and proper decorum.[13]

The area in which a question of free speech and assembly is most often raised is conduct in public demonstrations. In prohibiting certain types of demonstrations or disciplining students for conduct at demonstrations considered by the university to be unacceptable, the university has been challenged on the ground that its action violates the First Amendment's guarantee of freedom of speech and assembly.

The right to assemble at college or university buildings and to demonstrate peaceably has been upheld many times. This right does not include, however, the right to exclude others from free passage into an area or building. In *Buttny v. Smiley*,[14] a case arising from demonstrations on the University of Colorado campus against CIA recruitment, a federal district court ruled that students may not prohibit other students from free access to a building. The university has a proper and necessary interest in keeping its buildings and corridors open to normal institutional operations, and it may discipline students and others who obstruct these operations.

Another improper limitation on First Amendment rights is prior restraint. In *Hammond v. South Carolina State College*[15] the court held a college regulation requiring all demonstrations and parades to receive prior approval unconstitutional on the basis that the regulation was a restraint on student First Amendment Rights. Federal district courts in North Carolina and Illinois have recently declared speaker-ban statutes to be unconstitutional, ruling that such statutes must be very carefully drawn to escape the constitutional infirmity of vagueness.[16] While some speech may be regulated (for example, the filthy

8. *See* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); and Knight v. State Bd. of Educ., 200 F. Supp. 174, 178 (M.D. Tenn. 1961). *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

9. *See, e.g.*, Buttny v. Smiley, 281 F. Supp. 280, 286 (D. Colo. 1968), in which the court said, "We agree with the students that the doctrine of '*In loco parentis*' is no longer tenable in a university community."

10. *See* Van Alstyne, *The Student as University Resident*, 45 DENVER L.J. 582, 583-84 and note 1 (1968).

11. West Virginia v. Barnette, 319 U.S. 624 (1943).

12. *See* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

13. Goldberg v. Regents of the Univ. of Calif., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463, 471 (1967). *See also* Norton v. Discipline Comm. of East Tenn. State Univ., 419 F.2d 195 (1969), *cert. denied*, 26 L. Ed.2d 562 (1970); and Jones v. State Bd. of Educ., 407 F.2d 834 (6th Cir. 1969), *writ of certiorari dismissed as improvidently granted*, 25 L. Ed.2d 27 (1970). Wright, *The Constitution on the Campus*, 22 VAND L. REV. 1027, 1057 (1969), criticizes the result in the *Jones* case.

14. 281 F. Supp. 280 (D. Colo. 1968). *See also* Evers v. Birdsong, 287 F. Supp. 900 (S.D. Miss. 1968); Seymour v. Virginia Polytechnic Institute and State Univ., 313 F. Supp. 554 (W. D. Va. 1970); Cholmakjian v. Michigan State Univ., 315 F. Supp. 1325 (W.D. Mich. 1970); Bayless v. Martine, 430 F.2d 873 (5th Cir. 1970); and Close v. Lederle, 424 F.2d 988 (1st Cir. 1970).

15. 272 F. Supp. 947 (D.S.C. 1967).

16. Dickson v. Sitterson, 280 F. Supp. 486 (M.D.N.C. 1968); and Snyder v. Board of Trustees of the Univ. of Illinois, 286 F. Supp. 927 (N.D. Ill. 1968).

speech at Berkeley), the statute or regulation implementing the statute must be precise, narrow, and limited. Any type of speaker-ban regulation, however, is probably futile. As Professor Charles Wright recently noted, "I cannot find a single case decided on its merits in this decade in which a speaker ban has been upheld by a court."[17]

Freedom of the Press

The extent to which the university may control student publications has been substantially limited by several recent court decisions. In *Dickey v. Alabama State Board of Education*,[18] a federal district court held that a student editor could not be expelled for writing "censored" over the space where the editorial he had been told not to publish would have appeared. The editorial had praised the University of Alabama president for supporting academic freedom for university students and criticized the governor. In a more recent case, another federal district court ruled that a state college, Fitchburg State College, may not censor a student newspaper in advance of publication even though the state provides financial support.[19] In this case, the student newspaper had published an article by Black Panther leader Eldridge Cleaver that contained obscenities. The president withdrew funds to prevent the paper from publishing the article and appointed two administrators to review all material before publication. The court said, in ruling against the college, that "the state is not necessarily the unrestrained master of what it creates and fosters. . . . Having fostered a campus newspaper, the state may not propose arbitrary restrictions on the matter to be communicated."[20]

The Fitchburg case has far-reaching implications for student papers. It raises the question as to degree of control and responsibility for censorship that the university has for student publications when the university is the publisher and provides some financial support for the paper. As publisher, the university bears legal responsibility for the paper's contents. The corollary to legal responsibility is the power to control what is printed in the paper. It seems clear, for example, that the university can require the student editors to comply with state laws respecting libel or obscenity. It is unclear, however, how extensively the university may forbid such things as undocumented allegations, deliberate harassment and attacks on personal integrity. The Fitchburg State College case leaves doubts about the university's authority and duty to prevent such unethical practices.

A study on campus government and student dissent recently done by the American Bar Association dealt with the university's right to control student publications for which there is institutional subsidy and liability. It said that the university may not censor editorial policy or content in any broad sense, but may provide for limited review "solely as a reasonable precaution against the publication of matter which would expose the institution to liability."[21] I question whether constitutional requirements of free speech and free press impose such limited control. If they do, the university as publisher is far more limited than the typical newspaper publisher. If the ABA study represents the constitutional limits on university control of its student publications, the recommendations of the AAUP *Joint Statement on Rights and Freedoms of Students* may be the only reasonable alternative. They suggest that "whenever possible the student newspaper should be an independent corporation financially and legally separate from the university."[22]

Suits have been brought and cases are now pending on student rights in the area of association, religion, and economic factors. Right to privacy, confidentiality of records, and loyalty oaths represent other litigated areas of the law that time will not permit us to examine, but all these questions concern basic rights that are part of substantive due process of law.

PROCEDURAL DUE PROCESS

Procedural due process—dealing with the procedures and methods employed in the enforcement of regulations of the institution—is the second aspect of due process. The leading case on procedural due process is *Dixon v. Alabama State Board of Education*.[23] It signaled a dramatic change in the judicial approach to student expulsion and suspension. Before this decision, the courts had largely relied on the in loco parentis concept, the right/privilege distinction, or the contract theory as the basis for not reviewing procedures involving student dismissals. The court in *Dixon* rejected these theories and required the school to give proper notice and provide a fair hearing on the expulsion. Since *Dixon*, the cases have expanded on what a college must do to accord due process of law. These requirements can be broken down into the following elements.

Vagueness

An expulsion or suspension must be pursuant to a statute or regulation that gives adequate notice of the conduct prohibited. If the regulation is vague or ambiguous, it may be held not to afford due process of law because it does not properly communicate the type of action that, if engaged in, will result in expulsion.

17. Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).
18. 273 F. Supp. 613 (M.D. Ala. 1967).
19. Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970).
20. *Id.* at 1337. *See also* American Civil Liberties Union of Va. v. Radford College, 315 F. Supp. 893 (W.D. Va. 1970), and Channing Club v. Board of Regents of Texas Tech. Univ, 317 F. Supp. 688 (N.D. Tex. 1970).
21. REPORT OF THE AMERICAN BAR ASSN. COMM'N ON CAMPUS GOVERNMENT AND STUDENT DISSENT 14 (1970).
22. 154 AAUP Bull. 258, 260 (1968).
23. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

Soglin v. Kauffman,[24] which grew out of demonstrations on the Madison campus of the University of Wisconsin against Dow Chemical Company, is an example of a recent case that invalidated university expulsion on this basis. The federal district court threw out the suspensions and expulsions, which were based on a regulation providing that students may support causes "by lawful means that do not disrupt the operations of the university, or organizations accorded the use of university facilities."[25] The court held that this rule dealt with First Amendment freedoms, an area where courts are particularly demanding in requiring specificity in a rule. The court found that this rule failed to give any description of the type of conduct that might be considered disruptive and was, therefore, too vague to be constitutional.[26]

In another case arising out of the Dow Chemical demonstration on the Madison campus,[27] the Wisconsin Supreme Court upheld a criminal conviction under a state statute that made it a misdemeanor ". . . to engage in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance." The student alleged that the statute was void for vagueness, but the court found that it had established adequate standards and was not vague.

From these and other cases, it is clear that disciplinary rules and regulations are subject to challenge on the basis that they are too vague. Thus rules should be set forth in writing and promulgated in such a manner as to reach all parties affected by them. A regulation that requires a student to "conduct himself as a lady or gentleman" or not engage in "misconduct" is clearly insufficient, since it does not specifically say what type of conduct would invoke disciplinary action. It is important to state the regulation with as much clarity and detail as possible.[28]

Notice

The matter of notice in procedural due process has several aspects. One is the right to be forewarned of the type of conduct that, if engaged in, will subject one to expulsion. This aspect of notice was just discussed under the heading of vagueness. Another aspect of notice is the requirement that the student accused of a violation be given a written statement specifying the charges against him and the nature of the evidence to support the charges on which the disciplinary proceeding is based. The statement also must refer to a specific rule or regulation that has been violated and state when and where the hearing is to be held.[29]

Although prior notice of the hearing is an absolute requisite for due process, a university has discharged its responsibility if it honestly attempts to reach a student by telephoning him and sending a registered letter. If a student cannot be reached because he has changed his address without notice to the university, he cannot later complain that he did not receive notice.[30]

Another aspect of notice is how soon before the hearing notice must be given. No definite rule can be stated. What is proper notice will depend upon the circumstances in the particular case. In a Central Missouri State College case,[31] the court required ten days, while two days' notice of the hearing was found sufficient in an expulsion case at Tennessee State University.[32] In the latter case, notice had been given earlier that the students had not been cleared to reenter the university.

Still another aspect of notice is informing the student of his procedural rights prior to a hearing. This can be accomplished by sending him a printed statement outlining the procedure at the time he is notified of the charges. It is good practice to include a complete disciplinary and procedural code in the university catalogue or in a student handbook. Sending the student a copy of this statement should satisfy this aspect of notice.

Since some if not most students will prefer a more informal procedure, particularly in cases of minor violation, a form on which the student can waive the formal process should accompany the statement of charges. If a student chooses the informal procedure, the university need not have a formal hearing. As Professor Wright observes, formal hearings with due process observance "are likely to be demanded in only two kinds of cases: charges of cheating or similar serious misconduct in which the facts are dis-

24. 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd* 418 F.2d 163 (7th Cir. 1969). *Accord*, Meyers v. Arcata Union High School Dist., 269 Cal. App. 2d 549, 75 Cal. Rptr. 68 (1969).

25. Soglin v. Kauffman, 295 F. Supp. 978, 991 (W.D. Wis. 1968), *aff'd* 418 F.2d 163 (7th Cir. 1969).

26. *See* Dickson v. Sitterson, 280 F. Supp. 486 (M.D. N.C. 1968), which declared the North Carolina speaker-ban law unconstitutional because it was too vague. *See also* Sword v. Fox, 317 F. Supp. 1055 (Va. 1970); Still v. Pennsylvania State Univ., —— F. Supp. —— (M.D. Penn. 1970); and Wisconsin Student Assn. v. University of Wis. Regents, —— F. Supp. —— (W.D. Wis. 1970).

27. State v. Zwicker, 41 Wis.2d 497, 164 N.W.2d 512 (1969). *Accord*, Dunmar v. Ailes, 348 F.2d 51 (D.C. Cir. 1965); and Seigel v. Regents of Univ. of Calif., 308 F Supp 532 (M.D. Calif. 1970).

28. Professor Charles Wright, in his recently published Holmes Lecture, comments: "I think it no overstatement to say that the single most important principle in applying the Constitution on the campus should be that discipline cannot be administered on the basis of vague and imprecise rules." *Supra* note 17, at 1065.

29. *See* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158 (5th Cir. 1961); and Scoggin v. Lincoln Univ., 291 F. Supp. 161, 171 (W.D. Mo. 1968). *But see* Due v. Florida A&M Univ., 233 F. Supp. 396 (N.D. Fla. 1963).

30. See Wright v. Texas Southern Univ., 392 F.2d 728 (5th Cir. 1968), a case in which students deliberately avoided being served notice. The court held that after deliberately frustrating the notice and hearing process, the students could not later object to the expulsion as a denial of due process.

31. Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967).

32. Jones v. State Bd. of Educ., 407 F.2d 834 (6th Cir. 1969), *cert. dismissed as improvidently granted*, 25 L. Ed.2d 27 (1970). *See also* Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967), in which the court found nothing inherently prejudicial in allowing only three days to prepare for a hearing. The court went on to say, however, that the student is entitled to prove that he would be "seriously prejudiced" by the three-day time.

puted, and charges arising out of demonstrations or other activity of a political nature."[33]

Hearings

The most fundamental aspect of procedural due process is the right to a fair hearing. It need not be limited by the technical rules of a court of law, but it must be conducted in accordance with the basic principles of due process of law. These were spelled out in the *Dixon* case as follows:

> The nature of the hearing should vary depending upon the circumstances of the particular case. [But] a hearing which gives the . . . administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. . . . [T]he rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. . . . [T]he student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present . . . his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.[34]

Another aspect of the hearing is the make-up of the hearing board. It must of course not be composed of individuals with a direct interest or conflict of interest in the hearing.[35] The *Joint Statement* recommends that the committee include "faculty members or students, or if regularly included or requested by the accused, both faculty and student members. No member of the hearing committee who is otherwise interested in the particular case should sit in judgment during the proceeding."[36]

The degree of impartiality, however, is not settled. It is clear from *Wasson* that one may not be both a witness and a judge. Faculty members and administrators who are not directly involved in the case would appear to be sufficiently impartial.[37]

Inspection of Evidence

The court likely will require that a student be "permitted to inspect in advance of any hearing any affidavits or exhibits which the college intends to submit at the hearing." This was required in the *Esteban*[38] case. Inspection should include not only the evidence to be used against the student at the hearing, but also a list of witnesses and copies of the complaints and statements. The school may, however, be obligated to protect faculty evaluations of other students' performances and behavior from inspection. Such records are usually considered confidential.[39]

Witnesses, Cross-Examination, Confrontation, and Compulsory Production

The use of witnesses—allowing the student to confront informers, to call his own witnesses, and to compel their attendance—has produced considerable controversy in student discipline cases. In criminal proceedings and in most administrative proceedings, these rights have been held to be fundamental to procedural due process. In student discipline cases, however, the courts have given conflicting opinions. In one recent case the court held that students should be "permitted to hear the evidence presented against them and to question at the hearing any witness who gives evidence against them."[40] In a North Carolina case the judge at the trial court level ordered a new hearing on a student expulsion and said that "petitioner shall have the right to subpoena and cross-examine any witnesses that have heretofore testified in this proceeding."[41]

Most courts have concluded differently, finding that confrontation and cross-examination is not a requirement of procedural due process. In the classic *Dixon*[42] case, the Fifth Circuit held that a full-dress judicial hearing with right to cross-examine witnesses is not required because (1) it is impractical to carry out, and (2) the attending publicity and disturbance of university activities may be detrimental to the educational atmosphere. In accord is a general order issued by the judges of the Western District of Missouri, from which the *Esteban* case came. This general order was adopted to give guidance to that district in student-expulsion cases, and it provided that "[T]here is no general requirement that procedural due process in student disciplinary cases provide for . . . confrontation and cross-examination of witnesses . . . compulsory production of witnesses, or any of the remaining features of a federal criminal jurisprudence."[43] This position is the one most generally taken by the courts.[44]

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33. Wright, *supra* note 17, at 1083-84. *See also*, *Joint Statement*, *supra* note 22, at 261.

34. 294 F.2d 150, 158-59 (5th Cir. 1961).

35. See Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967). See text at p. 17.

36. 54 AAUP Bull. 258, 261 (1968).

37. *See* Lucas, *Student Rights and Responsibilities*, in THE CAMPUS CRISIS 64-65 (1969).

38. Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967). *See also In re* Carter, 262 N.C. 360, 137 S.E.2d 150 (1964).

39. *See* Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967). *See also* Holloway in STUDENT PROTEST AND THE LAW 92 (G. Holmes ed. 1969).

40. Esteban v. Central Missouri State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967).

41. *In re* Carter, 262 N.C. 360, 367, 137 S.E.2d 150, 155 (1964). The North Carolina Supreme Court invalidated this order because the judge had exceeded his jurisdiction by granting relief not asked by the petitioner. The Supreme Court, however, offered no opinion on the matter of cross-examination of witnesses.

42. 294 F.2d 150 (5th Cir. 1961).

43. *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education*, 45 F.R.D. 133, 147-48 (W.D. Mo. 1968).

44. *See, e.g.*, Goldberg v. Regents of Univ. of Calif., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 109, 171 S.W.2d 822, 826 (1942); and Wong v. Hayakawa, No. 50983 (N.D. Cal. 1969). *See* Wright, *supra* note 17, at 1076. Cases involving the expulsion of high school students are in accord. *See, e.g.*, Hobson v. Bailey, 309 F. Supp. 1393 (W.D. Tenn. 1970).

As often happens, what the law requires as minimum procedure and enlightened practice are not the same. Since there is no right to a public hearing in a student discipline proceeding, the university is usually in the position to prevent undue publicity and disturbance by closing the hearing. The argument that cross-examination is impractical to carry out perhaps has more substance, particularly if the examination is not conducted by legal counsel or someone trained in the technique. It is also true that cross-examination will make the hearing more legalistic, which may make the rehabilitative aspects of the hearing more difficult. Nevertheless, expulsion will in many cases hinge on the credibility of the testimony, making cross-examination essential to a fair hearing. Due process will then require questioning of witnesses.

Self-Incrimination

University disciplinary proceedings have generally been viewed as administrative proceedings that are not sufficiently criminal in nature to require the Fifth Amendment's protection against self-incrimination. There are times, however, when a student's conduct may result in his being charged with violating both a criminal law and a university rule. In situations where criminal proceedings and disciplinary proceedings are both pending, students have claimed that they cannot be compelled to testify in the earlier disciplinary hearing on the basis that the testimony, or leads from it, may be used to incriminate them at the later criminal proceeding. This objection, based on the Fifth Amendment's protection against self-incrimination, has been raised unsuccessfully in several cases. In *Furutani v. Ewigleben*,[45] students sought to enjoin expulsion hearings until after criminal actions arising out of the same activities on the basis that they would be forced to incriminate themselves to avoid expulsion and that their testimony would then be offered against them in the subsequent criminal proceedings. In denying their request, the court held that the students can object at the criminal trial to incriminating statements made at the expulsion hearings and that no Fifth Amendment right had been jeopardized. In so ruling, the court relied upon *Garrity v. New Jersey*,[46] a case in which compulsory testimony at a state investigation was held inadmissible in a subsequent criminal prosecution arising from the investigation.

The *Furutani* decision represents the majority opinion,[47] although at least two cases have suggested that the privilege against self-incrimination would be available at a hearing on expulsion.[48] But it is quite clear that the defense of self-incrimination will not be the basis for postponing expulsion hearings until criminal trials are completed.[49] Several commentators, however, have argued that the privilege against self-incrimination should be available in disciplinary proceedings involving violation of criminal statutes, such as occupying a campus building.[50] They note that in no other state proceeding can persons be compelled to confess their guilt of a crime, and "there is no reason to think that the university disciplinary proceeding can be an exception."[51] Under existing case law, however, the university may proceed with a prior disciplinary proceeding and, under the majority of opinions, students may be compelled to testify. There also is no question that a *Miranda*-type of warning is not applicable to a school investigation of alleged misconduct.[52]

Double Jeopardy

Students have argued that the Fifth Amendment's prohibition against double jeopardy prohibits the application of both criminal and administrative sanctions against the same individual for the same offense. There is no legal basis for this claim. As Professor Wright notes, "Claims of 'double jeopardy' are not uncommon, but are utterly without merit."[53]

Right to Counsel

In most of the student disciplinary cases that have reached the courts, colleges have permitted students to have legal counsel with them at the disciplinary hearing; the question of the right to be represented by counsel has therefore seldom been in issue. Most decisions in which legal counsel was in issue have held it to be not a requirement of due process.[54]

Several cases to the contrary have specifically upheld the right to counsel in some form.[55] In the similar North Carolina case, *In re Carter*, the superior court specifically stated that the parties are entitled to counsel.[56] It is my opinion that the trend is toward

45. 297 F. Supp. 1163 (N.D. Cal. 1969).

46. 385 U.S. 493 (1967).

47. See Goldberg v. Regents of Univ. of Calif., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967), and *General Order on Judicial Standards*, *supra* note 42, at 147.

48. State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 109, 171 S.W.2d 822, 826 (1942); Goldwyn v. Allen, 54 Misc. 2d 94, 99, 281 N.Y.S.2d 899, 906 (1967).

49. See Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D. N.Y. 1968). *See also* Kalaidjian, *Problems of Dual Jurisdiction of Campus and Community*, in STUDENT PROTEST AND THE LAW, 136-39 (G. Holmes ed. 1969).

50. Wright, *supra* note 17, at 1077, and Lucas, *supra* note 37, at 70-72.

51. Wright, *supra* note 17, at 1077.

52. *See* Buttny v. Smiley, 281 F. Supp. 280, 287 (D. Colo. 1968).

53. *Supra* note 17, at 1078. *See also General Order on Judicial Standards*, *supra* note 43, at 147-48.

54. *See* Perlman v. Shasta Joint Junior College, 88 Cal. Rptr. 563, 9 Cal. App. 3d 873 (1970); Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); Due v. Florida A&M Univ., 233 F. Supp. 396, 403 (N.D. Fla. 1963); *General Order on Judicial Standards*, *supra* note 43, at 147.

One of the more recent court expressions on the issue of right to counsel occurs in Barker v. Hardway, 283 F. Supp. 228 (S.D. W.Va. 1968). Students at Bluefield State College (West Virginia) demanded legal counsel at a hearing investigating alleged student disruption at a football game. The court held that the Sixth Amendment guarantee of right to counsel in criminal and semi-criminal cases does not apply to purely civil actions, as here. One should note that the faculty committee proceedings involved in *Barker* was investigatory, not adjudicatory. *Id.* at 237-38.

55. See Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967); Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S. 2d 899 (1967).

56. 262 N.C. 360, 367, 137 S.E.2d 150, 155 (1964). The lower court ruling was reversed on other grounds. *Id.* at 375.

full right to counsel, and the right soon will be required by the courts. I would recommend that if a student asks for legal counsel, it be granted.

Public Hearing

Most cases reviewed allowed students to choose whether the hearing would be open or closed.[57] In those cases in which a public hearing had been denied and the point litigated, the courts uniformly have held that an open hearing, in the sense that a defendant in a criminal case is entitled to a hearing in open court, is not required to comply with procedural due process.[58] Thus a fair procedure does not require that the disciplinary proceeding be open. (Incidentally, one of the problems the administration encountered at Columbia University was students' making a demonstration out of student disciplinary hearings. One solution to this problem was to schedule hearings in very small rooms.)

Let me point out that the Sixth Amendment provision for a public trial is not for the benefit of the public; it is for the protection of the accused. This constitutional safeguard is met if two or three neutral observers are allowed in the hearing room.[59] There is no requirement on the university to permit such theatrical performances as recently occurred in the trial of the "Chicago Seven." A completely open session can be the quickest way to destroy the fair and orderly function of the hearing.

Impartial Tribunal

As one court put it, "a fair hearing [in a student expulsion proceeding] presupposes an impartial trier of fact. . . ."[60] The question is, what constitutes an impartial trier of fact? In student discipline cases, one usually finds a commingling of the decisional and prosecutorial functions. The trier of fact usually includes administrators or others with prior knowledge and contact, if not direct involvement, with the case, and at times members of the tribunal have been permitted to be witnesses against an accused student.

Several cases have discussed the matter of the combined decisional and prosecutorial functions of the tribunal, and all that I have found have permitted the functions to be combined.[61] The courts have reasoned that it is difficult and burdensome, sometimes impossible, to obtain a panel with no previous contact with the case. If the student thinks there is bias, malice, or personal interest in the outcome of the case on the part of any member of the tribunal, he has the right to have that member or those members removed upon proving that the bias exists. This opportunity to prove bias satisfies the constitutional requirement for an impartial tribunal.[62]

Cases will arise in which the trier of fact is so closely connected with the student hearing that he clearly should not be permitted to serve on the tribunal. A student expulsion case at Oshkosh State University is an example of such a case.[63] The students faced expulsion on charges of breaking into the president's office, threatening him, and holding him prisoner. Under university rules, the president considers appeal from student discipline cases and makes recommendations to the board of regents. The regents excused the president from participation in the hearing and obtained the services of a former state supreme court justice to conduct the hearings and make recommendations. This procedure represents a fair and easy way of eliminating conflicts of interest. Even assuming that the president in such a situation is fair in his judgment, the university avoids the likely accusation that it has not provided an impartial tribunal.[64] The best procedure, though not required as a matter of law, is that recommended in the *Joint Statement*. "No member of the hearing committee who is otherwise interested in the particular case should sit in judgment during the proceeding."[65]

An issue related to the question of the impartial tribunal is the constituency of the forum. Clearly, the Sixth Amendment's requirement of a trial by an impartial jury, which is construed to mean a jury of one's peers, is not required in student disciplinary cases. The Sixth Amendment applies only to criminal prosecutions. Since a disciplinary hearing is a civil proceeding, reviewable in a court of law, the constitutional requirement of a jury trial has no application.

I would suggest that a jury trial by one's peers is not only not constitutionally required but also undesirable. In my opinion, the type of forum best suited for the university community is one in which there are representative members from all parts of the academic community that are bound by the rules governing the campus. This would normally include students, faculty, administrators, and nonacademic employees. Objection to a mixed tribunal, however, has frequently been made by the AAUP. It has insisted that faculty be tried only by faculty.

Search and Seizure

A student's right to privacy while living in a dormitory room has become an important issue on the campus today. Both the *Joint Statement* and the *Model*

57. *See, e.g.,* Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968).
58. *See* Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725, 731 (M.D. Ala. 1968); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 768 (W.D. La. 1968); and *General Order on Judicial Standards, supra* note 43, at 147.
59. *See* Van Alstyne, *Comments,* in STUDENT PROTEST AND THE LAW, 206-7 (G. Holmes ed. 1969). *See also,* Wright, *supra* note 17, at 1079-80.
60. Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967).
61. *Ibid. See also* Wright v. Texas Southern Univ., 277 F. Supp. 110 (S.D. Texas 1967); Jones v. State Bd. of Educ. 279 F. Supp. 190 (M.D. Tenn. 1968) *aff'd* 407 F.2d 834 (6th Cir. 1969), *cert. dismissed as improvidently granted,* U.S. 25 L. Ed. 2d 27 (1970).
62. *See* Perlman v. Shasta Joint Junior College, 88 Cal. Rptr. 563, 9 Cal. App. 3d 873 (1970).
63. Marzette v. McPhee, 294 F. Supp. 562 (W.D. Wis. 1968).
64. *But see* Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967), in which the court said that all evidence must be before the president of the college, since he is the one with the authority to expel or suspend a student.
65. *Joint Statement, supra* note 22, at 261.

Code, prepared by the Student Rights and Responsibilities Committee of the ABA's Law Student Division, recommend that a student's privacy be honored except in "extreme emergency circumstances," and the National Student Association reports that there are more student complaints about dormitory regulations than on any other subject.

Questions as to privacy have focused on the type of search that can be made of a student's dormitory room. If the student lives off campus, his Fourth Amendment protection against unreasonable search and seizure takes the same form as it would for any other citizen: a police officer can conduct his search of the student's premises only (1) with probable cause for the search and a warrant granting him authority, (2) with probable cause and circumstances such that obtaining a warrant would frustrate the purpose of the search, or (3) as an incident to an arrest made on the premises. In the latter case, the scope of the search would be very narrow and could certainly not cover the entire premises. When the student lives in a university dormitory, however, a different constitutional standard has been applied. Some of the reasons advanced by the courts for a different standard have been the special necessities of the student-college relationship, student understanding that they cannot regard their rooms as free of governmental intrusion because of college regulations permitting searches,[66] and the need to protect the entire student population from illegal activities in dormitory rooms.

The leading case on this subject is *Moore v. Student Affairs Committee of Troy State University.*[67] Here a search was made without a warrant, under the student's protest and not incidental to a legal arrest. The court held that the Fourth Amendment prohibition against unreasonable searches and seizures was not violated. In this case reliable informers had reported the presence of marijuana in the student's room, and there was evidence that the student was getting ready to leave and that he might be tipped off to the search before a warrant could be obtained. Marijuana was found in his room; the search was upheld on the basis that there was a "reasonable belief" by the college that the student was using the dorm room for illegal purposes.

The court held that if there is a "reasonable belief" that a crime is being committed or that contraband is in the room, the Fourth Amendment prohibition against unreasonable searches and seizures is not violated. Although the terms themselves do not tell us much, the court points out that the "reasonable belief" standard is lower than the "probable cause" standard that is required in all other warrantless searches. This lower standard is permissible, the court says, because student expectations of privacy in dormitory rooms are not as great as they would be in off-campus housing since school regulations usually permit its officials "to enter rooms for inspection purposes."[68]

The *Moore* decision is not easily reconciled with several other decisions in the area of administrative searches, such as searches concerning fire and health inspections.[69] A recent lower court opinion from New York declared illegal a dormitory room search at Hofstra University in which there was no warrant.[70] Police in this case entered a room because of the smell of marijuana in the hallway and information previously received about the defendant from an unidentified informant. This case is distinguishable from the *Moore* case, however, because there was no evidence that a search warrant could not have been obtained prior to the search.

In my opinion it is unwise to rely on the *Moore* case unless a clear "emergency" situation can be shown. Clearly it is preferable to obtain a search warrant if at all possible. The *Joint Statement* recommendation on searches strikes what seems to me to be a fair balance between the institution's legitimate needs to protect itself and the student's right of privacy in his dormitory room. It provides:

> Except under extreme emergency circumstances, premises occupied by students and the personal possessions of students should not be searched unless appropriate authorization has been obtained. For premises such as residence halls controlled by the institution an appropriate and responsible authority should be designated to whom application should be made before a search is conducted. The application should specify the reasons for the search and the objects or information sought. The student should be present, if possible, during the search. For premises not controlled by the institution, the ordinary requirements for a lawful search should be followed.[71]

Mass Hearings

At times universities have found it desirable or necessary to conduct an expulsion hearing in which charges simultaneously were considered against large numbers of students. In *Buttny v. Smiley*,[72] the court

66. See Wright, *supra* note 17, at 1078-79.

67. 284 F. Supp. 725 (M.D. Ala. 1968). *See also*, People v. Kelly, 195 Cal. App.2d 669, 16 Cal. Rptr. 177 (Dist. Ct. App. 1961), which upheld a warrantless search at California Institute of Technology on the basis of dormitory rules that permitted the search and the fact that police probably had evidence to arrest the student before they searched his room.

68. The *Moore* case was the basis for a recent North Carolina Attorney General's opinion that college dormitory searches are permissible when a reasonable belief exists that a student is using his dormitory room for illegal purposes or for purposes that would seriously interfere with campus discipline. See letter from N.C. Attorney General to James B. Mallory, East Carolina University Dean of Men, 13 January 1970.

69. *See* Camera v. Municipal Court, 387 U.S. 523 (1967).

70. People v. Cohen, 52 Misc. 2d 366, 292 N.Y.S. 2d (Dist. Ct. Nassau Co. 1968).

71. *Joint Statement*, *supra* note 22, at 261. *See also* Comment, *College Searches and Seizures: Privacy and Due Process Problems on Campus*, 3 GA. L. REV. 426 (1969), and Comment, *Public Universities and Due Process of Law: Students' Protection Against Unreasonable Search and Seizure*, 17 KAN. L. REV. 512 (1969).

72. 281 F. Supp. 280 (D. Colo. 1968).

upheld this procedure in a case involving sixty-five students who had locked arms to deny access to buildings at the University of Colorado in protest to CIA recruitment on campus. The students admitted acting as a group, and the court held that they could be tried as a group. Professor Van Alstyne made the following observation on the constitutionality of this procedure:

> There certainly is no legal impropriety in holding a joint trial, and I don't believe that even with the assistance of counsel the student could constitutionally insist upon a separate trial, despite the possibility that a kind of prejudice may occur because of testimony in one part of the trial that relates to another student.[73]

Transcript of the Hearing

Several cases have considered whether a college must provide a transcript of the hearing when the student requests one. Although the cases are divided, it is clear that if an appeal is taken, a transcript must be available unless the appeal is to be de novo, with all evidence presented again. The easiest way to handle this problem is to tape-record the proceeding. If an appeal is taken, the tape can be transcribed.

Immediate Suspensions

Circumstances may arise in which a university finds it necessary to suspend a student summarily pending a later hearing on the suspension or on permanent expulsion of the student. Immediate suspension may be employed only in the extreme situation where the continued presence of the student on the campus endangers the proper functioning of the university or the safety or well-being of him or other members of the university community.[74] In the few cases that have considered this issue, interim suspensions have been permitted only in extreme situations and where a hearing was soon to follow.[75] In a recent case from the University of Wisconsin,[76] the court declared invalid a suspension for thirteen days pending a hearing on expulsion for the violent disruption of the Madison campus. The university submitted numerous affidavits to show that the continued presence on the campus would endanger both persons and property. The court accepted this testimony but held that there was no showing that it would be impossible or unreasonably difficult for the regents, or an agent designated by them, to provide a preliminary hearing prior to the interim suspension order. Immediate suspensions are permissible, the court held, only when it can be shown that it is impossible or unreasonably difficult to afford a hearing.

CONCLUSION

I have now covered the major aspects of substantive and procedural due process. Several issues, such as the confidentiality of student records, transcripts, punishments, and appeals, however, have been mentioned only in passing. In general, I think one can conclude from the case law that if the procedures used in our institutions to deal with people are basically fair, we need have little concern over institutional disruption from the application of concepts of due process.

At least two points stand out. First, trustees and administrators need legal advice before making most of their institutional decisions, particularly in the area of student discipline. This is an area in which the law is changing rapidly, and many vexing questions about what the Constitution requires are still unresolved. Second, institutions need, if they do not have, specific written policies as to the types of conduct that are prohibited on their campuses and the procedures for trying alleged violations of that code. In developing these policies, trustees and administrators should look at the court decisions just discussed so that their code and procedures will comply with constitutional standards. If their institutions do only these two things they will have done much to minimize the possibility of future campus disruptions.

73. Van Alstyne, *Comment*, in STUDENT PROTEST AND THE LAW 206 (G. Holmes ed. 1969).

74. The extraordinary nature of interim suspensions is reflected in the *Joint Statement's* recommendation on the status of a student pending final action. It provides: "Pending action on the charges, the status of a student should not be altered, or his right to be present on the campus and to attend classes suspended, except for reasons relating to his physical or emotional safety and well-being, or for reasons relating to the safety and well-being of students, faculty, or university property." *Supra* note 22, at 61.

75. *See* Wright, *supra* note 43, at 1074-75 for discussion of the interim suspension cases.

76. Stricklin v. Regents, 297 F. Supp. 416 (W.D. Wis. 1969), *appeal dismissed for mootness*, 420 F.2d 1257 (1970).

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Mobile Homes Are Here to Stay

By Frederick H. Bair

While we keep hearing about revolutions in housing, no clear definition of what that term means has yet emerged. But it cannot be denied that in the housing field, mobile homes are the hottest things around, and they and their spin-off variations represent a development that will greatly affect the way that millions of Americans live.

For one thing, age groups for which mobile homes have recently been most attractive are increasing rapidly in number, and will continue to do so. Enlargement of the mobile home has also enlarged its market, and further enlargements of the units can continue almost indefinitely. The cost per square foot for mobile home housing has dropped, particularly in terms of constant dollars, while conventional housing costs have gone so high that many would-be buyers are priced out of the market. Sources and terms of financing for mobile homes and mobile home parks have improved.

On the other hand, resistance to mobile homes (and other housing having some of the characteristics) takes many forms. Mobile homes are disliked by many people because of their appearance and because of the appearance of a great many mobile home parks. Conventional home builders oppose them because of the threat to their market, and local construction workers oppose them because of the threat to their employment. Those involved in local governmental finance also oppose them, first because in many areas taxation methods have not been adapted to fit mobile homes, and second because, once methods have been devised, relatively inexpensive housing does not pay as much in taxes as housing that costs more.

Even when local cost-revenue studies demonstrate that mobile homes in a mobile home park come closer to meeting the governmental costs they create than single-family detached conventional housing, the opposition often remains, particularly in areas where there is fear of change, fear of social or economic integration, or fear of shifts in the balance of political power.

In many jurisdictions, this opposition takes the form of exclusionary zoning—or of subdivision regulation and construction codes designed to make housing as expensive as reasonably possible, going well beyond the basic purposes of protecting public health, safety, comfort, convenience, and the general welfare.

To a growing number of observers, it has become apparent that regulatory powers are too frequently used by localities *against* the broad general welfare, and that certain obligations and needs should override narrow parochialism. In an era of tender social conscience, the observations are having an effect. In themselves, they may not stir complacent local regulatory bodies to remedial action, but when higher legislative and judicial bodies and state and federal administrative bureaucracies join the action, the outlook for reform is much improved.

There are ways to regulate and control that do in fact give ade-

quate protection to the public health, safety, and comfort and do promote the public convenience and general welfare. There are ways to assure that all forms of housing pay their equitable share of governmental costs—although it does not appear that equity requires regressive forms of taxation, in which low-cost housing pays at higher rates than high-cost.

What's New

● *Demographic Factors.* Between 1960 and 1970, the number of household heads 34 years of age and under increased from 12.2 million to 16.6 million. By 1980, this number is expected to rise to 25 million, doubling the 1960 figure in 20 years and raising the proportion of total households with heads in that age group from 1960's 23 per cent to almost one-third of the national total.

This is the family-forming group, recently married, with relatively few children of school age, at the low end of their eventual earning power, highly mobile, and unsure where they will eventually settle. At this point in their life cycles, many of these people find mobile homes or rented quarters suited to their housing requirements, their prospects, and their incomes.

Less important, but still of considerable significance, is the number of households with heads between 55 and 74. The number of families in this group, contracting or contracted families, rose from 14.9 million to 18.4 million in the past decade, and will reach 21.8 million by 1980, holding at close to 28.5 per cent of the total number of households during the period. Many of these people retain their previous residences, but of those who do not, a proportion seek quarters other than conventional single-family dwellings. In retirement areas particularly, this group has had a strong effect on the market for mobile homes and apartments.

● *Increase in Size of Mobile Homes.* Before the 1955 breakthrough to the 10-foot-wide version, a typical 8 x 40 foot mobile home had a floor area of 320 sq. ft. In 1960, the dominant mobile home was 10 x 55, with a total floor area of 550 sq. ft. In 1970, about two-thirds of production was in units 60 feet or more in length, and the 12-foot widths for units (or components) was standard. For the first time, 14-foot-widths appeared, making up about 5 per cent of total production. Double-wide mobile homes (with two components forming the completed unit) accounted for 8 per cent and their popularity was increasing rapidly. Floor area of most units exceeded 700 sq. ft., and sizes up to 1,500 sq. ft. were readily available.

Thus the size of mobile homes has increased very rapidly, and there is no apparent limit to sizes that could be produced by combinations of components. This has had an important effect in increasing the market, and could lead to increased use of this form of housing by families with school-age children. (There has been interesting speculation on the market effects of adding bedrooms and baths as the family grows, and taking them off as the family contracts.)

● *Costs and Financing.* Price per square foot for mobile home housing, including furniture and appliances, has actually dropped somewhat with the increase in size. At the beginning of the '60s, the retail cost averaged somewhere in the neighborhood of $10. It is now around $9.

Department of Commerce figures indicate the average construction cost of conventional single-family dwellings as rising from $15,425 in 1964 to $19,225 in 1969. This does not include profit where units were built for sale.

In the last years of the past decade, FHA, which had previously shown only token interest, began insuring financing for mobile home parks built to good standards at an accelerated pace and insuring mobile homes built with suitable quality controls for twelve years with interest rates competitive with those for conventional housing. Under the VA Housing Act of 1970, financing became available to veterans (currently a significant market) for from $10,000 to $17,000, including provisions for acquiring and improving lots.

The Revolution

Response to these influences led to production of over 2 million mobile homes in the '60s, coming up from an annual low of 90,000 units in 1961 to over 400,000 units in 1969. In contrast to rapid gains in the last years of the '60s, the 1970 figures are at about the same level as 1969 production, and it may be that increasing numbers of units produced without permanently attached wheels will stabilize output of mobile homes in their familiar form at this level, or even reduce it. The 1970 statistics on housing may have lost a substantial number of such units because of lack of an appropriate classification in the system. (This happened with respect to mobile homes for years. Federal sources did not include mobile homes in housing supply figures, and there was alarm at the absence of low-cost housing and great concern about the drop in housing production as 1968 and 1969 showed lows for the decade. HUD's Operation Breakthrough was premised on a shortage of 500,000 low-cost units per year. When mobile homes were added into the figures, 1968 and 1969 became the best years for housing during the decade, and the production of 412,000 units in 1969 considerably lessened the extent of the low-cost housing disaster (although mobile homes are not used extensively for housing people at the lowest end of the income scale).

It should be noted that apartment construction, responsive to the same market pressures, also increased rapidly during the '60s.

About 5 million apartment units were produced (as against 2 million mobile homes and 9.3 million conventional single-family homes).

To give a feeling as to the revolutionary shift in the balance of housing production, here are figures for the year 1960 compared with those for the twelve months ending in November, 1970:

In 1960, 1.4 million new units were produced; in 1970, 1.8 million.

In 1960, 1,009,000 conventional single-family dwellings were produced, accounting for 72 per cent of the new housing supply. In 1970, 778,000 made up only 43 per cent of the total.

In 1960, a little over 100,000 mobile homes amounted to only 7.4 per cent of total new housing; in 1970, about 400,000 accounted for 21.8 per cent (about three times the proportion for 1960). Of total single-family supply in 1960, mobile homes made up 9.3 per cent; in 1970, 33.6 per cent.

In 1960, 287,000 apartment units made up 20.5 per cent of total new dwellings, mobile homes and apartments together 28.1 per cent. In 1970, 35 per cent of new units were apartments, and apartments and mobile homes together made up 57 per cent of the total.

Public Attitudes

In 1959, the board of directors of the American Institute of Planners rejected a suggestion that mobile homes be discussed at the next annual meeting. The argument was that trailers were of negligible importance in the scheme of things, and that a panel on this subject might be an entering wedge for special pleadings by the outdoor-advertising industry, junk dealers, and so on.

In 1961, the AIP program included a well-attended panel discussion on mobile homes, with Burnham Kelly, Dean of the College of Architecture at Cornell, and Charles Abrams, head of the planning school at Columbia and a leading figure in housing. Audience participation indicated more interest in problems than in potentials.

In a survey recently conducted by the American Society of Planning Officials, planners were asked four opinion questions:

1. What do you think or mobile homes as housing?
2. How does your planning commission feel about them?
3. How does your governing body feel about them?
4. What is the local climate of public opinion about mobile homes as housing? Does it seem to be changing? In what direction?

Of planners responding, 82 per cent were favorable to mobile homes as housing, and they indicated that 64 per cent of planning commissions and 54 per cent of governing bodies were also favorable. But the climate of public opinion was estimated by planners as being favorable in only 20 per cent of the reporting jurisdictions, although in the 75 cases in which direction of change was indicated, the change was favorable in 93 per cent.

Both favorable and unfavorable responses were qualified by concerns about appearance, quality of units, and tax problems.

Although these results hardly reflect universal enthusiasm for mobile homes, the contrast with the situation a decade ago is a remarkable improvement.

Planning Policies Relating to Housing

From the viewpoint of the truly general public welfare, it appears that local government has certain obligations that should be reflected in planning and regulation.

Local government has an obligation to provide freedom of choice in housing types. Where it is possible to satisfy evident demand for any form of housing without substantial and demonstrable disadvantage to the *general* public welfare or to the health and safety of occupants, that form of housing should be allowed.

The comprehensive plan should provide for satisfaction of the desire for a range of housing costs and housing types in line with broad public needs, and in locations appropriate for the kinds of housing concerned and for the comfort and convenience of occupants.

It is the obligation of local government to have regulations that carry out the intent of such a comprehensive plan, protecting the *general* public interest equitably, without improper and discriminatory emphasis on protecting the narrow interests of any segment of that public.

In establishing and enforcing such regulations, it is the obligation of local government to protect the health, safety, comfort, conveniences, and *general* welfare, using no controls that are not demonstrably and substantially related to the achievement of these purposes, nor any that exclude unjustly any class of person or form of housing.

It is the obligation of local government to prepare and adopt such controls only in the manner prescribed by law, and to administer them fairly.

Not all local governments seem to feel that they have these obligations, or appear to be limited by the constraints suggested.

● *Regulatory Abuses.* In the recent ASPO survey, it was found that of almost 300 reporting jurisdictions, 28 per cent did not permit new mobile home parks. Industrial locations—hardly appropriate for residential development—were permitted in 38 cases, and were the *only* locations allowable in 13. Commercial locations—also unlikely to be suitable for residential oc-

cupancy—were permitted in 78 cases, and were the only permissible location in 14.

Details of regulatory provisions indicate many cases in which applicants might be subjected to arbitrary and capricious decisions depending more on the reaction of the neighbors than on compliance with detailed standards.

Excessive lot and yard requirements are not unusual. Of 148 responses to questions on minimum lot and yard size, over 12 per cent indicated 5,000 sq. ft. or more, and 15 per cent required side yards of 20 feet or more.

● *Regulatory Negligence.* On the other side of the coin, regulatory negligence is evident, contributing to the kind of parks which have given mobile homes a bad image. Of 225 responses, 5 per cent indicated that park regulations have not been amended in the past twenty years, and almost 19 per cent reported that no substantial amendment had been made in ten years.

The minimum area for a park should be at least 10 acres, according to most authorities, and the minimum number of spaces should be at least 50. About one-third of 165 respondents indicated that parks under 10 acres were allowed. Of 80 responses, only 26 per cent indicated that the 50-or-more minimum is used, and 40 per cent allowed nine or less.

Minimum lot size required was under 1,500 sq. ft. in 12 per cent of the jurisdictions responding, under 2,000 sq. ft. in 18 per cent.

It is, of course, important for regulatory purposes to make a distinction between mobile homes and recreational housing such as travel trailers. Of 281 jurisdictions reporting on this point, 45 per cent failed to differentiate.

● *Basic Principles.* Planning principles directly related to mobile home parks include the following:

1. *Mobile home parks are residential uses.* They deserve the same protection from adverse environmental influences as other residential uses. They belong in residential districts and, exposed to surrounding general commercial or industrial development, they tend to become blighted just as other residential uses in such environments do. Many mobile home slums are that way because public regulation forced them into the wrong locations.

At present, mobile homes are detached single-family in type, but density for modern parks at up to eight units to the acre places them in the multifamily range. In the future, attached one-story forms with increased economy in use of space, increased amenity in appearance of space, and increased utility in function of space may justify an increase in density to perhaps twelve to the acre.

2. *Mobile homes are a form of housing desirable to many people.* To some, economy is a major factor; to others, convenience, ease of maintenance, or the neighborliness and facilities of the mobile home park are important. A lot of people choose to live in them as part of their housing cycles, and unless there are real and uncontrollable dangers to public health, safety, or general welfare, they should be allowed to do so.

These points need emphasis because many planners, and many members of planning commissions and governing bodies, have strong biases toward conventional single-family detached housing and tend to feel that any other form is substandard and that anyone who wishes to live in any other form is suspect.

3. *We are planning for people, not for taxes.* Seek first the creation of an orderly environment responsive to public needs, and then improve the revenue structure to finance it.

If this fails to persuade and the cost-revenue approach is used as a plowshare to bury mobile home parks, it can be beaten into a sword to defend them. Cost-revenue analysis generally shows that single-family detached conventional housing produces greater deficits per unit than mobile homes in parks. Educational costs alone serve to make the point. Assuming 1.5 school children per family for conventional single-family dwellings, school costs at $600 per child year, and taxes at $500, the $900 in school costs alone produces an annual deficit of $300. Assuming .5 school children per mobile home family (high for most parks), the same school cost per child, and a return of $100 from taxes or substitutes for taxes, the deficit per mobile home is $200 per year.

The moral is clear. If we are planning on a cost-revenue basis, we might start by restricting further single-family conventional development. Or, of course, we could go directly to the root of one of our financial difficulties and either eliminate children or abolish public schools.

Our local governmental revenues have never been rigged so that each use is self-supporting. Commercial and industrial uses produce surpluses that help to cover deficits in the residential field, and growing contributions from state and federal levels help in meeting local fiscal needs.

Regulation of Mobile Homes and Mobile Home Parks

● *Construction Codes.* Regulation of construction quality of mobile homes is increasingly controlled from the state level, and probably should be so controlled generally. Over 20 states now have this form of regulation. Most state codes are based on the American National Standard A119.1, Standard for Mobile Homes—Body and Frame Design and Construction; Installation of Plumbing, Heating and Electrical Systems.

Where state controls are not in effect, many jurisdictions now require certification of compliance with A119.1 before allowing mobile homes to be occupied within their boundaries.

● *Occupancy Codes.* Housing codes should be used to control occupancy of mobile homes in the same manner as for other housing. Enforcement of such codes may be helpful in providing for removal or renovation of substandard units and for reducing overcrowding where it is found to exist.

● *Health Codes.* In most states, the state health department is responsible for enforcement of state regulations relating to mobile home parks. The detail of such regulations varies widely, but water supply and sewerage is a basic consideration. In some instances there may also be local health departments exercising specialized controls.

● *Zoning.* Since zoning is a major form of local control, mechanics and substantive provisions deserve discussion in some detail.

Mobile homes on their own lots are often permitted by right or by special permit in certain districts. In the ASPO survey, 38 per cent of 284 reporting jurisdictions allowed such use. Variations by types of jurisdictions reflects less and less permissiveness as degree of urbanization increases. Thus, 75 per cent of predominantly rural counties and 67 per cent of urban counties permitted the use somewhere within their jurisdictions, but only 20 per cent of suburban cities. (Curiously, 31 per cent of central cities allowed independent use in certain districts.)

In the highest proportion of the returns, agricultural districts permitted independent use. This seems logical. But out of 84 jurisdictions allowing independent use, 28 permitted such use in commercial districts and 18 in industrial, which appears to be an invitation to blight.

Mobile homes as accessory uses were permitted in 30 per cent of responding jurisdictions, primarily in agricultural districts, but again unfortunately in some commercial and industrial districts.

● *Recommendations on Zoning for Mobile Home Parks.* Mobile home parks may be permitted by right in certain exisiting districts, by special exception in others, flatly prohibited in certain districts (among which commercial and industrial would be first choices), allowable by rezoning for special mobile home park districts, allowable by rezoning for planned housing developments in which mobile homes are one of a variety of housing types permitted, or allowable by rezoning as planned residential developments in which mobile homes are the only kind of housing. This list may not exhaust the permutations.

Uses permitted. Considering the outlook, it would seem desirable to use the planned development approach and to rezone for such planned development from existing residential districts with approximately the same residential densities, and perhaps from agricultural districts. And it might be foresighted to permit mixtures of housing types, rather than to restrict to mobile homes. A variety of modulars other than mobile homes are on the way, and if the park can be used for detached, semidetached, attached, and stacked forms, there will be room within the jurisdiction allowing for experimenting with such forms under the controlled conditions of planned development. Necessary supporting uses should, of course, be allowed.

Minimum area for creation of district; minimum number of units. As indicated previously, it has been standard practice to recommend a minimum of 10 acres, and a minimum of 50 spaces available for occupancy at opening, in mobile home park controls. Smaller parks have difficulty in supporting good management.

If there is to be local adjustment of these figures, it should probably be upward, particularly where there is to be flexibility in selecting housing types.

Maximum density. For detached units in current sizes and shapes, it seems probable that maximum density, with appropriate yards, streets, common space, and recreation and management facilities, will not exceed eight units per acre. With attached and semidetached forms, good design will probably permit twelve units per acre, something on the order of townhouse development (and some of the modulars may quite probably be townhouses).

Regulations could set over-all densities, or densities varying by housing type. The problem here is that the controls are on units per acre rather than on population. For more refined controls, the floor area ratio approach would be desirable, permitting a larger number of small units or a smaller number of large, with the population yield roughly the same.

Or where design, open space, and improvement controls are carefully worked out, the density might be permitted to establish itself.

Site planning, external relationships. As with any planned residential development, regulations should include guides and standards covering principal access points, protection of visibility where traffic from the park enters adjoining streets, exterior yards (including uses permitted in such yards as related to adjoining property), and indications as to where special buffering or screening will be required to protect the development from potentially adverse exterior influences or vice versa.

Site planning, internal relationships, generally. Here, in addition to the usual general language about harmonious and efficient design for a desirable residential environment, there should be detailed standards and requirements on common open space (including recreational areas), locations and character of other community facilities, and pedestrian and vehicular circulation.

(Continued on Page 29)

Citizen Participation In Municipal Government • • • One Approach

By H. Rutherford Turnbull, III

From time to time, local government's institutions are challenged by apparently radical sentiments and are called upon to respond to the frequently justified and reasonable—albeit vociferous—demands for change. During the past several years, local governments have been faced with demands for "citizen participation," "decentralization," or "community control" of functions and decision-making procedures—all under the rubric of "participatory democracy." Whatever the person who shouts them out may mean by these phrases and however they might be understood by the governmental official at whom they—and less polite words—are shouted, there is general agreement that they reflect a citizen's deep feelings of "alienation" from his local government.

An infrequent opportunity was presented to the Charlotte-Mecklenburg Charter Commission to respond to these sentiments and challenges while it was preparing a proposed charter for the consolidated governments of the City of Charlotte and Mecklenburg County and for any of the towns of Cornelius, Davidson, Huntersville, Matthews, and Pineville whose citizens elected to participate in the consolidated government and abolish their respective governments.

To take advantage of the opportunity that writing a new charter for a single government afforded, Charter Commission Chairman Jones Y. Pharr, Jr., appointed a Committee on Life and Government whose members were all citizens of the unincorporated area of Mecklenburg County or of one of the five small towns. They were William I. Ward, chairman (Davidson), Dr. Elizabeth Corkey (Mecklenburg County), Roy T. Fortner (Huntersville), Dr. W. H. McEniry (Mecklenburg County), Wallace S. Osborne (Mecklenburg County), and Rev. J. E. Wayland (Cornelius). Rev. Jack L. Bullard, executive secretary of the City's Human Relations Commission, gave valuable assistance to the Committee, and I served as its staff associate and drafted its report to the Charter Commission.

The Committee on Life and Government of the Charlotte-Mecklenburg Charter Commission held a series of meetings to perform its task of (1) examining "those things particularly valued by citizens of the smaller towns of Mecklenburg which those citizens may wish to retain for the future," (2) defining and enumerating the various features of government held to be desirable by the citizens of those towns, and (3) suggesting to the Charter Commission ways and means by which those qualities or features could be retained within the framework of a consolidated government for Charlotte and Mecklenburg County.

Early in its deliberations, the Committee recognized that forms of decentralization and community control are as compatible in a context of city-county consolidation in which five small municipalities might join as they are in an exclusively urban context, as, for example, when the forms would apply only to Charlotte.

Also early in its deliberations, the Committee recognized that many of the features of small town life that appear to be particularly valued by citizens of those towns also are values sought, but not always enjoyed, by citizens of the City of Charlotte and of unincorporated areas of the County.

The author is a member of the Institute staff who was assigned to work with the Charlotte-Mecklenburg Charter Commission in the recent unsuccessful consolidation effort.

The Committee and I recognized that "values" is ambiguous, but intended the ambiguity. If pressed to explain it—members of the Committee of course knew what it meant, although their definitions may have lacked precision—I would recall an incident that occurred early in our staff work. In October, 1969, I was interviewing the "director of public works" for one of the small towns (although that is far too weighty a title for him, it most accurately describes his duties) when an elderly lady broke in upon our meeting. Through her tears and distraught voice she told the "director" that her husband's grave in the municipal cemetery had been torn up. She suspected either local college students or local canines. The "director" excused himself from our interview, rounded up one or two other town employees and drove out to the cemetery with the lady, the employees, spades, and rakes. When he returned to our interview an hour later, the widow was calmed, the grave was freshly raked (it had not been disturbed, contrary to her belief), and normalcy had been restored between the citizen and the town government. The "values" obviously are governmental in nature (responsiveness, efficiency, clearly established priorities, and on-the-scene decision-making, among others) but they also are personal in nature (the first-name basis between the widow and the official, the official's knowledge of her circumstances, and his ability and willingness to treat her particular problem in a highly personal way, in a manner that reflects that these two people grew up together in the same town).

Accordingly, the Committee consciously and deliberately attempted to isolate those particular values sought by members of the small towns as well as by residents of unincorporated areas of the County and the City, to suggest procedures by which those common values could be preserved and enhanced by a structure of government, and to devise procedures that are as workable for members of the small towns as for residents of the unincorporated areas and Charlotte.

These were to be procedures by which all citizens of the consolidated government could be assured that their government could be capable of understanding their needs, responsive to those needs, and responsible in its actions. At the same time, they were to be procedures by which all citizens of the consolidated government would have methods for effectively expressing their needs, have free and open channels of communication with their government, and participate to the maximum extent feasible in the traditional process of democratic government.

Since the Committee's recommendations were not incorporated in the proposed Charter and were not reflected in the Report of the Charter Commission, they were not an issue in the campaign to promote consolidation. It is therefore speculation as to the reception they would have been accorded by the voters.

Because some of the recommendations might be interesting or useful to other local governments in North Carolina, excerpts of the Report of the Committee on Life and Government, entitled "Toward Neighborhood Government—The Precinct Selectman," are presented here.

H. Rutherford Turnbull, III

Values Common to All Residents of Mecklenburg County

The Committee concludes that the values of life in the smaller towns are the values that citizens of the unincorporated areas of the County and Charlotte also desire but do not have an entirely adequate means of obtaining under present governmental structure. These are the values of "making governmental employees and elected representatives more responsive and responsible to the needs and desires of the citizens, and of having ways for expressing individual citizen needs, for making citizen needs understood and for enabling those needs to be satisfied." The key values are governmental responsiveness, governmental responsibility and citizen satisfaction. Stated negatively, the Committee finds that citizens do not want to be "alienated" from their government, they do not wish to feel unable to affect what their government does, they do not wish their feelings of ineffectiveness to create among them a sense of apathy, and they do not want their government to so lack responsiveness or responsibility that they will feel that it is not worth their while to participate in the political process.

The Precinct Selectman—A Vehicle for Neighborhood Government

The Committee recommends that the Charter authorize the creation of an office of the consolidated government known as the "precinct selectman." Recalling that the Charter Commission has made a tentative decision to recommend election to the consolidated governing board partly by districts and

recognizing that the Charter Commission implicitly has found it desirable to give a more direct voice in government to persons who reside in an electoral district,[1] the Committee has sought to build upon these decisions by devising a method whereby more particular area interests can be presented in governmental matters, the normal political process can be lowered and broadened by having elected "representatives" in each precinct, and avenues for participation in the political process and in governmental affairs can be made all the more available to citizens.

Under a precinct-selectman procedure, a single representative of each precinct could be elected at the time of the elections for membership on the consolidated governing board [the Council]. The selectmen would serve for a term of four years — or for the same period as members of the governing board. And they would be elected on a nonpartisan basis.[2] Also under the precinct-selectman procedure, the members of the governing board would not be eligible to serve as precinct selectmen.

The use of the selectman procedure would depend on the initiative of the voters in each precinct. Upon a petition to the governing board by designated percentages of the voters, the governing board would be required to institute the precinct selectmen procedure. Before setting out the proposed requirements concerning percentages and procedures, a word is in order concerning the matter of local initiative for neighborhood government.

It is important that the impetus for the precinct selectmen come from the people and be directed to the consolidated government, rather than from the consolidated government and directed to the people. This kind of impetus will tend to enhance citizens' feelings of participating in government. It also may avoid potential criticism that, if the consolidated government institutes the precinct selectmen procedure on its initiative, it may be acting without sufficient information concerning the wishes of the people in the precinct or even in disregard of those wishes.

The Committee believes that the precinct-selectman procedure is not incompatible with consolidation of city and county governments. Indeed, the procedure and consolidation are mutually compatible, politically desirable and structurally feasible. The essence of each—especially in light of the Charter Commission's decisions about electoral districts—is the sharing of responsibilities, duties, opportunities and potential for governing. These concepts seek to enhance governmental responsiveness and responsibility and citizen satisfaction.

The Committee believes that the procedure for creating the office of precinct selectman should insure as broadly based citizen acceptance of the need for selectmen as is practicable. Evidence made available by the Mecklenburg County Board of Elections indicates that a voter turn-out of approximately 40 per cent of all registered voters is a relatively high turn out. Accordingly, the Committee believes that there should be two petition procedures for creating the office. One would require the creation of the office of selectman if 20 per cent of the registered voters in the precinct signed a petition for the office. If the 20 percent requirement were satisfied, the office would be automatically created and its holder chosen at an election to be held within 90 days after the signatures on the petition were certified, all as more fully set forth below, or at the next consolidated election, whichever occurs first.

The second procedure would require there to be a referendum of the voters in the precinct on the sole question of whether the office should be created for the precinct, *if 5 per cent of the voters in the precinct sign the petition.* If the majority of the persons voting in the referendum gave an affirmative answer, the officeholder would be chosen at an election to be held within 90 days after referendum or at the next consolidated election, whichever occurs first.

The difference between the two procedures is that the 20 per cent procedure automatically results in the election of a precinct selectman, whereas the 5 per cent procedure requires, first, a referendum on the issue and, second, if the referendum is successful, an election of a selectman.

The consolidated board of elections should certify to the governing board the signatures on the petitions. After certification, there should be either an election of a selectman (under the 20 per cent procedure), or the referendum and then an election if the referendum is passed (under the 5 per cent procedure). Persons qualified to vote in elections for members of the consolidated governing board and chief elected official should be entitled to vote at selectman referenda and elections; a majority of those who vote will be sufficient to adopt or reject the referendum issue.

Selectmen should be elected under a nonpartisan process. There should be a write-in procedure. The candidates or write-in persons receiving the highest number of votes would be declared elected (election by a plurality). The provisions of the statewide election law, Chapter 163 of the General Statutes, and of Chapter 9 ("Elections") of the Charter should apply.

The device of locally elected selectmen assures at least initial community acceptance and, by the working of the same factors of the political process as apply to representatives to the consolidated governing board, future responsiveness and accountability.

1. The Charter Commission recommended a council consisting of twelve members elected only by voters of electoral districts and six members elected at large by all the voters.

2. Councilmen were to be elected on a partisan basis. Selectmen were to be elected on a nonpartisan basis because area interests, not partisan ones, were sought.

The selectmen should be elected for terms of office that are the same as the terms of office for members of the consolidated governing board. Any person who qualifies to vote for members of the consolidated governing board should be eligible to serve as a selectman. Selectmen should be elected also, to the extent practical, at the same time as members of the consolidated governing board, although special elections should be authorized as well. Provisions should be made in the Charter for the petition-referendum procedure to be able to be begun between the date of adoption of the Charter by the General Assembly and the date on which the consolidated government will become effective, so that elections of selectmen can be held at the same time as the first election for the members of the consolidated governing board.

Any person wishing to be elected as a selectman should file notice of his candidacy, in substantially the same form required of candidates for the consolidated governing board, with the consolidated board of elections at least 30 days before the date of the election for the office of selectman.

The Committee has considered carefully the relationship between the partisan process and district councils. Without respect to the decision of the entire Charter Commission on the issue of whether the consolidated government will be partisan, the Committee recommends that selectmen be elected on a nonpartisan basis. The overriding consideration is not whether a partisan point of view is reflected, but whether a highly specific district point of view is officially recognized. The theme that the Committee has been emphasizing in its proposal has been a district sense of community, and the Committee believes that the district sense of community ought not to be complicated by partisan factors.

The Committee also has considered the relationship of the consolidated government and the selectmen. This consideration has ranged over a variety of questions, but has focused principally on the matter of whether the consolidated government or any of its agencies, departments, units, authorities, commissions or other bodies should be entitled to delegate certain powers to selectmen. In view of the Commission's mandate to consolidate governments, the Committee believes that it is unwise to empower the consolidated government to delegate powers to the selectmen.

The Committee has decided that selectmen should not also be representatives on the consolidated governing board. To permit them to be members of the consolidated governing board would simply either duplicate the role of the consolidated governing board members or make the entire concept of selectmen less meaningful, as their purpose is partly to be a vehicle for lowering the normal political process and insuring increased governmental responsiveness and responsibility and citizen satisfaction.

On the other hand, the Committee anticipates that the regularly elected members of the consolidated governing board, the Mayor, and other government officials would meet from time to time with precinct selectmen, and that the selectmen would have the right to require attendance by government officials at meetings of precinct selectmen and citizens. The Committee also anticipates that the selectmen would transmit to the consolidated governing board and to other agencies of the government the desires and opinions of citizens in the precincts, and the Committee recommends that selectmen be entitled to appear before any unit of the consolidated government on any matter concerning the precinct or its citizens. These rights would be preceded by notice in writing given by the selectmen a reasonable time before the desired conference.

The selectmen should be required to hold regularly scheduled public meetings, with notice and the agenda of the meetings similar to that of the consolidated governing board. In addition, they should be required to adopt rules of procedure which must receive the approval of the consolidated governing board. The rules should require that public meetings be held at regularly specified times in a predesignated place within the district. The consolidated government should be required to make available its governmental facilities for these meetings.

Rather than function as arms of the consolidated government, precinct selectmen should serve in advisory and advocacy roles, representing the interests of residents of the precinct.

The Committee acknowledges that citizens of the consolidated government will have interests that transcend their precinct boundaries; indeed, the Charter Commission decisions on at-large and electoral districts implicitly make the same acknowledgment. The natural and desirable result of citizens' having interests that are greater than their precincts would be joint action by precinct selectmen. The form of the action undoubtedly will be varied and may include joint meetings of selectmen, with or without the presence of the citizens or governmental officials, or joint presentations of similar points of view to the consolidated government. The Committee does not suggest that the Charter should require formal, mandatory councils of selectmen, but rather that the Charter authorize councils of selectmen to be formed voluntarily by selectmen from two or more precincts for the purposes of promoting the mutual interests of those precincts' citizens. The Committee recognizes that it is entirely likely that a selectman could be a member of several councils of selectmen, even though the several councils might be interested in different objectives. For example, a selectman from Mallard Creek may belong to a council to promote better access to U.S. I-85. At the same time he

might also be a member of a council of selectmen to bring about the establishment of a park in the UNC-C area. And he finally might be a member of a council to improve governmental services in the general services area of the county.

This arrangement would recognize and give voice to citizens' mutual interests, without regard for precinct boundaries or the limitations imposed by boundaries of electoral districts. It also would tend to supplement and enhance the area-wide interests of citizens, which the Charter Commission recognizes will be given voice in the governing board at least by its members elected at large.

Councils of selectmen would not be restricted as to minimum or maximum number of members; as few as two or as many as ten, for example, could make up a council. Also, the formation of councils would depend on the initiative of the precinct selectmen themselves; the governing board would not be authorized to require that councils be created. Finally, there should be no requirement that councils of selectmen be limited in membership to only selectmen from the same electoral district.

Mobile Homes are Here to Stay *(Continued from Page 24)*

Details on mobile home lots and related yards and other open spaces. The manner in which these items are handled will determine in large measure the opportunities for flexibility, adaptability, and innovative design.

It would probably be best to permit minimum area for the mobile home lot to adjust itself to the size of the units and additions to be used on them, plus related yards and other required open space.

Several devices are available for control. Fixed yard requirements should probably be minimal, providing for the possibility of attachment of units and placement of the off-side of the unit on the lot line (given access arrangements for maintenance). To provide for flexible design and still protect against overcrowding of lots, maximum lot coverage by the mobile home and its additions can be limited (with maximum lot coverage increasing for attached forms). This allows combination of open space on the lot in a variety of forms without freezing it into the usual fixed yard envelope. Somewhere on the lot, with location left optional, regulations should require an outdoor private living area of specified minimum dimensions.

Open space around the unit should relate in its dimensions and functions to the exposure of the portions of the unit involved. Thus where there is principal orientation of important windows on the entry side, the adjoining open space should have greater dimensions than on the off-side, and the principal view should probably not include the parking area on the lot. Related open space here might well be the outdoor private living area.

There should, of course, be suitable setback from adjacent streets, partly to provide some separation from traffic noise and lights, but particularly to protect visibility at points where vehicles will be entering or leaving parking areas on the individual lots.

Spacing between units should also be governed by performance considerations, and here the coordination possible in planned development becomes a major asset. Thus where a 20-foot spacing between units side by side might be accomplished by requiring 10-foot side yards for each (breaking up the open space on each lot into fragments), the same result can be accomplished by permitting each to locate on the lot line its off-side and to have a yard 20 feet wide on the entry side, where it has maximum utility.

In no case should units be closer together than safety from spread of fire permits, but where units are constructed with suitably fire resistant walls, attachment should be permissible.

Source for standards. As a point of beginning in setting standards in zoning ordinances (to the extent that such standards have not already been suitably established in other state or local controls), HUD's *Mobile Home Court Development Guide*, published in January, 1970, should be of considerable assistance. This source has only a hint of a beginning on the possibility of attached units, and its yard requirements are not related to orientation of outlook from the unit.

For possible adaptation to planned developments of the kind suggested here, FHA's *Minimum Property Standards for Multifamily Housing* has useful suggestions on use of the land intensity rating system for establishing floor area ratios and related controls on open space, including what is called "livability" open space. It also relates requirements on adjacent space to window exposure of dwelling units.

Sir Desmond Heap

Graham Ashworth

British Planners to Attend 14th Annual Planning Conference— April 28–29

North Carolina's fourteenth annual statewide planning conference, co-sponsored by the Institute of Government and the N. C. Chapter of the American Institute of Planners, will be held on Wednesday and Thursday, April 28 and 29, at the Institute. Invitations to the conference have been sent to members of city and county planning and governing boards, local housing and redevelopment commissions, and zoining boards of adjustment and to related agencies and officials working in the area of planning and development.

This year's conference will be built around three themes, and it will bring to North Carolina officials the accumulated experience of experts from other states, Washington, D. C., and Great Britain, as well as their own. The three conference themes or ideas are: the problems of poverty and low-income housing, special subjects related to rural and regional development, and the management of North Carolina's visual environment—the "looks" of the state's cities and counties and what can practically be done to improve them.

Two special conference speakers from Great Britain will highlight general sessions on Wednesday evening and Thursday morning. The first of these is Sir Desmond Heap, LL.M., Comptroller and City Solicitor to the Corporation of London. Among the several public offices currently held by Sir Desmond is one established in 1242, dating back to the reign of Edward I. More relevant to the conference, however, is the fact that Sir Desmond holds a place of world prominence in the planning and legal professions and is widely known both in the United States and in Europe for his many books and articles on planning law and practice.

The second speaker is Mr Graham Ashworth, A.R.I.B.A., A.M.T.P.I., an architect-planner acknowledged in England as one of the leaders of the planning profession there. Mr. Ashworth is the Executive Director of the Civic Trust for the North West, in Manchester, and he currently serves as a member of Council of the Town Planning Institute, the British equivalent of the American Institute of Planners. Those attending the conference will have a unique opportunity to assess for themselves the transfer value to North Carolina of the solutions to planning problems that have been in effect in the United Kingdom for some time.

The program itself will deal in concurrent sessions with specific subjects of current interest to

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CHARLOTTE-MECKLENBURG CONSOLIDATION DEFEATED

the issues . . . the principals . . . the results

By Warren J. Wicker

On March 22, the voters of Mecklenburg County rejected 7 to 3 a proposed plan for consolidating the governments of Charlotte and Mecklenburg County that had been under study since 1967.

The proposed plan would have merged the governments of the City of Charlotte and Mecklenburg County. Had it been approved in the county-wide vote, subsequent elections would have been held in the six smaller towns (one, Mint Hill, was incorporated in March by the current North Carolina General Assembly) to determine whether any of the governments of those municipalities would also be merged into the consolidated city-county government.

This article examines both the main issues that developed in the campaigns for and against the consolidation and the principal proponents and opponents, and reports briefly on the results of the voting.

(The March issue of *Popular Government* contains an article describing the history of the consolidation efforts in Mecklenburg County and outlining the characteristics of the plan being proposed.)

The proposed Charlotte-Mecklenburg consolidation went down by a vote of 39,464 against and 17,313 for. By election day, newspaper polls and many observers were predicting its defeat, but few anticipated that it would fail by such a large margin.

The vote in Mecklenburg came in a county where functional consolidation and cooperative activity between the governments had reached extensive proportions. Consolidation had been discussed for many years, and many officials saw it as a natural step in the evolution of cooperative and joint relationships between the two governments. Moreover, the move to create the Charter Commission in 1969 had the endorsement of all the local governments, the Chamber

of Commerce (which started this effort), the local press, the League of Women Voters, and several other groups. Except in the smaller towns, outspoken opposition to the idea of consolidation was generally not evident. All these conditions suggested that consolidation might receive a favorable vote.

Experience with consolidation attempts in other metropolitan areas indicated that citizens in the smaller towns and unincorporated areas of a county usually opposed consolidation. Local officials anticipated similar opposition in Mecklenburg. They also knew that elsewhere voter approval of consolidation seemed to have a better chance when some crisis beset the existing governments. The advocates of consolidation recognized that the absence of a crisis, the likely opposition of citizens outside of Charlotte, and possible resistance to change and consolidation per se were significant factors against consolidation. They were convinced, however, that a single government serving all the community would result in better coordination of services, better planning, wiser and more economical use of the community's tax resources, and a more responsive government. The city and county governing boards had sometimes spent months or years in trying to reach agreement on a joint course of action. With a single government, the advocates said, these decisions would be made faster and action needed by the community would be taken sooner. They were confident that both the need for consolidation and its advantages would commend themselves to the voters and outweigh the considerations often cited as disadvantages. It was thus with optimism that the Charter Commission began developing the plan in 1969.

The Issues

Early in their work, after the first visits to consolidated governments and the first public hearings, members of the Charter Commission concluded that representation, taxation, and the form of government would likely be key issues in the debates over whatever plan was developed. Other issues were identified as their work continued, often with a realization that probably no answer developed would please all citizens. In commending its work to the people the Commission said,

> *We wish we could say this* [the Charter] *is a perfect document. We wish we could say it will provide a government that can solve all problems. In candor, we cannot. . . . To those citizens who wish that some things about this charter were different, we offer the observation that the choice is between this . . . plan and the seven different governments we now have.*

The campaigns for and against the charter were waged largely in the final six weeks before the vote. Listed below are the major issues that appeared to be developed in the campaign. The analysis of the voting patterns indicated that some of them were important. The relative importance of many, however, cannot be measured from the voting results.[1] The issues are identified here. Later reports will have to weigh them.

1. **Consolidation.** As noted, from the beginning, the idea of consolidation appeared to have wide general approval, and in the campaign the concept as such was not opposed. In the last week of the campaign, for example, the opposition leader, Allen A. Bailey, said, "The community does not have to say 'no' to the idea of merger of our governments in order to say 'no' to the radical changes in government proposed under this charter. [After its defeat] we could, in fact, begin immediately to draft a document which would simply merge our two governments. . . ."

The size of the vote against the charter suggests that some generalized opposition to the idea of consolidation may have been present, but it never became a major issue.

2. **Elected Representation.** Judging from campaign statements, the question of elected representation was the issue that received most attention. It involved the proposed arrangements for electing both the consolidated governing board (council) and the school board.

In the existing city and county governments, both boards are elected at large for two-years terms. Charlotte has a seven-member council and a mayor and the county has a five-member board, from which the members select one of themselves as chairman. The nine school board members are elected at large for six-year, staggered terms.

The proposed charter called for a council of 18 members, 12 elected from single-member districts (about 30,000 people in each) and six elected at large, all for staggered terms of four years. The mayor was also to be elected at large for four years. The revision in the school board called for it to continue to have nine members but with six elected from districts and three at large.

Proponents claimed that the proposed plan would make government more responsive and give all citizens a feeling of being directly represented. The districts, as drawn, would have enabled both blacks and rural residents to elect three members of the council. Consolidation and the plan of representation, said the proponents, would give all citizens a voice in their government. The city's fringe-area residents are now subject to decisions of the city council on planning, zoning, annexation, utility rates, and many

1. Dr. Schley Lyons of the University of North Carolina at Charlotte undertook an intensive study of voter attitudes and behavior both before and after the referendum. When his study is complete, some indication of the importance of the various issues on voting should be available. L. M. Wright, Jr., associate director of the Charter Commission, also plans a volume that will report in detail on the work of the Commission, the development of major issues, and the conduct of the campaigns.

other matters, but have no direct influence in its selection. Under consolidation there would have been one county-wide council and all citizens equally represented on it. (Currently, most members of the elected bodies live within one fairly small geographical area of the county.)

Opponents charged that the plan would bring a return to "ward politics" and "log-rolling." They said that the council was too large and would result in government by committees. Moreover, they said, every citizen should be able to vote for all those who governed him, or, at the least, for a majority of them—something not possible under the proposed plan. They also suggested that some districts might not be able to offer well-qualified candidates and that the community should not approve a plan that prevented it from having the services of its most qualified citizens, regardless of where they live. District representatives, they said, would have a narrow view of the community's needs rather than a community-wide approach which would be of most benefit.

Besides these traditional considerations, the question of representation for blacks was a factor. Some proponents said that the community would be better off and better able to deal with current concerns if some black citizens were assured seats on the governing body. While there were few direct statements to the contrary, it appears that some opposition resulted from the feeling that no change in representation plans should be made if the result would be to increase the number of blacks on elected boards.

3. **Fair Representation.** One of the most controversial provisions of the proposed charter was Section 6-42, entitled "Fair representation." This section stated that in making appointments to all boards, commissions, and authorities of the consolidated government, the council "shall secure reasonable representation on each board, commission and authority of all sexes, races, income groups, geographic sections of the county and political parties." The section was also to apply to all boards and commissions of the government, whether or not appointed by the council. The charter also contained other similar and more specific provisions. The Civil Service Commission provisions, for example, required that each member reside in a different electoral district and that not all members be of the same "race or sex or political party."

Proponents saw these provisions as strengths—the means to make the government truly representative. The spirit of the provisions were right, and the word "reasonable" was adequate to provide the necessary leeway and prevent legal objections when exact proportions were not achieved in a particular case.

Opponents said that the section would open the government to endless suits and that federal judges would appoint members to the boards and commissions. They also said that the provisions would mean that many of the able citizens now serving on these boards could not be reappointed as the Section 6-42 requirements were implemented. As with the elected bodies, the government should be able to call on its ablest citizens for service, regardless of any other considerations or characteristics.

4. **Status of the Semi-Independent Boards and Commissions.** While the charter did not make major changes in the status of these bodies (the Hospital Authority, Housing Authority, Auditorium-Coliseum Authority, etc.), it made all of them subject to an audit by the central government and some of them subject to the consolidated government's personnel and budgeting provisions. Membership on the Housing Authority was increased from five to 15, of whom a third were to be tenants of public housing. For the Hospital Authority, the current requirement that new appointees be made from a list submitted by the Authority was removed.

Most members of the existing boards, commissions, and authorities objected to these changes. Opponents of the charter said that they would make the boards more "political" and discourage able people from serving on them.

Proponents said that the provisions more fully integrated these agencies with the general government, enabling the government to plan and coordinate services and activities better, and helped assure that all elements of government would be more responsive to citizens.

5. **Taxation.** The financing plan proposed called for some services to be provided county-wide and supported on a county-wide basis. Others could be provided only in urban service districts, or any could be provided at a higher level in urban service districts. To a large degree, the council was empowered to make annual decisions (in the budget) on the services provided and in the distribution of revenues other than those to be secured from the property tax. As a result, no precise projection of the tax impact of consolidation could be made. Consolidation could have been effected with almost no change in taxes for any taxpayer, or, depending upon decisions by the council, with a net tax decrease for taxpayers within the city and a net increase for those outside the city. Bonds issued by Charlotte became county-wide obligations, and subject to county-wide support in some cases.

Proponents said these arrangements permitted fair taxation—each citizen would pay for what he received, no more and no less. Opponents charged that the debt shift was unfair and that big government would bring higher taxes. Citizens in the areas outside the city appeared especially apprehensive about increased taxes.

6. **Form of Government.** The proposed charter called for a change from the council-manager plan to

a council-mayor-administrator plan. The key changes involved strengthening the role of the mayor and decreasing the role of the manager.

Leaders both for and against the charter supported these provisions and they did not appear to be an issue with the general population. City and county employees, however, strongly objected to the change when it was first announced during the charter-drafting process, and their apprehension about consequences to their jobs and job assignments continued. Before the vote, one observer said that 65 per cent of the county employees and 55 per cent of the city employees would oppose the charter. No direct evidence can be drawn from the returns, but the size of the anticharter vote suggests that his observations may have understated the opposition.

7. **Planning.** The proposed charter significantly strengthened the role of planning, which proponents claimed as a major advantage. Opponents expressly objected to some of the zoning provisions and saw others as giving government too much power.

8. **Partisan Elections.** City elections are now nonpartisan and county elections partisan. The charter called for partisan election for the council and nonpartisan for the school board (now also nonpartisan), and opposition was minimal.

9. **Economy in Government.** Charter backers said that a single government would produce better planning and better coordination of services, and thus effect real savings in the long run. No immediate savings were claimed. Opponents said that bigness would increase costs rather than reduce them.

10. **Community Unity.** Proponents saw consolidation—one government for one people—as a means to bring the people of the community together, and thus meet the demands of the future better. Opponents said that the representation plans would tend to divide the community.

11. **Charlotte Expansion.** Many citizens, especially those outside the city, appeared to see consolidation as a means for Charlotte to "take over" the county.

12. **Status of the Smaller Towns.** Throughout the work of the Charter Commission, people from the smaller towns indicated their fear of consolidation and sought to preserve the independence of the smaller towns. The charter did not, in fact, reduce the powers of the smaller towns except for a minor limitation on one type of annexation, but apparently the fears were not allayed. The vote outside the city was 9 to 1 against.

13. **Change.** Change itself appeared to be a value for some citizens—positive to some and negative to others. One opponent said that he had been against school consolidation and court reform and he was surely going to vote against consolidation of the governments.

Many other features of the consolidation plan brought forth some comments from either proponents or opponents during the campaigns, but the issues just listed appear to have been, at close range, the important ones.

The Proponents

The campaign for consolidation was headed by C. C. Cameron, Chairman of the Board of First Union National Bank and a long-time supporter of consolidation. Among the individuals and groups that supported consolidation were the following:

Committee for Fair, Open, Representative Government [FOR] (the committee that headed the campaign for approval)
Mayor Belk of Charlotte and six of the seven City Councilmen
Chairman James Martin and two of the other four members of the Mecklenburg Board of County Commissioners
Four of Mecklenburg's ten members of the General Assembly
Former Charlotte mayors Stan Brookshire and Ben E. Douglas
Executive Committee, Mecklenburg Democratic Party
Executive Board of the Democratic Women's Club of Mecklenburg County
Chairman, Mecklenburg Democratic Party
Charlotte Chamber of Commerce
Charlotte Jaycees
Mecklenburg Jaycees
Charlotte Business and Professional Women's Club
League of Women Voters of Charlotte-Mecklenburg
Presidents of all colleges and universities in the county except Davidson
Interested Citizens Association
The *Charlotte Observer*
The *Charlotte News*
Television Station WBT
Radio Station WBT
Radio Station WAYS
Radio Station WIST
National Conference of Christians and Jews
Black Ministers Conference
American Association of University Women
Mecklenburg Young Democrat Club
Charlotte Citizens for Independent Political Action

The Opponents

Allen A. Bailey, a prominent attorney and conservative Democratic leader, headed the opposition forces. Other individuals and groups that joined the campaign against consolidation included the following:

- Committee to Insure Good Government [CIGG] (the committee that headed the campaign against consolidation)
- Charlotte-Mecklenburg School Board
- Mayors of the five active smaller towns
- One member of the General Assembly from Mecklenburg County
- Charlotte-Mecklenburg Hospital Authority
- Chairman of the Charlotte Housing Authority
- Two of the five members of the Board of County Commissioners
- Former Charlotte mayor Philip Van Every
- Chairman, Mecklenburg County Republican Party
- Mecklenburg Conservatives
- Concerned Parents Association
- Mecklenburg Citizens for Fair Taxation
- Mecklenburg Farm Bureau Federation
- Members of Mecklenburg volunteer fire companies

The Vote

The turn-out for the referendum was moderately heavy, as 57,000 voters (out of 130,000 registered) went to the polls. Voting was especially heavy in the portions of the county outside of Charlotte. Results are indicated in the following table.

	For	Against	Total Vote	% For	% Against
Inside Charlotte	14,573	19,203	33,776	43.1	56.9
Outside Charlotte	2,740	20,261	23,001	11.9	88.1
Total	17,313	39,464	56,777	30.5	69.5

Preliminary analysis of the voting patterns permits a few observations.

1. Residents of Charlotte gave the charter more support than those outside the city, who represent only 32 percent of the county's population but provided more than half of the opposition to the charter. Taxation, status of the smaller towns, fear of Charlotte and other factors may have been key issues in the heavy outside vote against.

2. The charter was approved in only 15 of the county's 88 precincts. All of these either were black or had large black minorities. The total number of black votes, however, was relatively small. Blacks contribute just over 25 percent of the county's population, yet one observer estimated that fewer than 4,000 blacks voted. The representation features of the charter appeared to appeal to blacks.

3. The heaviest majorities against the charter were returned in the rural precincts. The vote in one was 1,113 to 36.

4. More affluent precincts gave the charter strong support, but not with majorities.

In short, opposition to the proposed plan was widespread.

The Future

The future of consolidation in Charlotte and Mecklenburg County at this time is uncertain. Immediately after the vote a few leaders from each side of the fight suggested that the charter should be revised and submitted to the people again soon. Others, both for and against, suggested that consolidation must have been an issue and that it might be better to concentrate on further functional consolidations for a few years and then, perhaps, try again to consolidate the governments.

Other areas of North Carolina had been much interested in the consolidation effort of Charlotte and Mecklenburg County, and its approval would probably have increased interest in city-county consolidation elsewhere. The defeat of consolidation in Mecklenburg seems likely to make advocates of consolidation in other parts of the state more cautious.

The author is an Institute staff member in the field of public administration. He served as director of the Charlotte-Mecklenburg Charter Commission staff.

WINSTON-SALEM PURCHASING AGENT RECEIVES AWARD

The annual Local Government Purchasing School was held at the Institute of Government on March 4-5, 1971, sponsored by the Institute and the Carolinas Association of Governmental Purchasing. During the School, the Association presented to Aaron C. Shepherd, CPPO, city purchasing agent for Winston-Salem, a Distinguished Purchasing Agent citation in recognition of his "outstanding service in the art of governmental purchasing." Shepherd is shown at right (center) receiving the citation from Ernest D. Campbell, president of the Association and purchasing director for the City of Greenville, S. C. Harry Collins, purchasing agent for Columbia, S. C., is at right.

In presenting the citation, Campbell reviewed Shepherd's accomplishments and contributions to public purchasing. He noted that Shepherd was instrumental in organizing the Association and served as its first president. He is a member and former president of the Winston-Salem Association of Purchasing Agents and a former member of the board of directors of the National Institute of Governmental Purchasing. In September of 1970 he became the first public purchasing officer in the Carolinas to receive the Certified Public Purchasing Officer's certificate from NIGP. Shepherd also holds a Certified Purchasing Officer's certificate from the Southern Purchasing Institute, is the author of many articles on purchasing, and has lectured at a large number of conferences and institutions on different aspects of purchasing.

Planning Conference

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North Carolina officials. For example, the workshops on regional development will cover such areas as comprehensive planning for health, criminal justice, and manpower, and the role of the new Councils of Government in North Carolina. The programs on the visual environment will cover such topics as billboard control, underground wiring, historic building conservation, and the details of the federal open space and urban beautification programs. The sessions on housing will be presented by officials of the Federal Housing Administration, the North Carolina Housing Corporation, and the Low Income Housing Development Corporation of North Carolina, among others.

A special clinic for members of city and county zoning boards of adjustment will also be held at the Conference.

Officials who would like further information about the conference or an invitation to attend should contact Robert E. Stipe or Philip Green at the Institute of Government.

New Books in the Institute Library

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Punke, Harold. *The Teacher and the Courts*. Danville, Ill.: Interstate Printers and Publishers, 1971.

Schaller, Frank. *New Town Story*. London: MacGibbon & Kee, 1970. $6.00.

Sharpe, David J., and Head, Murdock. *Problems in Forensic Medicine*. 2d ed., Washington, D. C.: Andromeda Books, 1970.

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