falls short of violence to legitimate exercises of the federal taxing power. Although as a solution it does not meet all of the questionable exercises of the taxing power, the danger of covert police regulation is mitigated.[140] To propose that the integrity of the tax power be retrieved by such limitation is not to pretend that Congress would thus be frustrated in its national police efforts. Rather, such a proposal might forecast the highly salubrious result of channelizing such efforts into the commerce field, where the material issue of federalism is familiar and better treated and where policy can more readily be determined by Congress.[141] In short, revitalizing the test would tend to spare, not only the national taxing power, but as well, federal police enactments that are appropriate and legitimate. The only victims would be dishonesty and covert regulation.

WRONGFUL SUBDIVISION APPROVAL BY THE PLAN COMMISSION: REMEDIES OF THE BUYER AND CITY

Recent studies have emphasized the social and economic advantages resulting from subdivision control.[1] Considerable attention has been directed towards over-all effectuation of planning objectives, formulation of state statutes and the creation of local planning authorities. Today, however, with the partial realization of these goals, remedial problems arise which endanger the entire program. Specifically, what is the course of action for an individual lot purchaser or municipality after a violation of subdivision regulations?

Subdivision control, in its modern context, is founded upon the older platting statutes.[2] The first statutory provisions for platting were to facilitate land conveyancing. The property owner who proposed to

140. Justice Jackson was concerned in the *Kahriger* case with the possibility of impairing the tax power, p. 378 *supra;* it might be suggested that covert regulation in the borrowed garb of a tax measure offers its own considerable threat, if not to the legitimate exercise, at least to the fruitfulness of the tax, a possibility which the Justice himself suggests. See p. 378 *supra.*

141. The national-or-local test is, in the commerce area, a familiar criterion (compare pp. 404-405 *supra*); also, the power has been extensively exploited. Congress being on familiar ground, and being freed of the need for cumbersome subterfuges, should thus be better able to define its policy and limit delegations to agencies.

1. See MELLI, SUBDIVISION CONTROL IN WISCONSIN 4-9 (1953). See also GALLION, THE URBAN PATTERN 254-258 (1950).

2. Many of these statutes are still on the books. See, for example, MICH. COMP. LAWS §§ 560.1-560.13 (1948), as amended, MICH. COMP. LAWS §§ 560.1-560.13 (Supp. 1952); WIS. STAT. §§ 236.03-236.05 (1951). The annotation in IOWA CODE ANN. c. 409, § 409.1 (1949) traces the platting statutes. Some illustrations of the old statutes are IOWA LAWS of 1860 tit. 9, c. 50, pp. 164-167; MICH. PUB. ACT 111 (1885).

convey sections of a tract in the form of lots was required to first survey the area and make a plat map designating streets, easements, and the boundaries of the lots. The map was then recorded and lots were conveyed by number instead of metes and bounds. The form of the plat map was controlled by detailed, technical requirements enunciated in the statute. Not only were discrepancies and controversies regarding boundary lines minimized, but real estate tax assessing was facilitated by making the assessor's roles accurate.

The harmful social and economic results of unplanned urban expansion, made conspicuous by ever increasing urban growth,[3] prompted legislative action. Subdivision control statutes, which gave additional import to platting procedures, resulted. The emphasis shifted from conveyancing advantages to those of planned community growth for the protection and promotion of the public health, safety, and general welfare —purposes necessitating employment of the states' police powers.[4] Today practically all states have enacted statutes to control subdividing.[5]

These statutes are, primarily, enabling acts[6] which grant the local governing unit power to establish a planning authority, generally a plan

3. GALLION, *op. cit. supra* note 1. Chapter 13 discusses urban expansion and results of the lack of intelligent planning. See also Note, 28 IND. L.J. 544-547 (1953).

"It is obvious that a basic method for directing the future growth of the city is to exercise control over private subdivision promotions at the periphery." WALKER, THE PLANNING FUNCTION IN URBAN GOVERNMENT 24 (2d ed. 1950).

4. WALKER, *op. cit. supra* note 3. Chapter 3 discusses development of the law relating to planning in general which includes such methods as zoning, building restrictions, and subdivision control. Subdivision control has been upheld under the police power. Mansfield & Swett v. Town of West Orange, 120 N.J.L. 145, 198 Atl. 225 (1938). See also Note, 28 IND. L.J. 544, 557 (1953).

5. A survey of state subdivision statutes may be found in Note, 28 IND. L.J. 544, 551 n.46, 574-586 (1953).

6. There have been mandatory or enabling classifications of subdivision statutes. MELLI, SUBDIVISION CONTROL IN WISCONSIN 13 (1953); Note, 65 HARV. L. REV. 1226, 1227 (1952). However, any such classification must be qualified. Not only must those which require or permit planning authorities be distinguished, but a further distinction should be made between required and permissive criteria by which the plan authority is guided in passing upon the proposed subdivision. To illustrate: IND. ANN. STAT. §§ 48-801—48-802 (Burns 1950) requires any subdivision to be platted and submitted to a local governing authority for approval prior to recording. The only guiding standard is that the authority *may* require streets and alleys to be contiguous to existing ways. This resembles a platting statute. IND. ANN. STAT.. § 53-701 (Burns 1951), provides that a city, town, or county *may* create a plan commission. The objectives enumerated more closely resemble the modern conception of subdivision control; this is an enabling act. See also N.Y. GENERAL CITY LAW § 27. Conversely, MASS. ANN. LAWS c. 41, § 81A (1952), appears to require a planning authority for towns attaining a population of ten thousand persons.

IND. ANN. STAT. § 53-746 (Burns 1951), stipulates the considerations to guide the established commission in approving a subdivision; the commission "shall determine if the plat provides for" contiguous streets, and minimum width, depth, and area of lots, and these are apparently mandatory considerations dependent upon the particular governing unit. This Section further provides that the commission *may* require graded and

commission,[7] whose approval of a proposed subdivision is a condition precedent to recording. The plan commission has authority to impose certain requirements as prerequisites to approval. Minimal statutes allow control over proposed streets contiguous with those in existence or in the master street plan and over width, depth, and area of lots.[8] The modern and more comprehensive statutes delegate additional authority to require substantial physical improvements prior to approval, such as curbs, sidewalks, water mains, storm and sanitary sewers, and graded or surfaced streets.[9] The increase in the number of required physical improvements[10]

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improved streets, water, sewage, and other utilities, essential municipal services, and school and recreational facilities—apparently permissive regulation. These Indiana sections follow generally the form of other statutes which separate the requirements into two categories. See MINN. STAT. ANN. § 462.28 (West 1947) ("shall"-"may" distinction); S.C. CODE § 47-1084 (1952); S.D. CODE § 45.3312 (Supp. 1952); TENN. CODE ANN. § 3493.11 (Williams 1934). Thus, a dogmatic unqualified classification is difficult.

7. For a classification of the states' statutes noting whether the local governing body or a plan commission has final authority over subdivision plats or whether a plan commission is established in an advisory capacity only, see Note, 28 IND. L.J. 544, 574-587 (1953). See also Note, 65 HARV. L. REV. 1226, 1228 (1952).

8. These standards appear to be the very minimum which a plan authority may impose, and practically all statutes make reference to contiguous streets. See note 6 *supra;* ARIZ. CODE ANN. § 16-708 (1939) (requires contiguous streets only); COLO. STAT. ANN. c. 163, § 173 (1935) (requires contiguous streets and makes minimum area and width of lots possible criteria); 65 HARV. L. REV. 1226, 1231-1232 (1952). In addition to statutes requiring only contiguous streets as a standard in approving, some set out no standards at all. MONT. REV. CODES ANN. § 11-608 (1947); ORE. REV. STAT. § 227.110 (1953); TEX. STAT., REV. CIV. art. 974a (Supp. 1950); W. VA. CODE ANN. § 3962 (1949). It may be questioned whether these statutes should not more descriptively be labeled platting statutes.

There is a close relationship, if not an overlapping, of width, depth, and area standards for lots in proposed subdivisions and the standards embodied in most zoning laws. See, for a discussion under zoning laws, Haar, *Zoning for Minimum Standards: The Wayne Township Case,* 66 HARV. L. REV. 1051 (1953); Note, 60 YALE L.J. 506 (1951).

9. Thirty-two states have statutes providing for physical improvements on subdivision land as a condition precedent to approval of the plat. In Note, 28 IND. L.J. 544 (1953), the textual discussion is followed by a chart designating the specific state statutes providing for physical improvements. For a more detailed, but outdated compilation, including standards of certain local plan commissions, see LAUTNER, SUBDIVISION REGULATIONS (1941). SUGGESTED LAND SUBDIVISION REGULATIONS which was published by the FEDERAL HOUSING AND HOME FINANCE AGENCY in 1952 indicates the complexity involved in detailed substantive improvement standards at the local level.

It must be remembered that not only do the state statutes themselves differ in the degree of authorized improvement requirements, but that the local governing units within any one state vary in the degree of exercise of their delegated power to promulgate regulations. *E.g.,* NEV. REV. STAT. § 14-115 (1943); WIS. STAT. § 236.143 (1951) (These statutes provide only for grading or paving of streets.); N.Y. GENERAL CITY LAW § 33 (This provides for paved streets, and installation of sidewalks, street lighting standards, curbs, gutters, street trees, water mains, sanitary sewers, fire alarm cables, fire signal boxes, and storm sewers in accordance with standards acceptable to the appropriate city departments.). Also see LAUTNER, SUBDIVISION REGULATIONS (1941); URBAN LAND INSTITUTE TECHNICAL BULLETIN No. 13, WHO PAYS FOR STREET AND UTILITY INSTALLATIONS IN NEW RESIDENTIAL AREAS? 5-8 (April, 1950).

10. There has been a substantial increase in the number of statutes authorizing

imposes a heavy burden on the subdivider.[11] Consequently, any avoidance by the subdivider places this considerable burden upon either the city or the lot purchaser. Accordingly, the remedies available to them become of the utmost importance.

For clarity of understanding, a hypothetical subdivision violation can be posed as a basis for considering the remedial alternatives of both the individual buyer and the local governing unit.

Pursuant to a state enabling act a municipality adopted a subdivision control ordinance; one of its requirements is that the subdivider pave streets and install connecting water and sewer mains. The plan commission has the authority to approve a subdivision plat map conforming with all applicable ordinances; approval is a condition precedent to recording. A bond may be substituted, payable to the city, as security for future completion of the improvements.[12]

A subdivider made a plat map designating lots and streets. Upon its submission, the plan commission signified their approval thereon, and the map was entered in the public record. For reasons not presently material, the commission approved the plat without securing either an agreement or bond from the subdivider for the required improvements.[13]

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physical improvements since 1940. See Note, 28 IND. L.J. 544, 565 n.113 (1953). Primarily responsible for the growing local requirements is the increase in legislation authorizing substantial improvements, coupled with a greater desire by the local community to carry out the statutory purposes.

11. "[C]ompliance with even the most minimal requirements . . . —street grading, water mains and sanitary sewers—often comprises as much as twenty percent of the total home cost. . . ." *Id.* at 569, citing MCMICHAEL, REAL ESTATE SUBDIVISION 135 (1949). There can be little doubt but that improvements are a heavy expense which cannot always be entirely offset by the increased price of the lots. Therefore any deviation from the ordinance standard would be a profit for the subdivider; such incentive may be appealing to him. This may be especially true if for one reason or another the municipal authorities are lax in subdivision control or the subdivider "gambles" on the probability of lot owners desiring to avoid litigation.

The "improvements" require the subdivider to have available a substantial source of funds even if he plans to sell the lots without building upon them. Hence, subdividers who have limited financial resources may also desire to avoid these requirements. Moreover, the amounts expended may force the subdivider to raise the price of the lot or house to a level which is beyond the means of the available market.

12. Many statutes permit the plan commission to accept a bond as security for future completion of the improvements. For a listing of these statutes by states, see Note, 28 IND. L.J. 544, 574-587 (1953).

13. Cognizance must be taken of the kind of violation which is caused by a *lack* of plan commission approval followed by a recording of the plat. Because of the absence of a showing of the commission's approval on the face of the plat, perhaps less difficult problems arise than in the wrongful approval case where the record signifies the commission's acceptance and conformity with the applicable ordinance. See, for an example of some statutes which recite that the recording of a subdivision plat prior to approval by the proper plan authority is "void", CONN. GEN. STAT. § 858 (1947); IOWA CODE ANN. § 409.14 (1949); Me. Rev. Stat. c. 80, § 85 (1944); N.H. REV. LAWS c. 53, § 20 (1942). Also, problems arise over attempts to circumvent the subdivision ordinance in the first instance by a failure to make a plat and, therefore, a failure to have an approved plat

A buyer with knowledge of the subdividing ordinance, after examining the recorded map and taking cognizance of the commission's approval thereof, bought a lot within the platted area. Subsequently, he discovered that the subdivider had entered no agreement for making the improvements nor had he executed a bond.[14]

The question may arise of the right of the buyer to complain of his predicament; that is, if the buyer actually knew or legally should have known of the deviation from the ordinance, then he cannot complain. Conversely, upon what does a buyer rely and to what extent is he privileged to rely thereon?

In considering the imputation of legal notice, several stages of the proceedings are relevant. Initially, the buyer might be on notice of the proceedings at the final hearing on the proposed subdivision. Obviously the strongest argument for holding him to such knowledge can be made in those states which require some form of notice of the hearing itself.[15] Even assuming that public notice of the hearing is given, it is doubtful that a buyer should be held to knowledge of the proceedings. For, real-

recorded. Problems of the latter type are discussed in MELLI, SUBDIVISION CONTROL IN WISCONSIN (1953) and in Note, 28 IND. L.J. 544, 561-563 (1953).

Nevertheless, the instant discussion is focused upon the wrongful approval case which appears to present the most difficult problems.

14. The facts of this hypothetical are very similar to those involved in Hocking v. Title Insurance and Trust Co., 37 Cal.2d 644, 234 P.2d 625 (1951), which is discussed more fully at p. 417 *infra*. Another case which involved a plat wrongfully approved, with lots below the minimum size required by the ordinance, is State *ex rel.* La Voie v. Building Comm'n, 135 Conn. 415, 65 A.2d 165 (1949). Also, in both of these cases the buyer of lots within the wrongfully approved subdivision was denied a building permit.

15. To make an affirmative classification, the statutes may be distinguished as to those which require public notice of a hearing and those which require that notice be given to the subdivider and adjoining record property owners. By elimination, the remaining statutes apparently make no provision for a hearing. Those states requiring notice to the subdivider and adjoining owners only are: ALA. CODE tit. 37, § 799 (1940); KY. REV. STAT. § 100.088 (1953) (says public hearing but limits notice to subdivider and adjacent owners); LA. REV. STAT. ANN. § 33.113 (1950); MICH. COMP. LAWS § 125.45 (1948); MINN. STAT. ANN. § 462.29 (West 1947) (hearing with notice by mail to subdivider only); N.H. REV. LAWS c. 53, § 23 (1942) (notice to subdivider); N.M. STAT. ANN. § 14-226 (Cum. Supp. 1951) (notice to subdivider); OKLA. STAT. tit. 11, § 1426 (1951); S.C. CODE § 47-1085 (1952) (notice to subdivider); TENN. CODE ANN. § 3493.12 (Williams 1934) (notice to subdivider). Those states requiring public notice of a public hearing are: CONN. GEN. STAT. § 859 (1949) (at commission's discretion); IND. ANN. STAT. § 53-746 (Burns 1951); MASS. ANN. LAWS c. 41, § 81L (1952); N.Y. GENERAL CITY LAW § 32; N.D. REV. CODE § 40-4821 (1943); WASH. REV. CODE § 58.16.050 (1951) (notice posted on or near land).

Two conclusions can be made. Of the statutes which make some provision for a hearing before final approval of the subdivision by the plan commission, the majority require only that notice of the hearing be mailed to the subdivider and the adjoining record property owners. There is a noticeable lack of requirements for public notice. Nevertheless, a local ordinance or regulation may provide for public notice and a hearing even though not required by statute. It has been suggested that perhaps considerations of inconvenience and lack of interest outweigh the advantages of a public hearing. Note, 65 HARV. L. REV. 1226, 1231 (1952).

istically, unless a purchaser has already been negotiating with the subdivider or has some special interest in the matter, he will not have, nor should he be bound with, knowledge of what has transpired at the hearing —the purchaser may well have been a nonresident at the time of the hearings.

Secondly, the buyer might be held to notice of the proceedings as transcribed in the plan commission minutes.[16] This argument forces recognition of the commission's minutes as a public record. However, the statutes disclose neither expressly nor by implication any intent to give such dignity to transcribed commission proceedings.[17] Moreover, the only public record established by the statutes is that for the approved plats,[18] thus signifying that a buyer need only look to the recorded map bearing the plan commission's approval, presumably in accordance with the ordinances and regulations. Hence, the buyer is bound only by the recorded plat.

While the buyer is bound only by the recorded plat, this does not preclude his being on notice of some violations. A failure of the plan commission to demand lots of the required depth, width, and area or a dedication of streets of the required width may be revealed on the face of the recorded plat. Admittedly, it is reasonable to contend that the buyer is on legal notice of the discrepancy and may not be able to assert any actionable injury. However, it is just as rational to argue that even though a deviation appears on the face of the plat, the subdivider has acted unlawfully and cannot successfully raise a defense of legal notice to defeat the buyer in redressing his injury.

A difficult aspect of the record-notice problem arises where the plan commission does not act unlawfully but, rather, in good faith grants a variance from the ordinance requirements.[19] Assuming that under proper

16. Such an argument is based on the erroneous assumptions that there is a hearing or meeting in every case and that a deviation is discussed and noted in some form of minute books. Suppose the situation where the plan commission is more of a titular body than a forceful agency and the secretary or chairman says: "It is all right Subdivider; I know what you want to do, and I will fix it up for you." Also, if there is a hearing on the deviation, the proceedings noted may be brief rather than detailed.

17. There are no requirements specified which would appear necessary to give the minutes the authority of a public record, such as: a requirement that minutes be kept, the form in which they are to be made, the place where they are to be kept, and the kind of index employed to make the material accessable. Without these requirements any minutes would have little practical utility.

18. See note 31 *infra*. The argument may arise, however, that by contrast a public record of real estate is not generally an absolute authority for reliance, and ancillary records must still be checked by a purchaser, such as the lis pendens and probate records. Yet, these ancillary records have been given their status by law, an argument which cannot be contended in the case of transcribed plan commission proceedings. See note 17 *supra*.

19. With minor exceptions, the statutes make no reference to authority in the

circumstances the commission could grant a variance,[20] the difficulty is conveying a warning of such a deviation to future lot purchasers. The statutes provide that the plan commission shall either approve or disapprove the subdivision and, if approved, endorse the same upon the plat map for recording.[21] There are no provisions requiring the notation of variances on the face of the plat. Even if an exception is lawfully made, the buyer receives no notice when he relies on the record.[22] On the other hand, the purchaser may be held to knowledge of the ordinance variance power lodged in the plan commission. This presents a difficult case; the best insurance against an inequitable result is to require by statute that variances be noted in detail on the face of the recorded plat.

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plan commission to grant subdivision variances. As an example of one of the exceptions: "Such general rules and [improvement] regulations may provide for the modification thereof by such county or regional planning commission in specific cases where unusual topographical or other exceptional conditions may require the same." OHIO GEN. CODE ANN. § 3586-2 (1938). See also N.Y. GENERAL CITY LAW § 33; OKLA. STAT. tit. 19, § 861.10 (1951). These appear to be the only statutes which make provision for variance power in the plan commission over subdivision improvement regulations.

20. It is fair to assume that a plan commission in adopting regulations could reserve the power to make exceptions when in its discretion the pecular circumstances made it appropriate. Although the Indiana statute makes no provision for subdivision variances, two municipal ordinances, for example, provide for modifications or variances. Revised Ordinances of City of Bloomington No. 10, § 305 (1950); Revised Ordinances of City of Kokomo No. 3266, § 5-1 (1952). However, those substantive regulations which may be varied under these ordinances are limited to street grades, curves and tangents, street signs, and trees. Such regulations even if varied would produce very little substantial injury to a lot buyer.

One court has required a plan commission to grant permission for a variance from a subdivision improvement ordinance. A subdivision regulation required that curbs and guttering be installed by the subdivider. The subdivider's and commission's engineers recommended valley gutters as a proper and practicable method of draining the land due to the unusual topography. In the face of the mandatory regulation, the court ordered the plan commission to approve the subdivision with valley guttering provided by the subdivider, for to refuse approval until the strict letter of the regulation had been complied with was arbitrary and unreasonable. Kesselring v. Wakefield Rcalty Co., 306 Ky. 725, 209 S.W.2d 63 (1948).

21. As an example of the typical statute provision: "[T]he commission shall approve or disapprove [the final plat]. If the commission approves, it shall affix the commission's seal upon the plat." IND. ANN. STAT. § 53-748 (Burns 1951).

22. The argument could be made that if a deviation is lawful there would be no resulting injury upon a lot buyer even though he was unaware of the variance. Yet a case possibly could arise where a lawful variance does cause real injury to the buyer. Suppose, for instance that due to rock subsoil the plan commission relieved the subdivider of his obligation to install sanitary sewer mains. Admittedly, the subdivider should have been compelled to make other provisions for sewage disposal; yet the plan commission following the ordinance on sewer mains granted a variance. Now it cannot be denied that the lot buyer has been injured when he discovers he must install a sewage disposal unit.

On the other hand, a variance in the area of a lot or width of a street may be revealed on the face of the plat. The public record indicating a lawful deviation makes the buyer's case very difficult; legal notice could defeat him.

Of course, if the variance is wrongfully made, the situation becomes a case of wrongful approval by the plan commission and no unique problem of variances arise.

It is necessary to return attention to the situation where the commission has wrongfully approved the plat and it has been recorded. The extent of the buyer's injury and the most appropriate type of remedy will be determined by the deviation and other particular facts. Of the potential remedies available to the buyer, the affirmative equitable relief of compelling the subdivider to comply with the ordinance suggests itself. By analogy, numerous cases involving building permits issued in violation of the building code or zoning ordinance hold that an injured private property owner is entitled to injunctive relief.[23] Indeed, it is stated without qualification that: "[N]o building permit by an administrative official could condone, or afford immunity for, a violation of law. . . ."[24] Such rule would prevent the subdivider from arguing that the commission approval rendered the failure to comply valid. Also, the subdivider could not argue innocence or mistake in failing to comply, for one is presumed to have legal notice of the applicable ordinance.[25] Although the remedy sought in the building permit cases is a negative restraining order, ordinarily more readily granted by a court than affirmative relief, little reason can be found for denying the latter here.[26]

Another remedy which may be available to the buyer is an action for damages because of fraudulent misrepresentation. Where the sub-

23. Lowry v. City of Mankato, 231 Minn. 108, 42 N.W.2d 553 (1950); Frizen v. Poppy, 17 N.J. Super. 390, 86 A.2d 134 (1952); Morris v. Borough of Haledon, 24 N.J. Super. 171, 93 A.2d 781 (1952); Marcus v. Village of Mamaroneck, 283 N.Y. 325, 28 N.E.2d 856 (1940).

24. Wyler v. Eckert, 73 N.Y.S.2d 789, 790 (Sup. Ct. 1947). This appears to be a very general principle and arises in practically every case involving an unlawful building permit or zoning deviation.

25. "When appellants procured the permit, they knew, or were chargeable with knowledge, that the Zoning Ordinance was in force and that the city officers and agents had no authority to disobey or disregard it." City of Idaho Falls v. Grimmett, 63 Idaho 90, 98, 117 P.2d 461, 464 (1941). See also Miami Shores Village v. Brockway Post, 156 Fla. 673, 678, 24 So.2d 33, 35 (1945); Zahodiakin Eng. Corp. v. Zoning Bd. of Adjustment, 8 N.J. 386, 396, 86 A.2d 127, 132 (1952).

26. For a general discussion with the conclusion that affirmative decrees are more freely granted today, see McCLINTOCK, EQUITY § 15 (2d ed. 1948). Recognition must be taken of the heavy expense on the subdivider which would be a result of the affirmative order to make the improvements. Yet this should not be a strong consideration in view of the ordinance requiring the improvements, the wrongful avoidance by the divider, and the accepted individual and public interest in subdivision control. An extreme case may arise, however, where the cost to the subdivider would so outweigh the benefit derived as to induce the court to, in essence, grant a variance.

Another consideration is that the subdivider has, after the sale of lots, been deprived of an opportunity to shift the cost to the buyers. Such an assertion should be of little effect when weighed with the ordinance and the wrongful act of the subdivider. If the price paid for the lot represents such a great difference from the value of the lot as improved, then to force the subdivider to make the improvement constitutes a windfall to the buyer and, thus, becomes inequitable. Perhaps the equity court would prefer to grant rescission. Obviously, the remedy cannot adequately be discussed when divorced from the facts.

divider makes a statement concerning the improvements which is in fact false and the buyer relies to his detriment, a much less difficult case is presented than where the vendor says nothing but lets the recorded plat speak for itself. By comparison, in a building permit case,[27] the defendant extended a garage and added a kitchen without obtaining a permit. Thereafter, the property was purchased by the plaintiff who was subsequently notified by the municipal zoning authority that the garage unit constituted a violation of the zoning ordinance. The court, in the plaintiff's action for fraudulent misrepresentation, awarded the purchaser damages and held that the vendor had a duty to inform him of the violation of the zoning ordinance.[28]

The court reasoned that the buyer was not bound by legal notice of the zoning ordinance, for those who make fraudulent misrepresentations are not protected by the recording acts.[29] The opinion is vague here as to whether the court is considering misrepresentation by silence or statements which the defendant made about the garage being usable as an apartment. Basing the misrepresentation upon a series of declarations makes it more reasonable to hold that the vendee could rely on these false affirmations as being true and not be held to the duty of inspecting the zoning ordinance. Conversely, if the misrepresentation is based upon a failure to speak, then it would appear that the buyer could more logically be held to have legal notice of the zoning laws. Yet, the wrongful act of the vendor in violating the ordinance prevents him from imputing to the buyer knowledge of the ordinance and the unlawful use.[30] When a buyer

27. Barder v. McClung, 93 Cal. App.2d 692, 209 P.2d 808 (1949).

28. "'[W]hen and where the conditions are not visible and are known only to the seller, and "where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention and observation of the vendee, the vendor is bound to disclose such facts to the vendee."' . . . In the circumstances presented it was the duty of the defendants to disclose to plaintiff that the rear apartment was maintained and used in violation of existing zone ordinances." *Id.* at —, 209 P.2d at 811. See also Rothstein v. Janss Inv. Corp., 45 Cal. App.2d 64, 113 P.2d 465 (1941) (sale of filled land). An excellent statement is made of the principle of misrepresentation by silence in Jordan v. Corbin Coals, 162 Wash. 503, —, 298 Pac. 712, 714 (1931).

29. This appears to be an unquestioned principle, although the court is not speaking of the recording acts in a more narrow sense but is using the term to refer to all those things from which notice is imputed—such as public ordinances and statutes.

30. It may be asked whether the result would differ if the seller was acting lawfully and had a variance from the zoning ordinance. Concededly, under usual circumstances a buyer would not be harmed by a variance but rather from a violation. Yet, suppose a buyer purchases a lot and house in a residential section from a seller. The entire area is residential and is zoned accordingly; the buyer makes it evident that he intends to use the lot for residential purposes. Unknown to the buyer, and unrevealed by the zone ordinance, the seller has obtained a variance from the Board of Adjustment to construct a service station on a lot adjoining that purchased by the buycr. Surely the buyer has been injured and his property value decreased. Could the seller, who has acted lawfully, successfully assert legal notice of the variance entered in the

witnesses what is an apparently proper use, he may justifiably assume that it is not in violation of the zoning ordinance in the absence of the vendor's revelation to the contrary; this is the essence of misrepresentation by silence.

To compare the subdivision case, the basic premise must be reiterated that a buyer is only on notice of what appears in the ordinance and the record of the plat. In the building permit case, the court concluded that the seller's misrepresentation precluded his taking advantage of the admitted imputed notice to the buyer of a violation. Here, however, the subdivider-seller's entire argument can be accepted and the buyer should still recover, for the subdivision ordinance when taken in conjunction with the approved recorded plat will not put the buyer on notice that there is any deviation from the ordinance. Rather, the ordinance and approval and record signify compliance with subdivision requirements.[31]

A discussion of damages in the case of buyer v. subdivider must take note of an alternative proceeding in which the buyer seeks damages from his title insurance company.[32] In *Hocking v. Title Insurance and Trust Co.*,[33] decided by the Supreme Court of California in 1951, the plaintiff purchased and took a deed for two unimproved lots in a subdivision; the plaintiff also purchased a policy of title insurance from the

transcribed proceedings (a public record in some states) of the Board as a defense in an action by the buyer? Is it unreasonable to believe that the buyer would not be on legal notice and that, depending upon the particular facts, the seller would be liable because of his misrepresentation by silence?

31. "The plaintiffs . . . were charged with notice that the recorded plan [subdivision plat] had been approved by the [plan] board; and they could properly assume this had been done in accordance with the statutes . . ., but they were not bound by the testimony adduced before the board or by the conditions orally imposed by the board before sanctioning the plan. . . ." Walker v. E. William and Mervill C. Nutting, 302 Mass. 535, 542, 20 N.E.2d 441, 444 (1939).

32. In the discussion of this case, the question naturally arises as to whether the buyer could sue the grantor-subdivider in contract for a defect in record title. The first distinction which must be drawn is between executory and executed contracts for the sale of realty. It is accepted that the law implies a duty upon the vendor to convey a marketable title, and equity will not decree the performance of a contract for the sale of land where the title is not marketable. See Wesley v. Eells, 177 U.S. 370 (1900); Houser v. Vose, 33 Ga. App. 451, —, 126 S.E. 869, 870 (1925); Lynbrook Gardens v. Ullmann, 291 N.Y. 472, 53 N.E.2d 353 (1943); Rife v. Lybarger, 49 Ohio St. 422, 31 N.E. 768 (1892). On the other hand, where the contract is executed, the buyer must look to the covenants in his deed for protection against a defect in the title. See Leach v. Johnson, 114 N.C. 87, 19 S.E. 239 (1894); Brady v. Bank of Commerce, 41 Okla. 473, 138 Pac. 1020 (1913); Jordan v. Jordan, 145 Tenn. 378, 433, 239 S.W. 423, 438-439 (1922). Because of the historical and technical construction put upon the generally utilized covenants of title, a difficult problem in itself arises over the scope of such covenants—that is, whether or not the usual covenants embrace a subdivision violation in which the recorded plat is void, or the deed is not entitled to record, or the use of the land is restricted. Such problems of the buyer's contract remedies could be minimized by adequate control powers vested in the local governing unit to correct a subdivision violation.

33. 37 Cal.2d 644, 234 P.2d 625 (1951).

defendants. Subsequently he discovered that the city council had approved the subdivision plat, which was recorded, without first obtaining from the subdivider a bond for the grading and paving of streets as required by the ordinance. The city refused to issue the plaintiff building permits, and he then sued on the title insurance contract alleging a defective and unmarketable title. The court affirmed the trial judge's decision that the complaint failed to state a cause of action. The majority distinguished between record title, the subject of the insurance contract, and the loss of value of the land, the plaintiff's actual injury; the violation of the ordinance unquestionably affected the value of the land but in no way the marketability of the record title itself.[34] The court evaded the basic issue, that is, what effect a violation of the subdivision ordinance has upon the record title of a lot purchased.[35] The marketability of title depends partially upon the enforcement powers of the local governing unit over a subdivision ordinance violation. If the city could be shown to have the power to void a sale or revoke the record of the plat, then patently there would be a defect of record title such as to render it unmarketable within the accepted meaning of that term.

The instant case was decided under the California statute on subdivision control. This act, unfortunately like so many others, is ambiguous as to just what course of action the city may pursue to enforce subdivision regulations. The city had the power to enjoin a sale in violation of the statute.[36] Manifestly, some interpretation of the statutory powers

34. One judge vigorously dissented adding: "[T]he city has refused permission to use the property at all for building, all of which springs from the defect in the title, consisting of the subdivider failing to comply with the law, a prerequisite to a clear chain of title where land is subdivided. It was the defendant's business and responsibility to ascertain whether there had been obedience to the law in perfecting the subdivision." *Id.* at 655, 234 P.2d at 631. The dissent further distinguished between a subdivision and zoning violation in relation to the policy liability exemptions as set out in footnote 1 of the majority opinion. He approached the underlying problem but apparently failed to grasp the crux of it—the effect upon the record title of a lot which results from a wrongfuly approved plat or the city's power to affect that title.

35. The plaintiff contended that the acceptance and recording of the plat in violation of the law resulted in the subdivision being in a litigious state. It was asserted that the general rule, that the failure to comply with mandatory provisions renders the related proceeding void, made the subdivision wholly void or voidable.

36. The statute, however, provides for other "enforcement" powers, including a fine. "Any deed of conveyance, sale or contract to sell made contrary to the provisions of this chapter is voidable at the sole option of the grantee. . . ." CAL. BUS.—PROF. CODE ANN. § 11540 (1951). See also WIS. STAT. § 236.16 (1951) (before approval and recording; any sale voidable at option of the buyer). "This chapter does not ban any legal, equitable, or summary remedy to which any aggrieved municipality or other political subdivision . . . may otherwise be entitled, and [the city or local unit may] *restrain* or *enjoin* any attempted or proposed subdivision or sale in violation of this chapter." (emphasis added) CAL. BUS.—PROF. CODE ANN. § 11542 (1951). Yet in the instant case the sale has been completed—there is nothing to enjoin. Could judicial interpretation find power in the city to effect title to subdivision lots from the phrase,

over subdivision violation was demanded by the facts of the instant case. The court should have expressly dismissed or affirmed any power on the part of the city to effect the record title to plaintiff's lot by either revoking the record of the wrongfully approved plat or voiding a sale made thereunder. Assuming that there is a direct relation between the powers of a city to enforce subdivision regulations and record title, the court neglected to consider the implications of the case before them. At best, however, if the court implicitly concluded that the statutory powers were inapplicable here, then its decision may be accepted.

Returning to equitable relief, the buyer has a strong case for rescission because the facts establishing misrepresentation in an action for damages are also grounds for this remedy. A Pennsylvania Supreme Court case presents a closely related situation.[37] A descriptive lot map accompanying a contract for sale of land by metes and bounds contained a notation of "sewer" between the street lines on the map. The buyer subsequently learned that the connecting sewers were on the opposite side of the street and could not be used by the lots in question. He sued for specific performance and asked as abatement from the $12,500 purchase price the cost of installing adequate sewers, which was approximately $8,500. The chancellor in the lower court found that the word "sewer" on the map indicated that there was a sewer available for the buyer's use; the representation while untrue was not made fraudulently for the purpose of misleading the buyer but innocently and by mistake. Though intent was not proved, the basic issue on appeal was, assuming the de-

"remedy to which otherwise entitled?" Many other statutes have sections similar to this; their manifest inappropriateness in wrongful approval cases is discussed pp. 425-427 *infra*.

Some statutes specifically provide that the recording of an unapproved plat shall be void. See note 13 *supra*. Other statutes go a step further and recite that any sale made from an unapproved plat is void and not entitled to be recorded. See KY. REV. STAT. § 100.093 (1953) (before plat approved and recorded; any sale void and not subject to be recorded); N.J. REV. STAT. § 40:55-15 (Supp. 1952) (before approval; restrain sale or performance of sale agreement and set aside and invalidate any conveyance made pursuant to such transfer or sale); OKLA. STAT. tit. 11, § 1466, tit. 19, § 861.10 (1951) (before approval and recording; any sale void and not entitled to recording).

Although the violation contemplated by these statutes is nonapproval rather than wrongful approval, judicial interpretation could possibly bring the latter within the statute. If this is accomplished and the recorded plat is void, the burden is upon the buyer to rescind. However, should the buyer refuse and seek a metes and bounds deed, would not the city be forced to exercise further enforcement powers to resume or maintain the status quo? For an analogous situation see note 58 *infra*. If the sale made thereunder is void and not entitled to be recorded, could the city rescind the sale or merely prevent its being recorded? Note the New Jersey statute which is more explicit and which grants the city power to set aside such a conveyance. An attempt to use the New Jersey statute was dismissed because it did not operate retroactively. City of Newark v. Padula, 26 N.J. Super. 251, 97 A.2d 735 (1953). See note 63 *infra*.

37. Mervitz v. Circelli, 361 Pa. 239, 64 A.2d 796 (1949).

fendants were liable, the propriety of the relief sought.[38] The court left little doubt that the buyer could have rescinded, although specific performance with abatement was denied.

In the subdivision situation the buyer relies upon the approved recorded plat rather than a map with the word "sewer" written upon it; the subdivider holds out to the vendee the recorded plat which, because approval is noted, signifies, for instance, that the vendor is to install sewers per ordinance. Indeed, there is a stronger case for redress, for the commission's approval, the record, and the affirmative ordinance add strength to the prayer for relief as distinguished from a notation on a descriptive map accompanying a conveyance by metes and bounds. A purchaser who relies to his injury upon that which the subdivider holds out to him as true should be able to establish sufficient grounds for rescission regardless of the intentions of the subdivider.[39]

Finally, the question arises as to the buyer's rights against the municipality and the plan commission for the latter's failure to enforce the subdivision ordinance or for wrongfully approving the plat. Unquestionably, subdivision control is an exercise of the police power and, consequently, a governmental function.[40] A municipality cannot be held liable for the acts of its agents while they are engaged in performing a governmental function, or for failures on their part to enforce the city's ordinances.[41] These dogmatic principles of law leave little room for discussion or refinement according to particular facts and circumstances.

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38. The court found two reasons for denying the buyer specific performance with an abatement of purchase price. First, only where there is a defect of title or quantity of land to be conveyed does the remedy asked here prevail. Where there is a claim of misrepresentation "collateral to the contract," the only available remedy is rescission or damages. Secondly, to enforce a contract with so large an abatement would be a great hardship upon the vendor and similar to making a new contract. There were comments to the effect that the plaintiff offered no evidence of fraud nor did the defendant offer evidence of knowledge by the plaintiff, although there was some question as to each.

It should be noted that there are two recognized rules on the measure of damages for fraudulent misrepresentation. They are either the difference between the value of what the plaintiff parted with and the value of what he received, or (the majority rule) the difference between the actual value of what the plaintiff received and the value which it would have had as represented. See McCORMICK, DAMAGES § 121 (1935).

39. See Clauser v. Taylor, 44 Cal. App.2d 453, 112 P.2d 661 (1941) (A failure to disclose to the vendee that land was filled is sufficient grounds for rescission.); Junius Const. Co. v. Cohen, 257 N.Y. 393, 178 N.E. 672 (1931) (Partial disclosure requires full disclosure, and misrepresentation, even though innocent, sustains rescission.).

40. See note 4 *supra.*

41. Kilbarg v. Township Committee of Hillside, 14 N.J. Super. 533, 82 A.2d 499 (1951); Lanni v. City of Bayonne, 7 N.J. Super. 169, 72 A.2d 397 (1950); Meadows v. Village of Mineola, 72 N.Y.S.2d 368 (Sup. Ct. 1947). See 18 McQUILLIN, MUNICIPAL CORPORATIONS § 53.35 (3d ed. 1950). "[A]ll persons officially charged with the execution and enforcement of such police ordinances and regulations are, quoad hoc, police officers." *Id.* at 229.

Admittedly, the plan commission has acted wrongfully and unlawfully. Therefore, does the buyer have an action against the members of the commission as individuals for a negligent or intentional wrong? Many of the cases on individual liability of municipal officers involve personal injuries and make verbal distinctions between nonfeasance and misfeasance, and discretionary and ministerial duties.[42] When a plat is approved without requiring compliance with the ordinance, the plan commission has acted in an unauthorized manner equaling intentional wrongful action. The purchaser has a legal right to rely upon the record and, without knowledge to the contrary, can presume the approved plat is in accordance with the ordinance.[43] The action of the commission was, in effect, nothing short of a fraudulent misrepresentation, causing harm to the buyer for which the commission as individuals should be liable. However, because of the vagueness and confusion in the law of personal liability of municipal officers, practical advice for the buyer would be to make this an attempted remedy of last resort.

In summation, the buyer has possibly three alternative remedies, a mandatory order, damages,[44] and rescission. Assuming in a given case that all remedies are equally available to the buyer, the peculiar circumstances in each case will determine the selection of one over another. The kind of violation is perhaps the most important determinant of the appropriateness of the remedy. Violations may be generally classified as a failure to install physical improvements,[45] a failure to dedicate sufficient land for the required street width, and a failure to plat lots of the proper width, length, and area.

Where the violation is a failure to make physical improvements, the most complete remedy would be a mandatory order compelling installation. They should be made as the ordinance requires without expense to the buyer. If this equitable relief be unavailable, the buyer's alternative

42. Smith v. Hefner, 235 N.C. 1, 68 S.E.2d 783 (1952); Miller v. Jones, 224 N.C. 783, 32 S.E.2d 594 (1945) (discretionary act—liable only for corrupt or malicious act or failure to act and not mere negligence; ministerial act—negligence is grounds for liability); Town of Old Fort v. Harmon, 219 N.C. 241, 13 S.E.2d 423 (1941); Milstrey v. City of Hackensack, 6 N.J. 400, 79 A.2d 37 (1951) (active misfeasance—liability; passive nonfeasance—no liability). See 4 McQUILLIN, MUNICIPAL CORPORATIONS §§ 12.208-12.212 (3d ed. 1950).

Is the duty imposed upon the plan commission to approve a subdivision ministerial or discretionary in nature?

43. See note 31 *supra.*

44. The remedy of damages could be pursued by either a tort action for fraudulent misrepresentation or a contract action based upon a defective title. See note 32 *supra.* However, the more usual action would be for fraudulent misrepresentation because of the question of the city's power under the usual subdivision statute to effect the buyer's record title. See note 36 *supra* and accompanying text.

45. See note 9 *supra.*

is an action for damages.[46] But the exact amount of damages is unpredictable, and under the generally accepted measure of damages in misrepresentation actions,[47] the recovery will more than likely be insufficient to reimburse the buyer for the cost of the improvements. This is especially true where the improvement must be made for the entire subdivision rather than one lot—paving the section of a street abutting one lot is of little advantage when the remainder of the street is not surfaced.

Where the violation is a failure to dedicate sufficient land for streets, there are no grounds for a mandatory order because there is nothing which the subdivider can perform. If the buyer gives up some property to meet the requirement, damages may be an adequate remedy. On the other hand, should the city acquire the land by condemnation with compensation, the buyer is faced with the difficulty of proving damages. Even so, could expectation damages be established?

If the violation is a failure to lay out lots of the proper length, width, and area, there may be again no basis for a mandatory order. Also, if the buyer has been denied a building permit because of inadequate lot area, damages are of little advantage, for the peculiar violation is one which the buyer could in no way correct even with receipt of damages. Should the buyer be able to make a different or more limited use of the lot, there may be grounds for expectation damages. Of course, overshadowing any type of violation is the possible remedy of rescission. This might have the manifest advantage of placing the parties in their original position. However, even rescission may be an unfeasible remedy if the buyer has already built upon his lot. Thus, it becomes obvious that no one remedy can be taken out of context of the circumstances and be found to be the solution to a buyer's dilemma after certain subdivision regulation violations.

The municipality[48] is also aggrieved by the contravention of a subdivision ordinance. If the subdivider is permitted to sell lots without complying with the ordinance, and especially if there has been construction upon the lots,[49] those same evils confront the local governing unit

46. It should be noted that a violation of certain kinds of physical improvement requirements will make it difficult for the buyer to prove injury. For instance, could a buyer prove damage, going to the value of his lot, by the subdivider's failure to install street signs, or to construct sidewalks of standard surface and size?

47. See note 38 *supra*.

48. The municipality is the more usual and important local governing unit involved in subdivision control. However, the considerations applicable to the city concern the county with equal appropriateness where it has a subdivision control statute in effect. For the jurisdictional limits of local governing units in the various states over subdividing, see Note, 28 IND. L.J. 544, 574-587 (1953).

49. A denial of building permits may be an indirect method of achieving the same results envisioned in the ordinance or in restoring the status quo. However, placing the

which it was the purpose of subdivision control to prevent. The city may make the improvements and bear the cost or, assuming proper authority, assess the benefited property owners all or a portion of the cost.[50] But, placing the burden upon the city is indirectly placing it upon the public. They should not have to bear an expense which was the legal responsibility of the subdivider in the first instance.

The city, after a wrongfully approved plat is recorded and sales are made from the subdivision, is faced with the problem of selecting appropriate affirmative powers to force the subdivider to fulfill his legal obligations. Basically, the city has only those enforcement powers over subdividing which the state enabling acts confer, for subdivision control is an exercise of the police power.[51] Other than the specific powers delegated to enforce subdivision control, it is questionable whether any of the city's general police powers are applicable.[52]

However, under conferred authority a city is empowered to abate a nuisance per se.[53] Although many varying examples are illustrated by

burden of remedying the violation upon the lot buyers is at best a circuitous and unpredictable method, as well as often an undue burden upon the buyers.

50. If the buyer has purchased purportedly improved property, such assessment will result in double payment for the improvements—once to the subdivider in the form of the purchase price and once to the city by way of assessment. For an exhaustive study on municipal assessment powers and procedure, see 14 McQUILLIN, MUNICIPAL CORPORATIONS (3d ed. 1950).

51. See note 4 *supra*. "There is no inherent police power in municipal corporations, and delegation by the state is requisite to the existence of police power in any municipal corporation. Consequently, the police power of any municipality is limited by the grant thereof to it by the state." 6 McQUILLIN, MUNICIPAL CORPORATIONS 521, 522 (3d ed. 1949).

52. See for a concise discussion of delegated general police powers, 6 McQUILLIN, MUNICIPAL CORPORATIONS §§ 24.33-24.48 (3d ed. 1949). "The delegation [of the police power] may be by constitution, statute or charter." *Id.* at 523. "The legislature may delegate police powers to municipal corporations by a general grant. Thus, most charters contain a general welfare or general grant of power clause that vests the municipal corporation with broad police power." *Id.* at 527

53. The authority to abate a nuisance per se is a necessary adjunct to the municipal police power. Such a power is usually delegated by a broad statutory grant. But the declaration and abatement of nuisances under this delegation are limited to those which are nuisances per se or in fact. For a concise and comprehensive discussion, see 6 McQUILLIN, MUNICIPAL CORPORATIONS §§ 24.63-24.75 (3d ed. 1949). In a case involving a general delegated power to declare and abate nuisances, the court said. "Primarily, even in the absence of statutes, it is within the power of municipal corporations to determine and declare what shall constitute a nuisance, and a large discretion vests in the municipal governing body in determining what these things are, but this power must be exercised reasonably and not arbitrarily, and a municipal corporation cannot make a thing a nuisance, which is not in truth one, merely by declaring it to be such. Its power is limited to such things as the common law declares to be nuisances." Hislop v. Rodgers, 54 Ariz. 101, 113, 92 P.2d 527, 533 (1939).

A theater was maintained in violation of a city ordinance requiring fireproof construction, a provision made violations subject to a fine. On cross complaint the city sought to enjoin the violation. In denying the injunction the court held. "The general rule is that unless an act is shown to be a nuisance per se, an injunction to aid in the

the cases, a subdivision violation could hardly be found to comprise the elements of this public wrong as narrowly construed by most state courts. It is easier to rationalize as a nuisance, for instance, the violation of a fire ordinance than contravention of a subdivision law because in the former the imminent danger to the public safety is clearer.[54] Perhaps, however, the development of a subdivision might progress to the point where a violation could be classified as a nuisance per se; a lack of sewers might be an imminent danger to the public health. Generally, however, because of the vagueness of nuisance concepts and the variety of subdivision violations, the local governing unit's authority to abate these wrongs is not a meaningful source of control.

The city might also rely on the doctrine that an unlawful act of its officers is void. Here the plan commission's wrongful approval would be a nullity, and the subsequent recording would be revocable. To analogize, it is generally conceded that an unlawfully granted building permit or zoning variance is revocable.[55] A grantee of an unlawful permit is presumed to know the law and that the deviation was wrongfully authorized.[56] Likewise, a bona fide purchaser from the grantee relies upon the permit at his peril. However, even after it is revoked, the burden remains upon the city to abate or restrain continuance of the violation.[57] Similarly, in the subdivision case a revocation of the recorded plat does not affirmatively remedy the violation.[58] If the city is to assure the objec-

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enforcement of a city ordinance will not issue. . . . [T]he remedy of injunction is not ordinarily available for the mere violation of a municipal ordinance. This relief does not appear ever to have been granted except where the violation amounted to a nuisance per se." Olson v. City of Platteville, 213 Wis. 344, —, 251 N.W. 245, 249 (1933). *But cf.* Town of Gallup v. Constant, 36 N.M. 211, 11 P.2d 962 (1932). The cases indicate confusion and conflicts as to whether a city may resort to equity to enforce an ordinance. Yet, they invariably discuss nuisance per se, nuisance in fact, or public nuisance.

54. See Miller v. The City of Valparaiso, 10 Ind. App. 22, 37 N.E. 418 (1893). Also Lipnik v. Ehalt, 76 Ind. App. 390, 132 N.E. 410 (1921) (public nuisance when building is situated in violation of ordinance and endangers other property).

55. Godson v. Town of Surfside, 150 Fla. 614, 8 So.2d 497 (1942); Giordano v. Mayor & Council of Borough of Dumont, 136 N.J.L. 294, 295, 55 A.2d 671 (1947); Ventresca v. Exley, 358 Pa. 98, 56 A.2d 210 (1948).

56. See note 25 *supra.*

57. The city probably would not revoke a permit or variance without subsequently using its specific statutory powers to prevent or abate a continued violation. After a permit is revoked the situation becomes the same as if one was using property in violation of the ordinance without securing proper authority.

58. The revocation of the recorded plat may, however, indirectly remedy the violation. The immediate effect is to throw the burden of action upon the buyer, for now he has no record title. The buyer must either rescind, obtain a title by metes and bounds, or correct the defect of the violation if possible. Because of the unique condition that the record discloses an approved plat, the buyer may rely upon the record as signifying compliance; a revocation upsets that evidence established by the recording acts to protect purchasers of realty. This reasoning becomes weaker when the violation appears on the face of the plat. If the buyer has built upon the land, his dilemma becomes

tives of subdivision control, some affirmative statutory authority is necessary which either requires the subdivider to subsequently conform to the ordinances or restores the status quo.

An examination of the enforcement provisions of the states' subdivision statutes discloses that approximately one-third provide that the local governing unit may enjoin any "sale, transfer, or agreement to sell" when facilitated by use of an unapproved and unrecorded plat. A transfer by metes and bounds does not avoid the statutes once platting has begun.[59] The majority of the statutes also imposes a fine for each sale

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even more acute. The question arises whether the resulting insecurity in subdivision land transactions is not too great a price for the remedying of subdivision violations.

The propriety of revocation depends upon the consequent advantage to the city; thus, revoking the recorded plat will in a circuitous way remedy the subdivision violation or restore the status quo. Because there may be numerous lot owners involved, the selection of various remedies merely adds to the complexity and minimizes the possibility of achieving a satisfactory solution. A buyer may find it impossible or impracticable, depending upon the type of violation, to undertake compliance with the regulation himself. Also, rescission will not return the subdivision to its original state unless all the lot owners rescind. A lot owner may instead choose to quiet title to his lot by metes and bounds. To digress, if a lot owner sought a substitute deed with a metes and bounds description, could the city under the usual statute enjoin the passage of the deed on the grounds that it was a "sale or transfer"? Or, has the "sale or transfer" been previously consummated and any further deed by metes and bounds a mere descriptive modification?

The innumerable contingencies and the possibility of an unwarranted burden upon a buyer, instead of upon the wrongfully acting subdivider, outweigh the conditional and indirect advantages to the city when a recorded plat is revoked. Such action is an unwise and unfeasible method of subdivision control which must find expression in affirmative powers delegated to the city.

Presumably, if a state subdivision statute provided that the record of a wrongfully approved plat was void or any sale made thereunder was void or revocable, then no question of feasibility or the policy of the recording acts could be raised. See note 36 *supra*. On the other hand, surely the practical effects and the dignity of the record must be taken into cognizance when the city is seeking to revoke the recorded plat without express authority from the subdivision statute.

59. Of the remaining statutes with the "enjoin" provision a minority provide as a violation any sale made before a plat is approved and recorded within the statutory definition of what constitutes a "subdivision." CAL. BUS.—PROF. CODE ANN. § 11542 (1950) (does not ban any legal, equitable, or summary remedy to which otherwise entitled); NEV. COMP. LAWS § 5063.19 (Supp. 1941) (does not ban any legal, equitable, or summary remedy to which otherwise entitled); N.J. REV STAT. § 40:55-15 (Supp. 1952) (in addition, may set aside and invalidate any conveyance). See note 36 *supra*.

The more usual statute violation which may be enjoined is any sale by reference to, or exhibition of, or by any other use of a plat before it is approved and recorded—a transfer by metes and bounds does not exempt. ALA. CODE tit. 37, § 800 (1940); COLO. STAT. ANN. c. 163, § 175 (1935); LA. REV. STAT. ANN. § 33:114 (1950); ME. REV. STAT. c. 80, § 85 (1944); MD. ANN. CODE GEN. LAWS art. 66B, § 28 (1951); MINN. STAT. ANN. § 462.30 (West 1947); N.H. REV. LAWS c. 53, § 27 (1942); N.M. STAT. ANN. § 14.228 (Cum. Supp. 1951); N.D. REV. CODE § 49-4823 (1943); PA. STAT. ANN. tit. 53, § 9172 (1938) (2d class city); S.C. CODE §§ 47-1090, 47-1052 (1952); S.D. CODE § 45.3315 (Supp. 1952) (knowingly or with intent to defraud); TENN. CODE ANN. § 3493-19 (Williams Cum. Supp. 1952); UTAH CODE ANN. § 10-9-26 (Supp. 1953); WASH. REV. CODE § 58.16.100 (1951) (§ 58.16.090, nonapproved plat filed shall be removed from record). WIS. STAT. § 236.16 (1951), provides, in addition to fine, imprisonment, and

of a lot from an unapproved plat; the deterrent effect of such a sanction is slight.[60] Literally, the nature of violation contemplated by the statutory language is *nonapproval*[61] rather than *wrongful approval.* To bring a wrongful approval within the statute and, consequently, under the enforcement powers, it must be the equivalent of nonapproval. It is conceivable that the courts could by statutory interpretation bring the violation within the terms of the section on enforcement powers.[62]

Even though there is acceptance of a wrongful approval-nonapproval analogy to bring a violation within the enforcement provisions of the statute, another nearly insurmountable barrier presents itself. The statutory language of "enjoin" implies a prevention of a violation in the first instance rather than remedial action after a sale has been concluded.[63]

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buyer's option to void, that any remedy to which the municipality may otherwise be entitled is not barred. Does "remedy to which otherwise entitled" mean those general police powers delegated to the city?

See, for a discussion of the problems over the extent of coverage of these more usual subdivision statutes, Note, 28 IND. L.J. 544 (1953). Nevertheless, the important fact here is that such a large number of the statutes include the near uniform enforcement provision of the enjoining of a "sale, transfer, or agreement to sell" in violation of the act.

At first glance the Indiana subdivision control statute applicable to cities and counties with plan commissions would seem to establish no enforcement powers. IND. ANN. STAT. § 53-790 (Burns Cum. Supp. 1953), provides the city may prescribe a fine for violations of any ordinance adopted pursuant to "this act" and may declare violations of specified sections to be common nuisances. The specified sections are those delegating power over zoning. The prescribed fine referred to is IND. ANN. STAT. § 53-793 (Burns Cum. Supp. 1953) (for any violation of "this act"). IND. ANN. STAT. § 53-791 (Burns 1951), gives the city power to restrain a violation of "this act or of an ordinance enacted" under its terms. Ind. Acts 1947, c. 174 is the one statute which delegates authority to establish a city or county plan commission with power over zoning and subdividing; thus all the sections discussed are within one act. IND. ANN. STAT. § 53-728 (Burns 1951), enumerates the powers and duties of the plan commission which include the general authority to: "Invoke any legal, equitable or special remedy for the enforcement of the provision of the act or ordinance or its action taken thereunder."

Admittedly the statutory provisions are poorly drawn; judicial interpretation is needed. Apparently, the city may fine for a subdivision violation or enjoin a violation. The latter remedy would be difficult to apply in the improvement violation cases after sales of lots have been completed.

60. The chart in Note, 28 IND. L.J. 544, 574-587 (1953), designates by states those statutes which impose fines. Many of these statutes also include the other enforcement powers previously discussed; some provide for only a fine; others fail to enumerate any statutory powers of enforcement.

An example of such a penalty section is CAL. BUS.—PROF. CODE ANN. § 11541 (1951). "Any offer to sell, contract to sell, sale, or deed or conveyance made contrary to the provisions of this chapter is a misdemeanor and . . . shall be punishable by a fine of not less than twenty-five dollars ($25) and not more than five hundred dollars ($500), or imprisonment in the county jail for a period of not more than six months, or by both such fine or imprisonment."

61. See note 13 *supra.*

62. The statute prescribing as a violation the sale of lots, "before [the plat is] approved and recorded as provided herein", could be interpreted to mean not only nonapproval but also an approval which was done in disregard to the ordinance.

63. In City of Newark v. Padula, 26 N.J. Super. 251, 97 A.2d 735 (1953), the

The efficacy of the restraining order depends upon the meaning of "sale, transfer, or agreement to sell." For example, is a conveyance of land for cash or a purchase money mortgage a transfer or sale within the meaning of the statute? If so, since the buyer has deed title, there is nothing to enjoin. In contrast, is a conveyance of deed title under an installment sales contract subject to a restraining order?[64] What if the buyer has built upon the land? Yet another interpretation is that the injunction is limited in applicability to the period of preliminary negotiations.

The possible interpretations of these common statutory provisions illustrate the patent inadequacy of subdivision control laws. There exists, at present, an insuperable deficiency in the enforcement powers. There is no statutory contemplation of violations as discussed here and, consequently, no adequate power to abate or treat violations after the period within which they could have been restrained. On the other hand, one and possibly two states have by design or chance attempted to cope with such inadequacies.[65]

City sought to set aside a conveyance of a lot made from a tract of land which constituted a "subdivision" and for which there had been no approval. The statute sued under provided that the city could "set aside and invalidate any conveyance made pursuant to such transfer or sale" from an unapproved subdivision. See note 36 *supra*. Although at the time of the conveyance the statute in effect provided only that, in addition to a fine penalty, the city could enjoin "the transfer or sale or agreement" to sell a lot within the subdivision prior to approval and recording. Though the court held that the statute sued under did not operate retroactively and affirmed the lower court's dismissal of the suit, some enlightening comments upon the provisions of the old statute were made. "Clearly, the object of the injunctive remedy was to arrest the transfer before it became an accomplished fact. Nothing in the statute . . . purported to confer upon, or had the effect of vesting in, the municipality the right to disturb, undo or vitiate an estate already vested by force of an unapproved conveyance. That omission was sought to be cured by . . . [the "set aside" statute]." *Id.* at 256-257, 97 A.2d at 738. "Obviously, the words 'transfer or sale' did not and could not contemplate the actual conveyance. . . . The word 'conveyance' and the words 'transfer or sale' are used in contradistinction. The latter can only mean the executory agreement, while 'conveyance' can refer only to the executed transaction, the deed itself. . . . [T]he only right in the municipality was to enjoin that which was as yet unconsummated, the executory contract of sale." *Id.* at 260, 97 A.2d at 740. The court vividly illustrates the inherent limitations of the more usual subdivision control provisions. Even so, enjoining the passage of the deed in an "executory" sales contract could in some cases be a powerful sanction. The court further found no powers in the city other than those expressly enumerated in the subdivision statute.

64. "True, a penalty might have been recovered against [the defendant], injunction proceedings maintained against the passing of the deed, but no action could have been maintained to set aside the deed once it was given and the estate vested in the grantee." *Id.* at 262, 97 A.2d at 741.

65. The statutes of Virginia and Kansas are indicative of an advancement over most subdivision control statutes. The Kansas statute, which provides that installation of improvements may be made a condition precedent to approval and record, specifies that any violation of the statutory provisions is a misdemeanor and that the proper officials or any person, "the value or use of whose property is or may be affected by such violation, may have the authority to maintain suits or actions . . . to *enforce* the

The correction of subdivision violations in wrongful approval cases, due to the lack of adequate municipal powers, remains with the individual lot buyer.[66] Although this may satisfactorily compensate him,[67] it affords no guarantee to the local governing unit that a uniform comprehensive system of subdivision control will result.[68] At best, such indirect methods represent a piecemeal scheme. Therefore, if the objectives of subdivision control are to be achieved, the statutes must vest in local governing units effective procedures for rectifying the various violations.

The local governing unit should be empowered to compel the subdivider by a suit in equity to conform to any local regulation. In the alternative, the subdivider should be liable to the city for the cost of correcting any violation. If the court determines that such action is impossible[69] or unreasonable,[70] then, and only then, should the governing unit set aside a sale or conveyance made from the wrongfully approved subdivision; the buyer would have a vendee's lien upon the land. This

regulations adopted in accordance with the terms of this act. . . ." (emphasis added) KAN. GEN. STAT. § 19-2925 (1949). This statute permits either a lot purchaser or the local governing unit to require the subdivider to make the improvements although there has been an unlawful approval and recording. The obligation is and remains upon the subdivider to conform to the regulations even after a violation.

The Virginia statute is not so definite: "In case of any violation or attempted violation of the provisions of this article, or of any of the provisions of the regulations adopted as authorized in this article, the governing body, in addition to other remedies, may . . . prevent such violation or attempted violation, to restrain, correct, or abate such violation or attempted violation, or to prevent any act which would constitute such a violation." VA. CODE § 15-794.1 (1950).

Although these statutes are an improvement over most, the enforcement powers should be more specifically enunciated to cover the possible kinds of violations likely to arise. There should be a minimum of doubt in the minds of local authorities as to the existence and propriety of enforcement or remedial power over a given violation.

66. The obligation to correct a violation or obtain redress may even be forced upon the buyer by the city, for example, denying the purchaser a building permit or assessing him for the cost of the improvements when and if made. Also some statutes, in an attempt to confer enforcement powers upon the city, indirectly place the burden upon the buyer. See notes 36 and 58 *supra.*

67. The previous discussion should leave little doubt but that the possible alternative remedies of the buyer will rarely if ever be sufficient to compensate him financially or otherwise. See pp. 421-422 *supra.*

68. Assume that, for example, where there are numerous lot buyers some may choose to rescind their purchases; some may elect to sue the subdivider for damages; some may sue for damages and yet never make the improvements; some may never sue for damages. In addition, the violation may be such that one buyer is unable to correct it without cooperation of the entire group or even with it, *e.g.,* improper lot area. It is obvious that any substantial and uniform correction of the violation would be the result of chance. See note 58 *supra.*

69. It is nearly impossible, for example, after lots are sold, for the subdivider to alter the area of the lots or make proposed streets wider.

70. If the buyer has not built upon the land and the purchase price shows little deviation from the value of the lot, to force the subdivider to make substantial expensive improvements takes the form of a windfall to the buyer. Perhaps, since there has been no building upon the lot by the buyer, it would be more equitable to set aside the conveyance and permit the subdivider to begin again.

action must be qualified by equitable considerations to prevent undue hardship upon a buyer.[71] Additionally, nothing in the statute should modify such rights as the buyer may otherwise be entitled to under tort, contract, or equitable law. The legislature should place appropriate enforcement powers in the local governing unit and encourage their utilization. And, accordingly, as the governing unit takes the initiative in assuring realization of subdivision control objectives, the courts must seek to provide a minimum of injury and a maximum of redress for the lot purchaser.

INTERLOCKING DIRECTORATES: A STUDY IN DESULTORY REGULATION

Forty years ago, the Clayton Act became a part of the antitrust laws of this country.[1] However, it was not until 1953 that the Supreme Court of the United States was afforded an opportunity to construe Section 8 of the Act which prohibits a common director between competing corporations.[2] John A. Hancock, a partner in the Lehman Brothers Investment Company, served as a director on the boards of six corporations (W. T. Grant and S. H. Kress Companies; Sears, Roebuck and Company and Bond Stores, Incorporated; Kroger and Jewel Tea Companies). After unsuccessful attempts to persuade Hancock to resign from the boards of one of each of the three sets of competitors, the Department of Justice filed complaints alleging that he held these positions in violation of Section 8. Soon after, Hancock resigned from the Kress, Kroger, and Bond Companies, apparently terminating all objectionable interlocking directorates.[3] But this conclusion fails to contem-

71. This, where for one reason or another the rescinding of the buyer's purchase would produce an unfair burden upon him (as where he has built upon his lot), would be an excellent place for the plan commission to consider the over-all circumstances and, by weighing the respective benefits and burdens, seek to work out some fair and equitable solution before resort to the courts.

1. 38 STAT. 730 (1914), as amended, 15 U.S.C. § 12 *et seq.* (1946).

2. "No person at the same time shall be a director in any two or more corporations, and one of which has capital, surplus, and the undivided profits aggregating more than $1,000,000 engaged in whole or in part in commerce, other than banks . . . and common carriers subject to the Act to regulate commerce . . . if such corporations are or shall have been theretofore, by virtue of their business and location or operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws." 38 STAT. 732 (1914), 15 U.S.C. § 19 (1946).

3. The term interlocking directorate when used in a general sense embraces any interconnection between corporate entities. As used in this Note, interlocking directorate