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## MOBILE HOMES: ZONING AND TAXATION

*Richard W. Bartke† and Hilda R. Gage††*

In recent years zoning, as a tool of urban planning, has been under increasing attack.<sup>1</sup> Some criticism has been directed at the concept of zoning as such, or at least at its practice of fostering single-use districts. The main thrust of the criticism, however, has been levelled against the application of zoning by local units of government. The term "economic zoning" has acquired a rather unpleasant connotation.

Most writing has concentrated on four aspects or devices of economic zoning: minimum floor space standards,<sup>2</sup> minimum acreage

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<sup>1</sup> See, e.g., Aloï, Goldberg & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1 U. TOLEDO L. REV. 65 (1969); Bowe, *Regional Planning versus Decentralized Land-Use Controls—Zoning for the Megalopolis*, 18 DEPAUL L. REV. 144 (1968); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Note, *Zoning—A Comprehensive Study of Problems and Solutions*, 14 N.Y.L.F. 77, 159-70 (1968).

<sup>2</sup> The most famous, or infamous, case, depending on one's point of view in this area, is *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953). For a discussion of this case and of the broader issues involved, see Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); Nolan & Horack, *How Small a House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954); Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954). For an excellent recent reevaluation of the problem, see Sager, *supra* note 1, at 780-98; Williams & Wacks, *Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited*, 1969 WIS. L. REV. 827.

standards,<sup>3</sup> separation of districts for different types of housing,<sup>4</sup> and elimination of multiple housing units.<sup>5</sup> Rather surprisingly, very little has been written concerning zoning with respect to mobile homes.<sup>6</sup> The subject is a fascinating one because mobile homes present peculiar problems and challenges to the utilization of urban land. It is also timely because recent technological developments in the field of pre-fabrication and modular construction may suggest approaches and alternatives to the solution, or partial solution, of the problems of the housing of low-income families. In many places, however, zoning may be a stumbling block in the path of such experiments.

This article will explore the approaches to the problem of mobile homes in both public and private zoning. It will also address the question of the proper taxation of mobile homes. Lighter taxation of mobile homes than of conventional housing has been frequently used

<sup>3</sup> See, e.g., Aloï, Goldberg & White, *supra* note 1, at 77-79; Bowe, *supra* note 1, at 150-54; Sager, *supra* note 1, at 796-98; Note, *Snob Zoning—A Look at the Economic and Social Impact of Low Density Zoning*, 15 SYRACUSE L. REV. 507 (1964). For a discussion of the economic impact of minimum acreage standards, in addition to other policy considerations, see Note, *Large Lot Zoning*, 78 YALE L.J. 1418 (1969).

<sup>4</sup> See, e.g., D. MANDELKER, CONTROLLING PLANNED RESIDENTIAL DEVELOPMENTS (1966); Symposium, *Planned Unit Development*, 114 U. PA. L. REV. 3-170 (1965).

<sup>5</sup> See, e.g., Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040 (1963); Bowe, *supra* note 1, at 154-56; Symposium, *Apartments in Suburbia: Local Responsibility and Judicial Restraint*, 59 NW. U.L. REV. 344-432 (1964).

<sup>6</sup> The law review writing, with two exceptions, seems to have been done by students: Carter, *Problems in the Regulation and Taxation of Mobile Homes*, 48 IOWA L. REV. 16 (1962) (this article is concerned not only with zoning but with other aspects of regulation as well); Eshelman, *Municipal Regulation of House Trailers in Pennsylvania*, 66 DICK. L. REV. 301 (1962); Note, *Trailer Parks vs. The Municipal Police Power*, 34 CONN. B.J. 285 (1960); Note, *Municipal Regulation and Taxation of Trailers and Trailer Camps Under Pennsylvania Law*, 57 DICK. L. REV. 338 (1953); Note, *Regulation of Mobile Homes*, 13 SYRACUSE L. REV. 125 (1961) (dealing with certain aspects of zoning and taxation); Note, *Regulation and Taxation of House Trailers*, 22 U. CHI. L. REV. 738 (1955) (an excellent short treatment of the law up to that point in time); Note, *Toward an Equitable and Workable Program of Mobile Home Taxation*, 71 YALE L.J. 702 (1962) (although primarily concerned with taxation this Note explores the interrelationship between taxes and regulation of mobile homes and their acceptance in a community); 61 MICH. L. REV. 1010 (1963); 17 RUTGERS L. REV. 659 (1963). There are two specialized books in the area: B. HODES & G. ROBERSON, *THE LAW OF MOBILE HOMES* (2d ed. 1964) [hereinafter cited as HODES & ROBERSON] (this work does little more than list the cases and give brief synopses of them), and E. BARTLEY & F. BAIR, *MOBILE HOME PARKS AND COMPREHENSIVE COMMUNITY PLANNING* (1960) [hereinafter cited as BARTLEY & BAIR] (this book, although written by non-lawyers and not primarily concerned with legal questions, has some excellent discussions of the problems involved). The problems are also mentioned in the standard texts on zoning and municipal corporations: see, e.g., 7 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 24.564 (3d rev. ed. J. Latta 1968); 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* ch. 17 (3d ed. 1960). See also Annot., 96 A.L.R.2d 234 (1964); Annot., 86 A.L.R.2d 277 (1962); Annot., 22 A.L.R.2d 774 (1952).

as an excuse for excluding mobile homes altogether. It is our hope that we will start a wider discussion which may result in needed change.

## I

## THE MOBILE HOME

The term "trailer" has been replaced by "mobile home." The change in usage was undoubtedly motivated by a desire to avoid connotations attached to the former term and to reflect the transformations in the product itself. In fact, this new term is rapidly losing its descriptive value, since the so-called mobile home is increasingly shedding its mobility.<sup>7</sup> A few examples may illustrate the change.

When, in 1942, the Supreme Court of Ohio discussed trailers used for family living it said:

[T]he evidence discloses that the average trailer is approximately 7 feet in width and 17 feet in length, thus having a floor area of but 119 square feet, with as many as five people living therein. No trailer is equipped with a toilet or shower.<sup>8</sup>

By 1960 the average mobile home had a length in excess of forty feet and a width of ten feet, and the industry was beginning to talk of twelve feet width.<sup>9</sup> The twelve-foot-wide trailer was introduced in 1962, and by 1965 such trailers, together with the so-called double wide units, two units placed side-by-side, accounted for over half of the sales.<sup>10</sup> The latest statistics for a full year, showing the shipments of mobile homes made in 1968, indicate that the overwhelming majority were twelve feet in width (in certain parts of the country more than ninety percent of those delivered) and that more than half of the units

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<sup>7</sup> The title and contents of an article bear this out. McKeever, *The Motionless Mobile Home—The Trailer Problem in Community Development*, 19 URBAN LAND, April 1960, at 1. See *Where Housing Market Has Lots of Life*, BUS. WEEK, Sept. 3, 1966, at 148, suggesting the term "relocatable housing." See also *State v. Work*, 75 Wash. 2d 212, 215, 449 P.2d 806, 808-09 (1969).

<sup>8</sup> *Renker v. Village of Brooklyn*, 139 Ohio St. 484, 487-88, 40 N.E.2d 925, 927 (1942). By contrast, a commentator writing twenty years later said:

The modern house trailer, more appropriately known as a mobilehome, is a large, compact, completely equipped apartment on wheels. It includes sleeping, cooking, washing and sanitation facilities. It is a unit independent of outside facilities except for water, gas and electric supply, and sewage disposal. The mobilehome is 10 or 12 feet wide, usually 50 or 55 feet in length, and can be moved only by special equipment.

Eshelman, *supra* note 6, at 301.

<sup>9</sup> BARTLEY & BAIR 6; HODES & ROBERSON 2.

<sup>10</sup> *Where Housing Market Has Lots of Life*, BUS. WEEK, Sept. 3, 1966, at 150.

were sixty feet or more in length.<sup>11</sup> Currently the industry is advertising twenty-four-foot-wide units (twenty-four feet wide when assembled<sup>12</sup>) and two-story mobile homes with 1,100 square feet of living space.<sup>13</sup>

Considerable changes have taken place in the design and concept of the trailer or mobile home park.<sup>14</sup> From the earlier stereotype of the shantytown or slum on wheels of the 1930's and the World War II years,<sup>15</sup> trailer parks have developed into attractive permanent residential communities, with appropriate landscaping and community services.<sup>16</sup> In fact, a vertical mobile home park is being erected in Capistrano Beach, California, on the condominium principle. The units will be hoisted by crane onto platforms and the residents will have access to them by means of elevators. The platforms are designed in such a way that the units will have a balcony on two sides.<sup>17</sup>

Although mobile homes are not yet included in the housing statistics, they play an increasingly important role in the field. In 1953 the mobile home industry produced approximately 100,000 units with a value of \$100,000,000.<sup>18</sup> This increased to 120,000 units in 1956 and to 223,000 units in 1963.<sup>19</sup> In 1968 the industry produced over 350,000 units and the total value of its output approached \$3,000,000,000.<sup>20</sup>

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<sup>11</sup> *Mobile Home Shipments to Dealers by Region During 1968*, 20 MOBILE HOME RECREATIONAL VEHICLE DEALER, March 20, 1969, at 80-85. For the latest figures see *Mobile Home Deliveries to Dealers by Region For the Third Quarter of 1969*, 20 MOBILE HOME RECREATIONAL VEHICLE DEALER, Dec. 5, 1969, at 44-55.

<sup>12</sup> *Id.*, Feb. 20, 1969, at 36.

<sup>13</sup> *Id.*, Jan. 5, 1969, at 6. For latest style changes and elevations approximating the appearance of conventional homes, see *Innovations in Design*, *id.*, Nov. 20, 1969, at 34-35.

<sup>14</sup> BARTLEY & BAIR 12-16; Fogarty, *Trailer parks: the wheeled suburbs*, 111 ARCHITECTURAL F., July 1959, at 127; French & Hadden, *An Analysis of the Distribution and Characteristics of Mobile Homes in America*, 41 LAND ECON. 131 (1965).

<sup>15</sup> HODES & ROBERSON 1-2; Note, *Towards an Equitable and Workable Program of Mobile Home Taxation*, 71 YALE L.J. 702-03 (1962).

<sup>16</sup> BARTLEY & BAIR 135-40; French & Hadden, *supra* note 14; cf. Berney & Larson, *Micro-Analysis of Mobile Home Characteristics with Implications for Tax Policy*, 42 LAND ECON. 453, 455 (1966). The Macomb County Planning Commission has recently published a study of mobile homes in the county, which reaches conclusions very similar to those of the earlier and broader studies. MOBILE HOME PARKS, MACOMB COUNTY, MICHIGAN I (1969) [hereinafter cited as MACOMB STUDY]. Macomb County forms a part of the Detroit metropolitan area. However, as a result of restrictive policies there is at present in certain areas an acute shortage of parks, which, because of the absence of competitive forces, produces a deterioration of services. See, e.g., *The Detroit News*, Aug. 26, 1969, at 1-D, col. 1.

<sup>17</sup> *Carriage House: Skyscraper Park Throws Out Rule Book*, 16 MOBILE HOME PARK MANAGEMENT, Sept. 1968, at 30.

<sup>18</sup> Note, *Municipal Regulation and Taxation of Trailers and Trailer Camps Under Pennsylvania Law*, 57 DICK. L. REV. 338 (1953).

<sup>19</sup> HODES & ROBERSON 4.

<sup>20</sup> Greenleaf, *Industry Capabilities*, 20 MOBILE HOME RECREATIONAL VEHICLE DEALER, March 20, 1969, at 42.

Furthermore, techniques developed by the mobile home industry are being experimented with in connection with "piggy back" or pre-fabricated housing, which is constructed in the factory in modular form, delivered to the site on flatbeds, and assembled into multi-story structures.<sup>21</sup>

Recent studies also indicate that the characteristics of mobile home owners no longer fit the earlier stereotypes.<sup>22</sup> For instance, the 1960 census data indicate that the number of children per household for the mobile home population is lower than that for the country at large. Similarly, in terms of income and assets, they approximate the national average. Nevertheless, many of the early preconceptions are still accepted at face value and hamper an evaluation of the problems involved.

Mobile homes increasingly provide the new low-cost housing being built in the country.<sup>23</sup> With the conventional \$10,000 home a thing of the past,<sup>24</sup> mobile homes are filling the vacuum. The tremendous

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<sup>21</sup> The Department of Housing and Urban Development undertook a pilot project in "piggyback" housing in Vicksburg, Mississippi. The modules were fully manufactured, using the production techniques of the mobile homes industry, brought to the construction site on flatbeds, and stacked upon each other by cranes. 3 HUD ANN. REP. 95 (1967). For a discussion of some later "piggyback" projects in Detroit, Boston, and Rochester, see "Instant Housing," 25 J. HOUSING, Oct. 1968, at 467. The possibilities of assembly-line housing were recently discussed at a conference in Detroit. The Detroit News, March 6, 1969, at 20-C, col. 1. Fruehauf Corporation, long a leader in the field of truck trailers and freight containers, recently announced plans to produce modular homes. The Detroit News, May 2, 1969, at 20-C, col. 1. See also Keith, *Factory-Built Housing Cuts On-Site Work to Two Days*, LAWYERS TITLE NEWS, Oct. 1969, at 3 (Mich. ed.).

<sup>22</sup> HODES & ROBERSON 4 (average annual income of mobile home resident exceeded national average in 1959); see French & Hadden, *supra* note 14, at 138:

For one thing, rather than placing an increased burden on community facilities, trailer inhabitants may actually contribute more to a community than they receive from it. Their demands for schools appear to be disproportionately low. Streets and sewers may be developed to a considerable extent by trailer park owners and, in some cases, trash disposal may be handled privately.

For a similar conclusion see MACOMB STUDY 31-32.

<sup>23</sup> "Now, that is the reason for the increase in the mobile home business, because the mobile home is today the only means by which these low- and moderate-income people can afford to buy a house." *Mortgage Credit, Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 159 (1967) (statement of Frank P. Flynn, Jr.). Mobile homes accounted for 75% of the sales of homes costing less than \$13,000. 130 FINANCIAL WORLD, Sept. 4, 1968, at 20. See also Aiman, *Mobile Homes: Market for Mini Houses is Big*, 202 IRON AGE, Sept. 5, 1968, at 56.

<sup>24</sup> See *Hearings, supra* note 23, at 159. See also Berger, *Homeownership for Lower Income Families: The 1968 Housing Act's "Cruel Hoax,"* 2 CONN. L. REV. 30, 31-33 (1969). A group of Negro businessmen in Detroit formed a construction company that claims that it can produce and sell conventional houses for \$10,000. The Detroit News, Jan. 26, 1969, at 1-A, col. 2. It is too early to determine what contribution toward solving the low-income housing problem they can make, but the development will be watched with interest by all students of housing.

decrease in home construction in 1966<sup>25</sup> did not affect the mobile home industry.<sup>26</sup> The same phenomenon seems to be developing in 1969.<sup>27</sup> As usual there is a lag between the facts of life and their official acceptance. Thus, new mobile homes are not reflected in the statistics of housing starts, distorting the picture, although the incongruity is becoming more and more apparent.<sup>28</sup> The new attitude was voiced recently, in somewhat exaggerated terms, by Pierre Rinfret, consulting economist and economic advisor to President Nixon during the 1968 campaign, as follows:

The answer is very simple. The housing industry, for example, deserves disaster. And it is getting it. We are developing a new industry that the stock market has just discovered. I discovered it three years ago. I said then that here is an answer to housing in the United States. It's called mobile homes. For six thousand dollars I can produce an eight-by-twenty-foot home, put it on six concrete blocks and on the land, and it will cost the buyer twenty-five dollars a month. And that is better housing than I can get from trade-union construction for twenty thousand dollars. So if conventional housing goes under, I will be delighted, because I have the alternative.<sup>29</sup>

## II

### THE MOBILE HOME AND PUBLIC ZONING

Zoning as an element of police power is supposed to serve the ends of public health, safety, and morals. It is well known that in practice these lofty ideals are seldom observed, since zoning is performed by

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<sup>25</sup> Newman, *The Low-Cost Housing Market*, 89 MONTHLY LAB. REV. 1362 (1966). For a discussion of the mortgage financing "crisis" of 1966, see *Hearings*, *supra* note 23, at 72; Klamann, *Public/Private Approaches to Urban Mortgage and Housing Problems*, 32 LAW & CONTEMP. PROB. 250 (1967).

<sup>26</sup> Aiman, *supra* note 23, at 56; Newman, *supra* note 25, at 1363; *Where Housing Market Has Lots of Life*, BUS. WEEK, Sept. 3, 1966, at 148.

<sup>27</sup> Greenleaf, *supra* note 20, at 42. For an evaluation of developments in mid-1969, see Wall St. J., July 11, 1969, at 1, col. 6, and for a later summary see Mayer, *Mobile Homes Move Into the Breach*, FORTUNE, March 1970, at 126.

<sup>28</sup> Thus in a staff memorandum prepared for the Board of Governors of the Federal Reserve System answering questions presented by the Commission on Mortgage and Interest Rates, the following is found in a discussion of the availability of funds to meet the national housing goals: "What allowance in either the regular or subsidized market is to be made for lower-priced mobile homes, which do not count as starts but do provide shelter?" *Housing Production and Finance*, 55 FED. RES. BULL., March 1969, at 228.

<sup>29</sup> II THE CENTER MAGAZINE, May 1969, at 65-66. Mr. Rinfret made this comment during a round table discussion at a seminar sponsored by the Center for the Study of Democratic Institutions held in New York City on February 5, 1969.

local units of government and is responsive to local sentiments and prejudices. Elected officials are closely attuned to the thinking of the community and translate its desires, expressed or implied, into the paragraphs of ordinances.<sup>30</sup> In the past, mobile home dwellers have been the stepchildren of zoning legislation.<sup>31</sup> Responding to the old stereotype of a shantytown on wheels, many municipalities have tried either to exclude mobile homes altogether<sup>32</sup> or to subject them to such stringent and onerous provisions as to discourage any attempt at mobile home living within their borders.<sup>33</sup>

The picture is complicated by the interaction of judicial decision and legislative response.<sup>34</sup> The cases themselves may be categorized in any number of ways, trying to fit them into neat little slots with their nice and shiny labels. Such attempts have been made in the past<sup>35</sup> and

<sup>30</sup> For elaboration and examples of such practices, see R. BABCOCK, *THE ZONING GAME* 153-85 (1966); Aloï, Goldberg & White, *supra* note 1, at 67, 74-80; Sager, *supra* note 1, at 780-82.

<sup>31</sup> Babcock calls trailer parks "everyone's pariah." BABCOCK, *supra* note 30, at 137. See also C. CRAWFORD, *STRATEGY AND TACTICS IN MUNICIPAL ZONING* 140 (1969).

<sup>32</sup> E.g., *Wright v. Michaud*, 160 Me. 164, 200 A.2d 543 (1964); *Board of Selectmen of Wrentham v. Monson*, — Mass. —, 247 N.E.2d 364 (1969); *Vickers v. Township of Gloucester*, 37 N.J. 232, 181 A.2d 129 (1962); *Napierkowski v. Township of Gloucester*, 29 N.J. 481, 150 A.2d 481 (1959); *Midgarden v. Grand Forks*, 79 N.D. 18, 54 N.W.2d 659 (1952); cf. *A & P Mobilehome Court, Inc. v. Town of Groton*, 21 Conn. Supp. 275, 154 A.2d 243 (1959); *Rezler v. Village of Riverside*, 28 Ill. 2d 142, 190 N.E.2d 706 (1963).

<sup>33</sup> E.g., *Karen v. Town of East Haddam*, 146 Conn. 720, 155 A.2d 921 (1959) (70-day limitation on the stay of mobile homes in trailer parks not unreasonable or arbitrary); *Rezler v. Village of Riverside*, 28 Ill. 2d 142, 190 N.E.2d 706 (1963) (limitation to two consecutive days in any calendar month with a cumulative limitation of 30 days a year not unreasonable); *Spitler v. Town of Munster*, 214 Ind. 75, 14 N.E.2d 579 (1938) (length of stay in "tourist camps" limited to 30 days); *Board of Selectmen of Wrentham v. Monson*, — Mass. —, 247 N.E.2d 364 (1969) (both total prohibition and limitation of stay to 30 days approved inferentially); *Cady v. Detroit*, 289 Mich. 499, 286 N.W. 805 (1939), *appeal dismissed*, 309 U.S. 620 (1940) (city ordinance prohibiting parking of occupied trailers in trailer parks for periods longer than 90 days in any 12 months upheld); *Renker v. Village of Brooklyn*, 139 Ohio St. 484, 40 N.E.2d 925 (1942) (length of stay of house trailers in trailer parks within the village limited to 60 days). For citation to additional cases and further discussion of such devices, see Carter, *supra* note 6, at 25-28.

<sup>34</sup> For example, after the decision of the Michigan Supreme Court in *Cady v. Detroit*, 289 Mich. 499, 286 N.W. 805 (1939), *appeal dismissed*, 309 U.S. 620 (1940), the Michigan Legislature adopted Public Act 143 of 1939 (repealed 1959), which was construed to deprive municipalities of the powers to limit the stay of trailers in licensed parks (*Richards v. Pontiac*, 305 Mich. 666, 9 N.W.2d 885 (1943)), but not outside of licensed parks (*Loose v. Battle Creek*, 309 Mich. 1, 14 N.W.2d 554 (1944)). For a discussion of the Ohio experience, see Carter, *supra* note 6, at 26-27.

<sup>35</sup> See, e.g., HODES & ROBERSON 153-200; Carter, *supra* note 6, at 19-46 (this article has a comprehensive collection of cases decided up to the time of its publication); Note, *Regulation of Mobile Homes*, 13 SYRACUSE L. REV. 125, 128-33 (1961).

will not be repeated here. This article is concerned with more fundamental questions: how far should a landowner be compelled to adjust his use of his property and mode of life to the wishes, ideas, or prejudices of his neighbors, and whether the equal protection clause of the Federal Constitution is involved when a municipality decides to exclude a certain group of people (those who by choice or necessity decide to reside in mobile homes) from its borders.

At the threshold, zoning for or against mobile homes involves two distinct, although interrelated, problems. The first is whether mobile homes may be deposited on permanent foundations on residential lots zoned for single-family dwellings. This problem involves the wording of the particular ordinances involved, and was so analyzed in the past.<sup>36</sup> But more recent opinions,<sup>37</sup> particularly that of the Supreme Court of Washington in *State v. Work*,<sup>38</sup> cast doubt on this proposition and suggest that broader and more fundamental issues are involved.

The second problem is the assertion that mobile homes belong only in mobile home parks, which should be subjected to appropriate governmental regulation.<sup>39</sup> This issue is highly debatable, particularly as the units are increasingly less mobile and more home, and some aspects of the problem will be discussed below.<sup>40</sup> What is, however, of immediate interest is the nature of a trailer park as such. Most zoning ordinances dealing with mobile home parks or, as they are still called, "trailer" parks, treat them as commercial ventures, as they are, and draw from this the unjustifiable conclusion that they belong in a commercially zoned area.<sup>41</sup> While ownership and operation of the mobile home park may very well be a business, and should be taxed, treated, and regulated as such, living in a mobile home is not a business. It does not differ in kind or degree from living in any other kind of dwelling. This approach is similar to saying that because the ownership and operation of an apartment house is a business, apartment houses belong only in commercial or industrial zones.

To push the analogy a little bit further, it could be asked whether the same authorities would classify a subdivision, developed with con-

<sup>36</sup> Compare *Town of Marblehead v. Gilbert*, 334 Mass. 602, 137 N.E.2d 921 (1956), with *Sioux Falls v. Cleveland*, 75 S.D. 548, 70 N.W.2d 62 (1955).

<sup>37</sup> *Douglass Township v. Badman*, 206 Pa. Super. 390, 213 A.2d 88 (1965); *Lescault v. Zoning Bd. of Cumberland*, 91 R.I. 277, 162 A.2d 807 (1960); *In re Willey*, 120 Vt. 359, 140 A.2d 11 (1958).

<sup>38</sup> 75 Wash. 2d 212, 449 P.2d 806 (1969).

<sup>39</sup> For a discussion of arguments in favor of this proposition, see BARTLEY & BAIR 12-13; Carter, *supra* note 6, at 33-35.

<sup>40</sup> Text at notes 81-104 *infra*.

<sup>41</sup> See, e.g., *New Orleans v. Louviere*, 52 So. 2d 751 (La. App. 1951). See generally BARTLEY & BAIR 75-80; HODES & ROBERSON 156-62; MACOMB STUDY 11-12.

ventionally built, single-family residences but owned by an investor who rented them, as a business, so that the development could take place only in a commercial or, worse still, an industrial zone. While this kind of development is not common, it is becoming increasingly popular in certain parts of the country to retain fee title to the land of a subdivision and to lease the lots on long-term leases to prospective homeowners, who then construct houses that they own.<sup>42</sup> Again the question could then be asked, "Is not the owning of such a subdivision and collection of rent a business?", and an immediate conclusion could be drawn that therefore this should not be a residential but a commercial or industrial zone. The fact that a subdivision is organized and developed as a commercial venture does not cause anybody to treat it, as far as the people who reside there are concerned, as a business. The mistake is in looking not at the primary purpose for which people frequent and use an area as a touchstone for the determination of its designation, but at the incidental profitability of the area to someone.

A. *A Home or a Vehicle—Is This Really a Question of Semantics?*

One of the guises under which the problem of mobile homes versus zoning ordinances has come to the attention of the courts is in connection with lot owners' bringing mobile homes on lots and placing them there more or less permanently.<sup>43</sup> Axles and wheels are often removed and the mobile home is put on a cinder or concrete block foundation. It is also attached to utilities, such as electricity, gas, water, and sewers. The question that may then arise is whether such homes violate the provisions of the local ordinance limiting the area to single-family residences,<sup>44</sup> or, essentially the same problem, whether they are subject to all the applicable requirements of the ordinance, such as minimum lot size,<sup>45</sup> minimum floor area,<sup>46</sup> the requirements relating to

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<sup>42</sup> For a discussion of this kind of residential development in Orange County, California, see G. LEFEOE, *LAND DEVELOPMENT LAW* 1068 (1966).

<sup>43</sup> See discussion in Carter, *supra* note 6, at 35-37.

<sup>44</sup> E.g., *Town of Manchester v. Phillips*, 343 Mass. 591, 180 N.E.2d 333 (1962); *Commonwealth v. Flannery*, 1 Pa. D. & C.2d 680 (1954); *Sioux Falls v. Cleveland*, 75 S.D. 548, 70 N.W.2d 62 (1955).

<sup>45</sup> *County of Will v. Stanfill*, 7 Ill. App. 2d 52, 129 N.E.2d 46 (1955). The area was zoned R-2 with a minimum lot requirement of 7,260 square feet. Defendants placed trailers on much smaller lots and connected them to utilities. The court held that trailers were "erected" within the meaning of the ordinance and violated minimum lot size requirements.

<sup>46</sup> *Kimsey v. City of Rome*, 84 Ga. App. 671, 67 S.E.2d 206 (1951) (300 square foot trailer violated requirement of minimum floor space of 700 square feet prescribed by zoning ordinance); *Town of Huntington v. Transon*, 43 Misc. 2d 912, 252 N.Y.S.2d 576 (Sup. Ct. 1964) (trailer on foundation a building within zoning ordinance and subject to minimum floor area requirement of 800 square feet); *Corning v. Town of Ontario*, 204 Misc. 38, 121 N.Y.S.2d 288 (Sup. Ct. 1953).

side yards,<sup>47</sup> and so on.<sup>48</sup> In this connection, it is very easy to treat the whole problem as one of semantics, and one writer has so approached it. After discussing the cases decided up to that point, he concludes a section of his article by admonishing municipal authorities that "[t]he problems referred to may best be solved by amending existing zoning ordinances so as to spell out the use districts in which mobile homes and mobile home parks are to be permitted."<sup>49</sup>

The issue is more fundamental and is not solved by the addition of a couple of sentences to an ordinance. What is involved is a question of the freedom of an owner to use his property in any way he sees fit, so long as the use is not illegal or violative of the rights of others. To say at this point that a municipality may, by enacting an ordinance prescribing an architectural design, make the use of any other design illegal is to beg the question or assume the answer. The problem is one of equal protection under the provisions of the Federal Constitution and corresponding provisions of state constitutions.<sup>50</sup> As a matter of policy the question is simply this: Will the individual homeowner be permitted to live in a manner that satisfies his desires or must he conform to the esthetic tastes of his neighbors?<sup>51</sup>

The semantic game of skill, as applied to mobile homes put more or less permanently on residential lots, takes various guises. In certain cases, municipalities have argued that such mobile homes are "buildings" or "single-family dwellings" within the meaning of the ordinance, and because they do not meet all the requirements as to side yards, size, or any other feature, the mobile homes are illegal.<sup>52</sup> In those cases

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<sup>47</sup> See *State ex rel. Mooris v. Nashville*, 207 Tenn. 672, 343 S.W.2d 847 (1961). This case involved the right to a permit on a large back lot in a commercial zone for 24 trailers. The reasoning of the court is not well articulated, but the opinion mentions, among other things, that the placement of the trailers would have violated side yard requirements of the zoning ordinance.

<sup>48</sup> *Lower Merion Township v. Gallup*, 158 Pa. Super. 572, 46 A.2d 35 (1946) (a trailer on a foundation is a building within the meaning of the ordinance and subject to all its requirements).

<sup>49</sup> Carter, *supra* note 6, at 37.

<sup>50</sup> For a discussion of equal protection implications of exclusionary zoning, see Aloï, Goldberg & White, *supra* note 1, at 96-102; Sager, *supra* note 1, at 780-800.

<sup>51</sup> The reading of two recent cases decided by the courts of appeal of Ohio and Illinois, in respect to the approval of building plans by an architectural board of review, is instructive. Compare *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74 (1963), with *Pacesetter Homes, Inc. v. Village of Olympia Fields*, 104 Ill. App. 2d 218, 244 N.E.2d 369 (1968). See also *Piscitelli v. Township of Scotch Plains*, 103 N.J. Super. 589, 248 A.2d 274 (1968); *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955); Comment, *Validity Rules Concerning Public Zoning and Private Covenants: A Comparison and Critique*, 39 S. CAL. L. REV. 409, 419-24 (1966).

<sup>52</sup> *Kimsey v. City of Rome*, 84 Ga. App. 671, 67 S.E.2d 206 (1951); *County of Will v. Stanfill*, 7 Ill. App. 2d 52, 129 N.E.2d 46 (1955); *Town of Huntington v. Transon*, 43 Misc. 2d 912, 252 N.Y.S.2d 576 (Sup. Ct. 1964); *Corning v. Town of Ontario*, 204 Misc. 38,

the owners just as strenuously have claimed that their structures are not buildings but vehicles, and therefore outside the purview of the ordinance. In other cases the roles are reversed, the municipal authorities arguing that the structures are vehicles, trailers, or what have you, and therefore illegal under the zoning provisions, the owners replying with equal vigor that the structures are buildings fully complying with the zoning and building codes involved.<sup>53</sup> Other cases turn on such interesting points as whether the mobile home is "parked" on the lot or whether it is "erected" thereon.<sup>54</sup> The reported decisions proceed in all conceivable directions. To a certain extent they seem to be the product of the time of decision, the earlier cases being strongly influenced by the size, construction, and available amenities of the trailers of the period (such as lack of indoor plumbing, cramped quarters, and similar limitations). Nevertheless, the recent cases seem to indicate a trend in the other direction.

The most extreme position excluding mobile homes from single-family districts seems to have been taken by the Massachusetts courts.<sup>55</sup> Their attitude can best be summarized as either "once a trailer, always a trailer" or "a trailer is a trailer is a trailer."<sup>56</sup> The fact that the mobile

121 N.Y.S.2d 288 (Sup. Ct. 1953); *Lower Merion Township v. Gallup*, 158 Pa. Super. 572, 46 A.2d 35 (1946).

<sup>53</sup> *Town of Brewster v. Sherman*, 343 Mass. 598, 180 N.E.2d 338 (1962); *Town of Manchester v. Phillips*, 343 Mass. 591, 180 N.E.2d 333 (1962); *Town of Marblehead v. Gilbert*, 334 Mass. 602, 137 N.E.2d 921 (1956); *Douglass Township v. Badman*, 206 Pa. Super. 390, 213 A.2d 88 (1965); *Commonwealth v. Flannery*, 1 Pa. D. & C.2d 680 (1954); *Lescault v. Zoning Bd. of Cumberland*, 91 R.I. 277, 162 A.2d 807 (1960); *Sioux Falls v. Cleveland*, 75 S.D. 548, 70 N.W.2d 62 (1955); *In re Willey*, 120 Vt. 359, 140 A.2d 11 (1958); *State v. Work*, 75 Wash. 2d 212, 449 P.2d 806 (1969).

<sup>54</sup> *City of Astoria v. Nothwang*, 221 Ore. 452, 351 P.2d 688 (1960). The city had no zoning ordinance but an ordinance prohibited the parking of trailers. The defendant put a mobile home on her lot and connected it to water, sewer, and electricity. It was held that this was not "parking" within the meaning of the ordinance. The opinion ends with a very broad hint that the city should amend its ordinance. See also *Davis v. Mobile*, 245 Ala. 80, 16 So. 2d 1 (1943).

<sup>55</sup> See *Wright v. Michaud*, 160 Me. 164, 170, 174, 200 A.2d 543, 546, 548 (1964); *Town of Brewster v. Sherman*, 343 Mass. 598, 180 N.E.2d 338 (1962); *Town of Manchester v. Phillips*, 343 Mass. 591, 180 N.E.2d 333 (1962); *Town of Marblehead v. Gilbert*, 334 Mass. 602, 137 N.E.2d 921 (1956).

<sup>56</sup> "A trailer on wheels, by its very nature, is not adapted for the type of permanent dwelling use very plainly contemplated by the by-law in using the term 'One-family detached houses.'" *Town of Marblehead v. Gilbert*, 334 Mass. 602, 604, 137 N.E.2d 921, 922 (1956).

In ordinary parlance the unit shown in the exhibits will be spoken of as a trailer or a mobile home, even if it has not been sold with wheels or its wheels have been taken away, and even if it has been affixed to the land. It looks like a trailer, has the qualities of a trailer superstructure, and has been built as a trailer.

*Town of Manchester v. Phillips*, 343 Mass. 591, 596, 180 N.E.2d 333, 337 (1962).

homes were purchased without wheels to be brought in on flatbeds, or that the wheels were to be removed and the structures were to be permanently attached to foundations, landscaped, and in every other respect made to comply with the applicable zoning ordinances did not make an impression on the Massachusetts judges. The language in the appropriate municipal ordinances, excluding from the term "[d]welling . . . an overnight camp, trailer, or mobile home"<sup>57</sup> or prohibiting the "[r]esiding in any trailer or tent,"<sup>58</sup> was held sufficient to exclude immobilized, permanently attached mobile homes. Such cases lend strong support to the contentions that the issue is purely one of semantics and that if the municipality uses strong enough language it will prevail.

Other states have held, with varying degrees of emphasis and under different factual situations, that mobile homes placed more or less permanently on a residential lot still remain trailers and within the prohibition of the ordinance.<sup>59</sup> These courts, as well as the Massachusetts courts that have focused on whether the structure had ever been a trailer<sup>60</sup> and the fact that it was not very securely attached to the land,<sup>61</sup> apparently fail to realize that the phrase "permanently attached to the land" is a misleading one. The distinctions are of degree, not of kind. It is common knowledge that conventionally built houses may be moved, and the spectacle of residences being moved by house movers from one lot to another is not unknown to our cities. The expression "conventionally constructed" is, of course, one of changing content. The convention in one age may have once been revolutionary. The difficulty of moving a house to another site seems to be a rather slender reed on which to lean in deciding a case.<sup>62</sup> The opinions do not tell us at

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<sup>57</sup> *Town of Manchester v. Phillips*, 343 Mass. 591, 592 n.1, 180 N.E.2d 333, 334 n.1 (1962).

<sup>58</sup> *Town of Brewster v. Sherman*, 343 Mass. 598, 599, 180 N.E.2d 338, 339 (1962).

<sup>59</sup> *Bixler v. Pierson*, 188 So. 2d 681 (Fla. App. 1966); *New Orleans v. Louviere*, 52 So. 2d 751 (La. App. 1951); *People v. Clute*, 18 N.Y.2d 999, 224 N.E.2d 734, 278 N.Y.S.2d 231 (1966) (memorandum decision); *State ex rel. Morris v. Nashville*, 207 Tenn. 672, 343 S.W.2d 847 (1961).

<sup>60</sup> *Town of Brewster v. Sherman*, 343 Mass. 598, 180 N.E.2d 338 (1962); *Town of Manchester v. Phillips*, 343 Mass. 591, 180 N.E.2d 333 (1962). The trial judge in *Phillips* very properly characterized the issue as whether something once denominated a mobile home forever remains such and held to the contrary, saying that having shed its mobility, the structure became a single-family dwelling. He was reversed on appeal.

<sup>61</sup> *Town of Marblehead v. Gilbert*, 334 Mass. 602, 137 N.E.2d 921 (1956). The court stressed that the trailer remained on its wheels, was not affixed to the land, and could be moved at any time. However, subsequent language in the opinion, and, of course, the later Massachusetts cases, make it clear that the presence of a foundation would not have changed the result.

<sup>62</sup> The point is made very forcefully by Judge Van Voorhis, in his dissenting opinion in *People v. Clute*, 18 N.Y.2d 999, 224 N.E.2d 734, 278 N.Y.S.2d 231 (1966):

No contention is made against appellant that she violated any setback or area restriction, that there was any sanitary or building code violation or that

which point a dwelling is "permanently" attached and at which it is not. Is it a question of the man-hours required to prepare it for moving or is it a question of the dollars involved? The opinions remain silent. These attempts remind one of the definition of a fixture attributed to the late Professor E. H. "Bull" Warren, as "realty with a chattel past and the fear of a chattel future."<sup>63</sup>

In the middle of the spectrum are cases in which the municipality claimed that the structure was a dwelling or building which, however, did not comply with zoning requirements as to side yards, backyards, minimum floor space, or some other respect.<sup>64</sup> While the language used by the courts, taken at face value, would strongly support the notion that the question was not purely one of semantics, this is weakened by the fact that the contention was made by the municipalities passing the ordinances. Therefore, the courts were proceeding from the assumption that the body which had passed the legislation was also interpreting it, and it is very difficult to say whether the same result would have been reached if the argument had been the other way around, although in some of the cases the statements of the courts are strong enough to indicate that it would.<sup>65</sup> Again the results are not uniform, and in an Ohio

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her domicile contravenes any of the ordinances of the town applicable to permanent residences except that, instead of being built on the site by carpenters and masons, it was prefabricated elsewhere and brought to its present location on wheels. . . . [I]t was placed on a permanent foundation (insofar as anything is permanent in this changing life) upon appellant's own premises. It is as much a residence as though it were an ordinary house which had been moved (as houses sometimes are) and brought to its resting place on wheels or rollers. If such a structure is subject to taxation as an ordinary residence, located for an indefinite time where it is situated, there is no constitutional power in the town to prohibit it, if it conforms to other requirements of statute and ordinance, merely for the reason that it was prefabricated and brought there on wheels instead of being constructed on the site. The arbitrariness of the ordinance is shown by section 61 (subd. i), which purports to forbid such a structure except in trailer parks, even though it has been fashioned into a building as a component part.

*Id.* at 1001-02, 224 N.E.2d at 736, 278 N.Y.S.2d at 233-34.

<sup>63</sup> A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 618 n.1 (2d ed. 1969).

<sup>64</sup> *Kimsey v. City of Rome*, 84 Ga. App. 671, 67 S.E.2d 206 (1951); *County of Will v. Stanfill*, 7 Ill. App. 2d 52, 129 N.E.2d 46 (1955); *Town of Huntington v. Transon*, 43 Misc. 2d 912, 252 N.Y.S.2d 576 (Sup. Ct. 1964); *Corning v. Town of Ontario*, 204 Misc. 38, 121 N.Y.S.2d 288 (Sup. Ct. 1953); *Lower Merion Township v. Gallup*, 158 Pa. Super. 572, 46 A.2d 35 (1946).

<sup>65</sup> A house trailer is simply a mobile house. It is as much a dwelling as any house which is built on a foundation and therefore not mobile. . . .

To say that these were not dwelling houses is an attempt to fictionalize a reality. They were used and intended to be used as homes, and were as much dwellings as any similarly sized structures could be. In fact they contained household conveniences rarely present in houses so small. They differed from the ordinary house only in respect to the ease with which they could be moved.

*Lower Merion Township v. Gallup*, 158 Pa. Super. 572, 575, 46 A.2d 35, 36 (1946) (emphasis by the court).

case it was held that the structure was not a "building," a conclusion which led the court to interpret the Ohio enabling statute as preventing the county from regulating such modes of living.<sup>66</sup> Whether one agrees with the reasoning of the court as to the applicability of the particular legislation, the precedential value of such an opinion is minimal because it clearly indicates that a change in the enabling statute would have produced a different result.

Four cases, in varying degrees, lend strong support to the contention that the modern trend of authority is away from a semantical game of skill and is concerned with more fundamental questions. These cases either hold or imply that the question is not one of the use of appropriate language in the ordinance, but a more fundamental one of the limit of the municipal power to make unreasonable distinctions between various modes of construction and living.<sup>67</sup>

*In re Willey*<sup>68</sup> is unusual in that it was an action by neighbors challenging the validity of the issuance of a permit by the city of Montpelier to Willey to erect a mobile home on a permanent foundation on his lot. The city determined that a mobile home on a foundation was a single-family house within the meaning of its zoning ordinance.<sup>69</sup> The county court overruled the city board of adjustment and was in turn reversed by the Supreme Court of Vermont. In the discussion, the court recognized the real issues involved and distinguished between the business of running a trailer park and the use of a mobile home as a residence.<sup>70</sup> It also pointed out that these matters are questions of degree, not of kind, and that houses prefabricated and brought to the site either whole or in sections do not thereby become

<sup>66</sup> *Brodnick v. Munger*, 102 N.E.2d 48 (Ohio C.P. 1951).

<sup>67</sup> The Illinois Court of Appeals in *County of Winnebago v. Hartman*, 104 Ill. App. 2d 119, 242 N.E.2d 916 (1968), indicated its disagreement with its supreme court's sanction of complete exclusion of mobile homes in *Rezler v. Village of Riverside*, 28 Ill. 2d 142, 190 N.E.2d 706 (1963), by distinguishing that case on the flimsiest of grounds and holding that mobile homes on permanent foundations were not "trailers" within the meaning of the county zoning ordinance. See also *Lakeland Bluff, Inc. v. County of Will*, — Ill. App. 2d —, 252 N.E.2d 765 (1969).

<sup>68</sup> 120 Vt. 359, 140 A.2d 11 (1958). The far-reaching importance of *Willey* may be gathered, *inter alia*, from the treatment it received by those who disagreed with the result. Thus the Massachusetts court dismissed *Willey* with the comment "strict construction of ordinance adopted." *Town of Manchester v. Phillips*, 343 Mass. 591, 597, 180 N.E.2d 333, 337 (1962). Similarly, Carter avoided discussion of *Willey* by saying that results similar to that in *Commonwealth v. Flannery*, 1 Pa. D. & C.2d 680 (1954), were reached in that case. Carter, *supra* note 6, at 36.

<sup>69</sup> Here is another example of an interpretation of an ordinance by the body enacting it.

<sup>70</sup> 120 Vt. at 363, 140 A.2d at 13.

vehicles.<sup>71</sup> The impact of the opinion is somewhat weakened at the end by a dictum to the effect that a specific provision in the ordinance could have prohibited the erection of mobile homes on lots.<sup>72</sup> However, the point was not before the court and was not fully argued.

*Willey* was followed in *Lescault v. Zoning Board of Cumberland*.<sup>73</sup> In that case, petitioner applied for a permit to use a trailer on a permanent foundation as a residence on a lot owned by him. The lot was in an area zoned single-family attached dwellings. The building inspector granted the permit but was overruled by defendant board. The court reviewed the ordinance and the facts and determined that the immobilized trailer was clearly a single-family residence within the meaning of the ordinance, making the action of the board an abuse of discretion.<sup>74</sup>

These cases, while containing excellent discussions and outlining very strong policy considerations, still rely primarily on the general definition of "single-family residence" in the ordinances. A further step away from semantics was taken in *Douglass Township v. Badman*.<sup>75</sup> The ordinance involved in that case prohibited all mobile homes, defined as "any portable structure or vehicle, titled or registered as a vehicle, so constructed and designed as to permit occupancy thereof for dwelling or sleeping purposes,"<sup>76</sup> from being located anywhere in the township except in mobile home parks and prohibited the removal of wheels from such structures. After the effective date of the ordinance defendant moved a mobile home onto his lot in the township, removed the wheels, and placed the home on a permanent foundation. The township brought criminal proceedings against him for violation of the ordinance. The superior court reversed a conviction and directed dismissal of the charges.

Defendant argued that his home was not a "mobile home" as defined in the ordinance and that, in any event, the ordinance was unconstitutional. The court did not reach the issue of the constitutionality of the ordinance. It held that a structure from which the wheels had been removed and which had been placed on a permanent foundation

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<sup>71</sup> *Id.* at 364, 140 A.2d at 14.

<sup>72</sup> "It is true that the legislative body of the City of Montpelier could have specifically barred the use of a trailer coach as a home in the residential zone of that city when the ordinance was enacted." *Id.* at 365, 140 A.2d at 15.

<sup>73</sup> 91 R.I. 277, 162 A.2d 807 (1960).

<sup>74</sup> *Id.* at 281-82, 162 A.2d at 810.

<sup>75</sup> 206 Pa. Super. 390, 213 A.2d 88 (1965). See also *Anstine v. Zoning Bd. of Adjustment of York Township*, 411 Pa. 33, 190 A.2d 712 (1963).

<sup>76</sup> 206 Pa. Super. at 393, 213 A.2d at 89.

is not a mobile home and therefore the provisions of the ordinance were not violated. While the court rested its decision on the narrowest possible ground, the implications of the opinion go further. It is highly questionable whether the court, if it had to face the issue, would really rest its determination on the presence or absence of wheels. Furthermore, since the ordinance prohibited the location of mobile homes outside of a park, it could be strongly argued that if the matter were purely semantic, there was a violation of the ordinance in locating the structure on defendant's lot. If the touchstone were simply the presence or absence of wheels, then while the mobile home was being towed onto the property and "located" there the law was being violated. Therefore, it must be presumed that the court would go further in another case and declare that a movable structure which otherwise complies with the zoning and building code can be erected or brought onto a lot zoned "single-family residences" and that the style of architecture or design is a matter of personal taste.

This line of reasoning is strengthened by the most recent case in point, *State v. Work*,<sup>77</sup> decided by the Supreme Court of Washington. This was a criminal prosecution for a violation of a zoning resolution of King County. Defendant had a mobile home eight feet by forty-six feet moved onto a lot owned by her. The tongue, axles, and wheels were removed and the body was put on a permanent concrete block foundation. The structure was connected to water, electricity, and a septic tank, all of which complied with the applicable county resolutions. The lot on which the structure was moved was located in a single-family district, and the zoning resolution defined a "building" as "any structure having a roof but excluding all forms of vehicles even though immobilized."<sup>78</sup> Defendant raised the twin defenses of unconstitutionality and of compliance with the resolution. Again the court decided the case on the narrower ground and reversed the conviction of the trial court, relying primarily on *Willey*.

This case goes further than the prior ones because, presumably learning from prior opinions, the county included the concept of an immobilized vehicle in its definition. While the case ostensibly turns on the definition of the term "vehicle," it is doubtful that the court engaged in verbal games and would have sustained the conviction if the county had used the phrase "immobilized mobile home." Consider the following language of the court:

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<sup>77</sup> 75 Wash. 2d 212, 449 P.2d 806 (1969). For an example of a contrary attitude see *State v. Huffman*, 20 Ohio App. 2d 263, 253 N.E.2d 812 (1969).

<sup>78</sup> 75 Wash. 2d at 14, 449 P.2d at 808.

Whatever features of mobility the home had originally, the mobility was of the home itself. It was not a vehicle, and it did not become a proscribed, immobilized vehicle when its mobile characteristics were removed and it was placed upon a foundation. It was a prefabricated 1-family-dwelling unit which was not prohibited upon the land in question.<sup>79</sup>

The court makes it plain that it was concerned not with felicity in the use of verbal formulae but with the characteristics of the structure involved. If it had more of the characteristics of a residence, the matter of design was to be decided by the individual taste of the owner, subject to appropriate health and safety regulations.

The reasoning of the court is strengthened when one notices that it pointed out that the ordinance would have clearly prohibited a discarded school bus from being placed on the lot and converted into living quarters.<sup>80</sup> Thus the court has stated, in effect, that in later cases it will look not at words but at the principal features of the structure involved. If the structure is a makeshift shanty that does not comply with health and safety regulations passed under the police power, it will be prohibited. On the other hand, if it is a structure qualifying under the applicable health and safety codes but constructed in a new or unorthodox way, it will be permitted and the question of colors, style, elevation, and materials used will be left to the discretion of the property owner.

Viewing the trend of the more recent decisions we believe that authority is definitely turning away from verbal skills and from attempts at ingenious definitions to the more appropriate consideration of the essential nature of the structure. If the structure is essentially a house, although not conventionally built, and the primary difference is the relative ease of removal, it is a home and should be permitted under the applicable zoning ordinance.<sup>81</sup>

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<sup>79</sup> *Id.* at 215, 449 P.2d at 808-09. See also *Algoma Township v. Van Lieu*, 16 Mich. App. 64, 168 N.W.2d 417 (1969).

<sup>80</sup> "The zoning ordinance clearly prohibits a discarded school bus being turned into living quarters and immobilized, but it does not prohibit defendant's dwelling unit upon the land owned by her." 75 Wash. 2d at 215, 449 P.2d at 809.

<sup>81</sup> The view that the issue is not primarily one of semantics is not shared by all. Upon the publication of the opinion in *State v. Work*, 75 Wash. 2d 212, 449 P.2d 806 (1969), the Association of Washington Cities sent to its member cities a release, dated March 17, 1969, entitled "Exclusion of Mobile Homes from Residential Areas," wherein the following definition of the term "vehicle" in zoning ordinances was suggested:

The term "vehicle" as used herein shall mean all instrumentalities capable of movement by means of circular wheels, skids or runners of any kind, along roadways or paths or other ways of any kind, specifically including, but not limited to, all forms of automotive vehicles, buses, trucks, cars and vans, all forms of trailers or mobile homes of any size whether capable of supplying their

B. *The Mobile Home Park—A Business or a Horizontal Apartment House?*

While the problem of the mobile home on a lot is important, and with the increased use of modular construction will become even more urgent, it represents only a small segment of mobile home litigation and mobile home use. It is still true that most mobile homes are located in mobile home parks.<sup>82</sup> We deal again with matters of degree. A distinction should be made at the outset between a trailer camp designed for temporary or vacation use and a mobile home park designed for year-round living.<sup>83</sup> While in borderline cases it may be difficult to determine where one ends and the other begins, in the vast majority of cases the distinction is clear. The issues involved and the public policy considerations applicable are not identical, and generally the two kinds of parks will not be found in the same locations. This article is concerned only with mobile home parks designed for year-round living by individuals or families.

Either by choice or by necessity, the great majority of mobile home dwellers reside in mobile home parks. The reasons for this are many, but when one considers the increasing preemption of mobile home living by newlyweds and retired senior citizens, the importance of economic factors is clear. When they have invested in a mobile home, these people usually cannot afford land to put it on. Furthermore, in the case of those retired, the desire to avoid the work involved in main-

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own motive power or not, without regard to whether the primary purpose of which instrumentality is or is not the conveyance of persons or objects, and specifically including all such automobiles, buses, trucks, cars, vans, trailers and mobile homes even though they may be at any time immobilized in any way and for any period of time of whatever duration.

The definition does not seem to be a great improvement on the one construed by the court in *Work*. However, if applied literally, it might exclude not only modular construction, but also conventionally constructed houses moved from one site to another.

In marked contrast to the games the Association of Washington Cities proposes to play with the term "vehicle," the zoning ordinance of the town of Monroe, N.Y., expressly includes mobile homes in its definition of "dwelling," but provides for a minimum floor area of 900 square feet and a minimum lot of 25,000 square feet. *Osetek v. Barone*, — Misc. 2d —, —, 304 N.Y.S.2d 350, 351 (Sup. Ct. 1969).

King County has, since the decision in *Work*, proposed a new ordinance regulating the location of mobile homes on private property. As of September 19, 1969, no public hearing on the proposed ordinance had been held.

<sup>82</sup> A recent study indicates that approximately 75% of mobile homes in use throughout the country are located in mobile home parks. MACOMB STUDY 6. See also Mayer, *supra* note 27, at 145.

<sup>83</sup> The distinction is carefully pointed out in Ring, *The Mobile Home*, 25 URBAN LAND, July-Aug. 1966, at 1. For a recent case discussing the problems of parks for temporary use, see *Baxter v. Gillespie*, 60 Misc. 2d 349, 303 N.Y.S.2d 290 (Sup. Ct. 1969).

taining a residential lot may be important.<sup>84</sup> Others may locate in a park rather than buy land because they anticipate having to move within a relatively short period. Again, if mobile homes or modular construction are to play a role in a partial solution of the housing problem for lower-income families, economic factors suggest that mobile home parks will be involved. For all of these reasons, zoning, as it affects mobile home living, is primarily a question of mobile home parks.<sup>85</sup>

In considering zoning regulations and policies with respect to mobile home parks, two distinct groups and interests are involved. As concerns property owners who want to develop their land for mobile home parks, our attention focuses primarily on due process, namely the permissible limits of municipal action limiting their right to use their property in any lawful way they see fit. This is the traditional manner of viewing zoning disputes—the immediate community interest versus the individual landowner.<sup>86</sup> However, it has been suggested that courts should take notice of another group that has so far been ignored: outsiders who want to move in and are excluded by zoning policies. As to this group, the argument goes, courts should pay attention to the new or expanded concept of equal protection of the law.<sup>87</sup> In the context of this discussion the group will consist primarily of the racially or economically disadvantaged who might be effectively precluded from seeking improved or different housing opportunities by the unavailability of mobile home parks within their means and having easy access to job opportunities.

As indicated above, local hostility to mobile homes and mobile home living has taken on various guises,<sup>88</sup> ranging from total prohibi-

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<sup>84</sup> BARTLEY & BAIR 11; HODES & ROBERSON 6; MACOMB STUDY 4-6.

<sup>85</sup> HODES & ROBERSON 91; BABCOCK, *supra* note 30, at 95.

<sup>86</sup> The difficulty with the due process approach should be obvious: It is an equation formulated to express and resolve the tension between the interests of the planning polity and the individual land owner . . . .

There is a second aspect of the traditional due process approach in zoning matters that is inappropriate to the problem of exclusionary zoning, namely, the question of whether the municipality has acted in a manner calculated to advance public welfare. . . . An acknowledgement of the sound basis of a zoning ordinance, followed by an offset of the importance of free residential access, would combine the virtues of judicial candor and decisional nuance.

Sager, *supra* note 1, at 784-85.

<sup>87</sup> *Id.* at 785-98.

<sup>88</sup> For a collection of representative cases see notes 32 and 33 *supra*; see Carter, *supra* note 6, at 24-28; Note, *Trailer Parks vs. the Municipal Police Power*, 34 CONN. B.J. 285 (1960); 61 MICH. L. REV. 1010 (1963); 17 RUTGERS L. REV. 659 (1963); cf. Village of Roxana v. Costanzo, 41 Ill. 2d 423, 243 N.E.2d 242 (1968).

The same courts have treated problems essentially similar to those raised by trailer parks differently. For example, the Supreme Court of Errors of Connecticut in two cases, *Karen v. Town of East Haddam*, 146 Conn. 720, 155 A.2d 921 (1959), and *Town of Heart-*

tion to onerous provisions—particularly those putting a time limitation on the stay of any one family unit in the park—which effectively eliminate mobile home living in many areas.<sup>89</sup> Where mobile home living is theoretically permitted, it is often regarded as a business and relegated to commercial or even industrial zones, making it extremely unattractive as an alternative residential option.<sup>90</sup>

As courts and legislatures eliminate some of the discriminatory practices against mobile home living, local government units become more sophisticated in devising new subterfuges. Thus a municipality may provide a token amount of land for mobile home parks, with a provision for allocating more land in the future for such purposes, depending on development. Later, when development has taken place and the area has been used for single-family residences, development is used as a justification for not allocating any more land for mobile homes.<sup>91</sup>

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land v. Jensen's, Inc., 146 Conn. 697, 155 A.2d 754 (1959), upheld the validity of municipal ordinances limiting the duration of the stay in a mobile home park in the community on the ground that an influx of a trailer population could put an intolerable burden upon the town's available municipal services, particularly its schools. Yet the same court, in *Beach v. Planning & Zoning Comm'n of Milford*, 141 Conn. 79, 103 A.2d 814 (1954), compelled the town to approve a residential plan despite a plea that the rapid suburban development was outrunning all municipal services, including schools.

There seems to be a general rethinking of the proper function of zoning and a new realization that zoning should not be used as a means of shifting the economic burdens of community services on single individuals or entities. See, e.g., *Westwood Forest Estates, Inc. v. Village of South Nyack*, 23 N.Y.2d 424, 244 N.E.2d 700, 287 N.Y.S.2d 347 (1969). The same kind of approach should be applied to mobile homes.

<sup>89</sup> Thus the recent study by the planning commission of Macomb County, which lies just north of the Detroit city limits, indicates that many mobile home parks located there as a result of Detroit's 90-day limitation on the stay in mobile home parks. This limitation was upheld in *Cady v. Detroit*, 289 Mich. 499, 286 N.W. 805 (1939), *appeal dismissed*, 309 U.S. 620 (1940). *MACOMB STUDY 10*.

<sup>90</sup> "Some communities feel, or have felt in the past, that the best locations for mobile homes are next to railroads or within industrial or commercial areas." *MACOMB STUDY 11*. The *Macomb Study* recommends that "community officials . . . locate mobile home parks on sites conducive to residential use and not relegate their location to sites within industrial districts, along railroad tracks or other undesirable areas." *Id.* at 12; cf. *Edwards v. Township of Montrose*, 18 Mich. App. 569, 171 N.W.2d 555 (1969) (unreasonable to prohibit mobile home park in an undeveloped area that was bounded on one side by a commercial gravel pit and on the other, across a river, by a sewage treatment facility). See also *BARTLEY & BAIR 75-80*; *HODES & ROBERSON 10*; *Ring, supra* note 83, at 4. A recent article, purporting to describe the experience of one family in mobile home living, concludes with the following: "We had learned that the biggest problem you can have with a mobile home is where to immobilize it." *What Living in a Mobile Home is Like*, 23 *CHANGING TIMES*, Oct. 1969, at 11.

<sup>91</sup> This technique is illustrated by the recent Michigan case of *Rottman v. Township of Waterford*, 13 Mich. App. 271, 274, 164 N.W.2d 409, 411 (1968):

[Plaintiffs] further contend that this vice in the ordinance [absence of any vacant land presently zoned for mobile home parks] is not overcome by provisions for rezoning so that land presently zoned for other purposes might be zoned in the future for trailer park use.

The court did not bother to discuss this argument.

The basic and almost insoluble problem is that zoning is done at the local level.<sup>92</sup> All of our metropolitan centers experience a proliferation of small municipal corporations, each with its own zoning powers. No overall plan for the development of the area can be prepared. The smaller the municipality involved, the more plausible the argument that it cannot and should not be required to provide for all possible uses. At the end of the scale we find the single-use municipality, which depends for all of its support and service areas on neighboring communities. When a number of single-use municipalities constitute a whole region, the result may be that no provision has been made for some given use within an extensive geographical territory. This in turn effectively precludes certain classes of people from ever seeking opportunities to live or work in major segments of the metropolis. It is notorious that certain of the smallest municipal corporations were formed for the sole purpose of acquiring zoning powers and thereby preserving what the inhabitants consider to be a desirable neighborhood.<sup>93</sup> That the problems here outlined are not theoretical is illustrated by the fact that in New Jersey, whose courts have sanctioned complete exclusion of mobile home parks from municipalities,<sup>94</sup> two-

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A variation of this technique consists of no area being specifically zoned for mobile home parks and then the parks are authorized only by special permit. See Scherrer v. Board of County Comm'rs, 201 Kan. 424, 441 P.2d 901 (1968), where the court held a denial of a permit to be unreasonable.

<sup>92</sup> BABCOCK, *supra* note 30, at 19-20; Aloï, Goldberg & White, *supra* note 1, at 72-74; Sager, *supra* note 1, at 793.

<sup>93</sup> One of the authors knows a suburban community of some 450 people, located on a small peninsula jutting into a lake, which has one road running the length of the peninsula giving access to the homes. It incorporated for the sole purpose of passing a zoning ordinance providing for a minimum lot size of four acres. For further examples, see BABCOCK, *supra* note 30, at 20-23.

<sup>94</sup> The seal of approval was given in *Vickers v. Township of Gloucester*, 37 N.J. 232, 181 A.2d 129 (1962). The opinion was not unanimous, and the dissenting opinion of Justice Hall addressed itself admirably to the fundamental issues involved:

In my opinion legitimate use of the zoning power by such municipalities does not encompass the right to erect barricades on their boundaries through exclusion or too tight restriction of uses where the real purpose is to prevent feared disruption with a so-called chosen way of life. Nor does it encompass provisions designed to let in as new residents only certain kinds of people, or those who can afford to live in favored kinds of housing, or to keep down tax bills of present property owners. When one of the above is the true situation deeper considerations intrinsic in a free society gain the ascendancy and courts must not be hesitant to strike down purely selfish and undemocratic enactments. I am not suggesting that every such municipality must endure a plague of locusts or suffer transition to a metropolis over night. I suggest only that regulation rather than prohibition is the appropriate technique for attaining a balanced and attractive community . . . .

*Id.* at 264-65, 181 A.2d at 147. See also the discussion of mobile home living, *id.* at 266-67, 181 A.2d at 148.

thirds of its nearly 600 municipalities prohibit mobile home parks altogether.<sup>95</sup>

We do not advocate the unregulated proliferation of mobile home parks. Such parks present problems of their own. By the very nature of the development, a much more intensive use of land is involved than is the case in most single-family residential districts.<sup>96</sup> Additional problems of waste disposal, municipal services, congestion, and traffic are present. And unless appropriate standards are developed, mobile home parks can easily become eyesores.<sup>97</sup> But in this respect they are no different from many other "cracker box" developments that have been thrown up in semi-rural areas, particularly in the 1950's.<sup>98</sup> Good planning demands appropriate requirements as to traffic pattern integration, beautification schemes (including possible screening with trees and shrubs), density requirements, and similar provisions, so long as they are not discriminatory.<sup>99</sup> It should always be borne in mind that any kind of regulation may become a means of exclusion.<sup>100</sup> Requirement may be piled on requirement to a point where the whole development becomes economically unfeasible, or at least unsuitable for those of modest means. As in most other areas, society must strike a balance.

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<sup>95</sup> Ring, *supra* note 83, at 4.

<sup>96</sup> A very interesting comparison of intensity of use is found in the study of the Macomb County Planning Commission. For the county as a whole the average density for mobile home parks is 12.1 units per gross acre, the range being from 5.1 units to 55.4 units. What is more important is that parks constructed after 1960 and designed for the larger, modern units have ten or fewer units per gross acre. This compares with four to six single-family residences per gross acre and 14 to 20 apartments per gross acre for the county as a whole. MACOMB STUDY 12. For a discussion of the relevance of density in regulating mobile home park development, see Hedrich v. Kane County, — Ill. App. 2d —, 253 N.E.2d 566 (1969).

<sup>97</sup> There is at present a private, national rating system for mobile home parks, known as the Woodall System, which awards from one to five stars. In connection with the authorization of FHA-insured mortgages for mobile home parks (12 U.S.C. §§ 1713(a) (1)(B), (6) (1964)), the Federal Housing Administration has developed a set of uniform criteria for their development. FEDERAL HOUSING ADMINISTRATION, MINIMUM PROPERTY STANDARDS FOR MOBILE HOME COURTS (1967).

<sup>98</sup> There is considerable force in Babcock's argument that good planning should provide for future absorption, at a minimum social and economic cost, of obsolete techniques. He says: "In 1980 it will be more costly to eradicate the blighted tract subdivision built in 1950 than it will be to redevelop the land now occupied by everyone's pariah, the trailer park." BABCOCK, *supra* note 30, at 136-37.

<sup>99</sup> See, e.g., BARTLEY & BAIR 30-94.

<sup>100</sup> Aloï, Goldberg & White, *supra* note 1, at 76-79; Sager, *supra* note 1, at 790-98. Justice Hall indicates in his dissent in Vickers v. Township of Gloucester, 37 N.J. 232, 265 n.4, 181 A.2d 129, 147 n.4 (1962), that in oral argument counsel for the township stated that people who live in trailers are a shifting population and do not make good citizens.

It should also be borne in mind that exclusionary policies may, in the long run,

A particular problem arises with low-income families. If mobile home living is to be used to alleviate housing problems of the poor and make it possible for them to move close to available jobs, extensive public expenditures will be necessary. Just as slums do not cause but are a product of poverty, and as setting building and occupancy requirements too high has an effect opposite from that desired,<sup>101</sup> the setting of too high requirements for mobile home parks, without public subsidies, will either exclude low-income families or result in evasions. In order to make mobile home parks for low-income families acceptable in new locations and not disrupt the neighborhoods by the creation of slums, it will be necessary to set high standards. But poor people, at least initially, will be unable to pay in full for the use of such parks and part of the cost will have to be underwritten, one way or another, by the public treasury at whatever level of government may be deemed best suited for the purpose.<sup>102</sup>

For too long the problem of mobile home parks has been regarded primarily as one of local concern, to be regulated in the first instance by local authority, which is to say by local prejudice.<sup>103</sup> Experience has

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produce unforeseen and undesirable side effects. A recent newspaper survey in Wayne County, Michigan (where Detroit is located), indicates that the severe shortage of space in mobile home parks, created in part by exclusionary practices, has resulted in deterioration of standards in some parks because of the absence of competitive pressures. *The Detroit News*, Aug. 26, 1969, at 1-D, col. 1.

<sup>101</sup> J. HEILBRUN, *REAL ESTATE TAXES AND URBAN HOUSING* 58 (1966); Davis & Whinston, *The Economics of Urban Renewal*, 26 *LAW & CONTEMP. PROB.* 105, 112 (1961); Sternlieb, *Slum Housing: A Functional Analysis*, 32 *LAW & CONTEMP. PROB.* 349 (1967); Comment, *Enforcement of Municipal Housing Codes*, 78 *HARV. L. REV.* 801 (1965).

<sup>102</sup> For an estimate of the financial resources necessary, see 2 *PRESIDENT'S COMM. ON URBAN HOUSING, REPORT: A DECENT HOME* 48-50 (1968).

<sup>103</sup> Those states that have legislation with respect to the regulation of mobile home parks fall generally into three categories:

(a) Statutes with detailed requirements: ALASKA STAT. § 18.35.030 (1962); CAL. HEALTH AND SAFETY CODE § 18250 (West Supp. 1964); ILL. ANN. STAT. ch. 111½, §§ 158-85 (Smith-Hurd Supp. 1970); IND. ANN. STAT. §§ 35-2841 to -2881 (1969); MICH. STAT. ANN. §§ 5.278 (31)-278(127) (Supp. 1969); MINN. STAT. ANN. § 327.20 (1966); N.D. CENT. CODE § 23-10-07 (1960); ORE. REV. STAT. §§ 446.002-.165 (1967); TENN. CODE ANN. §§ 53-3201 to -3216 (1955).

(b) Statutes that give the general power to confer licenses and adopt regulations to the appropriate state agency: ARK. STAT. ANN. § 82-110 (1947); DEL. CODE ANN. tit. 16, § 122(H) (1953); FLA. STAT. ANN. § 513.05 (1962); IOWA CODE § 135D.16 (Supp. 1969); KY. REV. STAT. § 219.160 (1962); ME. REV. STAT. ANN. tit. 22, § 2481 (1964); MISS. CODE ANN. § 41 A:8270(d) (Supp. 1968); MONT. REV. CODE ANN. § 69-113 (1962); N.M. STAT. ANN. § 12-1-13 (1953); OHIO REV. CODE ANN. § 3733.02 (Page Supp. 1968); R.I. GEN. LAWS ANN. § 23-21-4 (1956); S.C. CODE ANN. § 32-8 (Supp. 1968); UTAH CODE ANN. § 26-15-4 (1953).

(c) Statutes that give general authority to regulate mobile home parks to the local governing agency: CONN. GEN. STAT. REV. § 7-148 (Supp. 1967); GA. CODE ANN. § 88-1103 (1968); KAN. STAT. ANN. § 19-3701 (1964); MD. ANN. CODE art. 25, § 22 (1957); MASS. ANN. LAWS ch. 140, § 32B (Supp. 1965); NEB. REV. STAT. § 60-1601 (1968); N.H. REV. STAT. ANN.

shown that local governments are unable or unwilling to meet their responsibilities in this regard. It will become necessary to have uniform state-wide legislative standards, which would at least limit local discretion in this respect. Furthermore, more attention should be paid to the possibilities of the use of mobile homes in the fight against urban blight and inadequate housing. A careful reappraisal by all concerned is long overdue.

### III

#### THE MOBILE HOME AND PRIVATE ZONING

Private zoning,<sup>104</sup> known colloquially as covenants, conditions, and restrictions, whatever the legal label used by the courts,<sup>105</sup> performs essentially the same function as public zoning. In newly developing areas, it may constitute the only kind of enforceable and uniform regulation if it precedes public zoning.<sup>106</sup> Even in areas where public zoning exists or is about to be introduced, private zoning may be useful as a supplement.<sup>107</sup> Under these circumstances, however, there is a possibility of conflict between private and public zoning, and in recent

§ 47:22a (Supp. 1967); N.J. STAT. ANN. § 40:52-1(d) (1967); N.Y. TOWN LAW §§ 130(21), 136(11) (McKinney 1965); VT. STAT. ANN. tit. 24, § 2231 (1967); VA. CODE ANN. § 35-62 (1950); WIS. STAT. ANN. § 66.058 (1965).

Of course, this is but one small aspect of the fragmentation of our metropolitan centers. For a short discussion of the overall problem, see Grant, *Metropolitan Problems and Local Government Structure: An Examination of Old and New Issues*, 22 VAND. L. REV. 757-60 (1969).

<sup>104</sup> The term is increasingly used to denote private restrictions on use. See, e.g., Beuscher, *Private Zoning on Milwaukee's Metropolitan Fringe—A Preface*, 1958 WIS. L. REV. 610.

<sup>105</sup> The courts variously refer to these arrangements as covenants real, negative reciprocal easements, or equitable servitudes, although it is generally agreed that most of such restrictions in this country depend on the equitable device developed in *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (Ch. 1848). For further discussion see C. CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND"* (2d ed. 1947); McCarthy, *Restrictive Covenants*, 1955 U. ILL. L.F. 709; Paulus, *The Use of Equitable Servitudes in Land Planning*, 2 WILLAMETTE L.J. 399 (1963).

<sup>106</sup> Consigny & Zile, *Use of Restrictive Covenants in a Rapidly Urbanizing Area*, 1958 WIS. L. REV. 612, 612-14; Melli, *Subdivision Control in Wisconsin*, 1953 WIS. L. REV. 389, 448-53; Paulus, *supra* note 105.

<sup>107</sup> And even if the area is zoned, the private agreement has certain advantages over public control via zoning. It can be used to provide for more restrictive uses than required by the zoning ordinance. . . . In addition the private agreement has the advantage of providing much more stable protection to the property owners because it is not as easily changed as a zoning ordinance.

Melli, *supra* note 106, at 449 (footnote omitted). See also Consigny & Zile, *supra* note 106, at 614.

years these problems have frequently come before the courts.<sup>108</sup> There is no generally recognized method of resolving these conflicts and the law is very much in a state of flux.

Although public and private zoning are functional equivalents, the legal bases for their enforcement are very different. Public zoning is a function of the police power and is subject to all the requirements and constitutional limitations flowing therefrom. On the other hand, private zoning is regarded as contractual in nature and therefore is generally not subject to many of the limitations and restrictions said to be imposed on public enactments.<sup>109</sup> As a result, courts have taken distinctly different approaches to the enforceability of private and public regulation. This difference in approach has recently come under scrutiny and criticism.<sup>110</sup> Part of the criticism is directed towards the same abuse of private zoning that has at times characterized public zoning: the disguised or not so disguised attempt to exclude racial or economic groups from given communities.

Mobile homes and restrictive covenants have come into collision. The number of reported cases is small<sup>111</sup> and up to now the problem has presumably been a minor one, greatly overshadowed by the problem created by public zoning, particularly as it affects mobile home parks. However, with the decreasing mobility of mobile homes and with the trend toward prefabricated modular construction, such collisions are likely to occur much more frequently.

The reported cases fall under two distinct categories.<sup>112</sup> The first concerns the proposed establishment of mobile home parks in an area restricted to residences or single-family residences. These cases are easily disposed of. The other and more difficult group concerns attempts by owners of restricted lots to place mobile homes thereon. Although, at first blush, it could be suspected that since covenants are contractual in nature, the distinctions would be almost entirely a matter of semantics and would depend on the care with which the restrictive covenants had been drafted, the few available cases do not bear this out. Essentially,

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<sup>108</sup> Some of these problems are discussed in Berger, *Conflicts Between Zoning Ordinances and Restrictive Covenants: A Problem in Land Use Policy*, 43 NEB. L. REV. 449 (1964). This concern is not shared by all. For the view that no conflict, actual or potential, exists, see 5 R. POWELL, REAL PROPERTY ¶ 686, at 230.4-6 (recomp. by P. Rohan 1968).

<sup>109</sup> For a discussion of the difference in approach, see Comment, *supra* note 51.

<sup>110</sup> *Id.* at 419-37.

<sup>111</sup> We have been able to find only nine cases in point. For earlier cases dealing with "tourist homes" or "tourist camps" as violating restrictive covenants, for whatever light they may shed on the problem, see Annot., 127 A.L.R. 849 (1940).

<sup>112</sup> The cases are almost equally divided, with four dealing with the first problem and five with the second.

the courts treat the matter in the same way as they treat public zoning and decide the cases on the same grounds, whether upholding the validity of the use or condemning it as in derogation of the covenant. Public zoning cases are frequently used as authority, whether they uphold the use or condemn it. At least one court seems to have been much more liberal in the private zoning area than it was in the public sector.<sup>113</sup>

There seem to be only four reported cases dealing with proposed use of restricted land for mobile home parks.<sup>114</sup> Not surprisingly, the courts ruled in all of them that such use would violate the covenant as construed. This seems entirely proper, once it has been decided that the land in question is restricted to single-family living. Under such circumstances, a mobile home park does not qualify whether it is considered as a business or as a horizontal apartment house. But at least one court found it necessary to imply that the proposed use would violate one of the covenants against a "noxious or offensive trade or business."<sup>115</sup> This language should be taken with a grain of salt, since the person of the defendant, who was proposing to establish the camp, apparently had much to do with the result.<sup>116</sup>

In two of the cases, the main problem faced by the courts was whether the covenants applied to particular land and what their meaning was.<sup>117</sup> Some of the courts' reasoning may seem questionable, but once one has accepted the conclusion the result follows logically. In the most recent case, the court went out of its way to state in a very strong dictum, twice repeated, that the erection of a mobile home for family purposes on the land in a more or less permanent fashion would not have violated a covenant restricting the land to "farming and dwelling purposes."<sup>118</sup> Thus, it is safe to say that so long as the covenants

<sup>113</sup> Compare *Naiman v. Bilodeau*, 225 A.2d 758 (Me. 1967), with *Wright v. Michaud*, 160 Me. 164, 200 A.2d 543 (1964).

<sup>114</sup> *Hallet v. Sumpter*, 106 F. Supp. 996 (D. Alas. 1952); *Reetz v. Ellis*, 279 Ala. 453, 186 So. 2d 915 (1966); *Grange v. Korff*, 248 Iowa 118, 79 N.W.2d 743 (1956); *Foos v. Engle*, 295 Ky. 114, 174 S.W.2d 5 (1943).

<sup>115</sup> "It is not necessary to find that the operation of a trailer court in this residential area is a 'noxious or offensive trade or business' although under the circumstances it may well be classified as such . . ." *Hallet v. Sumpter*, 106 F. Supp. 996, 999 (D. Alas. 1952).

<sup>116</sup> The opinion indicates that defendant was moving from his prior location, which was to be incorporated into the City of Anchorage, to avoid police regulation. *Id.* at 998.

<sup>117</sup> *Hallet v. Sumpter*, 106 F. Supp. 996 (D. Alas. 1952); *Grange v. Korff*, 248 Iowa 118, 79 N.W.2d 743 (1956).

<sup>118</sup> "If such a trailer be placed on a lot of land and be there occupied by one or more persons as a place of abode, we think such use of the land would be a use for dwelling purposes." *Reetz v. Ellis*, 279 Ala. 453, 457, 186 So. 2d 915, 918 (1966).

Respondents cite *Schaeffer v. Gatling* . . . . The Supreme Court of Mississippi held that such use of the lot did not violate the restriction which required

are reasonably explicit in restricting the land to single-family residences, any attempt to use it for mobile home parks is invalid. We suggest only that in such cases the courts, rather than go out of their way to talk about mobile home parks as businesses, simply state that the restrictions preclude multiple family dwellings and that a horizontal apartment house does not comply with the provisions.

Concerning the use of the mobile home as one's residence on restricted land, the courts have disagreed. In each case one must look very carefully at the language of the restrictive covenant to determine whether the proposed use does or does not violate it. Nevertheless, there is a very obvious difference in emphasis between the two lines of cases, a difference not always justified by the difference in language. There is also, with one exception, a definite correlation with the attitude of the courts in dealing with mobile homes as affected by public zoning.<sup>119</sup>

The first case in which a mobile home was held to violate a covenant was decided by the Supreme Court of Colorado. The covenant provided that the land "will be used for dwelling houses only."<sup>120</sup> The trial judge construed this to mean that the land was to be used exclusively for the construction of new, permanent houses, that a trailer was a contraption to be used for hauling behind an automobile or truck, and that a trailer belonged in a trailer court.<sup>121</sup> This reasoning was approved on appeal.

In the next case, the Supreme Court of Iowa was faced with a restriction which provided that "[a]ll buildings erected upon the real estate . . . shall be of a permanent character and be upon foundations and shall not be less than 14 feet by 18 feet in size. No garage, trailer, shack or hut shall be used for living purposes."<sup>122</sup> The defendant brought his mobile home onto his lot. He removed the wheels, placed the home on cement blocks, and surrounded it by siding. He connected it to water, electricity, and a septic tank. Despite the immobilization of the structure and its floor area in excess of the minimum required by the covenant, the court held that it was a "trailer" within the meaning of the restriction and therefore prohibited.<sup>123</sup> Finally, an Ohio lower court, following the marked aversion to mobile homes displayed by the supreme court of that state, held that a covenant providing that

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that the property be used strictly for residential purposes. We are not disposed to disagree. . . . We do not think the Mississippi case is in conflict with our holding in the instant case.

*Id.* at 459-60, 186 So. 2d at 920.

<sup>119</sup> The exception, of course, is Maine. *See* cases cited in note 113 *supra*.

<sup>120</sup> *Pagel v. Gisi*, 132 Colo. 181, 182, 286 P.2d 636, 637 (1955).

<sup>121</sup> *Id.* at 185-86, 286 P.2d at 638.

<sup>122</sup> *Jones v. Beiber*, 251 Iowa 969, 971, 103 N.W.2d 364, 365 (1960).

<sup>123</sup> *Id.* at 973, 103 N.W.2d at 366.

"[n]o building shall be erected or maintained upon any lot except one residence designed and used for occupation by a single family and not more than one and one-half stories in height"<sup>124</sup> precluded mobile homes. Although the court paid lip service to the proposition that restrictive covenants should be strictly construed in favor of the free use of one's property, it concluded that a trailer was a trailer and not a residence within the meaning of the covenant.<sup>125</sup>

In marked contrast to the above reasoning, the Supreme Court of Mississippi held that the contemplated use was no violation. The covenant restricted the land to residential purposes and provided that "[n]o residences shall be erected . . . which shall cost less than \$6,000 . . ." <sup>126</sup> Defendants purchased a fifty-five foot mobile home, which cost more than \$6,000, and moved it to their lot where they rested it on a foundation of concrete piers, although the wheels were not removed. They connected the home to water, sewer, and electricity, and placed it on the land so as to comply with set-back requirements. The court indicated that if mobile homes were to be prohibited specific language to that effect would have to be used.<sup>127</sup> How specific such language would have to be and at which point modular construction would no longer be a mobile home remains to be decided in future litigation.

Similarly, the Supreme Judicial Court of Maine held that a mobile home, forty-six feet by ten feet with a permanently attached 300 square-foot living space, did not violate a restrictive covenant providing that the land should be used for residential purposes only and that no dwelling should be erected having less than 700 square feet of first-floor space, with asphalt roof and clapboard siding or better.<sup>128</sup> The court pointed out that the aluminum siding and roof of the mobile home exceeded the minimum quality requirements of the covenant, and that the combined floor area of the mobile home and its addition exceeded the minimum floor area prescribed. In doing so, the court distinguished its prior decision in *Wright v. Michaud*<sup>129</sup> by stating that the issue there involved

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<sup>124</sup> *Swigart v. Richards*, 87 Ohio L. Abs. 37, 38, 178 N.E.2d 109, 110 (C.P. 1961).

<sup>125</sup> *Id.* at 41-42, 178 N.E.2d at 111-12.

<sup>126</sup> *Schaeffer v. Gatling*, 243 Miss. 155, 158, 137 So. 2d 819 (1962).

<sup>127</sup> If the original owner of the subdivision had desired to prohibit the use of house trailers as residences, this could easily have been accomplished by designating house trailers as prohibited use, or by restricting architectural design, or by placing a minimum on the floor space for a residence, or by prohibiting temporary residences.

*Id.* at 159, 137 So. 2d at 820.

<sup>128</sup> *Naiman v. Bilodeau*, 225 A.2d 758 (Me. 1967).

<sup>129</sup> 160 Me. 164, 200 A.2d 543 (1964). Plaintiff applied for a variance to permit him to "park" a mobile home in a residential and farming zone. He proposed to remove the wheels, put the home on a permanent foundation, and connect it to utilities.

was the municipal power to pass zoning ordinances.<sup>130</sup> The broader issue of the limits of such power was completely ignored.<sup>131</sup>

As the above cases indicate, it should be possible in almost any jurisdiction to preclude by appropriate draftsmanship the use of mobile or modular construction homes in restricted subdivisions. Whether this interpretation will continue in force with the forthcoming revolution in building techniques remains to be seen. We suspect that when the full impact of factory-produced housing becomes evident the courts will have to change their attitudes. In the meantime, it would behoove developers to be very careful how they limit the structures that may be built in the subdivisions developed by them. If they use too restrictive language, thereby precluding various kinds of prefabricated or partially fabricated housing, they may find that their land is not marketable. In a period of rapid and dynamic change in construction methods and concepts, rigid rules as to the type of structure permitted may be detrimental both to developers and to purchasers in those subdivisions.

The day may come when courts will take a closer look at the broader policy aspects of private zoning. The first dent was made in *Shelley v. Kraemer*.<sup>132</sup> The full implications of this decision have not yet been settled,<sup>133</sup> but common sense dictates that a collision course be avoided. This can be accomplished by wise draftsmanship and reasonable judicial construction.

#### IV

#### THE MOBILE HOME AND TAXATION

Most of the money acquired by American municipalities to provide local services is derived from the property tax.<sup>134</sup> Because of this

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<sup>130</sup> 225 A.2d at 760.

<sup>131</sup> The *Wright* case seems to have been submitted on a short stipulation of facts (160 Me. at 165-66, 200 A.2d at 544) and the issues do not seem to have been really developed. For a discussion of financial limitations which preclude adequate presentation in many zoning cases, see *BABCOCK, supra* note 30, at 94-97.

<sup>132</sup> 334 U.S. 1 (1948) (racially restrictive covenants, while not illegal, are unenforceable by injunction). See *Barrows v. Jackson*, 346 U.S. 249 (1953) (money damages may not be collected for breach of racially restrictive covenants). See also *Capital Fed. Sav. & Loan Ass'n v. Smith*, 136 Colo. 265, 316 P.2d 252 (1957) (a possibility of reverter based on racial grounds may not be enforced). *Contra*, *Charlotte Park & Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956).

<sup>133</sup> For a collection of the more important articles in point, see *Sager, supra* note 1, at 777 n.55. See also an excellent article published since the *Sager* piece, *Haskell, Contractual Devices to Keep "Undesirables" Out of the Neighborhood*, 54 CORNELL L. REV. 524 (1969).

<sup>134</sup> D. NETZER, *ECONOMICS OF THE PROPERTY TAX* 8-10 (1966); *Reitze, Real Property Tax Exemptions in Ohio—Fiscal Absurdity*, 18 CASE W. RES. L. REV. 64 (1966).

ever-present burden of taxation imposed on the homeowner,<sup>135</sup> any feeling that certain groups enjoy the same services but do not contribute their fair share of the tax revenue leads inevitably to hostility. This is certainly true, in many parts of the country, with respect to mobile home dwellers.<sup>136</sup>

However much we may depart from the ideal in practice, we always profess in theory to strive towards the goal of horizontal equity in taxation.<sup>137</sup> The ideal for any tax system is to treat equally those similarly situated. Thus in the context of the income tax the ideal would be to tax the same amount all those whose spendable incomes are similar.<sup>138</sup> In the same way, the property tax should affect equally all those who own similar kinds of property of the same value.<sup>139</sup> In many states this principle is violated with respect to mobile homes.<sup>140</sup> This is partly due to antiquated legislation, which has not kept up with developments and which still treats mobile homes as vehicles, partly to conceptual difficulties of how to characterize mobile homes for tax purposes, and partly to the competition between state and local units of government for revenue dollars. However, in recent years a trend has become apparent in the direction of taxing mobile homes as real estate, which should be the goal of all the states, so that mobile home dwellers contribute their fair share to the support of the local services that benefit them.

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<sup>135</sup> NETZER, *supra* note 134, at 45-66. Heilbrun refers to it as "the heavy, continuous, and unyielding pressure of real estate taxes upon urban life." HEILBRUN, *supra* note 101, at 173.

<sup>136</sup> HODES & ROBERSON 109-10; MACOMB STUDY 27-32; Berney & Larson, *supra* note 16. For a recent expression of such sentiments, see *Monmouth Junction Mobile Home Park, Inc. v. South Brunswick Township*, 107 N.J. Super. 18, —, 256 A.2d 721, 725-26 (1969).

<sup>137</sup> "One universally accepted goal for any taxing authority is to insure that horizontal equity exists; that is, people in like circumstances should be taxed in a similar manner," Berney & Larson, *supra* note 16, at 458. See also Blum, *Federal Income Tax Reform—Twenty Questions*, 41 TAXES 672, 679 (1963).

<sup>138</sup> It is exceedingly difficult, of course, to reach the ideal, and there is a lively controversy as to the very concept of income. See the stimulating controversy between Professor Bittker and the proponents of the "comprehensive tax base." Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925 (1967); Musgrave, *In Defense of an Income Concept*, 81 HARV. L. REV. 44 (1967); Pechman, *Comprehensive Income Taxation: A Comment*, 81 HARV. L. REV. 63 (1967); Galvin, *More on Boris Bittker and the Comprehensive Tax Base: The Practicalities of Tax Reform and the ABA's CSTR*, 81 HARV. L. REV. 1016 (1968); Bittker, *Comprehensive Income Taxation: A Response*, 81 HARV. L. REV. 1032 (1968).

<sup>139</sup> For a description of the distortions created by special exemptions, see *Pacific Conference of the Free Methodist Church v. Barlow*, 77 Wash. 2d 492, 497-501, 463 P.2d 626, 629-31 (1969); Reitze, *supra* note 134.

<sup>140</sup> See, e.g., Note, *Toward an Equitable and Workable Program of Mobile Home Taxation*, 71 YALE L.J. 702 (1962).

Before a discussion of the types of taxation employed and of the recent developments, the question of the fair share has to be mentioned. Several studies, national and local, have indicated that earlier fears of an invasion by a nomadic, footloose population with many children have not proved true.<sup>141</sup> In fact, because of the type of people this mode of living attracts, mobile home dwellers may require fewer services than the population at large.<sup>142</sup> This seems particularly true of schools, which are heavily supported by local property taxation.<sup>143</sup> Therefore, studies might show that mobile home dwellers may be contributing more to public schools per household than owners of conventional houses, which may lead to a conclusion that they pay their fair share of taxes. However, such an approach is fraught with dangerous implications.

This line of reasoning follows the benefits received approach.<sup>144</sup> Pushed to its logical extreme, it would displace the concept of taxation according to ability to pay<sup>145</sup> and shift most of the tax burden to the poor. Therefore, however interesting the studies may be and however valuable in the short run to allay fears and hostilities of the community against mobile home dwellers, they cannot be used as a long-range policy guide. The ultimate objective should be to achieve a horizontal equality by subjecting mobile home dwellers to the same kind of taxation as their neighbors living in more traditional forms of housing.

The inventiveness of the legislators in the fifty states has produced a bewildering array of taxing schemes directed at mobile homes.<sup>146</sup> The devices can be grouped into four major categories. Mobile homes are either taxed as a kind of motor vehicle,<sup>147</sup> taxed as personal prop-

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<sup>141</sup> *E.g.*, HODES & ROBERSON 1-11; French & Hadden, *supra* note 14, at 131-39; Note, *supra* note 140, at 702-05.

<sup>142</sup> *See, e.g.*, MACOMB STUDY 30-32; Berney & Larson, *supra* note 16, at 458-62.

<sup>143</sup> MACOMB STUDY 30-32; Berney & Larson, *supra* note 16, at 460.

<sup>144</sup> It should be noted, however that any discussion of "fair share" follows the "benefits received" approach to taxation; that is, those who receive government services should pay for them in the same manner as is done in the private market place.

Berney & Larson, *supra* note 16, at 460.

<sup>145</sup> The concept of taxation measured by ability to pay was advocated by Adam Smith, as follows: "The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities . . ." A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 777 (The Modern Library ed. 1937).

<sup>146</sup> For earlier discussion of the various approaches, see Note, *supra* note 140, at 705-11; Carter, *supra* note 6, at 46-57.

<sup>147</sup> NEB. REV. STAT. § 60-1606 (1968); OKLA. STAT. ANN. tit. 68, §§ 2101, 2103 (1966); WASH. REV. CODE ANN. § 82.50.020 (Supp. 1969).

erty,<sup>148</sup> subjected to a license fee system,<sup>149</sup> or taxed as realty.<sup>150</sup> The last approach most nearly equalizes mobile homes and other forms of housing.<sup>151</sup> Arguably, taxing mobile homes as real estate where they have not been so taxed in the past places an unfair burden on mobile home dwellers: Taxes being a part of the cost of housing, the economy may have equalized the costs of living in mobile homes and other forms of housing under the present tax structure; changing the tax structure may destroy the equality.<sup>152</sup> In our opinion, however, this argument has been refuted.<sup>153</sup>

For a number of years there was confusion and uncertainty as to the validity of the taxation of mobile homes as real estate, particularly homes located in mobile home parks.<sup>154</sup> The dichotomy discussed above between mobile homes permanently placed on somebody's real estate as an alternative form of dwelling and those parked in a mobile home park recurs here. Where the owner or lessee of land brings a mobile

<sup>148</sup> ARIZ. REV. STAT. ANN. § 42-642 (Supp. 1969); ARK. STAT. ANN. § 84-406 (1947); CONN. GEN. STAT. REV. § 12-63a (Supp. 1969); IND. ANN. STAT. § 64-622a (1961); IOWA CODE § 135D.22 (Supp. 1969); MINN. STAT. ANN. § 168-012(9) (Supp. 1969); MO. ANN. STAT. § 137.090 (Supp. 1969); MONT. REV. CODE ANN. § 84-6601 (Supp. vol. 4, 1969); NEV. REV. STAT. § 361.563 (1968); R.I. GEN. LAWS ANN. § 44-3-1 (1956); S.C. CODE ANN. § 65-1436 (1962); S.D. COMPILED LAWS ANN. § 10-9-2 (1967).

<sup>149</sup> ALASKA STAT. § 35.1.74 (1962); CAL. HEALTH & SAFETY CODE § 18202 (West Supp. 1970); COLO. REV. STAT. ANN. § 13-3-4(e) (1963); DEL. CODE ANN. tit. 30, § 2301 (Supp. 1968); FLA. STAT. ANN. § 212.03 (Supp. 1969); IDAHO CODE ANN. § 48-410 (Supp. 1969); ILL. ANN. STAT. ch. 111½, § 169 (Smith-Hurd 1966); IND. ANN. STAT. § 35-2879 (1969); IOWA CODE § 135D.5 (Supp. 1969); KY. REV. STAT. ANN. § 219.130 (1969); ME. REV. STAT. ANN. tit. 36, § 1753 (1964); MASS. GEN. LAWS ANN. ch. 140, § 32G (1965); MICH. STAT. ANN. §§ 5.278(21), (22) (1960); MINN. STAT. ANN. § 327.16(3) (1966); MISS. CODE ANN. § 41 A:9696-185 (Supp. 1968); MO. ANN. STAT. § 144-560 (Supp. 1967); NEB. REV. STAT. § 60-1603 (1968); N.J. STAT. ANN. § 40:52-1 (1967); N.D. CENT. CODE § 23-10-05 (1960); OHIO REV. CODE ANN. § 3733.04 (Page Supp. 1968); ORE. REV. STAT. § 446-016 (1967); VT. STAT. ANN. tit. 24, § 2232(4) (1967); VA. CODE ANN. § 35-62 (1950); WIS. STAT. ANN. § 66-058 (Supp. 1969).

<sup>150</sup> ALA. CODE tit. 51, § 704(1) (Supp. 1967); DEL. CODE ANN. tit. 14, § 1930 (Supp. 1968); IOWA CODE § 135D.26 (Supp. 1969); NEB. REV. STAT. § 60-1601 (1968); N.H. REV. STAT. ANN. § 72:7a (Supp. 1967); N.Y. REAL PROP. TAX LAW § 102(12)(g) (McKinney 1960); PA. STAT. ANN. tit. 72, § 5020-201 (1968).

<sup>151</sup> See, e.g., Berney & Larson, *supra* note 16, at 461-62; Note, *supra* note 140, at 712-19.

<sup>152</sup> Rooney, *Micro-Analysis of Mobile Home Characteristics with Implications for Tax Policy: A Reply*, 44 LAND ECON. 414, 416 (1968):

The impersonal forces of the market, in effect, have established a "horizontal equity" with respect to all ownership costs. Given the American predilection to let the market be the final arbitrator in such matters, it is difficult to advocate horizontal equity as a taxation principal [*sic*] where other ownership costs are involved, the almost universal case.

<sup>153</sup> Berney & Larson, *Micro-Analysis of Mobile Home Characteristics with Implications for Tax Policy: Rejoinder*, 44 LAND ECON. 417 (1968).

<sup>154</sup> For a discussion see HODES & ROBERSON 110-19; Carter, *supra* note 6, at 51-55; Note, *supra* note 140, at 715-19.

home on his land, places it on a foundation, and connects it to utilities, it is not difficult to say that he intended to make it part of the realty.<sup>155</sup> It then follows that the value of the home should be assessed for real estate tax purposes and taxed accordingly. Some statutes make this distinction explicitly.<sup>156</sup> On the other hand, where mobile homes are placed in mobile home parks operated as such, the question arises as to who is to be taxed and how the tax is to be enforced.<sup>157</sup>

For purposes of administrative convenience and ease of collection, statutes that undertake to tax mobile homes in parks as realty add the assessed value of the homes to the land and impose the tax as a lien on the land or a liability of the owner of the park.<sup>158</sup> The validity of such taxes has been challenged by individual park owners and by associations of mobile home park operators; generally the ground is that imposing a tax on *A* for property owned by *B* is a denial of due process.<sup>159</sup> The early cases, either those construing general statutes and struggling with terms such as "attached," "permanently affixed," and "being part of the real estate,"<sup>160</sup> or those dealing with specific statutes mentioning mobile homes as such,<sup>161</sup> were confused. Such cases are collected and analyzed in the existing literature, and the articles give an idea of the state of the law prior to 1961.<sup>162</sup> However, decisions in New York and Pennsylvania have forcefully answered most of the objections and seem to indicate the trend of judicial thinking.

<sup>155</sup> *E.g.*, Crawford v. Wesleyville, 68 Pa. D. & C. 215 (1949). It is interesting to note that apparently the assessor of King County refused to enter the mobile home involved in State v. Work, 75 Wash. 2d 212, 449 P.2d 806 (1969), on the county tax rolls. Brief for Respondent at 2, State v. Work, 75 Wash. 2d 212, 449 P.2d 806 (1969).

<sup>156</sup> *E.g.*, MICH. STAT. ANN. § 7.2(1) (1960); WASH. REV. CODE ANN. § 82.50.180(5) (Supp. 1967).

<sup>157</sup> *E.g.*, Carter, *supra* note 6, at 51-55; Note, *supra* note 140, at 712-19.

<sup>158</sup> For example, chapter 726 of New York Laws of 1954 provided that mobile homes "shall be assessed to the owners of the real property on which they are located." This statute was subsequently amended to read, "shall be included in the assessment of the land on which it is located . . ." N.Y. REAL PROP. TAX LAW § 102(12)(g) (McKinney 1960).

<sup>159</sup> See discussion in Carter, *supra* note 6, at 53-55.

<sup>160</sup> *E.g.*, Erwin v. Farrington, 285 App. Div. 1212, 140 N.Y.S.2d 379 (4th Dep't 1955); Stewart v. Carrington, 203 Misc. 543, 119 N.Y.S.2d 778 (Sup. Ct. 1953); Mason Appeal, 75 Pa. D. & C. 1 (1950); Streyle v. Board of Property Assessment, 173 Pa. Super. 324, 98 A.2d 410 (1953).

<sup>161</sup> *E.g.*, New York State Trailer Coach Ass'n v. Steckel, 208 Misc. 308, 144 N.Y.S.2d 82 (Sup. Ct. 1955), *rev'd on other grounds*, 3 App. Div. 2d 643, 158 N.Y.S.2d 179 (4th Dep't 1956); Hartman v. Fulton County, 24 Pa. D. & C.2d 611 (1960).

<sup>162</sup> Carter, *supra* note 6, at 46-57; Note, *Regulation and Taxation of House Trailers*, 22 U. CHI. L. REV. 738, 745-51 (1955); Note, *supra* note 140, at 705-10.

The objections to this kind of legislation were analyzed by the New York Court of Appeals in *New York Mobile Homes Association v. Steckel*.<sup>163</sup> The contention that mobile homes could not be taxed or classified as realty was easily brushed aside. The court repeated a well-established principle that questions of classification are basically for the legislature, so long as there is a reasonable ground for the distinction.<sup>164</sup> The court saw no incongruity in treating immobilized mobile homes used as residences as part of the freehold. As to the contention that the mobile home park operators would be forced to pay taxes on another person's property, the court properly pointed out that they have an easy means of recouping such amounts in the form of increased rent.<sup>165</sup> Indeed, because of the vagaries of the Internal Revenue Code, the unfairness, if any, is to the owner of the mobile home rather than to the mobile home park operator. Since the tax is imposed on the operator or his land, it is he who can deduct it for income tax purposes.<sup>166</sup> At the same time the tax is passed on to the owner of the home in the form of increased rent which, being a personal expense, is not deductible.

The validity of taxation of mobile homes as realty to the owner of the land was also upheld in principle in *Lantz Appeal*.<sup>167</sup> The language of the Pennsylvania statute was at that time less explicit than that of New York's, and the court's main problem was to determine at what point the mobile home became "permanently attached to land."<sup>168</sup> Therefore, legally there seems to be no impediment to the taxation of mobile homes on parity with other forms of housing.<sup>169</sup>

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<sup>163</sup> 9 N.Y.2d 533, 175 N.E.2d 151, 215 N.Y.S.2d 487 (1961), *appeal dismissed*, 369 U.S. 150 (1962).

<sup>164</sup> *Id.* at 538, 175 N.E.2d at 153, 215 N.Y.S.2d at 490.

<sup>165</sup> *Id.* at 539, 175 N.E.2d at 154, 215 N.Y.S.2d at 491. *See also* Berney & Larson, *supra* note 16, at 458-62.

<sup>166</sup> INT. REV. CODE OF 1954, § 164(a)(1).

<sup>167</sup> 199 Pa. Super. 310, 184 A.2d 127 (1962).

<sup>168</sup> *Id.* at 314, 184 A.2d at 129.

<sup>169</sup> At first blush there seems to be an inconsistency in our advocacy of taxing mobile homes at a parity with other forms of housing and our earlier statements that mobile homes may play a role in the provision of adequate housing for the poor. The apparent inconsistency is that if taxes on mobile homes are adjusted, this would increase the costs of this kind of housing and make it that much harder for the less affluent to afford. This, in effect, is the thrust of Professor Rooney's articles. Rooney, *supra* note 152, at 415-16. However, we believe that the best way to help certain people is not to release them from some taxes and thereby increase the tax burdens of others similarly situated.

As indicated above, all available studies clearly show that the solution to the housing problems of the poor cannot be achieved without a massive investment of public funds. *E.g.*, URBAN HOUSING: REPORT, *supra* note 102, at 235. An exemption of certain forms

## CONCLUSION

The mobile home is here to stay,<sup>170</sup> whether in its present form or in the form of modular prefabricated housing. The trend in the past ten or fifteen years has been towards decreased mobility and increased livability. Many of our zoning and taxing laws date from a time when the house trailer was a makeshift contraption not really fit for permanent human habitation. These laws increasingly have no relationship to reality and should be revised. The concept of mobile home living is receiving more and more public support and unjustified discrimination against this mode of housing should end. On the other hand, there is no reason why dwellers in mobile homes should get a form of public subsidy through lower taxation. People who live in mobile homes should pay their fair share of local taxes.

Rapid developments in the field of mobile homes and modular construction will create, in the foreseeable future, additional problems, many of them legal. The question of jobs, crafts, and employment will be involved, as has already been evidenced by differences between the Detroit Building Trades Council on one side and the Teamsters and United Automobile Workers on the other.<sup>171</sup> The question of whether

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of housing from taxes has only the effect of throwing greater tax burdens on others, many of whom may be essentially in the same economic position. Furthermore, using this form of subsidy to benefit the poor is inefficient because of its indiscriminate application to many who can afford to carry their fair share of taxation. As all the studies indicate, mobile home dwellers are at least as well off as the average population and may be a little bit above the median. Berney & Larson, *supra* note 16, at 454-58; French & Hadden, *supra* note 14, at 135-38. As has been forcefully argued, tax incentives may not be the best or most economical means of achieving social ends in the field of housing. Stone, *Tax Incentives as a Solution to Urban Problems*, 10 WM. & MARY L. REV. 647 (1969). *But see* Berger, *supra* note 24, at 34; *cf.* Gabinet & Coffey, *Housing Partnerships: Shelters from Taxes and Shelters for People*, 20 CASE W. RES. L. REV. 723, 773-75B (1969). For a critical analysis of tax incentives in general, see Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

<sup>170</sup> Developments are very rapid. For example, on August 13, 1969, the Federal Home Loan Bank Board announced that it proposed to amend the regulations applicable to federal savings and loan associations (by addition of § 545.7-1 to title 12 of the Code of Federal Regulations) to permit such associations to make loans on the security of mobile homes, not to exceed 5% of their assets. 34 Fed. Reg. 13115 (1969).

<sup>171</sup> Teamsters Local 299 signed an agreement with Pre-Built Homes, Inc., a manufacturer of prefabricated housing, to represent all of its employees, many of whom were to be drawn from the unemployed of the inner city. This drew an angry protest from the Detroit Building Trades Council. The Detroit News, Sept. 30, 1969, at 10-A, col. 1. Earlier in the year, Walter P. Reuther, President of the United Automobile Workers, traded accusations and recriminations with Jack Wood, Managing Director of the Detroit Building Trades Council, and C. J. Haggerty, National Building Trades Council President. The Detroit News, June 3, 1969, at 16-A, col. 4.

a mobile home is chattel or land will increasingly arise, not only in connection with zoning or restrictive covenants, but also in other fields such as secured transactions.<sup>172</sup> The forthcoming revolution in construction will require a thorough rethinking and revision of building codes and similar enactments.<sup>173</sup> We hope that these areas will soon be explored and a discussion initiated.

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<sup>172</sup> In the secured transactions field the problems are perfection of security, priority, and liquidation. The experiences with § 9-313 of the Uniform Commercial Code have not been happy. See, e.g., Shanker, *An Integrated Financing System for Purchase Money Collateral: A Proposed Solution to the Fixture Problem under Section 9-313 of the Uniform Commercial Code*, 73 YALE L.J. 788, 794-95 (1964). Recently, Professor Shanker amplified his views in a letter, dated June 6, 1969, to the Review Committee for Article 9 of the Uniform Commercial Code, in connection with Preliminary Draft No. 1 of the proposed revision of § 9-313.

<sup>173</sup> California has just passed a law making a factory-built house that meets state specifications eligible to be placed anywhere in the state. Mayer, *supra* note 27, at 146.