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METES AND BOUNDS DESCRIPTIONS

(Excerpt from the Fundamentals of Land Measurement by John S. Hoag, 1971.
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Frequently we run into the metes and bounds description. Such a description is required when the owner of a large tract desires to carve out and sell a piece of the tract and the piece carved out is irregular in shape or cannot be located except by courses and distances.

The metes and bounds descriptions of today, as a rule, do not have the uncertainty as to place of beginning that existed in the metes and bounds descriptions of the days of the Colonists. Our present day descriptions generally refer to Government survey lines as monuments or markers to which the courses in the description may be related. By locating the place of beginning with reference to the Government survey much of the uncertainty that is found in metes and bounds descriptions of the Colonial days is eliminated.

1. Angular Lines. Many times in a metes and bounds description you have an angular course, that is, a course that does not run due north and south or due east and west but runs, let us say, "north 30 degrees east."

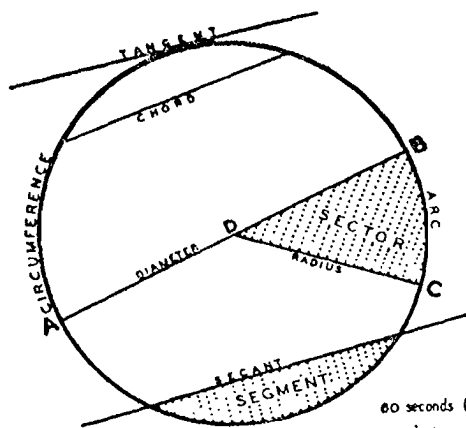


FIG. 1

60 seconds (") = 1 minute (')
 60 minutes = 1 degree (°)
 360 degrees = 1 circumference circle

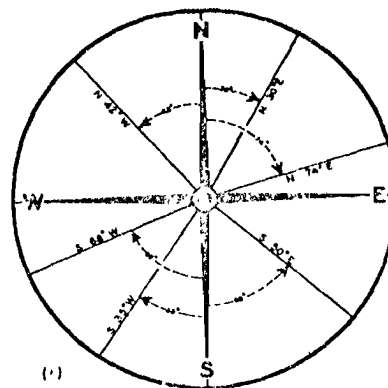


FIG. 2

A CIRCLE is a plane figure bounded by a curved line called a circumference, every point of which is equally distant from the point within called the Center.

CIRCUMFERENCE is the bounding line of a circle. ARC is any part of a circumference. See Fig. 1 B C.

1/360 of any circumference is a Degree of the circumference. If the space about a point be divided into 360 equal parts or angles, by straight lines meeting at the point, each angle is an angle of 1 degree.

DIAMETER--A line-segment drawn through the center and terminated both ways by the circumference. See Fig. 1 A B.

CHORD--Any line-segment terminated both ways by the circumference. See Fig. 1.

SEGMENTS--The parts into which a chord or a secant divides the circle.

RADIUS--A line-segment from the center to the circumference. See Fig. 1 D C.

SECANT--A line cutting the circumference in two points. See Fig. 1.

TANGENT--A line that touches the circumference in but one point, however far the line is prolonged.

To chart the line or angle of that course, you must use a protractor which is an instrument in the shape of a half-circle and is marked off into 180 degrees.

The courses usually are recited in their relation to a due north and south line.

To measure anything, you must, of course, have a unit of measurement. Rods, feet and inches are units for linear measure; degrees, minutes and seconds are the units for measuring angles. A degree is a 1/360th part of a circle and is divided into 60 minutes. Each minute is divided into 60 seconds. The protractor is the instrument used in measuring angles on a plat.

It should be remembered that the measurement of an angle in degrees and minutes is the measurement of the deflection between the two sides of the angle. The actual distance between the lines in feet or other unit of linear measurement

will depend upon the distance of the place measured from the vertex of the angle, that is, from the center of the circle. Near the vertex, the distance is a matter of inches but the sides of the same angle, measured at a place 100 feet from the vertex, may be 20 feet or more apart.

Indicated on Chart No. 3 in Figure 2 are several lines extending from the center of the circle to the circumference. The angle formed by each of these several lines with the North and South diameter of the circle is also noted on the chart. If we were to describe in words the direction of course of any of these lines, we would say North so many degrees and minutes East or West, as the case may be; or South so many degrees and minutes East or West.

To plot the course above quoted, namely "north 30 degrees east," you simply place the protractor on your paper with the base line due east and west and see that the center point of the base line rests on the point from which the angle is to be made. This will necessarily place the north and south center line of the protractor due north and south. You then merely count off from the top of the north and south line 30 degrees to the right, that is, to the east. Place a pencil dot at the 30 degree marker and then draw a line through the two points.

Should a course read "south 50 degrees east," you place the protractor with the rounded portion facing toward the bottom of your sheet and count off from the north and south line to your right 50 degrees.

Always remember to place the base of the protractor east and west and to measure the degrees to the east or to the west of the north and south dividing line. Just why angles are always so measured is not clear; however this practice secures greater uniformity and avoids considerable confusion that would necessarily result if some courses were measured north or south of an east and west true line.

2. Prolongation. The only exception to this rule is when the description calls for the angle to be measured from an extension (the technical word used is prolongation) of the preceding line in the description, as for example, "thence north 30 degrees to the left of an extension of the last described line." In such case, draw a dotted extension of the last described line; lay the protractor so that its center point rests at the end of the last described line and the base line of the protractor rests exactly on the line and the dotted extension thereof. Then count off your 30 degrees to the left, place a pencil dot and connect it with the end of the last described line.

3. Curved Lines. Frequently you have a curved line in a description, as for example, "thence south 80 degrees east 100 feet to a point of tangency; thence along a curve convex northeasterly and having a radius of 30 feet, a distance of 40 feet."

You must have an understanding of the meaning of the words used in such a course. A tangent is a line which touches a circle at one point and only one; and this point is called the point of tangency, or the point of contact. Convex means the outside of a curve; concave means the inside of the curve. Radius is the distance in a straight line from the center of a circle to the outside of the circle. A line that is tangent to a circle forms a right angle to the radius drawn to the point of tangency. See Figure 1.

In order to draw the curved line in the course above quoted, you first draw a line at right angles to the tangent point; measure 30 feet along this right angle

from the tangent point; place the point of a compass at this point and the pencil end of the compass on the tangent point; and then draw the arc to the right the required distance of 40 feet measured along the curve.

Surveyors, for greater accuracy in their angular measurements of land, carry out their figures into minutes and seconds but it is difficult for these to be shown accurately on a plat.

For the benefit of those who have had little or no experience in drawing a sketch plat of a metes and bounds description, there follows a relatively simple description with suggestions as to the manner in which the sketch plat thereof should be drawn.

4. Drawing a Sketch Plat. Let us take a metes and bounds description, course by course, distance by distance, just as we should do if we were actually drawing a plat or sketch to represent the land described. The tools required are simple: a fairly well sharpened pencil, a ruler, a protractor, and of course paper. A compass or divider is convenient and sometimes necessary.

First, we shall read the description of the tract we are about to sketch, and then consider it one course at a time.

Commencing at the North West corner of Section 12, thence South along the section line 21 feet; thence East 10 feet for a place of beginning; thence continuing East 34 feet; thence South 62 degrees, 30 minutes, East 32 feet; thence Southeasterly along a line forming an angle of 8 degrees, 04 minutes, to the right with a prolongation of the last described course 29 feet; thence South 13 degrees, 0 minutes, to the left with a prolongation of the last described line a distance of 49 feet; thence East to a line parallel with the West line of said section and 180 feet distant therefrom; thence South on the last described line a distance of 65 feet; thence due West a distance of 82 feet to a point; thence North 1 degree West 39 feet; thence North 58 degrees West a distance of 49 feet; thence Northwesterly along a line forming an angle of 163 degrees as measured from right to left with the last described line a distance of 49 feet; thence North to the place of beginning.

Before actually starting to draw we must determine the scale we shall use, that is, how many feet shall be represented by a distance of one inch on our sketch. This will be determined partly by the size of the sheet of paper available and partly by the greatest overall distance North and South or East and West in the tract we are going to draw. Our greatest overall distance seems to be 180 feet and, since our paper is of average size, let us use a scale of 10 feet to one inch.

Next, we must consider the place of beginning and the general direction the survey or tract will extend from such a point. These items will determine whether we shall commence our sketch at the top or bottom of the paper and at the right or left side.

Our description begins at the North West corner of a section and seems to extend chiefly East and South of the place of beginning. Accordingly, we shall start our sketch at the upper left hand corner of the paper.

Chart No. 4 represents the sketch (reduced in size) which we are about to draw. A study of this sketch will assist in understanding the various steps outlined.

Let us read the next call: "thence Southeasterly along a line forming an angle of 8 degrees, 04 minutes to the right with a prolongation of the last described course 29 feet." Going back, we extended the line just drawn by drawing a dotted line in the same direction. Now, we place the protractor so that the center mark is exactly over the end of the last previous course, and the base line of the protractor is directly over the line and the extension thereof. We now count off 8 degrees, estimate the 4 minutes and make a mark at that point. That is the direction of our next line, which we draw measuring 2.9 inches to indicate 29 feet.

The next call is of similar character: "thence South 13 degrees, no minutes to the left with a prolongation of the last described line a distance of 49 feet." We draw a dotted line to indicate the prolongation of the previous course, then place our protractor along it, count off 13 degrees to the left and make a mark to indicate the direction of the next line. We draw a line through that point, measuring a distance of 4.9 inches to indicate 49 feet.

The direction of the last two lines has been indicated by angles measured with the extension of the previous line. This practice is not followed to a great extent. As we have stated, the angles are usually measured East or West of a true North and South line. These angles could have been so measured, but we must follow the calls of our description.

The next call reads: "thence East to a line parallel with the West line of the section and 180 feet distant therefrom." To draw this line parallel with the West section line, carefully measure 18 inches due East from the section line in two places. In each case, mark the point, then draw a line through the two points fixed. The resulting line will be parallel to the West line of the section. The call continues: "thence South on the last described line a distance of 65 feet." We measure the distance of 6.5 inches to indicate 65 feet and mark the point as the end of the line.

"Thence due West a distance of 82 feet to a point." We draw a line due West 8.2 inches.

The next call is: "thence North 1 degree West 39 feet." Now the protractor comes into use again. We place it so that the rounded portion is facing toward the top of our sheet and the base line is directly over the line just drawn, with the center mark exactly over the end of that line. Then we mark a point just one degree West, or to the left from the 90 degree mark on the protractor. Now we draw a line through this last marked point, measuring a distance of 3.9 inches to indicate 39 feet as required by the call.

The next call reads: "thence North 58 degrees West a distance of 49 feet." Again, we place the protractor on the chart with the base line due East and West and the center mark exactly over the end of the line just drawn; we measure 58 degrees to the left or West, make a mark and draw a line 4.9 inches long through that mark.

The next call reads somewhat differently: "thence Northwesterly along a line forming an angle of 163 degrees as measured from right to left with the last described line a distance of 49 feet." This is substantially the same as one of the early calls where the angle was measured with the preceding line extended. This time the process is the same but the angle is measured directly from the previous line to the new one to be drawn. We place the protractor with the center mark at

the end of the previous line, a part of its base line directly over the line last drawn, then count off 163 degrees from the former line, make our mark, and draw our line a distance of 4.9 inches.

The last call is: "thence North to the place of beginning." No distance is given, and if given, the distance would not control; we would go to the place of beginning in any event.

Other metes and bounds descriptions may be treated in much the same manner. Many are easier and some are more difficult. The one we just worked with was located in Section 12 which should be a regular section containing about 640 acres. If your description is in a fractional section, it would be well to look at a plat of the government survey before drawing your sketch. This is not a bad practice to follow as a general rule.

Familiarity with the terms usually employed, with tables of measurement, both as to distance and area, and with the dimensions of the usual subdivisions of a section, will enable anyone with practice to draw a satisfactory and useful sketch of almost any tract of land.

It may be noted that, except for the place of beginning, no monument is mentioned in the above description. It is desirable where possible that corners, and places where direction is changed, be located by a suitable monument. Doing this will produce a much better description.

Anyone who must work with legal descriptions will find time devoted to drawing a sketch plat very helpful. Many descriptions which apparently are good, when tested by the drawing of a sketch, will be found to be ambiguous or incomplete. Steps then can be taken to correct the description, and future difficulties and embarrassment may be avoided.

OREGON vs MICHIGAN

ARTICLE SUBMITTED

BY

AVERN COHN HONIGMAN, MITLER,

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Because of the extensive debate over the practical effect of Justice Levin's approach to zoning decisions of local units as most recently expressed in Sabo v Monroe Township, 394 Mich 531 (1975), the Chairman of the Committee on Public Regulation of Land Use requested Professor George M. Platt of the University of Oregon Law School to comment on Oregon's experience under Fasano v Washington, 507 P 2d 23 (1973), the obvious progenitor of Justice Levin's views. Professor Platt's comments follow:

I. Observations

A. Rezoning as a Legislative Matter. It has been argued that rezoning in some cases involves policy decisions and should, therefore, continue to be treated as a legislative act. Rezoning for a regional shopping center is cited as an

example. Some suggest it would be inappropriate to treat it under administrative procedures, which would give a reviewing court wider scope of review than if it were viewed as a legislative decision clothed with the usual presumptive validity.

This goes to the substance of the Fasano holding perhaps more so than the procedural aspect of the case. Under the Oregon view of the relationship between planning and zoning, announced clearly in Fasano, the consideration of something as important as the location of a regional shopping center, with its attendant impact on capital improvements, etc., is a matter chiefly for the plan to determine. The question to be answered when the zoning map is changed is whether the rezoning is in accordance with the plan. In other words, the point at which rezoning occurs is not the crucial point. Because of the value of the permit (through rezoning) for a regional shopping center to one particular applicant, it is the Oregon view, expressed in Fasano, that rules of fairness and openness be followed in the form of a "quasi-judicial" hearing subject to fairly broad judicial scrutiny if challenged. This will best insure that valuable economic plums will not be passed out by a local government body on the basis of political or economic favoritism.

The basis of the choice of the Oregon Supreme Court in Fasano is quite clearly illustrated in the shopping center situation. The Supreme Court indicated in Fasano that it has little faith in the ability of local government to withstand the political and economic pressures involved in rezonings of this kind. As a result, the Court by its holding in Fasano refuses to continue the virtual isolation from review of these decisions favoring individual landowners.

B. Status of Planning and Zoning in Oregon. It has been suggested that Oregon under Fasano is inapt for comparison with Michigan because in Oregon zoning is conducted only in a few counties and the larger cities. The implication is that since there is no planning or zoning in the smaller cities and counties of Oregon, Fasano has not created any difficulties for Oregon, but since there are many small units in Michigan with zoning, great problems would be encountered. Any suggestion that there is minimal planning and zoning in Oregon is in error. The fact of the matter is that Oregon since 1969 has by state law (now found in O.R.S. 215.505) required all cities and counties to adopt comprehensive plans and to enact zoning ordinances. Although compliance has been slow in the non-urban areas of the state, by January of 1974, a survey made by the Oregon Local Government Relations Division of the Executive Department disclosed the following:

OREGON CITIES

Of the total of 238 Oregon cities, 154 (65%) had adopted plans and zoning ordinances; 70 additional cities (29%) had made substantial progress toward adopting plans and zoning ordinances; only 14 Oregon cities had not yet begun to plan and zone (these 14 cities contain only about one-tenth of one percent of the total population of Oregon which is 2,266,000).

OREGON COUNTIES

Of the total of 36 Oregon counties, 23 (64%) had plans and zoning; 13 additional counties (36%) had made substantial progress toward completing plans and zoning ordinances (there were no counties which had refused to at least begin to comply).

There has been no updating of this study for a year and a half. I believe that an updating would indicate increased compliance with the state law requirements in those cities which had not yet begun to plan and zone by 1974. It is also fair to observe that the plans and zoning ordinances of some small cities and counties probably lack much in professionalism.

A random sample of six counties and twelve cities was conducted most of which were selected because they were small in population. All had adopted plans and zoning ordinances and, perforce, had to cope with the Fasano procedures for rezoning.

Following is a list of the cities and counties surveyed.

CITIES

	<u>City</u>	<u>Population</u>
1.	Condon	1,150
2.	Eugene	92,000
3.	Forest Grove	7,100
4.	Heppner	1,475
5.	Hermiston	5,500
6.	Klamath Falls	16,750
7.	Newberg	5,200
8.	Newport	5,900
9.	Paisley	265
10.	Portland	372,200
11.	Springfield	26,500
12.	Waldport	800

COUNTIES

	<u>County</u>	<u>Population</u>
1.	Grant	7,450
2.	Hood River	13,800
3.	Lake	6,450
4.	Lane	237,000
5.	Wallowa	6,630
6.	Washington	189,400

C. The procedural Details and Impact in Oregon. Doubts are expressed about the competence of local bodies to handle the procedure made applicable under Fasano. It has been suggested that the cost of an administrative system would be prohibitive and would defeat such a system, that attorneys would be needed by all parties to prepare and present the evidence, and that record keeping would be too cumbersome and expensive. It is further suggested that the administrative hearing model would raise too many formalities such as swearing in of witnesses and the necessity of the presence of attorneys for conducting cross examination.

1. Costs. The interviews with Oregon attorneys and planners are inconclusive as to the cost impact of the Fasano procedures. If the applicant at the city or county planning commission level is unsuccessful in getting a rezoning, local Oregon ordinances routinely allow appeals to the appropriate city or county legislative body. In the places surveyed all were using tape recorders or secretaries for making a hearing record. Where an applicant wishes to appeal he is usually furnished with a summary of the evidence of the hearing before the planning commission and a copy of the written findings. In a few places a word-for-word record is made. Most places charge the applicant who want copies. Where it is word-for-word (in places, for example, like Washington County) it definitely runs the cost up to the applicant. Washington County for this, as well as other reasons (it has a very formal system of rules) has reported a drop in the number of applications for rezoning. Nevertheless the cost for record keeping, though passed along to applicants, has not had an identifiably adverse impact on the number of applications and appeals in almost all the cities and counties surveyed.

Another factor which would have a definite impact on costs would be the presence, asserted to be essential at administrative type rezoning hearings, of counsel. It is said that this would be essential for the preparation and presentation of evidence and cross examination. The Fasano requirement says nothing of the details for the Oregon hearing. The opinion requires very generally that the parties are entitled to be heard and are entitled to present and rebut evidence, are entitled to a fair tribunal (no ex parte contracts), and are entitled to a written record and findings. This broad requirement leaves the details to the localities and has given rise to quite a variety of approaches.

The practice in a very large majority of the Oregon cities and counties surveyed is that most parties are not represented by counsel. Since most Oregon cities and counties have adopted rules governing the conduct of the hearings, the smaller cities and counties simply dispense with the presence of a city or county attorney in most instances. The chairman of the planning commission or the county board of commissions or mayor of the city is usually well briefed ahead of time by the city or county attorney or staff planners, and is apparently able to conduct the hearings in a manner that as yet has not led to any appreciable amount of litigation -- virtually none in the appellate courts. In the larger cities and counties, publicly employed attorneys and planners are usually present at the hearings, but this was true even before Fasano. Thus it is not possible to reach a conclusion as to cost implications on this score. The survey seems to indicate that cost increase, if any, due to attorney participation is probably negligible under Fasano.

2. Difficulties Based on Cross Examination and Swearing In. It is suggested that an administrative proceeding dictates that attorneys are essential to present evidence and to cross examine. It is further assumed that all witnesses will be sworn in thus making the hearing far more strict than before.

Most places surveyed in Oregon, as indicated above, do not have attorneys present when hearings are conducted. Even where attorneys do represent the public body or the applicant, it is the exception rather than the rule that cross examination is conducted by counsel. Most Oregon local rules allow this, of course, but also the rules permit any party or any member of the planning commission or city or county governmental body to ask questions of any other party. So far this free system of cross examination has not been challenged and is working fairly well.

With respect to swearing in of witnesses, very few places have gone this far with their rules. Washington County is one of the exceptions, and it is reported that the requirement of an oath has had the direct effect of cutting down on the

amount of extraneous comment (call it evidence if you will) by witnesses. This swearing in apparently has a sobering impact on many persons. But most cities and counties do not insist on swearing the parties. So far this has gone unchallenged in the places surveyed.

3. Some General Observations on Oregon Practice. In talking to local attorneys and planners around the state one gets the unmistakable impression that a sincere effort is being made to comply with the spirit of Fasano -- to conduct the hearings in a way which insures fairness to applicants and the public. This desire to comply has resulted in very formalistic rules being adopted in some of the larger urban areas like Eugene, Portland, and Washington County. The Attorney General for Oregon last year issued a detailed opinion on what the rules should contain based on a very legalistic administrative law model. Or, Att'y Gen. Op. No. 7062, March 26, 1974. The rules adopted by places like Washington County have been imitated in few places; the attorney general's opinion taking the strict, legalistic approach, has been largely ignored.

Although it has not been stated specifically in any Oregon statute or court opinion since Fasano, there appears to be an explanation for this informality of approach, an informality that apparently stops short of strict compliance with administrative review requirements. It is probable that what Fasano wrought in Oregon is not meant to be a pure administrative law procedure at all. Because of the tradition of local, legally uninformed lay boards and citizens, it may very well be that the broad requirements set out in Fasano are meant to be tempered with this tradition of participatory local democracy.

Strongly indicative of this view is dictum from a very recent Oregon Court of Appeals case, Green v City of Eugene, 538 P 2d 368 (Ct. App 1975). The facts were that after a period of six months and several hearings of the city council a vote was taken on a rezoning application denying it. Participating in the final vote were three council members who had missed one or more of the earlier meetings at which evidence on the application was presented. By the council's own rules, these three were disqualified from voting because of their absences. The case was disposed of on another point in the Court of Appeals, but the court discusses what is required of a lay proponent or opponent who doesn't know about the council rule, doesn't have a lawyer to help him, and, as a result of this perfectly understandable ignorance, has not raised the issue of disqualification of the councilman at the appropriate time. There is a larger question here - just what is the nature of the hearing required under Fasano. The opinion in Green v City of Eugene is informative:

"Fasano v Washington Co. Comm., tells us that the proceedings before the city council to consider the zone change application were, for some purposes at least, 'quasi-judicial' in nature. In a 'judicial' context, the general rule is that timely objection must be made to allegedly irregular procedures, and that if no objection is made, no claim of irregularity is thereafter cognizable. Should the same rule be applied in this 'quasi-judicial' context - proceedings before a local governing body to pass upon individual land-use questions?

"Such a holding would arguably strain the Fasano 'quasi-judicial' analogy to the breaking point. It would amount to a holding that citizens supporting or opposing a requested land use proceed at their own peril unless they retain an attorney who will aggressively interpose any and all possible procedural objections. It would further

convert the relatively informal meetings of city council's and county commissions into formal courtroom proceedings. And it must be remembered we are establishing rules for both the largest, most metropolitan, and the smallest, most rural, communities in the state, some of which simply do not contain sufficient legal resources - to say nothing of financial resources - to convert every land-use determination into a formal trial." 368 P 2d at 369-70

It is fairly clear that critics have taken it for granted that Fasano dictates a formal, legalistic, administrative review procedure. It seems worth while making the point, along the lines set out in the above quotation, that the administrative hearing with its formal panoply is not inevitable and, in local rezoning matters is probably not advisable.

The diverse, and, in many cases, very informal hearings held throughout Oregon are successful in that the smaller communities without the legal resources to put on a full-dress administrative hearing, are still able to comply with the Fasano "quasi-judicial" approach. The survey of these smaller communities, although it disclosed this success of compliance, disclosed an unexpected area of dissatisfaction with the Fasano requirements. In the smaller counties and cities the elected officials are generally unhappy with the system. Despite its flexible informality of application, the elected officials still feel it interferes with the more free-wheeling town meeting atmosphere of pre-Fasano days. Interestingly enough, appointed local officials, the planning commission members, like the Fasano procedures better than the old system. Several of these smaller places reported this phenomenon. The apparent reason for this is that the planning commission members perceive in the Fasano procedure, even though highly informal, a system which really does make for a fairer disposition of applications. But the political pressures on elected local government bodies apparently have gotten in the way of this appreciation on the part of some elected officials.

D. Ex Parte Aspects of Fasano. Concern has been expressed about the impact of ex parte contacts upon the legality of an administrative procedure in the rezoning context. Here is another example of an assumption that Fasano mandates a pure administrative law hearing with all its formal prohibitions on contacts prior to the hearing.

One of the basic reasons for the establishment of the Fasano approach is the assumption by the Oregon Supreme Court that it is these outside, informal contacts by rezoning applicants, especially developers, which generate the kind of political and economic pressures on individual officials so inimical to proper land use decisions. Certainly the mention in Fasano of the desirability of eliminating ex parte contacts is pivotal.

The survey conducted included a specific examination of how local officials are dealing with the problem. The survey shows that in the larger cities and counties where size prevents close personal relationships between constituent and official, so characteristic of little towns, the planning commission members and city and county legislative officials have little trouble. They simply refuse to talk about it and characteristically refer the applicants and others to the planning staff. In most of the smaller communities where constituents are well known to officials, it is more difficult to redirect the attempted ex parte contacts although this often occurs. In one county (Lincoln) there is information that one or two members of the county legislative body don't even try to discourage the contacts and don't disclose them prior to the hearings. This proved to be the

exception. Indeed in almost all places surveyed the report was that the local elected officials were glad to have a good reason not to talk to constituents about rezoning decisions which often are charged with emotion.

Most of the Fasano procedures have so far gone largely without additional court scrutiny or elaboration. The ex parte matter is an exception. Tierney v Duris, 536 P 2d 435 (Or. App. 1975) arose on a factual background which is typical in the communities surveyed. In Tierney a rezoning for purposes of a shopping center was involved. This application raised major questions since its approval had important economic overtones. In order to satisfy themselves as to the attitude of their constituents, two council members took a door-to-door survey. The councilmen did not discuss the application with the developer-applicant, and the question was whether these other contacts outside and prior to the completion of the hearing were prohibited ex parte contacts within Fasano. The court held they were not.

"In any event, we hold there is no violation of Fasano when, as in this case: (1) the 'ex parte contacts' were not with the proponents of change or their agents, but, rather, with relatively disinterested persons; (2) the contacts only amounted to an investigation of the merits or demerits of a proposed change; and, most importantly, (3) the occurrence and nature of the contacts were made a matter of record during a quasi-judicial hearing so that parties to the hearing then had an opportunity to respond. See, West v City of Astoria, supra, 18 Or. App. 212, 524 P. 2d 1216 (concurring opinion). As we read Fasano its basic requirement is an impartial tribunal; ex parte contacts were just mentioned as one way in which impartiality could be compromised. We conclude that the ex parte contacts revealed by this record are, in the absence of any other claim or evidence of bias, insufficient to establish a lack of impartiality." 536 P 2d at 443

II. Conclusion

The requirement for basic fair procedures in rezoning hearings imposed judicially on local government in Fasano at first was met with hostility. The county and city elected official, according to the survey, initially resented the implications that there was any existence of unfairness or inappropriateness of conduct with respect to grant or denial of these rezoning applications. Since 1973, the year of Fasano, the survey indicates a gradual diminishing of this hostility. Replacing it in many places is a growing appreciation of the basic rightness and utility of the holding. There is growing recognition that it makes it fairer both in appearance and in fact to use the Fasano procedures. It has in practice resulted in defusing improper local political and economic pressures.

In at least two of the larger urban areas, Eugene and Portland, Fasano has produced another promising development. The city councils of these two urban areas have shifted responsibility for rezoning hearings from the planning commission to a hearings officer. This is permitted specifically by state statute stemming from Fasano. See Or. Rev. Stat., §215.406 for counties and 227.165 for cities. Other counties and cities with large enough volume of rezoning applications are also considering shifting to hearings officers. The greatest advantage to be gained here is that it will free planning commissions to plan whereas, in places like Eugene and Portland, before the institution of hearings officers to handle rezonings, large amounts of time and energy dealing with these isolated

land use decisions had to be expended by planning commissions who thereby tended to lose sight of the planning forest. The institution of a hearings officer system also seems an effective way to guarantee that an experienced official will bring to the hearings a full understanding of the procedures required. Due to lack of much experience with hearings officers in rezoning cases, it is too early to determine what the cost impact of such a system will be. Eugene reports, however, in a study made of its system for granting conditional use permits, for which a hearings officer has been employed for about two years, that the cost to the city has gone down as compared to the time when the planning commission was charged with conducting conditional use permit hearings. No study was made, however, as to cost to the applicants in conditional use cases.

By way of summary, the survey of 18 cities and counties in Oregon, all of which have comprehensive plans and zoning ordinances, indicates that the Fasano procedure required for rezoning hearings is working effectively. The system which has evolved reflects a variety of treatment from the very formal, legalistic kind of a hearing in two or three of the larger urban areas to a varying degree of informality in the smallest cities and counties in Oregon. Whether a Fasano type model would work in a very populous state like Michigan depends of course on tradition and practices. There is reason to believe, however, based on the Oregon experience, that a similar system would be successful if adopted in Michigan.

THE MOBILE HOME: PROBLEMS

WITH ITS RECOGNITION AS A VALID

HOUSING SOURCE

BY

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(This article is based on seminar papers submitted in Fall 1974 at the University of Detroit School of Law).

I. INTRODUCTION

America suffers from a housing shortage.
The mobile home offers an alternative solution.
Statistics show the industry is booming.
Its use should be recognized.

Even before the full impact of this current inflationary period was upon us, one could see that the high cost and low availability of housing was making it very difficult for a family to own their own home. This is a problem our nation has been constantly faced with since World War II. This escalating demand for housing has caused a 2 million shortage in housing units since 1967. [(30 Washington & Lee L. Rev. 459 (1973)]. As is a standard American practice, builders and the government looked to increased technology to solve the housing cost and shortage problem. Some of the alternatives have been the outdoor assembly line Levittowns, government sponsored public housing projects, government guaranteed mortgages designed to stimulate the private housing industry, massive apartment, condominium and cooperative complexes, and factory produced housing.

"I predict that by the end of this decade, at least two thirds of all housing produced in the United States will be factory produced." (Charles L. Edison & Bruce S. Lane, A Practical Guide To Low And Moderate Income Housing, Bureau of National Affairs, Inc., Washington D. C. 20037 (1972), p. 17:1).
Secretary of HUD, George Romney.

The greatest response to the housing problem has been from the above mentioned factory producers. The mobile home is the most successful example of modern technology in housing. This is a study of the mobile home as one form of industrialized housing now being offered to meet the national housing needs. The focus will be on the regulation of mobile homes and mobile home parks, the safety problems involved, and the concerns and problems of the mobile home owner.

While it is an oft criticized form of housing, some form of the mobile home is here to stay. Its popularity is based on price and availability. More than 5,000,000 mobile homes are in existence today. Three million have been built since 1945. (Building The American City, Report of the National Committee on Urban Problems. Frederick A. Praeger, Publishers New York, Washington D.C., London (1969) p. 438). One half of all housing starts are now mobile homes and 95% of all homes built for less than \$15,000 are mobile homes. The industry has increased its production from 200,000 units per year in the mid sixties to 500,000 units per year in 1971. [(30 Washington & Lee L. Rev. 459 (1973)]. More growth is still predicted. Eighty percent of all mobile homes are in mobile home parks. Over 13,500 of these mobile home parks average 60-75 unit sites. One thousand new parks a year are opened which offer over 100 unit sites. (Op. cit., Building The American City, p. 438).

The accepted definition of a mobile home was promulgated by the American National Standards Institute (ANSI A 119.1) as "A vehicular portable structure built on a chassis and designed to be used with a permanent foundation as a dwelling when connected to indicated utilities." (Housing & Development Law Reporter, Bureau of National Affairs, Inc., Vol. 3 p. 140:0011). Its origin lies in the 10 to 12 foot automobile trailers developed in the 1920's for sportsmen and vacationers. With the advent of the economic depression of the 1930's it was enlarged and used as a cheaper form of housing. The early trailers were small units gathered in poorly developed trailer camps. Since they had no plumbing, the occupants were dependent upon park owners for sanitary facilities. The trailers were improved and pressed into greater use during World War II as housing for military personnel and other government employees. Housing was scarce and so the federal government purchased 38,000 units during the war. After the war, the acute housing shortage encouraged the greater use and improvement in the product.

Mobile homes are built more like houses than mobile vehicles. They are constructed with a steel undercarriage for transportation, but the frames are made with 2 X 2 timbers (conventional houses are built with 2 X 4 frames). The floors and interiors are covered with plywood while the exteriors are covered with aluminum sheeting. They are fully insulated and wired with adequate plumbing also. The purchase price includes all furniture and appliances. The largest mobile homes are 14 feet wide by 75 long which equals or surpasses the 900 square feet size of the average new single family insured by the FHA. They, no doubt, would be wider except for the transportation restrictions on highway use. (The Report of the Presidents Committee On Urban Housing, A Decent Home, 1016 16th St., N.W. Washington, D.C. 20036, p. 155).

While there is no firm data on average life expectancy, they are known to have a faster depreciation because of lighter construction, obsolescence of built-in elements, and the continual modernizing and design changes in the newer models. (Geoffrey L. Neithercut, personal correspondence with the Michigan Mobile Home and Recreational Vehicle Institute). They must be lasting longer however because lenders are now more generous. Both FHA and the Veterans Administration will now insure 10 year loans (vs. 30 years for conventional homes). In 1964 only 25% of all loans were for more than 5 years.

The cost of a mobile home is cheaper than a conventional home because of the increased technological efficiency. The manufacturer can operate with a small capital outlay of \$100,000 to \$125,000 for facilities and equipment to produce 1 to 6 units per day. They often are located in areas of cheap labor and need only about 60 employees for production (Op. cit., A Decent Home, p. 156). Because mobile homes are prefabricated, there is a lowered unit labor cost. This, coupled with the elimination of costly vandalism, theft of materials and equipment, and bad weather interruptions can bring the costs as low as \$6-\$7 per square foot. (Op. cit., Building The American City, p. 439).

In sum, the mobile home is now a viable alternate to traditional housing concepts. It is equal to conventional homes, apartments, and condominiums in comfort, and yet the initial cost is much lower. In increasing numbers it is providing many people an opportunity to own their own home. But there are problems in this burgeoning industry. Some of these problems will now be considered.

II. THE PROBLEM OF REGULATION OF MOBILE HOMES.

These regulations get their authority from the States Police power. The regulations cannot be arbitrary or unreasonable in their efforts to protect the public health, safety or welfare. Nor can they abuse 14th Amendment due process or equal protections.

The biggest issue in the mobile home industry has always been regulation. Lack of public acceptance of mobile homes can be shown in exclusionary measures such as zoning and building codes which have always hindered the growth of this housing form. The basis of this regulation lies in the government's police power. [(Cady v Detroit, 289 Mich 499, 286 N.W. 805 (1939))]. This authority is an inherent attribute of state sovereignty. The broad object of the police power is to promote and safeguard the general or public welfare, and this broad object justifies impositions, restrictions, and prohibitions on individual action and use of property reasonably related thereto. [(People v Sell, 310 Mich 305, 17 N.W. 2d 193 ())]. This now includes regulations to promote the economic welfare, public convenience, and general prosperity of the community. (6 McQuillin on Municipal Corporations, (3d ed. Rev. 1969), p. 497, sec. 24.13. While the police power is inherent only in the states, a state can delegate the authority to exercise the power to municipalities either through its constitution or constitutionally authorized legislature. (Clements v McCabe, 210 Mich 207, 216, 177 N.W. 722, 725). The general rule, which has prevailed from the beginning, is that the state may delegate to its municipalities a portion of its police power, to enable them to promote the peace, safety, morals, health, and general welfare of their inhabitants. The necessity for broad municipal police power is essential with respect to crowded urban centers. (Johnson v Liquor Control Commission, 266 Mich 682, 254 N.W. 577). The majority of states have enacted enabling acts allowing municipalities to regulate mobile homes.

In Michigan these enabling acts and statutes include the Mobile Home Park Act (Mich. Stat. Annot., Sec. 5.278 (31) - 5.278 (127); Trailer Coaches Not Located in Licensed Parks M.S.A. section 5.278 (21), M.C.L.A. section 125.741; Housing and Zoning Laws, M.S.A. 5.2936 (1), M.C.L.A. 125.271, and; Regulations Under Police Power, M.S.A. 18.1241 - 18.1243, M.C.L.A. 125.781 - 125.783. The Michigan Courts have upheld these delegations of the police power by affirming the enforcement of reasonable local ordinances. Thus, in People v Hanrahan:

"The Constitution has granted to the Legislature authority to delegate to a city or village the right to enact by-laws and ordinances. . .for the enforcement of good order within the limits of the corporation; and for numerous other purposes affecting the health and welfare of its people; and, acting under this authority, the Legislature has conferred power upon the municipalities to enforce the observance of these ordinances by fine or imprisonment or both."
(People v Hanrahan, 75 Mich 611, 42 N.W. 1124, 4 L.R.A. 751).

In Michigan, this delegation of police power gives local governments the authority to license and regulate the maintenance of mobile home parks if such regulations bear a reasonable and substantial relationship to public health, safety, morals, or general welfare. The above mentioned test is enforced in Michigan against any arbitrary or unreasonable ordinances or their application.

"The undesirability, distastefulness, or unpopularity of trailer coach parks in a municipality does not authorize the municipality to prohibit their construction under the guise of enforcing zoning ordinance restrictions arbitrarily."
[(Dequindre Development Co. v Charter Tp of Warren, 359 Mich 634, 103 N.W. 2d 600 (1960))].

Nor can the local governments abuse their power contradicting or surpassing the state statutes.

"A Municipal ordinance may not regulate the spacing of trailer coaches more strictly than does the Mobile Home Park Act, which is preemptive and exclusive and does not merely establish minimum standards." [(Fye v Bouma, 38 Mich App 667, 197 N.W. 2d 114 (1972))].

In deciding whether the mobile homes could be constitutionally regulated as attempted, the courts are concerned mainly with the Fourteenth Amendment due process violations. When there is an abuse of the police power, the result is a taking of private property without due process of law. For example, in Duse v Wilhelm the court said that if a parcel of land cannot feasibly and economically be used for the restricted purposes for which it is zoned, then it is confiscatory and transgressive of the Fourteenth Amendment. [(6 Akron L.R. 5 (1973))].

At present, most mobile home legislation is strongly restrictive. Mobile homes are not understood nor favored by many civic officials, and they often limit mobile homes as much as possible. This attitude does not recognize that the mobile home can be a source for needed housing, especially for the poor. Should conventional housing be placed out of reach of the poor they may turn to mobile homes as a necessity. Should this occur, and if the strong anti-mobile home legislation continues to inhibit the use and growth of mobile homes, the net effect could be

discrimination against the poor. The restrictive legislation could be attacked as violative of the Fourteenth Amendment's Equal Protection clause. (Ibid, p. 5). A well known tactic used to exclude the poor in ordinances requiring minimum lot sizes. The Equal Protection argument has been used to strike these down.

"It is not difficult to envision the tremendous hardship, as well as the chaotic conditions which would result if all the townships in this area decided to deny to a growing population sites for residential development within the means of at least a significant segment of the people The question posed is whether a township can stand in the way of the natural forces which send our growing population into hitherto under-developed areas in search of a comfortable place to live. We have concluded not." (National Land & Investment Co. v Easttown Township Board of Adjustment, 419 Pa 504 at 528, 523, 215 a. 2d at 610, 612).

If this trend continues, local officials will be forced to re-organize their conceptions and regulations of mobile homes. This would begin with a reasonable use of the police power.

III. REGULATORY METHODS include:
comprehensive zoning plans dictating where mobile homes can be located; confinement to mobile home parks; total exclusion from entire municipalities; application of conventional home standards; and time limits on stay.

Once delegated the police power, local governments have used a variety of methods to regulate mobile homes. The primary tool is zoning ordinances. Where a state authorizes its political subdivisions to adopt comprehensive plans, and to implement such plans by zoning regulations, municipalities can restrict the location of mobile homes and mobile home parks in conformity with such a plan. A township, for example, may exclude mobile home camps from residential districts. [(June v City of Lincoln Park, 361 Mich 95, 104 N.W. 2d 792 1960; and Stevens v Township of Royal Oak, 342 Mich 105, 68 N.W. 2d 787 (1955)]. Black's Law Dictionary defines zoning as, "the division of a city by legislative regulation into districts and the prescription and application in each district of regulations having to do with structural and architectural designs of buildings and of regulations prescribing use to which buildings within designated districts may be put." (Black's Law Dictionary 4th Ed. Rev. West Publishing Co. St. Paul, Minnesota (1970) p. 1793). Through comprehensive zoning plans local governments prepare general plans to control the use of land and buildings by designating various use districts within the entire municipal area according to present and planned future conditions. The purpose is to organize the most appropriate uses of land in a manner consistent with the public interest and the safeguarding of the interest of individual property owners. (Zoning, Michigan Civil Jurisprudence 600, Chicago, Callaghan & Co.). Thus, a comprehensive zoning plan will classify areas of use into residential, commercial, industrial and unrestricted districts. Where such classification is reasonable and in the public interest it is valid. (M.S.A. sec 5.2934, M.C.L.A. 125.584). While the boundaries of the zoned districts must be clearly defined and reasonable, they are more or less arbitrary. (Op. cit., Michigan Civil Jurisprudence, p. 619).

Mobile home parks and mobile homes are usually zoned very restrictively to the less desirable areas of the municipality. They are often allowed only into commercial or industrial areas. They are usually zoned out of residential areas for a variety of reasons including fear of their effect on conventional property values and Courts have upheld this exclusion of mobile homes from residential zones. [(City of Howell v Kaal 341 Mich 585, 67 N.W. 2d 704 (1954); Roberts v City of Three Rivers, 352 Mich 463, 90 N.W. 2d 696 (1958); Conner v West Bloomfield Tp., 207 F.2d 482 (1953)].

The most common form of mobile home regulation is to confine their existence to mobile home parks. This means an owner cannot install a mobile home on individually owned private property. Although the validity of such confinement has been questioned they have been upheld because they tend to ensure the maintenance of health and safety standards. [(Tp of Wyoming v Herweyer, 321 Mich 611, 33 N.W. 2d 93 (1948)]. It is more convenient to regulate mobile homes when they are confined to one area. There are two grounds for such confinement. First, the sanitation problems in mobile homes require periodic inspection. Control and inspection is more convenient if they are all in one group. Secondly, grouping reduces architectural disharmony. Mobile homes are often criticized for their appearance which obviously is not consistent with conventional housing design. So one solution has been to confine the aesthetically unappealing structures together. At that point, as heretofore stated, the aesthetically unappealing parks are often kept out of undesirable areas. (The Mobile Home & The Law, 6 Akron L. Rev. 11, Marvin M. Moore 1973). Such confinement is usually upheld especially when the ordinance is part of a comprehensive plan. The court in Bane v Pontiac found such confinement valid when related to public health, although having no effect on prior nonconforming uses.

"An ordinance limiting the occupancy of trailers to licensed areas is not an unreasonable exercise of police power and is therefore valid.We find nothing objectionable in this provision....."

Some municipalities have expressed their hostility to mobile homes by ordinances completely prohibiting mobile home residence. For a municipality to prohibit completely a property use under its police power, the use must be inherently detrimental to public health and welfare. (Op. cit., McQuillin §§24.59 & 24.63). Generally since mobile homes and mobile home parks are not nuisances per se [(Richards v City of Pontiac, 305 Mich 666, 9 N.W. 2d 885 (1943)], nor inherently detrimental to the public health and welfare, [(Smith v Building Inspector for Township of Plymouth, 346 Mich 57, 77 N.W. 2d 332 (1956); and Pringle v Shevnock, 309 Mich 179, 14 N.W. 2d 827 (1944)], an ordinance which forbids their location within a township is not justifiable as an exercise of police power. [(Paul A. Germain, Regulation of Mobile Homes, 13 Syracuse L.R. 131 (fall 1961)].

Another argument against total exclusion of mobile homes is that since the state legislature has provided for the regulation of mobile homes, the regulation of a thing presupposes its existence somewhere in the political subdivision. (Op. cit., The Mobile Home & The Law, p. 8). Using this logic total exclusion of mobile homes was struck down in Gust v Township of Canton:

"Trailer camps may be lawfully operated in Michigan under CL 1948 and CLS 1954, #125.751 et seq. (Stat Ann 1953 Cum Supp #5.278(1) et seq.) which provide for the licensing and regulation therefore....The

nature and extent of the development of the Township, or lack of it, are such that it cannot be said that.... prohibiting trailer camps therefrom bears a real and substantial relationship to the present public health, safety, morals or general welfare....to so hold would be tantamount to declaring trailer camps....subject to exclusion from every area in the state by local governing bodies. That would hardly square with the legislative intent expressed in the above act authorizing their operation in Michigan." [(Gust v Township of Canton, 342 Mich 436, 70 N.W. 2d 772 (1955)].

A third argument against total exclusion of mobile homes is the aforementioned (p. 6 supra) constitutional arguments of due process discrimination and equal protection for the not-so-advantaged.

Covert attempts at total exclusion have been made by setting up anti-mobile home regulations with exceptions. When a mobile home owner applies for that exception, the owner is automatically refused. To counter this courts have demanded good reasons for the refusal. (Op. cit., McQuillin, §25.147 et seq). Another exclusionary method is to include mobile home classifications in the zoning ordinance, but not setting aside any designated land. This is also equal to virtual prohibition. While these covert attempts at indirect exclusion are usually found invalid, they have been sustained at times.

"It would seem that a community desirous of absolutely excluding mobile homes from its boundaries but lacking a compelling justification clearly related to the public health or safety has a somewhat better chance of accomplishing its goal if it employs indirect means of exclusion; but if the court perceives that the ostensibly innocent zoning scheme is merely a facade, then the ordinance will usually be deemed invalid." (Op. cit., The Mobile Home & The Law, p.p. 10 & 11).

Another form of exclusion of mobile homes has been made by the application of restrictions designed for conventional homes. An example would be the requirement of minimum lot sizes. However, this method has been successfully challenged (supra p. 11). A second size restriction would be a minimum square footage requirement of the home itself. However, 55% of all mobile homes sold today are measured 12 x 75 feet or larger. (Op. cit. Personal Correspondence). With this size they approximate the 900 square feet of the average single family dwellings because they have wheels or jacks instead of conventional foundations. (Op. cit., The Mobile Home and The Law, pp. 13-16). To not classify a mobile home as a dwelling is obviously a far-fetched fiction as the statistics can show.

Despite all the regulations and restrictions, the number of mobile homes and mobile home parks is still increasing. Any new attempts to regulate through zoning ordinances necessarily will affect existing lawful uses of mobile homes. A municipality must honor the vested property interests acquired prior to the enactment of a zoning law. So if an established mobile home owner can show a lawful use prior to creation of a regulation, the majority of states allow its continued existence as a nonconforming use. (Op. cit., Regulation of Mobile Homes p. 131), The courts appear to be lenient with mobile homes in deciding when a nonconforming use is established.

"The courts have treated nonconforming house trailers and trailer parks essentially the same as they normally treat nonconforming uses. However, they have exhibited a marked tendency toward leniency in deciding when the landowner has done enough to acquire a nonconforming house trailer and in determining when the landowner's proposed changes constitute an expansion of his nonconforming mobile home use." (Op. cit., The Mobile Home & The Law, p. 19).

Still further regulation of mobile homes is seen in limits on duration of stay. These are old fashioned regulations based on trailers that truly traveled. The time limits were designed to maintain the transient character of such camps. [(Cady v City of Detroit, 289 Mich 499, 286 N.W. 905 (1939))]. Despite the modern nature of mobile homes, these time limits for stay have not yet been thrown out. [(Loose v City of Bay City, 309 Mich 1, 14 N.W. 2d 554 (1944))]. Other limitations on mobile home living can be seen in private covenants banning mobile homes in real property purchase agreements. These are not common, but they are accepted.

As can be seen, there are a myriad of methods for regulating and limiting mobile homes. Despite all this control the industry continues to boom.

"Rapidly increasing sales in the face of these obstacles indicates that the mobile home industry must be doing something right." (Op. cit., A Decent Home, p. 157).

With the need for housing and the cost of conventional dwellings both spiraling upwards, local governments should recognize and accept the mobile home as a viable housing solution. This means the municipalities should reform their restrictive regulations by not excluding mobile homes from the communities, and by not confining their existence to narrow and unpleasant commercial and industrial zones. Housing should be equal to all. This means mobile home owners should not be forced to commute long distances to work in cities where their life style is banned. Just as fine conventional homes are not found near the noise and dirt of factories and car washes, neither do mobile home owners wish to be so confined. Of course some regulations should be retained. For reasons of health and safety, it is not unreasonable to confine mobile homes into mobile home parks that are clean, well-planned and well-run. For reasons of aesthetics, it may be reasonable to assign certain areas of municipality, but not others, where mobile homes can be placed.

Since the existence of the mobile home is a fact, municipal regulation should help improve its life-style rather than hindering it.

IV. SAFETY REGULATIONS: While improved mobile homes are still unsafe, State and local legislation has been ineffective and inconsistent. What is needed is a uniform federal safety code.

The mobile home can be touted as an alternative solution to national needs, but it first must make some additional technological improvements. First and foremost is the need for more safety consideration in the design, construction and installation of mobile homes.

"While rapid changes have taken place in the configuration of mobile homes, such as the 14 foot wides and double wides, and while the demand for mobile homes has greatly expanded,

insufficient resources and technology have been devoted to sound construction and safety features. Moreover, in some cases manufacturers have used known unsafe construction materials and techniques." [Congressman Louis Frey Jr. & J. Richard Knop, The Imperative Need for Uniform Mobile Home Safety Standards, 30 Washington & Lee 460 (1973)].

The average person has a very real suspicion of mobile homes regarding their degree of safety. This is so especially when the news accounts speak of lives lost in tragic 3 minute fires. Approximately 3.8 times more fire loss is occasioned by mobile homes than by conventional housing. The corresponding mortality rate is 3.29 times greater. Many of these fire losses were caused by short-lasting, poor quality wiring (19.2% of all mobile home fires in 1972) or faulty furnaces (13%). The mobile homes are poorly designed for safety in their layouts. Often they only have one door, the furnaces are usually located in the middle of the structures. Should they catch fire, the occupants could be blocked from the one exit. The furnaces are seldom sealed off from the living quarters. Usually they open into the hallway which runs the length of the structure. This provides an open highway for fires to travel throughout the entire structure.

Mobile homes suffer from a high vulnerability to windstorms. High winds damage or destroy nearly 5,000 mobile homes per year, and yet few municipalities have ordinances requiring that they be tied down. The existing tie-down ordinances are usually inadequate. (Ibid., p. 460-462).

Transportation of mobile homes from factory to installation present problems also. Today's mobile homes are built for permanent residency--not for travel touring. Thus, when they are on the highways they can suffer from structural instability and improper hitches. The result could be not just loss to the owners, but also possible danger to other highway users.

Until recently, most of these losses due to inadequate safety provisions were not covered by warranties. Michigan has passed a mobile home warranty act, but its duration is short, only one year. (Mobile Homes--Uniform Warranty Act, P.A. 288 M.C.L.A. 125.991 to M.C.L.A. 125.996 1974 Regular session). The safety factors make insurance companies hesitant to insure mobile homes. The cost of insurance on a \$6,000 mobile home is equal to the cost of insuring a \$40,000 conventional home. (Op. cit., Safety Standards, p. 463). If mobile home manufacturers are to continue offering cheap housing they must make their mobile homes more safe to avoid loss and reduce the high cost of insurance.

While these safety problems are self-evident, the business is still booming. Governments should take cognizance in this fact and take steps to minimize any safety hazards. Local governments have a lot of problems in dealing with home safety standards. They don't know how to approach the problem; is a mobile home a house or a vehicle? Where do they get the money and staff to determine and enforce safety standards?

"Local regulation, whether specially tailored to mobile home or not, has not and cannot operate effectively. Since the mobile home is usually constructed outside the local jurisdiction and arrives completed, it cannot be inspected for conformity with local plumbing, heating, electrical and structural codes." (Ibid., p. 466).

A survey of mobile home regulation has found only 27% of all local areas controlled with special local regulations the quality of mobile home construction. (*Ibid.*, p. 465). A problem for the manufacturers is that a variety of local regulations present inconsistent standards which pose obstacles to mass production and increase the cost.

Many municipalities may look to the states for regulation but this presents problems too. 34 states have mobile home codes, many different from the others. The result is a patchwork regulatory effect again.

One group of states regulate mobile homes and certain kinds of recreational vehicles together, but they exclude "motor homes". A second group regulates modular or manufactured homes and mobile homes together. A third group has adopted state-wide building codes applicable to all forms of housing including mobile homes. (*Ibid.*, p. 467). Michigan fits into this third category by regulating all housing by conventional standards. (M.C.L.A. 125.401 et seq. P.A. 1917). Interestingly the statute applies only to cities of 100,000 population or more, unless the smaller municipal corporations vote to adopt the state code.

Since it takes a lot of time, expertise, and money to develop mobile home standards most states rely on the American National Standards Institute Code A 119.1 (ANSI) for regulatory standards. However, these standards were developed by the Mobile Home Manufacturers Association (MHMA), (Barnet Hodes & G. Gale Roberson, *The Law of Mobile Homes*, 2d ed., New York, Chicago Commerce Clearing House (1964) p. 7), so they could be criticized as favoring the MHMA. Nor are the standards kept up to date. Lack of expertise causes ANSI to rely on the industry alone for research and obviously the industry would be hesitant to research something harmful to its best interests.

There is also a problem in the lack of uniform, adequate enforcement by the states which do have a regulatory statute. Some states have no state enforcement agencies. Others have paper agencies without funding. This naturally makes reciprocity among the states difficult. The states which do have enforcement agencies are presented with a difficult inspection task. Their staffs are small while there are numerous dealers and parks to be inspected. The best method would be to maintain continual inspection of the factories before final assembly seals off the important areas from the inspector's view. But without reciprocity, an inspector from Michigan cannot be expected to inspect a factory in Tennessee. The result is that states are often forced to rely on manufacturer guarantees or external lot inspections. (*Op. cit.*, *Safety Standards*, pp. 471-474).

The present patchwork system of state and local controls means increased costs to the manufacturer and consumer, and yet there is still no adequate protection offered the mobile home owner. There are two reasons why the present regulation is deficient: (1) the uniqueness of size and construction of the mobile home does not lend itself to adherence to local and municipal building codes; and (2) mass production demands standardized controls on construction, so that economies of scale can be maximized and optimal efficient distribution between states can be effectuated. (*Ibid.*, p. 476). Therefore in the interest of low cost efficiency for the manufacturer and affordable homes for the consumer uniform mobile home standards would seem useful and necessary. This can best be done at the federal level.

Until recently, there was no formal regulation of mobile homes at the Federal level. However, the FHA in 1969 and the Veterans Administration in 1970 were

authorized to guarantee mortgages on mobile homes. Accordingly, they adopted ANSI A 119.1. However, the FHA enforcement measures only consisted of self-certification by the manufacturers, and the VA only called for quarterly inspections with advance notice. The VA also requires a warranty, but a claim must show substantial non-conformity to the standards evident within one year from purchase date. It usually takes a hurricane to shake a mobile home into substantial non-conformity within that short a period. Also, the FHA showed its hesitancy regarding mobile homes by insuring only 12,000 of the more than 1 million mobile homes sold from 1970 to 1973. (Housing & Development Law Reporter, Bureau of National Affairs, Inc., Washington D.C. 20037 (1974) p. 140:0018).

The most notable federal regulation is in the Housing and Community Development Act of 1974. Title VI of this act, "Mobile Home Construction and Safety Standards" proposes "to reduce the number of personal injuries and deaths and the amount of insurance costs and property damage resulting from mobile home accidents and to improve the quality and durability of mobile homes." (Housing & Community Development Act of 1974, Title VI: Mobile Home Safety and Construction Standards, P.L. 93-383, 88 Stat. 633 §601 et seq., August 1974). To achieve these purposes the Secretary of HUD is to issue construction and safety standards after consulting with the Consumer Product Safety Commission, and coordinating with state and local laws. Also to be considered are the reasonableness of the standards on a geographical basis and the probable effect of such standards on the cost of the mobile home to the public. A National Mobile Home Advisory Council composed of members from consumer and community organizations, small businesses, the mobile home industry, and federal, state and local governments will be appointed. HUD is authorized to conduct mobile home research and development, and to make factory inspections with enforcement powers. The manufacturer must notify HUD of any safety defects and make necessary corrections. If not, or if the mobile home does not conform to Federal standards, the manufacturer can be required to repurchase the home or bring it up to standards. (Ibid).

This appears to be strong well written legislation. Its effectiveness in the future will depend on the degree of standards established. The composition of the advisory council is impressive in that it includes all the interested parties. No longer will the consumer be left out of the safety decisions. The manner promulgated to enforce safety and construction appears to be effective especially if defect corrections will actually be enforced.

Not only will this legislation benefit the consumer, but it can also help the manufacturer. At the very least it can clarify a uniform set of standards for the whole country. This helps the manufacturer to become more efficient and thus lowers costs. At the same time it can provide the future purchaser with a much safer mobile home. Of course local regulations will still be necessary, if they coordinate with this national standard the country will reap a greater benefit from mobile home housing.

- V. OWNER'S INTERESTS: Since most mobile home owners consider their mobile home a permanent residence they must consider warranties, the nature of their property and tenant rights.

So far this study has been concerned with regulation of mobile homes, mobile home parks, and the mobile home industry by the governments. Now attention will be shifted to the mobile home owner. What are their concerns and how does their unique form of home ownership affect them legally?

In general, the people who dwell in mobile homes and in mobile home parks have been divided into seven categories:

1. "Persons who have acquired a domicile in a community and intend to live there indefinitely but who prefer a mobile home because of the better living conditions and modern conveniences which it affords, the lower original cost and maintenance, and the simplicity and economy of housekeeping.
2. "Young married couples who prefer ownership to renting but are not financially able to furnish and equip a conventional home, or who are uncertain as to the length of time they may remain in a particular community.
3. "Defense workers and construction workers who are concentrated in an area where the increase in population has been rapid and is not likely to be permanent.
4. "Military personnel in areas where housing facilities are inadequate or who prefer transportable housing because of frequent family moves.
5. "Seasonal harvest workers who move from one locality to another.
6. "Financially independent persons who by necessity or choice travel extensively, or who prefer the sociability and atmosphere of a particular park location.
7. "Retired persons who prefer a home of their own which combines a maximum of comfort and convenience with a minimum of effort and expense to maintain."
(Op. cit., The Law of Mobile Homes, p. 5).

While mobile homes were originally for transient purposes, today about 60% of all mobile home owners never move their home. The MHMA reports that the average stay in one location by mobile home owners is 58 months, which is approximately the same residency duration as in conventional housing. About 70% of the mobile homes used since WWII have been used as permanent dwellings. (Op. cit., Building the American City, p. 438).

When buying an expensive article, the average consumer will inquire as to the manufacturer's guarantee. The mobile home owner also is concerned that the home be well-constructed. Should a problem exist the owner can use Common Law principles or the UCC. If a warranty problem exists the mobile home buyer can use the same UCC rules that apply to personal property. Thus, a buyer may recover from the dealer for a breach of any express (UCC 2-313) or implied warranties, including a warranty of merchantability (UCC 2-314) and a warranty of reasonable fitness for a particular purpose (UCC 2-315). [Housing-Mobile Homes-Some Legal Questions, Mark Summers, Frederick D. Fahrenz, David C. Shepler, 75 West Virginia L.R. 402 (1972-3)].

In addition, in Michigan a Uniform Warranty Act (Op. cit., Uniform Warranty Act), was recently enacted to protect the purchaser. It could be questioned as

weak however because the warranty requires "substantial defects" to be discovered within only one year. This is similar to the Veterans Administration mobile home warranty.

Sometimes it is necessary to determine whether a mobile home is a fixture or has become real estate. This is important with regard to the sale of land, priority of competing security interests, landlord-tenant relations, homestead rights, insurance contracts and taxes. The actual intention of the parties is usually the controlling consideration when coupled to the actual purpose to use. A mobile home will legally become real estate when the owner permanently places it on his/her land by means of structural foundations and is considered to be a permanent addition to the land. (Op. cit., The Law of Mobile Homes, p. 239). The importance of this issue can be seen when a mobile home owner sells property. Does the property include the mobile home as real estate or is it a separate chattel? Can a creditor bring a judgment against a mobile home when it is attached to the owner's property? If the mobile home becomes a fixture, which creditor has priority, the dealer who sold the mobile home, or the parties who have an interest in the property it is affixed upon? Without making an elaborate answer, let it be said that the safest way for the creditor to obtain full protection is to file both as a fixture and as a chattel. The same question returns when considering homestead exemptions. Is the mobile home truly the owner's residence or is it merely transient personality? The liability of an insurer is also dependent on the nature of property interest. If a \$8,000 mobile home is considered to be a fixture it will be valued after a fire loss by the amount (\$8,000) written in the policy. If that same \$8,000 mobile home is considered to be a personal chattel, it will be valued by its worth (\$3,000) at the date of loss. As is shown the difference in value makes the distinction important. The mobile home owner should be certain of the type of interest being insured so he/she does not waste money on unreturnable premiums. (Op. cit., Some Legal Questions, p. 406-417).

The final topic of study of owner's interests regards tenants' rights. Since most mobile home owners are confined by local regulations to mobile home parks they are very dependent on the park operators for a place to install their home, adequate services, and fair treatment. This is not always the result however.

"The fact that the supply of available spaces in mobile home parks.....far exceeds the demand can and does lead to abuses in landlord-tenant relations."

(Constance B. Gibson, Policy Alternatives For Mobile Homes, Center For Urban Policy Research, Rutgers University, The State University of New Jersey, New Brunswick, New Jersey. (1972) p. 27).

Low unit space ability can allow the park operator to exercise a feudal sway over the tenants. He/she can charge entry fees to new residents and raise the rent upon a whim. The manager can declare the park rules without consulting the tenants. Many tenants are forced to be docile through fear of eviction. That threat means not only pack your bags, but also move your trailer. Such a move can be difficult and costly in a short time. Meanwhile, if the tenant moves out by selling, the closed park manager can control who will purchase the home, or buy it himself, at a price below value from the desperate tenant seller.

When a mobile home resident defaults in the payment of rent for a park space, the manager can assert a lien upon the mobile home or other personal property of the tenant. (Op. cit., The Law of Mobile Homes, p. 226). Another response of the

landlord is self-help eviction. While this requires notice and a hearing, park operators have been known to "(summarily tow) the tenant's mobile home off the lot, in some cases causing injury to the unit and its contents, and in all cases depriving the homeowners of a place to live." (Op. cit., Policy Alternatives For Mobile Homes, p. 28).

Racial discrimination is often practiced by giving rental or sales information only on a face to face basis. When a minority group member offers to buy a lot, he/she is told it is sold or the park is full. The minority members lucky enough to get into parks have been victims of property and personal harassment.

While not all park operators are so vicious the opportunity is there and many have taken advantage of their unique power. What recourse does the tenant have? If the landlord maintains unhealthy or illegal facilities the tenant can report him to the proper authorities. If the landlord then evicts the tenant in reprisal, a defense of retaliatory eviction can stay the action in Michigan (M.S.A. 27a.5720; M.C.L.A. 600.5718). If the tenant can assert that the eviction is a hardship or that the park violates a health regulation, a temporary stay can be obtained. There are also a number of affirmative actions a Michigan mobile home tenant can take. (M.S.A. 27A.5701 et. seq., M.C.L.A. 600.5701). It might be wise for local or state governments to set up some form of ombudsman to mediate any park disputes. Finally, if nothing else works, the tenants can unite and go on a mobile home park rent strike.

VI. CONCLUSION

The mobile home industry today is in a state of flux: There is either too much regulation, not enough regulation or wrongly applied regulation. Meanwhile the industry continues its phenomenal growth. It is improving the product in many ways so that today much of the public has recognized the mobile home as a viable alternative solution to national housing needs. Government cannot ban its use so it should recognize and encourage its growth while insuring the safety of the mobile home for the residents. In so doing, government should remember not to cause the mobile home price to rise out of reach of the people who need it as a source of housing. The country needs housing and the mobile home is an effective source. While it has its problems, let it fulfill its role.

No. 74-1500

No. 74-1501

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

Brenda Joyce Northrip)	
Plaintiff-Appellee)	
Cross-Appellant)	ON APPEAL from the
)	United States District
v.)	Court for the Eastern
)	District of Michigan,
Federal National Mortgage)	Southern Division.
Association)	
)	
Defendant-Appellant)	
Cross-Appellee)	

Decided and Filed December 11, 1975.

Before: Phillips, Chief Judge, Celebrezze, and McCree, Circuit Judges.

McCree, Circuit Judge. This is an appeal and cross-appeal from a judgment of the district court setting aside a mortgage foreclosure made pursuant to a Michigan statute regulating foreclosure of mortgages by advertisement. The district court held the foreclosure proceeding violative of the due process clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 17 of the Michigan Constitution of 1963. Because we find no significant state involvement in the foreclosure proceedings assailed here, we reverse the judgment of the district court.

Northrip brought this action in Michigan Circuit Court and defendant Federal National Mortgage Association (FNMA) removed it to the U. S. District Court for the Eastern District of Michigan. Jurisdiction was asserted on diversity of citizenship and the existence of a question arising under the Constitution and laws of the United States. 28 U.S.C. §§1331 and 1332. Northrip sought injunctive relief to set aside the mortgage foreclosure proceedings taken pursuant to the Michigan statute regulating the foreclosure of mortgages by advertisement, Mich. Comp. Laws Ann. §600.3201 et seq., on the grounds that the procedure deprived her of property without notice and a prior hearing as required by the Fourteenth Amendment.

On July 28, 1970, Northrip signed a mortgage note and mortgage acknowledging a debt in the principal amount of \$11,000 owed to Auer Mortgage Company. The funds acquired by Northrip in the transaction were paid to a home repair company for work performed on Northrip's home. Auer later assigned the mortgage to FNMA.

The parties stipulated that Northrip made her last payment on the mortgage on April 6, 1972, because of her dissatisfaction with the home repairs. FNMA began foreclosure proceedings shortly after the default, and, on October 19, 1972, purchased the property at a sheriff's sale for \$11,476.68, the accelerated balance due on the mortgage note. Six months later, the statutory period for redemption expired and appellant's title to the property became final.

Chapter 32 of the Revised Judicature Act of the Compiled Laws of Michigan sets forth the requirements necessary to foreclose a real estate mortgage by advertisement: the mortgage must contain a power of sale; a default must have occurred in a condition of the mortgage by which the power to sell becomes operative; no suit or proceeding to recover the debt secured by the mortgage can have been instituted and remained pending; and the mortgage itself and its assignments must have been recorded. A notice that the mortgage will be foreclosed by sale must be printed in a newspaper published in the county where the property is located for at least four successive weeks at least once in each week. Within 15 days after the first publication, a true copy of the notice must be posted in a conspicuous place on the premises. The notice must specify the mortgage, the mortgagee, the assignees, the date of execution and recording of the mortgage, the amount claimed to be due at the date of notice, a description of the property, the date, time, and place of the sale and length of the redemption period. The mortgagee may appoint a person to conduct the sale or the sheriff of a county may conduct it. A deed by the officer or person conducting the sale must be prepared and recorded. The mortgagor or persons claiming under him have six months after the sale within which to redeem residential property not exceeding four (housing) units if less than one-third of the debt has been paid, and one year for such redemption if more than one-third of the debt has been paid.¹ The record indicates that FNMA foreclosed in strict compliance with the requirements of the statute.

The district court, in its opinion reported at 372 F. Supp. 594 (1974), correctly observed that a predicate to finding a due process violation is a finding of state action. The district court considered several theories advanced by Northrip upon which a finding of state action might be based and expressly rejected all but one. The court held that the involvement of the sheriff and register of deeds in the foreclosure proceedings did not constitute state action; that the statute authorizing mortgage foreclosure by advertisement did not authorize a private party to perform a government function and therefore did not constitute state action; and that the statutory scheme regulating mortgage foreclosure did not so pervasively govern FNMA's conduct that private action became state action. The court, however, accepted plaintiff's theory "that state action exists because the statute encourages mortgagees to seek foreclosure by advertisement, rather than by judicial process," relying on *Reitman v. Mulkey*, 387 U.S. 369 (1967), and *Bond v. Dentzer*, 362 F. Supp. 1373 (N.D.N.Y. 1973), *Rev'd* 494 F.2d 302 (2d Cir. 1974). Proceeding then to the question whether the foreclosure procedures followed by FNMA complied with the requirements of due process, the district court determined that they did not because Northrip was not afforded a hearing prior to foreclosure.

Appellant FNMA challenges the district court's determination that state action exists and cross-appellant Northrip contends that state action is present, not only under the theory accepted by the district court, but also under the other theories it asserted. Amicus National Consumer Law Center contends that FNMA is an instrumentality of the federal government and that its actions are those of the state and are subject to the due process requirements of the Fifth Amendment.

We consider first the conclusion of the district court that the existence of the statute regulating foreclosure of mortgages by advertisement constitutes state encouragement of this method of foreclosure and is therefore state action for the purposes of the Fourteenth Amendment. In *Reitman*, *supra*, the Supreme Court upheld the California Supreme Court's holding invalidating an initiative amendment to the state constitution that had the effect of overturning state statutes prohibiting

racial discrimination in disposing of real property. The amendment not only overturned the statutes but created a constitutional right to discriminate on the basis of race. The United States Supreme Court held that this constituted state action that encouraged racial discrimination. Justice White, speaking for the Court observed:

Private discriminations in housing were now not only free from [the regulatory statutes] but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discrimination need no longer rely solely on their personal choice. They could not invoke express constitutional authority, free from censure or interference of any kind from official sources. 387 U.S. at 377, 87 S.Ct. at 1632.

This case differs materially from *Reitman*. Judge Peck, writing for this court in *Turner v. Impala Motors*, 503 F.2d 607 (6th Cir. 1974), said that *Reitman* "deal[t] with a state attempt to accomplish indirectly what it was prohibited from doing directly. We cannot ignore the fact that the context of onerous racial discrimination in which the case was set demanded special scrutiny." 503 F.2d at 611. In *Turner* and in *Gary v. Darnell*, 505 F.2d 741 (6th Cir. 1974), we upheld the Tennessee and Kentucky legislatures' implementation of §9-503 of the Uniform Commercial Code, which authorizes a secured creditor to peacefully repossess collateral.

In this, case, as in *Turner* and *Gary*, we are not concerned with questions of racial discrimination or state use of indirect means to accomplish illegal ends.² Like *Turner* and *Gary*, this case concerns a remedy privately created by contract.

Michigan recognizes that the power of sale is an incident of the private right to contract. *Equitable Trust Co. v. Barlum Realty Co.*, 294 Mich. 167 (1940). A power of sale remedy in a mortgage was recognized by Michigan courts as a part of common law even before the first statute dealing with the subject was enacted. *Hoffman v. Harrington*, 33 Mich. 392 (1876). In fact, the statute permitting foreclosure upon advertisement was enacted

to enlarge and not to cut down the rights of mortgagors. Before such statutes were passed, sales made under a power of sale contained in a mortgage were governed by the same rules applicable to sales under any other power, and courts in the absence of statutes have never applied to such powers in any such technical rules as would impair the security of purchasers. The power is part of the contract, and should be construed on principles applicable to contracts, and not as a hostile process.

Reading v. Waterman, 46 Mich. 107, 110 (1881).

Therefore, it is clear that the statute under attack here did not create the power of sale foreclosure. Instead, the state,³ by enacting this statute, acted to regulate and standardize a recognized practice.³ If anything, the statute made foreclosure more difficult for the mortgagee because he was required to comply with its provisions. See *Barrera v. Security Building & Investment Corp.*, (5th Cir. No. 74-2565, Sept. 25, 1975), *Bryant v. Jefferson Federal Savings and Loan Association*, 509 F.2d 511, 515 (D.C. Cir. 1974), and *Bond v. Dentzer*, 494 F.2d 302, 308-09 (2d Cir. 1974).

From a comparison of the operation of this Michigan statute and the self-help repossession statute involved in *Turner*, we are convinced that there is no substantial difference in the amount of state involvement through encouragement.⁴ What Judge Peck said in *Turner* applies as well here:

It is clear that in this case the state did not exert any control or compulsion over the creditor's decision to repossess. The private activity was not commanded by the simply permissive statute. While mere existence of the statute might seem to suggest encouragement, we conclude that the effect of the statute is only to reduce a creditor's risk in making repossessions. As a practical matter, a creditor's decision is more likely to be principally influenced by the economics of the situation than by the presence of a permissive statute.

We fail to see where the creditor has sought to invoke any state machinery to its aid. Rather, the creditor has simply relied upon the terms of its security agreement pursuant to the private right of contract. Compare *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). Assuming that the statute was non-existent, the remedy of self-help repossession could still be utilized based on its common law heritage and the private right to contract. We fail to see how the creditor is attempting to enforce any right in reliance upon a constitutional or statutory provision as in *Reitman* or is even asserting any state-created right. Rather, we see a creditor privately effectuating a right which was created in advance by contract between the parties. At best, the right is one that is merely codified, but not created, in the statute.

503 F.2d at 611-12. (Footnotes omitted.) See also *Federal National Mortgage Ass'n. v. Howlett*, 521 S.W.2d 428 (Missouri Supreme Court 1975).

We also reject cross-appellant's arguments that state action exists because of the involvement of a state official in the foreclosure process and because the mortgagee is engaged in a traditional state function. The cross-appellant contends that state action may be found because the sheriff conducted the foreclosure sale pursuant to Mich. Comp. Laws Ann. §600.3216 and because the register of deeds was involved in transferring the title Id. §600.3232, 3236.

We observe at the outset that although a deputy sheriff conducted the foreclosure sale in this case, Michigan law permits the parties to agree that another person will conduct the sale. Mich. Comp. Laws Ann. §600.3216. In fact, in *Watson v. Lynch*, 127 Mich. 365 (1901), the Michigan Supreme Court held in a case where the sale was advertised to be made by the mortgagee, the sheriff was not authorized to conduct the sale unless so instructed by the mortgagee. See also *Bryan v. Staus Bros. & Co.*, 157 Mich. 49, 53 (1909).

Appellee cites *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) and *Fuentes v. Shevin*, 407 U.S. 67 (1972) as examples of cases where state action was present because state officers acted to deprive persons of property. The garnishment (in *Sniadach*) and replevin (in *Fuentes*) did not depend upon a contractual power granted to the creditor as is the case here. Instead, any person could invoke the aid of the state with no more than a bare assertion that money was owed him. A state officer then directed the debtor's employer to withhold wages (in *Sniadach*) or physically removed personal property from the premises (in *Fuentes*). In this case, the sheriff's presence was only incidental, and not essential, to the employment of a remedy entered into privately by the mortgagee and mortgagor.

With respect to the register of deeds, it appears that he is required to do no more than to record the deed and indicate whether a redemption takes place. As one court has observed: There is "little significance in the fact that a clerk may perform the ministerial act of recording the deed under power evidencing sale or that courts of the State of Georgia may enforce the agreement the parties have made. Were those factors considered determinative, every private agreement between citizens would be imbued with state action. "Global Industries v. Harris, 376 F. Supp. 1379, 1383 (N.D. Ga. 1974). (Footnotes omitted.)

Thus, we do not believe the presence of the sheriff and register of deeds in this procedure constitutes state action under the Fourteenth Amendment. We agree with the district court that: "State action does not necessarily result whenever a state renders any sort of benefit or service to a private entity or seeks to regulate private activity in any degree whatever." 372 F. Supp. at 597 citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972).⁵

Cross-appellant next contends that FNMA should be subjected to constitutional restraints because the state has delegated to it activity which the state would normally undertake itself. Specifically, Northrip asserts that the challenged statute empowers the mortgagee to make a unilateral determination of default, to initiate foreclosure proceedings upon that determination, and to cause the property to be sold pursuant to its request. State action has been found in a private party's exercise of powers traditionally and exclusively reserved to the state. *Nixon v. Condon*, 268 U.S. 73 (1931) (election); *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town); *Evans v. Newton*, 382 U.S. 296 (1966) (municipal park). As we have indicated already, this foreclosure statute does not empower the mortgagee to engage in any traditional state function. The rights exercised by the mortgagee upon the default of the mortgagor are essentially the same ones that existed at common law. The statute merely regulates the power of sale foreclosure; it does not create it. Accordingly, we do not find state action under the theory that FNMA was engaging in a governmental function.

We observe that the Fifth Circuit has recently discussed one of the cases relied on by Northrip and rejected its application to a non-judicial mortgage foreclosure procedure. *Barrera v. Security Building and Investment Corp.*, 519 F.2d 1166 (5th Cir. 1975). In the case relied on by Northrip, *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970), the Court considered a due process challenge to the self-help remedy created by a landlord lien statute. It empowered a landlord to enter premises held by a tenant in default and to restrain the tenant's personal property found on the premises. The court described such a taking as "closely resembl[ing] a seizure and satisfaction of a judgment - a function traditionally performed by a sheriff or other state agent." 519 F.2d at 1172, quoting *James v. Pinnix*, 495 F.2d 206, 208 (5th Cir. 1974).

The Fifth Circuit determined that *Hall v. Garson* was not applicable to a challenge of a non-judicial foreclosure statute because "no state statute creates a right in mortgagees to proceed by nonjudicial foreclosure; the right is created by contract. Moreover, the action taken by the appellee cannot be described as a function that has been traditionally the exclusive prerogative of the state." 519 F.2d at 1172.

FEDERAL ACTION

On appeal, Amicus National Consumer Law Center contends that state action, or more properly, federal action exists under another theory. Amicus contends that FNMA, a federally chartered corporation created for the purpose of maintaining a

secondary market for home mortgages, is a federal instrumentality and that its action in foreclosing upon the mortgage is the action of the federal government and is subject to the due process clause of the Fifth Amendment, FNMA, as it exists today, was created by Congress in the National Housing Act of 1968 as a government sponsored private corporation whose purpose was to provide a secondary market for home mortgages. 12 U.S.C. §1716. It succeeded what President Johnson termed a "hybrid" corporation by the same name "owned in part by private shareholders, in part by the government, but managed by Government officials." Believing that the secondary market operations were more appropriately placed in the private sector, the President proposed, and Congress passed legislation designed to transfer the secondary market operation of FNMA to completely private ownership. President's Message, Houses and Cities, H.R. Doc. No. 261, 90th Cong. 2d Sess. (1968). The common stock is presently traded on the New York Stock Exchange. Pursuant to the 1968 legislation, the Board of Directors of FNMA consists of 15 members. 12 U.S.C. §1723(b). Of the 15 members, five are appointed annually by the President and the remaining ten are elected by the common shareholders. Among the Presidential appointees, at least one representative is required from each of three affected industries: home building industry, mortgage lending industry, and real estate industry.

The Secretary of Housing and Urban Development is granted two kinds of supervisory powers over FNMA. First, 12 U.S.C. §1732a(h) provides:

The Secretary of Housing and Urban Development shall have general regulatory power over the Federal National Mortgage Association and shall make such rules and regulations as shall be necessary and proper to insure that the purposes of this subchapter are accomplished. No stock, obligation, security, or other instrument shall be issued by the corporation without the prior approval of the Secretary. The Secretary may require that a reasonable portion of the corporation's mortgage purchases be related to the national goal of providing adequate housing for low and moderate income families, but with reasonable economic return to the corporation. The Secretary may examine and audit books and financial transactions of the corporation, and he may require the corporation to make such reports on its activities as he deems advisable.

In addition to the broad regulatory powers granted by the statute above, the Secretary has authority to approve the minimum amount of FNMA stock to be held at all times by servicing companies, which, by statute, cannot exceed two percent, and to limit the rate of dividends on common stock. 12 U.S.C. §1718(c). However, the profits of the corporation are taxed at the regular corporate rates. The Secretary also is authorized to borrow in excess of 15 times the sum of capital, capital surplus, general surplus reserves, and undistributed earnings. 12 U.S.C. §1719(b). The Secretary of Treasury also has some control over FNMA in relation to the issuance of debt securities and borrowing from the Treasury. 12 U.S.C. §1719(b)-(e).

Before the reorganization of FNMA, its employees were government personnel within the Department of Housing and Urban Development, and therefore were covered by civil service requirements and retirement laws. To protect employee benefits that had accumulated, the statute provided for continuation of their participation in the system as long as they remained employees of FNMA. However, all employees hired after 1968 became employees of the corporation and are not subject to the civil service laws. 12 U.S.C. §1723a(d) (1).⁶

Amicus relies heavily on our decision in *Palmer v. Columbia Gas of Ohio*, 479 F.2d 153, modified by *Turner v. Impala Motors*, 503 F.2d 607 (6th Cir. 1974) as

authority for finding state action as a result of the government regulation placed upon FNMA. In that case we upheld a district court's finding of state action when a gas utility company terminated service to customers for nonpayment of bills. We observed in that case that the operations of the utility company were "fully circumscribed by an all-encompassing system of state statutes, city ordinances and the supervision of the state regulatory authority." 479 F.2d at 165. In addition, we determined that the state was significantly involved in the activity of turning off service because a state statute permitted the utility company to enter private homes and disconnect service. Ohio Rev. Code §4933.12. In addition, another statute permitted the utility company to obtain an ex parte warrant directing a constable to accompany an employee to aid him in gaining entry to remove or inspect company equipment in the home. Our conclusion was that the "regulatory activities of the state have insinuated it into a position of interdependence with the company so that it must be recognized as a joint participant with the company" 479 F.2d at 165.

After oral argument in the present appeal, the Supreme Court handed down its decision in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 315 (1974). Like the *Palmer* case, the Court in *Jackson* considered the question whether state action existed in a utility termination case. The Supreme Court held that the state was not sufficiently connected with the challenged termination to make the utility company's conduct attributable to the state because "[a]ll of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law." 419 U.S. at 358.

Although *Palmer* is distinguishable from *Jackson* because of the existence of state statutes permitting utility companies to enter residences for the purpose of disconnecting service and permitting the company to obtain, by ex parte application, a warrant to enter the premises, we understand *Jackson* to have limited *Palmer* to its peculiar facts. When private corporations are endowed by the state with functions or powers of a governmental nature, they become instrumentalities of the state and are subject to its constitutional limitations. That is not this case. Mortgage foreclosures through power of sale agreements are not powers of a governmental nature. As the history of this corporation shows, it was transferred to private control in 1968 because its activities were not thought to be governmental in nature.

There is some, and perhaps even significant, government involvement in, and regulation of, the workings of FNMA. The appointment of one-third of the board of directors by the President, the supervisory control of the Secretary of Housing and Urban Development over the corporation, the government status of some of its employees, and the congressional creation and extensive statutory regulation of the corporation amounts to at least some state involvement in the operation of FNMA's business.

However, *Jackson* indicates that our inquiry concerning state involvement does not terminate with a determination that there is some, or even significant, state involvement. (Dissenting opinion of Marshall, J., suggests the presence of "significant" state involvement in *Jackson*, 419 U.S. at 368). [T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." 419 U.S. at 351. The Court pointed out that: "If we were dealing with the exercise by Metropolitan of some power delegated to it

by the State which is traditionally associated with sovereignty, such an eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State." 419 U.S. at 352-53.

Here, as in Jackson, there is not a "sufficiently close nexus" between the state and the challenged act of foreclosure. As we have already determined, the power of sale foreclosure is not imbued with state action; it is a privately created contractual remedy analogous to the self-help repossession remedy afforded secured creditors under §9-503 of the Uniform Commercial Code. The statutes regulating FNMA imposed on it certain obligations but there is no indication that FNMA's activities necessarily should be considered powers traditionally associated with sovereignty, such as eminent domain.

It was the congressional intent to disassociate FNMA from its previous government ownership because it was not appropriate for the government to be involved in the operation of a secondary mortgage market. The House Banking and Currency Committee determined that FNMA's secondary market operation had proven economically sound and capable of being financed solely from private sources. Indeed, the committee expected that "the privately owned corporation, with its improved financing methods, will add significant impetus to the flow of funds in the secondary market and the availability of credit in the home mortgage market." 2 U.S. Cong. & Admin. News '68 at 2943.

We believe that FNMA is sufficiently analogous to the public utility described in Jackson so that its actions should not be considered those of the state.

However, we do not suggest that our investigation of state involvement would end so abruptly in another case. Judge Friendly has identified several factors to be considered in determining whether state action exists. Such a finding "hinges" on the weighing of a number of variables, principally the degree of government involvement, the offensiveness of the conduct, and the value of preserving a private sector free from the constitutional requirements applicable to government institutions." *Wahba v. New York University*, 492 F.2d 96, 102 (2d Cir.), cert. denied, 419 U.S. 874 (1974).

If the conduct here was more like that complained of in *Palmer*, where the state authorized a procedure empowering utility companies to obtain ex parte warrants to enter a home, a more offensive act and one that is generally associated with a power exercised by the sovereign, we would be inclined to find state action. Nor are we here concerned with a case of racial discrimination. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). *Evans v. Newton*, 382 U.S. 296 (1966). Here, instead, as in the case of self-help repossession under §9-503, we are concerned with an age-old creditor remedy. The fact that FNMA has foreclosed this mortgage is no more significant than if the Auer Mortgage Company, the predecessor mortgagee, had initiated foreclosure proceedings.

In this case too there is value in preserving the private sector free from constitutional requirements. Assuming arguendo that state action was present here and that due process was not afforded by the mortgage proceedings, *Amicus Curiae Michigan Savings and Loan League and Mortgage Bankers Association of Michigan* point out that there would be a substantial increase in costs any time a mortgagee instituted foreclosure proceedings. It is *Amicus'* estimate that the out-of-pocket expenses would increase from the present \$200 for a power of sale foreclosure to \$1000 for a foreclosure by judicial action. It should be observed too that there

is little reason to impose on any mortgagee the requirement of a due process hearing before foreclosing since, as a practical matter, unless the mortgagor had defaulted on the debt, there would be little reason for instituting foreclosure proceedings.

Since we find neither state nor federal action implicated in FNMA's mortgage foreclosure, we need not reach the due process issue. The Michigan due process provision, Article 1, Section 17 of the Michigan Constitution, like the Fourteenth Amendment due process provision, is applicable only where there is state action. *Grubaugh v. City of St. Johns*, 384 Mich. 165, 170, 180 N.W. 2d 778 (1970), *Himes v. City of Flint*, 38 Mich. App. 308, 315, 196 N.W. 2d 321 (1972). Northrip does not argue that the Michigan constitutional due process provision requires a different quantum of state involvement for a finding of state action from that required by the Fourteenth Amendment, and we believe that the Michigan courts would not find state action here.

The judgment of the district court is reversed.

FOOTNOTES

¹Michigan also has a statute governing foreclosure by judicial proceeding in an equitable action brought in circuit court. Mich. Comp. Laws Ann. §600.3101 et seq. As one commentator has observed and the district court confirmed, this proceeding is infrequently used because it is a longer and more expensive process. 372 F. Supp. at 597, Van Allsburg, Property Abandonment in Detroit, 20 Wayne L. Rev. 845, 867 (1974). Judicial foreclosure is employed principally when a deficiency decree is sought. Mich. Comp. Laws Ann. §600.3150.

²Judge Tamm, writing for the court in Bryant v. Jefferson Federal Savings & Loan Association, 509 F.2d 511 (D.C. Cir. 1974) determined that the district judge correctly held that the constitutional question concerning power of sale mortgage foreclosure was insubstantial and therefore did not require the convening of a three-judge district court to consider whether the statute was violative of the Fourteenth Amendment. Judge Tamm made this observation about the district court's opinion in Northrip:

We recognize that one District Court Judge in examining a similar foreclosure statute found state action on an encouragement theory. See Northrip v. Federal National Mortgage Assoc., 372 F. Supp. 594, 597 (E.D. Mich. 1974). We note, however, that the Sixth Circuit has subsequently rejected an encouragement argument in a self-help repossession case which we find indistinguishable. See Turner v. Impala Motors, No. 73-1826 (6th Cir., Sept. 20, 1974).

Judge Tamm correctly analyzed our holding in Turner. Some of the other decisions upholding 9-503 are Gibbs v. Titelman, 502 F.2d 1107 (3d Cir. 1974), Shirley v. State National Bank, 493 F.2d 739 (2d Cir. 1974), Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir. 1973), cert. denied, 419 U.S. 1006 (1974), Bitchel Optical Laboratories, Inc. v. Marquette National Bank, 487 F.2d 906 (8th Cir. 1973).

In Global Industries v. Harris, 376 F. Supp. 1379 (N.D. Ga. 1974), the court upheld a power of sale foreclosure statute similar to the one at issue here.

³The English courts have recognized that a power of sale is a "necessary incident to a mortgage [A] power to mortgage includes a power to give to a mortgagee all such remedies as are proper to be given to him, so as to mortgage the estate on the best terms, and one of these remedies is a power of sale." Re Chawner (1869) L.R. 8 Eq. (English) 569, 72 A.L.R. 158, 159 (1937).

Judge Wisdom explained the American experience with non-judicial foreclosure in Barrera v. Security Building & Investment Corp., 519 F.2d 1166 (5th Cir. 1975):

Non-judicial foreclosure under a power of sale can certainly be characterized as a traditional remedy. Although it is not entirely clear when powers of sale first came into use in this country, they were sufficiently commonplace in 1774 to prompt New York to enact a statute to regulate their use. G. E. Osborne, Handbook on the Law of Mortgages, 726 (2d ed. 1970). In 1828 a New York court described the power of sale as "as ancient as the formation of the English government in this state." Slee v. President, et al. Manhattan Co., N.Y. 1828, 1 Paige 48, cited in Osborne at 729, n. 12. In Texas, non-judicial foreclosure under a power of sale in a deed of trust has been used and recognized for over one hundred years. See, for example, Hipp v.

Hutchett, Tex. 1849, 4 Tex. 20, 25. Courts in the United States consistently recognized these powers of sale as valid and enforceable. Justice Field, speaking for the Supreme Court, held, in 1895:

There is nothing in the law of mortgages, nor in the law that covers what are sometime designated as trust deeds in the nature of mortgages, which prevents the conferring by the grantor or mortgagor in such instrument of the power to sell the premises described therein upon default in payment of the debt secured by it, and, if the sale is conducted in accordance with the terms of the power, the title to the premises granted by way of security passes to the purchaser upon its consummation by a conveyance."

Bell Silver & Copper Mining Co. v. First National Bank, 1895, 156 U.S. 470, 477, 15 S.Ct. 440, 443, 39 L.Ed. 497, 501. Somewhat later the Court noted that "[t]he validity of such a contractual power of sale is unquestionable." Scott v. Paisley, 1926, 271 U.S. 632, 635, 46 S.Ct. 591, 592, 70 L.Ed. 1123, 1125. Professor Durfee could, in fact, find only a single instance of judicial nullification of a power of sale. Durfee, Cases, Mortgages 355 n. 23, cited in Osborne at 726 n. 11, 519 F.2d at 1172-73.

⁴The other case relied upon by the district court as authority for finding state action by encouragement has been reversed by the Second Circuit. Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974). The Bond case involved a constitutional attack on New York's wage assignment statute. The court of appeals, relying on its decision upholding the self-help repossession statute, §9-503 of the Uniform Commercial Code, Shirley v. State National Bank, 493 F.2d 739 (2d Cir. 1974), held that a lender's action in filing the assignments with a borrower's employer was private action since the state was not significantly involved in the challenged conduct.

The State in this case has not deprived the plaintiffs of anything. They have entered into agreements with the defendants in which they have secured funds on the distinct understanding that if there is a default on the loan, the creditor may attach and collect a percentage of the debtor's wages. It was ever thus. A lender who advances money without any security except the fact that his debtor is employed, expects to be able to have access to the security without the necessity of commencing a lawsuit to establish the debt. F.2d at 307.

⁵We also agree with the district court's conclusion and find no merit in Northrip's contention that the statutory scheme regulating mortgage foreclosures in Michigan is so pervasive as to constitute state action.

This case is distinguishable from Turner v. Blackburn, 389 F. Supp. 1250, 1258 (W.D.N.C. 1975), where a three-judge district court found state action when a mortgage was foreclosed pursuant to a power of sale mortgage foreclosure statute in North Carolina. The court said the procedure was "a streamlined version of a judicial sale, with the clerk exercising by detailed statutory authority many of the supervisory powers inherent in a court of equity." See also Barrera v. Security Building and Investment Corp., 519 F.2d 1166, 1170 n. 5 (5th Cir. 1975).

⁶For a more detailed analysis of FNMA, its predecessor and its counterpart, Government National Mortgage Association, see Professor Bartke's article, Fannie Mae and the Secondary Mortgage Market, 66 Northwestern Law Review 1 (1971).

⁷Amicus National Consumer Law Center has brought to our attention a decision by a three-judge district court that has held FNMA to be a federal instrumentality. Federal National Mortgage Association v. Lefkowitz, 390 F. Supp. 1364 (S.D.N.Y. 1975). The court held that for the purposes of the Supremacy Clause FNMA was a "federal instrumentality." In arriving at this conclusion, the court discussed neither state action cases nor cases construing the Supremacy Clause as they related to federally organized corporations.

In that case, FNMA contended that it was not required to pay certain fees to the State of New York because payment would interfere with its ability to discharge its congressionally-mandated function. Although conceding that FNMA was a federal instrumentality, the court determined that the New York statute requiring mortgagees to pay mortgagors' interest on escrow funds did not impose such a burden on FNMA's federal function as to violate the Supremacy Clause. Although the court may properly have determined that FNMA was a federal instrumentality under the Supremacy Clause, we are not persuaded to follow the case in a situation involving state action under the Fourteenth or Fifth Amendment.