NONREGULATORY TECHNIQUES FOR URBAN GROWTH MANAGEMENT IN WISCONSIN

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WISCONSIN

COASTAL MANAGEMENT

NONREGULATORY TECHNIQUES FOR URBAN GROWTH MANAGEMENT IN WISCONSIN

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Prepared by:

David W. Owens, Project Leader
Steve Schaeffer
Gail Kalson
Victor Pol

Office of State Planning and Energy
Department of Administration
1 West Wilson St., Madison, WI 53702
Telephone: 608-266-3382

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SUMMARY OF CONTENTS

Note: Each chapter is introduced by a detailed Table of Contents.

PREFACE

This report looks at specific non-regulatory land management techniques and how they might be applied in Wisconsin. The traditional land use control measures -- mainly zoning and subdivision regulations -- are frequently less than fully effective in achieving community goals and objectives relating to the guidance of urban growth. The rates and patterns of urban development may profoundly affect a community's ability to provide necessary public services, preserve open space or agricultural lands, to cite a few examples. Therefore, this report attempts to help expand the range of techniques used by communities to manage urban development by examining several non-regulatory land management techniques in detail.

This report, initiated late in 1975, was funded through the Wisconsin Coastal Management Program. The initial draft was completed in August, 1976. Since that time it has been reviewed, revised and updated. Together with two previous Coastal Management Program publications, the report completes a package exploring regulatory and non-regulatory techniques of growth management available to Wisconsin coastal communities. The other reports are Lehmann, Mueller and Van Berkel, Capabilities of County Land Regulation Programs in the Wisconsin Coastal Area, Institute of Governmental Affairs, UW-Extension (December 1976); and Owens and Rothenberg, Urban Land Use and Coastal Management Programs in Wisconsin Coastal Municipalities, Wisconsin Office of State Planning and Energy (Spring, 1978).

Although special emphasis has been placed upon coastal areas and issues, the techniques discussed in this report are applicable and relevent to communities throughout Wisconsin.

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INTRODUCTION

Land and its use is increasingly becoming a focus of concern in the United States as well as Wisconsin. The growth of our urban areas, whether characterized as suburban sprawl, leapfrog development or scattered rural residential development, often does not put land to its best and most efficient use. Instead, valuable agricultural lands are being converted and environmentally sensitive or unique areas are being threatened by residential, commercial and industrial development. Neither are controversial land use issues limited to the urban fringe. Inner cities are facing land use problems such as the decline of their central business districts, the loss of historically significant landmarks, and the decline of older residential neighborhoods.

Yet, attitudes held by citizens and government of all levels toward the land are changing. Land is no longer viewed as an abundant and unlimited resource. Some communities are now starting to attempt to effectively manage and control their urban growth. This entails the determination of the desirable location, pattern, intensity and type of future development. Special consideration is commonly given to enhancing or protecting scarce or unique land resources.

Traditional land use controls have often proven to be inadequate for the purposes of long-range growth guidance. A wide variety of alternative methods have been proposed and are being employed in communities throughout this country.

This report examines a set of growth management techniques apart from those that traditionally receive most of the attention of land use planners and municipal officials, namely zoning and subdivision controls. With the exception of development moratoria, the techniques discussed here are considered to be non-regulatory in nature. In other words, although they may not necessarily dictate or directly affect land use, they may have significant impacts on future development.

Methods of growth management are not limited to the ones contained in this report. The options discussed are rather those that look particularly promising in terms of practicality, feasibility and legality in Wisconsin. The chapters in this study deal with public investments, acquisition of interests in land by government, property taxation, transferable development rights and urban growth moratoria. Each method is briefly described below.

The first chapter of this report is on public investments and land development. Public investments are government expenditures for the provision of public services, such as water and sewer services and road-highway facilities. Although the growth effects of transportation facilities are given consideration, the primary emphasis regarding public facilities is placed on sewerage systems and their extension as a growth management tool. The siting of sewerage facilities may particularly influence growth rates and patterns in certain areas, such as

those localities having soils unsuitable for unsewered development. To some extent, the scheduling of public improvements through capital improvement programming can control development. However, for communities wishing to undertake more than just a capital improvement program, other options to manage growth are available, as partially exemplified by the programs of Ramapo, New York and Petaluma, California. This chapter also explores the legal responsibilities and opportunities of public utilities in Wisconsin. The role of the courts and state agencies with relevant authorities are also considered. Finally, the implications of unsewered development on effective growth management and the constraints of federal and state funding are discussed.

The second chapter discusses the public acquisition of rights in land. Under numerous statutory delegations of authority, local governments and certain state agencies in Wisconsin may purchase or condemn full title to land or various interests in land. The different legislatively determined public purposes and uses for which government land acquisition programs may be undertaken are treated in conjunction with their application as a growth control or environmental protection mechanism. Specific programs of the Department of Natural Resources and the Department of Transportation serve as examples as to how land acquisition programs may be applied. Other means of gaining interests in land concern the subdivision dedication and official mapping authorities of municipalities. The concept of land banking, which may also hold promise as an alternative growth management technique for certain localities, is also examined.

The third chapter discusses property taxes and their effect on local financial resources. These taxes can have significant impacts on land use decision-making, both for municipalities and individuals. Communities may often base their land use decisions on the impacts particular land uses will have on their property tax base. Development which generates greater local revenues without increasing local expenditures for public facilities and services is often favored over that which provides little to the tax base and requires major additional financial outlays. Although municipal concern of the impacts land use may have on their revenue base is at times warranted, the effect of such concern may often divert attention away from other legitimate land use issues. This chapter explains how state programs and policies, such as payments in lieu of the property tax, shared costs, payments of the school tax on certain tax exempt property, property tax exemptions for manufacturing machinery, and mineral taxation, affect local tax revenues to largely negate the direct tax consequences development might otherwise have. Although it does not directly impact local property taxes, the new Farmland Preservation and Tax Relief Program is explained mainly in terms of its requirements for counties and farmers that wish to preserve and protect agricultural lands. The tax increment financing program is also examined as a tool for financing urban redevelopment projects,

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The fourth chapter discusses the transfer of development rights, a relatively new planning tool that has been receiving increasing attention. Transferable development rights (TDR) is a complex system of severing the right to develop land from the other rights inherent in the ownership of property. TDR has the potential to effectively guide development to meet a number of specific land use objectives, such as historic landmark preservation or protection of critical environmental resources. Although examples of actual or proposed implementation of the TDR concept are provided, TDR as a land use control mechanism is rarely used in the United States because of the complexities and uncertainties involved. For this reason caution should be exercised by communities considering the use of TDR. The legal questions TDR presents are multiple and have yet to be resolved in most states. Moreover, the requirements of effectively and efficiently managing an ongoing TDR program call for special municipal abilities in economics, planning and administration. It is therefore uncertain how the TDR concept will work in Wisconsin or to what extent it may be applied as a growth management technique.

The fifth chapter discusses urban development moratoria--government attempts to halt or slow the conversion of land from one use to another. They may be imposed for the purpose of maintaining the land use status quo in a community while comprehensive land use planning takes place or until essential public services can be provided to an area. However, they are often imposed without the necessary enactment of statutes and ordinances, thereby presenting legal problems for communities utilizing moratoria. Although the development moratorium is a regulatory growth management technique, it has warranted the attention of this report because it is still considered to be a nontraditional technique for most localities and is receiving greater attention and consideration for application by Wisconsin communities.

This report should allow planners, municipal officials, attorneys and citizens to develop a better understanding of these growth mangement techniques. Their application for differing purposes, administrative and fiscal requirements, and legal constraints and opportunities are given particular attention. It is hoped that Wisconsin communities may see answers or partial solutions to their land use problems in these methods. However, it is important to remember that quality land use planning is a necessary requisite to be employed in conjunction with alternative techniques of growth management.

CHAPTER 1 : PUBLIC INVESTMENTS AND LAND DEVELOPMENT

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I. Introduction

A public investment is quite literally what the name suggests; an investment of public funds for a public service. This report deals with two main public investments whose placements may have a significant impact on land use patterns: water and sewer services and road-highway facilities. Both the legal duties of a municipality relative to the provision of the service and the planning-land development guidance implications of service extension are discussed.

Traditionally the basic purpose behind public facility expenditures[1] is to preserve and protect the public health and environment. For example, the basic policy statement governing Wisconsin's sewerage and water regulations emphasizes direct environmental and health protection as the primary function of the provision of sewer and water service.[2] The stated purpose is: "to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private. Continued pollution of the waters of the state has aroused widespread public concern. It endangers public health and threatens the general welfare."[3]

However, most public investments have been made in response to increasing development. Public utility extensions have usually been provided to whatever development that is taking place, often sprawling urban development, rather than only making extensions to serve guided development. The resultant problem is that public utility service to outlying development is very costly to local governments. Development patterns that increase density and avoid sprawl could reduce capital development costs for local streets, sewers and the like by as much as 64%.[4] Because of the high cost of public utilities and low local community fiscal resources, plans have been developed to invert the current cause and effect pattern of growth demands and public utility installations. In these plans, the infrastructure of public utilities would precede growth development and channel the development into predetermined, already serviced areas. Utility services would be gradually extended from existing urban areas to accommodate new development.

The basic concept is relatively simple--the governmental unit determines: (1) how much growth will occur within a specified period; (2) where the growth could be most beneficially located to enhance the welfare of the community; and (3) what public service facilities will be needed and the specifications thereof. The local government installs the public facilities in the predetermined area. The local government can then channel development to pre-serviced areas by either relying on the inducement to build where desirable services are already installed or by prohibiting development in non-serviced areas.

This approach benefits the local government and fulfills the environmental and health purposes of traditional utility extension. The local government can plan with more certainty, stability and economy since it has predetermined where and at what density growth will occur, rather than simply providing services wherever growth occurs. The expense of installing public services is reduced because they are provided in a concentrated district as opposed to being scattered throughout a sprawled development pattern. The goals of environmental protection are furthered because growth is channelled around environmentally sensitive areas into those areas which are pre-serviced and can more readily accommodate new growth without environmental degradation. Public health problems that may occur due to inadequate public facilities are also reduced.

II. Examples of Controlling Growth Through Public Facilities

There are two existing types of programs through which local governments may control the location of public facilities. The first, Capital Improvement Programming, has only a limited effect on facility placement. The second is a type of growth management program which directly determines where public improvements will be situated.

A. Capital Improvement Programming

Capital Improvement Programming is the scheduling of physical public improvements for a community over a certain period of time. The scheduling is based on a series of priorities developed according to the need, desire or importance of such improvements and the community's present and anticipated financial standing.[5] A Capital Improvements Program (CIP) can have a great impact on a community's growth in that it determines whether or not certain investments will be made at all. The primary emphasis, however, is usually on financial analysis rather than location.[6]

The combination of a capital improvement program and a land use plan could result in an effective growth management program. Such a program would include all capital expenditures which influence the rate and character of growth. It is important that the entire range of public facility projects be viewed in terms of their cumulative impact on growth. Through a determination process of cost-benefit analysis, environmental analysis and projected growth analysis, decisions could be made on where to locate public investments so as to direct development into those areas deemed most approporiate to absorb new growth.

Of primary significance to an effective CIP-land use program is the need for various professionals and decision-makers to work together. Engineers, planners, administrators and political decision-makers all play important roles in public facility location. Therefore, a cohesive program coordinating the various policies and objectives of these groups is necessary.

Local government must act in a reasonable manner. Actions which are arbitrary or capricious will be invalidated by the courts. CIP's which reflect careful, well-reasoned planning and resource allocation are not likely to run into such fundamental legal obstacles.[7]

B. Direct Control Through Facility Extension

The focus of a growth management system is to "control or influence the rate, amount, or geographic pattern of growth within one or more local jurisdictions."[8] The elements used to influence growth are varied; they include legislation, administrative devices, planning approaches and fiscal techniques. Most existing growth management systems use the location of or access to public improvements as a part of the approach. As with CIP, a truly efficient and effective system would include coordinated decision-making among all of the above mentioned elements.[9]

Two of the most widely known growth management programs in this country are those developed by Ramapo, New York and Petaluma, California. The legality of both plans has been upheld by the courts. Both plans use the entire range of municipally controlled public facilities available to them to coordinate and time development.

A third and more limited system, that of Boulder, Colorado, uses sewer and water extension as a direct means of guiding growth. The Colorado Supreme Court recently held various aspects of the program as invalid.

1. Ramapo, New York

The township of Ramapo, New York is a rural and suburban area of unincorporated land located 25 miles north of New York City. Ramapo's program was developed in response to an explosive population increase (120% from 1960-1970), much of it taking place in areas inadequately served by public facilities. The plan attempts to control the timing and location of new development by tying it to staged capital improvements. Interim development controls were established in congruence with an 18-year capital improvement plan. The plan schedules the staging and sequencing of all sewerage, drainage, recreation and park facilities, as well as improved roads, throughout the town. Specific amounts of development points, based on the availability of public facilities and services for a site, are required before the construction of residential subdivisions of two or more lots can commence. The developer can advance the date of construction by installing the necessary public facilities himself.[10] Ramapo avoids overburdening existing and newly installed public facilities by limiting development to those areas having all of the

necessary supportive facilities. The New York Court has implicitly held that the Ramapo plan was within a "reasonable" time frame for the installation of services.[11]

2. Petaluma, California

Petaluma, California is a rapidly growing community approximately 25 miles north of San Francisco. The factors resulting in the adoption of Petaluma's growth management plan were very similar to those Ramapo faced. In this plan development is tied to utility and school capacity and is to be balanced between the two sides of the town. The plan permits the construction of 500 proposed future housing units based on their impact on public facilities, design and other factors. If a development project conforms to the general plan for the town, it is judged on the basis of its impact upon local facilities and is allocated points on the basis of such factors as the availability of public utilities and services. Additional points are received according to other rating scales. A permit is granted if sufficient points are accumulated. The plan restricts the number of dwelling unit permits per year to 500; each unit representing approximately three people. The restriction applies only to development projects involving five units or more and therefore does not restrict construction of single family homes on single lots.[12]

3. Boulder, Colorado

Boulder's growth management plan was also prompted by a desire to protect the current life style and the natural environment in the face of a high growth rate.[13] The plan operates in Boulder city and 44 square miles around the city in Boulder County. The city is the sole provider of sewer and water services in the area. When a developer requests sewer and water services from the city, the request is reviewed in terms of its compliance with the city's comprehensive plan and the range of urban services available to the proposed development prior to approval. However, legal difficulties arise when a development proposal involving land outside the city limits meets the zoning requirements of the county but does not comply with the city's land use plan and growth policies. This was the situation in the case of Robinson v. City of Boulder[14] where the City of Boulder denied water and sewer services to Robinson's proposed subdivision because it was inconsistent with various aspects of the city's interim growth policies. However, the subdivision plans met all the county requirements. The Colorado Supreme Court held that the city, as the sole and exclusive provider of water and sewer services in the area, acts as a public utility and may not refuse

hook up for non-utility related reasons where the city has held itself out to serve the area.[15] The court suggests the service denial would have been sustained had it been based on Boulder's incapacity to supply the service on economic considerations.

III. Water and Sewer System Extensions as a Growth Development Guide

A. The Impact of Sewer Extensions on Community Growth

Sewer (and water if in an area unsuited for private wells) extensions can be a highly effective growth management tool.[16] The impacts of sewer extension policies are often stronger and more direct than those of highways. Existing sewerage systems do attract certain types of development, especially in those areas where intensive development cannot be supported by septic tank disposal systems. Sewer investments are most likely to stimulate development in suburban areas with substantial tracts of undeveloped land.[17] "Generally, significant increases in single family housing construction can be expected to follow new sewer investments in areas where there is little vacant, sewered land, where vacant land prices are low relative to the regional average, and where large tracts of contiguous undeveloped land exist. Any variation from these conditions reduces the likelihood of major secondary impacts on single family housing."[18] Sewer installations also have a strong impact on multi-family development when an area has high access to existing employment centers and substantial amounts of vacant land.[19]

However, it is important to remember that a lack of adequate sewerage facilities does not necessarily prevent development. As it has been estimated that over 50% of the land area in Wisconsin is suitable for septic tank waste disposal systems,[20] many areas can be developed without the need for sewerage treatment systems.

B. Legal Concerns

As the Boulder example illustrated, water and sewer extensions or non-extensions raise several legal questions. The legal problems arise in three areas: (1) When the utility must extend its services; (2) when the utility may refuse to extend its services; and (3) when the municipality may compel property owners to utilize the services. The regulations and obligations concerning water and sewer extensions are, for the most part, mutually applicable. Because all sewer systems and most water systems in Wisconsin are municipally owned and operated, this paper will treat sewer and water utilities as being controlled by government or a governmental agency. Moreover, municipal utility obligations, responsibilities and regulations are not be construed inconsistently with those regulations governing public utilities under sections 196.01 to 196.79, Wis. Stats.[21]

1. Basic Duties of the Utility District--When is Extension Required?

a. Within the utility's "scope of undertaking"

Generally, a utility district[22] is required to serve those within the district as far as the utility's "undertaking" extends. The utility is required to serve those outside the district only where it has "held itself out" to serve the area. Unfortunately, these terms do not have any precise meanings. To analyze the situation, two questions are raised when a property owner requests service in an unserviced part of the district or in an extraterritorial area:

1. Has the utility extended service in that area before?
2. Is the utility holding itself out as available to provide service in the area?

In Wisconsin every public utility has only an obligation to furnish its service to all who reasonably require it within the scope of its undertaking, that is, where it presently provides service. If the utility is operated by the municipality the jurisdiction of service is not limited to the municipal boundaries, but extends to areas where the utility has "undertaken to serve."[23]

The utility's undertaking does not include all those areas where the utility has previously extended service. In Wisconsin profession of service can be limited in a number of ways even when there is a utility serviced building in the unserviced area. For example, extension outside the municipality's limits to property used for public, educational, industrial or charitable purposes is deemed to fix the nature and geographical limits of such utility service; the extension of such service for other types of uses in the same area is not required.[24] The utility may also extend extraterritorial service by a special well-defined contract to another town or area; the profession of service being limited to the terms of the contract.[25] A village or city utility may also file a map with the Public Service Commission explicitly defining the limits of extra-territorial extension.[26] The map would delineate the utility's "voluntary" service area.[27] "Once a utility has filed a map, neither distance nor a listing of other areas being served has any validity

as a test for determining whether or not a utility has held itself out to serve an area."[28] The question of profession of service is one of fact for the Public Service Commission and, eventually, the courts.[29]

b. Within the utility district

Within the utility district or municipality, the utility (municipality) generally has a discretionary function in providing both water and sewer service.[30] The date of construction, capacity, location, number of units and cost are factors that may legitimately lead to a decision not to serve a portion of the district. The city or utility cannot be compelled to extend service unless a refusal to extend is arbitrary or an abuse of discretion. Factors which can enter into the decision include: physical remoteness of the locality,[31] cost of providing service, immediate and prospective revenues collectible from the extension, impact of the extension on the general financial condition of the utility,[32] and whether the utility is "taking a stake" in the speculation of a developer's success by extending service.[33] If both the demand for the service and the probability of increased demand are low, it is likely that no extension would be required.[34] If the present demand is low but there is an expected increase in the future, and the cost of the new service will be recovered by reasonable charges only within a considerable period of time, it is likely that an extension must be made. Even if present demand is high and future demand is low, an extension will probably have to be made. However, if the demand is not high enough to support a reasonable return of revenue at any time the utility's ability to sustain a continuing loss in one area must be balanced against the service needs of the majority of the public.[35] An important factor in the balance is whether the utility can bear the initial cost burden and whether the unserviced area is close enough to the serviced area to warrant construction of interceptor lines.

It is becoming accepted in planning law that municipalities cannot zone out natural growth,[36] shirk their responsibilities to meet the demands of growing communities,[37] or restrict population to present levels.[38] A municipality may not, for example,

permanently prohibit a party from constructing an apartment complex because of an inadequate sewerage treatment plant capacity. The burden of maintaining or enhancing the general condition of the entire community may not be forced upon one party or class.[39] In short, a municipality cannot indefinitely postpone the improvement of its public utilities.

If the financial condition of the utility will not allow it to make an economically feasible extension and if an extension would seriously overburden present treatment facilities, the municipality generally will not be required to extend its services. An exception is where the reasons for inadequate facilities and finances are exclusionary; that is, the municipality wishes to deny services to a particular group[40] or it simply wishes to halt all growth.[41] However, a municipality may not plead poverty forever. Utility districts are required to construct adequate facilities for population increases that may be reasonably and naturally expected. Public facilities may be phased, allowing for gradual development, due to lack of financial resources. However, there must be a definite plan for extensions within a reasonable period of time--e.g., within 18 years as in the Ramapo plan.[42]

Although phasing, staging, or timing of development may be an answer to problems presented by the lack of both funds and time to upgrade existing utility systems in the face of growth pressures, there are several caveats to staging facility installations and denying extensions prior to the scheduled time.

1. A municipality acting as a utility generally may not deny water or sewer services for reasons unrelated to water or sewer services[43] in order to induce, for example, the application of larger lot sizes or other land uses.[44]

   The staging or phasing of growth in Wisconsin would not necessarily be motivated by growth pressures from nearby urban areas. A growth management program would more likely be in response to leapfrog development and its resultant high costs, or in response to environmental protection and a DNR order to install a water or sewerage system. The legal requirements are nevertheless the same. Utility service with the profession of service may not be denied for non-utility reasons. There must be a relationship between the denial of service and the inadequacy

of the conditions of the utility system. In preventing leapfrog development, the municipality may delineate an area of service near the municipal limits and refuse to serve any other extraterritorial areas. Even if the leapfrogging occurs within the municipal limits the utility is not required to serve areas beyond its profession of service or to extend its services in anticipation of new development.

A lack of adequate revenues to install an entire or partial sewer system immediately, with regard to a DNR order or environmental concerns, may also bring about the staging of public investments. The primary purpose of such a program would be to make the utility service economically viable rather than to control growth. The constitutional rights of equal protection and due process should not present themselves as legal problems for a program of this type. However, the DNR could refuse to permit the delayed installation of the necessary facilities on the basis of health or environmental considerations.

2. The Fourteenth Amendment, Due Process-- Legislation which restricts the development of land lacking adequate facilities is an exercise of the police power, which can only be exercised to promote public health, safety and the general welfare. The standard test of the validity of a regulation is whether or not the regulation is reasonable. The determination of reasonableness involves two questions: 1. are the objectives of the regulation legitimate; 2. are the means employed rationally related to the legitimate objectives?[45] The objectives of the restrictions may not completely insulate the community from natural growth. The regulations must relate to the general welfare, a concept encompassing very broad dimensions.[46] Preventing the overburdening of a sanitary system would be a reasonable exercise of authority consistent with the protection of the general welfare. Denial of utility extensions for specified periods of time in order to maintain the quality of the public utility system would be reasonably related to the valid use of police powers. In Town of Beloit v. PSC, the court held that on the basis of a filed service map, it would be a violation of due process to compel utility to extend beyond the area of its

undertaking.[47] Additionally, it may be argued that a denial of sewer services will not constitute a taking by prohibiting development since developers do not have a vested right to the commitment of municipal finances.

3. Equal Protection-- Police power regulations may not unfairly discriminate against lands and their owners that are similarly situated. For example, denial of public services because of racial discrimination has been found to be unconstitutional.[48] Regulation which restricts a fundamental public interest[49] must show a compelling government interest for its use. The constitutionality of a regulation may also be successfully challenged if it contains aspects which potentially exclude certain segments of society.[50]

   Phased growth plans would likely withstand a constitutional test if there is a demonstrable need to control growth, if an inceased capacity to accommodate growth is a result of the program, and if both low and moderate income housing are provided.[51]

   Equal protection challenges based only on the objection that the regulations unfairly discriminate against parcels of land that are similarly situated can be overcome if the classification created is reasonably related to the legitimate purposes of the regulation.[52] This is a minimal test which could be met by most reasonable phased growth programs that operate in conjunction with an approved municipal plan and schedule for the installation of public facilities.

c. Approval by DNR

In Wisconsin the discretion of a public water or sewer utility to extend service is subject to approval by the Department of Natural Resources (DNR). The DNR may also compel a municipality to construct a water supply or sewerage treatment system if the absence of such a system or plant constitutes a menace to public health or comfort.[53] The DNR may also require the sewerage system of any governmental unit to be planned and constructed so that it may be connected with the systems of any other town, village or city.[54] However, there are some limitations placed upon the DNR's authority.

In Beloit v. Kallas the DNR used its authority under Wis. Stats. sec. 144.07(1) to order the City of Beloit to extend its sewerage service to an area outside the utility's service area.[55] The area had a number of individual septic systems which were failing. Since the order required the annexation of the area by the city a referendum for annexation was held and defeated. Under section 144.07(1m), the DNR order to extend services is voided if annexation is defeated in a referendum. The Wisconsin Supreme Court, although recognizing the state's interest in protecting the quality of its waters, upheld the constitutionality of section 144.07(1m). The court stated that if two statewide interests conflict it is up to the legislature, not the courts, to decide which interest shall be controlling.[56] The decision affirmed the principle that a municipality has ultimate authority to control the expansion of its service area.

On the other hand, in the Village of Sussex v. DNR the Wisconsin Supreme Court held that a municipality must comply with a DNR order to establish a municipal water system, even if the electors voted against the allocation of construction funds in a referendum.[57] The village was without a municipal water system and had numerous private water wells which were found to be unsafe. The municipality was required to provide services to its citizens. Those private wells which had been tested and found as unsafe were required to be abandoned and sealed without their owners being entitled to compensation.[58]

The distinction between the outcomes of the two cases rests on the authority the DNR used to order the municipalities to comply with state regulations and the nature of the state interests involved. In Sussex the DNR found that the lack of a municipal water system created a public nuisance under Wis. Stats. section 144.025(2)(r). The court held that although sec. 66.065 provides one method whereby a municipality may construct a public utility on its own volition (the authority Sussex used for its referendum), sec. 144.025(2)(r) is an alternative. Moreover, where the provisions of Chapter 144 are resorted to, a referendum is unnecessary. The court stated that it was the legislative intent that the opinion of the local electorate, expressed in the referendum, could not defeat the state's public policy. In Beloit, sec. 144.07(1m) governs municipal compliance with DNR orders based on sec. 144.07(1). The legislative intent to allow a referendum to void the DNR order is explicitly expressed here.

The DNR may also refuse to approve an extension if it finds that extension will cause the treatment facility to operate beyond its capacity or if state water pollution standards would not be met.[59] This would preclude additional development, despite demand, until the treatment facility is expanded. The DNR also has direct approval power over any proposed sewerage plan.[60]

The DNR also has authority to administer environmental assessments and environmental impact statements (EIS) under the Wisconsin Environmental Policy Act (WEPA)[61] for state projects. However, the DNR has determined that EIS's are not required for sewer extensions.[62]

d. Metropolitan sewerage districts

A metropolitan sewerage district must allow the attachment of the sewage system of a petitioning municipality to its system when the qualifying requirements of Wis. Stats. sec. 144.05(1) have been met and prescribed procedures have been followed. This is limited to a locality within a county having a population of more than 240,000, located within a drainage basin of a lake not less than two square miles nor more than 16 square miles, and within 18 miles of a sewage plant and ten miles of a sewerage district.[63]

Under Wis. Stats. sec. 66.24(1)(b) a metropolitan sewerage district may refuse to provide service if the petitioning sanitary district does not conform to the commission's plans, which must be consistent with the adopted plans of the regional planning commission.[64] A denial of service may not be arbitrary; there must be a rational basis for the denial, such as the distance to the petitioning locality, unreasonable cost burdens on the district, etc.[65]

e. Other situations

1. Suppose a sewer interceptor traverses a non-serviced area, with the utility serving areas on either side of the non-serviced area.

   If a property owner adjacent to the interceptor requests annexation, must the utility grant it? If the property is within a district and if the capacity of the utility system would not be unreasonably overburdened and cause a health hazard, the answer would likely be yes. The

primary question is whether the presence of an interceptor connecting a serviced area to another serviced area constitutes a "holding out" of service. It is arguable that the municipality would not be financially burdened because the interceptor is already installed and the developer would pay the cost of laterals (and connectors if the area to be serviced is a subdivision). Therefore, mere installation of the interceptor could constitute a "holding out" of service. However, if the extension of the service would prove to create a health hazard to other residents and cause a malfunction of the sewerage system treatment plant, the extension should be denied by the DNR on public health grounds. If the non-serviced area is presently a health hazard, due to non-functioning septic tanks for example, the DNR could have the authority to compel an extension of the sewer facility to abate the hazard, depending upon the statutory basis DNR uses.[66]

A metropolitan sewerage district is composed of sanitary districts. To obtain service, each sanitary district must organize, petition the metropolitan district for inclusion, and build sewerage collector lines. If the sewer interceptor connects two sanitary districts of a metropolitan sewerage district, an individual property owner located between the sanitary districts would not be entitled to receive the service, even if his property was adjacent to the interceptor and one of the sanitary districts. If the owner organized the surrounding area into an appropriate sanitary district, annexation of the entire district could be compelled. However, the Wisconsin court, in the case In re City of Fond du Lac, stated that municipal approval is required before an unsewered petitioning area could join the municipal service district.[67]

2. If an area within a water or sewerage district is located at a distance from all serviced areas, and if the area in question poses a health hazard if it remains unserviced, must the utility extend to serve the area? Upon an order of the DNR, the utility must extend its service.[68] In the absence of a DNR order the answer depends on the financial status and treatment capacity of the existing system.[69] The utility is obligated

all who reasonably require it. The request for service of an area within the districts' limits which needs the service because of an existing or imminent health hazard is arguably reasonable.

3. If an area outside the municipality's limits poses a health hazard because of the lack of sewer or water services, must the utility extend its services to that area? In Town of Beloit v. PSC[70] well tests of an area outside the municipality showed that the water was unsafe. The utility was not compelled to extend because the utility had not held itself out to serve that area. A utility has no obligations to extend its services beyond its corporate limits.

f. Can unsewered development be prohibited?

Denial of utility extensions as a growth management tool alone cannot prevent leapfrogging and sprawl as long as unsewered development is permitted and the land involved can support a septic system. It has been argued that counties in Wisconsin possess the authority to completely prohibit unsewered subdivision development.[71] The argument is largely based on the premise that septic tank waste disposal systems lead to the deterioration of the ground water supply, which is a direct source of replenishment for the navigable waters of the state. The public trust doctrine[72] gives the state the power to protect the water quality of the state's navigable waters. Through Wis. Stats. sec. 144.26, the county would have the authority to ban unsewered subdivisions due to actual or potential threats posed by septic tanks to the ground water quality. In addition, municipalities would have authority under Wis. Stats. sec. 236.45 to restrict unsewered subdivisions in order to facilitate the adequate provision of sewer services. These restrictions would also be applicable to the extraterritorial subdivision review areas of cities and villages. The existence of unsewered subdivisions on scattered sites would mean that local governments may be forced to extend sewerage facilities sooner, and at greater expense, than would be necessary if compact development took place.

What these arguments may really point to is the need for closer supervision of septic tank installation and operation, not the total prohibition of unsewered

subdivisions. According to a survey done by the Department of Health and Social Services in the late 1960's, 89% of the septic tanks tested were in violation of the Administrative Code governing septic tank installation.[73] Twenty-two percent of the systems dysfunctioned in such a manner that discharges to the ground surface and to ground waters occurred. Had the tanks been properly installed, or had the initial permit been denied due to soil unsuitability, the majority of septic pollution problems would have been avoided. The DNR may also prohibit the use of septic tanks in any area where it finds that they would impair water quality.[74] If prohibited, the DNR must recommend alternative methods of waste disposal.

Given closer monitoring[75] of septic tank installation and maintenance, the ground water deterioration argument to prohibit unsewered subdivisions may well largely be addressed; that is unless it can be proven that all unsewered subdivisions create a concentration of discharges which most soils in the county cannot tolerate.

In addition, prohibition of all unsewered subdivision development might be unconstitutional if there were no alternate means of allowing growth.

In short, even if it could be shown that septic systems lead to some ground water deterioration, it would be necessary to provide adequate sewer services in areas in which growth could take place. In counties with few sewage treatment plants, an ordinance with blanket prohibition of unsewered subdivisions would likely be held invalid by the courts.

Nonetheless, it is possible to restrict unsewered subdivisions in certain areas. Under Wis. Stats. sec. 236.45 municipalities have the authority to enact subdivision ordinances to facilitate the adequate provision of sewerage disposal services. In areas where septic tanks would not be permissible under Wisconsin Administrative Code H 62.20 the local government could prohibit unsewered subdivisions.[76] Sec. 236.45 also permits subdivision regulations for the purpose of encouraging the most appropriate use of land throughout the county. It could be argued that the prohibition of unsewered development would be valid as encouraging appropriate uses of land when adequate sewered areas exist to accommodate growth.

> In short, unsewered development can be prohibited where health hazards would exist or where its installation would impair the adequate provision of services (i.e., prohibiting unsewered development in areas that will be sewered within a reasonable time). A total county-wide ban on unsewered development, absent extraordinary circumstances, may well be invalidated by the courts.[77]

2. Can Government Compel Landowners to Hook Up to Sewers?

As a general rule, municipalities can compel property owners to make connection with a sewer when the public health requires it, and to pay the costs and expenses involved.[78]

In Wisconsin any city, village or town with a population of more than 7,500 having a system of waterworks or sewerage, or both, may by ordinance require buildings used for human habitation and located adjacent to a sewer or water main, or on a block through which one or both of such systems extend, to be connected with either or both.[79] These powers of the municipality are broad. A 1950 Wisconsin attorney general's opinion advised that the city's authority to protect the public health extends to the installation of facilities needed to permit the drainage of household sewage into the public sewer system as well as the construction of a sewer pipe to the basement of a dwelling.[80] These facilities include toilets and a water system as well as connection pipes. The attorney general reasoned that the municipality has broad powers to act for the public health and that under Wisconsin Statutes sec. 62.11(5)[81] they could be limited only by express language. Since the purpose of Chapter 144 (which grants the authority to require sewer connections) is to promote and protect public health, the purpose of the statute would be thwarted if the local government could not compel the installation of facilities reasonably necessary to feed into the municipality's system.[82]

It seems clear, then, that a local government has the statutory authority to require a connection to the sewer system when the occupation of the property in question without a connection would pose a health hazard. It is quite unlikely that the property owner could obtain government compensation for a septic tank, the use of which is ordered discontinued.

In Village of Sussex v. DNR,[83] the Wisconsin Supreme Court held that the capping of private wells due to water contamination was a police power regulation that restricts property in order to prevent a public harm rather than to create a public benefit, and therefore the property owner has no right to compensation. Under the reasoning of Just v. Marinette,[84] a malfunctioning septic tank is as

great a public health hazard as a contaminated private well. Therefore, the Sussex line of reasoning should be controlling in a septic tank discontinuance situation.[85]

The next question raised is: May local government require the owner of property, which is located adjacent to a sewer or water main or is on a block through which such a system extends,[86] and which has an approved well-functioning septic system that poses no health hazard, to connect to the adjacent sewer line? May local government design and install a new sewer line past a number of well-functioning septic systems and require the owners thereof to pay the special assessments, fill in their septic tanks, and connect to the city sewer system?

The Michigan courts have held that there must be a finding that a private sewage system presents a health hazard before the owner can be required to connect to the municipal sewerage system.[87] In other words, sewage would have to flow or emerge from the property contrary to the public or private interest.

However, it can be argued that the concept of what constitutes a public health hazard was interpreted too narrowly by the Michigan courts. A concentration of septic tanks in one area, even though individually approved at the time of installation, may well prove to be a future health hazard because of the density of the systems in the area. The purpose of Wisconsin Statutes Chapter 144 is to prevent health hazards, not simply to take remedial measures once the harm has occurred. Therefore, in certain circumstances local government should have the ability to compel owners to connect to its sewer system even though private septic systems may be functioning properly at the time of inspection.[88]

In Vandervelde v. City of Green Bay[89] the issue of compelling connections to municipal systems was presented to the Wisconsin Supreme Court. The city wanted to extend a sewer line to property at the tip of a peninsula. The extension was planned to traverse private properties on the peninsula and the city wanted to levy special assessments and compel hook-ups by these intervening property owners. The court invalidated the entire condemnation and assessment process due to procedureal irregularities in the city council proceedings authorizing the sewer extension, easement acquisition and levy of special assessments. The decision did not bear on the issue of whether or not a reasonable necessity for the extension of services to the property owners existed. However, the court said that the city must show a "reasonable necessity" for it to exercise its condemnation powers.

Therefore, the Vandervelde decision could be interpeted to support a local government's ability to compel connection to its sewer system despite the presence of properly operating septic tanks if the government can show a reasonable necessity for the sewer extension.

C. Other Than Legal Concerns

1. Considerations in Developing a Growth Management System Based on Utility Extensions

The first step in developing a phased growth program or a utilities placement plan might be to decide why such a program is needed. This is particularly important since the local government must have a legitimate basis for guiding the timing and placement of growth.[90] There are at least four legitimate reasons for this type of planning: "(1) to economize on the costs of providing municipal facilities and services and to maintain them at a high quality level; (2) to retain municipal control over the eventual character of development by preventing premature and sporadic building in places unprepared for development; (3) to maintain a desirable degree of balance among various land uses; and (4) to achieve greater detail and specificity in development regulation."[91]

Second, if the goal of the program is to eliminate sprawl, the causes of the sprawl should be ascertained.[92] These causes may include: (1) private service alternatives to public service, e.g., private wells, private sewerage treatment systems, septic tanks;[93] (2) fragmented suburban utility districts or private systems serving specific developments that allow scattered and low density growth; and (3) a centralized metropolitan public service system that may operate in conflict with the area's growth guidance policies.[94]

Third, the consideration of the planning fundamentals for the extension of municipal services in relation to the particular municipal area is essential. These fundamentals include:

1. Basic information on the characteristics of land surrounding the municipality with respect to its use, its population, the level of existing development, presently available municipal services, and any environmental restraints which may require the use of municipal utility systems;[95]

2. A thorough understanding of the ability of the municipality to expand and extend its services and an appreciation of the costs incurred in extending services into new areas;[96]

3. A thorough analysis of the cost of extending each service presently offered by the municipality and of revenues which would be gained by annexation.[97]

2. Institutional Factors Affecting the Use of Sewerage Systems for Growth Management

a. Funding

Because of the high cost of sewerage treatment systems, funding programs for plants, interceptors and collectors have a major influence on the use of sewer extensions to manage growth. Federal Environmental Protection Agency funds supply 75% of the cost for treatment plants and interceptors, to which the state contributed an additional 5%. Another state program contributed 25% of the cost of collection systems for developed areas existing before 1970.[98] An additional state program provided up to 50% of the cost for a treatment system plant, interceptors and connectors for small communities that have limited financial resources and lack an existing treatment system.[99]

Funds for the state programs mentioned above have either been depleted or entirely obligated. Therefore, the legislature will be considering the enactment of a new state program to provide municipalities with state funding for needed water quality treatment facilities during its 1978 annual budget review. As proposed, the program will be allocated $60 million over a 10-year period, with the state providing 60% of total project costs.[100] The funds will be primarily earmarked for treatment facilities, although funds may also be used for collection systems in unsewered communities.

These programs were primarily designed to alleviate existing sewage treatment problems.[101] However, the federal Environmental Protection Agency guidelines require that a 20-year excess capacity be built into the system. This stipulation creates several problems. First, most communities have limited and inadequate tools to determine the amount of excess capacity that will be needed. Second, it is possible that growth within the next 20 years will not be in those same areas that presently present themselves as problems. Third, the excess capacity may be used to provide sewer services for rapidly expanding development, essentially providing a free bonus of pre-installed and pre-paid sewerage systems for such development. Fourth, the area requiring sewer service may not be the optimum or most desirable area for future development.

Suggested responses to these problems include the elimination of state and federal funds for excess capacity, making future users pay for the sewage treatment service.[102] One method of taking action is by requiring the municipality to pay for the excess capacity through bonding spread over the period of excess capacity. In this way federal and state funds would be spent for their original purpose of alleviating existing critical problems.

If such controls are placed on federal and state funds, municipalities that wish to encourage growth through service extensions will have to fund the project themselves. Undoubtedly few communities have sufficient funds of their own to finance such undertakings. However, through careful analysis and planning, such a system could become economical since those services would be concentrated rather than dispersed. Financial restrictions could induce municipalities to plan more carefully. However, they could also hinder the construction of sewers needed in the near future. New federal and state programs would be needed to help alleviate these problems.

In any event it may be very difficult for many communities to be able to rely upon obtaining state or federal funds. Currently, any community or sewerage district requesting federal funds is placed on a priority list administered by the Department of Natural Resources.[103] The list, first drawn up in 1973 and revised annually, reflects funding priorities for step 3 project phases, under which actual construction costs are financed.[104] The 1977 list contains 556 communities, most of which have received or have been approved to receive step 1 funds. However, since step 3 requires the greatest expenditure of funds (roughly 89% of the total funds available), only 54 projects, totaling over $244 million, are presently being funded for the construction phase of the process.[105]

In summary, it seems that a community that wishes to guide growth through utility placement must be prepared to fund such a program primarily through its own resources.

b. Alternative sewerage disposal methods

Alternate, less expensive methods of wastewater collection and disposal could possibly be used in rural or small communities to alleviate pollution

problems and, perhaps, to guide growth. The Northwest Wisconsin Regional Planning Commission has investigated the cost and feasibility of several alternate sewage disposal methods. The primary focus of the study was to explore optional methods of diverting sewage from filtering into lakes and streams in areas where installation of a sewage treatment plant and system would be prohibitively expensive.

One system uses grinder pumps and plastic pipes to divert sewage to stabilization ponds located away from the shore. This system would be suitable for small high density development. Another system uses one large septic tank for 10-15 residences. The septic tank and absorbtion field would be owned by the sanitary district. Both systems cost 1/2 to 2/3 less than a conventional sewage disposal system.[106]

These systems could be used to prevent and abate pollution. The utilization of such systems could encourage development where sewer extensions would be prohibitively expensive and where soils are inadequate to accommodate septic tanks. The systems could also be used to concentrate rural development in restricted areas.

c. Water facility service

State grants are also available for partial financial support for the construction of potable water systems. These grants are primarily designed to assist communities in extending water services to existing development, not to encourage new development. Administered by the DNR, the funds will provide 25-50% of the estimated project cost.[107]

D. Conclusion

Sewer extensions alone will probably fail as an effective growth management tool unless the land involved is unsuited for septic tank installation and use or if the land is economically unfeasible to subdivide into lots large enough to accommodate septic tanks.[108] The majority of the coastal area in Wisconsin has soil types which have severe or very severe limitations for use of septic tank systems.[109] It would seem that the control of sewer extensions would be a key element in any land use program for the coastal area. A coastal municipality could delineate on a map the area to be served outside its boundaries and thus limit development to that area[110] if reliance on septic tanks is prohibited by soil type.

Of course, alternative methods of sewage disposal, such as holding tanks or the mound system, may pose a threat to growth management programs based on the control of sewer extensions. Presently, these alternate systems are being considered in several counties on an experimental basis. Restrictions will have to be placed on their installation if sewer extensions are to be effective tools.[111]

Sewer extensions are a less effective means of growth guidance where land is suitable for septic tank installation. Approximately 36.3% of state's land area could support septic tank systems.[112] Based on the physical restrictions governing the use of the mound system during its trial period, an additional 8.4% of the state's land area could be opened up to unsewered development using the mound. This figure could increase to 18.6% if the mound system is to become available on the basis of its engineering limitations.[113] Those areas where generalized soil limitations for septic systems have been overcome by mound system technology are extensive along the state's Great Lakes shorelines.[114] The impacts of the mound, however, will be most significant in localized areas of poor soils and high development pressures.[115]

Much of the existing urban development in Wisconsin is served by septic tanks; 43% of the subdivision plats approved by the Department of Health and Social Services in 1975 were unsewered. In 1975 there were 16,254 septic tank approvals in the state.[116] It would seem that additional controls to supplement sewer extensions will be needed to guide growth in land areas suited to septic systems.

A municipality could use sewer extensions as part of its comprehensive plan. The sewer extension, as well as other public services, could attract development to a desirable area. The degree of attraction may, however, depend on the preferences and values developers or individuals may place on the large lot in the country.

If a municipality does not chose to guide its growth through a sewer extension program it should at least be aware of the ramifications involved with the installation of any interceptor. A municipality may not refuse service along the interceptor for non-utility reasons.[117] When an interceptor is installed it is essentially inviting development. Whether or not the development takes place depends on many factors. The point is that a municipality must be prepared to accept development once it does occur.[118]

One of the major factors limiting sewer extensions as a tool to guide growth are the financial resources of a community. Federal funds are not designed to be used as a growth guidance

mechanism. Even if they were, the communities requiring financial assistance far exceed the amount of funds available. When funds are not available, sewage treatment systems cannot even be installed for pollution abatement reasons, much less for anticipatory growth management purposes. Nonetheless, municipalities may be required to take certain measures to prevent pollution. Under such circumstances they should give consideration to both desirable and probable impacts that sewer installations will have.

IV. Potential Secondary Effects of Transportation on Growth

A. General Impacts

Although the secondary impacts are less strong and less direct than those of sewer investments, the location and type of transportation facilities can have an impact on land use.[119]

Transportation financing policies constitute one out of numerous factors that contribute to sprawl since transportation policies are basically auto related. Earmarking most transportation funds for highway and auto related purposes has prevented the serious evaluation of alternative means of transportation.[120]

Road location and type is partially determinative of land use near to roads. Their impacts can be on residential, industrial and commercial, and vacant or rural land uses.

The relationship of residential land use to highway development is complex. Single family, low density residential development is fairly independent of the location of highways, due to countervailing considerations, such as socio-economic pressures, zoning and schools. However, near the urban fringe convenient highway access tends to promote the conversion of vacant farmland to low density residential use. Such development usually occurs at a distance away from the highway in order to avoid the noise and commercial development associated with the highway itself. High density residential development is promoted in urban areas by highways, especially near interchanges and along circumferential highways.[121]

Industrial and commercial uses also develop along highways in formerly vacant areas. Arterial streets and radial highways can promote "strip" development, whereas circumferential highways attract more comprehensive development and induce commercial development along major arterials intersecting with them.

In rural areas, highways and all-weather roads are significant factors in the location of retail businesses. The most intensive and rapid land use changes in rural areas occur at interchanges and mostly involve highway-oriented businesses, such

as service stations, motels and restaurants. Interchanges with highly accessible frontage roads usually experience more intensive development than those with restricted access.

The amount of vacant land is another important factor influencing development near highways. The most pronounced conversions of land uses are independent of highways, taking place quickly after other private or public developments have occurred in light of the rate of urbanization of the area as a whole.[122]

B. Legal Issues

The issues related to road construction or extension are not as well defined or developed as those dealing with sewer and water extensions. Most of the related law pertains to the eminent domain powers of government to obtain property for roads; official mapping authorities used to limit construction in future roadbeds; and the provision of access through easements for land locked properties.

Another reason for a lack of well-developed legal issues related to growth management via road placement control is that most development begins in an area with preexisting road access to at least one point. A developer installs additional roads and either maintains them himself or deeds them to the municipality. Subdivision approvals are often contingent on proper road installations. Unlike sewer and water installation, there are no alternative systems available which may pose potential health hazards.

This is not to say that highway location is not a highly controversial issue. For example, the construction of I-43 from Sheboygan to Green Bay has engendered a great deal of opposition from farmers and other citizens who contend that running the freeway through prime agricultural land would deprive the state of valuable and productive agricultural lands. Environmental preservation concerns may also be the basis for objection to other highway projects; especially when a project would destroy a particularly sensitive environmental area.

Traffic safety, volume and other related issues are the major factors most often taken into consideration for highway location decisions. However, the issues of environmental protection and land use impacts of highways are two of the eleven topics presently being taken into consideration in the formulation of the State Transportation Policy Plan. Once adopted, the plan will act as a guide to decision-making for transportation planning done for specific modes of transport, such as airports, highways, etc.[123]

C. Conclusion

Although the secondary impacts of roads in urban areas have been found to be less immediate and less direct than the impacts of sewer and water facilities, in certain undeveloped areas they may be more immediate and potentially detrimental. Highways make access to an area available to more people; and a heavy influx of population, either residential or tourist, could destroy an environmentally sensitive area. In developed areas the issues surrounding transportation often relate to basic policy decisions on the amount of funds which should be spent on mass transit as opposed to additional road facilities.

To a large extent growth engendered by road extensions are primarily due to other considerations. However, used in conjunction with the full range of other public services, road construction and location could be an effective ancillary tool in a growth management program.

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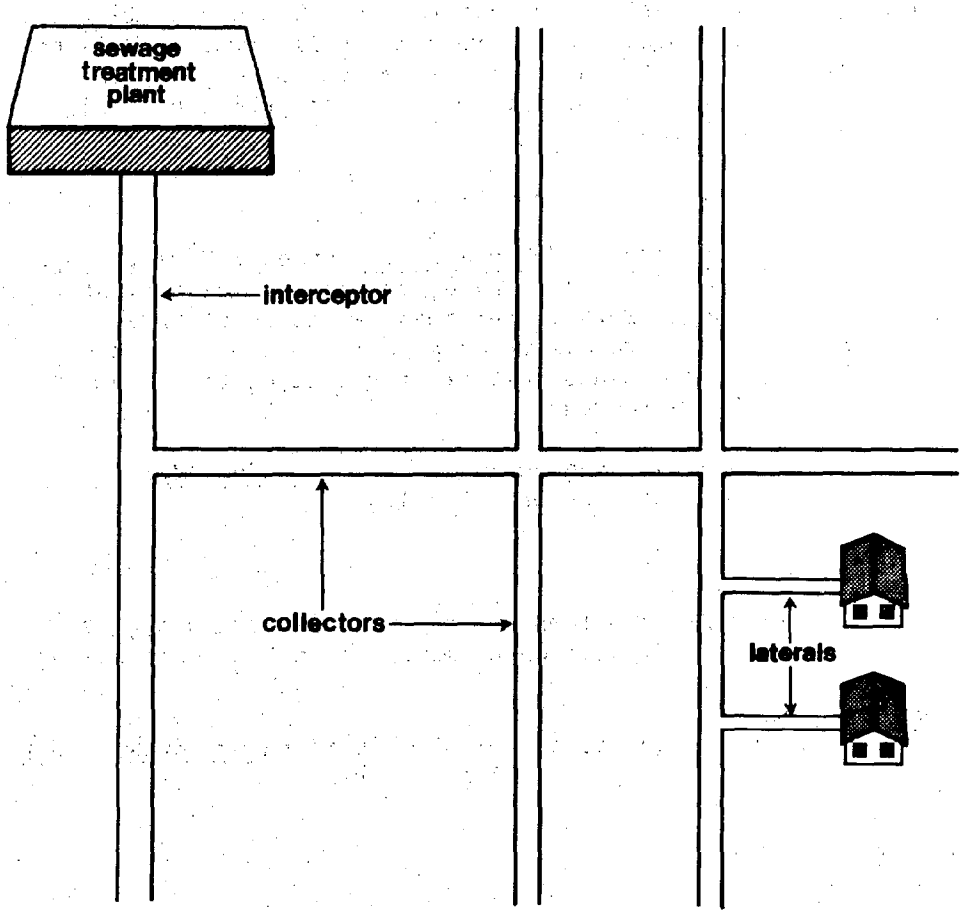
GLOSSARY OF SEWERAGE SYSTEM TERMS



The laterals carry raw sewage to a collector system which feeds sewage to an inteceptor which funnels all the sewage to the treatment plant. Laterals and collectors are often installed by a subdivider, and the interceptor is installed by the municipality. In unsubdivided areas, the individual owner pays for the lateral to his building.

Notes

1. E.g., sewers, water systems, transportation networks.

2. All Wisconsin public sewer systems are owned and operated by local government units. There are some private treatment plants serving industrial or commercial establishments. There are 513 water utilities in the state, most are municipally owned. This chapter will treat all water and sewer systems as municipally owned. The duties and obligations of both private and public utilities are essentially the same.

3. Wis. Stats. sec. 144.025(1) (1975).

4. Friedman, Public Service Costs and Development, Summary Report, Wisconsin Office of State Planning and Energy, Department of Administration (Sept. 1975). Suburban densities of three to fourteen dwellings per acre are all reasonable in cost. It is the one and two acre lot developments that are far more costly to service than other forms of development.

5. "Capital Improvement Programming," ASPO Planning Advisory Service Report No. 151, p. 1 (October, 1961).

6. Id. at 5-13.

7. More complex legal problems which may arise from a program using public facilities allocation to manage growth will be discussed later.

8. "Urban Growth Management Systems," ASPO Planning Advisory Service Report No. 309, 310, p. iv. (August, 1975).

9. Id.

10. Id. at 22-23.

11. Golden v. Planning Board of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291 (1972).

12. Construction Industry Association of Sonoma Co. v. Petaluma, 552 F.2d 897 (1975).

13. Supra, note 8, at 10.

14. Robinson v. City of Boulder, 547 P.2d 228 (1976).

15. Id. at 232.

16. See generally, Hirst and Thomson, "Capital Facilities Planning as a Growth Control Tool," Management and Control of Growth, Vol. II, p. 461, The Urban Land Institute (1975).

17. Secondary Impacts of Public Investments in Highways and Sewers, prepared for the Council on Environmental Quality, HUD, by Environmental Impact Center, Inc., p. 5 (Feb. 26, 1975).

18. Secondary Impacts of Transportation and Wastewater Investments: Review and Bibliography, Office of Research and Development, U.S. EPA, EPA 600/5-75-002, p. 21 (Jan. 1975).

19. Id. at 22.

20. Conversation with Dave Stewart, Dane County Regional Planning Commission, March 29, 1976.

21. Wis. Stats. sec. 144.12 (1975).

22. For descriptions of various types of districts (metro, municipal, town, etc.) and how to establish a district see, Klessig and Yanggen, Town Sanitary Districts in Wisconsin; Their Legal Powers, Characteristics and Activities, Inland Lake Demonstration Project, UW-Extension (November 1973); and Feltehausen and Abbot, Institutional Factors in the Creation of Local Sanitary Districts in Wisconsin, Land Tenure Center and Department of Agricultural Journalism, University of Wisconsin Water Resources Center, Technical Report Wis WRC 74-01 (April 1974).

23. City of Milwaukee v. PSC, 268 Wis. 116, 66 N.W.2d 716 (1954).

24. Wis. Stats. sec. 66.069(2)(d) (1975).

25. City of Milwaukee v. PSC, 241 Wis. 249 (1942).

26. Wis. Stats. sec. 66.069(2)(c) (1975).

27. The thrust of the land use plan being developed for Dane County involves the identification of urban service areas for the municipalities within the county. Dane County Regional Planning Commission, Newsletter, Vol. 10, No. 1 (January 1978).

28. Town of Beloit v. PSC, 34 Wis.2d 145, 151 (1966).

29. Id.

30. Sewer--McQuillan, The Law of Municipal Corporations, Vol. II, 31.17 (1964); water--"Right to Compel Municipality to Extend its Water System," Anno. 48 A.L.R. 2d 1222 (1956).

31. 48 A.L.R. 2d 1222 (1956).

32. Note, "The Duty of a Public Utility to Render Adequate Service: Its Scope and Enforcement," 62 Columbia L. Rev. 312, 316 (1962).

33. Ramsay, "Utility Extension: Timing and Location Control," 26 Stanford L. Rev. 945 (1974); reprinted in Management and Control of Growth, Vol. II. p. 444, The Urban Land Institute (1975).

34. Supra, note 32, at 316.

35. Id. at 316-318.

36. National Land and Investment v. Kohn, 419 Pa. 610 (1965).

37. Appeal of Girsh, 437 Pa. 398 (1970).

38. Appeal of Kit Mar Builders, Inc., 439 Pa. 768, 769 (1970); and Golden, supra note 11, at 398.

39. Westwood Forest Estates v. Village of South Nyack, 244 N.E.2d 700 (1969).

40. Hawkins v. Town of Shaw, 437 F.2d 1286, rev'd 303 F. Supp. 1162 (1972).

41. Golden, supra note 11; in Charles v. Diamond, 345 N.Y.S.2d 764 (1973), the court held that the village may not wait 4 years to alleviate a sewage treatment inadequacy. In Belle Harbor Realty Corp. v. Kerr, 350 N.Y.S.2d 698 (1973), the court held that a city could not punish a single landowner or a few landowners by refusing building permits where the sewage system was, and had been for some time, grossly inadequate. However, the court allowed a building moratorium stating that "if the city does choose to impose a moratorium, but then fails to remedy the sewerage problem with dispatch, property owners could... sue to compel such remedial action, as well as for any damages which might have resulted from the city's failure to perform its duty."

42. The federal grants for sewer construction require that a design life of 20 years be built into the system. Public Law 92-500.

43. E.g., a threat to public health; Comment, "The Limits of Permissive Exclusion in Fiscal Zoning," 53 Boston U.L. Rev. 453 (1973).

44. Reid Development Corp. v. Parsippany-Troy Hills Township, 81 A.2d 416 (1951) and 89 A.2d 667 (1952).

45. "Legal Considerations in Growth Management," ASPO Planning Advisory Service Report No. 309, 310, p. 58 (August 1975).

46. Id. at 61.

47. Beloit, supra note 28.

48. Hawkins, supra note 40.

49. The right to travel and migrate may be such a "fundamental right"; phased growth programs have been challenged on this ground; see, Construction Industry Association of Somoma Co. v. Petaluma, 375 F. Supp. 574 (1974), rev'd 552 F.2d 897 (1975) and Brower, Owens, et al., Urban Growth Management Through Development Timing 24 (1976).

50. Comment, supra note 43, at 474.

51. Id. at 475-476.

52. Supra, note 45.

53. Wis. Stats. sec. 144.025(2)(r) (1975); 60 Op. Atty. Gen. 523 (1971).

54. Wis. Stats. sec. 144.07(1) (1975).

55. Beloit v. Kallas, 76 Wis.2d 61, 250 N.W.2d 342 (1976).

56. The two conflicting statewide interests in this case concerned the protection of water quality and the expansion of urban areas through annexation.

57. Village of Sussex v. DNR, 68 Wis.2d 187 (1975).

58. Id. at 198.

59. Wis. Admin. Code sec. NR 110.05.

60. Wis. Stats. sec. 144.04 and Wis. Admin. Code Chapters NR 108 to 111.

61. Wis. Stats. sec. 1.11.

62. Under WEPA guidelines state agency actions are classified into three categories regarding EIS review requirements: Type I actions that always require an EIS; Type II actions that may or may not require an EIS, depending upon agency determination of significance via a screening worksheet procedure; and Type III actions that never require an EIS. There is a considerable amount of discretion exercised on the part of state agencies in determining what category an action will be placed in. DNR classified sewer extension approvals as Type III actions. The Wisconsin Environmental Decade has lost a recent suit against the DNR before the State Supreme Court contesting that proposed changes in the administrative rules governing sewerage systems require that an environmental assessment be done (Wisconsin's Environmental Decade, Inc. v. Department of Natural Resources, ___ Wis.2d ____ (1978)). Specifically, the complaint centered on NR 110.05, which relates to those regulations and procedures pertaining to sewer extensions. The court held that if WEPA requirements were not applicable to the establishment of administrative rules on

sewage extensions in 1974, they would also not apply to the recent changes in those rules promulgated in 1976, through sec. 144.025 (2)(c), Wis. Stats. The court stated that since the DNR is permitted, but not required, to adopt rules for sewer extension requests under sec. 144.025(2)(c), it is free to process sewer extension applications and determine if an EIS is required for extensions on a case-by-case basis.

63. Madison Metro Sewer District v. DNR, 63 Wis.2d 1975, 216 N.W.2d 533 (1974).

64. The recently enacted Farmland Preservation and Tax Relief Program, Chapter 29, Laws of 1977, contains provisions directly or indirectly related to public services. After September 30, 1982, counties must adopt agricultural preservation plans and/or exclusive agricultural zoning ordinances as requisites for tax relief eligibility of landowners. For those counties that have adopted an exclusive agricultural zoning ordinance, the following findings must be taken into consideration if land within an exclusive agricultural zone is rezoned: 1) whether adequate public facilities exist or will soon be provided (sec. 91.77(1)(a)); 2) whether the provision of these public services will not be an unreasonable burden for the local government (sec. 91.77(1)(b)); and 3) whether the land is suitable for development and will not result in undue water or air pollution, soil erosion, and will not unreasonably harm important natural areas (sec. 91.77(1)(c)). Counties that adopt farmland preservation plans must also include in such plans a "program of specific public actions designed to preserve agricultural lands and guide urban growth." Not binding on the county or landowners, the plan must include, among other things: 1) a plan for future expansion or financing of public facilities (sec. 91.57(2)), and 2) procedures and standards for controlling the installation and maintenance of private waste disposal systems, and identification of areas not suitable for such systems (sec. 91.57(3)).

65. The denial of a utility extension is not a taking of private property resulting from a lower land value without utilities because any value the property would have had with utility service was speculative. See Ramsey, supra note 33, at 448.

66. Wis. Stats. sec. 144.025(2)(r) (1975).

67. In re City of Fond du Lac, 42 Wis.2d 323, 166 N.W.2d 225 (1969).

68. Wis. Stats. sec. 144.025(2)(r) (1975).

69. Because the utility must plan for normal growth, it is likely that the municipality may not deny service forever.

70. Beloit, supra note 28.

71. Pritchard, "Banning Subdivisions That Promote Sprawl and Pollution," Center for Public Representation, Discussion Paper 75-1-DP, Madison, Wisconsin (January 28, 1975).

72. Article IX, sec. 1 of the Wisconsin Constitution.

73. Wirth, "Summary Report of a Survey of Private Sewage Disposal Systems Serving Water Front Properties," Wisconsin Department of Health and Social Services (November 13, 1967).

74. Wis. Stats. sec. 144.025(2)(q) (1975).

75. Dave Stewart of the Small Scale Waste Management Project suggests six minimum standards to provide a closer monitering of the county sanitary program:
    1. Require a certain number of qualified officials to administer the sanitary program, based on a formula including area, population and average number of permits requested.
    2. List qualifying characteristics of officials or provide a testing program for officials.
    3. Design a permit procedure and application for both conventional and innovative systems.
    4. Require mandatory preapproval of on site inspection prior to issuance of the permit with waiver of the inspection if the official personally knows the site or if soil maps indicate no possibility of any characteristic other than that on the application.
    5. Require one or more on site inspections during construction of the system.
    6. Require the official to sign a statement that inspections were made.

76. The basis for the police power regulation would be reasonable and in the interest of the public welfare.

77. See the chapter of this report on urban development moratoria for further discussion of these issues.

78. McQuillan, supra note 30, at 31.30.

79. Wis. Stats. sec. 144.06. In a case before the Wisconsin Supreme Court, Vandervelde v. Green Lake, 72 Wis.2d 210 (1976), it was held that legislative intent showed that the population restriction applies only to towns.

80. 39 Op. Atty. Gen. 499 (1950).

81. Wis. Stats. sec. 62.11 (5) Powers. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit,

and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

82. Supra, note 80.

83. Sussex, supra note 57.

84. Just v. Marinette County, 56 Wis.2d 7, 16 (1972).

85. Sussex, supra note 57, at 197-198; under Wis. Stats. sec. 146.14(1) improper sewage disposal facilities on private property constitute a public nuisance. The local government can order abatement of the nuisance. If the owner takes no action within 30 days, the local government can abate the nuisance or contract to have the work performed and recover the cost from the owner. This statute could also be used to compel sewer connection.

86. Wis. Stats. sec. 144.06 (1975).

87. Butcher v. Township of Grosse Ile, 387 Mich. 42, 194 N.W.2d 845 (1972); Andrews v. Jackson County, 43 Mich. App. 160 (1972).

88. Village of Sussex, which required that only contaminated wells must be capped, can be distinguished from the septic tank case. First, Sussex dealt with the authority of the DNR to order the installation of a village water system. The powers of a state agency over local matters should be limited to those measures which are absolutely necessary. A local government is composed of representatives of the locality and should be accorded wider discretion. The electors have a remedy against local officials--at reelection time or via referendum. There are no such safeguards against arbitrary state agency actions. Second, the septic tank system poses a greater public health hazard than individual wells. A large ground area overloaded with sewage could pollute ground water, which in turn could pollute surface waters further away from the immediate vicinity. Therefore, the local government should have broader powers to control septic systems.

89. Vandervelde v. City of Green Bay, 72 Wis.2d 210 (1976).

90. A legitimate basis may well provide a legal justification.

91. O'Keefe, "Time Controls on Land Use: Prophylactic Law for Planners," Management and Control of Growth, Vol. II, p. 62, The Urban Land Institute (1975).

92. There are three major kinds of sprawl: 1. low density continuous development; 2. ribbon development; and 3. leapfrog development.

93. The Department of Health and Social Services has approved three types of alternate private sewage disposal systems, called mound systems. They require conventional septic tanks sized as would normally be required for the number of rooms in the house. The septic tank is used as a holding tank from which fluid for filtration is pumped into an above ground mound (which may vary in size from 29' x 53' to 50' x 70'). Where septic tanks require 54" of permeable soil from the ground level to bedrock or the high water mark, mound system tanks require only two feet of soil and between one and two feet of fill. The filtration mound is artificially constructed above the ground, but the purified waste liquid does eventually filter into the ground. These systems are permitted with state approval when there are high groundwater, high bedrock or slow percolation rate conditions on the property. Like conventional septic tank systems, the mound systems need proper maintenance. There still exists the possibility of pollutants reaching the ground water supply.

Holding tanks are also permitted upon state DH&SS approval. However, despite the fact that they do not filter waste water into the soil they do present a health hazard because owners often hire non-certified disposal services which dump the sewage in creek beds or on the ground surface. Conversation with Douglas Hibray, Bureau of Environmental Health, Department of Health and Social Services, March 25, 1976.

94. Downing, The Role of Water & Sewer Extension Financing in Guiding Urban Residential Growth, Report #18, Water Resources Research Center, Univ. of Tennessee (June 1972).

95. Esser, "Urban Growth and Municipal Services, Part IV: Must City Boundaries Continue to Grow?" 23 Popular Government 19 (June 1957); Downing, supra note 94, at 164.

96. Id.

97. See Esser, supra note 95, for a detailed analysis of the effects of various policy approaches to utility extension on the municipality and area.

98. Wis. Stats. sec. 144.21 (1975) and Wis. Admin. Code Chapter NR 125.

99. Wis. Stats. sec. 144.23 (1975) and Wis. Admin. Code Chapter NR 127.

100. Conversation with Jim Sinopoli, Wisconsin Office of State Planning and Energy, January 26, 1978.

101. Conversation with Steve Friedman, Wisconsin Office of State Planning and Energy, July 15, 1976.

102. A municipality or town already has the statutory authority, through sec. 236.13(2)(a), to require as a further condition of approval

for a subdivision that the subdivider make and install any public improvements reasonably necessary or that he execute a surety bond to insure that those improvements will be made within a reasonable time. Section 236.13(2)(b) further states that such public improvements, which include laterals and collectors, may be required to be provided without cost to the municipality. Such subdivision exactions may also be applied to a municipality's extraterritorial subdivision review powers. Finally, sec. 236.13(2m) provides that the DNR may, if it deems it necessary to prevent pollution of the state's waters, require that a subdivider provide adequate private disposal systems or public sewage disposal facilities for lands within 500 feet of the ordinary high water mark of any navigable lake or stream.

Two communities along the shores of Lake Michigan illustrate the use of subdivision exactions with respect to sewerage facilities. The City of Marinette's subdivision ordinance requires that connections to the municipal system be provided, with the city assuming 40% of the cost and the developer paying the balance. The Village of Sister Bay's subdivision ordinance provides that after the village installs a sewerage system, developers are required to furnish laterals and pumping stations, if necessary. However, the village will absorb any extraordinary costs where the benefits derived from the facilities affect more than the subdivision itself, such as sewers with a diameter greater than eight inches.

103. The criteria used for ranking projects are contained in Chapter NR 160, Wis. Admin. Code.

104. There are three steps through which a municipality may receive federal funding. Step 1 provides funds for facility planning, step 2 funds are used for plans and specifications and step 3 funds go toward the actual construction of projects.

105. The Department of Natural Resources, "Status of Federally Funded Water Pollution Abatement Facilities in Wisconsin as of July 7, 1977," (Mimeographed and undated).

106. Conversation with Fred Goold, Project Director, Northwest Regional Planning Commission, July 16, 1976.

107. Southeastern Wisconsin Regional Planning Commission, Newsletter Vol. 14, No. 4 (July-August 1974) and Wis. Stats. sec. 144.22 (1975).

108. According to the state administrative code, the minimum lot size for septic tank installation is 20,000 square feet, with 10,000 square feet of continuous suitable ground area, and two suitable septic field areas.

109. This conclusion is drawn from Map 1 of the Land Resources Analysis Program, entitled "Generalized Soil Limitations for Use of Septic Systems" prepared by the State Planning Office, Wisconsin Department

of Administration and the Wisconsin Geological and Natural History Survey. University of Wisconsin-Extension (1975).

110. Wis. Stats. sec. 66.069(2)(c) (1975).

111. For example, alternative systems could be installed only to replace existing malfunctioning septic systems; or only when a denial of permits would be a denial of natural growth and sewer extensions would be economically unfeasible or extremely difficult to install due to distance or geography. The mound system was developed and is being tested by the Small Scale Waste Management Program of the University of Wisconsin. It provides three packages for differing soil conditions. One package is being developed only as a replacement for existing and failing septic systems. In addition to replacing existing systems, the other two packages may also be utilized in areas presently restricted to conventional septic systems. The mound underwent a two-year trial period which was administered by the Department of Health and Social Services. The physical restrictions under the trial period were considerably more stringent than presently known engineering limitations would indicate. Although the trial period expired in June, 1977 and allowed for the installation of 500 mound systems, it was extended along with an additional 600 mound permits, all of which were issued within a three-month period. Presently, there is a waiting list for the permits. (Conversation with Jim Sinopoli, Wisconsin Office of State Planning and Energy, January 12, 1978).

112. Ad Hoc Private Wastewater Treatment Systems Committee, "Report to the Natural Resources Board, Wisconsin Water Quality Program," Madison, Wisconsin (March, 1977) at 43.

113. Id.

114. Id. at 45. For example, under potential engineering criteria, the counties of Racine, Kenosha and Ozaukee will have, respectively, 47.8%, 43.5% and 41.1% of their land area suitable for mound development.

115. Id. at 49.

116. Id. at 25.

117. An example of a prime utility-related reason is seen in current development. Recently the Department of Natural Resources has been evaluating more closely requests for sewer extensions. Often, the treatment plant cannot adequately treat increased sewage from additional development. Extension permits are being denied by the DNR and, as a result, there is a negative impact on urban development. The municipalities are now being compelled to increase the treatment capacity before they can respond to the requests for service even in areas where they have a duty to serve.

118. For a description of interceptors which engendered growth or had no effect on growth, see the Waunakee-DeForest and Finger Road studies prepared by the Wisconsin State Planning Office (1976).

119. This short segment deals with transportation policies in relation to road-auto use. There is a good deal of literature which describes how mass transit facilities can be used to tie a community together and eliminate auto-created sprawl. See for example, A. Voohers, The Changing Role of Transportation in Urban Development; and Secondary Impacts of Transportation and Wastewater Investments, U.S. EPA-600/5-75-002, p. 13-14 (Jan. 1975).

120. Friedman, State Policy Paper, Draft, State Planning Office (1976) at 36.

121. Secondary Impacts, supra note 119, at 10.

122. Id. at 10-11.

123. Conversation with Jim O'Neal, Wisconsin Office of State Planning and Energy, January 30, 1978.

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CHAPTER 2 : PUBLIC ACQUISITION OF RIGHTS IN LAND

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I. Introduction

Land, the great wealth once thought to be the limitless frontier of the United States, is now recognized as a scarce resource. As soon as man-made development takes place on a particular parcel of land, the natural character of the resource is often irrevocably destroyed. The only certain way to preserve the natural character of land is by preventing unwanted development on it. This is especially true for particular types of land in a limited geographic area. That is to say, one type of land cannot be satisfactorily replaced by another type in another location. Land that was ideally suitable for industrial development but which was actually developed for residential use cannot be compensated for by a wetland on the other side of town--the wetland is in all likelihood unsuitable for industrial development.

Not only can uncontrolled development destroy valuable land resources, it can cost local governments undue additional expense for scattered public service installation.

Therefore, governmental guidance is needed to affect the placement of development to preserve certain important types of land resources and to concentrate development in certain areas. Where strong pressures for development exist, zoning is often an ineffective technique to accomplish this.[1] It also seems unfair to many people to preserve and maintain an important amenity and/or ecological benefit for all by placing the entire burden on one member of the community--the landowner.[2]

Numerous planners and lawyers advocate public acquisition of interests in undeveloped land in order to exercise a more stable and sure control over the use of the land and, at the same time, compensate those owners whose use of their land is restricted. This is not to say that public acquisition is designed to completely supplant the more familiar polic power regulations. Rather, government possession of interests in land, in addition to police power regulations, can play an important role in preserving our delicate natural resources--the open land--and in providing necessary services.

This chapter will describe acquisition powers already granted to state and local governments, some of the various interests in land that the government may acquire, purposes for which acquisition can be used, various land acquisition programs to guide growth and preservation, as well as limitations on the tools mentioned.

II. Powers of Acquisition in Wisconsin

A. Types of Interests in Land

Generally, there are two types of interests in land which government can acquire--"fee" and "less than fee." Possession of a fee interest gives the owner all of the various interests

in the land and incidents of ownership. There is no control of land left with the previous owner or any other individual. A less than fee interest grants the possessor of that interest only partial control and interest in the land. The owner of the fee also retains partial interest. Examples of less than fee interests are leases, easements, options, and rights-of-way. A summary of the interests in land acquirable by various government authorities, and the purposes for which they may be acquired, is listed in the chart, Appendix A.

1. Easements, in General

a. Definitions

The most common and most discussed less than fee interest purchased by government for land use control purposes is the easement. An easement is an interest in land whereby the easement purchaser acquires a limited privilege in another's land.

A positive (or affirmative) easement gives the purchaser the right to do something on the land. Examples are hunting, fishing, or crossing the land in some manner for some purpose. A negative easement restricts the landowner's privileges on the land, exemplified by prohibiting the filling of a wetland, prohibiting development of a specific type or prohibiting development entirely.

A common example of a negative easement is the purchase of a "scenic easement," as where the aesthetic value of an attractive stretch of coastline is preserved by governmental purchase of the right to develop that area.

Whether postive or negative, easements may be either "appurtenant" or "in gross". If the purchaser of the easement owns land adjacent to the land restricted by the easement and if the easement is for the benefit of this adjacent land, the easement is said to be "appurtenant" and can be enforced against future landowners by the holder of that easement. However, the ownership of the appurtenant easement is tied to the ownership of the adjacent property--this type of easement cannot be transferred to individuals other than owners of the adjacent land. On the other hand, if the easement grants general rights and no nearby land is specifically benefited, the easement is "in gross". Traditionally the ownership of easements in gross could not be transferred. That is, if A owns the right to fish on

the land of X, who lives 200 miles from A, A could not sell his "fishing easement" to his friend B. In Wisconsin, however, easements in gross are transferable to subsequent purchasers if the original easement grant: (1) provided for transferability; and (2) is in perpetuity.[3] Easements in gross are also binding on the heirs, successors and assignees of the owner of the underlying fee interest.[4]

The Wisconsin statutes provide for easement acquisition by the state, city, village and town.[5] Both positive and negative easements are recognized by common law in Wisconsin.[6]

b. Advantages over fee simple

The advantages to the government of easement acquisition as opposed to total fee title acquistion are several:

1. The property remains on the tax rolls of the locality. Rather than losing the entire value of the property as a taxable unit, the government keeps a productive source of revenue as well as gaining whatever benefit the easement provides.

2. The cost of an easement is often significantly lower than the cost of the entire fee.

3. When the government purchases the entire fee interest, it incurs continuing maintenance costs, but with an easement, the landowner, not the easement owner, is usually responsible for property maintenance.

4. Acquisition of an easement interest provides the government with greater flexibility. Instead of purchasing all the rights in land, the government can purchase only those rights it needs and can tailor the grant to specific areas.

5. Easements may be purchased for either a term of years or in perpetuity. When purchased in perpetuity the government obtains the longest term possible for control--something which is not necessarily accomplished by control under the police power.

c. Tax consequences

Property tax impacts

Easements provide certain tax advantages to the landowner. Sale of the easement to an agency reduces the property taxes. According to the City of Madison's Assessor's Office[7] the value for which the easement was purchased is subtracted from the value of the land to determine the property's present value for tax assessment purposes.[8] Thereafter the landowner is only taxed on the remaining value of the land.

Income tax impacts

Income tax consequences of the proceeds gained from the sale of the easement may not be as important to the landowner when small amounts of land and money are involved. Nonetheless, the consequences should be noted.

For Wisconsin taxing purposes capital gains (which are gains from the sale of a capital asset, such as land) are taxed at the same rate as ordinary income (which are gains of a noncapital nature, such as those accruing from salaries, rents, etc.). Therefore, the taxes on the proceeds of an easement sale are the same despite this distinction.

However, there is a difference with federal taxation. A capital gains rate is allowed for a "sale of property." Court decisions and Internal Revenue rulings indicate that if the easement restriction deprives the landowner of practically all beneficial interest in the property, then the sale of the easement constitutes a "sale of property." If the land is totally unusable to the owner for only occasional periods, so that the owner has beneficial use of the land most of the time, payments received may be considered as for sale of property; however authorities do not agree on this point.[9] In order for the easement to be a sale of land, it seems that the easement must be perpetual. Nonetheless, the mere fact that an easement is in perpetuity does not assure that it is a sale of the land. If the perpetual right does not deprive the grantor of any substantial benefit or use of the property, it is not a sale of land. This would mean that easements, such as scenic easements where the owner can maintain crops and retain substantial use, do not constitute a sale of property.

That is not to say that income taxes are necessarily paid on the proceeds received by the landowner. The owner has the option of treating the proceeds as income or the owner can apply the proceeds of the easement against the cost of the land before any income is realized. In tax terms, the proceeds may be treated as income or as a reduction of the "basis" for the property, whichever the owner elects. Only the land affected by the easement can be used to determine the cost basis for deduction.[10] For example, if the land affected by the easement originally cost $4,000 and the landowner received $1,000 for the easement, no taxes would have to be paid. The $1,000 could be treated as income or it could be offset against the price of the property, reducing the basis of the property to $3,000. Thereafter, if the property is sold for $5,000, the owner would have $1,000 income if the easement sale had been treated as income or $2,000 income if the easement sale had been treated as a reduction of the property's basis. In either case the owner is taxed for the $1,000 received for the sale of the easement, but the owner has the option of having it taxed when the easement is sold or when the underlying fee interest is sold.

The rulings that proceeds must be applied against the basis of the property subject to the easement indicate that some interest in land was sold and that any income realized would be treated as a "capital gain". There is an absence of specific rulings in the matter. Both the Tax Court and the Fifth Circuit have held that rights similar to an easement (a restrictive covenant) are a sale of property.[11] It seems safe to say, then, that proceeds derived from the sale of an easement should be declared and taxed as capital gains.[12]

B. Means of Acquisition

There are two primary methods by which government acquires rights in land--voluntary grants and involuntary sales; that is, by negotiated purchase, gift, or grant and by condemnation. Governments may acquire property by either method only for public purposes, which are usually given in the statutes authorizing acquisition.[13]

1. Voluntary Grant

Voluntary grants are generally the more preferable means of acquisition because the sales price is acceptable to

both parties and the government does not need to rely upon its coercive powers of condemnation. Voluntary grants are more simple than use of the eminent domain power (condemnation) which is a more complicated, expensive, and restricted procedure.

2. Condemnation

Public use requirement

Conceptually, individuals owning land are always subject to the sovereign power of government to take the land for a "public use." The public use requirement has undergone many variations in definitional tests and appellations. The most restrictive test requires actual use by the public, for example, public buildings. A less restrictive test permits condemnation of land where the public will have a right to use the land, regardless of the intensity of use. An example of this would be a scenic easement, where the public has no right to enter on the land, only a right to look at it. The least restrictive test, the public benefit test, requires only that condemnation contributes to the general welfare and prosperity of the community.[14]

In the area of urban redevelopment the courts have expanded the condemnation power the furthest. The public benefit test was used to permit condemnation of property to clear slums and erect new housing, even when the cleared land was sold to private individuals. The public benefit was derived in having slum-free cities, not through direct and actual general public use.[15] The leading case in this area, Berman v. Parker,[16] stated that once the purpose of the action is within the authority of Congress, the right to realize that purpose through eminent domain is clear. The case implied that eminent domain is coextensive with the public welfare, and that legislative determination of public use may limit judicial review. State courts have generally adopted Berman in reference to blighted areas, but have not extended the public benefit test to all areas of condemnation.[17] For example, where land being acquired is not slum land and the area is to be developed for industrial purposes, and the public benefit of increased prosperity will not be realized for some time, some state courts have held that the public use requirement has not been met.[18]

In Wisconsin, the common law and statutes appear to interchange the terms "public use" and "public purpose." Public purposes for which a municipal corporation can

exercise its eminent domain powers are listed in the statutes,[19] and a local government can condemn land only for a public purpose authorized by the statutes or constitution.[20] The Wisconsin courts have also held that private property cannot be taken by government without the consent of the owner except for a public use.[21] The right to declare what constitutes a public use or purpose is vested in the legislative body.[22] The legislative finding that a taking is for a public use is not binding on the courts, but they will not overrule such a legislative determination except in instances where it is manifestly arbitrary or unreasonable.[23] This means that there is a presumption that a use is public if the legislative body has so declared it.

According to the Wisconsin Supreme Court in a case involving urban redevelopment, public use means possession, occupation, or enjoyment of land by the public or public agencies.[24] However, "that the property may be in public use or ownership for a short duration of time is not consequential. It is the character of the use and not its extent which determines the question of public use."[25] The urban renewal program is a public use not only because it eliminates the slum but also in that it prevents slum recurrence. Therefore, the city can resell the cleared land with restrictions assuring against blight.[26]

Necessity requirement

Wisconsin statutes also require that a necessity be shown for a taking by condemnation.[27] As with public use, the determination of necessity for taking land by condemnation rests exclusively with the legislative body of the government.[28] The court will only interfere to prevent abuse of discretion in utter disregard of necessity and will not disturb the determination of necessity by the condemning government in the absence of fraud, bad faith or gross abuse of discretion.[29] The degree of necessity required to support condemnation is only a reasonable one; not an absolute or imperative necessity;[30] condemnation need not be immediate or even the most desirable means of acquisition.[31] The court has refused to overrule a determination of necessity where a county condemned a right-of-way to permit duck hunters access to a navigable lake since the determination by the condemning government is beyond question by the courts if there is reasonable ground to support it.[32]

Just compensation requirement

The United States Constitution[33] and the Wisconsin Constitution[34] require that just compensation be given

for the taking of private property by condemnation. Wis. Stats. sec. 32.09(2) sets out rules governing the determination of just compensation. It provides that "in determining just compensation the property sought to be condemned shall be considered on the basis of its most advantageous use but only such use as actually affects the present market value."[35]

The procedure for determining just compensation when easement interests are being acquired is more complex. With scenic easements, the Wisconsin Department of Transportation employs its own appraisers to determine the difference in market value with and without the easement restriction. The department has set a figure of $50.00 as the minimum amount they will pay for a scenic easement, no matter how small the parcel.[36] The Department of Natural Resources also maintains departmental appraisers to determine the value of interests in land condemned by the department.

III. Land Acquisition Programs in Wisconsin Involving Less Than Fee Interests

A. Department of Natural Resources

As of July 1, 1975 the Department of Natural Resources (DNR) held and controlled 966,898.70 acres of land in Wisconsin by fee ownership; the DNR also held easements on 25,792.19 acres of land within the state.[37] These interests in land are acquired by the state through the DNR for a variety of purposes including fish, game, wildlife and forest management, park facilities, and scientific area control.

The Department of Natural Resources has had the power to acquire easements by negotiation or condemnation since enactment of the ORAP (Outdoor Recreation and Resource Development Program) legislation (Laws of 1961, Chapter 427). All of the easements currently held by the DNR were acquired by negotiation or donation; the DNR has not resorted to its condemnation powers for acquisition of less than fee interests.[38] When negotiating easements the DNR employs its own staff appraisers unless the value of the easement exceeds $50,000. Staff and private appraisers are then used. The DNR relies on staff personnel due to the special nature of easement appraisals. Not many private appraisers are interested in or prepared to handle such appraisals. The DNR estimates that the cost of easements is generally about 60% of the fee cost, except in the case of fishing easements where the DNR acquires a pathline along a stream and fences it off. The per acre cost of that type of easement is usually larger than the per acre cost for the fee acquisition of the entire parcel. Nonetheless, easement

acquisition is preferred over fee acquisition because only the land needed is acquired, the remainder of the property remaining in private hands for production and on the locality's tax roles.[39]

Easements are mainly acquired by the DNR for fish and game management, whereby the landowners permit the public to hunt or fish on specified areas of their land.[40] The cost per acre has risen greatly since the program's initiation in 1961. However, the average price paid per acre is a somewhat misleading figure. Easements are often donated for a nominal sum. For example, in 1973-74 game easements cost an average of $336.68 per acre. In 1974-75 the cost was $120.00 per acre. The difference is accounted for by an increase in donations and a much smaller number of acquisitions.[41]

Sample easement grant forms used by the DNR are attached in Appendix B. The easements all state that they are to be in perpetuity or forever, and all provide that the landowner's heirs and assignees will be bound by the easement. Some forms indicate that the easement is assignable by the grantee (the State of Wisconsin) to its successors and assignees. The forms also set out the rights and obligations of each party under the easement so that the landowner knows exactly what he/she is selling.

B. <u>The Department of Transportation</u>

Wisconsin has been a pioneer in the acquisition of scenic easements. Since the initiation of ORAP in 1961 the Department of Transportation (under the name of the State of Wisconsin) has acquired more than 15,000 acres of land by easement along more than 290 miles of state and federal trunk highways.[42]

There is no statutory definition of scenic easements. In practice there are easements appurtenant to public land which often contain some incidents of a positive easement. That is, the State of Wisconsin acquires the right to enter upon the land to inspect for violations of the easement, to remove materials not in conformance with the easement, to perform such scenic restoration as necessary and to prune or cut trees and brush to improve the view. The landowner's activities on the land are limited by the easement and development of the land is often severely restricted or prohibited.

The Wisconsin Supreme Court has recognized the authority of the state to condemn scenic easements, in particular along the Great River Road, the state's largest single easement acquisition program.[43] The court stated that the public's visual enjoyment of the scenic view constituted a public use despite the fact that the general public could not enter upon the land.[44]

Because the acquisition of scenic easements is only permitted along federal and state trunk highways the bulk of planned scenic easements had been acquired by 1970.[45] In the early 1960's scenic easements were sold for 1% of the land value. This was due to inexperience in scenic easement acquisitions of both the appraisers and the public. Where there is little development pressure the market value of the land before and after sale of the easement could be negligible. Therefore, the Highway Commission in the Department of Transportation set the $50.00 minimum for any individual easement sale. Currently easements are purchased for less than 50% of the fee simple title, with prices varying widely depending on such factors as the severity of the restrictions.[46] As with the DNR, the Department of Transportation (DOT) employs its own staff appraisers to determine the value of an easement.

The Department of Transportation rarely uses its condemnation powers to acquire scenic easements. Aside from several parcels, as for example along the Great River Road, most of the scenic easements have been acquired through negotiation.[47] The present reluctance to condemn stems from a number of factors, not the least of which is an antagonism of local landowners to the use of condemnation powers.

Presently the Department of Transportation is acquiring easements only in spot areas to fill in existing programs. Funds are being used to maintain and improve existing acquired easements. Unless new acquisition programs are initiated, it is doubtful that intensive acquisition efforts will be undertaken since nearly all planned areas have been obtained.[48]

Appendix C contains sample forms used by the Department of Transportation to acquire scenic easements by negotiation or condemnation. Because these easements are appurtenant to state owned lands (highways), there is no question that they are binding on subsequent purchasers of the land. The State of Wisconsin is the grantee; thus the potential administration of the easement is not limited to a single state agency. Like the easements purchased by the DNR, scenic easements are also in perpetuity.

C. Local Government Acquisition Programs[49]

Local governments in Wisconsin generally acquire land mainly for immediate public facility needs. Although cities, towns and counties have the power to acquire easements, nothing is being done on a widespread basis, and no data is available as to whether individual localities are involved in such programs.

There are indications that easements are more frequently being used in subdivision developments in the state.[50] These instances

usually involve either required open space dedications (which are more often dedications of fee interests) or common ownership of open space in the subdivision (often the fee interest is held by a neighborhood or property owners association) with residents having rights to use this open space.

IV. Land Acquisition Programs to Guide Development

A. Land Banking

1. The Land Banking Concept

In general

In Wisconsin, as in most other states, land acquisition programs are often designed to preserve specific resources or to acquire specific amenities such as parks. This is often done without adequate coordination with local development plans; it is only rarely done with the active goal of furthering these development plans. Programs have been suggested which use acquisition of land by local or regional authorities to actively guide development. These programs do not acquire conservation or scenic easements to preserve the restricted land in perpetuity; rather they acquire fee interests and hold the land until it is appropriate for community development needs. "Land banking" is the term given to these programs whose purpose is the accomplishment of community development goals through public acquisition and holding of undeveloped land in anticipation of either future public use or resale in conformance with community needs.[51] While not a new concept, land banking has not been frequently used on any large scale basis in the United States. However, since its use is often suggested by planners and citizens this section examines the concept, its use in other areas, and its potential usefulness in Wisconsin.

Land banking is based on the assumption that zoning controls are eventually inadequate to control the timing or character of urban development. Its advocates believe that long range trends in land use cannot be foreseen well in advance, and that more effective control can be gained by acquiring the land, observing market forces, and developing and disposing of the land at appropriate times.[52] The local authority thereby has ultimate control over when and how the land is developed. The basic aims of land banking include: (1) insuring a continuing availability of development sites; (2) controlling the timing, location, type and scale of development; (3) preventing urban sprawl; and (4) preserving for the public financial gains made from property which increases

in value due to government activities such as the provision of public services.[53]

There are two basic types of land banking. The first concerns early site acquisition for public facilities. The second involves land banking to manage growth.

Early site acquisition

A basic impetus behind early site acquisition is to save money. The government acquires undeveloped land for key facilities prior to the time the sites may be needed for actual construction. The government thereby saves by not having to pay any higher post-development condemnation costs and avoids price increases due to inflation.[54] In addition to these cost savings, early site acquisition provides some certainty to private interests as to facility location, thereby helping to guide development.

A 1966 survey indicated that one-third of the cities in the United States having a population greater than 50,000 had some early site acquisition program.[55] In Richmond, Virginia, the local government may acquire property on which private construction is planned if the property was designated for some future public use in its master plan.[56] In some cases a program may go beyond acquisition of future sites for actual construction. For example, in Montgomery County, Maryland, the county may acquire land adjacent to a proposed public facility at the time the facility land is acquired and later dispose of the property in a manner consistent with the nature of the public facility.[57]

A basic requirement for any effective early site acquisition program is a comprehensive plan or long range capital improvements program that indicates where public facilities are to be placed. The plan may well also have to be inter-governmental in areas where rapid growth is predicted in presently non-urban areas.[58]

Land banking to manage growth

Though it has not been widely used in the United States, land banking to manage growth has been used extensively in Canada and Europe. Eighty percent of the city's residential development and 95% of its industrial development has occurred on city-acquired property[59] in Saskatoon, Saskatchewan. One-half of the population of Stockholm, Sweden lives in areas acquired by land banking. There, a government agency has the power of condemnation to purchase designated land before specific plans are made for its use. The land is leased out to private parties under

long term contracts, which provide for more adaptability to changing needs.[60] Denmark also uses land banking to control land speculation.[61]

In the United States, Puerto Rico has developed a land banking program to prevent land speculation and to reduce the cost of providing services. A public corporation is empowered to acquire land by negotiation or condemnation. However, land acquired by condemnation for public works development or social welfare must be developed within fifteen years. Land surrounding a public works project is also frequently condemned to capture the publically created increase in value. In this manner, an adequate land supply at reasonable prices can be insured for middle and low income housing. Once land is acquired, it can be disposed of with any desirable conditions and limitations.[62] In Commonwealth v. Rosso the Puerto Rican Supreme Court upheld the use of eminent domain for land banking even when land is held in reserve for an unspecified period of time and for an unspecified future use.[63]

There are two main legal issues relating to land banking: (1) How far in advance of actual use can sites be purchased or condemned? (2) Does the holding of land by a government agency pending an unspecified use at an unspecified time constitute a public use such that condemnation can be used for its acquisition?

On the first issue, the Wisconsin Supreme Court has not examined the question of how far in advance of actual use a government can acquire land. Courts of other jurisdictions have reached divergent results.[64] The Michigan court held an attempt to condemn land for a school to be built 30 years in the future as invalid, saying that land could be acquired only for projects in the reasonably near future.[65] In contrast, the Florida court has held that a city has a duty to provide for future needs and cannot be limited by present demands. The court stated that the owner is compensated for the forseeable future demand for his land because future demand is reflected in the present market value; this applied however only to projects already planned or foreseen.[66]

In Wisconsin, as in most states, there is a presumption that a use is public if so declared by the legislative body.[67] The legal question here is whether acquisition is warranted at the present time, and this is more likely to be a problem where the acquisition is by condemnation rather than purchase. The Wisconsin court has held that the necessity for condemnation be reasonable, not absolute, imperative or immediate.[68] It would seem that early

acquisition of land destined for a public use would be acceptable within a reasonable time, where done to ensure desired placement and lower acquisition costs. The savings to the community of land and facility costs would benefit the public. The timing of advance acquisition would be determined by the relevant facts in each case.[69] Interim use by leasing the land to private parties may be permitted although such use would not be the primary purpose for which the land was condemned.[70]

Whether or not a land banking municipality in Wisconsin could acquire and condemn land for an unspecified use at an unspecified time is a more difficult question. Wisconsin statutes give cities, villages and towns the authority to acquire interests in land for any public purpose.[71] Therefore, the question is whether or not holding of land for development management reasons is a public purpose, even when the land may later be sold to private developers.

The Wisconsin court has held that a city may condemn land and resell it with restrictions to prevent the recurrence of blight and that both the elimination of blight and the prevention of its recurrence constitutes a public purpose.[72] In that case, the land was part of an urban renewal project and was resold shortly after condemnation. In addition the future use was determined prior to condemnation. In land banking, the future use is not predetermined, and the land is held by the government authority for an indeterminable time.

It is, however, unnecessary for the use for which the property is sold to be a direct public use. The Wisconsin court has held that the power to sell previously condemned lands when it is determined that they are no longer needed for public use is latent in every taking. However, this is very different from the condemning of land when it is known from the outset that a part is not necessary for a public use.[73] Assuming the holding of land for a development management objective is a public purpose, it should be permissible for the city, village or town to condemn a parcel of land, all of which is legislatively determined to be necessary for that public purpose, and then resell it with desired restrictions when appropriate for development.

Traditionally, the public use concept required for condemnation was limited to a specific direct public use such as a public building. However, the concept has been gradually broadened so that "public use" is often equated with "public benefit" or "public purpose." These include the police power goals of protecting the public health,

safety and general welfare. The test concentrates on the overall purpose of the project.[74] If the goals of the government project are beneficial to the community and the use of the property bears a reasonable relation to the goals, then the public purpose requirement is most probably fulfilled. In addition, the governing body's determination of the public purpose gives a presumption of validity.[75]

The Supreme Court of Puerto Rico has upheld the use of eminent domain for land banking. The court relied on Berman v. Parker,[76] an urban renewal case, which broadened the scope of public use to public benefit and looked at the overall purpose of the program.[77]

The Wisconsin Court might well look to its own urban renewal case as a precedent for upholding land banking. This case, David Jaffery v. Milwaukee, stated that prevention of a blighted condition is as important as its elimination.[78] Land banking could eliminate many conditions leading to urban sprawl and, in addition, would affirmatively promote both efficient and less expensive facility placements and orderly development. These objectives are similar to those of preventing blight. With review of condemnation, the public purpose, only if arbitrary or unreasonable,[79] and the broadened public purpose doctrine in general, it would seem quite likely that land banking would be held valid (assuming an explicit governing body determination that growth and land management are public purposes).

2. Practical Problems with Land Banking

One of the purposes of land banking is to ensure an adequate supply of land and eliminate inflation and land scarcity caused by speculators. However, during the government acquisition period inflation of land prices may occur due to the amount of land taken off the market within a short time span. During the holding phase, the government will have to pay holding costs which may or may not be regained by leasing the property. These costs will either be absorbed by the government or be reflected in eventual land sales prices.

Commentators have suggested that the appropriate land banking agency be a special purpose corporation which would be unconstrained by state and local politics and would have the authority to acquire land outside of municipal boundaries.[80] Some commentators have dismissed the municipal corporation as the land banking entity because it cannot acquire land outside of its boundaries, giving no effective control over future urban development.

This problem does not exist in Wisconsin. Statutes permitting acquisition of fee title and other interests in land give municipalities (cities and villages) power to acquire land or interests in land outside of municipal boundaries.[81] Therefore, the municipal corporation could be an effective land banking entity in Wisconsin.

The major obstacle to a land banking program in Wisconsin is financing. If the seven county area of Southeastern Wisconsin were to have undertaken a land banking program from 1963-1990 on the scale of the Stockholm experience, it has been estimated that the cost would have been from five to six billion dollars.[82] This of course envisions a program which would acquire enough land to meet all the development needs of the area. It would be possible for a locality to initiate a land banking program on a much smaller scale or for more limited purposes, acquiring only certain crucial lands or acquiring only lands intended for open space. The cost of the program would be drastically reduced, as would the overall land use control effectiveness of the land banking program. It could also force new development into non-land banked areas beyond the control of the land banking authority. The result could be leapfrogging rather than development guidance.

3. Application to the Coastal Area

Given the constraints listed above, it is doubtful whether a coastal municipality could afford to land bank for purposes of guiding land use without considerable state or federal financial assistance. While the legal authority may exist for land purchase and its future resale, the amount of land and money needed for a well operating program would be prohibitive.

Nonetheless, communities could use some aspects of a land banking program to their advantage. Purchase of significant environmental areas would preclude development in those areas. An area could be classified as a park, a purpose for which the municipality has the authority to condemn.[83] Purchase or condemnation of an area could also come under the "any other public purpose" justification for acquisition.[84] However, resale of the land would not be envisioned, and the activity would therefore not be "true" land banking. The community could, however, resell the land if the need for development arose.[85] Communities might also consider the acquisition of key "development" land, holding it until it was ripe for development and then placing it back on the market.

Coastal communities could also undertake a land banking program using acquisition of easements or development

rights.[86] This could be done to manage growth, preserve certain land as open space, preserve highly productive agricultural land, or preserve exceptional natural environmental characteristics. Wisconsin statutes allow cities, villages and towns to acquire by purchase or condemnation easements for the benefit of the public or for any public purpose including the planning of the future needs of the municipality to best promote the public health, safety, morals, order, convenience, prosperity or the general welfare.[87] The statutes also provide for resale of an easement whenever it is no longer needed for a public purpose.[88] Therefore, when future development necessitates a different use other than preservation or holding there would be no impediment to resale since the public purpose of preserving the resource and directing growth into other desired areas would have already been served. If permanent control is desired, perpetual easements could be acquired. It would seem that scenic easements[89] are also acquirable since the Wisconsin Supreme Court has held that the visual enjoyment of onlookers constitutes a public use.[90] According to the statutes only a public purpose or benefit is necessary for acquisition of an easement. Scenic easements would also serve the planning function of prohibiting development in unsuitable areas.

A major drawback to even this limited land banking concept is the "political" climate and attitudes in many communities relative to their reluctance to accept such active government control of the land. Condemnation of easements may be politically unfeasible and negotiations may therefore be time-consuming and nonproductive. Landowners may view governmental acquisition of rights in land as simply too much irrevocable control.[91] These pressures are likely to be much greater if the acquisitions are being made by a state agency rather than a locality.

Another serious drawback is financial and is reflected by the fact that few localities have purchased easements on any large scale. In the case of perpetual restrictions on all development, the cost of the easement (which would be a purchase of development rights) would approach the cost of outright purchase of all interests in the land if any development demand exists or is likely to exist in the foreseeable future. In addition the enforcement costs might be higher than the locality may predict.

B. Non-Regulatory Means

1. Public Access

Localities can acquire parcels of land for many purposes

which would benefit the coastal area. Under Wis. Stats. sec. 23.09(9) any county, town, city or village may apply for state funds to acquire land providing public access to any navigable lake or stream. This undoubtedly falls into the general public purpose category for which the government may acquire land.[92] The statute does not authorize condemnation for public access, but if the various land acquisition statutes permit condemnation for any public purpose, and public access to navigable waters constitutes such, public access should be condemnable.[93] Wis. Stats. sec. 60.18(15) permits towns to acquire by condemnation sufficient tracts of land for the reservation for public use of lake shores. Such a legislative determination of public use for towns would probably carry over to cities and villages, who may condemn for any public purpose.

2. Parks

Counties, cities, villages and towns may acquire by purchase or condemnation land for parks.[94] Park land could be used to provide public access to the shore, as well as to preserve some environmentally valuable land, indirectly channeling development away from the resource.[95] Development could also be diverted through easement purchases restricting land use around the park.[96] Localities may also encourage gifts of land for parks to the locality. As significant tax benefits may be available to the donor, such gifts are often financially attractive to some donors.

3. Industrial Site Purchase

Another existing land acquisition mechanism which could be used to preserve coastal areas would be the municipal purchase of industrial sites. Wisconsin statutes authorize cities, villages and towns to acquire, by means other than condemnation, real property within or contiguous to the city, village or town for industrial sites and to improve the same.[97] This power could be used to preserve lands particularly suited for coastally related development or could be used to channel development away from the coast where desirable.

C. Regulatory Means (Exercise of the Police Power)

1. Official Mapping

Cities and villages in Wisconsin have the authority to reserve land for streets, highways, parkways, parks and

playgrounds.[98] Once such a facility is properly recorded in the official map, no building permit within that facility area may be obtained unless the land fails to yield a fair return.[99] While authorization exists for the mapping of parks, the power is rarely, if ever, used. The taking problems posed by the mapping of an owner's entire tract of land for park purposes differs greatly from issues raised when only part of someone's land is mapped for a street. If the owner were deprived of beneficial use of all the land, a variance would have to be granted under the terms of the statute, or the land would have to be acquired and compensation would have to be paid.[100] If the landowner could profitably use the land despite the mapped park (that is, without acquiring new building permits), the mapping technique can be a useful tool to freeze land use until the city or village raises enough money to purchase the land.[101]

The official mapping powers extend to all lands within the extraterritorial plat review area. This encompasses a three mile area for larger cities and one-half miles for small cities and villages.[102] For streets and highways, only intraterritorial city or village streets may be extended into the extraterritorial area; cross streets (those not running into the city or village) may not be platted on the official map. Platting of future streets on the official map gives future development pattern and direction.[103] The map also limits growth within a jurisdiction in that building permits are not to be issued unless a street, highway or parkway giving access to the proposed structure has been placed on the official map.[104]

The official map can be changed by the city council or zoning board of appeals where enforcement of the provisions would entail practical difficulty or unnecessary hardships to private individuals.[105] In these instances, the difficulty would be balanced against the public interest.

2. Subdivision Dedications

Wisconsin statutes provide that all subdivisions abutting navigable lakes and streams must provide public access to those waters.[106] Unless otherwise agreed to by the state, access must be at least 60 feet wide, connected to existing public roads and must be provided at one-half mile intervals.

In Wisconsin a municipality may require a subdivider to dedicate to the public a part of his platted land in

order to meet those demands on the municipality created by the influx of people into the community who occupy the subdivision lots.[107] Generally, dedicated land consists of land for streets and other public facilities. If a municipality can provide evidence to show that more schools, parks and recreation sites are needed as a result of the subdivision, or an accumulation of subdivisions, dedication for those purposes constitutes a valid exercise of the police power.[108] If a subdivision is too small to dedicate adequate land for such purposes or does not contain suitable land an in lieu of dedication fee may be imposed.[109]

Any municipality, town or county may also adopt ordinances governing subdivisions which are more restrictive than the state regulations.[110] One purpose these subdivision regulations can provide is the encouragement of the most appropriate use of the land.[111] Therefore, coastal municipalities could place restrictions on subdivisions to preserve the coastal area.[112]

Dedication of land for parks and open space could be sustained in that the coastal area is a valuable limited resource which would remain open were it not for the new development. For example, the need for dedication of specific areas for access points would be the direct result of the subdivision in that the subdivision occupies previously undeveloped land and the influx of people into the area would cause a need for additional public access points.

Some coastal areas may need to be preserved to prevent the diminuation of valuable and limited types of areas.[113] Subdivisions might be prohibited entirely in those areas to promote the purposes of Wis. Stats. sec. 236.45(1), which includes the promotion of the public health, safety, and general welfare, including adequate provision for transportation, water, sewerage, schools, parks, playgrounds and other requirements. If the protection of open space or scarce environmental resources is a public requirement the restriction should stand in court.

Subdivision exactions alone can not effectively serve to preserve open space. Decisions as to what land is to be dedicated are largely left to the subdivider. Not all subdivisions will have appropriate land for the desired use and needed lands are not available unless subdivision is taking place. This indicates that in other than specialized situations, the technique must be used in conjunction with other land use measures to be very effective.

V. Conclusion

Broad powers exist for the state and local governments to acquire fee and easement interests in land for various preservation and development guidance purposes. Condemnation, as opposed to purchase, of both fee title and easements is permitted for a public purpose. However, a judicial upholding of condemnation for land banking or land preservation requires a broad interpretation of the public purpose. While not yet tested in court, the statutes seem to provide a broad basis for condemnation of easements for environmental preservation and development guidance.

The DNR and the DOT seem to have had success with their easement acquisition programs. Easement acquisition may also be a useful growth management tool for local governments. However, acquisition programs have not been developed on the local level, largely due to a lack of funds, a lack of familiarity with the technique, and political problems.

If a program were developed, it would be important to anticipate where development pressure will occur in the future so that high costs can be avoided. Financing should be made available from the state and federal government, since preservation of valuable coastal areas will benefit more than just the local community. By financially backing a local program the state can also give impetus and direction to local acquisition programs.[114]

If an easement acquisition program is implemented it is important that the easement grants be written clearly to specify exactly what restrictions are imposed on the landowner's use of the property and what rights are acquired by the purchasing authority. In addition, it must be specified whether the easement is assignable by the easement holder to heirs and assignees. It would be best to include language to the effect that heirs, successors and assignees are also bound by the restrictions. Of course, the easement should be recorded and checked every 60 years to ensure that notice of the easement remains on record.[115]

Where police power regulations have failed or have proven to be inadequate, or where perpetual preservation of an area is desired, easement acquisition and fee title purchase may be the best and most effective technique of growth management.

Notes

1. Comment, "Easements to Preserve Open Space Land," 1 Ecology L.Q. 728 (1971) at 729.

2. Note, "Public Land Banking: A New Praxis for Urban Growth," 23 Case Western L. Rev. 896 (1972) at 906.

3. Poull v. Mockley, 33 Wis. 482 (1873); Reese v. Enos, 76 Wis. 634, 45 N.W. 414 (1890). The original grant should also be a recorded interest.

4. Although this is not stated in the statutes or cases, it can be inferred from the law surrounding easements. The recording statute, sec. 893.15(5), provides that recording of, for example, a subsequent deed referring to the easement extends the notice of the easement for 60 years. Also, providing that the easement be in perpetuity would be useless if it were not binding on subsequent owners of the land. In addition, it has been the general practice in Wisconsin relative to easements acquired by the state that they do run with the land.

5. See chart, Appendix A, for statutory citations and purposes for which easements may be acquired.

6. Kamrowski v. Wisconsin, 31 Wis.2d 256, 142 N.W.2d 793 (1966).

7. Interview with Clint Johnston, City of Madison's Assessor's Office, July 7, 1976.

8. Wis. Stats. sec. 70.30 provides that the assessor deduct the value of the easement retained by the government from the assessable value of the property. Although this statute does not pertain to easement interests obtained by the government, Jacob Beuscher believes that the statute sets the basic policy and that the courts will follow sec. 70.30 in all government-owned easement cases. Conservation Easements and Open Space Conference, Dec. 1961, Wis. Dept. of Resource Development and State Recreation Committee, page 31.

9. Fed. Tax Reports 766 CCH Volume 7 par. 4717.066.

10. Fed. Tax Reports 766 CCH Volume 6 par. 4717.0673.

11. Commissioner of Internal Revenue v. Louis W. Ray, 54-1 USTC par. 9235, 210 F.2d 390 (1954).

12. For a full discussion of the tax consequences of easements, see Note, "Progress and Problems in Wisconsin's Scenic Easement and Conservation Easement Program", 1965 Wisconsin L.R. 352 (1965) at 357-366.

13. Purposes for which Wisconsin governments may acquire property are listed in the chart, Appendix A.

    Other methods by which governments may acquire interests in land, such as through tax delinquencies, are not considered in this report.

14. Note, "The Public Use Doctrine: Advance Requiem Revisited", 1969 Law and the Social Order, 688 at 690 (1969).

15. Berman v. Parker, 348 U.S. 26 (1954).

16. Id.

17. Valente, Local Government Law 407 (1975).

18. City of Little Rock v. Raines, 241 Ark. 1071, 411 S.W.2d 486 (1967); Hogue v. Port of Seattle, 54 Wash.2d 799, 341 P.2d 171 (1959); Opinion of the Justices, 152 Me. 440, 131 A.2d 904 (1957).

19. See chart, Appendix A.

20. City of New Lisbon v. Harebo, 244 Wis. 66, 271 N.W. 659 (1937).

21. Schumm v. Milwaukee County, 258 Wis. 256, 45 N.W.2d 673 (1951).

22. Id.

23. David Jaffrey Co. v. Milwaukee, 267 Wis. 559, 579, 66 N.W.2d 362 (1954).

24. Id.

25. Id. at 581.

26. Id. at 584.

27. Wis. Stats. sec. 32.07 (1975).

28. Swenson v. Milwaukee County, 266 Wis. 129, 63 N.W.2d 103 (1953).

29. Id. at 132.

30. Klump v. Cybulski, 274 Wis. 604, 81 N.W.2d 793 (1957).

31. Herro v. Natural Resources Board, 53 Wis.2d 157, 192 N.W.2d 104 (1971).

32. Branch v. Oconto County, 13 Wis.2d 595, 109 N.W.2d 105 (1961); Wis. Stats. sec. 23.09(8) (1975) gives the county authority to condemn for such a right-of-way.

33. United States Constitution, Article V.

34. Wisconsin Constitution, Art. I, Section 13.

35. Wis. Stats. sec. 32.09(2) (1975).

36. Conversation with Lester Schultz, Real Estate Agent, Wisconsin Dept. of Transportation, July 1, 1976. The Highway Commission has condemned scenic easements in the past but is now reluctant to condemn easements, generally only using the power to fill in existing projects.

37. Report on the Land Acquisition Program, 1974/75, Wisconsin Natural Resources Board (January 1976) at 1.

38. Even with fee acquisition, the DNR does not often use condemnation. In recent years, only 5-6 projects have required condemnation. Among these were a section of railroad grade to be used for a bicycle trail, areas of two state parks and some land along a designated wild river. Conversation with Dick Steffes, Real Estate Division, DNR, August 4, 1976.

39. Conversations with Dick Steffes, Real Estate Division, Department of Natural Resources on June 30 and August 4, 1976.

40. Report, supra note 37, at 7.

41. Id. at 9, and conversation with Dick Steffes, June 30, 1974.

42. Summary of ORAP Program, 1961 thru 12/1/75, chart made available by the Dept. of Transportation.

43. Kamrowski, supra note 6; based on Wis. Stats. secs. 15.60, 84.105, and 20.420(86) (1975).

44. "The enjoyment of the scenic beauty by the public which passes along the highway seems to us to be a direct use by the public of rights in land which have been taken in the form of a scenic easement and not a mere incidental benefit from the owner's private use of the land." Kamrowski, supra note 6, at 265.

45. Summary, supra note 42, and conversation with Lester Schultz, Department of Transportation, July 1, 1976.

46. Conversation, supra note 36.

47. Id. This has not always been the case. Prior to the late 1960's the easements were frequently condemned if a negotiated agreement could not be reached.

48. Id.

49. For various acquisition powers see chart, Appendix A.

50. Conversations with Phil Evenson, Southwest Wisconsin Regional Planning Commission and Charles Denauer, City of Madison Department of Planning, July 2, 1976.

51. D. Brower, D. Owens, R. Rosenberg, I. Botrinick, and M. Mandel, Urban Growth Management through Development Timing 67 (1976) (hereinafter cited as Urban Growth Management).

52. Note, supra note 2.

53. Urban Growth Management, supra note 51, at 67.

54. Id. at 68.

55. Id.

56. Note, supra note 2, at 914.

57. Id.

58. Urban Growth Management, supra note 51, at 70.

59. Note, supra note 2, at 909-910.

60. Id. at 912.

61. Urban Growth Management, supra note 51, at 71.

62. Note, supra note 2, at 920-922.

63. Commonwealth v. Rosso, Opinion No. 67-172, El Tribunal Supremo de Puerto (December 7, 1967); appeal dismissed, 393 U.S. 14 (1968).

64. Note, "Techniques for Preserving Open Space," 75 Harvard L.R. 1622 (1962) at 1634.

65. Grand Rapids Board of Education v. Baczowski, 340 Mich. 265, 65 N.W.2d 810 (1954).

66. Carlor v. City of Miami, 62 So.2d 897 (Fla.), cert. denied 346 U.S. 821 (1953).

67. David Jaffrey, supra note 23, at 579.

68. Chicago and N.W.R. Co. v. Racine, 200 Wis. 170 (1929); Klump, supra note 30; Herro, supra note 31.

69. E.g., How much money is saved? How crucial is the location?

70. Wis. Stats. sec. 62.23(17) gives cities the ability to lease any real estate condemned but not necessary for improvement (i.e., memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, public building sites) with reservations to protect the improvement. Villages and towns also have this power under Wis. Stats. secs. 61.35 and 60.18(2). It would seem that by analogy the municipality could also lease the land to be used for the improvement prior to actual use. The purpose would be the same--to preserve or protect the land for the improvement.

71. Wis. Stats. secs. 61.34(3) & (3m), 62.22(1) & (1m), and 60.18(2) (1975).

72. David Jaffrey, supra note 23, at 581.

73. State ex rel. Thompson v. Giessel, 265 Wis. 185, 60 N.W.2d 873 (1953).

74. Berman, supra note 15. However, not all state courts have adopted this broad definition of "public use", and others have limited such a broad reading to cases involving urban redevelopment. See, e.g., Hogue v. Port of Seattle, 54 Wash.2d 799, 341 P.2d 171 (1959). See generally: Note, "The Public Purpose of Municipal Financing for Industrial Redevelopment," 70 Yale L.J. 789 (1961); Note, "What Constitutes a Public Use?" 23 Albany L. Rev. 386 (1959); Note, "What is Public Use in Eminent Domain," 4 St. Louis Univ. L. Rev. 316 (1957).

75. Urban Growth Management, supra note 51, at 76; Note, supra note 2, at 949-956.

76. Berman, supra note 15.

77. Id.

78. David Jaffrey, supra note 23.

79. Id.

80. Note, supra note 2, at 938.

81. Wis. Stats. secs. 62.22(1) & (1m), 61.34(3) & (3m); although secs. 62.22(1m) and 61.34(3m) do not specifically state that the city or village may acquire easements and other less than fee interests in land outside their boundaries, the statutory intent would seem to be concurrent with the preceeding section which explicitly permits extraterritorial acquisition.

82. Farmer, Evaluation of Fee Simple Acquisition, Less Than Fee Simple Acquisition, and Compensable Regulations to Control and Direct Urban Growth, Wisconsin Bureau of Planning and Budget (June 1973) at 9.

83. Wis. Stats. secs. 62.22(1) and 61.34(3) (1975).

84. Wis. Stats. secs. 62.22(1) and 61.34(3). The purpose would be preservation of scarce resources for the public benefit.

85. Wis. Stats. secs. 61.34 and 62.22 permit resale of acquired property.

86. While counties may acquire land for any public purpose (secs. 59.01(1) and 59.07(1)), they have no broad authority to acquire easements. It might be desirable to grant counties the authority to acquire scenic easements along county highways (the state is limited to scenic easement acquisition along state and federal highways only). Counties could then preserve spots of particular beauty or environmental importance in the coastal area when towns and villages do not have sufficient funds for this purpose. Also, the majority of the Wisconsin coastal shoreline is comprised of unincorporated areas. Only 137 of the more than 620 miles of shoreline lie within incorporated areas. (Conversation with Robert Chase, cartographer, Wisconsin State Planning Office, Aug. 12, 1976). Therefore, if scenic easements are seen as a valuable preservation tool, county authority to acquire easements could be particularly significant to coastal area preservation.

87. Wis. Stats. secs. 61.34(3m), 61.35, 62.22(1m), and 62.23 (1975); note that these purposes allowable for condemnation are the same as those for exercise of the police power, e.g., zoning.

88. Wis. Stats. secs. 61.34(3m) and 62.22(1m) (1975).

89. Those easements restricting development of areas along roadways to preserve particularly scenic views.

90. Kamrowski, supra note 6.

91. Irrevocable in that the landowner cannot terminate the easement, whereas he/she could seek a zoning variance or amendment.

92. Wis. Stats. secs. 59.01, 60.18(12), 61.34(3), and 62.22(1) (1975).

93. Counties have no general condemnation powers and therefore could not condemn a public access corridor apart from a park.

94. Wis. Stats. secs. 27.05(3), 60.18(12), 61.34(3), and 62.22(1) (1975).

95. For example, the Dane County Park Commission purchased a large tract of land on the west side of Lake Waubesa for park and preservation purposes. The city of Madison planning office encouraged the purchase to alleviate development pressures in that area and thereby forestall the need to extend services. Conversation with Charles Denauer, City of Madison, Department of Planning, July 2, 1976.

96. The DNR also purchases restrictive easements around state parks as a bumper zone (conversation with Dick Steffes, Department of Natural Resources, August 4, 1976). Although counties would not be able to acquire such easements, cities, villages, or towns could, provided the preservation of the area and the channeling of development are valid public purposes.

97. Wis. Stats. secs. 61.34(3), 62.22(1), and 66.52 (1975).

98. Wis. Stats. secs. 61.35 and 62.23(6) (1975).

99. Wis. Stats. sec. 62.23(6)(d) (1975).

100. Of course, immediate condemnation of the land for park purposes would have to be a public purpose.

101. Beuscher, "Conservation Easements and the Law," Conservation Easements and Open Space Conference, Madison, Wisconsin (Dec. 13 & 14, 1961).

102. Wis. Stats. sec. 62.23(6) (1975).

103. Beuscher and Kucirek, "Wisconsin's Official Map Law," 1957 Wis. L.R. 176 (1957) at 177.

104. Wis. Stats. sec. 62.23(6)(g) (1975).

105. Id.

106. Wis. Stats. sec. 236.16(3) (1975).

107. Wis. Stats. sec. 236.29; Jordon v. Menomonee Falls, 28 Wis.2d 608, at 620, 137 N.W.2d 442 (1965).

108. Id. at 618.

109. Id. at 622.

110. Wis. Stats. sec. 236.45 (1975).

111. Wis. Stats. sec. 236.45(1) (1975).

112. All but three of the counties bordering the Great Lakes in Wisconsin have adopted subdivision ordinances (Marinette, Kewaunee and Ozaukee have not). Furthermore, 26 of the 33 cities and villages along Lakes Superior and Michigan have adopted subdivision ordinances. The subdivision dedications or exactions these municipalities require vary. For example, Mequon requires a flat fee of $400, St. Francis requires a dedication of 5% of the land to be subdivided, and Superior mandates the dedication of open space and access to public sites.

113. Of course, to uphold the regulation in court it must be found to promote the public health, safety and general welfare.

114. Comment, supra note 1, at 743-746.

115. Wis. Stats. sec. 893.15(5) (1975).

APPENDIX A

Statutory Authorities of Wisconsin Governmental Units to Acquire Interest in Land[1]

The constitutional authority for the state and any of its counties, cities, towns or villages to acquire lands and convey lands acquired and not necessary for the public good is contained in Article XI, section 3a of the Wisconsin Constitution. Condemnation powers are also given to governmental units under sec. 32.02 of the Wisconsin Statutes. It should be noted that sec. 32.02 also gives condemnation authorities to special purpose government units, such as metropolitan sewage commissions, urban redevelopment authorities and metropolitan transit authorities. Sections 66.24(4), 66.413 to .415, and 66.94(10) and (11) provide these special purpose units powers to acquire land or interests therein through voluntary acquisition or condemnation.

GOVERNMENT UNIT	VOLUNTARY ACQUISITION, GIFT, DEVISE, PURCHASE	
	FEE TITLE	LESS THAN FEE TITLE
STATE Department of Natural Resources[2]	23.09(2)(d) DNR may acquire by purchase, lease or agreement, and receive by gifts or devise, lands or waters suitable for the purpose ... of state forests, state parks, public shooting, trapping or fishing grounds or waters, fish hatcheries and game farms, forest nurseries and experimental stations, and preservation of endangered species.	see 23.09(2)(d)
		23.09(10) DNR may acquire any and all easements in the furtherance of public rights, including the right of access and use of lands and waters for hunting and fishing and the enjoyment of scenic beauty, together with the right to acquire all negative easements, restrictive covenants, covenants running with the land...
	23.091(1) DNR may acquire lands and waters for state recreation areas.[3]	
	27.01(2)(a) DNR may acquire by purchase, lease, or agreement lands or waters suitable for state park purposes.	see 27.01(2)(a)
	28.02(2) DNR may acquire lands or interest in lands by grant, devise, gift or purchase within the boundaries of established state forests or purchase areas; and outside of such boundaries for forest nurseries, tracts for forestry research or demonstration and for forest protection structures, or for access to such properties.	see 28.02(2)
STATE Department of Transportation	84.09(1)DOT may acquire by gift, device, purchase or condemnation any lands for establishing, laying out, widening, enlarging, extending , constructing, reconstructing, improving and maintaining highways, streets, roadside parks and weighing stations...	84.09(1)(cont.) ...or interests in lands in or about and along and leading to any or all of the same...

	CONDEMNATION		RESALE, LEASE
	FEE TITLE	LESS THAN FEE TITLE	
	23.09(2)(d)(cont.) ...and may condemn lands or waters suitable for such purposes after obtaining approval of the senate and assembly committees on natural resources...		
			23.09(10)(cont.) The department also may grant leases and easements to properties and other lands under its management and control under such covenants as will preserve and protect such properties and lands for the purposes for which they were acquired.
	27.01(2)(a)(cont.) ...and may acquire such lands and waters by condemnation after obtaining approval of the senate and assembly committees on natural resources.		27.01(2)(g) DNR may lease parts or parcels of state park land or grant easements thereto.
	see 84.09(1)	see 84.09(1)	84.09(1)(cont.) DOT may convey such lands thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such lands so as to protect such public works and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works.

GOVERNMENT UNIT	VOLUNTARY ACQUISITION, GIFT, DEVISE, PURCHASE		
	FEE TITLE	LESS THAN FEE TITLE	
STATE Department of Transportation	114.33(6) DOT may acquire by gift, devise, purchase or condemnation any lands for establishing, protecting, laying out, enlarging, extending, constructing, reconstructing, improving and maintaining airports...	114.33(6)(cont.)... or interests in lands in and about airports.	
	195.199(2) DOT shall have the first right to acquire, for present or future transportational, recreational or scenic purposes, any property used in operating a railroad or railway including rights-of-way and rails, ties, switches, trestles, bridges and the like located thereon, which has been abondoned. Acquisition may be by gift, purchase or condemnation.[4]		
COUNTY			
	27.015(10) Any county in which there does not exist a county park commission acting through its rural planning committee may acquire by gift, grant, devise, donation, or purchase, condemnation or otherwise, with the consent of the county board, a sufficient tract or tracts of land for the reservation for public use of river fronts, lake shores, picnic groves, outlook points from hilltops, places of special historic interest, memorial grounds, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same...		

	CONDEMNATION		RESALE, LEASE
	FEE TITLE	LESS THAN FEE TITLE	
	see 114.33(6)	see 114.33(6)	114.33(6)(cont.) DOT may convey such lands thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such lands so as to protect such airports and improvements and their environs and to preserve the view, appearance, light, air and usefulness of such airports.
	see 195.199(2)		
			195.199(4) All or part of any interest in abandoned property acquired by DOT ... may be subsequently conveyed to another state agency or a county or municipality for transportational, recreational or scenic purposes...
	23.09(8) The county board of any county may condemn a right of way for any public highway to any navigable stream, lake or other navigable waters. Such right of way shall be not less than 60 feet in width...		
	see 27.015(10)		

GOVERNMENT UNIT	VOLUNTARY ACQUISITION, GIFT, DEVISE, PURCHASE	
	FEE TITLE	LESS THAN FEE TITLE
COUNTY	27.05(3) The county park commission may acquire by purchase, land contract, lease, condemnation, or otherwise, with the approval and consent of the county board, such tracts of land or public ways as it deems suitable for park purposes...	see 27.05(3)
	27.05(4) The county park commission may acquire in the name of the county by purchase, land contract, lease, condemnation or otherwise, with the approval and consent of the county board, such tract or tracts of land as it deems necessary for the purpose of providing a suitable and convenient place and station upon which airplanes and aircraft generally may land, be cared for, and make flight from...	see 27.05(4)
	27.065(1)(a) The county board of any county which shall have adopted a county system of parks or a county system of streets and parkways may acquire the lands necessary for carrying out all or part of such plan by gift, purchase, condemnation or otherwise; provided, however, that no lands situated within the limits of a city or village shall be acquired by condemnation unless and until the common council of the city or the board of trustees of the village wherein such land is situate shall consent thereto.	
	59.07(1)(a) The county board may acquire, lease or rent property, real and personal, for public uses or purposes of any nature, including without limitation acquisitions for county buildings, airports, parks, recreation, highways, dam sites in parks, parkways and playgrounds, flowages, sewage and waste disposal for county institutions...	see 59.07(1)(a)

	CONDEMNATION		RESALE, LEASE
	FEE TITLE	LESS THAN FEE TITLE	
	see 27.05(3)		
	see 27.05(4)		27.05(4)(cont.) The county park commission may let, lease or have such lands or station, and make such charge therefor, as they deem proper and advisable...
			27.05(6) The county park commission may let, lease or grant the use of such part or portion of the park lands now owned or hereafter acquired and located within 5 miles of the corporate limits of any city as to it shall seem reasonably necessary, convenient or proper to agricultural and other societies of similar nature for agricultural and industrial fairs and exhibitions and such other purposes as tend to promote the public welfare.
	see 27.065(1)(a)		
			59.07(1)(c) The county board may lease, sell or convey or contract to sell or convey any county property, not donated and required to be held for a special purpose, on such terms as the board approves.

GOVERNMENT UNIT	VOLUNTARY ACQUISITION, GIFT, DEVISE, PURCHASE	
	FEE TITLE	LESS THAN FEE TITLE
COUNTY	83.08(1) The county highway committee may acquire by gift, devise, purchase or condemnation any lands or interests therein for the proper improvement, maintenance, relocation or change of any county aid or other highway or street or any bridge thereon which the county is empowered to improve or aid in improving or to maintain. The county highway committee may purchase or accept donation of remnants of tracts of parcels of land remaining at the time or after it has acquired portions of such tracts of parcels by purchase or condemnation...	see 83.08(1)
CITY	27.08(2)(b) The city board of park commissioners may acquire for park, parkway, boulevard or pleasure drive purposes by gift, devise, bequest or condemnation, either absolutely or in trust real property...	
	62.22(1) The governing body of any city may by gift, purchase or condemnation acquire property within or without the city, for parks, recreation, waterworks, sewage or waste disposal, airports or approaches thereto, cemeteries, vehicle parking areas, and for any other public purpose; may acquire real property within or contiguous to the city, by means other than condemnation, for industrial sites;...	62.22(1m) ...the governing body of any city is expressly authorized to acquire by gift, purchase or condemnation any and all property rights in lands or waters, including rights of access and use, negative or positive easements, restrictive covenants, covenants running with the land, scenic easements and any rights for use of property of any nature whatsoever, however denominated, which may be lawfully acquired for the benefit of the public or for any public purpose...

	CONDEMNATION		RESALE, LEASE
	FEE TITLE	LESS THAN FEE TITLE	
	see 83.08(1)	see 83.08(1)	
	see 27.08(2)(b)		
	27.08(2)(c)(cont.) Every city is authorized, upon recommendation of its officers, board or body having the control and management of its public parks, to acquire by condemnation in the name of the city such lands within or without its corporate boundaries as it may need for public parks, parkways, boulevards and pleasure drives.		27.08(2)(c) Subject to the approval of the common council to buy or lease lands in the name of the city for park, parkway, boulevard or pleasure drive purposes within or without the city and, with the approval of the common council, to sell or exchange property no longer required for its purposes.
	see 62.22(1)		62.22(1)(cont.)...and may sell and convey such property.
		see 62.22(1m)	62.22(1m)(cont.)...and may sell and convey such easements or property rights when no longer needed for public use or protection.

GOVERNMENT UNIT	VOLUNTARY ACQUISITION, GIFT, DEVISE, PURCHASE	
	FEE TITLE	LESS THAN FEE TITLE
CITY		62.22(3) The city may by gift, purchase or condemnation take, injure or destroy any riparian rights or privileges appurtenant to land abutting upon Lake Michigan whenever it shall become necessary for the proper construction and use of any highway, street, boulevard, park or other public improvement without taking the lands or any portion thereof of which said riparian rights are appurtenant.
	62.23(17)(a) Cities may acquire by gift, lease, purchase or condemnation any lands (a) within its corporate limits for establishing, laying out, widening, enlarging, extending and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same; (b) any lands adjoining or near to such city for use, sublease or sale for any of the following purpose: 1. To relieve congested sections by providing housing facilities suitable to the needs of such city; 2. To provide garden suburbs at reasonable cost to the residents of such city; 3. To establish city owned vacation camps for school children...	see 62.23(17)(a)
	66.413(2) A city may, upon request by the redevelopment corporation, acquire, for such redevelopment corporation, any real property included in such certificate of approval of condemnation, by gift, grant, lease, purchase, condemnation, or otherwise ...Real property acquired by a city for a redevelopment corporation shall be conveyed by such city to the redevelopment corporation upon payment to the city of all sums expended or required to be expended by the city in the acquisition of such real property, or leased by such city to such corporation, all upon such terms as may be agreed upon between the city and the redevelopment corporation...	see 66.413(2)

	CONDEMNATION		RESALE, LEASE
	FEE TITLE	LESS THAN FEE TITLE	
		see 62.22(3)	
	see 62.23(17)(a)		see 62.23(17)(a)
	see 66.413(2)		

GOVERNMENT UNIT	VOLUNTARY ACQUISITION, GIFT, DEVISE, PURCHASE	
	FEE TITLE	LESS THAN FEE TITLE
CITY	66.43(4)(a) A city may, within its boundaries, acquire by purchase, eminent domain or otherwise, any real property or any interest therein, together with any improvements thereon, necessary or incidental to a redevelopment project...	see 66.43(4)(a)
VILLAGE	61.34(3) The village board may acquire property, real or personal, within or without the village, for parks, libraries, historic places, recreation, beautification, streets, waterworks, sewage or waste disposal, harbors, improvement of watercourses, public grounds, vehicle parking areas, and for any other public purpose; may acquire real property within or contiguous to the village, by means other than condemnation, for industrial sites; may improve and beautify the same; may construct, own, lease and maintain buildings on such property for instruction, recreation, amusement and other public purposes...	61.34(3m) The village board may acquire by gift, purchase or condemnation any or all property rights in lands or waters, including rights of access and use, negative and positive easements, restrictive covenants, covenants running with the land, scenic easements and any rights for use of property of any nature whatsoever, however denominated, which may be lawfully acquired for the benefit of the public or for any public purpose...
TOWN [5]	60.18(14) The town board may authorize the purchase of any lands within such town lying in such a position that the cost to the town of constructing and maintaining roads, bridges and other means of access thereto will in the near future exceed the purchase price of such lands... 60.18(15) The town board may acquire by gift, grant, devise, donation, purchase or condemnation or otherwise a sufficient tract or tracts of land for the reservation for public use of river fronts, lake shores, picnic groves, fine outlooks from hilltops or places or special historic interest...	

	CONDEMNATION		RESALE, LEASE
	FEE TITLE	LESS THAN FEE TITLE	
	see 66.43(4)(a)	see 66.43(4)(a)	66.43(4)(a)(cont.) The city may sell, lease, subdivide, retain for its own use, mortgage, or otherwise incumber or dispose of any such property or any interest therein; enter into contracts with redevelopers of property containing covenants, restrictions, and conditions regarding the use of such property in accordance with a redevelopment plan and such other covenants, restrictions and conditions as it may deem necessary to prevent a recurrance of blighted areas;... make any of such covenants, restrictions, conditions or covenants running with the land and provide appropriate remedies for any breach thereof.
	see 61.34(3)	see 61.34(3m)	61.34(3)(cont.)...and may sell and convey such property. 61.34(3m)(cont.) ...and may sell and convey such easements or property rights when no longer needed for public use or protection.
	see 60.18(15)		

GOVERNMENT UNIT	VOLUNTARY ACQUISITION, GIFT, DEVISE, PURCHASE	
	FEE TITLE	LESS THAN FEE TITLE
TOWN	60.184(3) The town park commission may acquire by purchase, land contract, lease, condemnation, or otherwise, with the approval and consent of the town board, such tracts of land or public ways as it may deem suitable for park purposes...	see 60.184(3)
MUNICIPALITY[6]	27.11(4)(b) The city board of public land commissioners may acquire lands and improvements thereon, within a distance of 500 feet on either side of and abutting on any public street or highway in the city for the purpose of converting the same into a parkway or boulevard. Said lands may be acquired by purchase, gift, or condemnation, but only after such acquisition shall have been recommended to the common council by said board and ordered by resolution of said common council. 27.13 Every town and village may provide and maintain parks, parkways, boulevards of pleasure drives pursuant to the provisions of this chapter which are applicable to cities.[7]	

	CONDEMNATION		RESALE, LEASE
	FEE TITLE	LESS THAN FEE TITLE	
	see 60.184(3)		
	see 27.11(4)(b)		27.11(4)(d) Said board may manage, control, govern, improve, subdivide, resubdivide and plat any land so acquired; and also to mortgage and sell the same, or parcels thereof, on such terms and with such restrictions and reservations as it deems necessary in order to convert such street or highway into a parkway or boulevard, and to protect the same and its environs, and preserve the view, appearance, light, air, health, and usefulness thereof.
	see 27.13	see 27.13	
			66.52(3) Sites purchased for industrial development...by the city, village or town...may be sold or leased for industrial purposes.

NOTES

1. All statutory citations listed in this appendix are from the 1975 edition of the Wisconsin Statutes.
2. Under sec. 23.14, created by Chapter 29, Laws of 1977, DNR must have gubernatorial approval prior to the acquisition of any lands.
3. Section 23.091 was created by Chapter 29, Laws of 1977.
4. Section 195.199 was created by Chapter 29, Laws of 1977.
5. Under sec. 60.18(12), town boards may exercise village powers contained in Chapter 61. Therefore, the above information pertaining to villages may also apply to towns.
6. A municipality is defined as any village, city or town.
7. Also see sec. 27.08(2)(b) and (c) under city.

APPENDIX B

Sample Easement Grant Form for Fish Management Used by the Department of Natural Resources

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
BOX 7921
MADISON, WISCONSIN 53707

EASEMENT (Fish Management)
FORM 2200-30
REV. 10-77

THIS EASEMENT, made this _____ day of _____, 19 ____, by and between

_____

_____, Grantor,

and the State of Wisconsin Department of Natural Resources, Grantee.

WHEREAS, the Grantor is the owner in fee simple of certain real estate which is in, near, or adjacent to the Grantee's project area known

as _____,

and located in _____ County, Wisconsin, and

WHEREAS, the Grantee desires to develop, operate and maintain such lands as a public fishing area for use and benefit of the general public.

NOW, THEREFORE, the Grantor for and in consideration of the sum of One ($1.00) Dollar and the terms and conditions hereinafter

contained, conveys to the Grantee, upon acceptance by the Grantee, within _____ months from the date hereof, an easement and right in perpetuity to develop, operate and maintain a public fishing area on the following described real estate.

The location of said easement is shown on Exhibit "A" attached hereto, and made a part hereof.

Upon acceptance, the Grantee shall pay _____ ($) Dollars to the Grantor for this easement.

The use of premises as a fishing area for the use and benefit of the public shall include the following rights:

1. The public shall have the right: (a) to catch and take fish from the waters thereon by legal means; (b) to travel in and along such waters; (c) to hike, observe wildlife and enjoy scenic beauty; and (d) to enter upon and utilize the above described lands to the extent necessary for the full enjoyment and use of the rights and privileges granted by this easement.

2. The Grantee shall have the right: (a) to develop such waters by installation and maintenance of current deflectors, covers, retarders and any other means deemed necessary by the Grantee for the purpose of fostering, improving and enhancing fishing therein without interference with the Grantor's use of land; (b) to post such signs and posters along the subject lands as are deemed necessary to delineate them for public use; and (c) to protect from erosion the above described land by mechanical means such as fencing and crossovers or by the planting of trees, plants or shrubs where and to the extent deemed necessary for the protection of the stream or lake.

3. The Grantor shall cooperate in the maintenance of the subject property as a wetland, including streams, springs, lakes, ponds, marshes, sloughs, swales, swamps, or potholes now existing or hereinafter occurring on the above described tract by not draining or not permitting the draining, through the transfer of appurtenant water rights or otherwise, of any of said wetlands by ditching or any other means; by not filling in with earth or any other material any low areas on said wetlands; and by not burning any areas covered with marsh vegetation.

4. No trees or shrubs shall be removed or destroyed by the Grantor on the lands covered by this easement except as may be incidental to the permitted uses.

5. The Grantee shall have the right to make such improvements and installations as are necessary, convenient and incidental to the full enjoyment and use of the rights and privileges granted by this easement.

6. No sign, billboard, outdoor advertising structure or advertisement of any kind shall be erected, displayed, placed or maintained upon or within the eased area, except one sign of not more than 8 square feet in area to advertise the sale, hire or lease of property or products produced upon the premises.

7. No new structures of any kind shall be placed or erected upon the premises described in this easement until an application, together with a statement of purpose for which the building or structure will be used, has been filed with, and a written approval obtained from the Grantee.

8. The general topography of the landscape, river frontage or creek frontage shall be maintained in its present condition, and no topographic changes shall be made without prior written approval of the Grantee.

9. No dumping of ashes, trash, garbage, sewage, sawdust, or any unsightly or offensive material shall be placed upon the eased area, except as incidental to the occupation and use of the land for normal agricultural or horticultural purposes.

10. The Grantor reserves the right (a) To the use of the said land, including the right of fishery in said stream, insofar as such right is not inconsistent with the use of the same as a public fishing area and with the rights, privileges and easements hereby granted; and (b) To use the water in the stream for domestic purposes including watering cattle and other stock.

11. The Grantor conveys to the Grantee, its employes, officers, and agents the right of ingress and egress from the subject easement area across all contiguous lands owned by the Grantors for the purpose of constructing, planting, altering, repairing, maintaining and replacing developments which are provided for in Paragraph Two. It is understood that field roads, roadways, passageways, lanes or other normally traveled routes will be utilized for such ingress and egress wherever possible and where such travelways exist.

The Grantor releases the Grantee from any claims of damage which may arise as a result of floods and flash floods on the lands.

The Grantor shall neither lease nor convey any other easement in any way affecting the use and enjoyment of this easement without the prior written permission of the Grantee.

And _____

_____ being the owner

and holder of _____ certain _____ lien _____

which is _____
INSERT DETAIL CONCERNING LIEN

against said premises, does hereby join in and consent to said conveyance free of said lien.

The terms Grantor and Grantee, when used herein, shall mean either masculine or feminine, singular or plural, as the case may be and the provisions of this easement shall bind the parties mutually, their heirs, successors, personal representatives and assigns.

WITNESS the hands and seals of the Grantor and of any person joining in and consenting to this conveyance on the day and year hereinbefore written.

In presence of _____ _____ (SEAL)

_____ _____ (SEAL)

_____ _____ (SEAL)

_____ _____ (SEAL)

_____ _____ (SEAL)

STATE OF WISCONSIN)
) ss.
_____ COUNTY)

Personally appeared before me this _____ day of _____, 19 ___, the above named _____

_____

to me known to be the persons who executed the foregoing instrument and acknowledged the same.

_____

(NOTARY SEAL)

Notary Public, State of Wisconsin
My commission (expires) (is) _____

ACCEPTED this _____ day of _____, 19 ___.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
For the Secretary

By _____

THIS INSTRUMENT WAS DRAFTED BY THE STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES.

APPENDIX C

Sample Scenic Easement Grant Form Used
by the Department of Transportation

Document Number _____

SCENIC EASEMENT

WHEREAS, the State of Wisconsin desires to preserve, protect and improve where necessary for scenic purposes,

and to prevent any future development which may tend to detract therefrom.

This Indenture, made by

grantor, hereby conveys and warrants to the State of Wisconsin, grantee, for the sum of _____ ($_____) dollars, scenic rights in perpetuity as hereinafter prescribed, in and to the following described parcel of real estate in _____ County, State of Wisconsin, to wit:

(See attached List of Suggested Scenic Easement Restrictions)

Project _____ Parcel Number _____

THE RIGHTS HEREBY ACQUIRED DO NOT GRANT THE PUBLIC THE RIGHT TO ENTER THE ABOVE-DESCRIBED AREA FOR ANY PURPOSE.

THE RIGHTS HEREBY ACQUIRED DO NOT GRANT THE STATE OF WISCONSIN, OR ITS AGENTS, THE RIGHT TO ENTER THE ABOVE-DESCRIBED AREA EXCEPT FOR THE PURPOSE OF INSPECTION AND ENFORCEMENT OF SAID RIGHTS, OR AS SPECIFICALLY SET FORTH HEREIN.

IN WITNESS WHEREOF, the said grantor... ha... hereunto set ..... hand.. and seal.. this ..... day of ....., A. D., 19....

ALSO IN WITNESS WHEREOF, ...
.....
being the owner.. and holder.. of ... certain ..... lien.. against said premises, hereby join in and consent to said easement free of said lien.

SIGNED AND SEALED IN PRESENCE OF .....(SEAL)
.....
.....
.....(SEAL)
.....
.....
.....(SEAL)
.....
.....
.....(SEAL)
.....

STATE OF WISCONSIN,)
.....County.) Personally came before me this ..... day of .....
A.D., 19..., the above-named .....
.....
to me known to be the person.. who executed the foregoing instrument and acknowledged the same.

.....
(NOTARY) .....
(SEAL) NOTARY PUBLIC, ... County, Wis.
My commission (expires) (is) .....

RECEIVED FOR RECORD
..... day of .....
A.D., 19..., at ..... o'clock
..M and recorded in Vol. .....
of ....., page .....
.....
Register of Deeds
.....County

Negotiated by .....

This instrument was drafted by the State of Wisconsin Department of Transportation, Division of Highways.

LIST OF SUGGESTED SCENIC EASEMENT RESTRICTIONS

The specific rights and interests hereby acquired are as follows:

1. The right for the State of Wisconsin, its agents and contractors, to enter upon the easement area;

   (a) To inspect for violations of the provisions of this easement and to remove or eliminate advertising displays, signs and billboards, stored or accumulated junked automobiles, farm implements or parts thereof, and other salvage materials or debris, and to perform such scenic restoration as may be deemed necessary or desirable.

   (b) To plant and/or selectively cut or prune trees and brush to improve the scenic view and to implement disease prevention measures.

   (c) To plant and/or selectively cut or prune trees and brush to improve the scenic view and to implement disease prevention measures. The area excluded from this provision is described as follows: (Then describe excluded area such as residence, etc.)

Note: Always use (a) plus (b) or (c), but not both (b) & (c)

The above is mandatory and should appear first on conveyance.

The owner's rights to engage in specified activities are acquired as follows:

1. The right to erect, display, place or maintain upon or within the scenic area any signs, billboards, outdoor advertising structures or advertisement of any kind, except that one (1) on-premise sign of not more than _____ square feet in size may be erected and maintained to advertise the sale, hire or lease of the property, or the sale and/or manufacture of any goods, products or services upon the land. Any existing signs, other than the one on-premise sign, and/or advertisements as described above shall be terminated and removed on or before _____.

2. The right to dump or maintain a dump of ashes, trash, rubbish, sawdust, garbage, offal, storage of vehicle bodies or parts, storage of farm implements or parts, and any other unsightly or offensive material.

3. The right to cut or remove any trees or brush.

4. The right to cut or remove any trees or brush, except as necessary in connection with the reasonable building of residences and access steps thereto, and suitable clearing for such residential purposes.

5. The right to cut or remove any trees or brush, except marketable timber and then only in compliance with local forest cropping practices, however, at no time will the scenic area be denuded of trees.

6. The right to park trailer houses, mobile homes or any portable living quarters used as a licensed "Mobile Home Park" for dwelling or residential purposes. (This is intended to permit temporary use)

7. The right to park camping trailers, motor homes, mobile homes, or any other portable living quarters, except nondependent mobile homes used as primary housing units placed on piers or a foundation with the wheels removed. (Intended for permanently placed mobile homes, etc.)

8. The right to park trailer houses, mobile homes, or any portable living quarters.

9. The right to quarry, or remove, or store any surface or subsurface minerals or materials.

10. All rights except general crop and/or livestock farming (agricultural) within the first _____ feet of the scenic area as measured normal to the (centerline) (reference line) (nearest edge of pavement) (right of way line) of the highway.

11. All rights except general crop and/or livestock farming (agricultural).

12. The right to develop the easement area except for limited residential development consistent with applicable state and local regulations. Such limited rights retained by the owner are as follows:

(a) Each single family residential lot fronting on and abutting (identify Highway) shall be limited to a minimum width of _____ feet as measured parallel to the highway;

(b) A total of _____ single family residential lots is the maximum number authorized for the easement area.

13. The right to alter the general topography by artificial means, except insofar as reasonably necessary for landscaping in building acceptable residences and appurtenant structures.

14. The right to change the use of the easement area from residential to any other use.

15. The right to develop the easement area commercially except as follows:

(a) Normal Maintenance and repair of existing buildings, structures and appurtenances or replacement thereof.

(b) To develop the easement area commercially to other than the existing use, as long as said change in use does not conflict with the scenic easement purpose and said change is subject to review and approval of the State Highway Commission.

16. The right to change the use of the easement area from commercial to any other use.

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CHAPTER 3: PROPERTY TAXATION POLICY AND LAND USE PLANNING

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I. Introduction

The conversion of agricultural lands for development, the abandonment of inner cities and many other current land use problems confronting communities are often attributed in part to property taxation. Although property taxation is most frequently viewed as a source of local revenue, it can also influence land use decisions made by local governments and individuals. This chapter explores the structure and policy behind the Wisconsin property taxation system and the impacts it may have on land use. A better understanding of the relationship between property taxation and land use will allow municipalities to more effectively utilize tax policies as a supplement to the other growth management tools.

A. Taxing Jurisdictions

In Wisconsin, as in many states, the taxation of real and personal property is an important source of local government revenue. During the 1973-76 budget period, approximately 21% of all municipal revenues, 25% of all county revenues, 60% of all school district revenues, and 55% of all vocational, technical and adult education district revenues were provided by property taxes.[1]

There are five primary government units in Wisconsin that have been vested with the power to tax property. These property taxing jurisdictions are: (1) the state government; (2) the vocational, technical and adult education districts; (3) the county governments; (4) the elementary and secondary school districts; and (5) the municipal governments. There are seventeen vocational, technical, and adult education districts, seventy-two county governments, four hundred and seventeen elementary and secondary school districts and one thousand eight hundred and thirty-eight municipal governments in Wisconsin.[2] (Municipal governments include cities, villages and townships). Each piece of property in the state is located in all five of these taxing jurisdictions and has a property tax levied against its assessed valuation by each taxing jurisdiction.

B. Constitutional Limitations

Local governments exercise the property taxing power under a specific delegation of power by the state,[3] subject to constitutional limitations.[4] The Wisconsin Constitution requires that property taxes be both uniform and ad valorem. Uniformity in property taxes means that all property within a taxing jurisdiction must be assessed and taxed at the same rates. An ad valorem tax means that the measure of the tax is the value of the property. The general rule concerning property tax is that all property in the state must be either taxed at full value or removed from the local rolls altogether.[5] But there

is an exception to this general rule. The Wisconsin Constitution specifically excludes forest and mineral lands, and agricultural and undeveloped lands from the uniformity and ad valorem requirements. In other words, the state is authorized to preferentially tax land that is used for agriculture, forestry or mining, having the power to establish special assessment methods and tax rates for these land uses.

C. Administration

In Wisconsin the property tax is administered in the following manner. First, each taxing jurisdiction calculates its property tax levy. This is arrived at by calculating the amount of money needed to provide its services and then estimating the amount of revenue it will receive from federal or state grants or aids, fees, operating receipts, fines, and other non-property tax sources of revenue. The difference between expenditures and all sources of revenue other than the property tax is the gross local property tax levy. This gross levy is then reduced by the amount of general and personal property tax relief received from the state. The remainder is called the net local property tax levy and is the amount of money that must be raised locally through the general and personal property tax.[6] The tax is levied by the various taxing jurisdictions, but it is collected by each municipal treasurer.

Next, the Wisconsin Department of Revenue calculates the full value of all the property in each taxing jurisdiction.[7] This annual calculation is based on market sales of property in the area during the prior year and is called the equalized value or tax base. The equalized value is used to distribute the various taxing jurisdictions' property levies among the various municipalities in proportion to the equalized value. For example, if a municipality contains 25% of a school district's equalized value, then the municipality must raise 25% of the school district's tax levy.

Finally, within each municipality, the tax burden is distributed among property owners according to assessed value. The assessed value of each parcel of property in a municipality is determined by the local assessor and is set at some percentage of full value.[8] The ratio of assessed value to equalized value (full value) is called the "assessment ratio." For example, if the assessment ratio is 50%, a home with an equalized value (full value) of $30,000 would be locally assessed at only $15,000. The assessment ratio varies greatly among municipalities. But, because the assessed value is only meaningful within the municipality, it doesn't matter if different municipalities assess property at different percentages of full value, so long as each parcel of property within a particular municipality is assessed at the same percentage of equalized value (full value).

II. Impacts of Property Taxation on Land Use Decision-making

A. Introduction

For years commentators have attributed a number of "land use ills" to the effects of the property tax: abandonment of central cities; suburbanization; urban sprawl; municipal fragmentation and fiscal mercantilism; exclusionary zoning; misuse of agricultural land; antipathy towards public ownership of lands; and others.

Three major questions are examined here concerning the impact of property taxation on land use decision-making. First, does the property tax structure encourage municipal officials to attempt to attract "good ratables", that is, encourage land uses that bring in a large amount of tax dollars and only require low expenditures for public services (for example, a research laboratory, a light industry, a factory, a shopping center, or a multi-family dwelling with only small apartments and no potential school children)? Secondly, does the property tax structure encourage municipal officials to attempt to exclude "bad ratables", that is, exclude land uses that do not bring in much in taxes, but require high expenditures for public services (for example, land uses exempted from the general property tax,[9] single family homes, moderate and low income housing, and multi-family dwellings with large apartments and great potential for school children)? Finally, does the property tax structure encourage speculation and tend to force urban fringe properties out of agricultural and undeveloped land uses and into developed uses?

B. Impacts on Government Decision-making

1. Attracting "good ratables" - Excluding "bad ratables"

The answer to the first two questions requires a brief analysis of the problems that can be caused by the competition among municipalities for "good ratables" and the exclusion of "bad ratables". An example of the impacts of inter-municipal competition is where officials seek to attract new factories or shopping centers while excluding new housing designed to serve the employees of those establishments. Traditionally, municipalities that were able to attract "good ratables" were rewarded with financial bonuses, whereas communities that decided to provide needed low and moderate income housing were penalized financially.

For example, the location of a factory within a taxing jurisdiction substantially increases the community's taxable property and subsequently provides the community with additional tax revenue. On the expenditure side, a factory usually requires only minor additional public services such as police, fire, welfare and education. Therefore, the location of a factory within a taxing jurisdiction could

result in a substantial net improvement of the community's financial status. Alternatively, the location of moderate and low income housing within a taxing jurisdiction usually results in only a marginal increase in the community's taxable property and subsequently provides the community with only minimal additional tax dollars. On the expenditure side, moderate and low income housing usually requires substantial additional public services such as police, fire protection, and educational and welfare services. Therefore, the location of moderate and low income housing within a taxing jurisdiction can result in a net deterioration of the community's financial position.[10]

In sum, municipalities may make major land use decisions that are based on a search for "good ratables" and an exclusion of "bad ratables". Zoning decisions may be based on fiscal considerations that distort other legitimate considerations, such as social, cultural, aesthetic, or environmental factors. The result is that municipalities may be encouraging development that does not belong in the community and discouraging the most needed types of land uses.

In an effort to reduce this intermunicipal competition, the Wisconsin Legislature has developed a complex system of: (1) shared taxes for municipal and county governments; (2) payments in lieu of property taxes; (3) payments of the school tax on certain tax exempt property; (4) shared costs for school districts and negative school aids; and (5) property tax exemptions for manufacturing machinery, processing equipment, merchants' stock-in-trade, manufacturers' materials and finished products.

a. Shared taxes

A key element of Wisconsin's attempts to reduce intermunicipal competition by moving towards tax base neutrality is the municipal and county shared tax program.[11] A portion of state collected individual and corporate income taxes, utility taxes, liquor and cigarette taxes, and auto registration fees is returned to local governments.

Prior to 1972, the distribution of these funds was largely based on their point of origination; towns with power plants had a considerable portion of state revenues paid by the utility returned to them. Wealthy tax districts got wealthier. However, in the 1972-76 period, the legislature moved to convert the "origination" formula for shared taxes into a "tax effort" formula.

While very complicated, the current distribution formula is based on four criteria. First, each city, village, town, and county receives an amount based on its population. Therefore, the local government receives state aid irrespective of its tax base.

These per capita payments help communities provide necessary public services and generate a greater willingness to accept low and moderate income housing, open space and other public uses.

Secondly, cities, villages, towns and counties receive an amount from the account based on the value of each public utility located within their borders. This payment reduces communities' attempts to exclude tax exempt public utilities.

Thirdly, municipalities and counties receive an amount based on their full valuation per capita and their current taxing effort. Given this third factor, communities that levy high taxes and that have small per capita valuation receive the most aid. Alternatively, local governments that levy low taxes and that have high per capita valuation receive very little aid. This factor distributes state aid away from wealthy communities that tax themselves heavily. In addition, the per capita valuation-taxing effort formula spreads the financial benefits of commercial and industrial growth and reduces fiscal competition among local governments. For example, given this formula, it is possible that the location of a "good ratable" within a municipality will decrease the community's shared tax revenues (i.e., if a very expensive private facility were to locate within a municipality, and if subsequently the per capita valuation were to rise, and if the property tax levy remains the same, then the amount of shared taxes would be reduced). Presently, it is not clear whether or not the formula is sensitive enough to respond to the location of one "good ratable", but it is clear that, for the most part, municipalities and counties cannot significantly improve their financial positions by attempting to attract "good ratables".

Finally, the shared tax law provides that no county or municipality can receive more than 109% of the amount of shared taxes sent to it in the previous year and that no municipality will receive a lesser amount of the shared taxes in 1976 than it received in 1975. Therefore, a community cannot substantially improve its financial position or be seriously penalized because of sudden economic and demographic shifts.

The importance of this system of shared taxes should not be under-emphasized. The state currently pays three-fourths of its collected revenues back to localities as property tax relief -- a sum amounting to $1,201,343,400 in 1973.[12] By 1974, all levels of local government in Wisconsin were receiving substantial portions of their revenue from sources other than the property tax, as is summarized by Table 1.[13]

TABLE ONE

Sources of Local Government Revenue in Wisconsin
1974

Revenue Sources	Counties	Cities	Villages	Towns
Local Taxes	20%	34%	27%	13%
Another Government	51%	48%	53%	78%
All Other	29%	18%	20%	9%

In summary, the shared tax distribution system has, to a large extent, neutralized the local fiscal impacts of industrial development.

b. Payments in lieu of property tax

As noted earlier, a number of land uses have been exempted from the general property tax. These exemptions include property owned by agricultural societies, Boy's Clubs of America, Boy Scouts, Camp Fire Girls, cemetary associations, churches, cities, colleges, counties, Girl Scouts, public utilities, religious associations, school districts, the state, towns, the U.S. Government, the University, villages, women's clubs, YMCAs and YWCAs, property used for camps for the handicapped, institutions for dependent children, educational institutions, Lion's camps for the visually handicapped, institutions for mentally deficient children, mobile homes, parsonages, infirmary-domicilary buildings of the Wisconsin Veterans Home, property included in conservation areas, and property classified as being of historical or scientific interest.[14]

The law provides a scheme of aids to local governments in lieu of the property tax for some of these exempt properties. This scheme is designed to discourage local officials from attempting to exclude these land uses. For example, state forest lands, state parks, state public refuges and state recreational facilities

are exempt from the general property tax and, in lieu of the tax, the Department of Natural Resources must pay 50¢/acre to the municipal government for each acre of such land situated in the municipality.[15]

Properties that are enrolled in the forest cropland program are also exempt from all local taxes and are subject to an annual state tax. These state taxes are distributed as follows: 20% to the county wherein the forest cropland is located, 40% to the town or village in which such property is located, and the remainder to the various school districts in which the forest croplands are located.[16] In addition to the above distribution, the Department of Natural Resources pays 20¢/acre to villages and towns for all lands designated as forest cropland.

Properties used in the production of metalliferous minerals are also exempt from local property taxes. However, the Wisconsin Legislature has recently enacted a new mining taxation bill into law in light of several significant discoveries of ore bodies in northern Wisconsin.[17] The tax was established in order for the state to derive benefits from the extraction of metallic minerals and so that the state and municipalities[18] impacted from mining would be compensated for costs incurred as a result of the loss of such minerals. The new mineral tax on mines is a graduated net proceeds occupational tax, which taxes the profitability of a mine at rates that vary with the levels of profitability.[19] In other words, as the profits derived from a mine increase, the rate of taxation increases in statutorily defined increments.[20] Of the revenues to be collected through the tax, 50% goes into the state general fund and 50% goes into the Investment and Local Impact Fund. Revenues in this fund are distributed to locally impacted communities at the discretion of the Investment and Local Impact Fund Board. The fund is to be used solely for the purpose of providing municipalities compensation for the costs associated with social, educational, environmental and economic impacts of mining. The law has established priority criteria for the distribution of funds to municipalities.[21] Generally, 20% of the revenue collected in a particular county is earmarked for that county, or $300,000, whichever is less. Each city, town or village in which mining occurs is to receive 10% of the tax collected from mining activities within their borders or $75,000, whichever is less.[23] Special provisions were also created for distributing revenues to towns[24] and school districts[25] which were previously receiving revenues under the former state mining tax on low-grade iron ore.

c. Payments of the school tax on certain tax exempt property

The Wisconsin statutes provide that the school district tax must be paid on all land owned by the state, county or municipality which is residential property and is used for public education,[28] on all real property held by the State Investment Board,[29] on all lands owned by the University of Wisconsin Board of Regents,[30] and on all agricultural land owned by the State and operated by the Department of Health and Social Services in connection with its penal and correction program.[31] The State must also make reasonable payments to municipalities for water, sewer, and electrical services, police and fire protection, and all other services directly provided to the state facilities by such municipalities.[32]

Thus, under existing Wisconsin law, municipal and school district officials need not be overly concerned, at least from a financial standpoint, about the location of such land uses within their jurisdictions.

d. Shared school costs and negative school aids

Municipal officials often justify their attempt to exclude "bad ratables ", particularly multi-family or low income housing, on the basis of the increased pressures that will be placed upon existing educational facilities.[33]

In several states this type of response by local officials has, in part, led to judicial challenges of financing educational costs through the property tax. Although the U.S. Supreme Court declined to declare it unconstitutional,[34] several state courts have acted. Several years ago it was estimated that such challenges have been made in at least 36 states.[35] The results have been mixed, with some state courts holding systems using the property tax for school financing constitutionally valid,[36] and other states finding violations of state constitutional provisions.[37]

An understanding of the arguments in the Wisconsin context requires a brief discussion of the state school aid program. The key element of the Wisconsin school aid program is the cost sharing formula. The cost sharing formula was first used in 1949. It was revised in 1969 and again in 1973. Under existing state law a school district's educational costs are categorized into net operating costs and non-operating costs. The state shares a school district's operating costs, but it does not share non-operating costs. "Operating costs" are defined to include teachers' salaries, school

maintenance expenditures, supplies and material costs, bus expenses, teacher retirement funds, teacher social security payments, debt retirement costs up to $100/-pupil, and capital outlay expenses up to $100/pupil. "Non-operating costs" are defined to include principal payments on bonds and loans, the cost of acquiring furniture and equipment, and the original cost of school facilities.[38] In other words, the state will help defray school districts' operating cost, but the costs of constructing and furnishing new schools must be borne primarily by local school districts.[39] Therefore, the increased educational costs that result from the location of "bad ratables" in a school district will be shared by the state so long as new school facilities are not needed. But, if the location of the "bad ratables" in the school district significantly increases the number of school age children and if new school facilities must be constructed, the state will not share in the construction costs (except for the inclusion of $100/pupil for debt retirement and $100/pupil for capital outlays within the definition of "operating costs"). This scheme may seem to perhaps set an upper limit on the number of "bad ratables" a school district would be willing to accept.

In addition to this cost sharing formula, the legislature moved to include in the school aid program a tax base sharing mechanism called negative school aids. This is a scheme adopted by the legislature in 1973, to take effect in 1977.[40] School districts with high tax rates and low per pupil tax valuations were to receive state funds, and school districts with high tax rates and high per pupil tax valuations were to make payments to the state.

Briefly, negative school aids were to operate as follows. First, the legislature has set a standard tax base for all school districts in the state. This number represents an approximate average of state-wide tax valuations per pupil. Secondly, all school districts with an actual per pupil tax valuation below the standard tax base were to receive an amount from the state equal to the taxes that would have been collected by the local school district at their current tax rates, if the actual per pupil tax valuation equaled the standard base. Thirdly, all school districts with an actual per pupil tax valuation above the standard tax base were to pay the state an amount equal to the taxes that were collected by the local school district, at their current tax rates, on the actual per pupil tax valuation in excess of the standard base (thus the name of the scheme--"negative school aids" for some "wealthier" districts). The intended result is that school districts

that spend at the same level will tax at the same rate, that the level of education will be solely dependent upon the local district's willingness to tax itself, and that the level and quality of education will no longer be dependent upon a district's wealth or property, i.e., ability to pay. Given the negative school aids formula, school districts could not significantly improve their financial position by attempting to attract "good ratables". And alternatively, school districts would not be financially penalized because per pupil tax valuations decline. Negative aids spread the financial benefits of increased per pupil tax valuation and reduce tax base competition among school districts.

However, the Wisconsin Supreme Court struck down the "negative aids" portion of the state school aids program as unconstitutional.[41] In a four to three decision, the majority held that the scheme would violate the state constitutional rule of uniform taxation.

In summary, the negative school aid formula would have counteracted tax base competition because the financial benefits of increased per pupil valuation and the disadvantages of reduced per pupil valuation would have been spread among all the school districts of the state. On the other hand, the impact of the shared school cost formula upon tax base competition is not clear because the state shares only certain categories of school district costs. Each school district has some expenses that are not shared by the state and must be borne entirely by the local district. Therefore, from a tax standpoint, school district officials can maximize their financial position by attempting to exclude "bad ratables" that have a great potential for school children and which will subsequently increase the local district's non-shared costs. Unless the tax base increase that results from the location of the "bad ratables" in the school district is sufficient to offset the increased non-shared costs, the school district may be worse off. Alternatively, school district officials can maximize their financial position by attempting to attract "good ratables" since they will not generally increase the number of school children in the district. Rather, they will reduce the amount of non-shared costs that must be borne by the individual local district taxpayer.[42]

e. Property tax exemptions for manufacturing machinery, etc.

The property tax exemption for manufacturing machinery and equipment is a key element of a scheme intended to

share the financial benefits of commercial and industrial growth and to reduce fiscal competition among city, village, town and county governments.

All manufacturing machinery and specific processing equipment used in production, assembly, fabrication, making or milling of new articles are exempt from the general property tax.[43] And as of May 1977, merchants' stock-in-trade, manufacturers' materials and finished products are also exempt from property taxation.[44] In other words, a large portion of Wisconsin's taxable industrial value is currently exempt from local property taxes.

In lieu of the exempt property taxes, the state pays a pro rata share of the exempt amount into the "Municipal and County Shared Tax Account" (with the state annually distributing to municipalities and counties funds from the shared tax account). The state's pro rata amount increases each year and by 1987 the state will be placing in this account 100% of the value of the exempt manufacturers' machinery, merchants' stock-in-trade, etc.[45] In other words, a significant portion of local government's industrial wealth has been removed from the property tax rolls, and by 1987, in lieu of the exempt property, the state will be making payments into a shared tax account.

2. Conclusion

It would thus appear that under existing Wisconsin law municipal officials cannot significantly improve their financial position by attempting to exclude "bad ratables" and to attract "good ratables". State payments in lieu of property taxes, payments of the school tax on certain tax exempt property, shared costs for school districts, property tax exemptions for manufacturing machinery, processing equipment, merchants' stock-in-trade, manufacturers' materials and finished products, and shared taxes for municipal and county governments tend to neutralize the impact of local increases or decreases in the property tax base. Professor Richard Stauber, one of the foremost students of the Wisconsin tax system, recently concluded that "with but rare exceptions, there seems to be broad general agreement that--in the long run and other things being equal--changing property values should not be the basis for community development decisions."[46]

C. Impacts on Private Decision-making

1. Introduction

Land use patterns have changed drastically in the last 15 years and current land use conversions are taking place at

an increasing rate. In many places, these rapid changes have resulted in social conflicts and high social costs. For example, a frequent pattern of urban development, urban sprawl and leapfrog development, is extremely costly for the provision of public services and is wasteful of energy. This pattern also results in the loss of agricultural lands, the intrusion into environmentally sensitive areas, and the reduction of open space.[47] Mixing agricultural land uses and residential land uses has also caused many problems for farmers, such as complaints about the noise, odor or dust from normal farm operations. Finally, haphazard urban development has resulted in septic systems sometimes being installed in places that do not have suitable soils, leading to failing septic systems that cause severe health hazards and water pollution.

Preferential taxation is one method frequently suggested to help reduce these social conflicts and the high social costs of unplanned urban development. The major focus of such programs is to influence the timing of private land development.

2. Preferential Taxation

In 1975, the Wisconsin Constitution was amended to authorize the legislature to preferentially tax agricultural and undeveloped lands.[48] In 1977, the legislature enacted the Farmland Preservation and Tax Relief Program, creating Chapter 91 and section 71.09(11) of the Wisconsin Statutes. It is worthwhile to first highlight the land use problems that this constitutional amendment and recently enacted program intend to solve.

Preferential taxation is based on several premises. First, it is recognized that the market value of undeveloped land increases sharply as urban development approaches. Secondly, it is argued that this encourages land speculation and tends to force fringe properties out of agricultural land uses and into alternative urban uses. Thirdly, it has been asserted that the additional property tax liability that is imposed on such agricultural lands causes farmers to prematurely sell their lands to development interests, leading to the premature development of the urban fringe, the loss of prime agricultural land, urban sprawl, and "leap frog" development.

Preferential property taxation of agricultural and undeveloped lands is intended to short circuit this development pattern. It is designed to insulate farmers from the financial impact of escalating property tax bills by establishing special assessment methods and/or lower tax rates for agricultural and undeveloped land, and to subsidize farmers who preserve prime agriculture lands. It is also designed to maintain current land use patterns and to deter specula-

tion and rapid development by providing for tax recapture or penalties upon sale or change of use (changes of use from agricultural or undeveloped to residential, commercial or industrial).

There are three main features to the Farmland Preservation and Tax Relief Program: a classification and eligibility scheme; the provision of tax relief; and a penalty system. The specific elements of each of these features are dependent upon whether or not the program is in the initial or permanent phase. The initial program began on December 1, 1977 and ends on September 30, 1982, after which the permanent program becomes effective. The permanent program is characterized by the required adoption of agricultural preservation plans and/or exclusive agricultural zoning ordinances by counties as requisites for tax relief eligibility of landowners. The Department of Agriculture, Trade and Consumer Protection (DATCP) administers the program.[49] An Agricultural Lands Preservation Board was established to, among other functions, certify local agricultural preservation plans and local exclusive agricultural zoning ordinances which are consistent with the standards provided in the law.[50]

A classification scheme provides criteria for determining whether or not specific lands qualify for tax relief under the program. Under the initial program any farmland owner in the state can apply for a contract with the state, qualifying him for tax relief if the contract is approved by the county board and the DATCP, if his farm is 35 acres or more, and if his "gross farm profits" equal or exceed $6,000 in the previous year, or totaled $18,000 or more over the last 3 years.[51] The contract will allow the owner and the state to agree to jointly hold the right to develop the land,[52] and has to incorporate several provisions mandated by law.[53]

Under the permanent program, "urban" counties[54] must adopt exclusive agricultural zoning ordinances on or before October 1, 1982 if farmers are to continue to be eligible for tax relief.[55] Exclusive agricultural zoning ordinances must meet specific state standards set out in sec. 91.75. Sec. 91.77(1) provides criteria which must be considered when rezoning land from exclusive agricultural zones. Rural counties must have either an exclusive agricultural zoning ordinance or an agricultural preservation plan in effect on or before October 1, 1982 if farmers are to qualify for tax relief. Provisions for those elements agricultural preservation plans must encompass, contained in sec. 91.55(1), include the identification of special environmental areas. Counties must also develop "a program of specific public actions designed to preserve agricultural lands and guide urban growth."[56]

Most preferential taxation programs adopted in other states are based on the concept of use value assessment. In other words, property tax assessments are based on the current uses of the land, rather than assessments based on the traditional full market value of property.

The tax relief available to owners of agricultural land in Wisconsin is a departure from other state programs since it consists of a tax credit against their state income tax for part of their excessive property tax. Therefore, local governments are not faced with any losses to their property tax base. The specific tax credit available to an individual landowner is dependent upon his income and the amount of property tax levied against his land.[57] The level of tax credits depends on the land preservation measures in effect.[58]

Penalty systems, such as Wisconsin's, provide a process whereby landowners who convert agricultural land to developed uses must pay deferred back taxes. This is to ensure that the preferential taxation program does not become a tax shelter for land speculators. The Wisconsin program does recognize those different circumstances under which a preservation contract may be breached and thereby provides different penalties. All the penalties include a rollback of tax credits previously received and most contain requirements that a 6% compound interest be paid.[59]

Although it is too early to evaluate the Farmland Preservation and Tax Relief Program, a few comments can be made with regard to some of the major arguments made against preferential taxation in other states. 1) Such programs generally apply on a statewide basis, therefore land well beyond the pressures of urban development receives the same preferential treatment as land on the urban fringe. However, the Wisconsin program does make a distinction between "urban" and "rural" counties, applying different requirements for these two categories and, after the initial five year start-up period, land must be either zoned for agricultural use exclusively or be in an identified farmland preservation area in an adopted local plan. 2) Preferential taxation causes a reduction in the local tax base and therefore reduces local government revenues. As has already been mentioned, in Wisconsin local governments would not lose revenues since the monetary incentive is provided through state income tax credits. 3) Taken alone, preferential taxation of agricultural and undeveloped lands has a limited long term impact on land use patterns unless it is implemented in conjunction with a regional or statewide land use plan.[60] The Wisconsin program provides that counties must adopt agricultural preservation plans and/or exclusive agricultural zoning ordinances if the program is to continue within their borders after the initial program expires.

Other arguments raised against the efficacy of preferential taxation include the following: that it is too little too late because the increased market value of the land, coupled with the federal income tax capital gains deduction, provides the selling farmer with gains that cannot be offset by tax subsidies and that preferential taxation at best only slightly retards inevitable land use changes. However, the success of the Wisconsin program cannot be measured until after the permanent program is well underway.

III. Urban Redevelopment and Property Taxation

A. Introduction

Many cities and villages are currently unable to finance needed urban redevelopment projects. The scarcity of federal funds, the rapid increase in the public cost of redevelopment, and the "weak" revenue bases of many local communities have severely restricted local efforts to combat urban blight. To overcome these constraints, the legislature has developed an alternative financing mechanism based on local property tax systems. It is called tax increment financing.[61]

B. Tax Increment Financing

Tax increment financing is a redevelopment funding tool that enables cities and villages to initiate redevelopment or industrial development projects on their own. It is a cost sharing scheme whereby all taxing jurisdictions within a specified tax increment financing district contribute property taxes to the municipality sponsoring the project.

Tax increment financing works as follows. First, a city or village designates a portion of the community as a blighted area and simultaneously determines the value of the taxable property located in the designated area. This value is called the tax increment base and remains constant throughout the life of the project.

Secondly, all the taxing jurisdictions continue to assess and tax the property located in the designated district. Property located in the district is not given perferential treatment in any way. It is assessed and taxed like any other property.

Third, taxes collected on the actual tax base valuation that exceeds the tax increment base are paid into a special fund. The monies in this fund are used to pay the costs of redevelopment. In other words, the property tax benefit that results from the local community's redevelopment project will be used to pay the redevelopment costs. The assumption is that the improvements made in the designated area will substantially increase the value of all the real property within the designated area.

As soon as the costs of the project have been met, the project terminates. Alternatively, the statute terminates the project within a specified time period (15 to 20 years) even if the costs have not been met.

Fourth, the law provides that the tax increment payment made by school districts will be reimbursed by the state. This provision is important because school districts would make the largest payments to the special fund and the reimbursement clause releases school districts from any fiscal burden.

The success of tax increment financing depends, to some degree, on the municipality's project selection. To be highly successful, the project should have a low initial tax base and should create as large an increment change as possible. Such a project could involve the location of expensive private facilities, such as office buildings and high rise apartments, in the district, with the location of facilities that create only small increases in tax base valuation being discouraged. Such undesirable facilities include single family houses, small businesses, low income housing, and multi-family complexes.

Five municipalities initiated tax increment financing projects in 1976[62] and an additional 19 communities commenced projects in 1977. These 24 project plans vary from developing industrial sites to creating recreational areas.

The use of tax increment financing by two coastal municipalities may be illustrative of how the program may be used. The City of Green Bay's project involves 170 acres around its central business district.[63] Most of that land presently contains old and delapidated commercial buildings, which will be cleared to allow the business district to expand, create parks and provide for some low and moderate income housing. Green Bay has decided to use tax increment financing because redevelopment funds were unavailable from other sources. In contrast, Milwaukee is using the program to help finance a 400 acre industrial redevelopment project in the Menomonee Valley.[64] The project is primarily con-concerned with improving the transportation network in that area. One hundred acres of underutilized land will also be acquired and prepared for industrial use by providing that land with sewer, water and other public services. Since redevelopment funds from other sources were insufficient to finance the project, Milwaukee is using tax increment financing as a supplemental funding source.

Unfortunately, to this extent, the degree of financial success of tax increment financing appears to be tied to a municipality's successful attraction of "good ratables" and exclusion of "bad ratables". As noted earlier, the competition for ratables often distorts land use decision-making. Although it is still too early to determine whether or not tax increment financing will be extensively used, its success may rely on dynamics counter to those provided in the shared tax formulas and the school aids program.

IV. Conclusion

This chapter has examined the Wisconsin property tax structure and analyzed some of the interrelationships between taxing policy and land use planning. Specifically, it was found that state payments in lieu of property taxes, payments of the school tax on certain tax exempt property, shared costs for school districts, property tax exemptions for manufacturing machinery, processing equipment, merchants' stock-in-trade, manufacturers' materials and finished products, and shared taxes for municipal and county governments have tended to neutralize the impact of local increases or decreases in the property tax base. In effect, municipal officials have no strong financial reasons to attempt to attract "good ratables" or to exclude "bad ratables". Rather, local officials are free to make land use decisions on the basis of environmental, social and cultural concerns.

Secondly, the concept of preferential taxation of agricultural and undeveloped lands was examined. It is intended to insulate farmers from the financial impact of escalating property tax bills, to subsidize farmers who preserve prime agricultural lands, to maintain current land use patterns and to deter speculation and rapid development. Although Wisconsin's program is too recent to be analyzed in depth, preferential taxation has deficiencies, such as the possibility that the income tax subsidies may be too small to offset market value gains and capital gains income tax savings and that the program at best would only retard the inevitable conversion of agricultural land to urban uses. However, it would appear that preferential taxation of agricultural and undeveloped lands, used in conjunction with land use programs, may be an important land use tool.

Finally, a redevelopment funding tool called tax increment financing was examined. It was found that tax increment financing provides cities and villages with an alternative redevelopment mechanism, that it allows the state to funnel aid through school districts to city and village redevelopment projects, and that its success appears to some extent to be tied to the successful attraction of "good ratables" and exclusion of "bad ratables". Unfortunately, this dynamic often distorts those land use decisions made for the redevelopment district. In short, the requirements of successful financing may run counter to the policies embodied in the shared tax formulas and the school aids program.

Traditionally, land use planners and tax policy formulators have been two distinct professional groups. It is only very recently that these two groups have begun to examine the interrelationships between fiscal policy and land use planning. The trend needs to continue, as property taxation can have major land use impacts which can have serious negative effects on land use decision-making. With study, communication and a great deal of effort, these impacts can be reduced and eventually eliminated. And Wisconsin is well on the way to doing just that.

Notes

1. Municipal Resources Provided and Expended - Bulletin (1975). A very small amount of state revenue is also generated by the property tax.

2. The State of Wisconsin Blue Book, 1975 at 681.

3. See Wisconsin Constitution Article VIII, sec. 1.

4. See Wisconsin Constitution Article VII, sec. 1 and Gottlieb v. City of Milwaukee, 33 Wis.2d 408, 147 N.W.2d 633 (1967).

5. The properties exempt from the general property tax are set forth in Wisconsin Statutes sec. 70.11.

6. The following is an example of the calculation used to arrive at the net local property tax levy:

   Total expenditures
   Less: Other sources of revenue
   Gross local property tax levy

   Gross local property tax levy
   Less: State general and personal property tax relief
   Net local property tax levy.

7. Wis. Stats. sec. 70.57 (1975).

8. Wis. Stats. sec. 70.32 (1975).

9. Wis. Stats. secs. 70.11 and 70.111 (1975).

10. There is a wealth of cases and literature on the problem of exclusionary zoning. For examples, see the bibliography in Fair Housing and Exclusionary Land Use at 61-72, ULI Research Report No. 23 (1974).

11. Wis. Stats. secs. 79.01 to 79.16 (1975).

12. Data supplied by Richard L. Stauber, Bureau of Local Fiscal Information and Analysis, Wisconsin Department of Revenue.

13. Id.

14. Wis. Stats. sec. 70.11 (1975).

15. Wis. Stats. sec. 70.113 (1975).

16. Wis. Stats. sec. 70.04 (1975).

17. Chapter 31, Laws of 1977 and Chapter 185, Laws of 1977.

18. Municipalities, for the purposes of the distribution of mineral taxation funds, are defined as any county, city, village, town or school district.

19. Net proceeds are the difference between the gross proceeds of a mining operation and its allowable deductions.

20. Section 70.395(5), Chapter 31, Laws of 1977.

21. Section 70.395(2)(h), Chapter 31, Laws of 1977.

22. Section 70.395(2)(d), Chapter 31, Laws of 1977. Also, an amendment to this section under Chapter 185, Laws of 1977, allows the $300,000 limit to rise with the national consumer price index, with 1977 acting as the base year.

23. Section 70.395(2)(d), Chapter 31, Laws of 1977.

24. Section 70.395(5), Chapter 185, Laws of 1977.

25. Section 70.395(4), Chapter 31, Laws of 1977.

26. Wis. Stats. sec. 76.24 (1975).

27. M. Rosner and R. Barrows, Public Land, Tax Exempt Land, and Property Taxes, Research Bulletin R 2774 (1976).

28. Wis. Stats. sec. 70.114 (1975).

29. Wis. Stats. sec. 70.115 (1975).

30. Wis. Stats. sec. 70.116 (1975).

31. Wis. Stats. sec. 70.117 (1975).

32. Wis. Stats. sec. 70.119 (1975).

33. In addition to the argument advanced by muncipal officials that the introduction of bad ratables in a community place increased pressures upon existing educational facilities, it is also argued that the location of bad ratables in a community will increase welfare costs. In 1974, the following expenditures were made for health and social services. Villages expended 0.8% of the total state expenditure for health and social services. Cities expended 2.9% of the total state expenditures for such services and counties expended 54.8% of the total state expenditures for such services. Finally, the state expended 42.5% of the total state expenditures for such services. Supra note 1.

34. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

35. N.Y. Times, at 20, col. 4 (Dec. 30, 1974).

36. See, e.g., Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Northshore School District No. 417 v. Kinnear, 84 Wash.2d 685, 530 P.2d 178 (1974); and Shofstall v. Hollins, 110 Ariz. 88, 515 P2d 590 (1973).

37. See, e.g., Serrano v. Priest, No. 938, 254 (Cal. Super. Ct., April 10, 1974), 5 Cal.3d 584, 487 P.2d 1241 (1971); Robinson v. Cahil, 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972).

38. Wis. Stats. sec. 121.07 (1975).

39. One notable exception concerns school districts which have incurred additional costs attributable to enrollment increases resulting from the development and operation of metalliferous mineral mining. Upon agreement between the school district and the Investment and Local Impact Fund Board, the school district may receive all or part of the non-shared costs attributed to mining development. Section 70.395(2)(f), Chapter 31, Laws of 1977.

40. Wis. Stats. sec. 121.08. For a useful summary, see "School Funding Equalization in Wisconsin," Wis. Dept. Pub. Instruction (Oct. 1975).

41. Buse v. Smith, 74 Wis.2d 550, 247 N.W.2d 141 (1976).

42. Each school district has some costs that are not shared by the state, i.e., payments on bonds and loans, the cost of acquiring furniture and equipment, and the original cost of school facilities. For some districts these non-shared costs make up a large part of their expenses. The portion of the educational expenses that must be borne by the local district equal:

$$\frac{\text{non-shared costs}}{\text{tax base}} = \text{part of the educational expenses borne by the local district.}$$

Given this relationship, if the tax base increases and the non-shared costs remain the same or increase slower than the tax base (i.e., "good ratables" locate in the school district), then the part of the educational expenses borne by the local district are reduced. Alternatively, if the tax base is reduced or if the non-shared costs increase (i.e., "bad ratables" locate in the school district and/or new school facilities must be constructed) then the educational expenses borne by the local district are increased.

43. Wis. Stats. sec. 70.11 (1975).

44. Wis. Stats. sec. 70.111 (1975).

45. Chapter 90, Laws of 1973; Chapter 39, Laws of 1975; and Chapter 224, Laws of 1975.

46. Stauber, "Tax Base Neutrality: A Summary," Paper presented to the Wisconsin Economic Development Association (Sept. 24, 1976), at 11.

47. See generally S. Friedman, Public Service Costs and Development, Wisconsin Office of State Planning and Energy, DOA-SPO-75-9 (1975).

48. Wisconsin Constitution Article VII, sec. 1.

49. Section 91.05, Chapter 29, Laws of 1977.

50. Sections 91.61 and 91.78, Chapter 29, Laws of 1977. Other functions of the Board include: 1) approval or denial of requests for early withdrawal from contracts (sec. 91.19(3)&(5)); 2) rulings on appeals from landowners who have been denied contracts by the county (sec. 91.13(7)); and 3) approval of the distribution of funds for counties to do agricultural preservation planning (sec. 91.65).

51. Section 91.06(6), Chapter 29, Laws of 1977.

52. Section 91.01(7), Chapter 29, Laws of 1977.

53. These provisions are found under section 91.13(8). Specifically, they state that: 1) no structures may be built and no land improvements may be made except those consistent with farm use; 2) farmland under contract may not be specially assessed for sewer, water, lights, or non-farm drainage (however, these services cannot be extended to the land unless the owner pays the special assessment); and 3) the contract stays with the land, even if it is sold to a different owner.

54. Under sec. 91.11(13), an "urban" county is considered to be a county with a population of over 75,000 or adjacent to a county with a population of 400,000 or more. In 1976, the urban counties were Brown, Dane, Fond du Lac, Kenosha, LaCrosse, Manitowoc, Marathon, Milwaukee, Outagamie, Ozaukee, Racine, Rock, Sheboygan, Washington, Waukesha, and Winnebago. All other counties are considered to be "rural".

55. In an urban county, the exclusive zoning can be rejected for all towns if a majority of towns file resolutions disapproving it with the county clerk within 6 months of the time the county adopts the ordinance (sec. 91.73(3)). In rural counties, exclusive agricultural zoning ordinances adopted by the county board will automatically take effect in all towns unless the town boards specifically reject them (sec. 91.73(4)).

56. Section 91.56, Chapter 29, Laws of 1977.

57. Farmers with incomes in excess of $35,000 will not be eligible for the credit. Property taxes eligible include all property taxes levied on farmland and improvements with a ceiling of $4,000 (sec. 71.09(11)(a)7). **This figure may not include special assessments, delinquent interest and special service charges.**

58. Under the formula used to calculate the potential credit, the maximum credit is $2,600. Under the initial program, 50% of the maximum credit (which is dependent upon income and property tax factors) is available if there is a farmland preservation agreement or contract in the absense of agricultural preservation plans or exclusive agricultural zoning ordinances (sec. 71.09(11)(b)3 f). Under the permanent program, 70% of the maximum credit is available if the land is located in an exclusive agricultural zone (sec. 71.09(11)(b)3 e), if the land is included in an agricultural preservation plan and the owner enters into a preservation agreement, or if the farmer signs a special transition area contract (sec. 71.09(11)(b)3 a), or if the county has adopted an agricultural preservation plan and the town has adopted an exclusive agricultural zoning ordinance (sec. 71.09(11)(b)3 d). 100% of the maximum credit would become available only in those counties which have adopted both an agricultural preservation plan and an exclusive agricultural zoning ordinance (sec. 71.09(11)(b)3 a).

59. Under the initial program, there is a rollback of all tax credits along with a 6% compound interest for contracts cancelled early (sec. 91.19(2)(b)) and contracts which have expired and where the eligible landowner does not extend his contract (sec. 91.37(3)). For contracts which have expired and where the landowner is ineligible for further tax relief, due to the lack of county adoption of a certified county agricultural preservation plan or exclusive agricultural zoning ordinance, there is a 2-year rollback without interest (sec. 91.37(2)). Under the permanent program, there will be a rollback of tax credits received for up to 20 years with 6% compound interest for contracts which have not been renewed (sec. 91.19(8)), contracts which were severed before their expiration date (sec. 91.19(7)), and where exclusive agricultural zones have been changed to a use other than agricultural (sec. 91.19(8)).

60. Alston, "Preferential Taxation of Agricultural and Open Space Lands: Proposal for Wisconsin", UW Institute for Environmental Studies, Working Paper 8F, (1972).

61. Wis. Stats. sec. 66.46 (1975).

62. The five communities are Brillion, Green Bay, Milwaukee, Platteville and Hudson. Conversation with Carol Kuehn, Wisconsin Department of Revenue, January 19, 1978.

63. The tax increment value for Green Bay's project has increased by $19,684,290 between 1976 and 1977. Conversation with Dennis Russell, City of Green Bay Department of Planning, January 19, 1978.

64. Conversation with James Scherer, Redevelopment Authority of the City of Milwaukee, January 20, 1978.

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CHAPTER 4 : TRANSFERABLE DEVELOPMENT RIGHTS

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I. Introduction

A. Transferable Development Rights (TDR)

Transferable development rights (TDR) is a complex system of separating the right to develop property from the other rights inherent in the ownership of property. It is possible to explain the basic concept with a simple example.

Example: A and B each own one acre of land. A TDR scheme is established with each acre of land in the community being assigned one development right (DR) and two DR's being required to build one unit of housing. A's land is suitable for building; B's parcel is a wetland. Land use regulations are enacted that permit A to construct one unit of housing and prohibit B from developing his land. In order to build, A needs 2 DR's, necessitating A to buy B's unusable DR if A is to build one unit of housing on his one acre parcel.

As a result of the DR transfer A is allowed to develop his land and B is compensated for the restriction on his land through A's purchase of his unusable DR without the problem of a governmental "taking" of B's land without compensation. Without having to directly compensate B the government has obtained preservation of the wetland.

B. Basic Underlying Assumptions of TDR

A transfer of development rights program largely involves what its title suggests. The right to develop is severed from one parcel of land and transferred to another parcel. The objective is to restrict the development of the first parcel and to encourage more intense development of the second parcel.

The advocates of the transfer of development rights concept make three basic assumptions. (1) Zoning regulations have failed to protect certain resources that require low density use and that are situated where the market place demands a high density use.[1] (2) Zoning regulations unfairly create "windfall gain and wipeout losses" by giving some landowners the opportunity to make high profits on land zoned for intense development while denying other owners the opportunity to intensively develop their land. This induces the owners of restricted land to demand zoning changes to realize their land's full development potential, often creating haphazard land use patterns.[2] (3) Either economic fairness or legal doctrines of just compensation[3] require that owners of restricted land be compensated for the inability to develop their land.

C. Explanation of the TDR Concept

TDR is designed to preserve low density resources and eliminate resulting economic inequities. TDR permits greater development density where it is not objectionable by severing the linkage of development potential (i.e., the right to develop) from a parcel of land.

Ownership of land is considered to incorporate the possession of a number of rights relating to the property. Severance of these individual rights in property is not unprecedented; for example, it is common to sell mineral rights of parcels of land, or to lease the right of possession of one's property to another for a period of time. The right to develop property can also be severed. Through the sale of scenic easements, property owners transferred development rights along the Great River Road to the state of Wisconsin. Development rights have also been transferred, to a limited extent, in cluster zoning (or PUD) plan, where the overall density of an entire parcel of land is transferred to specified areas of the parcel, leaving the remainder as open space. The bulk of one lot has also been transferred to an adjoining lot with "bonus" or "incentive" zoning, permitting a larger building than allowed for by standard zoning restrictions.[4] Severance and allocation of development potential by government is, therefore, not a new idea. In fact, the basic concept of zoning can be considered as a severance of development rights in one area and their allocation in another[5] in that more intense development is permitted in some areas and denied in others. Just as zoning allocates development potential for a public purpose (protection of the public health, safety or general welfare), TDR also manipulates development potential for a public purpose--such as preservation of endangered resources.[6]

Looking at zoning as a system to allocate development potential and at severance of development rights from land as a precedented concept, it is logically consistent to recognize the state's power to restrict land to a use that will preserve its natural character by means of "compensated acquisition of DR in order to prevent public economic loss."[7] In the TDR system, an owner of land whose use is restricted is compensated for the inability to develop by permitting the owner to sell the unused (and unusable) development rights to another landowner who can use the rights and who wishes to develop his land more intensely than current zoning regulations permit.

D. Steps to Form a TDR Plan--Various Types

It is extremely important to note that TDR does not replace zoning and planning. It is one component of a comprehensive land use program, not a substitute for such a program. All TDR proposals have the same prerequisite: a sound land use plan that identifies the land use and preservation goals for the area. No TDR plan should be implemented unless a well thought out land use plan is adopted by the proper authorities.

The subsequent steps in formulating a TDR program vary with each plan and are dependent upon the area to be preserved, the type of development permitted and the comprehensiveness of the plan. Illustrations of various plans will show the variety of techniques that may be used.

TDR systems have been proposed in these four settings: (1) to guide development on the urban fringe; (2) to preserve historic landmarks; (3) to protect critical environmental resources; and (4) to guide development around public facilities.[8]

The TDR proposals described below are not the only ones which have been developed. However, they are the most publicized ones and constitute a representative selection.[9]

1. Urban Fringe Development

Three proposals considered below envision TDR as a guide to development on the urban fringe--the New Jersey, Maryland, and Fairfax County, Virginia proposals. Of the three, the Virginia proposal is the most extensive in that it would use TDR as the basic land use control mechanism. The New Jersey plan has come closest to implementation. Originally brought before the state legislature in 1975, TDR enabling legislation was passed by the general assembly, yet failed in the senate by five votes.[10] The bill was re-introduced in both houses the following legislative session.[11] However, as of November 4, 1977 the New Jersey legislature has yet to enact the proposal.

New Jersey: Sidney Willis, the Assistant Commissioner of the New Jersey Department of Community Affairs explains the goal of the New Jersey TDR proposal, "We are not trying to achieve the whole world. We are not calling it land use reform. We simply wish to preserve some open space."[12] New Jersey's proposed attempt to preserve "some open space" utilizes TDR in a residential density transfer program.

There are five steps in the program. First, specific areas to be preserved must be identified in accordance with the community master plan studies. An area for preservation must consist of substantially unimproved land of at least 25 acres.

Second, the municipality designates the area to be preserved as an "open space preservation zone" and selects a transfer zone in which can be built the number of housing units that could have previously been built in the preservation zone (enabling legislation grafts the TDR system onto existing planning and zoning acts).

Third, DR's are issued to area landowners equal to the units allowed by normal zoning requirements in the preservation zone. The DR's are distributed in proportion to the value of the owner's undeveloped land in the preservation zone.

Fourth, acquisition of these unusable DR's are required to build at a new higher density in the transfer zone. The sale of the DR on the private market from the preservation zone to the transfer zone compensates the preservation zone owners for their inability to develop.

Fifth, if the transfer zone is not developed at an increased density, a new transfer zone may be created to ensure a market for the DR. Under a revised bill which was introduced in the state general assembly, the state would guarantee the sale of development rights under certain circumstances as well as establish an oversight committee.[13]

This TDR system equalizes the economic effect of zoning. The public gains in that open space is preserved by directing development pressures elsewhere. Under traditional zoning practice, those wanting to develop in excess of zoning limits merely applied for (and usually received) a variance or amendment to the zoning regulation. TDR limits the areas in which this increased density may occur by explicitly designating transfer zones and refusing to "upzone" in other areas. TDR also captures the windfall profits gained by those who formerly obtained variances and amendments by making developers pay for their increased density. The owners who were previously "wiped out" by zoning restrictions in preservation zones are compensated with the "captured" windfall profits when they sell their development rights.[14]

Maryland: The Maryland plan is not restricted to residential areas; it includes both residential and commercial zones. As in New Jersey, the process is initiated when a planning commission identifies the land areas to be preserved.

DR's are distributed according to the proportion of the total acreage owned by the individual owner. A developer must amass a specified number of DR's before building,

although required DR's are exempted for agricultural use, churches, and schools. The DR's from any state owned public lands are given to the local government, thereby providing them with an additional source of revenue for preservation. When more development is needed, the municipality allots additional DR's to DR holders.[15]

Fairfax County, Va.: The Fairfax County proposal, designed by Audrey Moore, a supervisor on the County Board of Supervisors, relies heavily on the market to determine density, residential areas and DR transfers. The TDR proposal would completely replace zoning. There are four steps to the plan.

First, the community would determine the basic features of a comprehensive plan through a referendum vote. The local government would then prepare a comprehensive plan establishing the anticipated total population, future commercial and industrial land use needs, and land requirements to support public facilities, conservation, farmland, open space and other uses. The plan would set specific locations for commercial and industrial sites only.

Second, the local government would determine the required number of rights for each residential, commercial or industrial development and the desired density of development. Public uses, recreation, farm use, conservation and public utilities require no DR's.

Third, owners receive DR's in proportion to the number of acres owned, subtracting any development already in place. The DR's are free from real property tax until they are used. Fourth, in order to develop, a builder must have DR's equal to those required for the development.

Revisions of the total plan would be by referendum and additional DR's would be distributed to those holding DR's.[16]

2. Landmark Preservation

In large cities demand for taller buildings has threatened the existence of landmarks that are often much smaller than the surrounding buildings. Operation of a small, old building is often at an economic loss. Plans to preserve landmarks have included TDR to transfer the unused development potential of the landmark to another site. New York City has implemented such a TDR plan and

Professor John Costonis has formulated a sophisticated TDR plan for Chicago.

New York: New York's TDR program began in 1961, allowing the transfer of unused landmark DR's to a contiguous commonly owned parcel.[17] In 1968, the program was expanded to allow the transfer to buildings across the street and to separately owned parcels.[18] In 1969 transfers were allowed in a continuous line from the landmark.[19] A 1970 amendment allowed the city to lease a city owned landmark to an adjacent owner for 75 years, thus permitting the owner to use the landmark's available DR.[20]

Despite the continuing relaxation of the requirements, New York City's TDR program has not yet been widely successful. It has been used to preserve only two landmarks.[21] Although the New York court invalidated TDR preservation plans for a third landmark,[22] it has recently ruled in favor of preserving Grand Central Station through the use of DR's.[23]

Several factors have contributed to TDR's failure to catch on in New York. First, the New York City Landmark Preservation Commission possesses alternative tools which effectively prevent landmark demolition without the use of TDR. An indication of the effectiveness of these tools is the fact that from 1965-1974 only one of 414 designated landmarks could not be saved from demolition.[24] Second, TDR can work only where there is a market for DR's; the New York central business district is for the most part overbuilt, thereby lacking the demand for increased density.[25] Third, zoning bonus programs, offering increased floor space in return for inclusion in the building plan of amenities such as pedestrian malls, supply most of the demand for increased density. Therefore, developers have little incentive to use a program as complicated as TDR to obtain increased density. Fourth, creation of a DR market would entail extensive down zoning in the central business district to provide strong incentives for DR acquisition. It is doubtful that such a plan would be politically feasible; owners would not want to pay for the development potential that was allowed by the previous zoning.[26] Fifth, the legal problems of TDR may have caused developers to be apprehensive about accepting TDR.

Chicago: The Chicago proposal abandons the New York concept of adjacency and allows DR transfers from any designated landmark to any land in the transfer district. The transfer district is to be created by the city council in the downtown area where public facilities already

geared to accommodate high density use will be able to absorb the additional density. The landmark owner would be able to sell the unused DR (which is allocated to reflect what the owner lost upon designation of his building as a landmark--the right to demolish the building, to alter the facade and so forth)[27] to an owner in the transfer district. The DR buyer may not exceed the previously allowable floor area by more than 15%. This ensures that the new building will not drastically exceed the existing planned density. After selling the unused DR the landmark owner receives a reduction in the real estate tax on the landmark, reflecting the decrease in the value of the property.

After selling the unused DR, the landmark owner must convey to the city a preservation restriction that binds present and future owners to maintain the landmark according to reasonable standards and prohibits the demolition or alteration of the landmark without the city's authorization.[28] If a landmark owner refuses to voluntarily sell the unused DR, the city may condemn the DR.[29] The city would pay the market value of the DR to the landmark owner and "deposit" the DR in a DR bank--a pool of DR's from donors and DR condemnation proceedings.[30] The bank provides the city with a fund of DR's to sell on the open DR market, giving the city a monetary fund to use for landmark preservation.[31]

The advantages of the Chicago plan, according to Professor Costonis, are many. The cost of landmark preservation is shifted to the whole downtown development process.[32] The landmark loses its speculative appeal and the owner's property taxes are reduced. The city avoids the necessity of outright fee acquisition and total loss of tax revenue. The city also gains additional taxes from the transfer site.[33] The plan facilitates city planning by easing space shortages, allowing flexible density controls and requiring fewer variances from city hall. In addition, the limitation of a 15% increase in floor area prevents super-density problems and avoids an overload on public services.[34]

Despite its advantages, the plan has not yet been adopted. One reason may be, as in New York, that competition from bonus zoning makes the plan unnecessary for developers seeking greater density. The Sears Tower and the John Hancock Building, the two tallest buildings in Chicago, do not exhaust their zoning potentials--an indication of the need for down zoning if TDR is to be successful.[35]

Another reason may be that there is a lack of market demand for more office space in the central Chicago

business district. Also, there is a reluctance to change on the part of those used to working with the established system. One critic of the Chicago plan believes that developers "just are not interested in analyzing a real estate venture in any other way than as they presently do."[36] This same critic also feels that before TDR is used to preserve landmarks, cities should exhaust their police powers.[37]

Landmark Preservation and Public Purpose: Any government land use regulation or program must be enacted for a legitimate public purpose and not for private economic gain. Both police powers and TDR preservation programs presume that historic landmark preservation is a legitimate public purpose. TDR advocates see the sale of DR's and the economic gain to DR buyers as incidental to that purpose. The benefits accrue to developers only for a public purpose and developers must pay market prices for the extra density benefits.[38] Therefore, it is argued, cities may legitimately engage in a TDR program and create the necessary markets.

3. Critical Environmental Resources

Increases in land values often threaten sensitive environmental resources. In Wisconsin wetlands and shorelands may be endangered becasue they can be filled to accommodate recreational or other forms of development. Prime agricultural lands in central southern Wisconsin are also threatened by urban sprawl.

In Puerto Rico rapid urban expansion threatens the spectacular dinoflagellates (small glowing organisms) in Phosphorescent Bay. A proposal has been developed to apply the TDR concept to preserve this and other environmentally threatened areas of Puerto Rico.[39]

The first step in the plan, as in other TDR plans, is to identify and make an inventory of the environmentally sensitive areas.[40] Next, these areas are designated "Protected Environmental Zones" (PEZ), with development restriction limits "broad enough to ensure adequate protection of the zone but not to the extent that development rights are unnecessarily restricted."[41] Designation challenges are thereby avoided and compensation is required. A landowner is permitted to challenge the PEZ designation of his land before the administering board. If the board finds the restriction an undue economic hardship it can either liberalize the restriction or compensate the owner through the sale of DR's.

The board determines the value of the DR and arranges the sale to an owner in a transfer zone which may be located anywhere on the island.[42] The board then gives the money received on the sale to the PEZ owner. Densities permitted as a right are deliberately skewed downward to provide a market for the DR, thus avoiding a problem that plagued the New York and Chicago plans discussed previously.[43]

The main differences between the Puerto Rican Proposal and other TDR proposals is that the Puerto Rican transfer zones are dispersed and DR's are transferred only through a government agency.

4. Public Facilities

Professor Richard Barrows suggests a fourth use of TDR.[44] A public facilities TDR program could function in exactly the same manner as a TDR program on the urban fringe. Development and preservation districts could be identified, with DR certificates distributed to landowners and a private market established for the sale of DR.

Alternatively, a public facilities TDR program could operate in a slightly different manner. Two types of districts would be established--a transfer or development district, and a preservation district. Like the Puerto Rican proposal, a designated governmental body would condemn the rights of development on parcels near the public facility deemed necessary for open space uses. Compensation would be paid by the government to these open space property holders for their incurred losses. The government agency would also establish one or more transfer districts near the facility, in which property owners would be eligible to purchase added DR's for more intensive development. These rights would be purchased from the "bank" of DR's held by the government agency. Examples of where such a program could be initiated are highway interchanges, areas suited to high density, and publicly-created open spaces, particularly in urban areas undergoing renewal-type projects.

II. Functional Feasibility of TDR

The complexities inherent in any TDR program are numerous. The problems posed relate to planning, economics, public awareness, not to mention the complex legal problems created by any new governmental activity. Other than potential legal problems, the most pressing question is: Is the TDR system functionally feasible?

A. How Proficient are the Planners?

Every TDR program requires a comprehensive plan, including preservation goals, an accurate assessment of future land needs for growth and development, and a precise delineation of preservation zones. This is necessary to assure a ready market for the excess DR's from the preservation zone and to provide an opportunity for adequate compensation for the preservation zone landowners. Do planners have tools sophisticated enough to predict the future or what may happen if the number of available DR's exceeds the need for development?

Will the TDR plan fall victim to exclusionary planning, allowing only for desired development rather than needed development? Changing growth demand will necessitate continual revision of a plan to ensure a market for unused development rights. Will this lead to regional land use problems, such that the resulting plan is just as haphazard as current zoning plans which allow changes through variances and amendments?

The complexity of planning, allocating DR's, and determining the number of DR's needed for each development requires competent administrative personnel, not the part-time effort of an overworked zoning board or municipal administrator. A very serious question is raised as to whether such administrative talent is widely accessible and as to whether many municipalities can afford such administrators once they have found them.

B. How Will the TDR Market Function?

The most complex questions relate to economics. Basically, TDR establishes a new market and item of exchange--the DR. How the market will function, and in what forms the DR units will be, is the key to the success or failure of a TDR program.

1. The Item: DR

The unit of development right used determines how smoothly the market will function. Various proposals have suggested housing units, acreage and assessed valuation as the basic unit. To assure the development right unit's free marketability, James Graaskamp of the University of Wisconsin School of Business lists four necessary qualities:

1. It must be scarce enough that it is not a virtual free good.
2. It must have a readily understood standard definition to be a fundible or exchangeable commodity.

3. It must have a market of sufficient buyers and sellers to establish a negotiated price, preferably day by day or week by week over the counter.
4. It must have a broadly distributed ownership of the surpluses to prevent monopoly or monopsony, a situation in which one buyer controls the market of many sellers.[45]

Problems arise with all of the DR exchange units which have already been proposed--assessed valuation, floor area ratio, acreage and housing units. Assessed valuation as the basis for DR units is inadequate because it is a future concept which has no concrete meaning or value in the present.[46] DR's distributed proportional to market value or use value require that the potential use be estimated, a difficult process. If the parcel has not been transferred on the market recently it may be difficult to determine an adequate value. Floor area ratios as exchangeable development units do not lend themselves to odd shaped buildings and large structures with few floors; therefore, their use as units of exchange would be limited.[47] It is inequitable to use acreage or land surface area as a development unit because all land is subject to different constraints for development.[48] Housing units as units for development rights are too vague and inflexible to be effective.[49]

Graaskamp suggests cubage for the ideal DR unit of exchange. A development unit would be described as a cubic foot or cubic meter of development, for example. Cubage would lend itself easily to any type of structure or use. Codes would set out minimum cubits or density required for all land uses, including agricultural, transportation or preservation uses. Development rights would be acquired in cubits, something like using imaginary building blocks to ascertain how many rights are needed for the desired development.[50]

Another flexible DR unit, which is less complex than cubage, is proposed by the Vermont plan. Dollars form the unit basis, measured by the value lost due to preservation restrictions. The dollar figure can be used interchangeably with housing, commercial and industrial uses.[51]

Another critical issue related to DR units concerns their allocation. What test can be used to determine the reduction in the value of the land so as to determine the number of DR's allocated? One possible measure could be the highest development value of the land minus the preservation value. Issues which may then arise involve

the assurance that the land would be developed to its highest potential. What if the preserved use is agricultural, the agricultural value is presently more than the development value, but at some time in the future the agricultural value falls? Does the owner of agricultural land then receive DR's?[52]

One of the primary considerations in designing the basic DR unit should be the ease of its administration. A complicated unit system would be cumbersome to administer and could add unnecessary problems to an already complex TDR program.

2. The Market Function--Sales, Supply and Demand, Timing, Costs

Those permitted to transfer the DR is an important variable in TDR proposals. The Puerto Rican proposal does not allow the private exchange of DR's. The government condemns the DR, "banks" it, then sells the necessary DR's to developers. There is no free market of DR's in this system. The government directly compensates the restricted owner and recoups its losses by requiring developers to buy what it labels "DR's" as a price for more intensive development.

However, most TDR proposals rely on the free market. The government plays a facilitating role by allocating the DR's.

A free DR market can become unbalanced by several variations in the supply. First, one individual could own most or all of the preservation area, having a monopoly on DR's. Second, speculators could buy up most of an area's DR's. Third, DR owners could refuse to sell, holding out for a better price. Taxation of DR's may provide an incentive to sell. However, if it is necessary to prevent speculation the TDR program could permit acquisition of DR's only if the buyer has definite plans for development, limiting the number of DR's acquirable to those required for a development proposal.[53]

The demand for DR's must be strong enough to absorb all DR's at some "reasonable price." Without adequate demand at a price sufficient to compensate DR sellers TDR will fail. Insufficient demand may not necessarily be indicative of a lack of preservation needs. There may be enough demand to threaten the resource, but not enough demand for development to fully compensate all the resource owners, especially when the preservation area is large.

In most proposals a market exists for DR's only if there is a demand for development in excess of that allowable by existing regulation. However, in many areas the existing zoning density is already higher than market demand. One solution is to downzone, creating a market for DR's. However, this scheme could create problems for those who own land in the transfer zone and object to having to pay for what they had as free before.

The market demand should be balanced so that the DR price adequately compensates the owner--a delicate balance for the market to strike. According to a study done by economist Richard Barrows, full compensation may require widely fluctuating DR prices, and market instability may be a serious problem.[54]

The Vermont proposal attempts to ensure a steady demand, and thereby compensation, by requiring all developers to buy DR's for a certain percentage (e.g., 10%) of their development. A $10,000 development would have to buy $1000 of DR's. This proposal would function as a tax on those developing more intensely.[55]

Another problem is posed when the demand for development exceeds the supply of DR's. How can the government furnish more DR's? Questions arise as to how additional DR's should be allocated equitably to the various landowners. An alternative to the issuance of more DR's would be to "up zone"--allowing for more intensive development by right, thereby reducing the demand for DR's.

Issuing more DR's and upzoning both have the effect of dropping the value of existing DR's.[56] The question would then be raised as to whether or not such government actions constitute a "taking" of the DR holders' property since the DR value has decreased. If this is held to be a taking, the government would either have to compensate DR holders for their loss or devise another way of obtaining more DR's without decreasing existing DR values.

One more factor must be added. The demand for DR's must be contemporaneous with the time DR holders will want to sell. One could assume that individuals will sell their DR's when they receive a good offer.[57] However, it is difficult to accurately predict when owners will sell their DR's.

At best, the possibilities for a smooth DR market are problematic. The problem of ensuring a delicate balance

of supply and demand is exacerbated by necessitating the provision of fair compensation for the preservation zone owners.

C. Is the System Cost Free?

TDR is advocated by some as providing a cost free land use control system.[58] The restricted property owner receives compensation for the restrictions; so there is no cost to him. Jared Shlaes posits that the only person who suffers is the developer who formerly obtained increased density by getting zoning variances rather than purchasing necessary additional DR's.[59] However, the developer who pays the property owner for additional DR's is under no compulsion to buy DR's. He buys them only if they are cheaper than buying additional property. According to Shlaes, the tenant or ultimate purchaser of the transferee site pays the same amount for the development as he would have for equal development in other areas; the transfer district doesn't pay because an area's total density is not increased, but rather redistributed; the public doesn't pay because the tax revenues are not decreased (preservation areas pay taxes on their restricted use value and transfer areas pay increased taxes);[60] and public monies are not used to compensate the landowner whose property is restricted.

However, the system is not "cost free." It is the consumer and developer who eventually pay. The distribution of the cost depends on the strength of the demand for development, the number of DR holders, the number of DR bidders, the number of developers, and other land market factors. The developer possibly pays more for the land, especially if the transfer area is an artificially created market for DR's. The increased cost may be passed on to the consumer--the home buyer, apartment tenant or business operator. It is they who may be paying for the open space which benefits the entire area. The cost borne by the consumer and developer is lower if DR prices are lower.

However, reducing costs for the private consumer and developer means that the restricted landowner is compensated at a lower rate which may not accurately reflect the loss in his land's value.[61]

Placing the cost burden of resource preservation on the consumer and developer may be warranted. It is their demand for more development which threatens scarce resources. The cost of change is more equitable if borne by those who demand change.

A counterargument is that present and future consumers and developers are not alone responsible for threatening preservation areas, nor are they the only beneficiaries of more growth.

The demand for growth which threatens resources is cumulative, one to which past development has already contributed. The present dilemmas resources warranting preservation face are in large part a result of previous development practices and patterns. In addition, preservation will benefit everyone, not just those developers and consumers who must purchase DR's. Therefore, the cost of preservation should be borne by all those who benefit--the community.

Nonetheless, a workable TDR system may be the most expedient and feasible way to allocate the cost to future development. Social attitudes and values toward the environment have changed; today there is a greater awareness of the need to protect certain resources. Changing values impose new costs and development will have to absorb those costs incurred through its activities.

D. Summary

Designing a functional TDR program involves many complex factors. First, the underlying plan must be comprehensive. It must be able to designate specific areas to be preserved and accurately predict future development needs and desired densities. Second, a development unit must be devised which is easy to administer, yet flexible enough to apply to development needs. Third, unit requirements must be designated for each possible use. Fourth, administrative personnel must be found who can run the program efficiently and effectively. Fifth, the DR market must operate smoothly.

III. Legal Issues Raised by TDR

There are two distinguishable rationales behind a compensatory TDR program. One reason is based in the belief that some government restrictions on development in preserved areas constitute a "taking" and involve a constructive exercise of the eminent domain power. It is therefore legally necessary to compensate restricted landowners. The other does not necessarily admit that restrictions on land for preservation purposes is a taking. Compensation for restricted landowners would be politically and economically desirable but not legally mandated.

This section deals primarily with TDR programs that involve the eminent domain (condemnation) powers of government and poses particularly complex legal problems.

A. Problems Giving Impetus to TDR

The Fifth Amendment to the United States Constitution declares "...nor shall private property be taken for public use without just compensation." Whether or not a land use regulation does or does not take private property is a complex issue based on

several considerations. A basic part of the test depends on whether regulation "unreasonably" diminishes the value of the land or one's ability to enjoy the use of the land. Unfortunately, "unreasonableness" is an imprecise term.

Advocates of TDR attempt to compensate for the uncertainty created by the imprecision and unpredictability of the extent of value diminuation constituting an unreasonable regulation and leading to a "taking."[62] This uncertainty frustrates efficient planning. They also feel that the economic consequences of open space or landmark preservation restrictions are not adequately taken into consideration in police power regulations or by those who contend that a valid public purpose never constitutes a taking.[63] Basically, TDR supporters believe that curbs on high profits and growth placed on owners of land restricted for open space, environmental or historic preservation necessitate some compensation.

Compensation by governmental acquisition of the entire fee interest of all land to be protected would be prohibitively expensive if done on a large scale basis. The TDR alternative was developed to compensate owners for some reductions in their land values and facilitate planning without the need for large expenditures of government funds.

B. Precedents for the TDR Concept

Creation of planning districts within which the development potential of individual parcels may be transferred to other parcels is a new idea. However, there is some legal precedent for the TDR concept which modifies the rights of private landowners for a public purpose.

The three primary precedents relate to the correlative rights of individuals arising from their shared relation to a common resource. In the Milldam Acts[64] private eminent domain was used to further shared resource use and to create a multiplier effect on industry and employment, somewhat similar to TDR's effect on land use.[65] Eminent domain was also used to further resource allocation in the Drainage and Irrigation Projects.[66] The ownership of the lands remained in private hands but the rights of the individual owners were restricted in order to assure common resource benefits. This is similar to TDR which leaves the restricted property with the owners but severs their development rights.[67] The most analogous precedent comes out of the oil and gas pool regulations[68] where common owners were allocated a proportionate share of a pool of oil or gas, rather than permitting each owner to withdraw as much as possible. Under TDR landowners share development potential,[69] just as the common gas pool owners share production potential.

Some TDR proposals would use eminent domain powers to facilitate government acquistion of DR's or to force the transfer of DR's. Specific precedents exist for eminent domain acquistion of less than fee interests. Government agencies have acquired a limited property interest in varied situations. In Wisconsin the state purchased scenic easements along the Great River Road to restrict development. In New York strips of land along highways were condemned, leaving the ownership of the property with private parties but severely restricting the use of the land.[70] California has legislation authorizing acquisition of less than fee interests to restrict land use.[71] Vermont and New Jersey statutes expressly permit government acquisition of development rights.[72]

Precedents also exist for the transferability of development rights and the use of DR's as a means of land use control. The New York City floor area ratio transfer plan allows transfer of the development potential of one contiguous lot to another.[73] Incentive bonus plans are commonly used in cities to obtain desired amenities in new development. The government restricts development, then enumerates conditions under which the restrictions will be relaxed.[74] Development rights are used as a means of control in that increased density is allowed when prestated conditions are met.

C. <u>More Specific Legal Issues Raised as to the Concept and Implementation of TDR</u>

TDR programs that use eminent domain powers to condemn development rights and force their transfer raise basic legal issues (not all TDR programs use eminent domain powers). Government must fulfill two conditions imposed by the Fifth Amendment to the Constitution before it may exercise its eminent domain powers to take private property. First, property may be taken only for a public use or purpose. Second, government must provide just compensation to the owner. Do TDR programs meet these requirements?

1. <u>Public Use</u>

The public use requirement restricts the government from taking private property for use for another private party's gain. Property may be taken by the government only for some beneficial public use.

Preservation of environmental resources and historic landmarks are legislatively determined public uses. Enabling legislation for a TDR program should include a provision designating preservation of endangered resources as a public use. There is a presumption of validity accorded to legislation by the courts. The burden will be on the party challenging TDR to prove that the program

unreasonably lacks a public purpose. The reluctance of courts to overrule legislative determinations of public purposes will work in favor of TDR.[75]

Government resale of DR's in the private market after their acquisition by condemnation raises two public use issues.[76] First, it allows private gain to a distinct group--the DR purchasers who may build in excess of zoning limitations. Initial decisions dealing with private gain resulting from the condemnation of property and subsequent resale to private parties do not usually invalidate such programs because of resulting private gain. The urban renewal cases provide strong precedents. These cases show that private gain may be justified by the benefits accruing to the public.[77] The main goal of TDR is not private gain, but resource preservation, which is a legitimate public purpose. In addition, developers do not acquire any economic gain gratuitously--they must purchase the DR's.

Second, government sale of DR's in the private market raises the issue that condemnation may not be used to recoup the cost of public programs (the public use requirement also proscribes condemnation exercised solely to regain the cost needs and to resell it for a profit). Cases dealing with recoupment show that objections will be overruled if recoupment is only an incidental element of the program.[78] Courts have overridden the recoupment objection in urban renewal cases where cities sold condemned property to private developers to rebuild blighted areas. Resale of the property was considered incidental to the public purpose.[79] The same is true with TDR since the primary objective of preservation of lands can not be attained without adequate compensation of the restricted landowner through the resale money.

2. Just Compensation

Principles of eminent domain set out certain requirements for just compensation. First, the compensation must be money.[80] Second, the compensation must be unconditional and definite. It must not be based on contingent events.[81] Third, compensation must be based on the value of the property at the time of the taking, not on subsequent and possibly inflationary effects.[82]

If the TDR program distributes DR's to landowners as "necessary" compensation for the taking caused by the

preservation restrictions, it would seem that the program would violate the principles enumerated above. The compensation is by DR certificate, not money. The value of the DR relates to the potential increased value of land in the transfer zone. The DR value depends on the value of developing other lands at the time of the sale of the DR rather than the value of the property at the time of the taking.[83] Compensation is conditioned on the creation of a market for DR's.

However, one can argue that allocation of DR's is equatable to just compensation. The principles of just compensation were developed to protect individuals whose entire fee interest in the property was taken by requiring government to give owners a fair price for what it takes. TDR programs do not take the title and use of property; the owner keeps the title, nonetheless restricted, of the property.

The restricted property may not necessarily be developed at the time of the taking. It is the future right to develop the property which is being taken. Immediate and unconditional payment of money might be to the disservice of the owner; DR's leave open the possibility of obtaining higher prices at a later time. Because of the dissimilarities between eminent domain and TDR it is possible that the courts would find just compensation in DR's.[84]

Two New York cases may be illustrative. In Fred F. French Investing Co., the court ruled that the allocation of DR's to a restricted landowner did not constitute just compensation and therefore the particular application of TDR, not TDR itself, was unconstitutional.[85] Here, a zoning amendment transferred the ownership of a private park to the city in exchange for DR's for the previous owner. The opening of the park to the public was not dependent upon the relocation and effective utilization of the DR's. Moreover, the DR's were transferable only to a section of the city, not to any particular parcel or place. The DR's were also subject to contingencies, as mandated by the amendment, once they were to be used. Therefore, the court objected to the allocation of DR's as compensation because the DR's were essentially worthless to the owner.[86] The owner had no site amenable for additional DR's and, left to his own resources, could not find a suitable transfer site.[87]

Penn Central Transportation Co. produced a different ruling by the New York court.[88] The railroad desired to construct an office building above Grand Central Station. In order to preserve the landmark, the city issued DR's

to the company. The DR's were transferable to specific parcels, some of which were owned by the company. The court held that "if the substitute rights received provide reasonable compensation for a landowner forced to relinquish development rights on a landmark site, there has been no deprivation of due process."[89] The court found that the transfer sites were suitable for office construction and that benefits would accrue to the company's neighboring property if the station was preserved.[90]

Availability of a readily accessible DR market seems to be a key element for DR's to qualify as just compensation. There seems to be no assurance that the market will guarantee compensation equal to the loss suffered by the owner. To ensure that DR's provide just compensation the municipality must either guarantee a smoothly operating market or purchase and sell the DR's itself.

Another important legal issue of TDR, if it is considered to be an exercise of eminent domain powers, is that condemnees are entitled to valuation by a jury.[91] Since the compensation required by preservation zone owners determines the cost borne by the developer or consumer, the unpredictability of a jury response might obstruct the smooth operation of a TDR program.[92]

3. Other Legal Problems

Other legal problems arising from the TDR concept apply whether the TDR program uses eminent domain powers or merely compensates restricted owners because it is politically desirable. Issues raised relate to the constitutional requisite of due process and equal protection, the uniformity requirement for zoning regulations, and the question of whether the private sector should bear the cost of preservation.

Some of the legal problems arise from the creation of DR transfer districts where DR buyers are allowed to build in excess of the zoning limits. It may be argued that a relaxation of zoning regulations sacrifices sound zoning and planning and therefore is an arbitrary exercise of the police power, prohibited by the due process clause of the Fourteenth Amendment.[93] John Costonis argues that bulk levels permitted by zoning are not exact scientific calculations and are often influenced by political pressure. Zoning sets a limit but tolerates a range of variations which will not destroy the planning objectives. A TDR program that would allow only a slight increase in a building's size, for example 15%, would be within a

tolerable range of zoning limits and would not permit every builder to exceed the bulk restrictions.[94] Also, builders who do not purchase DR's suffer no unconstitutional encroachment on their right to develop because the acceptable transfer district will tolerate only minimal density increases.[95] Since the restriction is based on planned objectives and rational distinctions, it is not arbitrary and does not violate due process requirements.

Most zoning ordinances require regulations to be uniform for each class or kind of building throughout a zoning district.[96] Does TDR violate this statutory requirement because it permits greater density in transfer districts? TDR programs are very similar to cluster, or PUD, and density zoning wherein bulk is redistributed. Density and cluster zoning measures have not been invalidated because they deny uniform treatment of all property owners. In fact, courts have held that cluster or density zoning meet uniformity requirements because all property owners within the area have the opportunity to develop their parcels within such flexible density limitations.[97] These precedents may be applicable to the TDR concept.[98]

The argument that only wealthy owners may be able to purchase DR's does not invalidate a TDR program on equal protection grounds. Both cluster zoning and PUD's favor large land holders, and those programs have not failed on equal protection grounds. Recent Supreme Court decisions also suggest that laws that discriminate in favor of those who can afford to take advantage of an opportunity are not invalid.[99]

There is also an equal protection argument to be made for DR purchasers within the transfer district. They may argue that they are denied equal protection because zoning densities outside the transfer district are more liberal than those within the district. Costonis believes that a properly implemented TDR program will not falter on this question because the classification is based on a rational distinction, the amount of maximum density an area can support.[100]

Landowners in districts not designated as transfer districts may also have their rights violated on equal protection grounds. All zoning districts have a certain tolerable range for increasing density, just as a transfer district has, since zoning limitations cannot be precisely determined. Therefore, perhaps all landowners in the municipality should be given the opportunity to exceed zoning density limits by purchasing additional DR's. This argument carries weight only if the transfer district and preservation district are not coextensive. If the DR's of a preservation district can be transferred only

to transfer districts, then the density of both districts as a unit remains the same. However, if unused DR's are transferred to a separate district the other districts within the community should also have a right to that shared development potential. This is largely a problem of semantics which can be obviated by having the transfer district boundaries include all of the preservation district.

In all TDR plans the burden of preservation is shifted from the government to private parties. Is this supported by any legal precedent so that its validity can be determined? There are two other areas in which public benefit costs are shifted to developers; special assessment and subdivision exaction.

Special assessment is not analagous to TDR. Property subject to special assessment must receive some special benefit distinct from any benefit enjoyed by the general public.[101] Benefits must arise out of the improvement financed by the exaction, which must be proportional to the property's share of the cost of the improvement.[102] The "improvement" under TDR, the preserved open space, benefits the entire community equally. The property which pays the cost, the transfer site, does not receive a benefit distinct from the benefit enjoyed by the general public. Even if the transfer site did receive a distinct benefit (e.g., increased density), it pays more than its proportionate share of the entire cost of preservation. Proportionality would require all parcels in the transfer district to contribute to the cost of preservation.[103] Therefore, it would seem that shifting preservation costs to developers might be held unconstitutional on the grounds of due process, since it arbitrarily imposes the costs of preservation on one group.

TDR advocates argue that TDR should not be analogized to special assessments.[104] The rationales of TDR and special assessment differ. TDR advocates say the cost of preservation should be borne by land development because it is that activity which threatens the resource, that this premise is irrelevant to special assessment doctrine and that therefore the TDR - special assessment analogy is inapposite.[105]

The better comparison can be made with subdivision exaction which, like the regulation aspects of TDR, is a police power measure.[106] Recent cases dealing with subdivision exaction do not limit the beneficial use of the exaction solely to the subdivision making the dedication; the community may also benefit from the exaction. The subdivision need only be a contributing factor to the need for the benefit. In addition, the cost imposed on the subdivision need not correlate with the enhanced value of the subdivision land.[107] A critic of TDR states that subdivision exaction

is based on the privilege to subdivide granted by the community and that exaction can be required only for additional community needs uniquely attributable to the development.[108] Costonis contends that the privilege argument does not take into account the economic incentives for subdividing and that the "uniquely attributable" test has been broadened.[109] He also believes that TDR's clear standards and its framework for equitably allocating resource protection costs "should allay justifiable constitutional and policy concerns that attend any cost shifting devise."[110]

IV. Summary and Conclusions

The functional and legal problems raised by TDR point out the following basic criteria a program must meet if it is to be successful:

1. The planning agencies that design the TDR program must be highly proficient.[111] They must be able to accurately delineate preservation and transfer districts and predict future development needs. Highly skilled economists, planning and administrative experts would be needed.

2. "The formula for issuing DR's must (a) fully reflect the loss in land values of those who are denied the right to develop their lands (if just compensation is required) and (b) be easily administrable."[112]

3. The DR market must be managed so that:

   a. There is an adequate demand for DR's, insuring adequate compensation for restricted land owners.

   b. The DR value does not fall below the DR value at time of issuance thereby denying DR holders adequate compensation.[113]

   c. Developers are encouraged to make use of DR's so that they can accrue benefits in doing so.[114]

   d. DR's are readily available. This requires that: (1) holders are willing to sell DR's when developers need them, and (2) a sufficient supply is available to meet future demand or that some means for creating a new supply of DR's is feasible.[115]

   e. The market is large enough for frequent exchange to provide information on the value of DR's.[116]

4. The TDR system must have safeguards against hoarding, fraudulent issue, dumping and other market destroying tactics.[117]

5. The program must be legally defensible.[118] If TDR is found to be an eminent domain measure requiring just compensation, rather than a police power regulation, courst must be convinced that TDR will provide adequate compensation.

6. Citizen support is a key ingredient of a TDR program. There must be a community awareness of and concern for land use problems if the public is to accept a complex TDR system.[119] Developers, consumers and landowners must be willing to work with TDR.[120]

However, a functioning TDR program may have several undesirable side effects. Difficulties may arise from the tax consequences of TDR.[121] Another potential undesirable effect of a TDR program is that developers may decide not to deal with the added complexities of a TDR system and choose to develop in areas which do not require DR's.[122] Given fragmented jurisdictions, this could lead to such urban sprawl problems as leapfrogging--problems TDR is supposed to alleviate, not exacerbate.

Perhaps the most serious of all the side effects of a TDR system concerns the basic premise of TDR, which says there is a need for government intervention to compensate property owners for reductions in land values due to resource protection, even when the owner retains the use (often profitable) of the restricted land. Contrary to traditional land use laws, TDR provides compensation for every reduction in property value. By compensating every land use restriction TDR assumes that every parcel will be fully developed.

Before embarking on the arduous and complicated task of creating a TDR system, one must seriously question the necessity for such a system. While it may be politically desirable to compensate to some extent the owners of restricted land, evolving law on the "taking" issue indicates that compensation is not always legally necessary.[123]

Police power regulation generally has the potential to preserve endangered resources without resort to compensatory programs such as TDR. However, TDR advocate John Costonis believes that it is unwise to push the police power to its outer limits. He contends that it would be naive to ignore the economic aspect of land use consequences.[124] Still, if police power regulation is used as a means of preservation, land prices should reflect the restrictions and the potential of obtaining a change in the restrictions. In addition, TDR presents its own adverse economic effects by allocating the cost of preservation to future developers and consumers and by creating possible tax burdens on both preservation and transfer zones.

Even if one accepts the premise that compensation is necessary for the preservation of our resources, the question still remains-- is TDR necessary? TDR purports to be fair. It may be more fair to allocate the cost of preservation to the state, so that the burden is distributed to the general population which is equally responsible, as future development is, for the demand on scarce resources.[125] Compensation would be granted through the judicical system where police power regulation is judged unreasonable and unconstitutional.

John Costonis predicts "whichever way you slice it, TDR is here to stay."[126] The concept may have merit, but as yet it is largely untested. There is a need for more empirical research and experimentation to define and solve the functional and legal problems of TDR.[127]

Clearly, the lack of experience with TDR is a heavy burden weighing against its implementation. There is a need to study alternative methods of land use control, both regulatory and non-regulatory, so that results can be compared with the advantages and disadvantages of TDR and an educated choice may be made.

Because the future of TDR is so uncertain, localities in Wisconsin should not actively pursue a TDR program in the immediate future. The program is too costly and complex to warrant its immediate use as a tool for furthering preservation objectives.

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Notes

1. Costonis, "Development Rights Transfer: An Exploratory Essay," 83 Yale L. J. 75, 75 (1973).

2. Barrows, "Transfer of Development Rights: A New Land Use Policy for Wisconsin?" Agricultural Economics Staff Paper Series, No. 87, p. 5, Cooperative Extension Programs, University of Wisconsin-Madison (January 1975); Costonis, supra note 1, at 99.

3. The federal constitution (Fifth Amendment) and state constitutions prohibit the taking of private property for a public use without providing just compensation to the owner. (Wis. Constitution, Art. I, sec. 13).

4. Costonis, "Development Rights Transfer: Description and Perspectives for a Critique," Management and Control of Growth, Vol. III, p. 93, The Urban Land Institute (1975); Costonis, "Development Rights Transfer: A Proposal for Financing Landmarks Preservation," Real Estate L. J. 163, 168 (1972). Building size is determined by a predetermined number, according to the zone. Thus the building potential of two combined lots permits a larger structure.

5. Carmichael, "Transferable Development Rights as a Basis for Land Use Control," 2 Florida St. U. L. Rev. 35, 45 (1974).

6. Costonis, "Development Rights Transfer: Description and Perspectives for a Critique," supra note 4, at 93. TDR advocates contend that the development potential of private property is a public asset and thus manipulable for a public purpose.

7. Eckert, "Acquisition of Development Rights: A Modern Land Use Tool," 23 U Miami L. Rev. 347, 353 (1969).

8. Barrows, supra note 2, at 9.

9. Other proposals include the Sonoma County, California proposal (Rose, Jerome G., The Transfer of Development Rights: A New Technique of Land Use Regulation, p. 233 (1975); the Saint George Community Development Project, Vermont (Rose, at 256); the Southampton, Suffolk County, New York local zoning ordinance #26, Sec. 2-40-30 (Ruess, John, Environmental Quality Council, State of Montana, Third Annual Report (Dec. 1974) p. 89); Illinois Revised Statute Chapter 24, 211-48.2-1A, and proposals in Colorado and Oregon (Reuss, at 89).

10. 6 Practicing Planner 45 (Feb. 1976).

11. 7 "TDR: Whats Happening Now," Practicing Planner 10, 12 (March 1977).

12. Willis, "The New Jersey Proposal: Preserving Essential Open Space," ASPO Planning Advisory Service Report No. 304, p. 12 (March 1975).

13. Supra note 11, at 12.

14. Willis, supra note 12, at 12; Woodbury, "TDR: A New Tool for Planners," 41 J. Am. Institute of Planners, 3, 9 (1975).

15. Barrows, supra note 2, at 11; Woodbury, supra note 14, at 8.

16. Barrows, supra note 2, at 12; Moore, "TDR's as the Solution to Failings of Existing Land Use Controls: Fairfax County, Virginia," ASPO Planning Advisory Service Report No. 304, p. 27-28 (March 1975); Woodbury, supra note 14, at 7.

17. Comment, "Development Rights Transfer in New York City," 82 Yale L. J. 338, 351 (1972).

18. Id. at 352.

19. Id. at 356.

20. Id. at 359.

21. Marcus, Norman, "The New York City Experience, " ASPO Planning Advisory Service Report No. 304, p. 3 (March 1975).

22. Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381 (1976); Costonis, "Fred F. French Investing Co. v. City of New York: Losing a Battle but Winning a War," 28 Land Use Law and Zoning Digest No. 7, at 6 (1976); Marcus, supra note 21, at 4; Richards, "Critique of the New York City Program," ASPO Planning Advisory Service Report No. 304, p. 5, 6 (March 1975).

23. Penn Central Transportation Co. v. City of New York, 42 N.Y.2d 324 (1977).

24. Comment, supra note 17, at 370; Richards, supra note 22, at 5.

25. Comment, supra note 17, at 369; Richards, supra note 22, at 6.

26. Legal problems may also result from downzoning. Zoning regulations are an exercise of the state's police power and must be enacted for a public purpose--to benefit the public health, safety or general welfare. The creation of a DR market may be considered by the court as an action for private gain (of preservation zone owners) rather than for the benefit of the public.

27. Shlaes, Jared, "The Chicago Plan", ASPO Planning Advisory Service Report No. 304, p. 8 (March 1975).

28. Costonis, "Development Rights Transfer: A Proposal for Financing Landmarks Preservation," supra note 4, at 169; Costonis, "The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks," 85 Harvard L. Rev. 574, 590 (1972).

29. The proposal also suggests that the city condemn a preservation restriction. (Costonis, supra note 24, at 590). It is difficult to understand how the city can condemn what does not yet exist.

30. Costonis, "Development Rights Transfer: A Proposal for Financing Landmarks Preservation," supra note 4, at 170; Costonis, supra note 1, at 87; Costonis, supra note 28, at 590.

31. Costonis, "Space Adrift: A Synopsis," Management and Control of Growth Vol. III, p. 108, The Urban Land Institute (1975).

32. Costonis, supra note 4, at 171.

33. Costonis, supra note 1, at 87; Costonis, "Development Rights Transfer: A Proposal for Financing Landmarks Preservation," supra note 4, at 171.

34. Costonis, "Development Rights Transfer: A Proposal for Financing Landmarks Preservation," supra note 4, at 174.

35. Jared Shlaes, a co-designer of the Chicago proposal, argues that a market would exist for the DR even under the present zoning. He contends that owners of inside or small lots who cannot get zoning bonuses will buy the DR. Shlaes, supra note 27, at 8.

36. Newsom, "Critique of the Chicago Plan," ASPO Planning Advisory Service Report No. 304, p. 9 (March 1975).

37. Id.

38. Costonis, supra note 31, at 112.

39. DeVoy, "The Puerto Rico Proposal: Preserving the Environment While Protecting Private Property Rights," ASPO Planning Advisory Service Report No. 304, p. 13 (March 1975).

40. Costonis, supra note 1, at 93.

41. DeVoy, supra note 39, at 14.

42. Costonis, supra note 1, at 94.

43. See Section 2 "Landmark Preservation" above.

44. Barrows, supra note 2, at 14-15.

45. Graaskamp, "Impressions on the Marketability of TDR's," ASPO Planning Advisory Service Report No. 304, p. 20 (March 1975).

46. Id. In addition, recorded assessments are often inequitable.

47. Id.

48. Heeter, "Six Basic Requirements for a TDR System," ASPO Planning Advisory Service Report No. 304, p. 44 (March 1975).

49. In addition, the problem of land use development is not confined to the residential area.

50. Graaskamp, supra note 45, at 20-21.

51. Heeter, supra note 48.

52. A minor question related to development unit allocation pertains to the physical form of the currency. Does it resemble "monopoly" money, a stock certificate, or a savings account passbook for the DR bank? Are there different colors for units to be used for industry, commercial buildings, and housing?

53. Graaskamp, supra note 45, at 22. This restriction could be difficult to enforce; it may be difficult to determine what constitutes a "plan." The limitation of DR acquisition to landowners limits the number of market participants, which would result in a monopoly on the buyer's side of the market.

54. Barrows and Pengruber, "Transfer of Development Rights: An Analysis of a New Land Use Policy Tool," American Journal of Agricultural Economics 549, 556 (Nov. 1975).

55. Heeter, supra note 48, at 45.

56. Barrows, supra note 54, at 552.

57. Id.

58. Shlaes, "Who Pays for the Transfer of Development Rights?" 40 Planning 7 (July 1974).

59. Id. at 9.

60. Id. at 8-9.

61. Barrows, supra note 2, at 22-23; Barrows, supra note 54, at 551; Bateman, "The Need for Further Experimentation," ASPO Planning Advisory Service Report No. 304, p. 50 (March 1975).

62. Carmichael, supra note 5, at 37; Costonis, "Development Rights Transfer: Description and Perspective for a Critique," supra note 4, at 100; Costonis, "Whichever Way You Slice It, TDR is Here to Stay," 40 Planning 7, 10 (July 1974).

63. Costonis, supra note 62, at 10.

64. The Milldam Acts gave a private property owner on a stream the right to erect a dam to harness the water power for operation of a mill and thereby flood the land of upstream owners. Although one person seemed to gain disproportionately at the expense of others, this was justified because of the public service derived from the mill. Later the public service justification receded and the multiplier effect of mill energy on the industrial and employment base of an area, in which all owners had an interest, became justification for what amounted to private eminent domain power of individuals. Carmichael, supra note 5, at 58-66.

65. Sharing a common resource, development potential, TDR could create a multiplier effect by encouraging proper management of land resources through the use of DR's. This would reduce sprawl, prevent resource waste, and permit utilization of resource areas to serve the public by providing groundwater recharge areas, wildlife refuges, etc. Carmichael, supra note 5, at 76, 105-107.

66. The Drainage and Irrigation Projects used private enterprise rather than government funds to construct needed facilities. There was little acquisition of property; in most cases the owner's rights were altered for the benefit of the district. For example, an owner's land could be drained without his consent; or land could be irrigated even if the owner chose not to use the water. In both cases, a charge was assessed against the land which could be sold for non-payment. This could be considered as an exercise of eminent domain powers, taking of the land for public benefit. Individual properties were blocked into a district delimited by the resource use and individual property rights were diminished in furtherance of the development of the resource. Carmichael, supra note 5, at 66-76.

67. Planning districts would be assembled as were the drainage and irrigation districts to distribute a common resource. Ownership remains in private hands but the right to the resource (DR) is distributed to all the owners. The general benefits of the use of the DR would be better planning, control of sprawl, and an equitable distribution of development entitlements. Carmichael, supra note 5, at 76-77.

68. Oil and gas is found in large subterranean pools. The surface land could belong to several owners. To prevent the owners from rapidly depleting the oil or gas by trying to withdraw a larger share than the other owners, regulations were imposed to secure just distribution and prevent immediate exhaustion of the resource. These regulations linked separately owned tracts into an interrelated web of rights. Control was exercised over the number and spacing of wells, in addition to the rate of production. Carmichael, supra note 5, at 77-97.

69. An area consisting of several zones could be considered to form a zoning pool with some owners receiving high value use and others low value use. These inequities result from those acts of government which determine the zoning districts. If a government is permitted to regulate disproportions caused by individual acts in the gas and oil pools, it seems the government should be able to use TDR to redress the inequities caused by its own regulatory acts. Carmichael, supra note 5, at 97-98.

Carmichael's point that government should be able to rectify the inequities it has caused by zoning is problematic. It is likely that zoning which took place a number of years ago has already resulted in the adjustment of the price of the land to some extent. In addition, some land may be difficult or impossible to develop and its price would reflect its development potential. To assign restricted owners' DR's to be sold on the market, when they

paid a price for the land which reflected a lack of development potential, would give those owners a windfall gain, something which TDR hopes to eliminate.

70. Rose, "A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space," 2 Real Estate L. J. 635, 646 (1974).

71. Id. at 647; Cal. Govt. Code 6950.

72. Id.; Vt. Stat. Ann. Tit. 10, 6303(b); N. J. Stat. Ann. 13.8A-23 (1974).

73. Id. at 649.

74. Id. at 650.

75. Costonis, supra note 28, at 601-611.

76. Id. at 603.

77. Id. at 605.

78. Id. at 607.

79. Id. at 610.

80. Courts have held invalid payments in stocks, bonds or lands. Rose, "Psychological, Legal and Administrative Problems in the Use of TDR's to Preserve Open Space," ASPO Planning Advisory Service Report No. 304, p. 18 (March 1975).

81. Id.

82. Id.

83. Id.

84. Id. at 19.

85. See footnote 22 above.

86. Note, "The Unconstitutionality of Transferable Development Rights," 84 Yale L. J. 1101, 1107-1110 (1975).

87. Id.

88. See footnote 23 above; "29 ZD 366 Historic Preservation," 29 Land Use Law and Zoning Digest, No. 8, at 9 (1977).

89. Supra note 23, at 325.

90. This case is in the process of being appealed to the U.S. Supreme Court. Probable jurisdiction noted and postponed, No. 77-444, S. Ct., Sept. 20, 1977.

91. Heeter, supra note 48, at 24.

92. Barrows, supra note 2, at 24.

93. Costonis, supra note 28, at 628.

94. Id. at 630.

95. Id. at 631.

96. Id. at 624.

97. Id. at 624.

98. Costonis, supra note 1, at 103; Costonis, supra note 28, at 626.

99. Costonis, supra note 28, at 626.

100. Costonis, supra note 1, at 111.

101. Note, supra note 86, at 1118.

102. Id. at 1119.

103. Id. at 1121.

104. Costonis, supra note 1, at 111.

105. Id.

106. Id. at 112.

107. Id. at 113.

108. Note, supra note 86, at 1117.

The Wisconsin court in Jordan v. Menomonee Falls, 28 Wis.2d 608 (1965), limits dedication to those needs which are specifically and uniquely attributable to the activity of the developer and which are not a result of the normal growth of the community. If the subdivision fulfills a purely local need within the community, exaction made for schools, parks, playgrounds and the like is not a valid exercise of the police power. Therefore TDR would have two difficulties in meeting the subdivision exaction analogy. First, the need for preservation may not be specifically and uniquely attributable to each developer who is required to purchase DR's, especially if the increase in development is within a tolerable range of the zoning. Second, even if the need for preservation is uniquely attributable to the individual developer, the increased development may well be a result of normal community growth, rather than an influx of growth from outside communities.

109. Costonis, supra note 1, at 116.

110. Id. at 117.

111. Barrows, supra note 2, at 16.

112. Heeter, supra note 48, at 44.

113. Id. at 45.

114. Id.

115. Barrows, supra note 2, at 17.

116. Id.

117. Heeter, supra note 48, at 46.

118. Id. at 43.

119. Barrows, supra note 2, at 16.

120. Heeter, supra note 48, at 46.

121. Bateman, "The Need for Further Experimentation," supra note 61, at 49. Worth Bateman, Director of the Urban Institute Land Use Center, presents the following dilemma:

> Because of the lack of development potential, the property tax base in the preservation zone will fall. Either the tax rate will rise to maintain the previous level of service, or the tax rate will remain the same or decline, causing the level of services to decline, which will further depress land prices. In the transfer zone the tax base will rise along with the rates due to the increased development potential. The increment will be needed to finance increased expenditures because of increased density. Because of higher prices in the transfer zone, low and moderate income families will be priced out of the housing market. Are these the desired results of a land use control program?

122. Barrows, supra note 2, at 22.

123. Bosselman, Fred, The Taking Issue, U.S. Government Printing Office (1973).

There are several recent examples of this trend. In a California case, Gisler v. County of Madera, 38 Cal. App.3d 303, 112 Cal. Rptr. 919 (1974), the court noted that an area's use had always been agricultural and upheld an 18 acre agricultural zoning ordinance. The court accepted the county's determination that an 18 acre minimum lot size was necessary in the agricultural area. (Mandelker,

"Introduction," ASPO Planning Advisory Service Report No. 304, p. 1 (March 1975)). Another case, Mayor and Alderman of Annapolis v. Anne Arundel County, 271 Md. 265, 316 A.2d 807 (1974), upheld an ordinance prohibiting the destruction or alteration of a designated landmark's exterior. The case involved preservation of an historic church that was in public ownership. The court found there was no taking since there was no limitation on the reasonable use of the site. (Mandelker, at 2). In a very important Wisconsin case, Just v. Marinette County, 58 Wis.2d 7, 201 N.W.2d 761 (1972), the court reexamined an owner's right to develop his property in light of expanding concepts of public benefit and public harm. (Just, at 16). The court stated that "the changing of wetlands and swamps to the damage of the general public by upsetting the natural environment and the natural relationship is not a reasonable use of that land which is protected from police power regulation." (Just, at 18). Therefore, the government was not required to compensate the landowner, even though the use of his land was greatly restricted.

124. Costonis, "Development Rights Transfer: Perspectives," Management and Control of Growth, Vol. III, p. 99, The Urban Land Institute (1975).

125. Bateman, supra note 121, at 50.

126. Costonis, supra note 62.

127. In 1975 a Dane County commission, staffed by Dane County Agricultural Agent Tom O'Connell, was formed to investigate the possibility of using TDR to preserve agricultural land in the county. The commission decided that TDR had too many unresolved problems to be of beneficial use in Dane County. One of the major obstacles to success was the complexity of establishing and administering a TDR program. In addition, the commission felt that the TDR concept was too new and untested to warrant implementation in Dane County. As a result of their study, the commission moved to look into other means of controlling land use. (Conversation with Tom O'Connell and Minutes of Commission Meetings on file with Dane County Clerk).

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CHAPTER 5 : URBAN DEVELOPMENT MORATORIA

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I. Introduction

Development moratoria are governmental attempts to halt or retard the conversion of land from one use to another. The concept is much the same as that of "stop-gap" zoning.[1] The intent of the development moratorium is to maintain the land use status quo during the duration of the moratorium. While moratoria are often based on regulatory programs (such as requirements for building permits, sewer extension approvals, and zoning changes), they are considered in this report on non-regulatory techniques for controlling development for several reasons. Often they are imposed without the passage of statutes and ordinances, either being imposed informally or as a temporary halt to normal regulatory procedures. A more important reason for the inclusion of this chapter is, however, that the development moratorium remains a nontraditional technique for development control in most areas. It is frequently a new and untried step for governmental officials and there is consequently a need for information on the concept, its use, and its limitations.

II. The Moratoria Technique

A. Basis for Imposition

Moratoria are imposed for a variety of reasons. The most common is to temporarily halt the development of land while land use planning takes place. The process of initially developing (or comprehensively revising) a land use control program can be quite time consuming. Technical planning studies must be undertaken, community goals and objectives established, alternative courses of action developed, and some means of implementing the adopted plan decided upon. Furthermore, there should be considerable public discussion and debate throughout this process. Communities often feel that development which may not be consistent with the program that is in the process of being produced should not be allowed to be commenced during this period.[2] Therefore, in these situations, a development moratorium may be imposed to temporarily halt all development. This is done to prevent the acquisition of a vested right to develop the land and thereby a right to create what may eventually be non-conforming uses.[3]

In other situations, there may be sections of the community that are facing development pressures but are without the necessary urban services (such as water and sewer facilities, roads, schools, parks) to support that development. In these cases, the community may deem it necessary to halt development in that area until essential services can be provided.[4]

Finally, a community may just want to temporarily stop development while it figures out what, if anything, it can do about problems occasioned by new development. These problems may

include rising school costs, rising taxes required to finance construction and operation of sewer facilities and new roads, and the changing character of the community brought on by new development.

In all of these situations, a community may turn to the development moratoria as a technique to provide some "breathing space" while a more permanent solution can be devised.

B. Forms of Moratoria

There are several ways in which a development moratorium can be effectuated. Moratoria can be imposed by local, state, or federal government. The device is used most frequently by local governments, occasionally by states, and infrequently by the federal government. The specific type of moratorium applied also varies, depending upon the problem being addressed.

1. Locally Imposed Moratoria

Locally imposed development moratoria are of three types: formally adopted moratoria applying to all or part of a locality's jurisdiction; informal administrative moratoria; and extraterritorial moratoria adopted by municipalities when extending land use controls to new areas.

The land development process can be formally slowed by a locality in several fashions. A common method is for the governing body to direct that no building permits be issued in certain specified areas for a specified period of time.[5] Such a moratorium can apply to the entire jurisdiction for a temporary period while, for example, a comprehensive planning process is underway. Or it can apply to a specific geographic area, such as shoreland or coastal areas, while special protective measures are being considered.[6] A moratorium on the issuance of new building permits should, however, be distinguished from an attempt to impose a general construction ban. An immediate stopping of all construction would, absent extraordinary circumstances, be illegal.[7] A second manner in which localities can formally slow the development process is by prohibiting additional use of necessary urban services. New development can, for example, be prohibited from tapping into the locality's water or sewer system, thereby preventing development that cannot be supported by on-site facilities from taking place.[8] A third technique that localities can use to formally slow the development process is to place a freeze on existing zoning regulations. The municipality can, for a specified period, refuse to issue conditional use permits, special exceptions or variances, or accept plats or certified surveys for review. It can also refuse to make legislative changes, such as rezonings or ordinance

amendments, in its land use control ordinances. This strategy often delays the instigation of intensive use development as, for example, a multi-family housing project cannot be constructed in an area zoned for single-family housing use without a special exception, variance, or rezoning.[9]

Localities tend to more frequently rely on informal administrative moratoria rather than any formal public decision to slow development for a specified period of time. It has been noted that "... the most common practice consists of a tacit agreement between the local legislature, the planning commission, and the building superintendent not to issue building permits or to grant rezonings for a period of time. The freeze is continued for only a month or two and is accomplished through administrative delay or the misplacing of building permit and rezoning applications."[10] The reasons for using informal rather than formal moratoria are varied: a desire to avoid adverse publicity; a desire to retain "flexibility"; a fear that formal moratoria may be illegal; or a desire to avoid any potential litigation. Ironically, informal moratoria are much more vulnerable to legal attack than are formal moratoria. As one eminent authority notes, "This administrative procrastination, calculated to deny a property owner the right to use his land in a currently lawful manner, is supportable neither by law nor by sound and ethical practice."[11] However, several courts have upheld reasonable administrative delays in issuing building permits while proposed zoning ordinances (or changes therein) are before the legislative body for consideration.[12]

A final local moratoria technique, which has particular relevance in Wisconsin, is the use of extraterritorial zoning freezes. Municipalities in Wisconsin have the power to zone unincorporated land adjacent to the city.[13] In order to maintain the status quo while the city considers the proper form of land use regulation for these areas, the city is empowered by statute to enact an interim zoning ordinance for the extraterritorial area that freezes existing land uses (or existing county or town zoning) for up to two years.[14] This freeze, under certain conditions, may be extended for a third year. The statutorily expressed purpose for this grant of power is to maintain existing land uses while the city prepares a comprehensive zoning plan for the area.[15]

The Wisconsin Supreme Court upheld this grant of power in the case of Walworth Co. v. City of Elkhorn,[16] holding that:

> We can preceive no constitutional objection to interim zoning when properly authorized by statute. It is common knowledge that the prepa-

> ration of a proper comprehensive zoning ordinance often requires much study and time. The very pendence of the adoption of a comprehensive extra-territorial zoning ordinance might precipitate action on the part of property owners in the territory affected which would tend to frustrate the objective sought to be obtained by the prospective ordinance.[17]

Thus municipalities have the express power to freeze existing uses in areas in which they intend to exert extraterritorial zoning powers while planning for the area is underway.

2. State Imposed Moratoria

While of much less frequent incidence than local moratoria, state governments can act to stop or slow development. By 1973, at least fourteen states had moved to impose development moratoria,[18] usually for water quality reasons. For example, in New Jersey the state's Department of Environmental Protection recently moved to place construction moratoria on twenty-six local governments upon finding that their sewage treatment facilities had reached or exceeded capacity.[19]

3. Federally Imposed Moratoria

Though infrequently used, the federal government does have the power to institute development moratoria. The federal Environmental Protection Agency directly mandated a moratorium on the issuance of building permits for new construction in Douglas County, Nevada, while federal and state funded water treatment facilities were under construction.[20] Other federal regulations, such as the Clean Air Act,[21] may indirectly lead to imposition of development moratoria by, for example, prohibiting new development that would cause significant deterioration of air quality.

III. Experience with Moratoria

A. Wisconsin Applications

1. Locally Imposed

While a number of communities in Wisconsin have expressed interest in the development moratoria concept, few have gone so far as to adopt formal moratoria. Several have instituted moratoria on rezonings and review of land subdivision plats and certified survey maps. Another community in southeastern Wisconsin has attempted to halt construction of multi-family housing within its jurisdiction. Finally, several communities have used temporary freezes on the issuance of building permits while specific planning and zoning issues were being considered.

The City of Delafield is an example of the use of a rezoning and subdivision approval moratorium. The Delafield moratorium was adopted in October, 1974, to be in effect for one year.[22] Subsequently, the moratorium was extended for an additional six months, to expire on May 6, 1976.[23]

The area covered by the moratorium had long been subject to land use regulations. Initial coverage was through a town zoning ordinance adopted in 1939. In 1974 it was determined that a new comprehensive plan should be prepared for the area, with an extensive revision of the existing zoning ordinance to follow. Therefore, in order to ensure the integrity of the planning process, prohibit the creation of nonconforming and "undesirable" uses, promote public participation, and allow sufficient time for the consideration of alternatives,[24] a development moratorium was adopted.

The moratorium was instituted when the city council formally adopted a direction to the city planning commission to discontinue the acceptance, review, and approval of all land subdivision plats, certified survey maps, and rezoning applications. There was no moratorium on the issuance of building permits, so construction allowed by right under the existing ordinance could be commenced. Also, some flexibility was built into the moratorium by allowing exceptions to it when the proposed development was not in apparent conflict with the master plan being prepared. Therefore, following the completion of the draft master plan in the summer of 1975, several compatible developments were allowed to proceed.[25]

Another community in southeastern Wisconsin has used the moratoria technique to prevent the construction of most multi-family housing within the city for a three-year period.

The technique used was the placement of an indefinite moratorium on all rezonings to multi-family zoning categories and a refusal to zone any newly annexed land for multi-family housing. Land already zoned for multi-family housing within the city (only three or four parcels) was not rezoned to lower density uses. However, as most of the community's development pressure was coming from fringe areas, the moratorium was effective in halting new multi-family construction.[26]

An example of the use of short term moratoria while specific planning issues are discussed is found in an occasional practice of the City of Madison. When a particularly controversial petition for a rezoning is made, the common council, on motion of the council member from the affected area, directs the building inspector to temporarily refrain from issuing any building permits in the area in question, the moratorium to last until a study has been made and the issue resolved.[27]

The use of extraterritorial moratoria is explicitly allowed by Wisconsin law. The statutes provide that:

> The governing body may enact, without referring the matter to the plan commission, an interim zoning ordinance to preserve existing zoning or uses in all or part of the extraterritorial zoning jurisdiction while the comprehensive zoning plan is being prepared. Such ordinance may be enacted as is an ordinary ordinance but shall be effective for no longer than 2 years after its enactment, unless extended as provided in this paragraph. Within 15 days of its passage, the governing body of the city shall publish the ordinance in a newspaper having general circulation in the area proposed to be zoned as a class 1 notice, under ch. 985, and the city clerk shall mail a certified copy of the ordinance to the clerk of the county in which the extraterritorial jurisdiction is located and to the clerk of each town affected by the interim zoning ordinance and shall file a copy of the ordinance with the city plan commission. The governing body of the city may extend the interim zoning ordinance for no longer than one year, upon the recommendation of the joint extraterritorial zoning committee. . . . No other interim zoning ordinance shall be enacted affecting the same area or part thereof until 2 years after the date of the expiration of the interim zoning ordinance or the one year extension thereof. While the interim zoning ordinance is in effect, the governing body of the city may amend the districts and regulations of the ordinance...[28]

By the terms of this statute, a city may place a freeze on existing county or town zoning (or existing land uses) within its extraterritorial area[29] for a period up to three years. Municipal exercise of this power was upheld in the case of Walworth Co. v. City of Elkhorn.[30] In that case, a landowner, whose land was outside of the City of Elkhorn but within its extraterritorial zoning jurisdiction, wished to construct a liquor store. Since the county had previously placed his land in an "agricultural" zone, he petitioned for a rezone to a "general business" zone. However, before the county could respond to his petition, the city adopted an interim zoning ordinance that directed all existing zoning uses in the area be preserved while an extraterritorial zoning plan was being prepared. The county contended that the city action was ineffective without county approval, so they disregarded the city action, rezoned the area, and gave the landowner permission to construct his store. In the city's suit to enforce its interim ordinance, the court upheld this form of development moratoria. The court

held that since such action was specifically authorized by statute, county permission or approval was not required; that extraterritorial zoning is a reasonable and valid exercise of the police power; and that a two-year freeze was not of unreasonable duration.[31]

2. State Imposed

As noted above, states occasionally impose development moratoria, usually for water quality reasons such as inadequate municipal waste treatment capacity. In Wisconsin there had been only one major action of this type prior to 1976.[32] That came when the Department of Natural Resources (DNR), in response to water pollution problems, imposed an 18-month development moratorium in northwest Milwaukee.

This moratorium, the Lincoln Creek case, was imposed because a lift station was overflowing daily and causing any new waste added to the sewerage treatment system to be bypassed. Therefore, the DNR moved to prohibit additional development projects from hooking into the system. The moratorium imposed was in effect from June, 1971, until January, 1973. As construction was underway to remedy the situation, all construction was not halted. Rather, the developers were told they could continue their work, but their facilities could not be occupied until the water quality problem was remedied.

The entire question of state review and approval of sewer extensions underwent considerable discussion and change in 1976. The DNR's administrative rules on sewer extension approval, as they existed from 1974 to May, 1976, required denials of requests for extension if the extension would cause bypasses or would create or add to problems of lack of treatment capacity. In late 1975 environmentalists charged the DNR with routine failure to enforce this rule; the DNR acknowledged that up to 60% of their approvals would have to be denied if the rules were strictly enforced.

While new rules were being finalized, the DNR strictly enforced the old rule on extensions. An emergency rule was enacted in late May, 1976, and a revised permanent rule became effective on October 1, 1976. These new rules also require denial in bypass and overload situations, but allow approval if the locality agrees to correct the situation by July, 1982. Explicit grounds for variances are also set forth.

B Non-Wisconsin Applications

1. Locally Imposed

Nationally, the use of development moratoria is a relatively common occurrence. A 1973 survey by the International City Management Association of almost 3,000 U.S. cities and counties revealed that 18% of all communities responding were using development moratoria.[33] A 1974 survey of communities involved in efforts to stage community development by a University of North Carolina group also showed widespread use of development moratoria. In that study, the following usage was reported:[34]

	Percentages of Respondents			
Type of Moratoria	In Use	Formerly Used	Intend To Use	Not Used or No Response
Water/Sewer extensions	42%	3%	6%	49%
Legislative zoning changes	34	6	1	59
Building permit issuance	34	9	1	56
Water/Sewer hookup	32	-	4	64
Subdivision approval	19	3	3	75
Administrative zoning changes	12	-	-	88

Of perhaps even more importance, this survey asked planning directors to evaluate the effectiveness of all the tools used in their communities to time urban development. Significantly, the three tools rated highest in terms of efficiency were development moratoria, water/sewer hook-up, water/sewer extension and subdivision approval moratoria.[35]

Several communities imposing development moratoria have done so as part of a larger urban growth limitation program that uses the provision of public services as a growth guidance technique. These strategies, notably the development control scheme of Ramapo, New York, have recently been the subject of important litigation and a great deal of discussion in legal literature.[36]

An interesting example of a very broad local moratorium is found in the attempt of Livermore, California, to slow the pace of residential development. A city ordinance

was adopted by initiative in 1972 that placed a moratorium on the issuance of building permits for residential development until: (1) sufficient educational facilities were available to avoid overcrowded classrooms and double sessions; (2) adequate sewer capacities were available; and (3) an adequate water supply was available.[37] The ordinance was invalidated by a California Superior Court, however, and on appeal the California Supreme Court held the ordinance constitutionally valid and remanded for examination as to whether it was within the city's police power.[38]

Another community that adopted a comprehensive moratoria procedure via the initiative process was Dade County, Florida.[39] There, the county manager can, by administrative action, prohibit the issuance of building permits where "it is in the public interest to make a determination as to whether the zoning of an area is appropriate." The county board is required to hold a public hearing on the order as soon as possible after its issuance and can, by majority vote, overrule the order. While the moratorium is in effect, no building permits are issued for the area and no variances, special exceptions, or zoning ordinance changes are allowed. The duration of the moratorium is to be a "reasonable time," long enough for the county manager to make an analysis of the proper zoning for the area.

2. State Imposed

In addition to the not infrequent use of state imposed development moratoria for water quality protection,[40] several states have moved to formally impose development moratoria in other situations. For example, New York's Tidal Wetlands Act[41] provides for a moratorium on tidal wetland alteration pending completion of the preparation of land use regulations for affected areas.[42] In a judicial challenge, this provision was held to be valid.[43] In Georgia, residential construction using septic tanks has been prohibited in areas where sewer lines are scheduled to be built within three years.[44]

IV. Feasibility of Future Use of Moratoria

A. Legal Issues

If a development moratorium that is inconsistent with legal limitations is adopted, it may be rendered void upon judicial challenge. Such a consequence recently befell a moratorium on water and sewer extensions in Boulder, Colorado.[45] Legal challenges to development moratoria may be based on constitutional or statutory grounds.

1. Constitutional Issues

The first constitutional issue likely to be presented by a development moratorium is a challenge on "takings" grounds.[46] A landowner who is prevented from using his property as he sees fit by a moratorium might well contend that his property has been constructively appropriated by the government for public benefit, thereby requiring that either the landowner be compensated or the moratorium lifted.

Where the value of the owner's property has been greatly diminished by the governmental action,[47] or an individual landowner is unreasonably forced to bear the brunt of a regulation,[48] courts have found the governmental action to be a "taking." However, a recent Wisconsin case held that where an ordinance is designed to protect an existing public benefit by restricting change in the natural character of the land, there was no "taking."[49]

An important element in determining whether a development moratorium is a "taking" is the duration of the moratorium.[50] This would, of course, be one factor bearing on the impact of the governmental action on property values. Further, if the moratorium has a life beyond that necessary for the resolution of the problems that lead to its imposition, courts may well find this to be an undue burden on the property and declare the governmental action a "taking."[51] So moratoria of indefinite duration should be avoided. However, a development moratorium of reasonably limited duration will not likely be overturned on "taking" grounds, provided that it is designed to apply to more than isolated landowners. As one California court noted, "it is well settled that. . . some uncompensated hardships must be borne by individuals as the price of living in a modern enlightened and progressive community."[52]

A second constitutional area of challenge is that of the due process guarantees.[53] If a governmental action is found to be arbitrary and capricious, based on impermissible governmental objectives, or that it is an inappropriate means for attaining permissible objectives, the action will be overturned on due process grounds.

A development moratorium issued without definable standards is subject to challenge on an arbitrariness basis.[54] A moratorium of indefinite duration is certainly susceptible to challenge on this point. To avoid an "arbitrary and capricious" label, the ordinance or rule establishing the moratorium should clearly set forth a reasonable expiration date.[55] A second area of examination on due process grounds relates to the objectives of the moratorium.

If the court finds the purpose of the moratorium is to, for example, exclude racial minorities, then the moratorium will be voided.[56] However, moratoria designed to promote the public health (e.g., prohibit new construction while adequate water and sewer systems are being provided), safety (e.g., prohibit new construction on highly erodible shorelines while protective measures are being devised), or general welfare (e.g., freezing existing land uses while a comprehensive plan is being prepared) are serving permissible governmental objectives.[57] For this reason, the instrument creating the moratorium should explicitly state the purpose for its imposition. Finally, the locality should establish that the moratorium is a reasonable means for effectuating the stated objective. While court review on this point is not usually rigorous, with the courts usually accepting any rational relationship between the means and the objective,[58] from a practical standpoint the development moratoria should only be applied in urgent circumstances. If a less drastic tool is available and will adequately deal with the problem, it should be used before employing a moratorium.

A final element of the due process question is the issue of vested rights. As a general rule, a moratorium can only be applied prospectively--it cannot be used to stop construction that is already underway. A New York decision, Hasco Electric Co. v. Dassler,[59] involved a community that had imposed a 60 day total development moratorium in an area for which a rezoning petition had been made. The court held that while the city could prohibit the commencement of building for a reasonable time, it could not prohibit the completion of construction already underway. Once the landowner has secured a building permit and actually commenced work, his permit generally may not be revoked.[60]

A third potential constitutional challenge to development moratoria is the right to travel question. Though not explicitly mentioned in the Constitution, courts have long recognized a constitutionally protected right of individuals to travel and migrate.[61] A recent U.S. District Court decision, Construction Industry Assoc. of Sonoma Co. v. City of Petaluma[62] invalidated a local growth control ordinance on this basis. Although the circuit court overturned this decision on appeal,[63] the right to travel remains an important consideration. A total development moratorium with an extended duration would surely affect the ability of persons to migrate to the area in question and therefore might well present problems in a right to travel sense, especially if the views of the district court in the Petaluma case are adopted.[64]

2. Statutory Issues

a. Localities

Local imposition of a development moratorium is an exercise of the police power. In the United States, it is generally held that localities have no inherent power to exercise this police power.[65] Rather, legally they only possess such powers in this area as the state has delegated to them.[66] Therefore, without a grant of explicit[67] statutory power, a locality's action designed to retard the land development process by imposition of a development moratorium may be held invalid on ultra vires grounds--that is, that the locality is acting beyond its legally delegated powers.[68]

A complicating factor in this regard in Wisconsin arises from the fact that the state constitution grants home rule powers to cities and villages.[69] This provision allows municipalities to control "local affairs" within their jurisdictions while leaving the state free to deal with matters of "state-wide concern". If a development moratorium was held to be a "local affair," then municipalities would need no other statutory grant of power in order to impose a moratorium. However, if imposition was held to be a matter of "state-wide concern" and not a "local affair," then the home rule provision would not serve to grant any power in this regard to municipalities.

There are no clear legislative or judicial tests for determining in which of these two categories a given activity will be placed. The issue is adjudicated on a case-by-case basis. The general factors usually considered include: (1) whether uniform statewide regulation or conformity on the subject is necessary or desirable; (2) historic considerations; (3) the need for cooperation among governmental units; and most importantly, (4) the activity's relative effect on people outside of the acting jurisdiction.[70]

Which category a development moratorium falls into is an open question, but there are indications that a moratorium reasonably limited in duration might well be a "local affair."[71]

Because it remains uncertain whether the home rule provision of the constitution gives municipalities the power to impose development moratoria, and because home rule powers have not been extended to towns and counties, an examination of statutory provisions that might give localities this requisite power is appropriate.

First, cities,[72] villages,[73] and towns exercising village powers[74] clearly have the power to freeze existing land uses for up to two years via an interim zoning ordinance. Should such a locality not have a zoning ordinance and wish to freeze existing uses while the planning process and formulation of a zoning ordinance is underway, interim zoning is the appropriate means for accomplishing a development moratorium. The same is true when a city or village is extending its zoning into an extraterritorial area.[75] However, counties do not have the explicit power to adopt interim ordinances[76] and municipalities probably cannot use the interim ordinance technique to freeze existing uses if they already have a zoning ordinance.[77]

Other than the above circumstances, under what authority might a locality impose development moratoria? The primary justification for such an action would be as an exercise of the locality's general police powers. Cities have been delegated broad police powers by the state, as common councils "have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation,. . . and other necessary or convenient means."[78] Village boards have a similar general grant of power,[79] and towns are authorized to exercise village powers.[80] Therefore, a city, village or town could pass an ordinance placing a moratorium of reasonable length on water or sewer hookups, the issuance of building permits, the processing of subdivision applications, or applications for rezonings, subject to the constitutional limitations discussed above, as an exercise of their general police powers.[81]

In reviewing such a local action, the courts accord local ordinances a presumption of validity.[82] While the regulated activity must be one to which police power influence is appropriate, the Wisconsin court has noted that it "will not interfere with the exercise of police power by a municipality unless the illegality of the exercise is clear."[83]

In essence, the test is whether the ordinance exceeds the "boundaries of reason."[84] Factors likely to be considered for this test would be the gravity of the problems facing the locality as a result of unchecked development and the appropriateness of the particular moratorium as a response to those problems. In sum,

> . . .whether a given situation presents a legitimate field for the exercise of the police power placing restraints upon the use of property or upon personal conduct, depends

> upon whether the situation presents a reasonable necessity for the imposition of restraint in order to promote the public welfare, and whether the means adopted bear a reasonable relation to the end sought to be accomplished.[85]

b. States

State activity in the development moratoria field is generally limited to halting development where there are serious problems related to inadequate disposal and treatment of wastewater.[86] In addition, states occasionally may act to protect critical natural resource areas while planning for their protection is underway.[87] In both instances, the state may, as a sovereign power, exercise its police powers for the promotion of the public health, safety, or welfare.

In Wisconsin, the state mechanism practically used for imposing a development moratorium would be the refusal of the Department of Natural Resources to approve the extension of a local sewer system.[88] This would have the effect of prohibiting occupation of any construction that could not be adequately served by private septic systems.[89] State regulations require that applications for sewer extensions be denied if an overload exists at the sewage treatment plant or if the additional connections would result in an overload on the sewage system.[90] Where inadequate capacity exists to treat the wastes generated by urban development, the state can move to stop the development.[91]

B. Institutional and Political Problems

In addition to legal constraints to the use of development moratoria, there are several other issues that impact on the potential efficacy of the device.

First, when localities impose development moratoria, it may well only have the effect of shifting development to a nearby locality without similar restrictions, thereby contributing to urban sprawl.[92] If the purpose of the moratorium is to temporarily prevent development in a particular natural resource area that covers more than one local jurisdiction, such as a coastal shoreline, a single locality cannot effectively deal with the problem. In order to have a development moratorium that is effective, all relevant jurisdictions must act in concert. Given the differing interests of local jurisdictions, such concerted action is not always possible.

A second problem in this area is the amount of manpower and technical expertise necessary to do the background work leading to a development moratorium. Documenting the necessity for a development moratorium, which should be done prior to imposition, is a time-consuming and expensive task.[93]

Thirdly, since development moratoria are perceived to have strong short term detrimental economic impacts on a locality (as housing starts are prohibited), the political pressure against imposition can be intense.

Finally, imposition of development moratoria may cause serious adverse social impacts. A community ban on the construction of multi-family housing, for example, restricts the availability of housing most affordable by low-income persons. Similarly, if a development moratorium lasts long enough, the housing supply will be artifically restricted, and if the demand for housing is growing, housing costs will naturally rise. In an era when owner-occupied housing is already beyond the economic reach of a substantial number of potential homebuyers, exacerbation of the problem by a development moratorium should be avoided if at all possible. Some of these adverse social problems can be overcome by giving construction approval priority to developments, such as low-income housing, that will mitigate adverse social impacts.[94] Such a strategy is particularly important if the moratorium is being imposed in an urban or suburban area or deals with other than recreational second homes.

V. Summary and Conclusions

Urban development moratoria can, if properly and cautiously applied, well serve the community. It can prevent a rush to acquire vested rights to develop while land use planning is underway.[95] By so doing, it allows necessary free public discussion and debate of the plan being produced.[96] Also, moratoria can protect the public health by preventing development from taking place with inadequate urban services.

In Wisconsin, the state can clearly act to impose moratoria if necessary for the protection of the public health. Cities and villages are explicitly empowered to use moratoria when first embarking upon intraterritorial or extraterritorial land use regulation. Cities, villages, and towns can also adopt moratoria of reasonably limited duration whenever necessary to protect the public health, safety, or welfare, and counties can adopt similar moratoria related to explicitly granted police powers (such as zoning and subdivision regulation).

The development moratoria is an appropriate land use control device for preserving the status quo in a limited area for a period of time reasonably related to the actual needs of the community. It cannot, and should not, be used in an attempt to stop all development for an

indefinite period. It will not work well if the jurisdiction applying it is too small to address the whole of the problem leading to the moratorium, if the jurisdiction is incapable of withstanding the strong political pressures that will be brought to modify the moratorium, if the jurisdiction does not have adequate technical resources to document the necessity for a moratorium, or if there are simply a great number of building permits already outstanding that cannot be revoked.

If a development moratoria is adopted, it should be explicitly limited to a reasonable duration. The necessity and purposes for its imposition should be clearly stated. In no instances should a community use the moratorium as a device to exclude minorities or low-income persons from a jurisdiction.

Given such proper application, the development moratoria can legitimately protect the natural environment over the short term while longer-range solutions are produced.[97]

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Notes

1. "Stop-gap" zoning is that which freezes land in its present use category, in effect a moratorium on rezoning or zoning amendments. This is distinguished from "interim" zoning, a technique that places land into a new category (e.g., very large lot sizes) that is designed to discourage any intensive use of the parcel during the period while permanent controls are being devised. A. Rathkopf, The Law of Zoning and Planning 11-2 (4th ed., 1975). A closely related zoning technique (perhaps indistinguishable from "interim zoning") is the use of "holding zones." This is used in situations where the community is unsure as to what the eventual character of the area should be, and the community wants to delay any intensive development in the area. In such situations, the land is often placed in a low-intensity use zone with the intention of allowing higher intensity use at some future date. D. Hagman, Urban Planning and Land Development Control Law 119-20 (1971).

2. While communities are contemplating imposition of new or different land use regulations, developers often rush to secure building permits and get their projects underway before potentially more restrictive regulations can be adopted--a "race for diligence." Once a development is legitimately underway, government is often powerless to prevent its completion as the new regulations generally cannot operate retrospectively. See the discussion of vested rights in text accompanying notes 59-60, infra.

3. For the most part, courts have historically been amenable to allowing such temporary restrictions. See, e.g., Miller v. Board of Pub. Works, 195 Cal. 477, 234 P. 381 (1925); Monmouth Lumber Co. v. Ocean Twp., 9 N.J. 64, 87 A.2d 9 (1959). In Miller, the City of Los Angeles was allowed to restrict residential development of structures housing more than two families while a zoning plan was being studied. But see, Alexander v. City of Minneapolis, 267 Minn. 155, 125 N.W.2d 583 (1963).

4. For a discussion of the affirmative use of the location of urban services to influence urban development patterns, see the chapter of this report on public investments.

5. Moratoria on building permit issuance, if limited to a reasonable time period, are generally upheld by the courts. See the discussion of legal issues, infra.

6. See, e.g., City of Dallas v. Crownvich, 506 S.W.2d 654 (1974), where a moratorium on the issuance of building permits in an area for which a historic preservation ordinance was being considered was upheld as a valid exercise of the city's police power. Communities, with mixed legal success, have also used methods other than moratoria to control the rate at which;building permits are issued. ;Srme have used a quta system; others have imposed a large fee on building permit issuance. Cutler, "Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe," 1961 Wis. L. Rev. 370, 393 (1961). Several cases have invalidated uses of quota systems. See, e.g., U.S. Home and

Development Corp. v. LaMura, 89 N.J. Super. 254, 214 A.2d 538 (1965); Albrecht Realty Co. v. Town of New Castle, 8 Misc.2d 255, 167 N.Y.S.2d 843 (1957).

7. See, Rathkopf, supra note 1, at 11-1. Construction that is already underway cannot, for the most part, be halted. See text accompanying notes 57-58, infra.

8. This has been the type of moratorium most frequently used by local governments. D. Brower, D. Owens, R. Rosenberg, I. Botvinick and M. Mandel, Urban Growth Management Through Development Timing 107 (1976).

9. This technique is often used in conjunction with "down zoning"; a community will rezone land to lower intensity uses and place a moratorium on any rezoning for a specified period. This is often thought to be necessary where large parts (or critical areas) of the community were previously zoned in a classification that is later thought to allow too much development.

10. D. Heeter, "Interim Zoning Ordinances," ASPO Planning Advisory Service Report No. 242, p. 2-3 (1969).

11. Anderson, American Law of Zoning, 362 (1968).

12. See, e.g., Chicago Title & Trust Co. v. Village of Palatine, 22 Ill. App.2d 264, 160 N.E.2d 697 (1959); Cohen v. Incorporated Village of Valley Stream, 23 Misc.2d 1017, 189 N.Y.S.2d 110 (1959). However, if localities delay indefinitely in this manner, mandamus may be available to require issuance of the building permit. See, e.g., Holdsworth v. Hague, 9 N.J. Misc. 715, 155 A. 892 (1931). For recent cases dealing with moratoria in "pending ordinance" situations, see Williams v. Griffin, 542 P.2d 732 (1975) and Casey v. Zoning Bd. of Warwick Township, 459 Pa. 219, 328 A.2d 464 (1974).

13. Wis. Stats. sec. 62.23(7a) (1975). The extraterritorial zoning jurisdiction extends to all unincorporated areas within three miles of the corporate boundaries of first, second, or third class cities; one and one-half miles for a fourth class (population under 10,000) city or village. Wis. Stats. sec. 62.23(7a)(a) (1975).

14. Wis. Stats. sec. 62.23(7a)(b) (1975).

15. Id. Cities also have the power to enact interim zoning ordinances within corporate limits. This ordinance can be adopted without the usual procedural steps required for a zoning ordinance and may be effective for up to two years. Wis. Stats. sec. 62.23(7)(da) (1975).

16. Walworth Co. v. City of Elkhorn, 27 Wis.2d 30, 133 N.W.2d 257 (1965).

17. Id. at 38-39. A later case upheld the freezing of existing uses within the city via an interim zoning ordinance. City of New Berlin v. Stein, 58 Wis.2d 417, 206 N.W.2d 207 (1973).

18. Thirteen examples--California, Connecticut, Iowa, Maryland, Massachusetts, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, and West Virginia--are cited by Urban Growth Management, supra note 8, at 99-100. A fourteenth is the Wisconsin Lincoln Creek experience discussed below.

19. Id. at 100. In Wisconsin there has also been considerable controversy regarding Department of Natural Resources enforcement of administrative rules regarding approval of sewer extensions vis-a-vis local treatment plant capacity.

20. Id. at 99.

21. 42 U.S.C. sec. 1857 (1975).

22. Ordinance No. 99, An Ordinance to Establish a Development Moratorium in the City of Delafield. Another locality in the same general area adopting a similar moratorium is the Town of Genesee in Waukesha County. There a moratorium on plat approvals was in effect while a land use plan was being prepared by the Southeastern Wisconsin Regional Planning Commission. Milwaukee Journal, Accent Section (April 29, 1976 and December 30, 1976). Similar moratoria have been at least discussed in a number of other communities (for example, the Village of Elkhart Lake). Plymouth Record (January 20, 1976).

23. Ordinance No. 99.01, An Ordinance to Extend the Terms of Ordinance No. 99 Until May 6, 1976 (Oct. 15, 1975).

24. These are the objectives laid out in the ordinance adopted to institute the moratorium. Supra note 22.

25. Telephone interview with Mr. Martin Marcheck, Donahue & Associates, Inc., consultant to City of Delafield, Dec. 12, 1975.

    A second reported example of a moratorium on subdivision approvals was the Town of Genesee in Waukesha County, the moratorium applying while a land use plan was being prepared by the regional planning commission. Milwaukee Journal, Accent Section (April 29, 1976 and December 30, 1976).

26. Information is based on interviews with the city clerk of the city involved. The city, which requested anonymity in print, is in the 6,000-7,500 population class.

27. Telephone interview with Charles Dinauer, Director, Madison Dept. of City Planning, Feb. 25, 1976.

The limited moratoria are used in two situations. First, where the city proposes to down zone an area through an amendment of the zoning map, a moratorium on building permits that would not be consistent with the new zoning is imposed. The moratorium is usually to last about 60 days--time enough for the council to adopt or reject the down zoning. This has been done with an estimated frequency of three or four times a year. The second instance of use involves proposed textual amendments to the zoning ordinance that would establish more restrictive use categories. There the procedure, which was used twice, involves official introduction of the amendment followed by council enactment of a moratorium that lasts until the amendment is accepted or rejected. Development that is consistent with the more restrictive provision is allowed to be commenced. Neither technique has been used since 1974.

The city is involved in a suit challenging use of a moratorium in the latter situation.

28. Wis. Stats. sec. 62.23(7a)(b) (1975).

29. Defined as the unincorporated area within three miles of the corporate limit (1 1/2 miles for villages and cities with populations under 10,000). Wis. Stats. 62.23(7a)(a) (1975).

30. Walworth Co., supra note 16.

31. Id.

32. In this period, the DNR used its authority to impose moratoria to informally negotiate with communities relative to the pace of development vis-a-vis the availability of adequate supporting services. At least eight communities were notified that applications for sewer extensions would likely be denied--Jackson, Fontana, West Bend, Saukville, Little Chute, Sturtevant, DePere, and Ashwaubenon. In almost every instance, these communities worked with the DNR to relieve water quality problems and avoid the imposition of a formal development moratorium. Letter from Robert M. Kroll, Chief, Municipal Wastewater Section, DNR, Dec. 19, 1975.

33. Data cited in "The Sewer Moratoria as a Technique of Growth Control and Environmental Protection," Rivkin/Carson, Inc., HUD Contract No. H-2095R (1973) at 14, table 6.

34. Urban Growth Management, supra note 8, at 170-71.

35. Id. at 175. Of the 21 tools rated, only these three were rated "very effective" by over 50% of the respondents.

36. Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291 (1972). See the extensive discussion of this case in II Management and Control of Growth: Issues, Techniques, Problems, Trends 1-119, The Urban Land Institute (1975). See also, Robinson v. City of Boulder, 547 P.2d 228 (1976) and note 45, infra.

For a full discussion of the use of public services to influence urban development, see the chapter of this report on public investments.

37. Livermore, California, Initiative Ordinance Re Building Permits, approved April 11, 1972, effective April 28, 1972. The Livermore ordinance is discussed in Clark and Grable, "Growth Control in California: Prospects for Local Government Implementation of Timing and Sequential Control of Residential Development," 5 Pacific L.J. 570, 595-96 (1974).

38. Associated Home Builders, Inc. of Greater Eastbay v. City of Livermore, Civ. No. 425754, memorandum decision, Sup. Ct., Alameda Co., Cal. (1972).

39. Dade County Ordinance No. 72-18, March 14, 1972. The ordinance is reprinted at 349 F. Supp. 1209 (1972).

40. See supra note 18. Another action of this nature was a recent suit by the state of Texas against the city of Houston to block issuance of new building permits and limit sewer connections until adequate capacity is provided. 4 Land Use Planning Repts. at 5 (Sept. 6, 1976).

41. N.Y. Envir. Conservation Law, SS25-0101 to -0602 (McKinney 1975).

42. N.Y. Envir. Conservation Law, S25-0202 (McKinney 1975).

43. Matter of N.Y. City Housing Authority (Commissioner of the Environmental Conservation Dept.), N.Y. Supreme Court for Queens Co. (Aug. 14, 1975), cited in 3 Housing and Development Reporter 368 (1975).

44. 3 Housing and Development Reporter 203 (1975). Proposed new rules would allow use of interim septic tanks if the owner agreed to hook-up to the public sewer within one year of its construction. Id.

45. Robinson, supra note 36. The city's refusal to extend water and sewer services to a 79-acre subdivision was overruled; the court said Boulder could refuse to extend service for utility-related reasons, but not for growth control or land use planning reasons. This conclusion seemed to be largely based on a finding that the city had previously held itself out as servicing the area.

46. "...nor shall private property be taken for public use without just compensation." U.S. Const. Amend. V. For a discussion of the background of the "taking" issue and evolving trends in this area, see F. Bosselman, D. Callies, and J. Banta, The Taking Issue (1973).

47. See, Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922). In this case Justice Holmes stated that, when determining if a governmental action affecting property value constituted a "taking," "One fact for consideration. . . is the extent of diminution [of value]. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." 260 U.S. at 413. The Wisconsin court has held that mere depreciation of value does not constitute a "taking." Rather the test is whether "the restriction practically or substantially renders the land useless for all practical purposes." Buhler v. Racine County, 33 Wis.2d 137, 143, 146 N.W.2d 403, 406 (1966). A 50 percent reduction in value has been held not to be a taking per se. Jefferson Co. v. Timmel, 261 Wis. 39, 51 N.W.2d 518 (1952).

48. The Wisconsin court has stated that "...if the damage is such as to be by many similarly situated and is in the nature of a restriction on the use to which land may be put and ought to be borne by the individual as a member of society for the good of the public safety, health, or general welfare, it is said to be a reasonable exercise of the police power, but if the damage is so great to the individual that he ought not to fear it under contemporary standards, then courts are inclined to treat it as a "taking" of the property or an unreasonable exercise of the police power ." Stefan Auto Body v. State Highway Comm'n, 21 Wis.2d 363, 369-70, 124 N.W.2d 319, 323 (1963). See Starner v. Ruskin, N.Y. L.J., Feb. 26, 1969, at 35, col. 2 (1969) where a restriction applicable to a single parcel was held invalid as a "taking". Also see Charles v. Diamond, 345 N.Y.S.2d 764 (1973).

49. Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972). Here the court upheld an ordinance that prohibited a landowner from placing fill in his wetland property. For a full discussion of the case see Large, "This Land is Whose Land? Changing Concepts of Land As Property," 1973 Wis. L. Rev. 1039 (1973).

50. See, e.g., Hollywood Beach Hotel v. City of Hollywood, 329 So.2d 10 (1976).

51. In Golden, supra note 36, the New York court held that an ordinance that prevented development for up to 18 years did not constitute a "taking".

52. Metro Realty v. County of El Dorado, 222 Cal. App.2d 508, 518, 35 Cal. Rptr. 480, 486 (1963).

53. "...nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV.

54. The city of Livermore, Cal. ran into such problems. See text accompanying notes 37-38 supra.

55. In Wisconsin, a two-year freeze on existing zoning and land uses pursuant to statutes authorizing interim zoning ordinances has been upheld. Walworth Co., supra note 16; City of New Berlin, supra note 17.

Generally the duration permissible is dependent upon the scope of the problem being addressed--a two-year moratorium would be impermissible if imposed relative to a sewer overload that can be and is corrected in six months, but permissible if imposed to permit a two-year planning and implementation process to proceed.

At least one case upheld an ordinance without an explicit expiration date, but it involved an interim zoning ordinance, clearly labeled as such, which the court said was intended to expire upon adoption of the permanent ordinance (the preparation of which was in progress). Mang v. County of Santa Barbara, 182 Cal. App.2d 93, 5 Cal. Rptr. 724 (1960).

See generally, Urban Growth Management, supra note 8, at 57-8; Rathkopf, supra note 1, at 11-9.

56. See, Kennedy Parks Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669, aff'd 436 F.2d 108 (1970), cert. denied 401 U.S. 1010 (1970).

A more recent case, Village of Arlington Heights v. Metropolitan Housing Development Corp., ___ U.S. ___ (1977), examines what must be shown to raise constitutional infirmity on a racial discrimination basis. Racially discriminatory intent or purpose must be shown.

57. The geographic area for which a moratorium is being prepared may impact on the validity of the objective. For example, a moratorium may be valid for protecting the status quo in an undeveloped urban fringe area, but invalid in a highly developed area. See, Willdell Realty, Inc. v. New Castle Co., 270 A.2d 174 (1970).

58. See, e.g., Nebbia v. New York, 291 U.S. 502 (1937).

59. Hasco Electric Co. v. Dassler, 143 N.Y.S.2d 240 (1955), aff'd 1 App. Div.2d 894, 150 N.Y.S.2d 552 (1956). See also, Dade Co. v. Jason, 278 So.2d 311 (1973); Cooper v. Dubnow, 41 A.D.2d 843, 242 N.Y.S.2d 564 (1973).

60. On vested rights generally, see D. Hagman, supra note 1, at 181-87.

Also see, Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal.3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976). There the developer had obtained a grading permit and subdivision approval, but had not received a building permit. The developer

had undertaken rough grading and had installed or was constructing storm drains, culverts, utilities, and street improvements. The court held Avco had not acquired a vested right to construct buildings.

61. See, Memorial Hospital v. Maricopa Co., 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Edwards v. California, 314 U.S. 160 (1941); Crandell v. Nevada, 73 U.S. 35 (1868).

62. Construction Industry Assoc. of Sonoma Co. v. City of Petaluma, 375 F. Supp. 574 (1974).

63. Construction Industry Assoc. of Sonoma Co. v. City of Petaluma, 522 F.2d 897 (1975), cert. denied 424 U.S. 934 (1975). The circuit court did not, however, reach the substantive right to travel issue. Rather, the plaintiffs were held not to have standing to assert the issue.

64. On the right to travel generally, see Note, "The Right to Travel: Another Constitutional Standard for Local Land Use Regulation?" 39 U. Chicago L. Rev. 612 (1972); Note, "Zoning--Petaluma: A New Land Use Ordinance in Search of a New Judicial Standard of Review," 54 N.C. L. Rev. 266 (1976).

65. Town of Mt. Pleasant v. Beckwith, 100 U.S. 514 (1879), affirming Beckwith v. City of Racine, Fed. Case No. 1,213, 7 Biss. 142; City of Fond du Lac v. Town of Empire, 273 Wis. 333, 77 N.W.2d 699 (1956); Village of Milton Junction v. Town of Milton, 263 Wis. 367, 57 N.W.2d 186 (1953); 38 O.A.G. 12 (1949).

The U.S. Supreme Court has also spoken on this point:

> [M]unicipalities have no inherent right of self government which is beyond the legislative control of the state. A municipality is merely a department of the state. . . . However great or small its sphere of action, it remains the creature of the state, exercising and holding powers and privileges subject to the sovereign will.

City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923).

66. "Cities have only such powers as are expressly granted to them by the legislature and such others as are necessary and convenient to the exercise of the powers expressly granted." City of Madison v. Tolzmann, 7 Wis.2d 570, 573, 97 N.W.2d 513 (1959); Milwaukee v. Raulf, 164 Wis. 172, 159 N.W. 819 (1916). See McQuillan, 2 Municipal Corporations sec. 10.09 (3d rev.ed., 1966); Rathkopf, supra note 1, at 2-77.

67. Traditionally, localities are held to possess only those powers granted in express words, those necessarily or fairly implied in or incident to expressly granted powers, and those essential to

the accomplishment of declared objectives and purposes. J. Dillon, Commentaries on the Law of Municipal Corporations, sec. 237 (5th ed., 1911). Older Wisconsin cases stated a similar rule. Bell v. Platteville, 71 Wis. 139, 36 N.W. 831 (1888); Gilman v. Milwaukee, 61 Wis. 588, 21 N.W. 640 (1884).

68. See, e.g., Alexander, supra note 3, where a moratorium on building permit issuance pending a comprehensive rezoning was voided on the grounds of a lack of statutory power to so act.

69. Wis. Const. Art. XI, sec. 3. The relevant portion reads:

> Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village.

For the background of the constitutional amendment creating this section, see Schoetz, "Home Rule and the Inherent Powers of a Municipal Corporation," 7 Marq. U. L. Rev. 192 (1923); Note, "Home Rule in Wisconsin," 3 Wis. L. Rev. 423 (1926). For latter treatments, see Hansen, "Municipal Home Rule in Wisconsin," 21 Marq. U. L. Rev. 74 (1937); Note, "Municipal Corporations--Home Rule in Wisconsin," 1955 Wis. L. Rev. 145 (1955). For a general treatment, see Sandalow, "The Limits of Municipal Power Under Home Rule: A Role for the Courts," 48 Minn. L. Rev. 643 (1964).

70. C. Antieau, Municipal Corporation Law, sec. 3.40 (1975). The durational dimension of the moratorium assumes added significance because of its influence on the likelihood of the moratorium affecting residents outside the imposing jurisdiction.

71. Cf. State ex rel. Ekevn v. City of Milwaukee, 190 Wis. 633, 209 N.W. 860 (1926). It was held that a limitation on the heights of buildings was a "local affair," a key factor being whether the subject matter "grows out of and is presented by and because of their [sic] being such city or village as distinguished from a rural or pastoral community." Id. at 640. The problems leading to a development moratorium are almost certain to be of such an urban nature. Further, the states of California and Pennsylvania have held that city planning and local zoning are, respectively, "local affairs." C. Antieau, supra note 70, at sec. 3.39.

However, moratoria may well be imposed for reasons of public health, and the Wisconsin court has held that "the promotion and protection of public health is a matter of state-wide concern." State ex rel. Martin v. City of Juneau, 238 Wis. 564, 571, 300 N.W. 187, 190 (1941). However, this statement came in the context of upholding a state order to a municipality to provide waste treatment facilities and might not be apposite if the issue was the municipality's power to protect the public health.

72. Wis. Stats. secs. 62.23(7)(da) and 62.23(7a)(b) (1975). See City of New Berlin, supra note 17; Walworth Co., supra note 16. A number of other states specifically authorize interim zoning ordinances. See, e.g., Cal. Govt. Code sec. 65858 (West 1976); Colo. Rev. Stat. Ann. sec. 30-28-121 (1973); Ky. Rev. Stat. Ann. sec. 100.334(2) (1970); Ore. Rev. Stat. sec. 215.104 (1975); Utah Code Ann. sec. 10-9-18(g) (1972); Wash. Rev. Code sec. 36:70.790 (1976).

73. Wis. Stats. sec. 61.35 (1975).

74. Wis. Stats. sec. 60.74(7) (1975).

75. In these cases the development moratorium may last as long as three years. Wis. Stats. sec. 62.23(7a)(b) (1975).

76. There is, however, a provision whereby an existing county zoning ordinance remains in effect for up to one year following a comprehensive revision of the ordinance by the county while the revision is pending town approval. Wis. Stats. sec. 59.97(5)(d) (1975).

77. The relevant portion of the statute reads "The common council of any city which has not adopted a zoning ordinance may. . .enact an interim zoning ordinance. . ." Wis. Stats. sec. 62.23(7)(da) (1975) (emphasis added).

78. Wis. Stats. sec. 62.11(5) (1975).

79. Wis. Stats. sec. 61.34(1) (1975).

80. Wis. Stats. sec. 60.18(12) (1975).

81. On the subject of administrative moratoria pending zoning changes, Professor Freilich notes that:

> The courts have long upheld the right of a municipality to deny administratively a building permit to a developer where the use would conflict with a proposed change in the zoning ordinance which has been aired at a public hearing or published in a newspaper of general circulation.

Frielich, "Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning," 49 J. Urban Law 65, 86 (1971). He further notes that express statutory authorization may be required for moratoria prior to the public hearing stage. Id.

In addition to general police powers, localities may rely on the express grants of power in the zoning enabling statutes. See Wis. Stats. secs. 59.97(4) and 62.23(7). For example, relevant portions of the county statute say:

For the purpose of promoting the public health, safety and the general welfare, the county board of any county may by ordinance...establish districts...and adopt such regulations as the county board shall deem best suited to carry out the purposes of this section.

82. "Municipal corporations are prima facie the sole judges respecting the necessity and reasonableness of ordinances under their police power, and every intendment is to be made in favor of the lawfulness and reasonableness of such ordinances. The city is presumed to have full knowledge of local conditions, and its adoption of an ordinance in the light of this knowledge creates a prima facie presumption that it is reasonable."

Dyer v. City Council of Beloit, 250 Wis. 613, 616, 27 N.W.2d 733 (1947).

83. Highway 100 Auto Wreckers, Inc. v. City of West Allis, 6 Wis.2d 637, 643, 96 N.W.2d 85, 97 N.W.2d 423 (1959).

84. Clark Oil and Refining Corp. v. City of Tomah, 30 Wis.2d 547, 554, 141 N.W.2d 299 (1966). In this case a local ordinance prohibiting deliveries of gasoline to retail gas stations in trucks of greater than 1,500 gallon capacity was voided. The court ruled that the attacking parties had established invalidity of the ordinance beyond a reasonable doubt, noting that "there is no reasonable view that could have been picked by the council by which it can be demonstrated that this section of the ordinance promotes safety and the general welfare." Id.

85. State ex rel. Carter v. Harper, 182 Wis. 148, 152, 196 N.W. 451 (1923). The case upheld the state zoning enabling statute. See also, Village of Wind Point v. Halverson, 38 Wis.2d 1, 155 N.W.2d 654 (1968) where a village setback requirement was upheld as a valid enactment under the village's general police power grant. For a similar holding as to cities' powers, see, Boden v. Milwaukee, 8 Wis.2d 318, 99 N.W.2d 156 (1959). See generally, Rubin v. McAlevy, 54 Misc.2d 338, 282 N.Y.S.2d 564, aff'd 29 A.D.2d 874, 288 N.Y.S.2d 519 (1967), which upheld a town building permit moratorium while comprehensive amendments to the zoning ordinance were being prepared.

86. In Wisconsin, basic state level authority for water quality protection is vested in the Department of Natural Resources. Wis. Stats. sec. 144.025 (1975). The Department of Health and Social Services is also involved, see, e.g., statutory provisions relating to septic tank approval, Wis. Stats. sec. 144.03 (1975).

87 See, e.g., the New York Tidal Wetlands Act. N.Y. Environmental Conservation Law secs. 25-0101 to -0602 (McKinney, 1975).

88. State approval is required for any proposed system, plant, or extension thereof. Wis. Stats. sec. 144.04 (1975), and Wis. Admin. Code sec. NR 110.05. See test accompanying supra note 32.

89. The state can require that sewerage be purified before it is dumped into a stream. Madison Metropolitan Sewage District v. Committee, 260 Wis. 229, 50 N.W.2d 424 (1951).

90. Wis. Admin. Code sec. NR 110.05(1) (1976). The regulations do have a variance procedure, allowing, for example, extensions to development started before the effective date of the regulations and where system improvements are underway or are planned. Id., at sec. 110.05(2). These rules were extensively revised in mid-1976.

91. An area of potential future state activity is moratoria for the protection of air quality. Wis. Stats. secs. 144.30-144.45 (1975).

92. A 1973 HUD survey on sewer moratoria asked whether the housing market was such that housing starts were being shifted to other jurisdictions without moratoria. Approximately one-third of the respondents indicated moderate or major shifts, with two-thirds indicating little or no shifts. Rivkin, "Sewer Moratoria as a Growth Control Technique," II Management and Control of Growth: Issues, Techniques, Problems, Trends 473, The Urban Land Institute (1975).

93. Also, the process of communicating this information to affected parties and the public can be quite time-consuming. The Department of Natural Resources has indicated that even after it has gathered sufficient data and determined that a sewer extension application must be denied, it takes 30 to 60 man hours to explain to the community involved just what the Department is doing and why. Interview with Robert Krill, Chief, Municipal Wastewater Section, Bureau of Water Quality, Division of Environmental Standards, Department of Natural Resources, Dec. 10, 1975.

94. But see, Board of Co. Supervisors of Fairfax Co. v. DeGroff Enterprises, Inc., 214 Va. 235, 198 S.E.2d 600 (1973) where a local ordinance mandating that 15 percent of new multi-family housing constructed be available for low and moderate income persons was voided. See generally, H. Franklin, D. Falk, and A. Levin, In-Zoning: A Guide for Policy-Makers on Inclusionary Land Use Problems (1974); Kleven, "Inclusionary Ordinances--Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing," 21 U.C.L.A. L. Rev. 1435 (1974).

    A recent federal district court case upheld a sewer moratorium that included a policy favoring multi-family housing applications for sewer hook-ups as additional sewer capacity became available. Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n., 400 F. Supp. 1369 (1975).

95. However, in some instances, imposition may cause a short term spurt in development. Developers, upon learning that a moratorium is under consideration, may accelerate applications for building permits in anticipation of the moratorium and subsequent stricter land use controls.

This can lead to an undesirable unbalancing effect on the housing market--spurts of development preceding and following the moratorium with no new housing development during the moratorium.

96. For a discussion of the need for adequate public participation in land use planning, see Comment, "Public Participation in Local Land Use Planning: Concepts, Mechanisms, State Guidelines and the Coastal Area Management Act," 53 N.C.L. Rev. 975 (1975).

97. Development moratoria should be viewed only as temporary devices to preserve the status quo. Otherwise, they would be no more than an example of, as one commentator termed sewer moratoria, "a regrettable characteristic within the American governmental process--ad hoc, piecemeal efforts to solve a complex problem rapidly by simplistic means." Rivkin, supra note 92, at 481.

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