# DEVELOPING A GROWTH MANAGEMENT SYSTEM FOR RURAL COASTAL COMMUNITIES

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This work was sponsored by the Office of Sea Grant, NOAA, U.S. Department of Commerce, under Grant No. NA 79 AA-D-00048 and the North Carolina Department of Administration. The U.S. Government is authorized to produce and distribute reprints for governmental purposes notwithstanding any copyright that may appear hereon.

UNC Sea Grant College Publication UNC-SG-WP-81-9

December 1981

Price: $3.50

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National trends indicate that people are resettling the warm coastal regions of the country and North Carolina's coastal zone has shared a part of this growth. The growth situation in North Carolina's rural coastal communities is far from uniform, however. From 1960 to 1970, some coastal communities actually declined in population while in others the population more than doubled. Farming and forestry remain the dominant activities in many areas, but new recreational developments, industrial plants and mining activities have spurred growth in other communities. The context in which these changes are occurring is also very diverse. There may be few environmental constraints to development in the more inland areas of the coastal zone, but the growth of communities bordering the oceans and sounds is limited by salt marshes, estuarines, shifting dune systems and other fragile areas. In addition, a rural community may be a town of 500 people with little familiarity with planning and regulation of land uses or a small city of 20,000 people that has an adopted land use plan, capital improvements program and zoning ordinance.[1]

This report describes a process for the development of growth management systems for North Carolina's rural coastal communities. As defined here, growth management is a conscious government program to influence the characteristics of growth and achieve community land use goals, objectives and policies. In areas experiencing little growth, the management system might attempt to encourage beneficial industrial, commercial and residential development while in rapidly developing areas such a system would have more traditional growth management objectives such as slowing development until public services are available. There has been no attempt to provide a ready-made system for managing growth in North Carolina's coastal communities since

the combination of regulations and incentives designed to guide development in one community would necessarily have built-in objectives that may not be applicable to another community. Existing systems can be useful guides, but the varied social, economic and natural environments of rural coastal communities require careful attention to local conditions if the growth management system is to be effective in the achievement of community goals and objectives.

The process of designing a growth management system involves six basic steps: (1) determination of community goals, objectives and policies; (2) analysis of the defacto growth management system; (3) inventory of tools and techniques for goal achievement; (4) adjustment of the management techniques to the community; (5) growth management system synthesis and (6) monitoring for system effectiveness. (See figure 1) An attempt has been made to point out important factors to consider in the development of a management strategy, but the degree and manner of consideration of these factors will depend very much on local conditions. Although the process of system design is described sequentially, in practice many of the steps will overlap and will be undertaken simultaneously.

Even though this report concentrates on the development of a growth management system, ideally the process of management system formulation should be integrated with the land use planning process.[2] Background studies of social, economic, fiscal and environmental conditions are important to an understanding of existing problems, future needs and citizen goals. The land use planning process will be the basis of decisions about the manner in which growth should be influenced and the tools that will be effective in the achievement of planning goals. In addition, as courts delve deeper into the development management process, planning studies will be essential to justify public

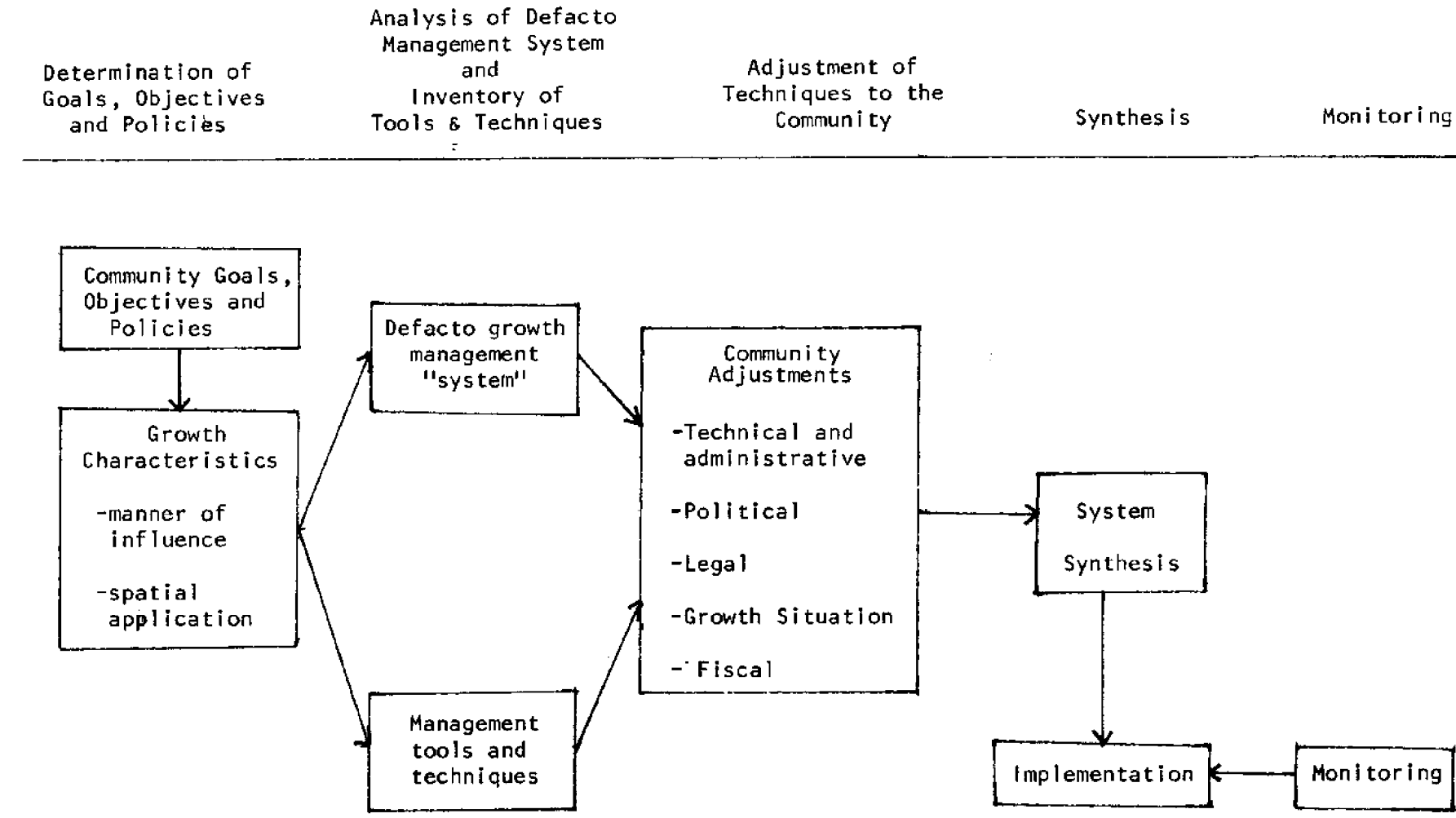
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Figure 1

land use decisions.[3] There has been no attempt here to describe a planning process for rural coastal communities. In the rural context, the emphasis on familiar parts of the land use planning process such as population and economic projections may be lessened because of the absence of information or difficulties of making such projections when a single new development may change the direction, rate, amount or type of growth. Rural coastal communities, which have had little previous experience with planning, might place primary emphasis on environmental factors and the determination of citizen goals, desires and attitudes.[4] No matter what form the planning process takes, a clear expression of the community's goals and objectives along with policies for their achievement is needed before undertaking the design of the growth management system.

## Determination of Goals, Objectives and Policies

The community's goals and objectives will be the basis for the development of the growth management system, and the methods used to identify goals and objectvies are very important in rural communities that are unfamiliar with the purposes and processes of land use planning. Many rural residents view planning and development management as either wasteful government activities or programs that infringe property rights and accomplish little else. The goal determination stage can serve as a means of familiarizing and educating citizens about the problems associated with growth and the purposes of development management. In the process of discovering the community's goals, the planner should seek input from special interest groups and various segments of the population that will be affected by a development management program. Although planning staffs may be limited, the small populations of rural communities present the opportunity for contact with a substantial percentage of

community residents. Such contact might take the form of surveys or actual involvement of the representatives of community groups in planning studies.[5] As goals and objectives are being identified, citizens should also be consulted about specific policies that the community should adopt to achieve the desired goals. Whereas the goals and objectives will be broad declarations of desired end states, they will be translated into implementable terms by the policy statements. For example, residents may adopt the goal of improving the economic well-being of the community with the related policy of encouraging new industrial and commercial development.

While local goals are being defined, the goals of other levels of government that may have some impact on the community should be identified. Federal and state constitutional principles should be viewed as an integral part of the community's goals, objectives and policies since they may be used to judge the legality of the growth management system.[6] In addition, the goals and objectives of federal and state programs operating in the community should be reviewed and compared to local goals. The actual operation of these programs and their impacts on the achievement of local goals will be studied later in the management system development process.

When local goals, objectives and policies are adopted, the geographic area of their application should be determined. Since goals and objectives are broad declarations of desirable end states, they may apply to the entire planning jurisdiction; however, the more particular policies will probably focus on specific areas, which may be distinguished by the present availability of public services, present uses or special environmental characteristics. Continuing with the previous example of goals and policies, the goal of improving the economic well-being of the community residents will apply throughout the community, but the policy of encouraging industrial

and commercial development may be limited to areas that already have similar uses while being inapplicable to environmentally sensitive areas. The spatial application of the community's goals, objectives and policies will be crucial in designing the growth managment system. If the community chooses one technique as the basis of its development management system, the emphasis of that technique may vary throughout the jurisdiction. The geographic differences between goals also may require the adoption of several interrelated tools and techniques for different parts of the community.

After the community's goals, objectives and policies are applied spatially, they should be defined in terms that will link them to the tools and techniques which are available for managing development. Growth management tools and techniques influence one or more of the following characteristics or aspects of growth:

1) the absolute amount or quantity of development;

2) the type of development, both major types such as residential, commercial, industrial and open space and sub-types such as single or multifamily residential;

3) the cost of growth, either the economic costs, the manner in which these economic costs are distributed (distribution costs) or the environmental costs;

4) the location of development, both the geographic direction of growth and the types of development that can take place on a particular parcel of land (site options);

5) the timing or rate of growth;

6) the quality of development and

7) the density of development.[7]

Similarly, most of the community's goals, objectives and policies can be achieved by affecting these same aspects of growth. If the community's goals are defined in terms of the characteristics of growth that relate to goal achievement, the process of growth management system design can begin by choosing tools that influence these specific growth characteristics.

For example, suppose the community adopts the policy of encouraging industrial and commercial development in areas currently served by water and sewer. In order to achieve this policy, the growth management system will need to influence the type of development and the location of this development. In designing the management system, the community will want to choose programs, tools and techniques that affect these aspects of growth. Although it may not be possible to relate all of the community's goals, objectives and policies to the characteristics of growth, most of them should be definable in this manner so the transition can be made from goals to techniques for their achievement.

In the process of matching community goals with the related characteristics of growth, the manner in which the characteristic is to be influenced should also be determined. The achievement of a goal may require the density or quantity of growth to be influenced, and there are several techniques available for these purposes; however, some of these techniques tend to increase while others decrease the density and amount of development. The correct growth management tool or technique can be determined only if the community has decided how the relevant growth characteristics are to be affected. At the end of this step in the process of developing a growth management system, there should be a list of community goals, objectives and policies that have been defined in terms of the geographic area of their application and the characteristics of growth that must be influenced for goal achievement. These products of the goal determination stage might be organized as shown in figure two.

| GOALS, OBJECTIVES AND POLICIES | SPATIAL APPLICATION* | CHARACTERISTICS OF GROWTH | MANNER OF INFLUENCE ON CHARACTERISTICS |
|---|---|---|---|
| Encourage Industrial and Commercial Development | Areas presently served by public utilities adjacent to existing industrial/ commercial development | Type | Encourage Commercial/ Industrial Development |
| | | Location-site | Encourage designated sites to be developed for Industry/Commerce |
| Encourage Multifamily Housing | Areas presently served by public utilities adjacent to downtown | Type | Encourage Residential Development |
| | | Sub-type | Encourage Multifamily Housing |
| | | Location-site | Encourage Multifamily Housing in areas near downtown |
| | | Density | Encourage Increased densities |

*In practice, the spatial aspect of the community's goals would be represented on a map or by a more specific definition of the geographic area to which it applies.

Figure 2

## The Defacto Growth Management System

Once the community's goals, objectives and policies have been defined, it is important to take stock of the community's progress toward its goals and the public actions that have influenced the aspects of growth and aid or detract from goal achievement. In essence, this step represents an attempt to understand the existing growth management "system" and the manner in which it is affecting the community's development. In preparing the land use plan, background studies focused on growth trends and factors influencing those trends. At this point a closer look is taken at public actions that may be influencing development. Even though a community is not consciously managing growth in a particular way, existing local regulations, tax policies, federal aid programs and state laws work together to influence the type and patterns of development. When viewed as a whole, all of these factors form the defacto growth management system.[8] It is important to understand this defacto management system for several reason. First, existing policies, programs, tools and techniques may be accomplishing some of the community's goals, and these actions might be used as a base for the new management system. In addition, communities often adopt a growth management tool or system of techniques with no consideration of the factors that already influence development. This may result in the adoption of unneeded regulations or growth management techniques that detract from goal achievement when used in connection with existing public actions.

Important but often overlooked elements in the defacto growth management system are federal aid and regulatory programs that have both direct and indirect impacts on the characteristics of growth.[9] The goals of some of these programs were reviewed previously during the determination of local goals and objectives. At this point, the actual impact of these programs on local development should be analyzed. In most cases, it would be an

overwhelming task for a locality to catalogue all of the federal programs that affect the use of land, but an awareness of programs with major impacts on local development is important since these programs will form a background on which the management system will operate. For example, federally funded highway projects may influence the rate, location and types of growth, and a locality will need to consider these impacts when making growth management decisions. The availability of federal grants for waste water treatment facilities and other services may affect not only the quantity of new development but also will be crucial for a growth management system based on the availability of public services. In addition to aid programs, direct federal regulation has an impact on land use. Federal permits must be issued under the Federal Water Pollution Control Act[10] for the discharge of industrial, commercial and municipal effluents (in some cases these permit programs are administered by the state) while new sources of air pollutants must meet national standards prescribed under the Clean Air Act.[11] Depending on existing water and air quality, the conditions for permit issuance under these programs may be so strict as to place a limit on certain types of development. In coastal areas, federal permits for dredging and filling under section 404 of the Federal Water Pollution Control Act may prevent building in marsh or estuarine areas.[12] The intended effect of all of these federal environmental programs is to decrease the environmental costs of growth. In reviewing the federal aid and regulatory programs which are part of the existing defacto management system, it is important to identify those programs with major impacts in the area and the manner in which they influence the characteristics of growth. A simple diagram of the relevant programs and their impacts might be presented as in figure 3. Although a locality may be unable to change the focus of these programs, an awareness of their impacts may lead to adjustments in the management system and more effective and efficient achievement of community goals.

| FEDERAL OR STATE PROGRAM/REGULATION | SPATIAL APPLICATION* | CHARACTERISTIC OF GROWTH INFLUENCED (ACTUAL OR POTENTIAL) | MANNER OF INFLUENCE |
|---|---|---|---|
| Section 201 Wastewater Treatment Grant | Throughout jurisdiction | Quantity | Permits greater amount of development. |
| | | Direction | Permits development in areas with poor soils for septic systems. |
| | | Timing | Permits restriction of development until services are extended. |
| Section 404 Dredge and Fill Permits | Wetland Areas | Environmental Cost | Reduce damage to wetlands. |
| | | Location | Limits development options for wetland sites. |
| State Critical Environmental Area Permits | Designated Critical Areas | Environmental Cost | Reduce damage to Critical areas. |
| | | Location | Limits development options for critical area sites. |

*The spatial application of many of these programs may correspond with critical areas or other areas with special environmental characteristics that may have been mapped during the planning process. The spatial application of other programs should also be mapped while recognizing that it may not be possible to define the exact spatial influence of some federal and state programs. Maps of the areas influenced by federal and state programs can be compared to community goal maps to identify possible conflicts between local goals and federal or state programs along with areas where the use of local management techniques may duplicate the efforts of these programs.

Figure 3

Much like the federal programs, existing state programs will affect the various aspects of growth and must be considered as part of the defacto growth management system. A state's decision to construct highways or acquire land for parks and other facilities influences the location, amount and quality of development. In coastal North Carolina, permits are required for development in designated areas of environmental concern,[13] dredging and filling in marshlands[14] and the alteration of coastal sand dunes.[15] These regulations not only prevent environmental damage by development but also may reduce the overall quantity of development in a community with a large proportion of critical environmental areas. As in the case of federal programs, existing state programs and their impacts on development should be catalogued. (See Figure 3)

In analyzing both the federal and state programs which are elements of the defacto management system, a locality may find that existing programs and regulations effectively reinforce local growth policies and accomplish some of the community's goals and objectives. For example, a community which seeks to protect critical environmental areas might find that existing federal and state permit programs are more than adequate to prevent harm to fragile environments. In such a case, there would be no need for direct local regulation in this area unless the community desired to protect environments not covered by the state or federal programs. The locality might better concentrate its energies on supplementing the federal and state programs by controlling activities adjacent to critical areas. An awareness of the coverage of federal and state programs should enable the local community to avoid duplicative regulation and achieve efficiencies in the development of a growth management system.

In addition to federal and state programs, the tax policies of various levels of government affect land investment and development patterns. A community will have little control over some of these policies such as the encouragement of land speculation by federal capital gains tax rates; however, local property assessments and tax rates may have a substantial effect upon development. For example, although property tax rates may have little impact on growth when development pressures are great, when market values are stagnating, high property taxes tend to discourage investment in redeveloping areas.[16] In reviewing the defacto management system assessment policies and tax rates should be analyzed to determine their effect on land development and changed, if needed, to coincide with community goals.

The components of the defacto growth management system with the most potential for direct control of the land development process are existing local land use regulations and policies. The purposes for which local regulations were adopted may not always coincide with their actual impacts so in cataloging the characteristics of growth influenced by these regulations and policies, both their actual and intended effects should be reviewed. This analysis can be aided by referring to the matrix in Appendix I where the tools and techniques for growth management are correlated with the characteristics of growth that they tend to influence. Even though this matrix lists the traditional impacts of a tool, it should be used with caution since a particular tool, as adopted by a community, may have an entirely different emphasis. The summary of this analysis can be similar to that of the federal and state programs and should include the characteristics of growth that are influenced, the manner of influence and the geographic area of influence. (See Figure 4) Even though a local zoning or subdivision ordinance, as written, may appear to aid in the achievement

| Existing Land Use Regulation | Spatial Application | Growth Characteristic Influenced | Manner of Influence (Intended) | Manner of Influence (Actual) |
|---|---|---|---|---|
| Zoning | Throughout jurisdiction* | Quantity | Growth limited by present density standards. | (Same as Intended) |
| | | Major type | Residential, Commercial, Industrial and Agricultural uses permitted. | (Same as Intended) |
| | | Sub-type | Amount of multi-family housing restricted. | (Same as Intended) |
| | | Site | Limits uses in particular areas | Site options almost unlimited; zoning changes easily obtained. |
| | | Density | Residential density limited to 3 - 4 dwelling units/acre. | (Same as Intended) |
| Building Inspection | Throughout jurisdiction | Quality | Ensure safe structures in compliance with state building code standards. | Some sub-standard structures built due to non-enforcement. |

*Because zoning requirements usually vary throughout a jurisdiction, this analysis would be more useful if applied to each zoning district.

Figure 4

of community goals, the continuing failure to enforce the ordinance or a tendency to permit variances from ordinance requirements may have results counter to goal achievement. These enforcement policies are as important as the regulations themselves and should not be overlooked in analyzing the defacto management system.

The final analysis of the defacto mangement system will involve a comparison of the present effects of the system with the goals and objectives of the community. This can be done by matching the characteristics of growth that must be influenced for goal achievement with the characteristics of growth influenced by existing federal programs, state programs and local regulations. In some cases, existing public actions may be accomplishing many of the community's goals but there may be needless duplications which can be eliminated to make the system more efficient and effective. If the defacto management system is not achieving community goals, then modification of presently used tools and techniques may be in order. For example, if the existing zoning ordinance prohibits multifamily dwellings in areas where such housing is desired by the community, chanages in height regulations, lot sizes, or use regulations will conform the zoning ordinance to community goals. If the present defacto system (even with changes in the components) seems to be inadequate or incapable of achieving community goals, then additional tools and techniques will have to be analyzed for possible additions to the present system or for the development of a new growth management system.

If present programs and regulations are not influencing growth as intended, an analysis of the development market and growth potentials may indicate adjustments that are needed to achieve community goals.[17] The detail of market studies will vary between communities, but they might

include a summary of existing growth trends, growth potentials and the strength of the development market. If the growth management system is developed in conjunction with a land use plan, many of these studies will have been completed in the early stages of the planning process. Previously, the manner in which the development market has reacted to various components of the defacto growth management system was reviewed, but now the focus changes to determining why the market reacted that way. This analysis should indicate the types of growth management tools and techniques that will be most effective in achieving community goals and objectives. If development pressures are relatively weak, management measures which concentrate on regulation may slow or stop development. If the development market is strong, however, more regulation or better enforcement of existing regulations may be needed to avoid the problems of haphazard development.[18] The ultimate effectiveness of a growth management system will be determined by its interaction with the development market so an understanding of the likely results of this interaction is essential to the design of a growth management system.

## Inventory of Growth Management Tools and Techniques

Assuming that the defacto management system is not achieving all the community's goals and objectives, the next step in designing a growth management system is an inventory of tools and techniques that might be used effectively in the community. The characteristics of growth that are relevant to the achievement of each of the community's goals should be compared to the matrix in Appendix I to determine the tools and techniques that might be used to accomplish each goal. It is important to remember that although a tool influences a characteristic of growth which must be affected for goal achievement, it may not affect the characteristic in the desired manner.

For example, if the community desires to encourage increased densities in the developing area of town, there will be several tools that influence the density of development such as the transfer of development rights, conventional zoning, minimum lot size, height restrictions, bonus zoning, performance zoning and maximum lot size. Minimum lot size and height restrictions, however, tend to limit density and would not help in the achievement of this objective. The analysis of the various tools used to influence the density of development ( and each of the other relevant aspects of growth) might follow the format in figure 5. After this review, there should be a list of tools and techniques that can be used individually to achieve each of the community's goals, but at this stage there is no attempt to analyze the adaptability of a particular technique to the unique social, political, economic and natural environments of the community. The lack of familiarity with a tool or its seemingly exotic nature should not result in its exclusion from the inventory. Although some tools reviewed at this stage may seem beyond the capabilities of the community, local variations may make an exotic technique a key element in the growth management system.[19] The sole purpose of the inventory is to discover all the tools and techniques that might aid in the achievement of community goals and objectives; refinement of the tools to local needs is left until the next stage.

Adjusting Growth Managment Techniques to the Community

After the inventory of growth management tools and techniques is completed, futher analysis should reveal the techniques that are most practical for local use. Theoretical management system formulations coordinating various tools may seem to accomplish community goals, but if the system components are not acceptable to the local community or within the community's capabilities, then

| Relevant Growth Characteristic and Desired Influence | Tools & Techniques that Influence Characteristic | Analysis of Tools and Techniques |
|---|---|---|
| Density: increase density in developing areas. | Conventional Zoning | Applicable: change zoning to allow increased densities. |
| | Minimum Lot Size | Not applicable: used primarily to decrease densities. |
| | Height Restrictions | Not applicable: used primarily to decrease densities. |
| | Bonus Zoning | Applicable: can be used to increase densities and obtain amenities desired by the community. |
| | Performance Zoning | Not applicable: used primarily to control externalities of development and may restrict development densities. |
| | Maximum Lot Size | Applicable: will encourage increased densities by restricting lot size. |
| | Transfer of Development Rights | Applicable: permits increased densities by transfer of development rights from protected areas. |

Figure 5

the system will not be successful. At this stage in management system development, an attempt is made to limit consideration to those tools that are compatible with the local situation. Those tools which do not seem acceptable in their present form should be analyzed to determine if some variation would result in more compatibility with the community's environment. If a tool is still unacceptable, it should be placed in a reserve of possibilities since it may become very appropriate as the community's composition and growth situation change.

In choosing the tools and techniques that are most appropriate for the community, each technique should be reviewed in relation to several factors: (1) the technical and administrative expertise available to the locality; (2) the local political situation; (3) the legal status of the technique; (4) the community's growth situation and (5) the fiscal resources available to the community.

Each tool in the inventory will require a certain level of technical expertise and administrative capability. In a small town, management techniques that require extensive planning studies, environmental monitoring and design evaluation may be ineffective because of the lack of technical support. This may not be a major constraint, however, if a locality is able to obtain technical assistance from state or regional planning agencies. Even if technical assistance is available, administration of the permit and appeal procedures, which accompany many of the newer, more flexible management techniques, may overwhelm a community that presently uses part-time inspectors and citizen boards in land use regulation. At the same time, a permit procedure based on clear standards that can be easily managed by existing personnel may form a key part of the community's final management system.

Even if it is technically and administratively feasible to use a particular tool or technique, its use may be politically unacceptable. Community residents are often wary of growth management per se because it is viewed as a threat to private property rights. This fear is often heightened when new techniques, which community members do not understand, are introduced. Hopefully many of these misunderstandings can be avoided by involving citizens throughout the process of developing the growth management system. While the community as a whole may accept the need for a particular tool, opposition by groups directly affected by the tool's operation may impede its effectiveness. This is especially true where these groups have the ability to influence the local decision-making body. (This opposition may be relevant in regard to the probability of legal challenge. See discussion below.) In any case, political acceptance will be essential for the effective implementation of all or part of a growth management system and will be a major consideration before any technique is adopted.

Closely related to the political acceptability of a particular tool or technique is its legal status. There will be clear authority for the use of some tools under current enabling legislation while the status of other tools will be uncertain. The tools in this latter category should be placed in the reserve of possibilities for replacing or reinforcing various techniques that prove to be ineffective. As new enabling legislation is adopted or these reserve techniques receive court approval, they may be valuable aids for accomplishing local objectives. Although a tool's status under enabling legislation is crucial to its usability, a major concern of the legal analysis will be the constitutionality of the particular techniques. Previously federal and state constitutional requirements were reviewed in relation to their influence on community goals, objectives and policies,

and the operation of a particular technique will have a direct impact on the achievement of constitutional objectives. Newer techniques and those that infringe substantially on private property rights will be most subject to constitutional challenge; however, any technique may be unconstitutional in its application. Growth management techniques that are adopted using constitutional principles as a guide will be more likely to withstand potential legal challenges, and the mere possibility of legal challenge should not prevent the consideration of a particular technique. Legal defense can be costly, however, and a community may not want to adopt a measure that is almost certain to be challenged in court.

In analyzing the defacto growth management system, the characteristics of existing growth in the community and the strength of the development market was reviewed. The growth situation, which is also reflected in the community's goals, objectives and policies, will aid in selecting tools from the inventory. As mentioned previously, most growth management efforts have been in communities experiencing heavy development, and the techniques used in those areas may be inappropriate in a community experiencing little growth. An awareness of the type of development that is most likely to take place will allow the elimination of tools that influence development activities rarely pursued in the community. In addition, the geographic extent of growth and its problems should be considered in choosing appropriate tools and techniques. A community will have little success influencing development activities that occur beyond its jurisdiction, and in such cases, cooperation with county and state management efforts will be essential to achieve community goals.[20]

The final consideration in choosing the techniques that are appropriate for the community is the cost of using a particular tool. The administration of some tools will require the hiring of full-time inspectors and other support personnel. In addition, tools that are based on the availability of public services will require the commitment of public funds and the issuance of bonds for service extensions. In considering the cost of a particular tool the savings that will result from the management of growth and the availability of state and federal aid should be determined before a tool is abandoned. Even if the use of a tool will lead to fiscal savings in the long run, initial expenditures for implementation may be politically unacceptable if increases in local taxes are required. In any case, the cost of implementing a growth management system will be an important consideration, especially to the community with limited fiscal resources.

After the inventory of possible growth management tools and techniques has been evaluated in terms of the community's characteristics, there will be a list of techniques that are compatible with local conditions. In most cases, there will be several appropriate tools for achieving each of the community's goals. If, however, all the tools that influence a growth characteristic of particular concern have been eliminated, these tools should be reevaluated and restructured in terms of local conditions.

At this point, the process of growth management system development should have resulted in several products. There should be a list of community goals and the characteristics of growth that must be influenced for goal achievement. Corresponding with each of these goals are tools and techniques that are compatible with the community's environment and will be effective in goal achievement. In addition, there should be a compilation of federal and state programs along with other existing public actions that

influence the community's growth. The next step will involve the blending of these products into the actual growth management system.

## Synthesis of the Growth Management System

The state and federal programs that are beyond local control are good places to start in the development of the actual growth management system. As mentioned previously, the goals of such programs must be considered along with local goals and objectives, and a state or federal program may preempt the need for local action in regard to a particular objective. From this basis, several alternative management system formulations should be developed by putting together various tools and techniques needed to achieve the community's goals and objectives. One of the alternative systems might include only those tools that are presently used in the community (relying heavily on the defacto management system), and others would be comprised of various combinations of existing and new management techniques. The spatial application of community goals might be used as a framework for designing the alternative management systems. As mentioned previously, geographic changes in community goals may require the adoption of different techniques in different parts of the community or necessitate geographic variations in emphasis of community-wide tools.

In developing each alternative system, different management techniques might be used for each goal; however, tools that can be used to achieve several different goals are prefered over single-goal tools since systems with fewer tools to coordinate will be easier to administer and probably more effective. In addition, tools and techniques that supplement and complement each other should be used together. For example, a preferential taxing scheme would

ease the burden of use restrictions placed on land in exclusive agricultural zones and might reduce the political pressures for changing such classifications. While complementary tools will be helpful in system development, it may be desirable to avoid using techniques in combination that affect the same characteristic of growth in the same manner. It would seem to make little sense, for example, to establish performance zoning to prohibit certain types of development while adopting conventional zoning to prohibit the same uses. In most situations, such combinations only detract from system efficiency, but they may be necessary to manage rapid growth. Because the community may have numerous goals, the techniques for the achievement of these goals may appear to conflict when first combined in the management system. Many of these conflicts will be resolved by the geographic or spatial application of the particular techniques (i.e. according to the area of the goal's application), but some tools may conflict because community goals are inconsistent and such conflicts will be resolved only if the community adjusts its goals or reorders its goal priority. The process of combining various tools and techniques into a system that achieves all the community's goals is not easy since it requires the coordination of complementary tools, elimination of needless duplication and the resolution of inconsistencies.

There are several principles that should be considered in formulating a growth management system for a rural coastal community. Since a major goal of a community's initial effort at growth management might be to familiarize residents with the purposes of planning and development management, the growth management system might use one or two tools that concentrate on education and citizen involvement. As a corollary to this, the growth management system could be adopted incrementally with the initial

elements focusing on just a few aspects of growth with other techniques being added later.[21] For example, at first a community may want to concentrate on the location of development by adopting a zoning ordinance with a development timing ordinance being added after the zoning ordinance has been in operation for a while. Using such an incremental approach in adopting the components of a growth management system will avoid overwhelming the community with a multitude of ordinances and build a foundation for more extensive growth management efforts.

Once alternative growth management systems have been developed, a system should be chosen for implementation based on effectiveness and efficiency of operation.[22] The main question in guaging effectiveness is whether or not the system will achieve community goals and objectives. The standard of system efficiency will vary between communities and may involve review of the cost of implementation, the time required for development approval under the system, or the number of new personnel required for implementation. Although a planning staff can predict the effectiveness and efficiency of a particular combination of techniques, the actual selection of a growth management system will be done through the political process.

## Monitoring the Growth Management System

Once the growth management system has been implemented, some means of monitoring its effectiveness should be developed. This might involve the collection of detailed statistics concerning housing starts, government expenditures and other factors on a weekly or monthly basis, but in its simplest form, such an evaluation would ask periodically whether or not the community goals are being achieved. Such a procedure is necessary

since the management system may not have the desired impact either because of misjudgments in system development or because the pressures for development and community goals change over time. With some form of monitoring, deficiencies in the system can be recognized and adjustments made in the actual implementation process or by selecting new management techniques. Without periodic evaluations, a growth management system that was designed to fit the needs of a particular community will lose its effectiveness as community goals and conditions change.[23]

## Conclusion

The concept of growth management should not be restricted in application to suburban communities that are facing rapid development. Growth management systems can be important aids to rural coastal communities in achieving local objectives and avoiding unnecessary costs that often accompany new growth. This paper presents a methodolgy for growth management system design that is not unnecessarily complicated but considers many of the factors that influence growth. This proposed design process was developed in light of the unique characteristics of rural communities and can be used by any community to choose the combination of growth management tools and techniques that will be most effective in light of local conditions.

Several considerations are emphasized in the approach to growth management system design that is described here. In the early stages of this process, the framework for system design is established by defining the community's goals and objectives in terms of their spatial application and the characteristics of growth that must be influenced for goal achievement. Later, existing federal, state and local governmental actions are defined in similar

terms, and growth management techniques that may aid in the achievement of local objectives are inventoried and reviewed in an attempt to choose those most compatible with local conditions. Using the information gathered up to this point, various tools are joined into alternative growth management systems with an alternative being selected for implementation based on its probable efficiency and effectiveness in operation. Finally, provision is made for monitoring the system's operation to ensure that the system has the desired impacts on growth and adapts to changing community conditions.

The methodology that is outlined in this report should provide a starting point for developing growth management systems to meet the problems and needs of rural coastal communities facing a variety of development pressures. It is hoped that some insight has been provided into factors that can influence growth and a means of guiding that influence to achieve community goals.

## FOOTNOTES

1. This information is derived from the synopses of the land use plans developed by North Carolina's coastal counties and towns under the Coastal Area Management Act of 1972, N.C. Gen. Stat. §§ 113A-100 et. seq. (1978).

2. Growth management should not be a replacement for land use planning. Not only are basic land use planning studies important in choosing the most effective tools for achieving growth management goals, but the development of a trial management system can lead to modifications in the land use plan that reflect constraints and opportunities discovered while formulating the proposed growth management system. (Chapin and Kaiser, 1979) Many of the management systems that are presently in operation are geared toward solving specific problems with little consideration of the side effects of the system's operation. (Gleeson et al., 1974, p. 11-3) Integrating growth management system development with the land use planning process is one way of ensuring that the interdependency of community problems and their solutions is recognized. (Burrows, 1978, p. 131)

Sanibel Island, Florida's comprehensive planning process is a good example of the integration of land use planning with the development of a growth management system. With the primary goal of protecting the natural environment of the island, planning studies focused on six principal natural systems and identified several ecological zones on the island. Studies of the carrying capacities of each of these zones formed the basis for performance standards controlling the design and construction of residential development along with permitted development intensities in various parts of the island. The development regulations together with the comprehensive plan form one interrelated document that serves to guide growth on the island. (Clark, 1976)

3. Traditionally, local land use regulations with a reasonable connection to the public safety, health and general welfare have been given a presumption of validity by the courts. A few state courts, however, have begun to require land use regulation decisions to be justified by policies expressed in a comprehensive plan. (Fasano v. Board of County Commissioners, 264 Ore. 574, 507 P.2d 23 (1973); see also, Mandelker, 1976) Some courts may be willing to review planning studies that underlie policy decisions, especially when land use regulations are unusually restrictive. See Boca Villas Corp. v. E.E. Pence, (Fla. 15th Cir. Ct. 1976)

4. Frederic Sargent has suggested that environmental planning might be the only planning that is needed for a rural community. (Sargent, 1976) In areas such as the coastal zone, environmental factors may be the major constraints on development and the primary determinants of urban form. Communities that are experiencing few development pressures might identify fragile areas where development is to be prohibited or limited. In addition, requirements for water and sewer systems often depend on the assimilative capacity of the natural environment. Even communities that are concerned primarily with economic development may use environmental factors not only to determine the proper location of new development but also the types of development that are most appropriate for the community.

5. According to Lawrence Suskind, the major way of avoiding challenges to development planning and regulation is to make sure that the planning process is open and politically credible. (Suskind, 1978, p. 19) One step towards political credibility is the early involvement in the planning process of developers, builders, community groups and other residents that will be affected by the operation of the growth management system. (Godschalk et al., 1977, pp. 13-15; Wilkinson and Leary, 1976, pp. 69-70) Although special interest groups may be anxious to appear at public hearings, sole reliance on such public input will not be very effective in guaging the values of average citizens. (Peterson, 1977, p. 121) Sargent has gone beyond the use of citizen advisory boards and surveys of citizen goals by successfully using citizen volunteers in planning studies such as visual quality surveys. (Sargent, 1976) Although few growth management schemes provide for citizen participation throughout the planning process, continuous citizen input is important to ensure that the management process remains open, politically credible and flexible enough to recognize the changing needs and desires of the community. (Burrows, 1978, p. 132)

6. See Godschalk et al., 1977.

7. Derived from Brower and Carraway, 1977; see also Einsweiler et al., 1978, p. I-25.

8. For other approaches to growth management system design and their treatment of the defacto growth management system, see Chapin and Kaiser, 1979; Einsweiler et al., 1978; Godschalk et al., 1977.

Many growth management schemes have been criticized for superimposing another level of development requirements on what is often an already restrictive system of development regulation. (Burrows, 1978, p. 132) This problem may be the result of a failure to consider the existing defacto growth management system and its effect on the development process.

9. A recent study indicates that most existing growth management systems ignore levels of government other than the level at which the system is to operate. (Gleeson et al., 1974, p. II-4) This may be a very grave omission, especially in regards to the federal government since not only are there numerous federal regulatory programs in the environmental area, but it has been estimated that there are nearly 1000 federal programs for rural development. (Skokowski, 1973) These programs and regulations tend to focus on narrow problems so they may have conflicting effects on land development and may be at cross-purposes with local growth management objectives. (Crosswhite, 1970, p. vi; Einsweiler et al., 1978, pp. II-40 to II-79)

10. 33 U.S.C. 1342 (1976).

11. 42 U.S.C. 7411 (1976).

12. 33 U.S.C. 1344 (1976).

13. N.C. Gen. Stat. § 113A-118 (1978).

14. N.C. Gen. Stat. § 113-229 (1978)

15. N.C. Gen. Stat. § 104B-4 (1972).

16. Pichard, 1966, p. 10; see also Stocker, 1976.
Montana has experimented with the use of tax policy as the basis for local planning and land use management required under state law. Under the Montana system, land taxes are proportional to the land's cost to the municipality, the cost of services required by it and the land's ability to carry a given usage. See Fagg, 1979.

17. An understanding of the development process is very important since a growth management system attempts to influence development patterns by affecting the market. (Chapin and Kaiser, 1979) For a study of how public land use policies are incorporated into a developer's decisions, see Weiss et al., 1974. A planning and management program for small towns based on cooperating with developers to achieve community goals has also been proposed. (Wilkinson and Leary, 1976)

18. Most growth management systems emphasize regulations or restraints and very few incorporate incentives for development. (Gleeson et al., 1974, p. II-3; Croke et al., 1972, p. 25) This emphasis may be the result of rapid growth situations that many existing systems were designed to manage. Nevertheless, a community must think carefully about the amount of control that is needed. If the state of the development market is overlooked, the community may adopt more controls than it really needs. (Peterson, 1977, pp. 129-30)

19. The small town of St. George, Vermont (population 500+) is successfully using its own version of transfer of development rights to protect fringe farm areas and encourage the development of the village center. (Merriam, 1978, p. 113)

20. The bulk of new growth in eastern North Carolina is taking place in the unincorporated portions of the counties and beyond the effective control of the municipalities. (Wilkinson and Leary, 1976, p. 13) Some form of cooperation is needed between county governments and municipalities to effectively manage this growth to their mutual benefits. Generally, however, there is often a balkanization of growth management techniques among local governments that detracts from the solution of regional problems and leads to competition among jurisdictions for new development. (Croke et al., 1972, p. 25)

21. A suggested growth management system for the rural counties of western North Carolina emphasizes the adoption of the system in stages to ensure its political and grassroots acceptance. It is even recommended that individual tools such as zoning be gradually strengthened as the community becomes more familiar with the regulation of development. (Holt, 1976, pp. 35-46; see also Godschalk et al., 1977, p. 215)

22. For a more thorough discussion of effectiveness and efficiency considerations, many of which have been reviewed previously in this report, see Chapin and Kaiser, 1979.

23. Growth management systems have been criticized for being no more dynamic than conventional approaches to development regulation because of the failure to include provisions for periodic review of the system's effects. (Burrows, 1978, p. 132) For discussion of a monitoring approach, see Einsweiler et al., 1978.

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# Appendix I

## Tools and Techniques of Growth Management Systems

## INTRODUCTION

This appendix identifies tools and techniques by which urban development may be guided or controlled at the local governmental level. The majority of those techniques which have been discussed in recent years as being applicable to growth management have been included. Some of the tools included in the report are not yet being used in North Carolina, and some would require additional enabling legislation before they could be used. Although such techniques would not be immediately relevant as part of a growth management strategy, they are included here to indicate some of the promising directions which may be taken in the future. If planners and officials are aware of innovative techniques, and if those techniques appear to serve a need in managing, that awareness can lead to changes in laws which will help to make the techniques a reality.

The specific techniques discussed fall into four major groups: land acquisition, public spending, taxation, and regulation. All tools are presented according to a common format, beginning with a brief description of the tool and its statutory or legal authority, if any. The viability of the tool is discussed next, including an assessment of political validity (does the tool appear unconventional or run counter to popularly accepted ideas of property or other rights?) and technical viability (does the tool require sophisticated administration or large implementation staffs which may not exist at the local level?). Next is a section describing where the tool has been used and with what results. This is particularly important where the tool is a new one or relatively unknown. A section on legal issues tries to anticipate some of the questions which may be raised concerning the constitutionality of each tool and cites legal cases where these questions have been addressed. A final section discusses the tool's growth management focus, i.e., a discussion of which characteristics of growth (such as quantity, location and timing) the tool is effective in influencing. This discussion should not be considered as a complete catalogue of a technique's effects. Only those characteristics which traditionally have been influenced by the particular tool are included. An individual growth management technique in some way may have an effect on all the characteristics of growth, but the primary impact of the tool will depend on the manner in which a locality chooses to apply it.

Corresponding to the growth management focus sections is a matrix which lists on the vertical axis each tool and identifies the purposes for which a tool is best used. The horizontal axis holds seven major aspects of development, some of which are further broken down into sub-headings. An "X" under the growth aspect column indicates that the tool has been used primarily to affect this characteristic of development. An asterisk suggests secondary effects of the tool and growth aspects which may be influenced depending on how a locality elects to use the technique.

To complete the matrix, each tool was analyzed to determine if it was effective in:

1. influencing the amount or quantity of new development that will occur in a locality. Only tools which exert a powerful effect on the quantity of new development for a significant length of time (i.e., at least several years) have been designated on the matrix. All of the tools considered will affect how much growth will occur, but that is not the major function of most of the tools.

2. influencing the type of new development. The first sub-heading under this heading is major types. Tools are evaluated in terms of their ability to control the overall mix of uses or the amount of growth within broad categories of uses, such as industrial, commercial, residential, and low density/recreational uses. For example, a tool which strictly controls the extent of commercial growth would be rated as effective under this sub-heading. Similarly, under the sub-heading sub-types, tools are evaluated in terms of their ability to influence the amounts of growth within more specific types of uses which comprise a major use category. For example, single family dwellings and multi-family dwellings would be considered sub-types of the major use category of residential development. A tool which significantly influenced the number of single family units to be constructed in a community would merit an "X" under sub-type.

3. reducing or distributing the costs of growth. The first sub-heading, economic costs, refers to avoidable monetary costs associated with new development.

Tools are designated on the matrix which tend to reduce these costs otherwise borne by the municipality or the landowner. The purpose of the second sub-heading, environmental costs, is to identify techniques which are especially effective in preventing or reducing damage to natural ecosystems which the locality wants to protect. Tools which have a significant impact on how the economic costs of growth are distributed are identified under distributional costs.

4. influencing the location of new development. First, tools are analyzed in terms of their effectiveness in influencing the general geographic direction or areas where growth will occur. The second consideration is whether a tool can significantly influence the options for development on a particular site.

5. influencing the timing or rate of growth. Tools which allow the locality to phase the development of land are included under this heading.

6. influencing the quality of growth. Quality would include such characteristics as construction standards, appearance, and level of amenities.

7. influencing the density of new development. Tools which increase and decrease the overall density of new development are noted.

A concluding cautionary note is in order. All too often communities have taken ordinances and policies from other jurisdictions and applied them locally without really attempting to understand them and modify them for local use. The results are often disastrous. It is very important to look at planning and plan implementation as a system responding to a set of unique local conditions, and to evaluate the addition of any tools and techniques within that context.

| ACQUISITION | QUANTITY | TYPE | | COST | | | LOCATION | | TIMING/ RATE | QUALITY | DENSITY |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Major Type | Sub-Type | Economic | Environ-mental | Distri-bution | Direction | Site | | | |
| Fee Simple Acquisition | | | | | X | X | | X | | | |
| Acquisition of Less Than Fee Interests | | | | | X | X | X | X | | X | |
| Advance Site Acquisition | | | | X | | | * | * | | | |
| Growth Management Land Bank | * | * | | | * | X | X | * | X | * | * |
| Transfer of Development Rights | X | X | X | | X | X | X | X | | | X |
| Compensable Regulation | | | | | | | | | | | |
| **SPENDING** | | | | | | | | | | | |
| Capital Programming | * | | | * | * | * | X | | X | | |
| Urban & Rural Service Areas | * | | | X | | X | * | | * | | |
| Annexation | X | | | * | * | | X | | X | | |
| Development Timing | | | | * | | * | | | X | * | |
| **TAXATION** | | | | | | | | | | | |
| Special Assessment | | | | | | X | | | | | |
| Preferential Assessment of Property | | | | | | X | | X | | | |
| Land Gains Taxation | | | | | | X | | | X | | |

| DEVELOPMENT REGULATION | QUANTITY | TYPE | | COST | | | LOCATION | | TIMING/ RATE | QUALITY | DENSITY |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Major Type | Sub-Type | Economic | Environ-mental | Distri-bution | Direction | Site | | | |
| Interim or Temporary Development Regulations | | | | | | | | | X | | |
| Conventional Zoning | X | X | X | | * | | | X | | | X |
| Exclusive Agricultural or Nonresidential Zones | X | X | | * | | | X | | | | |
| Minimum Lot Size | X | | X | | * | | | | | | X |
| Height Restrictions | X | | X | | | | | | | * | X |
| Conditional and Contractual Zoning | | | | | X | X | | X | | X | |
| Special Exception | | | * | X | X | | | X | | X | |
| Bonus and Incentive Zoning | X | | * | X | X | | | * | | X | X |
| Floating Zones | | | X | | | | | X | | | |
| Performance Zoning (overlay) | | | | | X | | | X | | X | |
| Performance Zoning (without conventional zoning) | X | X | X | | X | | | | | X | X |
| Planned Unit Development (PUD) | | X | X | X | X | | | X | | X | |
| Cluster Zoning | | | | X | X | | | X | | X | |
| Traditional Subdivision Regulation | | | | X | X | X | | X | | X | |
| Off-site Subdivision Regulation | | | | X | X | X | X | | X | | |

| DEVELOPMENT REGULATION (continued) | QUANTITY | TYPE | | COST | | | LOCATION | | TIMING/ RATE | QUALITY | DENSITY |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Major Type | Sub-Type | Economic | Environ-mental | Distri-bution | Direction | Site | | | |
| Total Population Provisions | X | | | | | | | | | | |
| Annual Permit Limits | | | | | | | | | X | | |
| Official Mapping | | | | X | | | | X | | | |
| Mandatory Low Income Housing Construction Ordinance | | | X | | | X | | | | | |
| Regional Fair Share Housing Agreements | | | X | | | X | | | | | |
| Maximum Lot Sizes | X | | X | | | | | | | | X |
| Building Codes | | | | | | | | | | X | |
| Regulation of Mobile Homes | | | X | | | | | X | | | |
| Municipal Enforcement of Restrictive Covenants | | X | X | | X | | | X | | X | |
| Local Environmental Impact Statement | | | | | X | | | X | | | |

# LAND ACQUISITION

## Introduction

In general a local government may acquire land by purchase, devise, gift or condemnation but not without statutory authority to do so. The power to acquire land is granted to municipalities expressly by specific acts of the legislature or is implicit where it is necessary to the exercise of specifically conferred powers or powers essential to the purpose for which the municipality was created. The power of a local government to acquire property by condemnation is more limited than the power to acquire by other means. Authority to use the power of eminent domain will generally not be implied.[1]

In addition, a local government may not acquire land unless it is for a public purpose or use. It is common for a statute which authorizes acquisition to include a section which states that land acquired under the act is for a public purpose. Such legislative determinations of public purpose are given great weight but are not conclusive. What constitutes a public purpose is ultimately determined by the courts.[2]

Two tests have evolved as limits to the public purpose doctrine: the "use by public" test and the "public benefit" test. Early North Carolina cases rejected the public benefit test[3] which permits acquisition as long as it tends to promote the welfare of the community.[4] Under the more stringent use by the public test, the acquired property must actually be used or employed by the public.[5] For example, acquiring land for an industrial park which would eventually be purchased from the government by private industries would probably meet the public benefit test but would not meet the use by the public test.[6]

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[1] Chester J. Antieau, Municipal Corporation Law (New York: Mathew Bender, 1974), Vol. 2A, p.6.

[2] Jack Goodman, "Restricting Revenue Bond Financing of Private Enterprise" 52 North Carolina Law Review 859, 873 (1974)

[3] Cozard v. Hardware Co., 139 N.C. 283, 51 S.E. 932 (1905).

[4] Lawrence Senn, "Eminent Domain - The Public Use Requirement", 46 North Carolina Law Review 663 (1968).

[5] Id., p. 664.

[6] Id., p. 668.

## Fee Simple Acquisition

Fee simple acquisition means acquiring full or absolute title to the property. This technique is used when full use of the property by the public is required.[1] When the full use of the property is not required to achieve the public goal, municipalities generally look to some less expensive way to achieve their objectives, such as acquiring a less than fee interest.

### Authority

The general authority to acquire interest in real property is granted to North Carolina counties and municipalities in N.C.G.S. 153A-158 and 160A-11, respectively. Arguably, these general grants of authority are sufficient to empower a local government to acquire land for a public purpose but specific statutory authorizations avoid any questions as to the purposes for which local governments may acquire land.

N.C.G.S. 160A-457 authorizes any city to acquire property "appropriate for the preservation or restoration of historic sites, the beautification of urban land, the conservation of open space, natural resources and scenic areas, the provision of recreational opportunities, or the guidance of urban development..." This grant of power appears to be sufficiently broad to permit the use of fee simple acquisition in all phases of a growth management system. However, any acquisition, even if authorized by statute, will have to meet the public purpose test.

The status of open space as a public purpose has been clarified by Article XIV, Section 5, of the North Carolina State Constitution which declares that it is the "policy of this State to conserve and protect its lands and water for all its citizenry". Among the types of open space mentioned are parks, recreational areas, forests, wetlands, estuaries, beaches, historical sites, openlands and places of beauty. In addition the amendment states that to fulfill this public purpose, the State and all local governments may acquire the fee simple or lesser interest in properties by purchase or

donation. After acquisition the land can be placed in the newly established "State Nature and Historic Preserve" by dedication to and acceptance by the General Assembly. Thus a public purpose for open space does exist and land that qualifies as open space can be acquired by local governments.

Assisting Authority

The Department of Housing and Urban Development is authorized to make 50 percent grants for acquisitions and development of open space in urban areas to local and state governments if needed to carry out a comprehensive plan element (U.S.C.A., Title 42, 1500 (a) (b)).

Grants can also be given to local and state governments for the acquisition of open space in undeveloped areas which will guide future urban development. The limit of such grants is 75 percent of the cost of acquisition (U.S.C.A., Title 42, 1500 (c) (2)).

Viability

The political viability of purchasing fee simple interests in property is largely determined by the local political climate and the use for which the property is purchased. Land acquisition is in itself a sensitive operation due to the amounts of money generally involved and the complicated nature of transactions between a local government and its citizens.[2] The use of condemnation proceedings to acquire property is, of course, more politically volatile than acquisition by conventional purchase.

The expense of fee simple acquisition seriously reduces the utility of this technique. The level of expertise of the local government can influence the cost of acquisition. Expertise in securing state, federal and private grants for acquisition; in stimulating donations of property from private sources; and expertise in all phases of the acquisition procedure (including appraisals and negotiation) can reduce acquisition expenditures.[3]

All levels of government use fee simple acquisition and are equally suited to using this tool, depending on the purposes for which the land is acquired.

## Where It Has Been Used and To What Effect

Virtually all local governments use fee simple acquisition, usually to acquire locations for public facilities such as fire stations, schools or parks. Some programs that are designed to achieve less traditional objectives are:

1. Boca Raton, Florida, started a land acquisition program for the purpose of expanding public access to the beach front. By November, 1973, almost 74 acres of beach front had been obtained. The city had spent about $17 million for acquisition as of July, 1974.[4]

2. Boulder, Colorado, initiated a greenbelt program in 1967 which is purchasing foothills land on the outskirts of the city for scenic preservation.[5] As of 1973, it had bought or optioned more than 2,700 acres.[6]

3. Palo Alto, California, allocated $4 million to begin an acquisition program of foothills surrounding the city. The program is the result of a development study which concluded that it would be cheaper for the city to buy the land than to allow it to be developed.[7]

## Legal Issues

Challenges to a local government's authority to purchase (rarely litigated) or condemn property are infrequent. The big issue is generally price and not authority. When the authority to condemn is challenged, it is usually on the basis of the "public use" clause in both the North Carolina and U.S. constitutions. (See above, Introduction to Land Acquisition for a discussion of the public use doctrine.)

## Focus

Fee simple acquisition by a locality for purposes of providing open space or land for recreational uses may at the same time protect the land from uses which have serious environmental costs. The benefits of acquisition often accrue to different groups of residents (e.g. residents across town may not benefit much from a small park). Since the general public pays for land purchases, this technique has the effect

of distributing the costs and benefits of acquisition differentially. Regardless of the intended use, fee simple acquisition gives the local government more control over the development options of a particular site than any other technique.

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[1]Michael E. Gleeson et al., Urban Growth Management Systems: An Evaluation of Policy Related Research (Minneapolis: School of Public Affairs, University of Minnesota, 1974), p. III-2.

[2]Charles E. Little, Challenge of the Land (New York: Pergamon Press, 1968), p. 38.

[3]Id., pp. 33-41.

[4]Gleeson et al., p. II-18.

[5]Id., p. II-23.

[6]Robert Cahn, "Where Do We Grow From Here?" Management and Control of Growth, I, ed. R.W. Scott et al. (Washington, D.C.: Urban Land Institute, 1975), 73.

[7]Id., p. 71.

## Acquisition of Less Than Fee Interests

Ownership of property consists of a bundle of rights, which may be purchased in whole or in part. Fee simple ownership includes the entire bundle of rights, while a less than fee interest constitutes some lesser bundle of rights. An easement is an example of less than fee interests in land. Easements convey some set of legal rights over land to a second party, while retaining basic title and ownership with the first party.

Easements may be affirmative or negative. An affirmative easement is a right to use land. A governmental body which wants to establish a system of hiking trails may purchase an easement from the property owner which would grant to the public the right to hike on certain parts of the property. A negative easement will prevent the owner of land from using it in certain ways. A local government may buy a scenic easement in order to prevent the owner from doing anything which would destroy the aesthetic attractiveness of the property.[1] Easements are particularly useful tools when regulation will not do the job and fee simple acquisition is not necessary or desirable.

### Authority

In addition to the ability to acquire easements under the general power of eminent domain, North Carolina counties and municipalities are authorized to acquire easements "in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment" (Open Spaces Acquisition Act, N.C.G.S. 160A-401 et seq.). In most cases, the types of easement obtained under the Open Space Acquisition Act will be easements in gross, which means that there is no adjacent property which is benefited by the easement. The North Carolina Supreme Court has held that easements in gross are interests which are personal to the grantee (the party to whom the easement is granted) and terminate at the death of the grantee. However, when the grantee is a local government, the easement would presumably continue as long as the local government exists.[2] Many states have found it desirable to enact legislation that has the effect of reducing the property tax on land for which an easement has been granted. The North Carolina Trails System Act (N.C.G.S. 113A et seq.) allows changes in value which are the result of an easement (granted to the Department of Administration pursuant to the Act) to be taken into consideration

in the assessment of the land for tax purposes. The Open Space Acquisition Act does not contain a similar provision. However, there is a strong argument that property tax relief is available in the absence of such legislation:

> G.S. 105-317(a)(1) requires the appraiser to consider several items, including zoning and "any other factors that may affect its value." A conservation easement resembles in some ways a zoning restriction, which is specifically mentioned in the statute, and it is clearly another "factor that may affect" the value of the land. In a revaluation year, then, the grant of an easement would have to be taken into account by the appraiser and would result, in many cases, in a reduction of the tax value of the property. . . . In non-revaluation years, the situation is somewhat more difficult. . . . It can be argued that the grant of a conservation easement by the landowner and the acceptance of the grant by the governmental unit should be treated the same as a zoning change--as a "circumstance external to the property" requiring reappraisal under G.S. 105-287(b)(6).[3]

Viability

The political viability of this technique is essentially the same as that of fee simple acquisition. A more important impediment to the effective use of this technique is the fact that a large part of the general public is not familiar with easements and is reluctant to get involved in a transaction with the local government due to their uncertainty about the technique.[4]

The technical limitations on the use of this technique are money and expertise. The cost of acquiring an easement that restricts development in an area that is developing will be almost as great as buying a fee simple interest.[5] There are several attributes of easement acquisition which reduce the overall cost. When a fee simple interest in property is purchased by a local government, the land is taken off the tax rolls. When an easement is purchased, the property is still taxed. Even when the taxes are reduced on the property subject to the easement, the government may come out ahead for two reasons. First, property restricted by this kind of an easement may not require many municipal services. Second, the lower taxes are commonly recouped through increased valuations on nearby property which is made more valuable by the assurance that neighboring property will

not be despoiled by development.[6] Another attribute which makes this technique cheaper than fee simple acquisition is that the owner of the property has the responsibility for maintenance.

Relatively few landowners are wealthy enough or public-spirited enough to give away title to their property, but many may be willing to give an easement, particularly if the valuation of their property is decreased for tax purposes. A gift of an easement to a local government can also enable the owner to deduct the value of the easement from his or her income tax as a charitable gift.[7]

North Carolina legislation does not include provisions for penalties to be imposed when the conditions of an easement acquired under the Open Space Acquisition Act are violated. Local governments must enforce the easement by suing the landowner. The cost of enforcing an easement (through a civil action) is a cost not incurred in fee simple acquisition.

The expertise required to make the most effective use of this technique is the ability to anticipate development pressure.[8] Once development pressure exists, the cost of acquisition approaches that of fee simple acquisition. Legal expertise is also required for easement acquisition. Easements often must be tailored to the individual parcel of land. The terms must be explicit in order to give the landowner sufficient notice of what rights have been relinquished. Failure to spell out the rights of each party may result in renegotiation with the landowner over some use not excluded but not specifically allowed for in the agreement or litigation resulting from a misunderstanding.[9] Both results are costly.

Where It Has Been Used and to What Effect

This technique has been used throughout the United States. An example of the cost saving aspect of this technique is provided by the Wisconsin Highway Commission which has purchased scenic easements along many miles of highway at about one-half of the price of fee simple acquisition.[10] The Blue Ridge Parkway in North Carolina is also protected in some areas through scenic easements.

Legal Issues

The validity of this technique will not be successfully challenged if there is enabling legislation and if the public purpose test is met. The public purpose test was discussed earlier in the introductory section on land acquisition.

Focus

Acquisition of easements allows a locality to restrict the uses of the land to those which are compatible with the environment. By purchasing open space easements, the community can have a direct impact on the direction of growth. When a locality purchases an easement the general public absorbs the cost. Since the benefits of an easement often accrue unevenly to different groups, this technique has significant distributional effects. Easements are often used specifically for the purpose of limiting the development options of a particular site, but they can also be used to require a specific quality of development. For example, a locality might purchase a facade easement which would prevent property owners from changing the external appearance of their buildings.

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[1]William A. Campbell, "Conservation Easements: An Effective Tool in the Environmental Kit," Popular Government (Chapel Hill, N.C.: Institute of Government, April 1973), p. 37.

[2]Id.

[3]Clyn Smith, "Easements to Preserve Open Space Land," 1 Ecology Law Quarterly 737 (1971).

[4]Id., p. 741.

[5]M. Moore, "The Acquisition and Preservation of Public Lands," 23 Washington and Lee Law Review 283 (1966).

[6]Id., p. 272.

[7]Smith, p. 741.

[8]Id., p. 737.

[9]Id., p. 735.

[10]Campbell, p. 37.

## Advance Site Acquisition

Advance site acquisition involves the purchase of land for public facilities in advance of actual need. This technique has enabled state and local governments to: (1) forestall rising land prices caused by inflation, and (2) preempt private activities from developing those sites best suited for public use.[1]

### Authority

This technique is used under the authority of state and local governments to acquire property. No additional enabling legislation is required prior to its use.

### Viability

The viability of this technique involves considerations identical to those discussed in the section on Fee Simple Acquisition. This technique does reduce the monetary barriers to fee simple acquisition, but nonetheless requires large expenditures.

The technical limitations on the use of this technique are funding and expertise. The main element of expertise involved (in addition to those discussed under the section on fee simple acquisition) is comprehensive planning capability. Localities that lack this capability will not generally be able to use this technique effectively.[2]

### Where It Has Been Used and to What Effect

A survey conducted in 1966 indicated that about one-third of American cities with populations over 50,000 used advanced acquisition programs.[3] Some examples which demonstrate the cost savings aspect of the technique are listed below.

Richmond, Virginia's master plan designates sites that will eventually be acquired by the city. The city may acquire the designated property whenever private construction is contemplated for the parcel. The city's power to block new construction in designated sites means that it need not purchase and demolish recently constructed buildings. According to a HUD study, the program produced a benefit cost ratio of 2:1.[4]

The Board of Education of Montgomery County, Maryland operates an advance acquisition program for school sites

which has saved an average of $37,000 for each of 17 sites included in a HUD study.[5]

The State of California, through the Division of Highways, has financed advanced acquisition of highway rights-of-way. It is estimated that the land purchased between 1952 and 1966 for $62.5 million would have cost $380.5 million if acquired when actually needed.[6]

Legal Issues

The courts have generally upheld the localities' right to acquire land well in advance of actual need.[7] Advance acquisition (condemnation for a future use) was recognized by the U.S. Supreme Court as early as 1923 in the case of Rindge v. Los Angeles County, 262 U.S. 700 (1923).[8] A decision by the North Carolina Supreme Court, which upheld the taking of land for construction of a public airport when there were only seven privately owned planes in the county and no commitment from commercial airlines to use the airport,[9] indirectly supports this idea. There the court said: "If the taking is in reality for the purpose of making the property available for use by the public, it is immaterial that in the immediate future, only a small segment of the public will be likely to make actual use of it."[10]

The concept of advance acquisition is indirectly supported in N.C.G.S. 160A-372 which allows a board of education to reserve school sites in advance of actual need when school sites are included in the local government's comprehensive land use plan. Whenever a subdivision is submitted for approval which includes part or all of the school site, the board can prevent it from being subdivided by acquiring it within 18 months.

Focus

If the advance acquisition program is administered properly, the cost of land acquisition (including holding costs) can be reduced.[11] Although the primary emphasis of such a program is to reduce acquisition costs, acquisition will affect the development options of a particular site and may influence the direction of growth since proposed public facilities often attract adjacent development.

[1]David Brower et al., Growth Management Through Development Timing (Chapel Hill, N.C.: Center for Urban and Regional Studies, 1974), pp. 119-121.

[2]Id., p. 124.

[3]Id., p. 120.

[4]Id., pp. 122-123.

[5]Id., p. 122.

[6]Id., p. 123.

[7]Id., p.135.

[8]Robert J. Eckert, "Acquisition of Development Rights: A Model Land Use Tool," 23 University of Miami Law Review 352 (1969).

[9]Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

[10]Id., p. 60.

[11]See, e.g., discussion of Richmond, Virginia's system in text accompanying note 4.

## Growth Management Land Banking

Land banking for the purpose of managing growth involves the public acquisition of land for eventual use by the government or resale to the private sector in order to influence the character and timing of growth.[1] The land bank accumulates a stock of real estate, and growth is influenced by decisions involving when to sell parcels, to whom they should be sold, and what restrictions should be placed on the use of the parcel.

### Authority

There are no restrictions in the North Carolina Constitution which limit the authority of the state to create a land bank or engage in land banking. Local governments would require enabling legislation by the N.C. General Assembly in order to create a land bank because they have only those powers expressly conferred and those necessarily implied from express powers[2] which do not include the power to engage in land banking. However, under N.C.G.S. 160A-457, cities are authorized to acquire property appropriate for "the guidance of urban development." Such property can then be retained for public purposes or sold to any "person, firm, corporation, or governmental unit." Although this is not specific authority for land banking, it would seem to permit the advance acquisition of land and its subsequent sale for growth management purposes.

### Viability

The political viability of land banking to control growth has been stated as follows:

> There are just too many people who have a legitimate vested interest in maintaining the present pattern of private land ownership, or who believe that they have such an interest, or who are just philosophically opposed to a vast expansion of the public role in the economy.[3]

Opposition to this technique centers on the following features of land banking:

1. Land banking captures for the public appreciation in land values which otherwise would go to landowners or speculators.[4]

2. Land banking reduces the cost of raw land not owned by the land bank by eliminating the possibility of land scarcities which are contrived by developers and by disposing of property in the land bank at below market prices.[5]

This tool requires an extremely high level of expertise, particularly in the areas of estimating impacts of the program on the overall land market, optimizing investment policies, land acquisition and financing.

In addition, lack of sufficient funds may preclude the use of this technique by many local governments. The amount of land required to carry out the objectives of the land bank depends on the objectives themselves, as well as the physical, economic and social characteristics of the area,[6] but will often require more money than local governments are willing to invest.

During the start-up period, revenues from the sale of previously acquired parcels will be below expenditures. Funds must be provided by other sources, the most likely being state and federal sources or debt financing. The problem with debt financing is that in order to secure it, a land bank must pursue policies that are likely to generate at least enough revenue to service the debt. These policies in some instances might conflict with other policies and objectives (such as keeping land prices low).[7]

The problem of finances bears directly on the choice of the appropriate land banking entity which is discussed below.

Municipalities face several problems which limit the possibilities of land banking at the local level. First, the problems that land banking tries to deal with are often regional. A municipality's power of eminent domain is often restricted to its jurisdictional boundaries. Second, most municipalities do not have the financial resources to initiate an effective land banking program.[8]

Alternatively, public purpose corporations can be set up to operate in a broad geographical area. They are not restrained by the constitutional limits on state and local debt, and are relatively autonomous with no direct voting constituency.[9] On the negative side, it is argued that

public corporations do not have sufficient accountability to the public and that the primary legal responsibility of a public purpose corporation is to its stockholders rather than the general public.[10]

Where It Has Been Used and to What Effect

So far, none of the states have adopted general purpose land banking schemes. Most foreign land banks have been successful but are carried on in such different economic, social, and political climates that their experiences are generally not considered to be transferable.[11] The preeminent example of European land banking is Stockholm, which has followed a policy of large-scale acquisition since 1904. Public land banking has been instrumental in establishing the 18 planned communities in the Stockholm area. Over half of the city's population lives in areas acquired by land banking.[12]

Saskatoon, Saskatchewan has been able to keep land prices down through land banking despite great population increases. Land prices there are substantially lower than in comparable Canadian cities.[13]

Legal Issues

Land banking for the purpose of managing growth was challenged in the U.S. courts in Commonwealth v. Rosso.[14] The use of the power of eminent domain by a Puerto Rican land banking agency was challenged under the United States and Puerto Rican constitutions.

The legislation under attack created a public corporation which was authorized to acquire land and keep it in reserve for the public benefit, without any particular use being designated for the land at the time of taking. The landowners in the Rosso case claimed that the government was prohibited from condemning private property until there was a specific use for the land and a clear public necessity for doing so. In upholding the legislation, the court stressed the need to regulate land, given the large population and small size of the area.[15] (The particular land conditions of the Commonwealth are cited as a reason why the decision has little relevance to the continental United States.[16])

The fact that the United States Supreme Court dismissed the appeal of the Rosso case is an indication that the court agreed with the decision. But, assuming that land banking is permissible under the U.S. Constitution, the technique is still subject to challenge under the North Carolina Constitution.

Whether or not land banking for the purpose of growth management will be upheld in North Carolina will be directly affected by the North Carolina Supreme Court's treatment of the "public purpose" requirement. (See previous discussion of public purpose in section on Acquisition: Introduction.) The direct resale of public land to private developers has been upheld in the case of urban renewal as a valid public purpose, and urban renewal cases will undoubtedly be relied on in arguments for the validity of land banking.

Focus

The primary emphasis of a land bank should be to influence the general geographic areas where growth will occur and the timing of new development by the acquisition and resale of key parcels of developable land. A land bank will have a major distributional effect by capturing increases in land values resulting from development pressures. Thus the economic benefit of rising land values will accrue to the general public (through the land banking entity) rather than to individual landowners or speculators.

By imposing use restrictions on the land it resells, a land bank can affect the density and quantity of growth and the major types of development. Similarly, use restrictions can be designed to limit the development options of a particular site or to assure that new development has the attributes or level of quality that the locality deems appropriate. Use restrictions might be especially effective in reducing the environmental costs of growth by imposing standards for development which are compatible with environmental concerns.

[1]David Brower et al., Growth Management Through Development Timing (Chapel Hill, N.C.: Center for Urban and Regional Studies, 1974), p. 120

[2]Town of Grimesland v. City of Washington, 234 N.C. 117, 66 S.E.2d 794 (1951).

[3]Sylvan Kamm, "The Realities of Large Scale Public Land Banking," Management and Control of Growth, III (Washington, D.C.: Urban Land Institute, 1975), p. 87.

[4]Brower et al., p. 128.

[5]Id., pp. 127-128.

[6]Richard P. Fishman, "Public Land Banking: Examination of Management Technique," Management and Control of Growth, III (Washington, D.C.: Urban Land Institute, 1975), p. 73.

[7]Id., p. 77.

[8]Id., p. 68.

[9]Id., p. 67.

[10]Brower et al., p. 132.

[11]Kamm, p. 64.

[12]Brower et al., p. 125.

[13]American Law Institute, A Model Land Development Code, Advisors' Proposed Official Draft No. 1 (Philadelphia, 1975), p. 256.

[14]Commonwealth v. Rosso, Opinion No. 67-172, El Tribunal Supremo de Puerto Rico, Decembre 7, 1967, Appeal dismissed, 393 U.S. 14 (1968).

[15]Fishman, p. 72.

[16]Kamm, p. 89.

## Transfer of Development Rights (TDR)

The basic concept underlying TDR is that ownership of land gives the owner a bundle of rights, each of which may be separated from the rest and transferred to someone else. The right to develop the land is one of these rights.[1] Under a TDR system, an owner can sell this development right to another property owner who is required by statute to collect a specified number of development rights before developing his or her own property.

Under a typical TDR system, the government awards development rights to each parcel of developable land in the community based on acreage or value of the land. The system is set up so that no owner possesses enough development rights to develop all of his or her property without buying some rights from someone else. Persons sell their development rights on the open market because they do not want to develop or are prohibited by some regulation from developing their property. Land for which development rights have been sold cannot be developed.

The system would work in the following way. Suppose "A" owns four acres of land and the land has been allocated two development rights. If "A" is required (by a regulation) to have one right per acre in order to develop the land for commercial purposes, "A" has two choices. First, "A" can develop just two acres and use up all the allocated development rights. In that case the remaining two acres cannot be developed because their rights have been transferred. Alternatively, "A" can buy two more rights on the market and develop the entire four acres.

The use of TDR is predicted to eliminate substantially the value shifts and inequities of zoning[2] by allowing the market to compensate owners who under a normal zoning scheme would have the development potential of their land restricted with no compensation.

In addition to being proposed as a basic land use system that can replace zoning, TDR has been suggested as a means of preserving open space, preserving landmarks, preserving ecologically sensitive areas, and managing growth.[3]

Authority

Most of the proposals for the TDR recognize that enabling legislation will be required as authority for the system. New York City has based one of its modified TDR systems on existing zoning enabling legislation. That system, which is discussed below, was overturned by a New York trial court (though not for lack of statutory authority). It would appear that enabling legislation would be needed in North Carolina prior to the implementation of a TDR system.[4]

Viability

TDR runs counter to traditional notions of property rights. The newness and novelty of the concept would appear to render it politically unacceptable in North Carolina at present. TDR requires a high level of expertise and staffing in designing as well as administering the system. One proposal for TDR suggests that in preparation major studies would be required to investigate the costs and wastes of present development practices, to document and analyze the desirable ends to be gained by better regulations, and to outline the rights of landowners as they are presently served by zoning and as they might be better served by TDR. An interdisciplinary team of economists, experienced land developers, financiers, planners, lawyers, and physical scientists should be assigned the task of developing several model structures for the creation and precise legal and technical definition of development rights, including a thorough analysis of tax consequences and recording problems, and the management of the market place structure for the sale and exchange of development rights.[5]

Where It Has Been Used and to What Effect

TDR is currently in use in St. George, Vermont, and New York City. St. George, a small town of under 500 residents, is located in a rapidly growing urban area. It is using TDR as a means of controlling its growth. The town purchased 48 acres of land where the town will attempt, through zoning and TDR, to focus its growth.

To develop the land designated as the village center (which includes the 48 acres of town-owned land), a developer must purchase development rights from landowners outside the village center. As explained by one observer:

> The net effect of this plan is that the development will be concentrated in the designated area and the owners of land outside the village will be compensated by the sale of their development rights for the loss of their right to develop their own land. The rate of the development of the village will be regulated by the rate at which the Town issues the certificates of development rights.[6]

As of January, 1978, a transfer of eighteen development rights from thirty-six undeveloped acres had been executed in St. George. In exchange for these rights, the developer received a long-term lease on three acres of land in the city center to build eighteen housing units, an industrial building and a commercial facility.[7]

New York City designed a plan to preserve historic landmarks on the TDR principle and a plan to preserve parks. Historic landmarks are almost never as large as their zoning would permit. Often it is more profitable for a landmark owner to tear down the building and construct a larger structure. The New York ordinance authorized landmark owners to sell the square footage allowed by zoning which has not been utilized to owners of nearby lots. The purchasers of the development rights can then exceed the bulk allowed by the zoning regulations by the amount of square feet they purchased. The purchase price compensates the landmark owner for preserving the building.

After four years no transfers under the system had taken place. The reasons postulated for the failure of the system to win the confidence of landmark owners and developers are (1) inadequate analysis of the economic burden of landmark ownership and of the urban design consequences of the transfer system, (2) onerous administrative controls of dubious necessity, (3) general uncertainty of the program's legality, and (4) reliance on voluntary participation by landmark owners.[8]

A second New York City ordinance which uses TDR principles resulted from public opposition to a developer's proposal to build on two small private parks. The City Planning Commission responded by creating a special park district prohibiting development on designated parks and requiring that the development rights of those parcels be transferred to owners of land in another separate area of the city. Owners of parcels who bought development rights were to have

their floor area ratio increased by as much as 20 percent. The plans to preserve historic landmarks and parks based on the TDR principle have been reviewed by the New York courts but with mixed results.

Legal Issues

The New York system designed to preserve parks was invalidated in Fred R. French Investing Co. v. City of New York, 39 N.Y. 2d 587, 350 N.E. 2d 381, 385 N.Y.S. 2d 5 (1976). The city's attempt to transfer the development rights from private park land to other property was invalidated because the marketability of the severed development rights was "so uncertain and contingent" as to deprive the property owners of the reasonable income productivity or other private use of their property.

In Penn Central Transportation Co. v. City of New York 42 N.Y. 2d 324, 366 N.E. 2d 1271, 397 N.Y.S. 2d 914 (1977), the plaintiffs challenged the Landmarks Preservation Commissions's refusal to permit the erection of an office building over Grand Central Terminal. The New York Court of Appeals held that there was no taking of private property since the Terminal could be used to produce a reasonable return in its present state, and the plaintiff was not totally deprived of the development rights above the Terminal since they were transferable to other parcels of land in the area. In affirming this decision, the United States Supreme Court found that the TDR scheme mitigated the financial burden on the plaintiffs so that the restriction did not amount to a taking of the plaintiff's property.[10]

The taking problem is not the only legal problem that TDR faces. TDR conflicts with accepted interpretations of the uniformity provision in typical zoning enabling legislation, i.e., that all regulations shall be uniform for each class or kind of building throughout each district. Some of the proposals are also likely to be challenged on equal protection grounds by property owners who feel the system has unfairly discriminated against them and on substantive due process grounds by those who claim that the purposes of TDR are not legitimate governmental objectives and/or that the means are not rationally related to the objective.

In spite of the legal problems the concept faces, TDR's advocates claim that the legal precedent exists and that judicial approval, while not assured, is a good possibility.

Focus

When utilized as a basic land use system in place of zoning, TDR influences nearly all of the characteristics of growth identified in this report. The initial decision on the number of development rights to be issued sets the overall density of the community as well as the maximum quantity of new development (at least until there is an affirmative decision to issue more development rights). Under some TDR proposals the quantity of different types and sub-types of development is controlled by restricting the amount of land that can be developed for a particular use. Alternatively, the mix of uses can be controlled by a system which allocates commercial rights, residential rights, and other types of development rights instead of one general purpose kind of development right. To construct housing, for example, a developer would have to own a specified number of housing rights.

TDR proposals generally suggest that the local government designate some areas where, for environmental or other reasons, development is not allowed. The use of this type of provision can direct growth away from particular areas, can protect the natural environment, and can limit the development options of a particular site. Finally, TDR systems possess what most commentators consider to be an equitable mechanism for distributing the costs of development regulation and the benefits of growth.

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[1]Jerome G. Rose, "Transfer of Development Rights: A Preview of an Evolving Concept," 3 Real Estate Law Journal 331 (1975).

[2]Rose, p. 337. See also John J. Costonis, "Development Rights Transfer: An Exploratory Essay," 83 Yale Law Journal 96 (1973).

[3]Rose, p. 337.

[4]In a recent survey of state legislative commissions (thirty-three states responding), twelve jurisdictions felt that TDR was not authorized under existing enabling statutes. Five states felt that no enabling legislation was needed for a TDR scheme while sixteen states, including North Carolina, were unsure of the need for new enabling legislation. See

Dwight H. Merriam, "Making TDR Work," 56 North Carolina Law Review 77, 109 (1978).

[5]Donald M. Carmichael, "Transferable Development Rights as a Basis for Land Use Control," 2 Florida State University Law Review 35 (1975).

[6]Leonard V. Wilson, "Precedent Setting Swap in Vermont," American Institute of Architects, 59 (March 1975), 52.

[7]Merriam, p. 113.

[8]Costonis, p. 96.

[9]Donald Elliott and Norman Marcus, "From Euclid to Ramapo: New Directions in Land Development Controls," 1 Hoffstra Law Review 76 (1973).

[10]46 U.S.L.W. 4856, 4865 (1978).

## Compensable Regulation

A system of compensable regulations provides compensation to landowners whose property values have decreased due to land use regulations (usually zoning regulations). Compensation is provided to save restrictive regulations from being struck down by the courts. While property may be regulated to a certain extent, if the regulation is too restrictive it will be recognized by the courts as a "taking" of property by the government and invalidated by the courts. To avoid that result, compensable regulation legislation is drafted to give the government the option of compensating the landowner for the restriction of his property to prevent the regulation from being held unconstitutional.

### Authority

It is not clear under North Carolina law whether specific enabling legislation is required for this type of compensatory scheme. Arguably zoning enabling legislation together with the power of eminent domain would permit a local government to enact compensatory land use regulations. However, absent enabling legislation, there is no guarantee that the courts will approve the use of compensatory regulations.

### Viability

This type of compensatory system is not in use in North Carolina, but appears to be politically feasible. However, to the extent that this technique is viewed as a way of allowing more extensive land use regulation, it will probably arouse hostility among some property owners. Funding is a major problem for compensatory systems, especially when they are used extensively. In addition, some mechanism would have to be developed to determine the level of compensation with an opportunity for appealing the value determination to an administrative court or a court of law.

### Where It Has Been Used and to What Effect

Compensatory schemes are now being used at both the state and local levels. Rhode Island has adopted legislation which compensates owners of wetlands for restrictions on their use.[1] At the local level, Dayton, Ohio passed an ordinance restricting most of the land surrounding a nearby airport to low-density uses, but provided an administrative procedure whereby claims can be filed alleging an unconstitutional taking. If the taking is proved, the city must either raise sufficient funds to compensate the landowner or allow the proposed development to take place.[2]

Legal Issues

Compensable regulations could be challenged as authorizing expenditures for non-public purposes and being beyond the scope of enabling legislation. In addition, the regulatory aspect of such an ordinance is subject to challenge on any of the grounds used to test traditional zoning.

In City of Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969), a compensatory zoning ordinance was challenged as being beyond the power of the city and an unauthorized use of public funds for a non-public purpose. The ordinance restricted an area to low-density single family dwellings even though there was increasing demand for apartment buildings. In addition, there were provisions for compensating landowners for any decrease in property value caused by the restriction. The Missouri Supreme Court held that the city had both the power of eminent domain and the power to zone and there was "no constitutional or statutory provision which prohibit[ed] the blending of the two powers. . . ." Even though neighboring property owners were the primary beneficiaries of the restrictions, the court also found that the development potential of the area was being purchased for a public purpose. The Missouri Supreme Court favorably viewed the exercise of "zoning with compensation," but it is uncertain how these issues will be resolved by the courts of other jurisdictions.

Focus

There is increasing interest in the use of this technique and some form of compensation could aid in the acceptance of other growth management tools. However, since extensive use of compensation would be infeasible for most communities, and the legal status of compensable regulation is very uncertain, the utility of this technique for managing growth is unclear.

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[1]Ronald A. Shellan, "Compensable Regulations: Outline of a New Land Use Planning Tool," 10 Willamette Law Journal 451, 454 (1974). For a thorough discussion of the concept of compensatory regulation and examples of the legislative and judicial use of the tool, see Donald G. Hagman, "Compensable Regulation: A Way of Dealing with Wipeouts from

Land Use Controls?" 54 University of Detroit Journal of Urban Law 45 (1976).

[2]Fred Bosselman et. al., The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control (Washington, D.C.: U.S. Government Printing Office, 1973), p. 303.

## PUBLIC SPENDING

The power to spend is not specifically granted to the General Assembly in the North Carolina Constitution, or to the cities by the General Statutes, although that power has clearly been exercised and is considered valid.

The major limitation on the city's right to expend municipal revenues is that the expenditures must be for a public purpose. The requirements for satisfaction of the public purpose test under the spending power are generally the same as those discussed under the taxing power.[1] Although the question of public purpose is usually decided on the specific facts of a particular case, two basic tests are often used: that the expenditure is reasonably related to the operation of the city government, and/or that the expenditure promotes the general welfare of the community. The first standard may be met when the city can demonstrate that it is doing something it is authorized to do under the General Statutes.

The second standard may be a little more difficult to define. The public welfare is not confined to public necessity, but may mean public convenience as well.[2] The use need not be for the benefit of every citizen in a community, but may be for inhabitants of a restricted area, so long as use and benefit are not for particular persons, interests or estates.[3]

Due in part to a lack of specific definition of public purpose, the courts give substantial weight to the legislative declaration of public purpose,[4] and will generally contradict that declaration only where the purpose is clearly private or manifestly incorrect.

The major challenges with regard to the spending power, however, may result from a city's decision not to spend. Most of the services provided by a city are extremely expensive and are essential to the growth and development of the community. The North Carolina statutes and case law relevant to this question are discussed below in the section on capital programming.

Broader constitutional issues are discussed below in the section on development timing, as these comprehensive regulations are most often the context in which the constitutional issues are raised. The discussion of these issues in specific sections by no means indicates, however, that they are relevant only to those specific topics.

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[1] Green v. Kitchin, 229 N.C. 450, 50 S.E. 2d 545 (1948)

[2] Keefer v. Town of Lake Lure, 246 N.C. 252, 141 S.E. 2d 252 (1965)

[3] Id.

[4] Dennis v. Raleigh, 253 N.C. 400, 116 S.E. 2d 923 (1960)

## Capital Programing

A capital program is usually a timetable by which a city indicates the timing and level of municipal services it intends to provide over a specified period of time. Generally, the program is laid out for a five to ten year period, although it may be shorter or longer according to a town's confidence in its ability to predict its future needs.

Capital programing can be used by itself as a growth management technique. By tentatively committing itself to a timetable for the provision of capital for the extension of city services the city can control its growth to some extent, especially where the surrounding area is of such a nature that provision of on-site sewage disposal and provision of water are unusually expensive. Few developers will be able or willing to put up sufficient capital to develop land according to a schedule different from that of the city's capital program. Both developers and planners can benefit from the relative certainty that such a program provides.

The capital program is far more effective, however, as a part of a more comprehensive growth scheme. In addition to formulating a timetable for the provision of services, a municipality can regulate the extension of and access to municipal services. (Another technique used in conjunction with capital programing, a development timing ordinance, is discussed in a separate section.) In general, the manipulation of utility extension policy has two types of effects. A decision not to extend services to a specified area or not to expand current facilities can make development prohibitively expensive or put a limit on the growth of the city as a whole. By coordinating its utility extension policy with its comprehensive plan, a community may control the location of development.

There are a number of advantages in the use of a utilities extension policy to control growth. It is generally less expensive than land acquisition and less subject to legal challenges. By making the serviced land more attractive for development than generally less expensive land in outlying areas, it reduces the necessity of county or area-wide land use regulation. It is less subject to change over time than are zoning regulations. And finally, it puts a limit on the growth potential of the community without opening up the broad constitutional challenges available under more thorough development timing and permit limitation schemes.

Regulation of access to facilities can be an effective tool insofar as a town can control the number of users that can connect to its water and sewage disposal systems, and the number of entry points to its streets and highways. Access is especially important to the timing of growth in that through the use of the permit-letting power a city can coordinate the actual provision of services with its fiscal capability to expand.

Authority

The power to draw up a capital program is not explicitly granted to cities by the General Statutes of North Carolina, although the authority is granted to issue revenue bonds under N.C.G.S. 159-83, and general obligation bonds under N.C.G.S. 159-48. The requirements for the preparation, filing, and content of the city budget are found in N.C.G.S. 159-11 to 159-13. A capital program would merely require the use of these powers in conjunction with one another and a city's engineering and planning offices.

Authority to construct and maintain electric power generation, transmission and distribution systems, water supply and distribution systems, and sewage collection and disposal systems is granted to cities under N.C.G.S. 160A-312. Cities are further granted the authority to finance the construction of such systems by N.C.G.S. 160A-313, to fix and enforce rates to be charged for use of the systems by N.C.G.S. 160A-314, and to require that landowners within the city limits connect to the system under N.C.G.S. 160A-317.

Viability

Capital programing generally requires the staff and expertise to engage in long-range planning. Consideration must be given to the projected demand for facilities, capability of the current systems, projected revenues and expenses within the city budget, and the environmental constraints affecting the system.

The political viability of an extension or access policy depends on how restrictive it is. A moderately restrictive program will be far more palatable to developers and residents than will a very restrictive policy. To the extent that the restrictions increase the value of the homes of the current residents, however, those residents may be inclined to support them.

Where It Has Been Used and to What Effect

Many North Carolina municipalities, particularly the larger ones, use capital programing.

The use of utilities extension as a part of a growth control strategy is common. It has been used with varying success in a number of areas, including Montgomery and Prince George's counties in Maryland; Ramapo, New York; and Boulder, Colorado. It is difficult to evaluate the success of this tool in particular, because it is almost always used in conjunction with such other tools as capital programing, access to existing facilities and general zoning restrictions. In 1974, the City of Durham, North Carolina enacted a utilities extension policy, the effect of which cannot yet be determined.

Before water supplies became abundant, Pinellas County, Florida regulated access to existing facilities. The Board of County Commissioners required all building permit applications to be reviewed by the County Water Department if a development was located in an unincorporated area and proposed to hook up to the county water system. The developer had to apply for a water allocation as part of the building permit application, and a water allocation had to be granted before the building permit could be issued.[1]

Legal Issues

In and of itself, a capital program is subject to challenge only if its elements fail to meet the procedural and substantive requirements of the Local Government Finance Chapter of the North Carolina General Statutes (Chapter 159). Where the program proposes to restrict growth to any substantial degree, it may be challenged on constitutional grounds (see section on Development Timing).

The use of utility extension policy as a tool for controlling the growth of a city is somewhat limited by the statutory and case laws of North Carolina. Within the city limits a city is required to provide equal service to all inhabitants, once it provides service to any inhabitants,[2] and the city may require inhabitants to connect to the city systems.[3]

The city may extend utility services beyond the town line, but only within reasonable limits and for the public benefit,[4] but is under no duty to do so.[5] A city must consider, in extension beyond the town boundaries, the amount of territory to be serviced, its distance from the town and the effect extension will have on customer rates and the town's capital debt structure.[6]

If a city decides to extend services beyond the town line it has a certain amount of discretionary power to condition the provision of those facilities, and to set the rates to be charged for those services. Because the agreement to provide services to extraterritorial areas is of a contractual nature, the city, in its proprietary capacity, may require that specific conditions be met, it would seem. And because the city is under no duty to provide services, those conditions may vary substantially with the particular circumstances, absent equal protection problems.

Although the city is also allowed to set rates for the use of its services, this aspect is perhaps subject to greater restraint in that rates charged to all extraterritorial customers must be substantially similar to avoid equal protection problems. Charging substantially higher rates will not be held discriminatory when it applies alike to all extraterritorial customers, and so the city may only use this method to discourage all growth outside the city limits and may not simply discourage or encourage growth in a particular direction.

With regard to areas which the city intends to annex, it has little discretionary power with regard to the provision of services. Under N.C.G.S. 160A-35 (for cities of less than 5000) and N.C.G.S. 160A-47 (for cities of 5000 or more), the city must make plans for the extension of services to an area which it proposes to annex, and those plans must set forth the proposed method of financing such extension. That duty cannot be delegated.[7]

The city may be subject to equal protection challenges if it fails to allow access to a developer after it has granted access to a similarly situated developer. Thus, a city should restrict access only in accordance with a comprehensive growth plan, and a record should be kept of the reasons for acceptance or denial in each case.

Focus

A capital improvement program (CIP) coordinated with extension and access policies provides a significant amount of control over the location and timing of growth as was explained above. Another characteristic of growth which these tools influence is cost. Environmental costs can be avoided if the CIP is effective in directing growth away from environmentally sensitive areas. The costs of the infrastructure required by new development (e.g., new

roads, sewage lines) can be reduced by scheduling and providing services in an orderly and efficient manner. Capital expenditures are a major expense for most communities, and they are usually financed by a bond issue which taxes both those already residing in the community and future residents. The length of time required for debt retirement has a significant impact on the relative tax burdens placed on these groups. In addition to having this distributional effect, it seems that a CIP can be used to justify a limit on population growth. Financial inability to absorb a new development may be a legally acceptable justification for limiting population. This inability would be reflected in the level of services contemplated by the CIP.

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[1]Michael E. Gleeson et al., Urban Growth Management Systems: An Evaluation of Policy Related Research (Minneapolis: School of Public Affairs, University of Minnesota, 1975), p. II-68. For an update on the Pinellas County system, see Robert C. Einsweiler et al., The Design of State, Regional and Local Development Management Systems, Vol. I (University of Minnesota: Hubert H. Humphrey Institute of Public Affairs, 1978) I-11.

[2]Fulgham v. Town of Selma 238 N.C. 100, 76 S.E.2d 368 (1953).

[3]G.S. 160A-317.

[4]Town of Grimesland v. City of Washington, 234 N.C. 117, 66 S.E.2d 794 (1952).

[5]Fulgham v. Town of Selma, 238 N.C. 100, 76 S.E.2d 368 (1953)

[6]See generally Public Service Co. of N.C., Inc. v. The City of Shelby, 252 N.C. 816 (1960).

[7]In re Annexation Ordinance, 255 N.C. 633, 122 S.E.2d 690 (1961).

## Urban and Rural Service Areas

The designation of urban and rural service areas is one way in which a city or county may generate its tax revenues on a more equitable basis. The taxing authority classifies each parcel of land within its jurisdiction according to whether or not it is slated to receive services (i.e., as an urban or rural service area), and imposes a higher tax rate on those parcels which are to receive services.

The logic behind the use of this tool is that those areas which are receiving minimal or no services are not putting as heavy a burden on the governmental revenues as are those areas which do receive services. User fees paid by the heavily serviced areas do not compensate for the enormous expenditure of capital for the initial provision of facilities, and arguably, the nonserviced areas should not be forced to bear the additional costs until services are extended.

This tool is probably most equitable and least open to constitutional challenge if applied in conjunction with a capital program and sewer extension policy which will assure that the benefit of services will be conferred only on those who have borne their share of the burden of increased taxes.

This tool will probably be most effective if used in conjunction with a regulatory program which restricts development to the serviced or designated areas. Without such a regulatory scheme it is possible that the land which is designated "rural" will become more attractive for development due to lower tax bills, and thus, lower land costs.

### Authority

There is no authority in the North Carolina General Statutes for the designation of urban and rural service areas, to which different tax rates might apply. Under Article V, Section 2 (2) of the North Carolina Constitution, however, the General Assembly does have the authority to specify classifications of real property to which different tax rates may apply. That authority is non-delegable with regard to real property, and so clearly cities and counties do not have the authority to set up classifications systems on their own.

However, it is arguable that a county or municipality could achieve the same results through a revaluation of property. Under N.C.G.S. 105-317(a)(1), in determining the true value

land, the local appraiser is required to consider the advantages and disadvantages of a tract of land as to location, zoning and any other factor that might affect its value. Certainly the likelihood of receiving municipal or county services essential for development is a factor which should be taken into account in the appraiser's calculations. (See previous discussion under Acquisition of Less Than Fee Simple Interest.)

The land classification system developed for planning under North Carolina's Coastal Area Management Act (CAMA) provides for the division of county and municipal lands according to whether or not services will be provided within the next ten years. This system not only provides the basis for a capital improvement program but also a differential taxing scheme following the urban and rural service area concept. If legally permitted in North Carolina, tax rates based upon the present and future availability of services would aid the implementation of the completed CAMA plans.

Viability

Since a taxation scheme based on the designation of urban and rural service areas is a natural adjunct to a capital improvement program, except for determination of the applicable tax rates, once a municipality or county has engaged in long-range capital programming and planning no additional technical expertise would be required.

The political viability of the differential taxation of urban and rural service areas may depend on the level of increases in tax rates which occur in currently serviced areas. Needless to say the scheme would be very popular to the extent it reduces taxes in non-serviced areas.

Where It Has Been Used and to What Effect

This tool is used in the Nashville, Tennessee Metropolitan government. It has not been in effect long enough to assess accurately its effectiveness.

Legal Issues

This type of tool is open to challenge as violative of the uniformity of taxation language found in most state constitutions. It has been upheld, however, by the Tennessee Supreme Court, with regard to its use in the Nashville Metropolitan area.[1] The Nashville City and Davidson County governments were merged with the consent of the voters. In lieu

of the previous property tax system, in which the county levied an additional tax on its own residents, the county was divided into a general service district and an urban service district, and a separate tax rate was applied to each. The court found the new system to be substantially the same as the previous entity. Thus, the court found no reason why a different tax rate could not be administered to the new system as it had been under the old system, based on the provision or lack of urban services. The court seemed to put substantial emphasis on the intent of the framers rather than the actual construction of the constitutional provision involved, which may limit the usefulness of this decision in other jurisdictions or under a different set of facts.

Focus

This technique reduces the costs of providing municipal services in that premature (and inefficient) extension of services to sparsely settled areas is not allowed. Through its tax component, this technique distributes the costs of services only to those who receive them. If rural areas cannot be developed without water and sewer services either because of environmental constraints or other prohibitions, growth in these areas will be forestalled and its timing controlled by the municipality's decision on where to rezone for urban services.

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[1]See Frazier v. Carr, 210 Tenn. 565, 360 S.W.2d 449 (1962).

## Annexation

Annexation is the means by which a city increases its land area. The procedure for annexation is controlled by statute. Generally the area to be annexed must be contiguous to the city, but provision is often made for the annexation of noncontiguous areas under certain conditions. As a precondition to annexation a North Carolina city must demonstrate that it has a plan to extend services to the area (see N.C.G.S. 160A-47). Annexation procedures may originate with the city, or the residents of the area to be annexed if that area is not contiguous to the city. The city's power to annex is not absolute, however. If 15 percent of the qualified voters residing in an area which a city proposes to annex sign a petititon calling for a referendum, a city must call that referendum and a majority of the so qualified residents must approve.

### Authority

Power to annex is granted to the cities by N.C.G.S. 160A-24 to 160A-58.6. The statutes generally cover the rights of a city to annex, the duties of a city which attempts to annex and the procedures to be followed in the annexation process.

N.C.G.S. 160A-35 governs annexation by cities under 5000 population while N.C.G.S. 160A-47 describes the procedures for annexation by cities of greater than 5000 population.

### Viability

The difficulty of compiling the annexation report required by statute which includes maps and plans for the provision of services will vary from situation to situation. However, the procedural prerequisites to annexation are probably less of a stumbling block than political opposition to annexation.

### Where It Has Been Used and to What Effect

Virtually all municipalities at some point exercise their annexation powers.

### Legal Issues

Most of the challenges to annexation in North Carolina have been based on procedural defects. Constitutional questions might arise on an Equal Protection ground if a city were to select arbitrarily those areas it would annex, but a city

must only show a rational basis for its annexation policy. Thus it would seem that a city with a comprehensive plan and growth policy based on an evaluation of the relevant environmental and social factors involved in annexing specific areas would be able to pass constitutional muster.

Focus

The use of annexation policy as a land use control is fairly clear. Because the decision to annex is discretionary, a city may direct its growth to areas which are best able to support development, favoring development in areas closest to existing services and disfavoring development in areas of environmental sensitivity. To the extent that growth is guided in this fashion, the cost of service provision and the amount of environmental damage can be reduced. Further, a city may control the timing of its growth to ensure that municipal facilities are capable of bearing the additional load. Annexation is particularly effective when used in conjunction with a utility extension policy, as the primary difference between annexed and non-annexed land is the duty to provide utilities service. Additionally, depending on how it is used, annexation affects the quantity of a municipality's growth. To the extent that annexed land becomes subject to stricter development controls, the quantity of growth may be reduced. On the other hand, annexation can be used to increase the physical size and population of a municipality.

## Development Timing

Development timing is a process which puts limits on the physical and demographic growth of a town which is under substantial pressure to expand its services to provide housing for an expanding population. A timing ordinance is usually set up to coordinate that expansion with the town's fiscal ability to provide services, and further, is connected with a town's comprehensive plan in order to control the quality of the development.

The power of a development timing ordinance lies in the fact that certain services essential to the development of new housing, i.e., sewage disposal, water supply and roads, are so expensive that a developer must usually rely on a municipality to provide the capital for them. Thus, a municipality can exert substantial leverage on the location of and timing of growth through denial or provision of municipal services.

Development timing ordinances are enforced by means of the municipality's control over the permit-letting process, and justified by its connection with a comprehensive plan. These ordinances require that a permit be issued for each dwelling constructed, and that the municipality may condition, or, absent constitutional restraints (see discussion of legal issues), completely deny any development on land within its jurisdiction on the basis of the current or anticipated lack of services, even though the municipality would generally be held responsible for their provision. Using a comprehensive plan to delineate the location and type of development desired and a capital program to schedule the provision of services, the city can make available to the developer with reasonable certainty information concerning when the development of a special parcel will be allowed and the type of development that will be allowed.

The comprehensive nature and extended duration of the ordinance offer a far more stable atmosphere in which a city may protect those land-related assets which are most precious. The thorough research and survey work which are necessary for the application of an ordinance to a specific area should provide the city with substantial justification for its judgment as to ability of specific areas to support various degrees of development.

Authority

Municipalities in North Carolina have been granted the authority to regulate development within their jurisdictions by the General Assembly. Under N.C.G.S. 160A-381 a city is empowered to regulate the development which takes place within its jurisdiction through the general police power, and in the issuance of permits, a building inspector is required to follow the provisions of those regulations literally.[1]

Cities are futher empowered to regulate the subdivision of land within their jurisdiction. Under N.C.G.S. 160A-372, a city may enact a subdivision control ordinance to provide for orderly growth and development. Although the statute appears to stress the positive regulation of subdivision development, it recognizes the right to condition development on the provision of community service facilities in accordance with municipal policies and standards. N.C.G.S. 160A-373 allows the city to condition further the right to develop on the approval of either a planning agency or the city council, or both.

While the above statutes have been sufficient to grant cities the power to enact general Euclid type zoning ordinances, the extensive control over growth and development envisioned by a development timing ordinance is arguably not within the statutory grant of authority. There is no relevant case law in North Carolina, but a development timing ordinance has been challenged in Ramapo, New York, as an exercise of power not granted to the city by the state legislature.[2] The plaintiffs argued that there was no grant of authority to control the timing of development, and that the purpose for which the ordinance was enacted was not authorized by law. The highest court in the State of New York held that although the State Zoning Enabling Act did not specifically authorize a development timing ordinance, such power was implied in the legislation.[3] The New York enabling legislation is substantially similar to that found in the North Carolina statutes. Further, under N.C.G.S. 160A-4 the legislature indicated that the provisions of that chapter be broadly constructed "to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect."

Viability

As discussed below in the section on Legal Issues, the level of staffing and expertise required to implement a development timing ordinance is beyond that which is available to most municipalities. In addition to technical problems, the political viability of this tool is questionable. In

some cities where this tool has been implemented, developers and construction interests have strenuously fought these ordinances.

Where It Has Been Used and to What Effect

Development timing ordinances have been enacted in two cities in the United States--Ramapo, New York, and Petaluma, California. Both ordinances have been challenged in the courts and a discussion of the results of those challenges can be found below.

Legal Issues

Constitutional objections to development timing ordinances are generally based on four grounds: substantive due process, the taking issue, the right to travel, and equal protection of the laws.

Substantive Due Process--The substantive due process argument is based upon language in the Fifth and Fourteenth Amendments to the U.S. Constitution, and contains two elements: first, that the objective of the ordinance must be a legitimate governmental objective, and second, that the regulations imposed by the ordinance must be rationally related to the objective.

Two recent cases concerning development timing ordinances have involved such due process issues, and have been decided in favor of the municipalities. The case of Golden v. Planning Board of the Township of Ramapo[4] involved the town of Ramapo, New York, which is located about 25 miles from New York City and which had come under substantial growth pressures in the middle and late 1960's. Following extensive studies on the capacity of the land within the town boundaries, the public services available, population trends in the area and other factors related to the population growth in the area, the township adopted a Master Plan which sought to keep the town's population increase at a moderate level, and to preserve the rural, semirural and suburban character of the community. A Comprehensive Zoning Ordinance was then enacted designating over 90 percent of the available land for residential use, much of it with large minimum lot sizes.

The third step consisted of the adoption of a six-year Capital Budget based on studies of the sewer and drainage systems, and the demands of the Master Plan. The township further adopted a Capital Program which provided for the

location and timing of the basic services for the subsequent 12 years, which would put the township at its maximum desirable development capacity. To tie development to the Capital Program, the township further enacted an Amended Zoning Ordinance which required the developer to obtain a special use permit from the Town Board before he could begin construction. The permit would be issued only when a certain number of public facilities were available in the area. The developer could either wait until the township had put in the facilities, or show evidence that he had provided them himself.

The ordinance was upheld by the highest court in New York State. The court found that the purpose of the ordinance, directing the growth of population through a phased development ordinance, was within the scope of the traditional zoning purposes recognized as valid in Euclid v. Ambler.[5] Recognizing the usual presumption of validity granted to a legislature's judgment as to the sufficiency of the relationship between the regulations and the permissible governmental objective, the court upheld the ordinance as a valid means of serving the welfare of the community.

The case of Construction Industry Association of Sonoma County v. City of Petaluma[6] involved a small town near San Francisco which found itself under growth pressures similar to those in Ramapo. Following studies by the city planning department, the city council adopted an official growth policy in 1971. The plan created an "urban extension line" beyond which the city would not annex land or extend services for the next 15 years. Within the line the number of building permits to be issued yearly was limited to 500, approximately one-third to one-half of the estimated market demand. As in Ramapo, permits were issued to a developer on the basis of a competition in which various proposals were rated according to an "intricate" system which is apparently not as forthright as the Ramapo system.

The Federal District Court held the ordinance to be unconstitutional, primarily because it violated the plaintiff's right to travel, but also noted that the purpose of the ordinance was to exclude prospective residents, and thus, was illegitimate in the absence of showing of a compelling state interest.[7] The Ninth Circuit Court of Appeals reversed, however, finding that the plan was not exclusionary, furthered the legitimate state purposes of preserving Petaluma's small town character and avoiding the social and environmental

problems caused by an uncontrolled growth rate, and bore a rational relationship to that purpose.[8] The U.S. Supreme Court has declined to review the Circuit Court decision.[9]

There is no statute in North Carolina recognizing the control of growth as a legitimate state purpose, and there have been no cases decided on that issue.

The Taking Issue--The taking issue is based on the Fifth and Fourteenth Amendments of the U.S. Constitution which prohibit the taking of private property by government for a public use without just compensation. Where a regulation on the use of certain parcels of land is so restrictive as to constitute a confiscation of the land, the courts will invalidate the regulation or require that the owner be compensated.

The taking issue was litigated in Ramapo, as the plaintiffs contended that the development of some land within the area was prohibited for as long as 18 years, and that such strict regulation amounted to a taking. The court disagreed, however, holding that development of the land was not permanently prohibited, but only temporarily denied. Although the court opinion did not discuss the matter, it should be noted that the ordinance allowed development where the developer was willing to provide the necessary services, and that during the period in which the land could not be developed, that land could be revalued for tax purposes to reflect the decreased value caused by the regulations.

Two aspects of the Ramapo situation deserve further attention in light of the North Carolina situation. First, the court in Ramapo may have been willing to uphold the ordinance because of the extensive planning efforts which preceded it and the attempt to mitigate the adverse economic impact of the plan. Elements of that process were: the use of professionals in the analysis of problems and proposal of solutions; a positive commitment by the town to assure the provision of lower income housing; an affirmative commitment by the town to assimilate growth; a capital facilities plan and budget which reflected the commitment to growth; tax relief for property temporarily enjoined from development; retention of economic uses for property despite the deferral of the right to develop; and a definite time period for the vesting of development rights. Clearly a great deal of manpower and money went into the creation of the plan, and most North Carolina cities will not have such resources available.

Second, the Ramapo ordinance was based on an 18-year time period which was justified because of the enormous development pressure that it was under. It is doubtful that pressures of similar magnitude will be present near North Carolina cities, and so the time period will need to be shortened accordingly.

Right to Travel--The Supreme Court has recently held that the right to travel, although not specifically mentioned in the Constitution, is a fundamental individual right, and that it includes the right to migrate, resettle and find a new job. Phased development ordinances, by placing restrictions on the rate and absolute limits of the growth of a town will necessarily restrict the right of an individual to move into the area so restricted. This issue was not discussed by the court in Ramapo, but the District Court in Petaluma based its decision to invalidate the ordinance on the restrictions which the plan placed on the right to travel. That court refused to accept any of the justifications offered by the city as sufficiently compelling to justify the restriction of a fundamental right. The Circuit Court avoided the right to travel issue, holding that the plaintiff construction association did not have a right to travel, and could not assert a claim on behalf of a group of low-income plaintiffs who had themselves been denied the right to be parties to the suit.

Equal Protection--Although the Equal Protection argument was not raised in either the Ramapo or Petaluma cases, an argument can be constructed that development timing ordinances create arbitrary and unreasonable classifications, and are therefore prohibited under the Fourteenth Amendment. Such an argument would have to show that similarly situated developers were treated differently and that that treatment was arbitrarily or unreasonably applied. This was clearly not the case in Ramapo and Petaluma, where permit competitions were judged according to standards which measured the availability of services in the proposed development area, or the quality of the development proposed.

Focus

Obviously, the primary purpose of enacting a development timing ordinance is to slow the rate of growth so that adequate services will be available. Another beneficial aspect of this technique is that it reduces the cost of providing services by promoting orderly and efficient extensions of

service. When the developer decides to provide services, the costs are passed directly to the purchaser. To this extent, established residents do not pay for the infrastructure and capital expenses generated by new development. Also development timing ordinances establish a standard relating to the quality of facilities and services to which new residential developments must have access, and this indirectly influences the quality of development.

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[1]Lee v. Board of Adjustment 226 N.C. 107, 37 S.E.2d 128 (1946)

[2]Golden v. Planning Board of the Township of Ramapo 334 N.Y.S. 2d 138, 285 N.E.2d 291, appeal dismissed 409 U.S. 1003 (1972).

[3]334 N.Y.S.2d 138, 146.

[4]See fn. 2, supra, for full citation.

[5]272 U.S. 365 (1926).

[6]522 F.2d 897 (1975), rev'g 375 F.Supp. 574 (N.D. Cal. 1974).

[7]375 F.Supp. 574, 582-3.

[8]522 F.2d 897, 906.

[9]424 U.S. 934 (1976).

# TAXATION

## Introduction

Taxation, while not a land use control per se, may have significant impact upon land use decisions. Its primary function is to distribute the tax burden so as to complement a town's land use regulation and development scheme.

A municipality in North Carolina may levy a tax only if specifically authorized to do so by the General Assembly.[1] The General Assembly has authorized cities to levy property taxes[2] and a number of taxes of much less importance.[3] Cities also have the power to levy special assessments[4] if specific procedures are followed.[5]

There are four basic constitutional restrictions on the power to levy local and county taxes: the tax must be levied for a public purpose; the tax must not be arbitrary, capricious, unreasonable, prohibitive or confiscatory; all taxpayers must be treated with substantial equity under the law; and the tax must be applied uniformly within each class of taxable persons or things.

## Public Purpose

Article V, Section 2, subsection 2 of the North Carolina Constitution states: "The power of taxation shall be exercised . . . for public purposes only." Although it is discussed here, the major challenges based on the public purpose requirement are filed when the money is actually spent, rather than when the tax is levied. The definition of public purpose is not static, but may change as various aspects of society change.[6] Thus, the legislative declaration of what constitutes a public purpose is entitled to great weight in a court's consideration, though such declaration is not conclusive.[7] A public purpose is usually one which benefits the town as a whole and not specific persons or estates,[8] or one which is for the support of the government or for any of the recognized objects of the government.[9]

## Arbitrary, Capricious . . .

Article V, Section 2, subsection 2 of the North Carolina Constitution states: "The power of taxation shall be exercised in a just and equitable manner." This requirement basically reflects the due process clause of the Fourteenth Amendment of the U.S. Constitution. The test is usually

whether the tax has some fiscal relation to the protections, opportunities, and benefits given by the local government, or whether the local government has contributed anything for which they can fairly ask a return. This test rests on the theory that the taxpayer is to be justly compensated by governmental benefits for the taxes he pays.[10] The legislative body has freedom in deciding the amount of the tax, and it will usually be upheld by the courts as long as there is some possible fiscal relation between the benefits provided by the government and the return sought.

Substantial Equity

The substantial equity requirement recognizes that the Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution demands that all persons in a specific class, or similarly situated, must be treated in a substantially similar manner. Article V, Section 2, subsection 2 of the North Carolina Constitution grants the General Assembly a non-delegable power to classify property, and requires that each class be treated similarly throughout the State. The General Assembly has delegated the classification power to cities with regard to other taxes, and the cities are subject to similar restraints. The power of a legislative body to classify is flexible, and the dominant limitation is that the classification not be unreasonable or arbitrary,[11] and the burden appears to be on the challenger to demonstrate the alleged unreasonableness.

Uniformity

The uniformity requirement is met when the rules discussed with regard to the classification of taxable persons or property are applied to the individuals within those classes. That is, the tax must be applied uniformly to all members of a class and cannot be indiscriminately applied to certain members of the class.[12] Uniformity must be coextensive with the jurisdiction in which the classification has been made, and thus, a state tax must be applied uniformly across the state, and a city tax must be applied uniformly throughout the city.[13]

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[1]N.C.G.S. 160A-206, Person v. Board of State Tax Commission, 184 N.C. 499, 115 S.E.2d 336 (1922).

[2]N.C.G.S. 160A-209 grants the power and N.C.G.S. 105-271 through N.C.G.S. 105-395 delineates the rules and procedures to be followed in the administration of the tax.

[3]N.C.G.S. 160A-210 through 160A-214.

[4]N.C.G.S. 160A-216.

[5]N.C.G.S. 160A-217 through 160A-238.

[6]Martin v. North Carolina Housing Corp., 277 N.C. 29, 178 S.E.2d 665 (1970).

[7]Id.

[8]Id.

[9]Green v. Kitchin, 229 N.C. 450, 50 S.E.2d 545 (1948). For further discussion of public purpose see 25 N.C. Law Rev. 504 (1947), and Mitchell v. N.C. Industrial Development Financing Authority, 273 N.C. 137, 159 S.E.2d 745 (1968).

[10]State of Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1941).

[11]Southern Grain Provision v. Maxwell, 199 N.C. 661, 155 S.E. 557 (1930).

[12]See Article V, Section 2, subsection (2) of the North Carolina Constitution.

[13]Hajoca Corp. v Calyton, 277 N.C. 560, 178 S.E.2d 481 (1971).

## Special Assessments

Special assessment is a tax method in which all or part of the cost of a specific facility (such as a road improvement, sewer or water system) is charged to the property which is so situated in relation to the improvement that it derives a special benefit from it. The tax charged each property owner is usually proportionate to the distance for which the facility abuts his property, the area of the land served or the value added to the land served by the project.

### Authority

Authority to levy special assessments is granted to cities by N.C.G.S. 160A-217 through 160A-236. N.C.G.S. 160A-216 specifically authorizes a city to make special assessments against benefitted property within its corporate limits for the provision and improvement of streets and roads, water lines, sanitary sewer lines, and storm sewage and drainage systems. Procedural requirements are specified in N.C.G.S. 160A-223 through 160A-231.

### Viability

It is fairly easy to comply with the procedural requirements for special assessments which usually entail notice of the special assessments and hearings on the decision to impose the assessment. The major problems in using this technique are political since the usual methods of apportionment may seem mechanical and arbitrary and the tax burden on a particular piece of property is often very large.

### Where It Has Been Used and to What Effect

Most communities use some form of special assessment procedure to finance public services. In several instances in the early 1900's, special assessments were used to capture increases in property values and to reimburse property owners for decreases in the value of their property due to zoning changes. In this form, special assessments serve as a means of financing compensable zoning regulations. (See previous discussion of compensable zoning.) Although there has been a renewed interest in the use of special assessments to offset substantial increases and decreases in property values resulting from land use regulations, special assessments have been rarely used for this purpose.[1]

Legal Issues

Most challenges to the special assessments are based on procedural grounds and in these challenges, the burden is on the plaintiff to prove irregularity in the city's action.[2] A special assessment may be invalidated also if it is shown that the improvement does not confer a special benefit on the assessed property. However, the burden of proving this lack of benefit is very difficult to carry since the legislative finding of special benefits is presumptively correct.[3] Constitutional questions are less important because the assessments are collected for and applied to specific local purposes and are not open to the broad challenges which more common taxes for the general revenues must face.[4]

Focus

Special assessments seem to have little value as control over land use in developing areas, although within a town boundary the assessments may be used to finance the provision of those services a city deems necessary, and such a decision is invalid only where a gross abuse of discretion can be shown.[5] This technique is useful in distributing the costs of the infrastructure required by new development to the new property owners.

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[1]Donald G. Hagman, "Zoning by Special Assessment Financed Eminent Domain," 28 Florida Law Review 655 (1976).

[2]Broadway v. Asheboro, 250 N.C. 232, 108 S.E.2d 441 (1959).

[3]James W. Erwin, "Municipal Law--Special Assessments for Street Improvements--The Standard of Review," 41 Missouri Law Review 457, 460 (1976).

[4]See generally Southern Railway v. City of Raleigh, 9 N.C. App. 305, 176 S.E.2d 21 (1970).

[5]Raleigh v. Mercer, 271 N.C. 114, 155 S.E.2d 551 (1967).

## Preferential Assessment of Property (Use-Value Assessment Taxation)

Use-value assessment taxation is a system of taxation in which the tax assessor values a parcel of land solely on the basis of its current income-producing capacity. It is to be distinguished from the usual market-value assessment systems which generally included consideration of the zoning, potential for development and sales price for similar parcels in determining the value of a parcel. Preferential taxation is the term used when certain classes of property are assessed at a use-value rather than their market-value rate.

Currently, preferential assessment taxation of farmland has been enacted in at least forty-one states including North Carolina.[1] Twelve of those states have extended their statutes to include open lands (North Carolina has not). This legislation has as its immediate goal the reduction of the tax burden on lands subject to development pressure and on lands which cannot (due to regulation) or should not (for the health, safety and welfare of the community) be developed. By limiting the value of the land to a figure which is tied only to the income which that land currently produces, tax bills are kept at a level which will allow the owner a reasonable rate of return on his land and encourage him to continue his low-intensity use of the land.

In some states the preferential assessment alone is relied upon to counteract the tendency to develop land when it becomes profitable, but most states have recognized the fact that without further control the use-value assessment will provide a haven for the speculator who can now hold the land at a lower interim cost, and wait for the land to appreciate in value.[2]

North Carolina uses a deferred taxation system to increase the likelihood that the tax will have the effect of holding the land out of development. The deferred tax system requires that the tax assessor keep two sets of books for eligible lands, one containing the usual market-value assessment, and one containing the use-value assessment. The taxpayer pays according to the use-value assessment until the land is converted to a higher use, and the difference between the amount he pays under use-value and the amount which would be due under a market-value system is considered deferred tax. Upon conversion to a higher use, all deferred taxes become due. State laws vary, but most require the payment of five to ten years' deferred taxes, including interest. North Carolina requires the payment of deferred tax for the five years

previous to termination of eligibility.[3]

There is some criticism of the deferred taxation control system in that: (1) it encourages the development of the best farmland, as it will have the highest income-producing capability in its present use and therefore a smaller accumulation of deferred tax; and (2) it encourages leap-frog development because land farther from the developed area will have a lower market value, and thus less deferred tax will accumulate.[4]

A second form of enforcing the preferential assessment system is through "use restriction controls." These controls require that land be subject to some enforceable use restriction before use-value assessment can be applied. California's statute is typical, and requires that a landowner sign a contract with county or municipal officials restricting his right to develop the land for ten years, before use-value assessment is allowed.[5] The contract is rescindable by either party, but a tax of approximately 12.5 percent of the market value is imposed on the landowner during the year of rescision.[6] The criticism of this method of enforcement is simply that it has not worked. Land which is contracted for does not have a high potential for development,[7] and landowners near expanding urban areas do not want to give up their right to develop at a substantial profit.[8] Further, when prime land is put under contract, the penalty for rescision is not a significant deterrent to conversion of the land after about seven or eight years.[9]

The major shortcoming of the preferential assessment taxation statutes as they presently exist, then, is that by themselves, they have not had much effect on the land use patterns near expanding urban areas.[10] A study in Maryland has concluded that "preferential assessment has little overall effect on the pattern and timing of development. . . . Most landowners will yield to the pressure of the market about the time when the land is ripe. . . . At the optimal conversion time it will be platted and will change uses."[11] Similar conclusions have been reached in California and Oregon.[12]

Authority

The state legislature is responsible for providing regulations governing the collection of taxes, and so it is the legislature which enacts the statute allowing use-value assessment for specific classes of property. In states where courts apply constitutional standards strictly, there might well be

constitutional challenges on the basis of the uniformity of taxation language found in most state constitutions. A number of states have amended their constitutions either in response to or in anticipation of adverse court rulings. Most states have instituted the program on a statewide basis, requiring only that individuals apply to their assessor for a change in valuation. California, however, granted each county the authority to decide whether or not it would prefer to participate in the system, and thus has the individual landowner contract directly with the county or municipality.

Authority for preferential taxation of farmland in North Carolina is found in N.C.G.S. 105-277.4. A landowner whose land falls within the definition of agricultural or forest lands in N.C.G.S. 105-277.3 may apply to the county tax supervisor to have his land assessed at its current use-value. If the landowner disagrees with the supervisor's assessment, he may appeal to the county Board of Equalization or County Commissioners. Further appeal can be made before the State Board of Assessment.

(Under N.C.G.S. 105-278, real property which is designated as a historic structure or site can receive preferential tax treatment upon annual application of the property owner. As in the case of agricultural lands, the deferred tax must be paid when there is a change in the ordinance designating the historical district or the property loses its historic character.)

Viability

One of the major complaints about preferential assessment taxation is that it can have a severe impact on the fiscal affairs of local jurisdictions. Because the laws are not generally restricted to farmland in the path of development, the smaller rural counties stand to lose a substantial portion of their tax base under a preferential assessment system. A study done of the Williamson Act (preferential assessment for farmlands and open spaces) in California found that the average tax on land preferentially assessed under the Act in 1968-69 was reduced from $2.75 to $1.58.[13] This loss of revenue must be made up by other taxpayers, of course.

The revenue loss problem is attacked directly in New York and California, both of which take money out of general revenues to reimburse counties and school districts for money

lost through their preferential assessment acts. New York will reimburse one-half of the revenue lost to the county and school districts as the budget allows,[14] and California reimburses counties on a per acre basis for farmland under contract with the county[15] and reimburses school districts where the tax rate exceeds specific limits.[16] North Carolina has no such program, and there is little need for it because of the minimal use of the preferential assessment statute. Applications for assessment at use value have been received from less than five percent of the land eligible for such treatment, but as counties complete their property revaluations, the program can be expected to become more popular.

Legal Issues

Most state constitutions contain language to the effect that "no class of property shall be taxed except by a uniform rule, and every classification shall be made by general law uniformly applicable."[17] And generally, the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution requires that similarly situated individuals be treated in like manner unless the state can show a reasonable basis for the distinction. The question then arises whether singling out a particular class of land use for preferential treatment is an unreasonable classification, and whether the state can show good cause for the distinction. In many states (including North Carolina) the issue has not been raised, in part because use of the preferential assessment statutes is minimal. In those states where the laws have been challenged, they have been challenged as violative of state law (as opposed to constitutional claims), and they have frequently been overturned because of the courts found preferential tax treatment of specific land uses to be arbitrary and unreasonable classification by the legislature.[18] More recently, however, the Supreme Court of Florida upheld a preferential assessment statute which treated agricultural lands as a special class. In Lanier v. Overstreet, 175 So.2d 521, (Fla. 1975), the court upheld the constitutionality of a Florida statute requiring that lands used solely for agricultural purposes be assessed on the basis of their value in agricultural use, while ignoring the land's potential for other uses. The court found that Article IX of the Florida Constitution was actually a mandate to classify property so as to secure a just valuation of all property.

The most common way to enact preferential assessment, however, has been through the amendment of state constitutions to allow the legislatures to treat agricultural and

open space land use as a special class for tax purposes. One recent reversal of this trend has occurred in California, where a provision of the state's constitution that authorized this technique was repealed in 1974, and subsequently enacted by statute.[19]

Focus

As a growth management technique, preferential assessment gives municipalities a way to distribute their tax burdens in a more equitable fashion. Use-value assessment can supplement other land use regulations which significantly decrease land values by relieving some of the financial burden of holding the restricted land. In some cases, preferential assessment may be an incentive for landowners not to develop by allowing them to profitably continue farming and other non-intensive activities.

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[1]John C. Keene et. al., Untaxing Open Space (Washington, DC: Council on Environmental Quality, 1976), p. 13.

[2]"The fact that the land may have been purchased and was actually being held as a speculative investment is of no consequence provided its actual use is for a bona fide agricultural purpose," Smith v. Parrish, 262 So.2d 238 (Fla. 1972).

[3]N.C.G.S. 105-277.4 (c).

[4]Joseph T. Henke, "Preferential Property Tax Treatment for Farmland," 53 Oregon Law Review 117, 128 (1974).

[5]Cal. Gov't. Code 51240-51246 (West Supp. 1974).

[6]Cal. Gov't. Code 51282-51283 (West Supp. 1974).

[7]Hoy F. Carman and Jim G. Polson, "Tax Shifts Occurring as a Result of Differential Assessment of Farmland: California 1968-69," 24 National Tax Journal 449, 456 (1971).

[8]W. Gary Kurtz, "The Dilemma of Preserving Open Space Land--How to Make Californians an Offer They Can't Refuse," 13 Santa Clara Lawyer 284, 292-293 (1972).

[9]Averill Q. Mix, "Restricted Use Assessment in California: Can It Fulfill Its Objectives?" 11 Santa Clara Lawyer 259, 264-268 (1971).

[10]Kurtz, p. 291.

[11]Henke, p. 123.

[12]Id., p. 124.

[13]Carman and Polson, p. 456.

[14]New York Agricultural and Markets Law, 503(f) (McKinney 1974).

[15]Cal. Gov't. Code, 16107 (West Supp. 1972).

[16]Cal. Gov't. Code, 16113-16114 (West Supp. 1972).

[17]N.C. Const., Art V, 2(2).

[18]State Tax Commission v. Wakefield, 161 A.2d 676 (Md. 1960); Boyne v. State, 390 P.2d 225 (Nev. 1964).

[19]Cal. Gov't. Code, 65560 et seq., Cal. Rev. and Tax Code 421 et seq.

## Land Gains Taxation

The land gains tax applies to gains realized from sale or exchange of land held by the seller for a short period of time (for example, Vermont's tax applies to land held less than six years). Exceptions can be made for sales clearly not motivated by speculative gain, such as sales of less than one acre, or the sale of a principal residence. When a structure is attached to the land sold, the proceeds are apportioned between the land and the structure and only the land portion is taxed.

The tax schedule applied may vary in magnitude depending upon the extent of the problem of land speculation, but generally the tax rate would increase directly with the percentage of profit realized, and inversely with the length of the holding period.

Not only does the tax tend to make land speculation much less attractive, but it also serves valuable revenue-gathering objectives. It provides an entirely new basis for taxation, and as such, may take the weight off some of the more burdensome and less socially desirable forms of state taxation. Because the tax is levied at the time of transfer, it does not have to depend on the speculator's residence to tax the gain realized. The tax only applies to gains from the sale of land, and thus only affects those who have actually benefited from the fluctuation in land prices.

The tax has specific advantages over other systems which attempt to take advantage of increased land value, such as the use-value assessment systems. Since the land gains tax applies to all transfers of land not held for a specific period, and is not tied to specific types of uses, it may have a broader impact on land development pressures. While the use-value assessment system keys on removal of pressure to sell land, it is effective only to the extent that the prospective seller is not tempted by the attractive offers he receives. The land

gains tax is not so dependent and applies its disincentive to the speculator, who generally instigates the transfer. The use-value assessment system also tends to depress the tax base of a community while a land gains tax appears to increase revenues, though it may be that the depressing effect which the land gains tax would have on the local market as a whole would be equally harmful to the local tax base.

## Authority

The authority to levy a land gains tax is vested in the General Assembly in North Carolina, but no such tax has been enacted.

## Viability

Since the land gains tax is designed to reduce speculation, it may result in a decline in the local tax base. Before a land gains tax is enacted, it would be desirable to compare the resulting declines in the tax base to the benefits of decreased development pressures and the proceeds from the tax. Needless to say, in areas facing increasing development pressures, such a tax will meet resistance from developers and short-term landowners who stand to benefit from the rise in land prices.

As conceived by the Vermont legislation, the administration of the program would be the responsibility of the state tax commissioner so that this technique would require no extra staffing on the part of local governments.

## Where It Has Been Used and To What Effect

The tax has been in effect in Vermont since 1973[1] and is expected to generate more than $1 million per year in revenue. Although the effects of the tax on land speculation are difficult to discern after such a short period of time, it appears that the tax has had substantial effect in discouraging out-of-state land speculators from investing in Vermont, and further seems to have depressed the second-home market in Vermont.[2]

## Legal Issues

The Vermont Supreme Court has upheld the land gains tax instituted in that state. In Andrews v. Lathrop,[3] the plaintiffs charged that the tax violated the Equal Protection clause of the Fourteenth Amendment by arbitrarily discriminating against sellers who have held land for less than six years. The court found the objective of deterring land speculation to be permissible and that the distinction between short and long-term trades had a rational relationship to the problem of land speculation. With regard to the six-year standard, the court deferred to the judgment of the state's legislative body.

Since the Vermont land gains tax does not apply to land which includes the principal residence of the buyer or seller, it has been argued that the tax discriminates against non-residents who own vacation homes and the resulting increases in the cost of second home purchases by out-of-staters unconstitutionally burdens the right to travel. Although the results of such a challenge are uncertain, the constitutionality of the tax may depend on whether a court finds that an alternative means would further the state interests represented by the tax without burdening the fundamental right to travel.

## Focus

The land gains tax serves two primary inter-connected growth management objectives. First it tends to make land speculation much less attractive, and thus may slow the rate of development. Short-term trading is usually financed by high-interest loans, and the burden of those loans in addition to the income on property taxes due to development pressures provides a powerful incentive to make the land "productive" as soon as possible. By decreasing the potential gains and the corresponding development pressures, the land gains tax reduces the financial pressures to develop land prematurely. In addition, the tax removes the injustice of individual benefit at common expense. Land speculation increases the wealth of the speculator primarily as a result of the social pressures and demands for the limited commodity in which he deals. The tax distributes to the general public the increase in property value which is attributable to the community.

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[1]Vt. Stat. Ann. tit. 32, Section 10001-10010 (Cum. Supp. 1977)

[2]For a summary of the effects of the tax as of 1974, see Note, "State Taxation, Use of Taxing Power to Achieve Environmental Goals: Vermont's Taxes on Gains Realized from the Sale or Exchange of Land Held for Less than Six Years," 49 Washington Law Review 1159, 1177-82 (1973).

[3]132 Vt. 256, 315 A.2d 860 (1974).

[4]Note, "Freedom of Travel and Exclusionary Land Use Regulations," 84 Yale Law Journal 1564, 1579-83 (1975).

# DEVELOPMENT REGULATION

## Introduction

Regulatory tools applied by local governments to guide land use and protect environmental values are all subject to a range of legal challenges. These challenges will be discussed at some length here and referred to only briefly, if at all, in discussing the individual tools. When a tool is particularly vulnerable to a specific challenge or has been subjected to a unique legal objection, that circumstance will be discussed at more length under the heading for the specific tool.

All local regulatory powers are derived from the police power of the state.[1] A regulatory power may not be exercised by localities until the state has, through enabling legislation, described the nature of the power and authorized its use by the locality. Thus local regulations are subject to several general types of legal challenge: (1) constitutional challenges--state or federal--which prescribe limitations on the state and its laws; (2) challenges that the local governments' application of the authorized power is "ultra vires", that is, outside of the authority given the local government through the enabling legislation; (3) challenges that the regulating body has not adhered to the laws of procedural fairness required by the enabling legislation, constitutional guarantees, or other state legislation prescribing minimum requirements for such procedural safeguards as notice and hearing.

## Constitutional Challenges

Constitutional challenges may be divided into general categories.

1. The first challenge is based on the due process clause that zoning regulations must have some "reasonable tendency to promote" or "substantial relationship to" the public health, safety, morals or general welfare.[2] This concept includes at

least four ideas.[3] First, the regulations must be designed to promote some public interest that may legitimately be supported by the police power of the state. Secondly, there must be an actual or substantial relationship between the regulation and the legitimate goal. Thirdly, even though there is a legitimate goal, if the collective hardship to individuals outweighs the public benefit, the regulation may be invalidated. Fourthly, the regulation must be adopted in pursuit of public, rather than private, interests.

2. The second constitutional principle is that the zoning ordinance must not discriminate among landowners, and must respect the equal protection clauses of the state and federal constitutions.[4] Although it is clear that regulations will often treat property differently, these differences must have some rational justification which relates back to the purpose of the regulatory scheme itself.

3. The third constitutional constraint requires that the regulation not be confiscatory.[5] That is, it must not amount to a taking of private property for public use without compensation. A diminution in the value of property is permissible, but "if the application of the (regulation) has the effect of completely depriving an owner of the beneficial use of his property by precluding all practical uses or the only use to which it is reasonably adapted, the ordinance is invalid."[6]

4. A fourth and more recently applied constitutional constraint involves infringement on the fundamental right to travel.[7] It is recognized that the right to travel may be legally regulated, and the courts will balance the extent to which the regulation interferes with the right to travel against the governmental interest involved. This right is not specifically mentioned in the federal constitution, but has its roots in English common law and the Articles of Confederation, and has thus long been considered a "fundamental" constitutional right.[8] The doctrine includes interstate travel and arguments have been made to extend its constitutional protection to intrastate travel but this issue is still undecided.

The right to travel may have legal implications for local regulation schemes that systematically operate to restrict mobility, such as comprehensive growth management plans which limit the number of new residents who may move into the area. But the reasonable use of planning tools, especially when carefully related to natural environmental features that constrain growth, should not run afoul of the right to travel.

5. A fifth constitutional issue involves the unlawful delegation of legislative powers.[9] This prohibition is given substance by the concomitant rule that all statutes delegating legislative powers must be accompanied by "adequate standards" to describe the limits of that power and its application. This concept applies clearly to grants of power to administrative agencies, and somewhat less clearly to local legislative bodies. In states that have not granted broad home-rule powers to local governments, these governments may be partially analogous to administrative agencies and must therefore operate within the powers granted by the state. In local land use and environmental regulation decisions, agencies that are delegated such powers by the local governmental body must be provided with adequate standards in that grant. The unlawful delegation challenge will therefore turn on the issue of adequate accompanying standards to ensure that the body to which the delegation is made is not free to restrict, either capriciously or arbitrarily, the rights of individuals.

It should be mentioned at this point that the four types of due process inquiries are generally considered to be "substantive" in nature. Although the guarantee of due process is found in both the state constitution[10] and the federal constitution,[11] the inquiry about the above-mentioned substantive aspects of the public purpose of the legislation is left to the state courts. The Equal Protection guarantee and the prohibition against taking of property without just compensation have their basis in both the state[12] and federal[13] constitutions. The right to travel is based on the federal constitution.[14]

Challenges Based on Inadequate Authority

Challenges that the application of the regulatory power is outside of the authority of the enabling legislation are

based on the principle that the police power lies ultimately in the state, and therefore sub-state regulatory bodies may exercise only those powers delegated to them by the state.[15] The issue will generally turn upon the care with which the local ordinances and regulatory actions thereunder are conformed to the legitimate purposes set forth in and the powers delegated by the enabling legislation. This formula for avoiding actions which are "ultra vires", or outside legitimate authority, is deceptively simple in that the limits of the powers delegated are not always clear. This is especially true under the general enabling legislation for zoning because of problems in defining special zoning techniques for the purpose of determining whether they fall within the permitted powers. Court decisions have been of little aid in clearing up these definitional problems.

Procedural Due Process Challenges

Challenges that a regulating body has not adhered to the laws of procedural fairness (or procedural due process) may rest on several bases. Many of the decisions concerning local land use and environmental regulations are made by bodies consisting of appointed, rather than elected officials. The decision-making procedures of these bodies have been increasingly subjected to more demanding procedural safeguards and rules because of their quasi-judicial nature.[16] Other decisions, such as original ordinances and zoning amendments, are determined through legislative processes by elected officials, and are therefore not necessarily required to follow such procedures.

However, regardless of the legislative or administrative label, these regulatory processes are almost invariably accompanied by requirements that public notice be provided and that interested parties be given as opportunity to be heard at public hearings. The nature of the general requirements for notice and public hearing is set forth in general statutes and may be referred to by the enabling legislation. In some instances, special requirements may be set out within the enabling legislation itself.

Procedural requirements are generally uniform, and will

not be discussed in relation to each regulatory procedure unless special provisions make them different for that procedure.

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[1]Donald G. Hagman, Urban Planning and Land Development Control Law (St. Paul, Minn.: West Publishing Company, 1971), p.76.

[2]Michael E. Gleeson, Robert C. Einsweiler et al., Urban Growth Management Systems, ASPO Planning Advisory Service Reports Nos. 309 and 310 (Chicago: American Society of Planning Officials, 1975), pp. 58-68.

[3]Michael Brough, "Flexibility Without Arbitrariness in the Zoning System: Observations on North Carolina Special Exception and Zoning Amendment Cases," 53 North Carolina Law Review 925 (June, 1975).

[4]Gleeson et al., pp.68-70.

[5]Peter Glenn, "The Coastal Area Management Act in the Courts: A Preliminary Analysis," 53 North Carolina Law Review 303 (December, 1974).

[6] Id.

[7]Gleeson et al., pp. 70-72.

[8]Aptheker v. Secretary of State, 378 U.S. 500 (1964).

[9]Hagman, pp. 164-168; Glenn, pp. 314-327. For general discussion of the relationship between local and state governments, see Philip P. Green, Jr., Planning Law and Administration (Chapel Hill: Institute of Government, Univ. of North Carolina, 1962), pp. I:14-I:37.

[10]N.C. Const. Art. 1, Sec. 19.

[11]U.S. Const., Amend. XIV.

[12]N.C. Const. Art. 1, Sec. 19.

[13]U.S. Const. Amend. V, XIV.

[14]It is uncertain from what constitutional provision the right to travel is derived. Both the Privileges and Immunities Clause of the 14th Amendment and the Commerce Clause have been cited as the source of this right. Regardless of its source, the right to travel is firmly established and has been repeatedly recognized. See Shapiro v. Thompson, 394 U.S. 618, 630 (1969).

[15]N.C. Const. Art. 1, Sec. 1; Green, pp. I:14-I:37.

[16]Humble Oil and Refining Co. v. Board of Alderman, 284 N.C. 458, 470, 202 S.E. 2d 127, 138 (1973).

## Interim or Temporary Development Regulations

Development moratoria do not always entail absolute prohibition of development. The term is often used to describe a scheme of temporary or interim regulations designed to substantially retard development. Development moratoria can be of at least two general types.

First, planning moratoria may be used to slow or freeze development in a certain area until planning can take place and a permanent scheme of controls can be devised and implemented. Because complete prohibitions on development have met with legal difficulties, interim development regulations must deal with the problem of determining what types of development should be allowed or prohibited during a moratorium. Interim development controls are designed to serve three functions: they permit planning and ordinance writing to proceed relatively free of development pressures; they prevent uses that will be contrary to the eventual regulatory and planning scheme from being initiated before that scheme becomes operational; and they allow time for public debate on issues relevant to development of the permanent control system.[1]

Secondly, environmental moratoria can be used to restrict development during a period in which extreme pressures are being put on community resources. These moratoria are most commonly called for in periods of rapid community growth and expansion, and to be effective must generally be tied to programing of facilities related to the environmental problem. Inability to provide sewer service at a rate to keep pace with demand is the most common example of a situation which might justify environmental moratoria.[2]

### Authority

The power to use interim moratoria on development is not explicitly granted by North Carolina enabling legislation. Total prohibition of development is not likely to be found legal.[3] However, interim controls, if reasonably related to the needs of the community, may be accomplished through use of permissible processes such as the special use permit and zoning amendment.

## Viability

The political viability of any moratorium would depend on its comprehensiveness and duration. An attempt to prohibit most or all types of development is likely to be unpopular unless obvious and extreme conditions exist to warrant the moratorium. Any scheme to control growth should better rely upon guidance rather than prohibition, except in hazardous or fragile areas.

Once interim development standards are formulated, the moratorium can be administered through the building permit process. The primary technical and administrative probems arise in the assimilation of data to justify the restriction of development.

## Where It Has Been Used and To What Effect

Interim development controls have been adopted in several states to protect critical areas. In California, planning agencies for both the Lake Tahoe and San Francisco Bay areas have been authorized to use interim ordinances during the formative period of their plans. In New York, the Hudson River Valley and the Adirondack Park are the subjects of interim regulation proposals. In New Jersey, interim zoning legislation lasting for two years has been used to protect the Hackensack Meadowlands.[4]

At the local level, moratoria have been used in Fairfax County, Virginia and in other places to prohibit temporarily connections to sewage facilities.[5]

Moratoria and interim controls have generally been successful in their purpose of slowing development. The one application of an environmental moratorium in North Carolina's coastal area was in Currituck County, which instituted a 15-month moratorium on approval of new subdivisions in 1972, thus providing time for land use planning and replatting of gridiron subdivisions which had laced the Outer Banks with total disregard for topography.[6]

## Legal Issues

Local interim controls are most likely to be challenged

on the basis that the regulations are not permitted by enabling legislation and are therefore "ultra vires" or outside of local authority. Constitutional attack may be based on the claim that the controls constitute a taking of property without compensation. (This has been claimed by developers in Livermore and Pleasanton, California.) Judicial decisions in other states have held that interim controls are constitutional and within the Standard Zoning Enabling Act.[7]

To be valid, moratoria must be temporary and reasonable, and not place the community's burden on the individual.[8] An indefinite moratorium is especially questionable, unless the community can demonstrate a good faith effort to establish the balance between growth and environmental considerations, which is the rationale for the moratorium in the first place.

Focus

As a growth management technique, interim regulations are effective in temporarily slowing the rate of growth. In areas facing heavy development pressures, a temporary respite from development may be essential to the planning and establishment of a regulatory scheme that is geared to achieving any of the objectives of growth management.

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[1]Robert H. Freilich, "Development Timing, Moratoria, and Controlling Growth: Preliminary Report," in Management and Control of Growth: Issues-Techniques-Problems-Trends, II, ed. by R. W. Scott et al. (Washington, D.C.: The Urban Land Institute, 1975), 363-364.

[2]Id., pp. 364-365.

[3]For example, in Westwood Forest Estates v. Village of South Nyack the court rules "such restraint must be kept within the limits of necessity and may not prevent permanently the reasonable use of private property"--23 N.Y.2d 424, 244 N.E.2d 700 (1969).

[4]Michael E. Gleeson, Robert C. Einsweiler et al., Urban Growth Management Systems: An Evaluation of Policy Related Research, ASPO Planning Advisory Service, Nos. 309 and 310 (1975), p. 47.

[5]Id.

[6]James R. Hinkley, "A State's Approach to Land Use," Water Spectrum 6, No. 2 (Reprint 1974), 4.

[7]Steelhill Development, Inc. v. Town of Sanborton, 469 F.2d 956 (1st Cir. 1972), Monmouth Lumber Co. v. Ocean Township, 9 N.J. 64, 87 A.2d 9 (1952).

[8]Gleeson et al., p. 47.

## Conventional Zoning

Conventional zoning is probably the most commonly employed device for guiding development at the local government level.[1] It is normally used to control the use of land and structures thereon, as well as for more detailed regulation concerning the area of the lot which may be developed (setbacks and separation of structures), the density of the development (minimum lot sizes, etc.) and the height and bulk of buildings and other structures. The general purpose of zoning is to avoid undesirable side effects of development by segregating incompatible uses and by maintaining adequate standards for individual uses.

### Authority

In North Carolina, authority to zone has been given to municipalities under N.C.G.S. 160A-381 and to counties under N.C.G.S. 153A-340. The zoning power is administered by the elected legislative body of the locality, although certain aspects may be delegated. The permissible purposes for zoning are set out in the statute as lessening congestion in the streets; securing safety from fire, panic and other dangers; promoting health and general welfare; providing adequate light and air; preventing overcrowding of land; avoiding undue concentration of population; and facilitating adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Any zoning technique applied by the local government which is found not to serve legitimately these purposes is considered illegal, because the locality may not exceed the authority granted to it by the state.

Conventional zoning has been found to be a constitutional exercise of the police power since the landmark case City of Euclid v. Ambler Realty.[2] Federal judicial activity has increased with the recent employment of new zoning variations, and the results have been mixed, depending on the particular technique.

### Viability

Zoning has long been politically accepted as a method of regulating and segregating uses of land. Protection of property values is probably the main motive for public acceptance. Zoning has been used to promote aesthetic amenities and orderly development, and these purposes seem to have received tacit acceptance by the courts when the regulations also further other cognizable public purposes.[3]

Zoning has traditionally been rather arbitrary, guided by a few general principles such as placing commercial uses along major thoroughfares and insulating industrial uses from residential areas. In theory, zoning should be based on a well-designed comprehensive plan--but in practice this is seldom the case.[4]

Zoning has been traditionally used by municipalities, but more recently, some counties have implemented zoning. Generally, zoning has been applied to smaller and more densely populated jurisdictions, yet countywide zoning for broad use classifications may be effective for protecting the natural environment.

Where It Has Been Used and to What Effect

Zoning, as the most common of all regulatory tools, has been used throughout the nation. The results have been greater segregation of uses, and consequently more orderly patterns of development. Whether this has been a benefit to the community at large is not always certain. Allowances for variances and other legal means of deviating from the zoning ordinance have given zoning very broad political dimensions, and therefore some potential for abuse.

Legal Issues

The states' power to zone has been upheld by the U.S. Supreme Court as a legitimate exercise of the police power. Taking, equal protection, and right to travel problems are minimal for the practical reason that conventional zoning has not been so restrictive as to infringe on fundamental rights or to greatly diminish property values.[5] The U.S. Supreme Court has recently reaffirmed the comprehensiveness of local governments' power to regulate through zoning ordinances. An ordinance restricting land use to one-family dwellings, with family defined so as to preclude effectively more than two unrelated people living together, was upheld as reasonable, having a rational relationship to a permissible state objective, and not involving any fundamental rights.[6] Even though the zoning power is very broad, recent techniques promoting flexibility in zoning have been successfully challenged on constitutional grounds. These will be discussed under the appropriate topic.

Zoning has been upheld in North Carolina against attacks of unlawful delegation of legislative power.[7]

Focus

Conventional zoning is generally used for controlling the density of new development and, consequently, the quantity of growth that will occur. Conventional zoning ordinances designate the types and subtypes of uses allowed in a particular area and thus can limit the development options of a particular site.

Zoning, especially in combination with some of its more flexible variations, has the potential to protect environmentally sensitive areas from the encroachment of incompatible uses.

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[1]Donald G. Hagman, Urban Planning and Land Development Control Laws (St. Paul, Minn.: West Publishing Co., 1971), pp. 67-146; Philip P. Green, Jr., Planning Law and Administration (Chapel Hill: Institute of Government, Univ. of North Carolina, 1962), pp. XII-1-102.

[2]City of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[3]Appeal of Parker, 214 N.C. 51, 197 S.E. 706, appeal dismissed Parker v. City of Greensboro, 305 U.S. 568 (1938).

[4]Some state courts are beginning to require a comprehensive plan as the basis for a zoning ordinance and have struck down zoning provisions which are inconsistent with such a plan. See Daniel R. Mandelker, "The Role of the Local Comprehensive Plan in Land Use Regulation," 74 Michigan Law Review 899 (1976).

[5]For more thorough discussion, see Hagman, pp. 164-190.

[6]Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

[7]Jackson v. Guilford County Board of Adjustment, 275 N.C. 155, 166 S.E.2d 78 (1969).

## Exclusive Agricultural or Nonresidential Zones

This type of zoning ordinance excludes residential use and thus has a direct limiting effect on housing and population. This technique prohibits subdivisions and their urban uses from expanding and is, in effect, a holding zone to contain and restrict urban areas.

The need to protect agricultural areas becomes evident when, due to the increased demand for commercial and residential development, property values begin to increase rapidly. The capital appreciation of land and increased costs of farm production force farmers to sell to developers. This results in scattered residential development that is detrimental to farming, to the long-range development potential of the land, and to the efficient provision of public facilities and services.[1]

Land which is not suitable for agriculture cannot be designated for such use simply to prevent further growth in an area. If land in the urban fringe, which is in fact not agricultural land but in reality land ready for development, is zoned exclusively agricultural, the courts will probably invalidate the ordinance as a taking without just compensation.

The same problems are encountered in any attempt to zone an area exclusively industrial or for other exclusively nonresidential uses.

### Authority

Authority for this technique is provided by the North Carolina zoning enabling legislation.

### Viability

When development pressure is strong this technique will be very unpopular with landowners and may generate lawsuits as well as hostility. No special technical expertise is required.

### Where It Has Been Used and to What Effect

This technique has been used in several states. Florida enacted a statute in 1959 which allowed exclusive agricultural zoning and provided for tax relief for land so zoned.[2] Santa Clara County, California and Lancaster County, Pennsylvania have both made extensive and effective use of agricultural zoning.[3]

The effectiveness of this technique is usually short-lived in the face of development pressures. Often, zoning ordinances of this type are eroded by the granting of variances and end with an amendment which replaces the exclusive agricultural zone.[4]

Legal Issues

Exclusive agricultural zoning may be challenged on the ground that it does not further legitimate state objectives. However, the technique should survive such a challenge because arguably it promotes the general welfare. First, the technique avoids costly and uneconomical extensions of municipal services. Second, it segregates incompatible uses. Intruding residential concentrations could create problems by lowering the water table, and generating objections to some by-products of agricultural activities, such as noise. Third, exclusive agricultural zoning preserves the scenic value of the area.

The use of this technique may also be challenged as a taking of private property without just compensation. Since most land zoned exclusively for agriculture can be used profitably in agriculture, this technique is not necessarily confiscatory. As mentioned previously, the courts will have no trouble in finding a taking if the land is not really suited for agricultural use. Invalidation is likely when nearby lands have been developed and the property in question has acquired considerable value.[6] The crucial question is how burdensome the ordinance becomes to the particular landowners involved.

Focus

As mentioned above, this technique can limit the amount of new residential development. It thereby affects the quantity of growth that will occur and restricts the types of new development which are permitted within the zoning designation. In addition, this type of ordinance directs growth to areas outside the zoned area. In a fashion similar to that of urban and rural service areas, this technique can reduce the costs of providing municipal services by reducing the demand for premature (and inefficient) extension to sparsely settled areas.

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[1]Michael E. Gleeson et al., Urban Growth Management Systems: An Evaluation of Policy Related Research (Minneapolis: School of Public Affairs, Univ. of Minnesota, 1974), p. III-32.

[2]James S. Wershow, "Agricultural Zoning in Florida--Its Implications and Problems," 13 University of Florida Law Review 485 (1960).

[3]M. Moore, "The Acquisition and Preservation of Open Lands," 23 Washington and Lee Law Review 274, 285 (1966).

[4]Id.

[5]Note, "Protection of Environmental Quality in Non-Metropolitan Regions by Limiting Development," 57 Iowa Law Review 126, 143 (1971).

[6]Moore, p. 286.

## Minimum Lot Size

Minimum lot size or large lot zoning (one acre or more minimum lot requirements) can be used to protect agricultural land, to preserve open space, to protect environmentally sensitive areas, or to keep residential development at a low density.

The spatial effect of this type of zoning is to produce a largely inefficient form of development at a time when land is becoming a scarce resource. The economic effects of large lot zoning vary with the situation. Although many municipalities think their fiscal situation will be improved through large-lot zoning, the increase in costs of services that must be provided often makes it a costly proposition.

The effect on the individual property owner is to drive up land and housing costs. The social implications of this rise in housing costs are that it may exacerbate problems of social and racial residential segregation.

### Authority

Authority to require minimum lot sizes exists in North Carolina pursuant to the State's zoning enabling legislation.

### Viability

Minimum lot sizes of one acre or less are used extensively. Once lot size requirements increase significantly beyond that point (2-10 acres) the use of the technique is problematic. Large-lot zoning often reduces the economic return to the landowner, and when used extensively, it reduces the supply of developable land which raises land prices and housing costs for all income groups and makes it difficult for moderate and low income families to find housing in their price range. On the other hand, communities that wish to preserve their present character or to preserve open space areas may find that the objections to the technique are outweighed by its advantages. The political viability appears to depend upon the purposes of the zoning ordinance and its economic and social effects.

As mentioned previously, the use of large-lot zoning might not have the effect which is intended. Careful planning and study of the spatial, social, and economic impacts in the particular community setting are vital. The impacts will vary with the pressure for growth in the community, the minimum size of lots used, the relative amount of land so zoned,

the length of time the land is left in such zones and a number of other localized factors.[1]

Where It Has Been Used and to What Effect

Large-lot zoning is used nationwide. As mentioned previously, it has been used for varied purposes. It can, however, have undesirable consequences, particularly if carried to an extreme. Below are illustrations of some of the negative results of large minimum lot requirements.

One survey (completed prior to 1968) found that in St. Louis County, Missouri, there was a 350-year supply of 1-acre lots, but only a 4-year supply of 1/3-acre lots. Large-lot zoning in that area had been estimated to impose on homebuyers costs of $1 million per year for land in excess of their needs.[2]

In parts of Decatur, Illinois, some neighborhoods go without sanitary sewers and street repair. The effect of the low-density development is to make it so expensive to provide services that the residents cannot afford the improvements.[3]

Legal Issues

Because of the wide array of purposes served by this type of ordinance, many of them valid, public purposes, this technique has been challenged with less success than have minimum floor area ordinances. There is now a national trend toward judicial invalidations of excessive minimum lot requirements, at least where it appears that the primary purpose of the requirement is exclusionary (i.e., to prevent certain groups of people from finding homes in the community).

The fate of large-lot zoning in the courts will depend on the purpose and whether large-lot zoning is a valid means of accomplishing the purpose. For example, in Steel Hill Development, Inc. v. Town of Sanbornton, 469 F. 2d 956 (1st Cir. 1972), a six-acre minimum was upheld as a valid means of preserving the natural resources of the area where no exclusionary effect existed. In Salamar Builders Corp. v. Tuttle, 29 N.Y. 2d 221, 325 N.Y.S. 2d 933 (1971), an increase in minimum lot size was upheld because it was needed to prevent septic tank pollution. However, a four-acre minimum was held void in National Land and Investment Co. v. Kohn, 419 Pa. 504, 215 A2d 597 (1965). The township argued that the zoning was needed to prevent the overburdening of existing municipal services and facilities. The court said

that four-acre minimum was neither a necessary nor reasonable method of accomplishing the township's objective.

Challenges to large-lot zoning are usually based on the argument that the ordinance has taken the property affected by it without just compensation. The taking problem involved is more pressing in areas subject to development than in rural areas. Large-lot zoning in nonrural settings therefore faces a greater likelihood of being struck down as an invalid taking.[4]

Focus

Although this technique can be used for purposes of environmental protection, there may be less costly and more effective means to achieve this objective. Cluster housing ordinances, for example, would be more effective than large-lot zoning for either protecting the environment or preserving open space. This technique generally limits residential development at a low density which in turn limits the quantity of growth.

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[1]David Brower et al., Growth Management through Development Timing (Chapel Hill: Center for Urban and Regional Studies, Univ. of North Carolina, 1974), p. 36.

[2]Stephen Sussna, "Residential Densities: A Patchwork Placebo," 1 Fordham Urban Law Journal 132 (1972).

[3]Id., p. 132.

[4]Michael E. Gleeson et al., Urban Growth Management Systems: An Evaluation of Policy Related Research (Minneapolis, Minn.: School of Public Affairs, Univ. of Minnesota, 1975), pp. III-40.

## Height Restrictions

Regulation of building heights is used to control the density of development, and to minimize the effects of tall buildings which often cut off light and air, generate increased traffic and cause difficulties in providing fire protection and other municipal services.

### Authority

The North Carolina zoning enabling statutes authorize the regulation of building heights.

### Viability

Regulating building heights is an acceptable practice and is in widespread use. Virtually all North Carolina zoning ordinances contain height restrictions.[1]

This technique does not raise technical problems and is easy to administer.

### Where It Has Been Used and to What Effect

As mentioned previously, height restrictions are used nationwide to prevent tall buildings from blocking light and air to adjacent property, to allow for the orderly provision of municipal services and to control the density of development.

### Legal Issues

As early as 1909, the U.S. Supreme Court upheld building height regulations. There is little doubt about the constitutionality of this technique in principle[2], but a maximum height regulation may be invalid as applied. This technique is subject to challenge on due process, equal protection and taking grounds, as is any zoning ordinance.

### Focus

Height restrictions limit most directly the absolute quantity and density of growth in a particular area. Where desired, height restrictions can prevent some subtypes of development such as high rise office buildings or apartments. In many communities, height is a quality of growth which is considered an important and appropriate target of regulation.

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[1]Phillip P. Green, Jr., Zoning in North Carolina (Chapel Hill: Institute of Government, Univ. of North Carolina, 1952), p. 174.

[2]Id.

## Conditional and Contract Zoning

Under contract zoning a landowner contracts with the local government to subject his property to deed restrictions in exchange for a desired zoning change. Conditional zoning involves similar limitations on and concessions from the developer, but there is no reciprocal obligation on the local government to change or forego any part of its regulatory power.[1]

Both conditional and contract zoning may be distinguished from special use permits that are accompanied by conditions in two ways: first, criteria that must be met before a special permit is issued are spelled out in the ordinance and apply equally to all property owners in the jurisdiction. Second, special permits require no concessions or commitments from the community; the applicant needs only to demonstrate that he meets the required conditions for the permit to be granted.

The purpose of these two techniques is to provide for flexibility in making decisions concerning individual parcels of land. By their use officials may reconcile various interests affected by land reclassifications and allow for utilization of property which is suitable for development but has been somehow poorly classified in zoning.

### Authority

Conditional or contract zoning must be authorized by zoning enabling legislation. In North Carolina, conditions may be attached to special use permits and variances, and certain concessions may be gained from developers through subdivision regulations. However, these are particular techniques which may be utilized only when certain predetermined circumstances are found to exist (only certain types of uses explicitly described in the zoning ordinance are eligible in the case of special permits; only when undue hardship results to the landowner due to zoning in the case of a variance; and only when a developer voluntarily subdivides his property in the case of subdivision regulations). North Carolina zoning enabling legislation does not clearly permit the use of contract or conditional zoning.

### Viability

Viability is difficult to assess. The general principle of flexibility to prevent arbitrary restraints on property caused by static zoning ordinances must be balanced against the need for consistency in land use decision-making.

It seems likely that planners and large-scale developers would favor some degree of flexibility, while small property owners would prefer predictability.

Technical viability is dependent upon the degree of analysis which would accompany conditions and contracts. A thorough determination of the impact of each project would burden the technical capability of the local government. However, project-by-project determinations may be more feasible than long-range planning decisions. The analysis of the impacts of individual projects does in fact provide for decision-making in a continually updated context.

Where It Has Been Used and to What Effect

Zoning with conditions has been found valid in New York since the early 1960's.[2] More comprehensive use has been made of conditional zoning in Sacramento County, California.

Research revealed no qualitative evaluation of results from local jurisdictions that have implemented zoning with conditions, although the observation has been made that contract zoning deals with problems on a piecemeal basis. Although it may yield satisfactory results for the owner of the parcel in question and for the municipality, neighboring property owners may not be protected from adverse consequences.

Legal Issues

There are several potential legal challenges to contract or conditional zoning. First, the municipality may be accused of abrogating its police power by entering into a private contract with a landowner. This problem may be avoided if the city does not make a binding promise to rezone. The agreement would then be in the form of a "unilateral contract" in which the city acts to rezone in return for the landowner's promise (a rather dubious distinction).

Contract or conditional zoning may also be challenged for failing to meet the requirement that all areas in each zoning district must be subject to the same restrictions. Although contract zoning has been upheld against such claims in other jurisdictions, North Carolina courts are not likely to uphold rezoning based on a contract with a developer.[3]

Conditional zoning, if not explicitly illegal itself, may be collaterally attacked as spot zoning.[4] Contract zoning has been invalidated by the North Carolina courts as impermissible spot zoning.[5]

Focus

In negotiations which take place in regard to conditional or contract zoning, one of the concessions which developers may be asked to make is that the land be developed in a way that minimizes adverse environmental impacts. By making this concession, the developer (and subsequent purchasers) rather than the local government or established residents pay the costs of protecting the environment. The conditions or contract might also involve other requirements regarding the quality of development. For example, a commercial developer might be required to dedicate a parcel of land for public use as open space. To the extent that contract and conditional zoning add flexibility to a traditional zoning ordinance, they broaden the options for the development of a particular site.

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[1]Regardless of academic legal distinctions, courts have usually dealt with both under the general category of zoning with conditions. Michael E. Gleeson et al., Urban Growth Management Systems: An Evaluation of Policy Related Research (Minneapolis: School of Public Affairs, Univ. of Minnesota, 1974), p. III-59.

[2]Church v. Town of Islip, 8 N.Y.2d 354, 168 N.E.2d 580, 203 N.Y.S.2d 866 (1960).

[3]Michael Brough, "Flexibility Without Arbitrariness in the Zoning System: Observations on North Carolina Special Exception and Zoning Amendment Cases," 53 N.C. Law Review 927, 949-958 (1975).

[4]Id.

[5]Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432, (1971).

## Special Exception

The special exception is one of the principal devices explicitly allowed in North Carolina which may permit flexibility in a land use control system. It is employed in areas where certain activities are found to be permissible, but require special control and/or scrutiny because of the particular problems they pose. Typically, the specified use is allowed by right in the area in question (often the entire zoning jurisdiction) if certain conditions or criteria are met by the applicant. These conditions must be specified in the ordinance.

This technique has been used recently as a comprehensive tool for growth management by designating all or almost all new development a special exception rather than a use by right.[1] This approach has generally been found illegal.[2] However, where such broad application of the special use permit is used in connection with interim zoning, during times of study and decision on permanent zoning, it is more acceptable to the courts.[3] The criteria for gaining a special use permit may be conditioned upon prior existence of adequate municipal facilities or findings of no adverse environmental impact. Although requiring special use permits throughout an entire jurisdiction might not be feasible, special use permits for most types of development in environmentally sensitive areas may be legally and practically acceptable regulatory tools.

### Authority

Authority to use the special exception exists in North Carolina pursuant to N.C.G.S. 160A-381 to 392 (for cities) and N.C.G.S. 153A-340 to 347 (for counties). The grant of power provides that the Board of Adjustment or the City Council may issue special use permits or conditional use permits, and may impose reasonable and appropriate conditions and safeguards upon these permits. Thus, the Board of Adjustment is specifically authorized to attach additional conditions to a special exception permit.

### Viability

The special exception has been used extensively and seems politically acceptable for regulating certain types of development, the location of which pose particular problems or cannot be reasonably provided for in a static zoning ordinance or plan. When more comprehensively used, as for all

new development in a particular area, the special exception could possibly encounter political resistance as excessive infringement on individual property rights and an excessive burden on development.

Technical viability would depend on at least two factors. First, the nature of the criteria which the special use must meet will affect the degree of technical information that would be required in processing a permit. Second, the number of cases or uses which are required to receive a permit would further determine the extent of the burden on technical, as well as administrative, staff capability.

Where It Has Been Used and to What Effect

The special exception has been used in North Carolina for many years. The result of its use, along with the variance and amendment techniques, has been a high degree of flexibility in varying from original zoning ordinances and moving toward ad hoc land use decision-making. Although flexibility is desirable in responding to rapidly changing circumstances, it also opens the decision-making process to greater pressure from special interests. Therefore, it is important that the criteria for granting special use permits be as reasonable and objective as possible, and that procedural safeguards be carefully provided to ensure fair decision-making.

Legal Issues

The special exception has generally been upheld as constitutional where applied to a limited number of uses. However, where every or almost every use is handled by special permit, the courts are likely to find the scheme invalid. The basis of attack is usually that it constitutes an unconstitutional delegation of legislative power. Nevertheless, application of the special exception to all uses was recently upheld when tied to interim zoning or the prior existence of adequate facilities. Specifically, existence of sewage systems, drainage, and access roads has been found to be an acceptable basis for special exception zoning.[4] The special exception has not been so broadly applied in North Carolina. Constitutional challenges have been based on the unconstitutional delegation theory,[5] and such decisions have turned on whether or not the administrative body based its decisions only on those considerations set forth in the ordinance. To allow decision by a nonlegislative body to be based on its own determination of a public purpose would be to allow an unlawful delegation of a legislative power.

There are no decisions in North Carolina which clarify how broadly the special exception may be used and still remain within the delegated power. The purpose of the special exception has been found to be "the amelioration of the rigors of necessarily general zoning regulations by eliminating the necessity for a slavish adherence to the precise letter of the regulations."[6]

The special exception process is administrative and therefore must follow the strengthened procedural requirements recently set forth by the North Carolina Supreme Court. In ruling on an application for a special permit, a municipal board must "(1) follow the procedures specified in the ordinance; (2) conduct its hearings in accordance with fair trial standards; (3) base its findings of fact only upon competent, material and substantive evidence; and (4) in allowing or denying the application, . . . state the basic facts on which it relied. . . ."[7]

Focus

Provided the conditions of the zoning ordinance are met, this technique increases the development options for an individual site. Depending upon the stringency of the conditions, the special exception may have some impact on the quantity of a particular sub-type of development. This technique is also useful because the conditions imposed may diminish the environmental and economic costs of development in addition to ensuring that the quality of the development will be acceptable to the community.

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[1]Donald Hagman, Urban Planning and Land Development Control Law (St. Paul, Minn.: West Publishing Company, 1971), p. 207.

[2]Id.

[3]Id., p. 208.

[4]Robert H. Freilich, "Development Timing, Moratoria, and Controlling Growth: Preliminary Report," in Management and Control of Growth: Issues-Techniques-Problems-Trends, II, ed. by Randall W. Scott et al. (Washington, D.C.: The Urban Land Institute, 1975), 363-364.

[5]Keiger v. Winston-Salem Bd. of Adjustment, 278 N.C. 14, 178 S.E. 2d 616, appeal after remand 281 N.C. 715, 190 S.E.2d 175 (1972).

[6]Lee v. Board of Adjustment, 226 N.C. 107, 37 S.E.2d 128 (1946).

[7]Humble Oil and Refining Co. v. Board of Aldermen, 284 N.C. 458, 471, 202 S.E.2d 129, 138 (1974).

## Bonus and Incentive Zoning

Under bonus and incentive zoning, municipalities allow developers to exceed the limitations imposed by conventional zoning in exchange for developer-supplied amenities which are desired by the community. For example, a builder may be permitted to exceed the prescribed height restriction if he provides open space around or adjacent to the proposed building.

### Authority

Bonus and incentive zoning are not explicitly permitted by North Carolina zoning enabling legislation. The most analogous technique that is permitted is the variance, which allows minimal variation from zoning restrictions in cases of hardship. The variance may be accompanied by conditions. The requirement of undue hardship seems, however, to invalidate the analogy, and it seems likely that bonus or incentive zoning might be found illegal on the same grounds as contract zoning.

### Viability

Bonus or incentive zoning may be affected by the same problems that concern other flexible zoning tools. Case-by-case decisions raise the spectre of influence-peddling and political maneuvering. However, bonus and incentive zoning, if applied only for limited uses which have been determined to be in the public interest, would probably not affect the majority of landowners. Thus public resistance to this tool might be lowered.

### Where It Has Been Used and to What Effect

In San Francisco density bonuses are given for provision of such amenities as direct access to rapid transit. In New York's Theatre District, the incorporation of a legitimate theatre in the development can be rewarded with a 20 percent increase in permissible floor area.[1] The technique seems to have worked in encouraging the desired results where used in the metropolitan context but, despite its potential, has been used little in nonurban areas.[2]

### Legal Issues

Legal problems might arise for two reasons. First, when used without traditional zoning, incentive zoning deals primarily with density, and not use, in classifying land uses. There may be questions as to whether this is within existing enabling legislation. (Apparently no municipalities have used this tool without also using conventional

zoning.) Secondly, if used in combination with traditional zoning, the technique might be attacked as unlawful contract zoning. On the other hand, incentive or bonus zoning is similar to dedication, and the use of dedication has been upheld when used as part of a subdivision regulation and in other contexts.

Incentive zoning will have a better chance of meeting constitutional requirements if it complements a rational underlying regulation and is a reasonable means of achieving a permissible government objective. Most of the purposes for which a local government would want to use incentive zoning are recognized as valid public purposes, but commentators disagree about the importance of the relationship between the amenity provided by the developer and the bonus allowed in return. For example, an incentive ordinance may allow a smaller lot size in subdivisions in return for more open space than is ordinarily required. There is an obvious relationship between allowing smaller lots and providing more open space. A more difficult situation arises when an ordinance allows smaller lots in return for the provision of an amenity such as bikeways. It may be that incentive ordinances for non-controversial purposes are not likely to be challenged, and perhaps even a tenuous relationship between the amenity and the bonus will justify the ordinance.

Focus

This technique can reduce the economic costs of growth if the developer is induced to design the development so that it can be serviced efficiently. Also, incentives to the developer can be exchanged for provisions that protect the environment (e.g. planting vegetation to reduce run-off) or provisions which require a desired level of quality (e.g. covered pedestrian walkways, dedication of land for public use as open space). Since many of the incentives are in the form of density bonuses, this technique will have a direct impact on the quantity of development. To the extent that increased densities permit the building of multi-family housing, incentive zoning also will increase the development options for a particular site.

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[1]Michael E. Gleeson, Robert C. Einsweiler, et al., Urban Growth Management Systems, ASPO Planning Advisory Service, Nos. 309 and 310 (1975), p. 47.

[2]"Bonus or Incentive Zoning--Legal Implications," Syracuse Law Review 21 (1970).

## Floating Zones

Floating zones are shown in the ordinance text, but not on the zoning map.[1] A floating zone may be employed when the local government recognizes that a particular type of activity is desired for a general area but the specific site has not been located in advance. Property intended to be used for that activity may be rezoned upon application if the owner can meet the conditions in the ordinance. Thus a floating zone is verbally described as a certain type of zone and then waits to be affixed by a second ordinance to a particular piece of land which fits that description. Uses typically designated in floating zones include shopping centers, light industry and mobile home parks.

### Authority

Floating zones are not explicitly authorized by enabling legislation in North Carolina. A floating zone may be held invalid where spot zoning has been held invalid. The North Carolina courts have defined spot zoning as arising "where a small area, usually a single lot or a few lots, surrounded by other property of similar nature, is placed arbitrarily in a different use zone from that to which surrounding property is made subject."[2] This definition would seem to incorporate the floating zone concept. The purposes of the floating zone may be better achieved through use of the special exception technique, by requiring more detailed conditions to be met and findings made before the special use is granted.

### Viability

Political viability would involve balancing the problems of unpredictability against the advantages of increased flexibility. Decisions concerning locating such zones would become open to influence of special interests and other political activity.

Technical viability is probably good in the sense that specific placement of floating zones may be deferred until such a need is clearly defined. The locational decision can be based on actual facts rather than on abstract future needs. Such incremental guidance decisions may be technically superior to long-range static plans.

Where It Has Been Used and to What Effect

Floating zones have been used in New York to allow 10-acre or more sites to be rezoned to permit multiple family dwellings where certain standards of size and height are met. In these cases the technique can give greater control over site design and can allow flexibility in locating such facilities.

Legal Issues

In applying the floating zone technique, legal issues can be avoided if it is implemented as an extension of the special use concept.[3] The legal issues would involve the reasonableness and clarity of standards imposed on the proposed development and the reasonableness and public purpose rationale for designating some types of development as subject to the floating zone concept.

Focus

The amount of a particular sub-type of development (such as shopping centers) can be controlled by the use of this technique. For example, if the conditions in the zoning ordinance are stringent, the number of shopping centers can be limited. The use of a floating zone can also increase the number of development options for a particular site.

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[1]Donald Hagman, Urban Planning and Land Development Control Law (St. Paul, Minn.: West Publishing Co., 1971), pp. 117-119.

[2]Zophi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968).

[3]Rogers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951).

## Performance Zoning

Performance zoning sets standards for each zone based on permissible side effects of a development rather than specifically enumerating the types of uses permitted. If the prescribed standards are met, any use is allowed in the zone. This technique has been used for some time in industrial zoning to set standards on noise, glare, dust, toxic emissions, vibration, heat, odors, electrical disturbance, radioactivity and so forth. More recently, the technique has been applied to a broader range of uses, with standards keyed to demands on support services such as sewerage, roads and other public facilities. Further application may involve protection of the environment by specifying maximum levels of permissible stress on natural resources. For example, a community may specify the amount of permissible runoff in a given zone, and any use would have to meet that standard before development could take place.[1]

Performance controls for sensitive lands can be perceived as a system to protect natural processes in environmentally sensitive areas, such as aquifers, stream valleys, wetlands, shorelands and flood plains. Under an ordinance based solely on performance standards, all development would be permissible so long as it did not interfere with the natural processes of aquifer recharge, stormwater runoff, and so on, for which a community has set a specific level of performance. The performance control ordinance is designed to preserve natural processes by permitting development which is in accord with these processes rather than by banning all development in sensitive lands. Under performance controls it is up to the developer to prove that his project is compatible with the natural processes before the project is approved. In practice, performance controls are generally used in conjunction with traditional zoning ordinances.[2]

### Authority

The power to zone by use of performance standards is not explicitly granted by state zoning enabling legislation, and there are no court cases dealing with the technique. It may be argued that performance standards, if rationally devised and consistently applied, could qualify as a comprehensive plan, and zoning in conformance to those standards could be upheld under the broad grant of zoning

powers for the public health, safety and welfare. Local authority to use a performance standard approach in regulating minor development in areas of environmental concern seems to be granted in North Carolina's Coastal Area Management Act.[3] In addition, performance standards would seem to be permissible when used in other critical environmental areas such as flood plains.

Viability

Political viability would seem to be questionable if performance standards are applied to an entire jurisdiction due to the resultant uncertainty as to whether a use will be allowed. Further problems might result from distrust or lack of faith in the ability to set standards objectively and accurately, due to a lack of understanding of the methods and criteria. However, performance controls do present an ecologically acceptable compromise between full-scale development of sensitive lands and banning development on these lands altogether.

Technical viability depends on the comprehensiveness with which standards are applied and whether or not the entire jurisdiction is subjected to them. Performance of certain processes may be measured readily, while techniques to measure others are still crude. Case-by-case considerations of every development proposal would impose a tremendous information and work load which could only be met by a large staff and/or sophisticated equipment. This is not presently a realistic expectation in the coastal area. However, this technical burden could be placed on the developer, with the local government staff or an independent agency certifying the results. Simpler applications of performance standards that do not require quantitative analysis are frequently inexpensive and do not require special data systems or staff.[4]

Where It Has Been Used and to What Effect

Bucks County, Pennsylvania and Sanibel, Florida have both adopted performance standards as integral parts of their growth management systems. Bucks County developed a natural resources plan based on a grid network information system that contains a computer file on the natural features of the county.[5] Protection policies were formulated according to the relative environmental sensitivity of each planning cell grid and converted into corresponding allowable development intensities. Based on this information, a performance standard ordinance has been adopted taking

into account the percentage of open space to be maintained in each planning district, the maximum permissible ratio of impervious surface to gross acreage and the maximum feasible density.[6]

Sanibel Island, Florida has adopted performance standards for development based on the characteristics of the natural ecological zones of the island. Permits are granted only if the applicant can demonstrate that the proposed development will not interfere with the geology, hydrology, vegetation, and wildlife in each zone.[7]

Legal Issues

Legal issues center around the vagueness of standards, the reasonableness of the restrictions on development and the uniformity of their application. Thus, due process, the taking issue, and equal protection would be the major challenges. Although it is difficult to predict the judicial response to individual performance zoning ordinances, regulations based on clear and rational performance standards would probably be legally acceptable when related to environmentally sensitive areas.

Focus

When used as an overlay to conventional zoning, performance standard zoning generally places additional restrictions on the development options of a particular site and further protects the natural environment. Also, by setting standards on other side effects such as glare and vibration, performance zoning gives the community a way to control these undesirable qualities of development which cannot generally be controlled by conventional zoning.

When used as a replacement for conventional zoning, this technique can be used to reduce the adverse environmental effects of development and to promote a desired level of quality in new development as mentioned above. In addition, it influences many of the characteristics of growth in much the same way as conventional zoning. For example, an ordinance which stated a maximum permissible ratio of impervious surfaces (which would include buildings, roads, sidewalks, etc.) to gross acreage would in effect restrict the density and consequently the quantity of new development. To continue with the impervious surface ratio as an example, it seems that this type of

standard clearly favors some sub-types of development over others. In terms of residential construction, multi-family units which ordinarily require less in the way of impervious surfaces because they are multi-storied might be feasible to construct where single family dwellings would not be. In a similar fashion, standards for a particular area can be developed to favor some types of development over others. A community would probably enact standards that make it unlikely that industry could locate in a residential area for example.

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[1]Michael E. Gleeson et al., Urban Growth Management Systems: An Evaluation of Policy Related Research, ASPO Planning Advisory Service, Nos. 309 and 310 (1975), p. 40.

[2]Id., p. 37; Charles Thurow et al., Performance Controls for Sensitive Lands: A Practical Guide for Local Administrators, prepared for the U.S. Environmental Protection Agency (Washington, D.C.: U.S. Government Printing Office, 1975), pp. 440-450.

[3]See N.C.G.S. 113A-120(1975) which sets forth the conditions for the denial of permits for minor development in AEC's.

[4]Thurow et al., p. 2. Simple use of performance standards would be similar to North Carolina's sand dune protection ordinance which prohibits the disturbance of dunes and dune vegetation unless a permit is issued which finds that the proposed action will not materially reduce the dunes' effectiveness as protection from high wind and water. See N.C.G.S. 104B-3 et. seq. (1972 & Cum. Supp. 1977).

[5]Edward J. Kaiser et al., Promoting Environmental Quality Through Urban Planning and Controls (Washington, D.C.: Office of Research and Development, U.S. Environmental Protection Agency, 1974), pp. 145-147.

[6]Bucks County Planning Commission, Performance Zoning (Doylestown, Pa.: The Commission, 1973). See also David R. Godschalk et. al., Responsible Growth Management: Cases and Materials (University of North Carolina: Center for Urban and Regional Studies, 1978).

[7]John Clark, The Sanibel Report: Formulation of a Comprehensive Plan Based on Natural Systems (Washington, D.C.: The Conservation Foundation, 1976).

## Planned Unit Development (PUD) and Cluster or Average Density Zoning

Planned unit development and cluster or average density zoning combine elements of zoning and subdivision regulation in permitting flexible design of large and small-scale developments which are planned and built as a unit. Specific plans for the development are required in advance, and must be approved by the administering body. This concept eliminates the lot-by-lot approach common to zoning and subdivision regulations, and can be used as an incentive for better development by enabling complete schemes to be planned and approved.[1]

In its simplest form, planned unit development takes the shape of cluster development. An example might involve a developer with 100 acres of land which he could divide into 400 quarter-acre lots according to existing local ordinances. Cluster zoning would give him the alternative of clustering units closer together in one part of the site, provided that overall number of units does not exceed 400. The open space saved by clustering is left for the common use of the residents.[2] From this simple "density transfer," planned unit development builds into complex forms. In its most advanced stage, planned unit development allows a variety of housing types as well as commercial, agricultural and industrial uses.

Typically, developers are permitted to develop under PUD provisions when the proposed development exceeds a minimum specified number of acres or housing units. Planned unit developments are usually subject to zoning ordinances, although they are not actually mapped, and must therefore comply with the use restrictions within the zones where they occur. Increasingly, however, some mixing of uses and increases in density are permitted.

The PUD technique provides flexibility because the actual design is a matter of negotiation between the developers and planning authorities. PUD's are generally attractive to developers of large tracts of land, and generally though not necessarily, to higher priced development.

### Authority

PUD ordinances are not specifically authorized by enabling legislation in North Carolina. However, many local jurisdictions, some of them in the coastal area, have such ordinances. Their validity has not been tested in the courts.

Although the possibility exists that PUD ordinances may be upheld even in the absence of a zoning enabling provision, such enabling legislation is needed on the State level to remove doubts as to their validity.[3]

Viability

Political viability would seem to be rather high in view of local passage in many jurisdictions of PUD ordinances despite lack of assurance of their validity. Technical viability will vary because past experience shows that the PUD process has generally been undertaken in jurisdictions having long experience with planning and zoning techniques and large and competent staffs. Therefore, PUD technique should be considered as a tool for growth management primarily in those areas with experience in the field of development control.[4]

Where It Has Been Used and to What Effect

PUD ordinances have been used in Montgomery County, Maryland; Prince George's County, Maryland; Boulder, Colorado; Chapel Hill, North Carolina; and many other places. The tool relates primarily to larger developments, which generally will be located on fringe areas where large tracts of vacant land are likely to be found. Smaller developments and individual unit construction will not be controlled by this tool. Requirements of more sophisticated planning and information, as well as greater staff requirements to analyze them, can raise the cost of development and local government administrative expenses. This is one reason the PUD concept has been used primarily for higher income developments. Planned unit development may, however, be a useful tool to allow preservation of environmental characteristics in nondeveloped areas where residential use is allowed. PUD's have also been found to conserve energy and can be provided with needed urban services more economically than conventional development.[5]

The various forms of PUD have been frequently championed as measures to protect the coastal environment by clustering development around sensitive areas, dunes, marshes, etc.[6] Currituck County, North Carolina has made extensive use of a variation of the PUD process in developing a highly celebrated land use plan designed to enhance the county's coastal resources. Critics of the Currituck plan, however, assert that heavy densities offered by the plan as an inducement to developer cooperation threaten the goal of environmental protection.[8]

Legal Issues

A recent study by the American Society of Planning Officials revealed that two-thirds of local PUD ordinances used either the special exception/conditional use procedure or a zoning amendment--and thus did not rely on specific state enabling legislation.[9] In North Carolina, then, legal attacks on PUD would be similar to those involving the special exception in that it might be challenged that such a use of the special exception was an unconstitutional delegation of power. However, the North Carolina Supreme Court has held that as long as procedural requirements are met, the use of the special exception is legitimate.[10]

Other attacks on PUD ordinances are most likely to be based on the equal protection requirement that regulation be uniform to all similarly situated property owners. PUD may also be attacked as spot zoning in that it usually relates to only one landowner and land parcel, allowing it to deviate from regulations applicable to others in the same zone. Although some early applications of PUD were rejected in the courts,[11] more recently PUD has been upheld in most state courts where it has been tested.[12]

Focus

To the extent that clustered development is more efficient to service and limits encroachment of development into environmentally sensitive areas, these techniques reduce the economic and environmental costs of growth. The open space which is provided through clustering not only improves the quality of development in many communities, but it also increases the development options for individual sites by permitting some sites to be reserved from development.

Whereas a cluster development ordinance simply affects residential development, a PUD ordinance offers more control over growth. It allows a community to specify the mix (generally residential and commercial uses) of new development and may require varied types of residential construction.

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[1]See generally Robert W. Burchell, Planned Unit Development--New Communities American Style (New Brunswick, N.J.: Rutgers University, 1972), and F. So et al., Planned Unit Development Ordinances, ASPO Planning Advisory Service, No. 291 (1973).

[2]Daniel R. Mandelker, Managing Our Urban Environment (2nd ed.; Indianapolis: Bobbs-Merrill Co., Inc., 1971), pp. 1075-1078.

[3]Lee A. Patterson, "Planned Unit Development and North Carolina Enabling Legislation," 51 N.C. Law Review 1455-1478 (1973).

[4]Thomas J. Schoenbaum and Ronald H. Rosenberg, "The Legal Implementation of Coastal Zone Management: The North Carolina Model," 1976 Duke Law Journal 1 (1976).

[5]Real Estate Research Corporation, The Costs of Sprawl (Washington, D.C.: U.S. Government Printing Office, 1974).

[6]For example see Charles Thurow et al., "Quotations from Snohomish County, Washington Shoreline Management Master Program, June 1974," Performance Controls for Sensitive Land: A Practical Guide for Local Administrators, prepared for the U.S. Environmental Protection Agency (Washington, D.C.: U.S. Government Printing Office, 1975), p. 105; and Frank B. Barick and T. Stuart Critcher, Wildlife and Land Use Planning with Particular Reference to Coastal Counties (Raleigh, N.C.: Interagency Wildlife Coordination Section, N.C. Wildlife Resources Commission, 1975), p. 102.

[7]Robert V. Bode and William P. Farthing, Coastal Area Management in North Carolina (Chapel Hill: Institute of Civic Education, The Law Center, Univ. of North Carolina, February 1974), Appendix A.

[8]Gary Soucie, "Fare-Thee-Well, Currituck Bank," Audubon 78 (January 1976), 34-35.

[9]So et al., p. 49.

[10]Humble Oil and Refining Co. v. Chapel Hill Board of Aldermen, 284 N.C. 458, 202 S.E.2d 129 (1974). See Frederick Carr, "The North Carolina Humble Case and Its Impact on Planned Unit Development," Carolina Planning, 1 (Summer 1975), 44-50.

[11]Hiscox v. Levine, 31 Misc. 2d 151, 216 N.Y.S.2d 801 (1961)--for abuse of administrative discretion, lack of uniformity. Eves v. Zoning Board of Adjustment of Lower Gwynedd Township, 401 Pa. 211, 164 A.2d 7 (1960)--for spot zoning and lack of uniformity.

[12]Orinda Homeowners Committee v. Board of Supervisors, 11 Cal. App.2d 768, 90 Ca. Rptr. 88 (1970)--held PUD complied with uniformity provisions. Cheney v. Village 2 at New Hope, 429 Pa. 626, 241 A.2d 81 (1968) upheld all aspects of the PUD process. Orrell v. Planning Bd., 66 Misc.2d 843, 322 N.Y.S.2d 44 (Sup. Ct. 1971) essentially held Hiscox v. Levine was no longer applicable.

## Traditional Subdivision Regulation

Subdivision regulations control the process of converting raw land into building sites. They can establish effective requirements and standards for public improvements, including streets, drainage pipes, sewer outlets, and so forth. These standards may be enforced by requiring the developers to post performance bonds.

Dedications of a specified amount of land (usually for parks or schools) or money in lieu of land force the developer (and indirectly the residents) of the subdivision to provide for needs generated by the subdivision. When the developer is allowed to pay in cash instead of in land, the community is given additional flexibility in meeting the needs of the subdivision. If, for example, a good park site is not available on the land owned by a developer, the cash contribution can allow the local government to purchase a nearby park site for the neighborhood.

Standards have recently been broadened in scope, and a subdivision plan may be refused approval where there is a fair or substantial showing that the subdivision will cause undesirable off-site problems such as creating hazards, environmental degradation or increasing the burden on already overloaded public facilities, such as roads and sewers. In this newer form, subdivision regulations can facilitate orderly municipal growth in accordance with a comprehensive plan by controlling the sequence and time of development. Subdivision controls relating to off-site facilities are covered in a separate section.

### Authority

Cities have authority to regulate subdivision in North Carolina pursuant to N.C.G.S. 160A-371. The regulations are developed and administered by the local city council, the city council on recommendation of a planning agency, or a designated planning agency. County subdivision regulation is enabled by N.C.G.S. 153A-330 and may be exercised by the Board of County Commissioners or their appointed agency.

A "subdivision" is defined as "all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose of sale or building development (whether immediate or future) and includes all division of land involving the dedication of new street or a change in existing streets."

As part of the subdivision control, North Carolina municipalities can require the "dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision" pursuant to N.C.G.S. 160A-372. School sites may be reserved in accordance with a comprehensive plan but there is no authorization for the dedication of school sites. The use of fees in lieu of the dedication of land is not expressly authorized.

Viability

Political viability of subdivision regulation has already been established since it is probably second only to zoning as the most widely used development management tool.

In general, current residents of a city can be expected to support a dedication requirement because it makes new development pay for its own park or school land. Developers and holders of developable land may be expected to oppose these restrictions.

Technical viability is not a major issue in the traditional use of subdivision regulations which concentrates on good engineering and physical design criteria. Fine tuning regulations to protect environmental values (other than just aesthetics) seems to be substantially feasible. The limits of the degree of permissible regulation are not certain. In drafting the ordinance, clear and uniform standards must be used to put developers on notice of performance requirements.

Where It Has Been Used and to What Effect

Subdivision regulation has been used extensively throughout the United States. The results have been the maintenance of minimal design standards in new subdivision, the level of which will vary depending on the thoroughness with which the administering local agency develops and applies regulations. Dedication requirements are widely used. The amount of land required for dedication varies, usually from 3-12 percent of the subdivision's gross area.[1]

Legal Issues

Subdivision regulations may be challenged on due process and taking grounds, but most courts have upheld a certain degree of regulation as a permissible application of the police power to protect the public health, safety and welfare (Mansfield & Sweet, Inc. v. Town of West Orange, 120 N.J.L. 145, 198 Atl. 225 (1938)). Dedication of land for streets and

utilities is commonly required and has been generally upheld (Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, 217 N.W.58 (1928)). Curb and gutter requirements and similar design criteria accompanying street and utility requirements have been upheld (Petterson v. City of Naperville, 9 Ill.2d 233, 137 N.E.2d 371 (1956)). Dedication of school and recreational sites has met mixed judicial reception.

The challenges in the early 1960's came in Illinois and New York. In Pioneer Trust & Savings Bank v. Village of Mt. Prospect,[2] the court invalidated an ordinance requiring that one acre per 60 families be dedicated to recreational purposes because it found that the overcrowded condition of the city was the result of the "total development of the community," rather than the subdivision in question. The test it created was that, "if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation."[3] This language clearly put a heavy burden on the city to show the connection between the increment of burden produced by the subdivision and the exaction demanded of the subdivision. In Gulest Associates, Inc. v. Town of Newburgh[4] the court invalidated an ordinance which allowed the city to charge fees in lieu of land dedication for recreational purposes because the money could then be spent on any recreational purpose in the city, and was not specifically earmarked to benefit directly the subdivision which had provided it.

More recently, courts have begun to uphold mandatory dedication ordinances. In 1971, in Associated Home Builders v. City of Walnut Creek,[5] the California Supreme Court affirmed the constitutionality of a statute which allowed cities to condition their approval on the dedication of land or payment of fees in lieu thereof, for park or recreation development near the subdivision so long as "the amount and location of land to be dedicated or fees to be paid bears a reasonable relationship to the use of the park and recreational facilities by the future inhabitants of the subdivision."

In 1966, in Jordan v. Village of Menomee Falls,[6] the Wisconsin Supreme Court found no constitutional difficulties with a municipal ordinance which conditioned approval of a subdivision on the dedication of land or payment of fees in lieu thereof, for the expansion of parks and schools, even though the state enabling legislation did not specifically

authorize such conditions. Using the provision that the statute should be construed liberally, the court allowed the city the authority to impose the conditions where it could show that subdivision in general had the cumulative effect of creating a need for services (parks, schools, recreation facilities). More important, however, the court held that in order to prove unconstitutionality, a developer would have to show that the conditions were unnecessary in his case because the city already had adequate facilities, or that the normal growth of the city without the addition of the subdivisions would have required the extra facilities.

There is no case law on this issue in North Carolina, although the enabling legislation discussed above is substantially similar to that of Wisconsin, on which the Jordan case was decided.

There is likewise no case law in North Carolina which sheds light on the extent to which subdivision ordinances may be used for purposes of environmental protection. Because the public purpose doctrine is the best rationale for subdivision regulations, local ordinance requirements for dedication of open space or other regulatory techniques for the purpose of environmental protection would seem to stand or fall on the demonstrability of the public purpose served by regulating such areas.

Focus

As mentioned above, it is common for subdivision ordinances to contain a dedication requirement. The distributional effect of the ordinance is to make new residents pay for the services or facilities they require. The dedication requirement also provides the option of no development for some sites.

Traditional subdivision regulations also impact environmental and economic costs of growth. Regulations can be tailored to require elements which protect the environment (such as drainage systems) and which reduce the capital outlay generated by growth (e.g. the elimination of unnecessary curb and gutter requirements). Generally, this technique regulates many aspects of the quality of residential construction (e.g. appearance and design).

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[1]M. Moore, "The Acquisition and Preservation of Open Lands," 23 Washington and Lee Law Review 289 (1966).

[2]22 Ill.2d 375, 176 N.E.2d 799 (1961).

[3]Id. at 380, 176 N.E.2d at 802.

[4]25 Misc.2d 1004, 209 N.Y.S.2d 729 (Sup. Ct.) aff'd 75 App. Div. 815, 225 N.Y.S.2d 538 (1962).

[5]4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, appeal dismissed 404 U.S. 878 (1971).

[6]28 Wis.2d 608, 137 N.W.2d 442, appeal dismissed 385 U.S. 4 (1966).

## Subdivision Controls Relating To Off-Site Facilities

This type of ordinance requires that there be adequate off-site facilities available (such as parks, fire and police protection) before a subdivision will be approved. This technique is similar to the development timing ordinance made famous by Ramapo, New York, which was discussed earlier in the section on Development Timing. It is different from a development timing ordinance in that no effort is made to predict when certain facilities will be made available by the local government. The purpose of the ordinance is not to "time" development, but to make sure that development takes place only if there are adequate facilities to support development.

This tool is to be distinguished from traditional subdivision regulations which have as their purpose the assurance that the city will not have to bear the burden of providing an adequate infrastructure (or on-site facilities) to the development. On-site facilities which are often required in traditional ordinances are adequate water and sewer conduits, a road system which will match city standards, and dedication or reservation of land for parks and school sites.

In enacting subdivision regulations which take into account off-site facilities, the city is recognizing that new developments require more services than those listed above--the city water and sewage system may have to be expanded to handle the additional flow, parks and school facilities may be inadequate, the neighboring roadways may be inadequate to support the additional burden. These types of problems affect not only the subdivision, but the rest of the city as well, and through the conditioning of subdivision permits upon amelioration of these effects, the city can protect its own revenues and force the development to carry the burden it produces.

### Authority

Authority for subdivision regulation by municipalities is found in N.C.G.S. 160A-372. That statute recognizes as legitimate objects of regulation, the provision of a coordinated

street system, the provision of community service facilities (sewer and water facilities), and the dedication of parks, recreational areas, and the reservation of school sites. Performance bonding is approved where necessary to ensure compliance with service provision requirements. The statute further recognizes two goals of subdivision regulation: "(to) provide for the orderly growth and development of the city" and "(to) provide for the more orderly development of subdivisions." Under the first of those, it would seem that a city would have the authority to condition its subdivision permits on the provision of adequate off-site facilities, especially in light of N.C.G.S. 160A-4, which indicates that the legislature intended that the provisions of that chapter be broadly construed "to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect." The power to implement subdivision regulations is guaranteed to a city by N.C.G.S. 160A-373, by which a city is authorized to condition the granting of permits on the approval of the city council, the planning commission, or both.

Viability

In general, current residents of a city can be expected to support this type of regulation, as it will protect their tax revenues, and to the extent that it increases the price of development, will make their property more valuable. Developers and holders of developable land may be expected to oppose these restrictions.

Where It Has Been Used and To What Effect

This technique is not yet in widespread use. It has been used effectively in the cities mentioned below.

Brooklyn Park, Minnesota, a distant suburb of Minneapolis, uses this technique as the key to its growth management system. Its subdivision ordinance requires the availability or provision of off-site storm drainage facilities prior to development. The cost of providing such facilities has allowed the city to prevent virtually all development on vacant land in the northern two-thirds of the municipality. Without expensive,

staged construction of a storm drainage collection system in this area, premature residential construction would be in danger of flooding and would create flooding problems for the developed area to the south.[1]

Loudon County, Virginia, which is within the Washington D.C. metropolitan area, has a zoning ordinance that requires applicants who seek rezoning of their property to pay for the increased capital costs caused by the development of their property should the rezoning be approved. The ordinance sets out standards and definitions that result in a real dollar amount to be paid to Loudon County on a housing unit basis.[2] While this ordinance does not relate directly to subdivisions, it is included here because a similar type concept could be made applicable to subdivision ordinances.

Legal Issues

While subdivision controls relating to off-site facilities have been challenged in a number of state courts, the U.S. Supreme Court has never ruled on their validity, and so the cases cited below are all the decisions of the highest state court.

In a leading case on subdivision regulations, the California Supreme Court upheld a requirement that a developer dedicate larger rights-of-way than were necessary for the amount of housing he was constructing in order to accommodate future growth.[3] The court based its decision on the fact that it found such regulations would directly benefit the development in the long run since landowners would not have to be disturbed by taking proceedings when the inevitable expansion of the roads was required.

Further support for the use of this type of tool may be found in Noble v. Chairman and Township Commissioner of Mendham Township,[4] in which the plaintiff was challenging a requirement that an adjacent road be widened as a precondition to the approval of a subdivision. The Appellate Division of the New Jersey courts found that the planning board owed a duty to present and future landowners and residents to so condition the

permit, as the result of its mandate to act in the public interest.

The court decision that upheld the Ramapo development timing ordinance (see above, section on Development Timing) strongly supports the validity of off-site facilities requirements.

Focus

As mentioned above, one of the primary reasons for using this technique is to make growth pay for itself. In addition to this distributional effect, this technique can be used to reduce the economic and environmental costs of growth. It promotes development in areas where there can be orderly and efficient extensions of municipal services and where major expenditures for new roads, schools, etc., are not required. It can also be used to make development in environmentally sensitive areas conditioned on the availability of facilities or services which reduce the adverse impacts of development. An ordinance of this type can slow the rate of growth where the necessary off-site facilities are not available. Also, by directing growth to areas where adequate facilities are available, it affects the location of new development.

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[1]Michael Gleeson et al., Urban Growth Management Systems: An Evaluation of Policy Related Research (Minneapolis: School of Public Affairs, Univ. of Minnesota, 1974), pp. II-28-30.

[2]Id., p. II-50.

[3]Ayers v. City Council of Los Angeles, 34 Cal. 2d 31 (1949), 207 P.2d 1.

[4]91 N.J. Super. 111, 217 A.2d 335 (1966).

## Total Population Charter Provisions

Total population charter provisions attempt to establish absolute limits on permissible population, either by setting a numerical limit on population itself or on the permissible number of housing units or related permits.

### Authority

There is no explicit statutory authority in North Carolina which allows regulation for the purpose of limiting absolutely the population within a local governmental jurisdiction. The only authority would flow from the broadest imaginable interpretation of the general permission to regulate for the "public health, safety, and welfare".

### Viability

Political viability would appear to be low in many areas of North Carolina. Economic growth is a goal and a legitimate need in most localities, and attempts to thwart absolutely such growth will meet powerful opposition from practically all sectors of the population. Absolute growth limitations seem very simple, involving no technical or administrative problems, unless efforts are made to be selective concerning growth that takes place prior to reaching the limit. However, to be legally acceptable, very thorough and sophisticated planning capacities are required to show persuasive reasons for regulating population growth, such as clear and overwhelming constraints on the environmental capacity of the area.

### Where It Has Been Used and To What Effect

A population quota was proposed by a citizens group in Boulder, Colorado, but was rejected by referendum.[1] In 1972, the citizens of Boca Raton, Florida, passed a charter amendment limiting the total number of dwelling units within the city.[2]

### Legal Issues

Legal challenge is practically assured by including absolute limits on population growth in any community plan. The

Boca Raton restriction was challenged as violating state and federal constitutional guarantees of due process and equal protection. A Florida trial court invalidated the growth cap as a violation of substantive due process holding that the population limit did not rationally promote the public welfare.[3]

The New York Supreme Court found that a quantitative quota system was invalid since the ordinance violated the constitutional prohibition against taking property without just compensation.[4] The court dwelt on the fact that the regulation was not in accordance with a comprehensive plan, indicating that the power to control growth was valid only in accordance with a comprehensive plan if exercised.[5]

Further constitutional challenge is likely to be based on the claim that an absolute limitation infringes on the fundamental right to travel, and such a limitation can be supported only if it furthers a compelling state interest. In order to withstand constitutional challenge, any population limitation will have to be justified by critical constraints to population growth determined through careful planning studies.

Although there are no North Carolina cases on quotas, it seems safe to predict that it would be very difficult to justify an absolute limit to population growth.

Focus

These provisions attempt to influence the quantity of new development.

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[1]Michael E. Gleeson, Robert C. Einsweiler et al., Urban Growth Management Systems, ASPO Planning Advisory Service, Nos. 309 and 310 (1975), p. 45.

[2]Ronald A. Zumbrun and Thomas E. Hookano, "No-growth and Related Land-Use Legal Problems: An Overview", 9 Urban Lawyer 122 (1977).

[3]Boca Villas Corp. v. E. E. Pence, No. 73 106 CA(1)01 F (Fla. 15th Cir. Ct. 1976) (currently on appeal). For further discussion of the case, see David R. Godschalk et al., Responsible Growth Management: Cases and Materials, (University of North Carolina: Center for Urban and Regional Studies, 1978) pp.x-1 to x-17.

[4]Albrecht Realty Co. v. Town of New Castle, 8 Misc.2d 255, 167 N.Y.S.2d 843 (1957).

[5]Gleeson et al., p. 46.

## Annual Permit Limits

Annual permit limits may be used to limit population growth and construction by setting an absolute quota on the number of building permits that are issued by a city or county. While not protecting specific environments, the result of such a quota is to reduce the overall pressure of new development, and indirectly to reduce the threat to specific environments. A similar, although not so rigid approach, is to dictate stringent conditions which must be met before a permit will be issued. These conditions could include specific requirements for building in sensitive environmental areas.

### Authority

North Carolina's building laws set various standards for structures in pursuance of the public health, safety, and welfare. However, absolute limitations on the number of permits are not mentioned in enabling legislation. The enabling statutes do not clearly state how stringent the conditions precedent to permit issuance may be.

### Viability

Annual limits on new construction would be technically and administratively simple. The existing building inspection department of a locality could review building permit applications for compliance with the conditions of permit issuance. However, a scheme would probably be locally acceptable only if based on thorough and complex planning efforts, and on a clear perception that rapid growth is posing severe problems for the jurisdiction involved.

### Where It Has Been Used and to What Effect

Annual permit limits have been used in Petaluma, California and Pinellas County, Florida.

Petaluma, a suburban city north of San Francisco, set a limit of 500 units per year to be distributed on a geographical basis throughout the city, with at least 10 percent for low and moderate income housing.[1] The City Council has the power to increase or decrease the quota by 10 percent within a given year, provided that the balance of housing is maintained. Included in the reasons for this quota system was environmental protection.

Pinellas County, Florida, limited for a time the number of permits issued in unincorporated areas and in municipalities served by its county water system.[2] The number of permits issued was related to the availability of scarce water re-

sources, using an equation which contained those four variables appearing to impact most directly on water resources and demand: population distribution, rate of growth, land area, and assessed valuation. This model assigned to each of the eighteen municipalities obtaining water from the county a percentage of the water available for new growth. Unincorporated areas received allocations as well. No community was allowed to issue more building permits than could be served by its water allocation. This system was later dropped when water supplies became plentiful.[3]

Legal Issues

The Petaluma building permit system was challenged in federal district court. The court held that the quota system was not supported by any compelling governmental interest and that it constituted a violation of the right to travel.[4] However, the court of appeals reversed, holding that the permit limitation was not exclusionary and bore a rational relationship to the legitimate state purpose of environmental protection and the preservation of Petaluma's small town character.[5]

The Pinellas County system has not yet been tested in the courts. Research reveals no North Carolina cases concerning building permit limits. However, a land owner has no right to a permit unless he meets all the conditions necessary for its issuance.[6] Under N.C.G.S. 160A-417, the issuance of a building permit is conditioned upon compliance not only with the state building code, but all applicable local laws such as zoning regulations. If such laws bear a reasonable relationship to the public health, safety and welfare, it seems that even very restrictive conditons would be upheld.

Focus

Although permit limits indirectly reduce the threat to specific environments, the primary reason for using this technique is to slow the rate of growth.

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[1]Michael E. Gleeson, Robert C. Einsweiler et al., Urban Growth Management Systems, ASPO Planning Advisory Series Reports Nos. 309 and 310 (Chicago: American Society of Planning Officials, 1975), pp. 18-19.

[2]Id., pp. 19-20.

[3]Robert C. Einsweiler et al., The Design of State, Regional and Local Management Systems, Vol. I (University of Minnesota: Hubert H. Humphrey Institute of Public Affairs, 1978) pp. I-11.

[4]Construction Industry Association of Sonoma County v. City of Petaluma 375 F. Supp. 574 (1974).

[5]522 F.2d 897, 906 (9th Cir. 1975) cert. denied 424 U.S. 934 (1976).

[6]In North Carolina, a building permit may even be revoked if the proposed structure would not meet the standards imposed by zoning amendments adopted subsequent to the permit's issuance (unless the land owner has already begun construction in reliance upon the permit). See Town of Hillsborough v. Smith, 276 N.C. 48, 170 S.E. 2d 904, 49 ALR 3d 1 (1969).

## Official Mapping

An official map is a map, legislatively adopted, which reflects a municipality's fixed decision to locate streets, parks and other facilities at the places market on the map and to acquire property later. The map is implemented by a prohibition against improvements in areas earmarked for acquisition and enforced by injunctive relief and denial of the right to compensation for unauthorized improvements.[1] Most systems have a variance procedure for landowners who are unable to make a reasonable economic return on either the restricted parcel or the legal plot as a whole.[2]

### Authority

Enabling legislation is required prior to the use of this technique. At present in North Carolina, the use of mapping by local governments is authorized only for school sites. N.C.G.S. 160A-372 allows the reservation of school sites provided the sites are included in the local government's comprehensive plan. The school board must agree to acquire the site within 18 months of a subdivision proposal in order to prevent the private development of the land.

### Viability

The political popularity of mapping will depend to a great extent on the uses for which land may be reserved, the size of the area reserved for such uses and the number of years for which the land may be reserved.

The use of mapping requires long-range planning capabilities.

### Where It Has Been Used and To What Effect

Several states allow the use of official mapping. There is little written about the results of using the technique, but there is no reason to suspect that it does not serve its stated purpose.

## Legal Issues

The major legal limitation on the use of official mapping is the taking problem. A brief discussion of the way courts have dealt with the technique follows. While some existing statutes authorize official mapping not only of streets but of future park and drainage systems, the constitutionality of official mapping for areas other than streets is as yet uncertain. Courts have generally invalidated regulations as applied to specific properties if the regulations prevent all structural development. Often the relatively narrow strips of land needed for streets occupy small portions of lots, with considerable building space remaining on each lot. On the other hand, official maps for parks, reservoir sites, wildlife areas or other uses will often affect whole properties. The Pennsylvania Supreme Court in the well-known case of Miller v. Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951) held invalid a statute authorizing a park mapping plan and an accompanying ordinance which froze development for three years prior to public purchase. The New Jersey court, in New Jersey Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 237 A.2d 881 (1968), displayed a somewhat less critical attitude in upholding the constitutionality of a statute which granted a municipality a one-year period to decide to purchase mapped parks and playgrounds. However, the court read into the statute an obligation of the municipality to pay for this one-year "option" to purchase.[3]

## Focus

The use of an official map can reduce a municipality's expenditures for land acquisition. A municipality is not required to compensate the property owner for any improvements made after the map is adopted. Individual sites are kept free from additional improvements and development options of the site are restricted.

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[1]Jan Z. Krasnowiecki and James C.N.Paul, "The Preservation of Open Space in Metropolitan Areas," 110 University of Pennsylvania Law Review 184 (1961).

[2]Michael E. Gleeson et al., Urban Growth Management Systems: An Evaluation of Policy Related Research (Minneapolis: School of Public Affairs, Univ. of Minnesota, 1974), p.III-52.

[3]Jon A. Kusler, "Open Space Zoning: Valid Regulation or Invalid Taking?" 57 Minnesota Law Review 74 (1972).

## Mandatory Low Income Housing Construction Ordinance

The mandatory low income housing construction ordinance requires developers to include a minimum amount of subsidized or lower cost housing in their conventional projects (both sale and rental). Although the details of the enacted and proposed ordinances vary, they are similar in certain essential features: (1) the ordinances usually apply only to large developments (often 50 or more units); (2) the typical required percentage of low and moderate income units is small (10-15 percent); (3) the ordinances attempt to make the requirement economically feasible by tying it to the availability of federal subsidies or increasing allowable densities for the development.

The objectives of the ordinances are: (1) to produce enough low and moderate income housing to meet the needs of the area's residents; (2) to avoid an overconcentration of low cost housing in particular areas of a community; and (3) to stimulate better quality construction and maintenance of subsidized housing.[1]

Inclusionary ordinances should not be viewed as a solution to all of the housing problems of a community. Because these ordinances are often tied to federal subsidies, the number of low income units produced is often not sufficient to meet the community's needs. Other approaches such as housing rehabilitation and increased state and local funding may be necessary to attack the full range of housing problems facing many communities.[2]

Inclusionary ordinances will probably not be useful in areas where the demand for new housing is weak, or where the profitability of housing construction is relatively low. The reduced profitability of construction under these ordinances may be enough to prevent development. In areas of high profitability, the rate of return even with the ordinances may be high enough to stimulate development.[3] There are incentives for developers (particularly local developers) to remain in an

area, even though they do not approve of this type of ordinance. Developers have a knowledge of the local housing market, reputations in the area, and experience in dealing with the local officials which would be lost by transferring out of the area. These factors may induce a developer to accept a lower rate of return. In addition, the developer can pass at least some of the loss along to purchasers of the conventional units.[4]

Authority

Whether or not additional enabling legislation is required in North Carolina to authorize a mandatory low income housing construction ordinance depends on how broadly the North Carolina courts are willing to interpret existing enabling legislation. It is conceivable that this type of ordinance could be justified as promoting the general welfare of the community and that municipalities are empowered by the zoning enabling legislation to enact ordinances for inclusionary purposes. A local government, however, would be unwise to count on the North Carolina courts accepting this reasoning. Similar extended arguments can be made with respect to other grants of police power authority, but it is doubtful that they would receive judicial approval. A better approach may be to enact express enabling legislation to authorize the adoption of inclusionary ordinances.

Viability

In terms of political viability, this technique faces the same obstacles as any other program designed to aid the poor. A favorable aspect of the technique may be that the ordinance imposes no direct cost on the local government. Developers can be expected to strenuously oppose this type of ordinance.

Before this technique is used, serious study should be given to local housing market and housing needs to determine the probable effects of the ordinance. In addition, the housing studies will be valuable in defending the use of the ordinance if it is later challenged in court. Great care should be exercised in preparing, drafting and defending the ordinance.

## Where It Has Been Used and To What Effect

Inclusionary ordinances have been passed in several areas including Fairfax County, Virginia; Montgomery County, Maryland; Los Angeles, California; and Cherry Hill, New Jersey. The Fairfax County ordinance was invalidated before it had any impact but a new voluntary inclusionary zoning ordinance has been adopted which provides for an optional density bonus up to twenty-five percent for developments which include moderately priced housing. Even though a state-imposed sewer moratorium has decreased construction activity in Montgomery County, priority for sewer hook-ups is given to projects including low and moderate income housing. Montgomery County's program is one of the most successful in the nation since five developments have been constructed and eleven additional projects have been approved with over 1200 units in the low and moderate income range. The Los Angeles ordinance has not achieved much success since it depends on government housing subsidies which have been very limited since 1974.[5]

The Philadelphia suburb of Cherry Hill appears to have had some success with its ordinance. The ordinance requires that 5 percent of the rental units in projects of 25 dwelling units or more in multi-family zones be rented at below market rents. The township has issued building permits for 2,000 units subject to the 5 percent low-rental requirement.[6]

The most appropriate level of government to use this technique is the county level. The purpose of the technique may be thwarted if developers have the option of building in the next town under no similar restraints. If an entire area subject to growth pressures is covered by an inclusionary ordinance, the market for new construction is less likely to be affected by the ordinance, and in addition, the ordinance represents a fair way to allocate resporsibilities for housing low income families throughout the region.

## Legal Issues

The Fairfax County mandatory low income housing construction ordinance was invalidated in Board of Supervisors of Fairfax County v. Degroff Enterprises, Inc., 214 Va. 235, 198

S.E.2d 600 (1973). The Virginia Supreme Court recognized that providing low and moderate income housing serves a legitimate public purpose, but held that this public purpose could not be accomplished by the zoning ordinance which the county had enacted because the ordinance exceeded the authority granted by the zoning enabling legislation. (Montgomery County, Maryland and Los Angeles enacted their low-income housing percentage requirements under local charter authority rather than state enabling legislation.)[7] A second ground for invalidating the Fairfax ordinance was the court's conclusion that it violated the guarantee of the Virginia Constitution that no property will be taken or damaged for public purposes without just compensation because it fixed rents and sale prices at below market rates.

Most commentators conclude that this decision is an aberation and that the court's reasoning is questionable at best. Nonetheless, it is a precedent that must be overcome if an inclusionary ordinance is challenged.

Inclusionary ordinances will probably face substantive due process attacks. In order to be upheld the ordinance must have a valid public purpose and must be rationally designed to achieve it. Even the court which struck down the Fairfax County ordinance recognized that providing low income housing was a valid public purpose. The choice of means to achieve this objective is more troublesome. The developer is used to solving a communitywide housing problem and to the extent that the cost cannot be passed on, is singled out to bear an economic burden.[8] On the other hand, other professionals (doctors, attorneys, etc.) are called upon to serve less than profitable clients and are expected to absorb the loss or spread it among other clients.

The use of provisions to reduce potential economic loss to the developer (such as density bonuses) will bolster the argument that the means are reasonable and will also help to avoid the taking problem which is closely related. One commentator has concluded that under any of the tests for determining when a taking has occurred, these ordinances will be upheld if appropriate steps are taken to minimize the economic loss to the developer.[9] Another has concluded that whether or

not cost saving approaches offset the losses caused by the ordinance will depend on features of the ordinance and local conditions and, if losses are not offset, communities must make direct cost payments to developers to account for the difference.[10]

Many of the legal problems of a low income housing construction ordinance can be avoided by making the program voluntary. Although voluntary inclusionary programs have not achieved the success of mandatory ordinances, developers may be encouraged to participate in such a program if they can be convinced of the profitability of incentives such as density bonuses.

Even though it is uncertain at best whether or not the North Carolina courts would validate inclusionary ordinances, this technique should not be overlooked as a means of coping with the problem of low income housing in North Carolina.

Focus

This type of ordinance increases the amount of a particular subtype of development, i.e., low cost multi-family housing, while distributing some of the costs of low income housing to residents of conventional, newly constructed housing.

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[1]Thomas Kleven, "Inclusionary Ordinances...Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing," U.C.L.A. Law Review 1448 (1974)

[2]Id., pp.1470-1473.

[3]Id., p.1482.

[4] Id. Studies have shown that if the developer is granted a density bonus for building low and moderate income housing, he may, in fact, receive a more profitable return on his investment than he could expect from a conventional project. See Gregory M. Fox and Barbara R. David, "Density Bonus Zoning to Provide Low and Moderate Cost Housing," 3 Hastings Constitutional Law Quarterly 1015, 1028 (1976).

[5] For a good discussion of the Fairfax County, Montgomery County, and Los Angeles programs along with a nationwide survey of low income housing construction ordinances, See Fox And Davis, supra note 4.

[6] Ernest Erber and John Prior, "The Trend in Housing Density Bonuses," Planning, 60 (November 1974), 7.

[7] Id.

[8] Herbert Franklin et al., In-Zoning: A Guide for Policy Makers on Inclusionary Land Use Programs (Washington, D.C.: The Potomac Institute, 1974) p. 139.

[9] John A. Baade, "Required Low-Income Housing in Residential Developments: Constitutional Challenges to a Community Imposed Quota," 16 Arizona Law Review 445 (1974)

[10] Kleven, p. 1528.

## Regional Fair Share Housing Agreements

This technique involves voluntary agreements by the local governments of a region to provide a fair share of the low income housing needed in the region. This is one of several approaches that planning officials have taken to accommodate the interests of low income residents. Another approach has been to review development regulations which increase the cost of housing.

Many land use and environmental regulations may have the effect, deliberate or not, of discriminating against low income and minority groups. Courts have sometimes invalidated ordinances on the grounds that they were discriminatory, particularly when they appeared to discriminate on the basis of race. When a court finds that regulations are motivated by racial discrimination, they will be struck down as violations of federal and/or state constitutions and laws. Some courts have gone further than just prohibiting discriminatory policies and have imposed on localities an affirmative obligation to consider regional housing needs in the exercise of their land use regulations.[1] A regional perspective on housing needs would appear to be supported by a recent decision in which it was held that the Department of Housing and Urban Development (HUD) abused its discretion in approving community development block grants for seven suburban communities in the Hartford area.[2] Six of the seven communities had reported that no low income people were expected to reside within their borders during the period of the grant. The decision emphasizes the illicit nature of local planning approaches that are exclusionary.

### Authority

Fair share housing agreements are primarily voluntary and require no special legal authority.

### Viability

Although resistance to the acceptance of low income housing may be encountered in suburban communities, the political

acceptability of affirmative efforts to provide housing or other lower income programs depends to a greater extent on the availability of federal grants. Local governments may be the primary actors in making application for federal housing assistance but in large metropolitan areas application for and approval of housing assistance funds may occur at the regional level based on area-wide housing allocation plans.

Where It Has Been Used and To What Effect

Most anti-exclusionary approaches adopted to date have been in large metropolitan areas. Among the governmental bodies that have adopted or proposed fair share plans are the Miami Valley Regional Commission in Ohio, the Metropolitan Council of the Twin Cities Area in Minnesota, and the Metropolitan Washington Council of Governments.[3] Although little housing as been built under these plans because of federal housing subsidy cutbacks, fair share allocation programs have proved that suburban communities are willing to accept some responsibility for the provision of regional low-income housing needs.[4]

Focus

Use of this technique affects the quantity of a particular sub-type of development, i.e. low income housing. Because low income housing is generally subsidized, this technique generally redistributes income to lower income families. It also redistributes responsibility for providing low income housing among all the local governments within a region.

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[1]Southern Burlington NAACP v. Township of Mount Laurel, 119 N.J. Super. 164, 336 A.2d 465, U.S. Supreme Court review denied (October, 1975).

[2]City of Hartford v. Hills, 408 F. Supp. 889 (D.Conn. 1976).

[3]For a list of other groups with fair share plans, see David Listokin, "Fair-Share Housing Distribution: Will It Open the Suburbs to Apartment Development," 2 Real Estate Law Journal 739 (1974).

[4]Id. at 758.

## Maximum Lot Size

A municipality can require that some or all of its residential land be subject to a maximum permissible lot size. The purpose of this technique is to keep lot sizes relatively small so that theoretically at least the homes built on them will be of low or moderate cost.

### Authority

Authority to require maximum lot sizes exists in North Carolina pursuant to the State's zoning enabling legislation.

### Viability

This type of zoning is likely to be opposed by established residents who would not welcome low and/or moderate income newcomers or who think this type of development will cost the community more than the tax revenue it will provide.

On the other hand, this technique appears to be more politically acceptable than mandatory low income housing construction ordinances. The most equitable (and politically viable) way to implement this concept may be to tie it in with a subdivision ordinance.

Any new subdivision could be required to include a percentage of lots which do not exceed the statutory maximum. This type of measure would prevent a concentration of small lots in any one area and would apply equally to all new residential developments. The community reaction would probably depend on the quantity of developable land to which the maximum size applies.

### Where It Has Been Used and To What Effect

An ordinance of this type does not appear to have been adopted anywhere in the United States. However, a Minnesota statute (G.S.868) enacted in 1976 indicates that a similar ordinance may be enacted in the Twin Cities Area in the near

future. The act established as part of the Metropolitan Council a "modest cost private housing advisory committee" whose duties included investigating the following:

(1) a zoning classification and ordinances that take into account minimum and maximum single family lot sizes; and

(2) minimum and maximum square foot area requirements for single family homes and multi-family units.

A senate version of the bill would have required each local government in the region to have zoned at least 25% of its buildable residential land under a zoning classification which set 9,500 square feet as the maximum lot size. Similar density requirements for multi-family construction would have been applicable to 10% of the local governments' buildable residential land.

Legal Issues

It is unlikely that a maximum lot size can be successfully challenged. There may be an attempt to show that there is no relationship between the ordinance and the public health, safety, morals, or general welfare. However, in light of recent housing and zoning cases, it is unlikely that the purpose of encouraging low and moderate income housing will be found unrelated to the general welfare. Provided that the ordinance is applied to property in a manner that does not violate principles of equal protection, it should withstand legal attack.

Focus

The use of maximum lot size zoning encourages the construction of low and moderate income housing. It also tends to increase the quantity of new development that will occur because this development is of a relatively high density.

## Building Inspection

All North Carolina cities are authorized to have a building inspection department and must appoint building inspectors, electrical inspectors, plumbing inspectors and other inspectors as appropriate to enforce state and local laws relating to: (1) the construction of buildings and other structures; (2) the installation of such facilities as plumbing systems, electrical systems, refrigeration systems and air-conditioning systems; (3) the maintenance of buildings and other structures in a safe, sanitary and healthful condition; and (4) other matters that may be specified by the city council.[1] Counties also are authorized to establish building inspection departments, but are not required to do so.[2]

### Authority

The authority for cities to enact building inspection departments is found in N.C.G.S. 160A-411 to 438, and for counties in N.C.G.S. 153A-350 to 375.

The North Carolina Building Code Council is authorized to establish a North Carolina State Building Code, which has the force of law and must be complied with by all localities having a building inspection program (N.C.G.S. 143-138). The Building Code Council also is responsible for making changes in the State Building Code and for reviewing building laws. The Insurance Commissioner, through the Division of Engineering of the Department of Insurance, is responsible for enforcing the State Building Code throughout the state (N.C.G.S. 143-139). A recent opinion of the Attorney General, however, stated that the Commissioner of Insurance did not have jurisdiction in those counties that had not established building inspection departments.

### Viability

Building code provisions are generally politically acceptable except in rural areas where governmental regulations of any type are frowned upon. Building inspection requires professional competence and the ability to recognize defective

structures. The building inspector also may have the responsibility of insuring that structures comply with applicable zoning and other land use regulations.

Where It Has Been Used and To What Effect

This technique is used throughout the nation, especially in urban areas. However, enforcement of building codes is often sporadic especially in rural areas facing increasing growth pressures due to second-home development.

Legal Issues

Legal challenges generally involve applications of the standards of the State Building Code that have led to denial of building permits.

The North Carolina State Building Code has the force of law, Drum v. Bisaner, 252 N.C. 305, 113 S.E. 2d 560 (1960). Localities may not amend the State Building Code even by imposing stricter standards unless such amendments are approved by the State Building Code Council, Greene v. City of Winston-Salem 287 N.C. 66, 213 S.E.2d 231 (1975).

Focus

As a growth management technique, building inspection is useful in regulating the quality of new construction.

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[1]N.C.G.S. 160A-412 (1976).

[2]N.C.G.S. 153A-351 (1978).

## Regulation of Mobile Homes

There are several ways to regulate mobile homes, including licensing, inspection, taxation and zoning. Uniform standards regarding the construction and sale of mobile homes are contained in N.C.G.S. 143-144 through 143-148. Local building inspectors are charged with enforcement of the statutes. The focus here is on the use of zoning and local ordinances relating specifically to the use of mobile homes and mobile home parks.

Due to the general feeling of hostility toward mobile homes, communities often enact ordinances which prohibit mobile homes in all areas except mobile home parks, or restrict the location of mobile home parks to non-residential districts.

### Authority

The authority to regulate mobile homes stems from the North Carolina zoning enabling legislation and from legislation granting counties and towns the power to enact ordinances which protect the general health and safety--N.C.G.S. 153A-121 for counties and 160A-174 for cities.

### Viability

In spite of the improvements in design and construction of mobile homes, they are not popular with residents who live in conventional housing. Local resistance to mobile homes may be diminished somewhat by requiring that they be located in mobile home parks. This technique does not require special expertise or staffing.

### Where It Has Been Used and To What Effect

Restrictions on the use of mobile homes for residential purposes are in widespread use.

### Legal Issues

The different types of mobile home ordinances face

different legal problems. Ordinances that limit the use of mobile homes to mobile home parks have generally been upheld.[1] These provisions provide for easier enforcement of health and safety standards. In State v. Martin, 7 N.C. App. 18, 171 S.E.2d 115 (1969), the court upheld the validity of an ordinance prohibiting the location of a mobile home anywhere in the town except in a mobile home park and sustained a conviction for violation of the ordinance.

Ordinances that restrict the number of mobile home parks that may be operated in the community are often upheld. The ordinance in State v. Martin restricted the number of parks to those in operation on the date that the ordinance was passed. If the ordinance limiting the number of mobile home parks has the effect of excluding all mobile homes, it is subject to the same constitutional objections as a straightforward attempt to prohibit all mobile homes.

A community may not ban the use of mobile homes. Neither the use of a mobile home for residential purposes nor the operation of a mobile home park is inherently a nuisance when in compliance with reasonable sanitary and safety regulations.[2] If the use is not inherently detrimental to the public welfare, its absolute prohibition is a denial of equal protection of law and due process of law.[3] The North Carolina decision in Town of Conover v. Jolly, 277 N.C. 439, 177 S.E.2d 879 (1970), held that a mobile home is not a nuisance, per se, and that the town could not prohibit the use of mobile homes as permanent residences when the homes were constructed, equipped, located and used so as to present no threat to the health or safety of its occupants or of any other person. The court found a lack of authority for the ordinance without reaching the issue of whether the ordinance violated the state constitution's due process clause.

Often municipalities restrict the location of mobile home parks to non-residential districts. The fundamental residential character of the use poses serious questions as to the reasonableness of such a zoning ordinance.[4] In City of Raleigh v. Morand, 247 N.C. 363, 100 S.E.2d 870 (1957), the court upheld as a valid exercise of the police power an ordinance that prohibited the construction and maintenance of a

mobile home park in an area zoned for residential purposes.

There are cases going both ways in other jurisdictions on whether a mobile home parked in a single-family detached zoning district is permissible.[5] There does not appear to be North Carolina case law on this subject.

Focus

Ordinances which regulate the location of mobile homes generally limit the quantity of this type of residential development. Ordinances which prohibit mobile homes except in mobile home parks reduce the development options of an individual site which may have been suitable as a location for a mobile home.

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[1]Barnett Hodes and G. Gale Roberson, The Law of Mobile Homes (Washington, D.C.: Bureau of National Affairs, 1974), p. 172.

[2]Id., p. 113.

[3]Id., p. 116.

[4]Id., p. 191.

[5]Id., p. 230.

## Municipal Enforcement of Restrictive Covenants

Restrictive covenants are private agreements between the landowner and the person to whom the land is sold or transferred. Generally restrictive covenants create negative easements governing how the land may be used. When used on a large scale, restrictive covenants can become an important land use control mechanism even in the absence of municipal enforcement.

Restrictive covenants are often used by subdivision developers who set the terms of the covenants for all the property in the subdivision. Frequently the terms govern architectural requirements, cost of construction, maintenance of the lot and exterior of the home and other controls not normally found in zoning ordinances.[1] This technique is often used in areas where zoning regulations apply.

Normally, only the landowners who benefit from the covenants can enforce them. There appears to be only one state (Texas) that allows municipalities to enforce these private contractual agreements. Advocates of municipal enforcement view this technique as a replacement for zoning. They claim that the rigidity and centralized decision-making of zoning is eliminated through the use of this technique. The system is decentralized in that land use decisions are initiated at the neighborhood level and flow upward to a centralized city enforcement machinery. It permits unique neighborhood development rather than imposing uniformity. Municipalities take on the burden of enforcement because unless they are regularly enforced the covenants cease to be binding. If uses not allowed by the covenants are permitted to exist, the covenants lose their ability to restrict how the land may be used in the future.

Municipal enforcement provides for equal enforcement throughout the restricted areas, despite the financial capabilities of local residents who may not be able to afford going to court to enforce the restriction.[2]

Obviously this technique can be applied only when there is a widespread system of restrictive covenants already in force. It gives the local government very little control over the nature of new residential development, leaving most of the decision-making in the hands of the developer.

## Authority

North Carolina municipalities would not have the authority to enforce private restrictive covenants absent express enabling legislation. It would be ill advised to assume that the courts would find implied authority for this technique in the zoning enabling legislation.

## Viability

Developers will probably welcome the use of this tool as a replacement for zoning. In areas where there is strong resistance to any land use controls, this may be a politically acceptable alternative to zoning.

The legal resources required for enforcement are probably not great once the local residents are certain that the local government is serious about enforcement. There should be some coordination between the legal department and planning department which may try to influence the terms that developers write into the covenants.

## Where It Has Been Used and To What Effect

In Houston, Texas, citizens for generations have relied on restrictive covenants as a means of controlling land use and have refused to adopt zoning. The land use pattern of the city is not a great deal different from other cities. However, the city does have subdivision controls, minimum housing standards and a building code.[3]

## Legal Issues

Because of the uniqueness of this technique, many of the

legal questions surrounding its use are not resolved. The use of the technique can be expected to be challenged on many grounds even where statutory authority exists.

Due Process - To withstand judicial scrutiny, the municipal enforcement of deed restrictions must bear a rational relationship to a legitimate objective. There is no agreement that the technique will survive this challenge. One argument is that since the objectives of enforcement are identical to the objectives of zoning, the technique will not be invalidated as having an impermissible objective. It is unlikely that a court would say there is no rational relationship between enforcement of the restrictions and the objectives.[4]

The countervailing argument is that enforcement of private restrictive covenants without planning or standards is haphazard. If zoning must be in accordance with a comprehensive plan, then enforcement of covenants must also be in accordance or it will not be reasonable. To circumvent this objection the city could, for example, specify a set of uniform requirements with which restrictions must comply before the city will participate in enforcement of the private covenants. It could also map out and draw the restrictions for different areas of the city and present these to the developers as the only restrictions that the city would be willing to enforce in that area.[5] Politically, this could present a problem in that if residents are generally opposed to zoning, they would probably find this too close to zoning to be acceptable.

Public Purpose--The expenditure of public funds to enforce private deed restrictions raises the public purpose issue. The argument for upholding this technique as having a valid public purpose is that a benefit is given to the entire community when decay and deterioration of neighborhoods are prevented. On the other hand, if the dominant benefit is to relieve a neighborhood civic association or a private individual from the burden of paying for litigation to restrain breaches of covenants, municipal enforcement may be regarded as an expenditure for a private purpose.[6]

Focus

As mentioned above, restrictive covenants are generally used to govern the appearance and other aspects of the quality of construction. This technique could be used to prevent environmental damage if landowners were persuaded to agree to covenants which restrict the uses of their property or incorporate design standards or simplified impact standards.

The development options for an individual site may be governed by the terms of a restrictive covenant. For example, the new owner may agree to use the land only for residential purposes. By making the terms of the covenant more comprehensive, it is possible, for example, to limit the types of residential construction allowable.

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[1]Bernard H. Siegan, Land Use Without Zoning (Lexington, Mass.: Heath and Co., 1972), p.34.

[2]John C. Allen, "The Municipal Enforcement of Deed Restrictions: An Alternative to Zoning," 9 Houston Law Review 838 (1972).

[3]Siegan, p.24.

[4]Allen, p. 822.

[5]Thomas M. Susman, "Municipal Enforcement of Private Restrictive Covenants: An Innovation in Land Use Control," 44 Texas Law Review 764 (1966).

[6]Id.

## Local Environmental Impact Ordinances

The North Carolina Environmental Policy Act of 1971 enables North Carolina localities to require detailed environmental impact statements from developers of "major development projects".[1] Like the federal and state environmental impact statement requirements, local environmental statements must generally include a discussion of the environmental impacts of the proposed development, of measures to mitigate adverse environmental effects, of alternatives to the proposed actions, or relationships between short-term uses of the environment and long-term productivity and of irreversible environmental changes.[2] The purpose of such a statement is to give localities the authority to encourage environmentally sound land use patterns by requiring developers to account for environmental values in project design and site layout.

### Authority

The North Carolina Environmental Policy Act of 1971, N.C.G.S. 113A-8 to 10, authorizes localities to require environmental impact statements from developers of major development projects.

### Viability

While the idea of a local environmental impact ordinance is appealing to many localities as a way to control large development projects, the use of the tool has not been widespread. Generally, this limited use reflects a lack of understanding of the potential flexibility and adaptability of the tool, as well as a fear that such an environmental impact ordinance might add yet another burdensome procedural requirement to the development approval process.

For a local environmental impact ordinance to be effective, a locality must have the professional capability to review impact statements and to assist developers in laying out projects that adequately account for ecological processes. This review process would not necessarily be cumbersome, however, and environmental considerations probably could be

readily incorporated into the existing subdivision and planned unit development review process (see above, sections on Planned Unit Development and Traditional Subdivision Regulation).

Where It Has Been Used and To What Effect

The enabling legislation for local environmental impact statements has been largely ignored, despite its potential for improving land use patterns and involving the public in localities' decision-making process.

Legal Issues

Because of its limited application in North Carolina, no lawsuits have occurred involving local environmental impact ordinances. However, several other states require that local governments conform to environmental impact procedures.[3] The highest court of California, for example, has held that the local environmental impact ordinance procedure is required upon a locality's issuance of a special use permit where the project would significantly affect the environment.[4]

Focus

This technique provides the local government with information relevant to planning decisions. However, since it is not tied to enforcement provisions which prevent environmentally unsound development, it does not seem very effective for influencing any of the characteristics of growth.

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[1]N.C.G.S. 113A-9 (1) states that the term "major development project shall include but is not limited to shopping centers, subdivisions and other housing development, and industrial and commercial projects, but shall not include any projects of less than two contiguous acres in extent".

[2]N.C.G.S. 113A-4 (1978).

[3]Nicholas C. Yost, "NEPA's Progeny: State Environmental Policy Act", Environmental Law Reporter 3 (1973), 50090-50098.

[4]Friends of Mammoth v. Board of Supervisors, 8 Cal.3d 247, 104 Cal. Rptr. 761, 502 P.2d 1049 (1972).