Timing and Sequential Controls--The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region

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Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region†

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† This Article is the result of a 1972-73 grant from the Twin Cities Metropolitan Council to Professor Freilich to study and recommend a legal policy for regional growth in accordance with the Council's decision to pursue growth in a timed and sequential manner.

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I. INTRODUCTION

In 1972 the Court of Appeals of New York ushered in a new era of land use planning in the United States when it issued its opinion in Golden v. Planning Board of the Town of Ramapo.1 In upholding the constitutionality of timing and sequential controls for the regulation of metropolitan land development, the court approved the first major linkage between planning and zoning in the shaping of an urban area. This Article is the outgrowth of a study, prepared by the authors for the Twin Cities Metropolitan Council, which used the Ramapo concept of controlling the timing and sequence of growth to develop a program of planning goals and techniques for the control of urban sprawl in the Minneapolis-St. Paul region. The study indicated that it may be possible, through regional growth controls, to redistribute a portion of the current rapid growth on the suburban fringe of the area into the urban core or free-standing new towns. The region may thus be able to accomplish its critical objective of regulating urban sprawl while simultaneously assuring adequate public facilities for all housing consumers, substantial savings in capital and operational costs, prevention of environmental degradation, creation of permanent open space, and regional production and distribution of low and moderate income housing. This Article will explore the urgent need for growth controls in the region and will analyze the constitutional problems of regulation and the methods, plans, and techniques which may be used to implement the proposed program.

The problems of urban sprawl and improper regional growth have been at the center of the national consciousness for at least a decade.2 The current energy and environmental

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2. Lewis, Waking Up, N.Y. Times, Jan. 3, 1974, at 35, col. 1. A number of major commissions and study groups have turned their attention to grappling with these problems and their solutions. The National Commission on Urban Problems (the Douglas Commission) was directed by the President to study the problems that urban areas are facing. After two years of deliberation, five volumes of testimony, and nineteen separate technical reports, the Commission in its final report, Building the American City, surveyed the problems of suburban development, urban sprawl and premature subdivision. It recommended to the President and the Congress:

At the metropolitan scale, the present techniques of development guidance have not effectively controlled the timing and location of development. Under traditional zoning, jurisdictions are theoretically called upon to determine in advance the sites needed for various types of development. . . . In doing so, however, they have continued to rely on techniques which were
crises have opened the eyes of the country to the ugliness and costliness of the scattered development and inner city abandonment which have characterized our metropolitan land development since World War II. These crises, while signalling the end of an egregiously affluent, wasteful life style, should be taken as a challenge to create a more rational system of land use planning and to revitalize urban life. Instead of a policy of unplanned growth with a secondary, half-hearted effort towards

never designed as timing devices and which do not function well in controlling timing. The attempt to use large-lot zoning, for example, to control timing has all too often resulted in scattered development on large lots, prematurely establishing the character of much later development—the very effect sought to be avoided. New types of controls are needed if the basic metropolitan scale problems are to be solved.

NATIONAL COMMISSION ON URBAN PROBLEMS (DOUGLAS COMMISSION), BUILDING THE AMERICAN CITY, H.R. Doc. No. 34, 91st Cong., 1st Sess. 245 (1968) [hereinafter cited as DOUGLAS COMMISSION].

The Regional Plan Association, in its Second Regional Plan for Greater New York, describes urban sprawl as follows:

Speculative ventures and premature developments are pushing Spread City farther and farther out, with isolated new homes and subdivisions dotted along rural roads as far as 50-80 miles from major cities.

Regional Plan Association, Second Regional Plan for Greater New York, 90 REGIONAL PLAN NEWS 9 (1969). “The result is ‘leapfrogging’, the antithesis of overall planning for an area, which causes scattered development, soaring costs of municipal facilities and services to residents.”

Noble, A Proposed System for Regulating Land Use in Urbanizing Counties, ASPO PLANNING ADVISORY SERVICE REPORT 16 (1967). The Advisory Commission on Intergovernmental Relations states:

Unplanned development, scattered in random and leap-frogging fashion over the countryside destroys natural space for the growing demand for recreation and other purposes. Furthermore, it spirals public service for sewers, water lines, and school bus transportation.


... A larger public role in the deployment and development of land. ... also means in some cases holding land from development for open space or future use and preventing the work of land that is haphazard and unplanned.

NATIONAL COMMITTEE ON URBAN GROWTH POLICY, THE NEW CITY 113 (1969). The Douglas Commission therefore concludes:

The prevention of urban sprawl should therefore qualify as a valid public purpose justifying the use of valid zoning and timing regulations. ... The Commission recommends that ... local governments establish holding zones in order to postpone urban development in areas that are inappropriate for development.

NATIONAL COMMISSION ON URBAN PROBLEMS, ALTERNATIVES TO URBAN SPRAWL 45 (Res. Report No. 15, 1968).

For a view that man should consider the rapidly occurring crises of the age as a challenge rather than a curse, see A. TOFFLER, FUTURE SHOCK (1970).
equitable redistribution of wealth, a policy of planned distribution of scarcity, which will include in its very fabric a fair distribution of amenities to all economic, social and racial groups in our society, can be developed. The techniques proposed in this Article for controlling growth would permit the Minneapolis-St. Paul metropolitan area to shape its growth towards such an end, while improving the quality of life for all its inhabitants.

A. LAND USE PLANNING AND THE PROBLEM OF GROWTH IN AMERICA

In most metropolitan regions of the nation growth has been taking place almost exclusively on the suburban fringe. This great movement of people and industry to the suburbs has led to wasteful and inefficient urban sprawl and leapfrog development. Most suburban communities have been unable to provide adequate municipal facilities for new residential developments. Developers seeking inexpensive land have located in areas without adequate sewage, roads, police stations, recreation facilities, and other services, thus shifting the burden of capital investment to the public sector. The result has been a soaring general property tax rate to meet the increased need for public facilities. This transfer of the true cost of development from the developer and consumer to the public sector has led to land speculation, destruction of environmental resources, defensive incorporations and annexations, and an increase in the cost of public services.

Much of the failure to prevent or adequately deal with these problems can be attributed to two causes. First, most jurisdictions do not adopt a comprehensive approach to urban problems. Even where there is regional planning on a scale commensurate with the scope of the problems, sufficient regional power to implement this planning does not exist. The bulk of the power to regulate land use is shifted by state enabling acts to local political units and, so held, is at best ineffective. In many instances this distribution of power is an active impediment to the goals of effective land use control.


4. See Freilich, Golden v. Town of Ramapo: Establishing a New Dimension in American Planning Law, 4 Urb. Law. ix (1972). Other consequences of the public bearing the costs of private development are an imbalance between uses; inefficient use of energy resources because of sprawling roads and utility lines; poor quality in those services which are provided due to the extensive demands on the limited resources of the communities; and an unwillingness to provide adequate housing for diverse racial, economic and ethnic groups.
Second, governing bodies have often assumed that the due process clauses of the state and federal constitutions restrict their ability to adequately govern the decisions of private landowners. Many people in the United States still hold a deep-seated belief that land ownership is "absolute."5 Of course, under American law, all property is held subject to the police power, which allows the state to regulate where necessary to preserve the public health, safety and welfare of the community. This power is not clearly circumscribed, but is capable of expansion to meet conditions of modern life.6 Although a flexible view of the police power was clearly enunciated in the important early zoning cases, those who framed the precursors of today's zoning and subdivision ordinances still believed the police power to be unequal to the task of regulating the orderly growth of land. Members of early planning bodies thought that communities could regulate and divide territorial area into use zones or even provide for flexible planned development, but that regulating the timing and sequence of the development process was an impermissible taking of property without just compensation.7 In addition, even where such narrow interpretations of the due pro-

5. See C. Berger, Land Ownership and Use 1-14 (1968), for an excellent discussion of the effect of nuisance and civil rights laws and land use regulation on the "absolute" right of ownership.

   Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago or even half a century ago, probably would have been rejected as arbitrary and oppressive.

7. For an excellent analysis of the due process clause as a restriction on land use regulation, see F. Bosselman, D. Callies & J. Banta, The Taking Issue (1973), particularly for the showing that courts have been limiting taking questions to fewer and fewer areas in order to expand the natural role of land regulation in a complex society.
cess clause were not invoked, governing bodies were constrained by equally restrictive readings of the state enabling acts from which their powers were derived; thus no direct remedy dealing with scattered development and urban sprawl was ever considered. Instead, communities sought to remedy the defects through zoning devices intended for other purposes. Agricultural and industrial holding zones, numerical quotas, excessive large lot zoning, elimination of multiple family uses, and minimum floor area restrictions have all been improperly utilized as growth control devices.\(^8\) Unfortunately, these devices have further exacerbated the problem and resulted in the disastrous side effect of excluding low and moderate income families.\(^9\)

B. The Minneapolis-St. Paul Experience

Two recent reports comprehensively document that the development currently being experienced in the Twin Cities metropolitan area mirrors the national pattern. These reports note the following trends:\(^10\)

1. Agricultural activities are moving further away from the urban core, opening up large amounts of vacant land for housing developments in a 12 county area within a 50 mile radius of Minneapolis-St. Paul;

2. The population of the region is rapidly growing in a wide band of middle-outer suburbs, tapering off in the inner suburbs and declining in the two central cities;

3. Development is dispersing into pockets of housing at sites scattered along lakes and roads far out into the previously rural countryside, resulting in the creation of 25 new municipalities within the last 10 years;

4. More than 85 percent of the predicted 830,000-880,000 population increase in the region by 1990 will fall within the middle-outer suburban rings, and beyond;

5. Rapidly expanding urban sprawl and increasingly scat-

\(^8\) Cutler, Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe, 1961 Wis. L. Rev. 370.


\(^10\) Citizens League Planned Unit Development Committee, Minneapolis, Growth Without Sprawl (September 19, 1973) [hereinafter cited as Citizens League Report]; Twin Cities Metropolitan Council, Discussion Statement on Metropolitan Development Policy (October 17, 1973) [hereinafter cited as Metropolitan Development Discussion Statement].
tered development are resulting in more costly public and private facilities, inefficient use of capital investment in built-up areas, loss of valuable open space, high costs in abating substantial surface and ground water pollution, and vastly increased rates of taxation. A side effect of this scattered development is competition between communities, which produces further fragmentation, imbalance in the provision of housing and public services, and serious energy problems.

To address these problems, the Metropolitan Council is attempting to determine the feasibility of implementing timing and sequential growth control policies for the region. In particular, it is considering whether timing controls, including development easement acquisition and open land taxation policies, can be developed for rural and urban service areas and whether controls which can be sustained beyond a first generation capital improvement plan can be formulated for agricultural and open space areas.

A physical development framework has been published which proposes a regional policy for managed growth based on timing and sequential controls and incorporates maximal local government involvement and decision-making. The Physical Development Framework Policy begins by dividing the metropolitan region into five separate planning areas: Planning Area I consists of the metro centers, the downtown areas of Minneapolis and St. Paul; Planning Area II, the central city and older suburban areas; Planning Area III, the areas of active urbanization; Planning Area IV, the rural areas; and Planning Area V, free-standing new towns and cities within the rural area. Certain objectives have been set for each planning area, and the Council has suggested how development and redevelopment should be carried out in each area consistently with these objectives. For Planning Area I these objectives include attracting financial institutions, specialized professional and retail functions, office space users, and regional cultural and entertainment complexes and encouraging a broader socio-economic mix. The Planning Area II objectives emphasize the maintenance of structures and neighborhoods in generally sound condition, the redevelopment or rehabilitation of deteriorating neighborhoods, the construction of new houses in types and densities consistent with the market preferences of the population at large, the removing of uncertainties about the future of older neighborhoods and the reduction of concentrations of minorities and low income families. The goals set forth for Planning Area III include supporting growth and additional public investment as needed to complete
development of skipped over land in municipalities that have already invested in capital facilities, opening up new land for urbanization in a staged, contiguous manner through capital budgeting of public service extensions, and providing balanced housing types for a variety of income levels.\footnote{\textit{Citizens League Report}, supra note 10, also calls for the timing of development in accordance with the availability of adequate public facilities.}

Planning Area IV would, at least for the generation of capital investment in built-up and contiguous areas, remain primarily rural, with provision for the optional development of free standing new towns and communities. The restriction of growth and prevention of sprawl in Planning Area IV should result in greater reinvestment in Planning Areas I and II and a revitalization of the core of the region. The policies for Planning Area IV center around the preservation of an agricultural economic base and lifestyle, primarily through the enforcement of standards for residential development which will absolutely prevent public health and pollution problems and prohibit the extension of metropolitan-scale facilities or services into the area. Finally, the Council suggests that Planning Area V be reserved for free-standing new towns or rural communities in which development of a local economic base for growth will be emphasized. Each Planning Area V community will also be surrounded by a Planning Area III development of staged, contiguous growth to prevent scattered development and sprawl.

Throughout all the areas designated in the regional plan, low and moderate income housing would be encouraged. Where necessary, both subsidies resulting from capital cost savings and a bonus and incentive program for developers would be used.

This Article reviews and analyzes the legal techniques that are available to implement regional development growth policies. Thus, for Planning Area III a complete analysis of the Ramapo plan as well as other police power controls is explored. For Planning Area IV a combination of compensatory techniques, low density zoning, and transfers of development rights is proposed. The decisions, policies and guidelines of the Council, as well as statutory, constitutional and case law, are analyzed from both the national and Minnesota perspectives in order to ascertain whether existing legal powers are adequate to authorize these techniques. The analysis extends to the questions of whether the techniques are constitutionally permissible and whether the past policies of Minnesota and the Metropolitan Council accommodate the philosophy of timed and sequential
growth. It is our conclusion that there are no constitutional impediments to the use in Minnesota of the various legal techniques analyzed; however, there is a need for legislative authorization in order to implement properly and effectively a regional growth control guidance system.

II. POLICIES OF THE METROPOLITAN COUNCIL WITH RESPECT TO URBAN GROWTH CONTROL

A. POLICIES RESPECTING URBAN GROWTH CONTROL

In its role as coordinator of the planning and development of the metropolitan Minneapolis-St. Paul area, the Metropolitan Council is empowered to prepare and adopt a comprehensive development guide which will direct "an orderly and economic development, public and private, of the metropolitan area." The Council has repeatedly recognized through its decisions, policies, and guidelines the need to regulate the timing and sequence of growth. In seeking to control urbanization in the metropolitan area, Council policies have developed in two directions. First, the Council has supported programs of preservation and rehabilitation within that part of the metropolitan area which is already truly urban or suburban in order to encourage a redirection of growth back into the city proper. Second, upon the assumption that new areas must be urbanized to provide services for a growing population, the Council has developed policies to control growth in areas of active urbanization.

1. Policies for the Already Existing Urban Areas

The Council's policy stresses the maximum use and reuse of existing structures and already-developed areas. There is a strong commitment to increasing the liveability and viability of the downtown districts, older commercial areas, and older residential neighborhoods. The concept of timed development is most suitably applied in areas that are not yet developed or that are still undergoing development; therefore, this concept does not play a direct role in the center city policies of the Council ex-

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CEPT insofar as a staged renewal or rehabilitation program is established. However, the actual timing and staging of growth in urbanizing areas is directly influenced by the success of attracting growth back into the cities, for an effective revitalization of the older metro area should diminish the need for additional urbanization elsewhere.

2. Policies for Areas of Active Urbanization

The Council has devoted the bulk of its attention to areas where active urbanization is underway. This emphasis is the result of the realization that both the viability of the older metropolitan areas and the continued existence of a rural hinterland are inextricably tied to development policies in the rural-urban fringe. Urbanization which is not integrated with development in the central city and older suburbs fragments the metro area, unnecessarily duplicates pre-existing services, and wastes rural land that need not yet undergo the painful adolescence of urbanization.

Council policies for areas of active urbanization necessarily depend upon analyses of problems within the context of time. The decision to plan is, in effect, the choice to acknowledge the interplay of growth and time; thus, the underpinnings of Council policy lie in projections of population growth in the metro area by the year 2000. The Council has recognized that to regulate growth adequately over time it must use planning tools both of definite duration, such as capital improvement and short- and long-term development plans, and of flexible and indefinite duration, such as "as long as they are needed," "pay as you use" and "availability of services" plans.

An example of the crucial role phased development concepts play in Council policies for areas of active urbanization can be seen in the Council Sewer Program. The present Sewer Guide

16. Id. at 52.
17. Id. at 59.
18. Id. at 136.
19. The goal of phased and timed development is also apparent in other policies of the Council:
1. Transportation

The Council's Metropolitan Development Framework states that "[h]ighway investment should support staged development of the urbanizing portions of the Metropolitan Area. . . . Transportation facilities help achieve the desired urban result if a coordinated and staged transportation-development plan is followed." Id. at 94. Accordingly, the Council has proposed that transit guideways be provided "in a staged program moving each corridor outward from congested areas." Id. at 100.
states that the orderly growth and development of the metro area can be encouraged by the phased extension of interceptors to which developments must connect. Decisions on sewers are to be made in accordance with Sewer Policy 17, whereby plans and programs of providing central sewer service to urban areas are formulated according to the following priorities:

1. [To] serve existing development that is subject to immediate threats to public health or safety, or that is producing serious pollution of natural resources;
2. [To] serve areas that are scheduled to open up for development within five years consistent with other metropolitan development policies, giving top priority to higher density areas and lower priority to lower density areas;
3. [To] serve remaining development that requires sewers.

The Council's guidelines and procedures for review of community comprehensive sewer plans (CSP) state that one of the key points to be contained in such plans is an incremental construction program. In order to prevent the extension of an interceptor through open land from operating to disrupt this incremental approach, the Council has determined that construction of such an interceptor will not automatically open the area up for development. Rather, the interceptor construction is to be viewed as compatible with the staged economic extension of sewers contemplated by the Council for the Metropolitan Service Region.

The same goal of orderly and economic growth is apparent in the Council's newly-developed system for the allocation of

2. Housing

The Council has promoted policies favoring housing development "timed to coincide with the economical and orderly provision of such urban level services as central sewer and water facilities, adequate public roads and transportation systems . . ." Id. at 133. Council policy states that timed extension and addition of services is the preferred way to achieve a priority system designed to encourage residential development within or contiguous to the urbanized portion of the region. Id. Development of services should occur on a priority basis, e.g.,

First Priority—Mostly developed with 35 per cent or less of the land undeveloped.
Second Priority—Developing/developed with between 36 and 60 per cent of the land undeveloped.
Third Priority—Rural/developing with between 61 and 89 per cent of the land undeveloped.
Fourth Priority—Rural with over 90 per cent of the land undeveloped. Id. at 136.

3. Recreation Open Space

The Council has declared that "the provision of recreation open space should be an orderly process requiring a local recreation open space plan and five-year capital improvement program." Id. at 157.
20. Id. at 51.
21. Id. at 53.
22. Id. at 58.
reserve capacity costs, the Service Availability Charge.\textsuperscript{23} Under this system, developers are assessed according to a "pay as you use" rather than a "pay as you can" formula. The timing element of this system is highly flexible, so that it can respond to the needs and pressures generated by a growing population.

The Council's implementation of orderly development thus depends to a large degree upon controlling development by timing. The Council has established priorities expressed in terms of years and has suggested capital improvement plans of finite duration. It has also relied upon concepts of flexible staging expressed in terms of such variables as need and availability of services. The Council has not confined development to a strict timetable. Rather its timing controls are currently characterized by their fluidity. There is no doubt, however, that the goal of orderly and economical development could justify more stringent timing controls than the Council presently chooses to use.

B. \textbf{POWERS OF THE COUNCIL TO IMPLEMENT REGIONAL GROWTH CONTROL}

Even the most thoughtfully created and clearly articulated policies have little consequence in the absence of the power to implement them. The lack of stringency and definiteness in Council timing and staging policies probably reflects more an awareness of powerlessness than a conscious choice to impose flexible controls. The Council, as a creature of the legislative will, can exercise only those powers delegated to it. It lacks sufficient police power and possibly the power to enter cooperative compacts with other governmental entities. The Council stands in the unenviable position of a coordinator with very limited means to enforce coordination upon those who do not wish to cooperate.

Enabling legislation has not vested the Council with a uniform grant of supervisory power; power delegated by the state varies according to the subject matter to be supervised. The Council has its greatest amount of authority in the area of sewer services. In addition to its usual review powers under the Metropolitan Council Act, the Council has recently been granted control over sewer matters of metropolitan significance.\textsuperscript{24} In addi-

\textsuperscript{23} Id. at 59.
tion, it reviews applications for assistance under federal grant and loan programs. Further, the Council is empowered by the Metropolitan Sewer Service Act to give binding approval or disapproval to local sewer plans. While the Council also has considerable power to control solid waste disposal, as the Metropolitan Development Framework indicates, the processes of solid waste disposal do not contain the same urban shaping potential as does the development of a regional sewer system.

Apart from sewage and solid waste control, however, the Council's powers are basically restricted to review and recommendation. These restrictions can render the Council's best attempts to create area-wide plans worthless. For example, the only result of the Council's disapproval of the Watergate project was that the project was forced to utilize nonfederal financing, taking it outside of Council jurisdiction.

C. POSSIBLE LEGISLATIVE ALTERNATIVES

Under existing legislation the role of the Metropolitan Council to influence and shape regional policy is limited. The Council could adopt three alternative postures to expand its role under current law:

(1) Influence patterns of growth through regional capital improvement plans and projects.

25. The Intergovernmental Cooperation Act of 1968, 42 U.S.C. §§ 4231-33 (1970), as effectuated through the rules promulgated in the Office of Management and Budget Circular A-95, provides for review of applications for assistance under more than 100 federal grant and loan programs by state, regional and metropolitan clearing houses. See Heyman, Legal Assaults on Municipal Land Use Regulations, 5 U. Ill. L. Rev. 1, 17 (1973). The reviews are advisory only, and seek to identify the relationship of proposed projects to area comprehensive plans. The review requirement, originally established under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3301 et seq. (1970), has stimulated the creation of regional councils of governments and preparation of regional plans, but it will obviously not regionalize land use planning. Occasionally certain areas have used A-95 review to stimulate a regional program. For example, Dayton, Ohio's Miami Valley Regional Planning Commission "fair share housing" plan was designed to distribute low and moderate income housing equitably, but the plan has not been particularly successful. Craig, The Dayton Area's "Fair Share" Housing Plan Enters the Implementation Phase, 6 Ctrv. Jan.-Feb. 1972, at 50. Moreover, the effectiveness of A-95 review has been further weakened by its omission from general revenue sharing under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 1221 et seq. (Supp. II, 1972).

29. Id. at 190.
(2) Enter into cooperation agreements with governmental entities in the region. However, the power to enter into such agreements is granted only to those governmental entities which are empowered by Minnesota law with the power to zone, a power not granted the Council. Even if authority to enter into such contracts could be implied, this approach would of necessity be piecemeal, and would tend to fragment rather than unify the metropolitan area.

(3) Attempt to use its powers of review over federal grants and loans to force compliance with the regional plan. As the Watergate project shows, however, an unfavorable decision does not necessarily stop a project which conflicts with Council plans. Furthermore, it is questionable whether under the statute this is a legitimate use of the power of review.

Each of these approaches has serious limitations; existing legislation simply does not delegate sufficient power to the Council to permit it to plan and control growth in the metropolitan area effectively. New legislation is vital and would supplement the powers recently granted to the Council by the Metropolitan Reorganization Act of 1974. New legislation addressed solely to the Council or relating to all regional planning districts and local governmental units could be sought.

As will be shown in subsequent sections, a comprehensive range of new techniques must be established by the Council. These techniques will require the use of regulatory, compensatory and financial powers. At a minimum, the Council will require power to (1) review comprehensive planning of local communities to insure that local plans and implementing ordinances are in accordance with regional planning, particularly capital improvement programming; (2) condemn land to insure that environmentally critical areas are preserved, and that long term open space areas in Planning Area IV are provided through development easement acquisition, land banking, and transfers of development rights; (3) insure that housing for low and moderate income families is located throughout the region, and provide for rehabilitation and insurance of blighted and transitional areas and compensation for affected communities and property owners in Planning Area IV; and (4) enter into intergovernmental agreements with local governmental units which will cover all areas of planning and environmental concerns and would include provisions for technical service and assistance.

Local governments must remain the essential link in the process, retaining decision-making powers at the implementation

stage of the planning process. They will, however, require extensive new powers, including power to utilize timing and sequential controls in zoning and subdivision regulation; to impose interim development controls to protect the planning process; to provide for capital improvement planning and long term budgeting; to utilize flexible zoning, subdivision and official mapping techniques; and to grant assessment relief for restricted properties.

III. STATE AND REGIONAL POLICIES SUPPORTING REGIONAL URBAN GROWTH CONTROL

The next two sections will deal with the two major hurdles confronting utilization of growth controls on a broad scale. First, the constitutionality of growth control and its many planning facets must be established. This problem will be discussed in Section IV. The second critical problem for comprehensive growth control lies in the level and scope of the regulatory unit itself.

Traditional approaches in land use control have concentrated decision-making power at the local or municipal level and, perhaps secondarily, at the county level. Only rarely has the power to control land use been exercised by the state or a regional unit. The traditional lack of state initiative has not been a result of impotence. States have inherent power over their political subdivisions and, within the limits of equal protection and due process, can add to or withdraw the power delegated to local units at will. It is becoming increasingly apparent that there are many advantages to control at a higher level over land use problems. A number of crucial land use problems are not local in either effect or origin, and the scope of effective regulation must be commensurate with them. It is proving impossible to successfully regulate regional problems with a frag-

LAND USE CONTROLS

In response to this necessity, states are passing statutes to recapture some of the police power previously delegated to municipalities and exercise it on the state or regional level. A great many of these new regional acts seek to protect critical environmental areas, as well as coastal zones and wetlands. The usual approach is for the statute to establish a regional commission and a set of state or regional standards; it is usually provided that if a locality fails to protect the designated areas, the state or regional commission will have the power to implement its statutory duty. There are also a growing number of states which have established regional control over areas where critical problems transcend political boundaries, and they have fared well in the courts. These regional control bodies do not repre-

sent a cooperative federalism with local implementation in accord with state or regional standards. Rather, they represent direct control by special regulatory units whose boundaries encompass the problem areas.

A. VALIDITY OF REGIONAL APPROACHES

The utilization of regional and state level units for the exercise of zoning and planning power will necessitate a new delegation or redelegation of the police power. Jurisdictions that have considered the issue have held that delegation to regional bodies is both a constitutionally reasonable means to the legitimate end of regional problem solving and a valid technique under appli-


Centralization of land use control could increase even more rapidly with the adoption of a federal land use planning bill such as the Land Use Policy and Planning Assistance Act of 1973, S. 268, 93d Cong., 1st Sess. (1973), which was passed by the Senate, but died in the House Rules Committee. The Act contemplated five annual grants to the states, covering up to 90 percent of the cost of developing a state land use program. Three subsequent annual grants would cover up to two-thirds of administrative costs. A total of 800 million dollars would have been apportioned to the various states in accordance with the scope of their problems and their financial need. The grants would have been a supplement to present funding, not a replacement, but they would not have been usable for land banking.

To qualify for grants under the Senate Act, the state would have been required to develop a land use planning process within three years, including a state level planning agency, an inventory of land and natural and human resources, and a program to regulate land sales and developments of more than fifty units which are located more than ten miles from the SMSA. Within five years, the state would have had to develop a land use program, including methods to control areas of critical ecological concern, areas of historic interest, areas around key government facilities, developments of more than local significance, and methods to assure the local regulations would not create an imbalance of land uses.

The bill contemplated federal review to determine the efficacy of planning and implementation, and sanctions ranging from loss of planning benefits to loss of unrelated highway, airport and recreational grants were considered, although the latter sanctions were stripped from the bill both in the Senate and in the House Committees.
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As will be discussed, the ultimate validity and efficacy of police power regulation by any level of jurisdictional authority will depend upon resolution of the constitutional issues of due process and taking. The nature of the unit exercising the power may, however, make a difference in the outcome of decisions on the validity of regulation. Though the scope of the unit does not change the essential nature of the exercise of police power, it does bring some different considerations to the balancing process which may affect the outcome. For example, governmental units are invariably required by statute or case law to exercise zoning power pursuant to a comprehensive plan. When a comprehensive plan is drafted by a regional body, it is far less likely to be influenced by parochial considerations, and far more likely to be in accord with the scope of the problem. Therefore, even if regulation is severe in certain areas, a reviewing court, on examination of the plan, can more easily assure itself that exclusion of third parties is not its objective.

A regional unit should be utilized where a problem is widespread and a harm to a large segment of the population is threatened. It has been established that the police power can be used in land use regulation even by small neighborhood groups, as long as the interests advanced are not purely private. 


however, the wider the scope of regulation the more apparent is the public nature of the interest sought to be protected. Thus, a wider scope has an influence on the weight of the legitimate public objective, and this in turn can result in the constitutional imposition of a greater impact on the individual.  

B. MINNESOTA EXPERIENCE WITH STATE AND REGIONAL PLANNING

Minnesota, like many states, provides for state and regional comprehensive planning. However, the planning is primarily advisory, and the bulk of the police power is concentrated among the various local units.

All counties, except Ramsey and Hennepin, can plan comprehensively and can implement the plan with zoning, subdivision regulations, and interim controls. However, the significance of this power from a growth control standpoint is diminished somewhat because county political boundaries are rarely the boundaries of the problem areas, and because counties have no control over incorporated areas. Municipalities and urban towns can also plan comprehensively and can implement the plan with subdivision regulation, official mapping, zoning, and capital improvement plans. The exercise of these powers must be “in accordance with a comprehensive plan,” but, as in other jurisdictions, the courts do not equate a comprehensive plan with comprehensive planning. However, there are a number of statutory requirements that “due cognizance” be taken of adjacent municipalities in the formulation of plans and controls. The judicial branch can participate in this ad hoc regionalism by resolving conflicts between units with a “balancing of public interests” test.

40. Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969).
42. MINN. STAT. §§ 462.381-.396 (1971).
43. See text accompanying notes 24-29 supra.
44. MINN. STAT. §§ 394.21-.37 (1971).
45. Connor v. Township of Chanhassen, 249 Minn. 205, 81 N.W.2d 789 (1957); see also note 38 supra.
46. MINN. STAT. §§ 394.06-17 (1971).
47. Town of Oronoco v. City of Rochester, 293 Minn. 468, 197 N.W. 2d 426 (1972). Regional factors are not expressed in the concept or definition of “in accordance with a comprehensive plan” in the zoning enabling acts, and are therefore used only by a limited (albeit growing) number of courts as decisional factors in passing on the validity of local zoning ordinances. The judicial art in this respect is embryonic. Certain conclusions can, however, be drawn. Initially, it is apparent that
Even though much of the regulatory power remains fragmented among local units with only patchy and incomplete substitutes for true regional control, there is a growing legislative trend in Minnesota toward regional control of urban area functions and of state-wide interests affected by uncontrolled development. An examination of recent and proposed legislation indicates that the state may be on the verge of adopting a regional approach to comprehensive land use planning and growth control.

1. Orderly Annexation

An analysis of Minnesota annexation law makes it clear that a preference for orderly, rational growth characterizes municipal boundary changes in Minnesota. Together, legislators and judges have formulated a state policy of annexation whereby municipal boundary changes depend upon the objective condi-

the courts have almost always used regional factors in a negative or static sense, considering whether the proposed zoning is compatible with the existing state of the locality and region rather than whether the future needs of the region require the change. McDermott v. Village of Calverton Park, 454 S.W.2d 577 (Mo. 1970) (single family zoning in 1953 constitutes the planning of the area); Huttig v. City of Richmond Heights, 372 S.W.2d 833, 841 (Mo. 1963); Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954). Where the courts have used regional factors affirmatively and prospectively, as in the cases of In re Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970) and Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970), in which local zoning practices were invalidated because of their exclusionary effect on residents from adjoining central cities, the decisions have been just as blind to regional planning needs by the single-minded dicta that every municipality, no matter what its size, or what the regional needs are, must have multi-family zoning and small-sized lots. Cadoux v. Planning and Zoning Comm'n of the Town of Weston, 162 Conn. 425, 294 A.2d 582, cert. denied, 408 U.S. 924 (1972). Such decisions, though admirably egalitarian, are as parochial from the planning standpoint as the decisions to exclude. It would seem that a balance between total exclusion and total inclusion is possible, and that equal protection need not be deemed incompatible with comprehensive regional planning.

One reason why the courts have tended to emphasize negative factors lies in the restrictive standing requirements in zoning cases which have always favored resident landowners. See Ayer, The Primitive Law of Standing in Land Use Disputes: Some Notes from a Dark Continent, 55 Iowa L. Rev. 344 (1969). The breakthrough in permitting non-residents to challenge the validity of zoning ordinances, Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972); Allen v. Coffel, 488 S.W.2d 671 (Mo. App. 1972), even across state lines, Township of River Vale v. Town of Orangetown, 403 F.2d 684 (2d Cir. 1968), argues well for a more expansive, positive role of the judiciary in these matters. United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).
tion of the territory involved rather than upon the often parochial and subjective desires and interests of inhabitants of either the territory sought to be annexed or of the annexing body. Because intensive development in America is no longer feasible outside the bounds of governmental entities capable of providing necessary services, municipal boundary changes should serve as barometric indicators of growth conditions within an area. The significance of a state policy favoring orderly annexation therefore transcends the technicalities of municipal administration, for such a policy is an essential element in any attempt to plan, time, and control growth.

The keystone to Minnesota annexation law lies in the requirement that the property to be annexed be "so conditioned as properly to be subjected to village government." Since the Minnesota Supreme Court read this requirement into the 1913 annexation statute by reasoning that the qualifications for territory included in an original incorporation should also extend to territory sought to be annexed, it has been an integral part of the state's annexation law. Although its language has changed and it has moved from judicial construction to explicit statutory expression, its philosophy remains the same: it is the condition of the territory to be annexed that determines whether annexation will occur. Furthermore, the supreme court and the legislature have consistently concluded that the territorial condition which will trigger annexation must be one of present or impending urban (or suburban) development. Thus, the court has traditionally refused to allow annexation of areas which are basically rural and appear to be destined to remain so in the reasonably foreseeable future.

The refusal to impound primarily agricultural land within urban boundaries unless "being approached . . . by the onward march of an expanding residential population or . . . likely to be so approached in the reasonably foreseeable future" is a state decision to avoid contribution to the complex of pressures that leads to premature urban-suburban development of rural land. Thus, the "so conditioned" requirement is a mainstay of the policy in favor of ordered and orderly municipal growth. By preventing premature annexation, municipalities are encour-

48. MINN. GEN. STAT. § 1800 et seq. (1913).
50. MINN. STAT. § 414.041 (1971).
52. Id. at 37, 95 N.W.2d at 301.
aged to make full use of their current territorial resources before ingesting another bite of rural hinterland.

The creation of the Minnesota Municipal Commission (MMC), which serves as an administrative overseer of most municipal boundary changes within Minnesota, is further evidence of a state policy favoring orderly and controlled growth. In establishing the Commission, the legislature announced that “sound urban development is essential to the continued economic growth of this state” and empowered the Commission “to promote and regulate development of municipalities so that the public interest in efficient local government will be properly recognized and served.”

In the usual annexation project, those seeking a boundary change desire immediate action. Minnesota has recently enacted a statute allowing for a process termed “orderly annexation,” which permits the MMC to set aside designated territory for future annexation to a municipality until such time as the annexing entity is found to be willing and prepared to furnish urban services and the territory to be annexed is or is about to become urban or suburban in nature. When these conditions are met, the Commission may allow annexation. After annexation, the taxes in the annexed territory increase over a period of three to five years to the same rate as that of the annexing unit. As the MMC has said, “[t]his procedure allows the village to plan today to service the growth that everyone concedes will take place while not annexing any land until that growth actually does occur.”

Minnesota has also expressed support of an orderly municipal growth process by enacting a statute that empowers any municipality outside Ramsey and Hennepin counties to divide itself into urban and rural service districts for taxation purposes. By allowing differential taxes according to an area’s predominant nature, the pressures caused by assessment of urban level taxes in a non-urban area can be somewhat reduced.

2. Recent State Legislation

The Critical Areas Act is one of the most recent expres-
sions of concern with a policy of state direction and control of
growth. The Act's policy statement reflects an awareness that
uncontrolled development may have irreversibly damaging ef-
facts upon certain areas of the state classified as "areas of criti-
cal concern." Under the Act, the Minnesota Environmental
Quality Council (EQC)\(^\text{59}\) can recommend the designation of criti-
cal areas to the governor. The governor can then establish the
area as a "critical area" by an order which delineates the bound-
daries of the area, the reasons for its establishment, and the stand-
ards and guidelines for area regulation.

Local jurisdictions must submit their present plans for these
areas for review by the regional council which, in turn, makes
recommendations to the EQC. If a locality fails to make plans
which conform to the regional plan, the EQC can formulate le-
gally binding regulations for the area. Once the plan is in ef-
fect, no development can take place within the area except in
accord with the regulations. The Act provides for the establish-
ment of regional standards, regional review, and regional imple-
mentation should localities fail to conform their plans to the
standards. It demonstrates a legislative awareness of the im-
portance of regional planning for, and control of, critical regional
problems. It is only a short step from this to regional planning
and control of the timing and sequence of development.

Several other acts demonstrate the legislative awareness of
interjurisdictional problems and the necessity for comprehensive
regulation. The Minnesota Fiscal Disparity Law,\(^\text{60}\) which distrib-
utes a portion of the total increase in assessed value of commer-
cial-industrial property in the metropolitan region to all the com-
mosities in the area so that no municipality gets the full tax
benefits of new development within its boundaries, is not a tim-
ing device in itself but is integrally related to the concept of
staged growth. It reinforces the orderly, economic extension of
service into areas by removing the incentive for growth speci-
fically for the sake of increasing the local tax base. It permits
decisions regarding development in the region to be made by con-
sidering the best use of the land rather than simply the use of
the land which would generate the most tax revenue. Although
the law was challenged as violative of the Minnesota Constitu-
tion, the Minnesota Supreme Court has held that it is valid.\(^\text{61}\)

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60. MINN. STAT. § 473F.01 (1971).
The Flood Plain Management Act creates a state commission with authority to coordinate state, local and federal activities with regard to flood plains. Local ordinances must be reviewed for conformity and a failure of local initiative can be rectified by the commission. Similarly, the Shorelands Development in Municipalities Act establishes a commission which promulgates model standards for land use within a designated distance of lakes, ponds and flowage. Local plans must be in compliance or face change by the commission. A final example is afforded by the Metropolitan Airports Commission, which has vertical and horizontal zoning authority to regulate land use intensity around airports. Though not extensive in scope, the authority is commensurate with the range of the problems, and not political boundaries.

It seems abundantly clear that authorization of regional growth controls, particularly for the timing and sequence of development, would be compatible with both the developing trend of Minnesota law and policy and the continued responsibility of local units of government to implement that policy through the necessary ordinances.

IV. POLICE POWER REGULATION—THE CONSTITUTIONAL FRAMEWORK

There are two ways in which a state may control the use of land within its borders. First, it may use eminent domain to purchase land or interests in land. Second, it may regulate, that is, exercise its plenary power over matters relating to the public health, safety and general welfare. The power to regulate was initially vested in the state legislatures, but has, to a

61. In a four-three decision, the court held that the law was not in contravention of Art. 9, § 1 of the Minnesota Constitution. Village of Burnsville v. Dakota County, No. 44253 (Sep. 13, 1974).
64. The act is basically similar to that sustained in Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
65. The act, Minn. Stat. § 360.101 et seq. (1971), was sustained in Minneapolis-St. Paul Metropolitan Airports Comm'n v. McCabe, 271 Minn. 21, 135 N.W.2d 48 (1965).
66. See Consolidated Rock Prods. Co. v. Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962). The inherent nature of the power was recognized by the tenth amendment to the Constitution of the United States and reserved to the states.
considerable extent, been delegated to local political units by means of enabling legislation and home rule provisions. Regulation has been the work horse of past efforts at land use and growth control, and is likely to remain so in the future regardless of the regulatory unit since it can be used in a pervasive manner and without the necessity of compensating the regulated parties. Thus, the success of growth control may ultimately depend on the judicial response to the particular techniques of regulation. The basic test for determining constitutional limitations on the police power was expressed in Lawton v. Steele: a valid exercise of the police power must be a reasonable means to a legitimate end. This test, in various forms, is used in virtually every case in which the issue of police power validity is raised.

A. THE LEGITIMATE END

The legitimacy of the objective of regulation operates, in the first instance, as a threshold test. If a reviewing court finds the objective to be legitimate in some sense, it then examines the reasonableness of the means. In this subsequent examination, the legitimacy of the objective again is examined, although this time in a qualitative rather than a threshold sense.

There have been a number of attempts to formulate a definitive test for legitimate objectives of the police power. One test states that the police power can be used to regulate activities threatening harm to the public health, safety or general welfare. Another provides that the state may control a use's

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68. No compensation is required if the regulation is valid. Binder, supra note 41; F. BosseLMAN, D. Callies & J. Banta, The Taking Issue (1973). The early developers of zoning in New York City were conscious of the possibility of utilizing zoning by condemnation, but selected the police power approach primarily because of the real-politic of economics. See S. TOLL, ZONED AMERICAN (1969). The use of zoning by condemnation is recognized as valid by the courts. State ex rel. Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920), aff'd in part, Berry v. Houghton, 273 U.S. 671 (1927); Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969).
69. 152 U.S. 133 (1894). The decision was reaffirmed in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).
70. F. BosseLMAN, D. Callies & J. Banta, supra note 68.
harmful externalities,\textsuperscript{72} while a third permits the police power to be used to resolve conflicts within the private sector.\textsuperscript{73} A final test states that regulation may be used to meet the specific needs generated by new uses.\textsuperscript{74} Certain objectives, measured by any of the above tests, are not legitimate ends of the police power. Thus it is invalid to use governmental powers for private benefit, even with compensation,\textsuperscript{75} or to promote the proprietary as opposed to the governmental interests of an exercising body without compensation.\textsuperscript{76} Finally, it is often stated that uncompensated police power regulation cannot be used for achieving a positive public benefit, as opposed to preventing a harm.\textsuperscript{77}

The overall concept of growth control is difficult to categorize, primarily because it encompasses a diverse number of objectives. Some of the ends sought are clearly those of preventing harm to the public health and safety: pollution control, adequate municipal facilities, and control of the development of environmentally critical areas such as flood plains and unstable hillsides. However, a great number of the objectives are not related to health and safety, but only to the residual concept of general welfare, such as the preservation of land resources and land character, and the promotion of more efficient and socially balanced use of land. These objectives, depending upon the circumstances and the jurisdiction, may or may not shade into the area of public benefit where compensation is necessary for control.\textsuperscript{78} The national trend reflects a widening view of general welfare and regulable harms, at least where the protection of the environment is concerned. Thus, courts may be willing to view a state of natural environmental balance as a desirable end rather than as a prelude to development,\textsuperscript{79} and to hold that the changing of the natural state is a harm that

\textsuperscript{72} Dunham, \textit{A Legal and Economic Basis for City Planning}, 58 COLUM. L. REV. 650, 669 (1958).
\textsuperscript{73} Sax, \textit{Takings and the Police Power}, 74 YALE L.J. 36, 67 (1964).
\textsuperscript{74} Heyman & Gilhool, supra note 3.
\textsuperscript{76} Sax, supra note 73.
\textsuperscript{78} \textit{CITIZENS' ADVISORY COMMITTEE ON ENVIRONMENTAL QUALITY, TASK FORCE ON LAND USE AND URBAN GROWTH, LAND USE AND URBAN GROWTH} 23-24 (1973).
can be regulated under the police power without compensation. In addition, there may be an increasing tendency to give legislative declarations of necessity and purpose with regard to environmental regulations a presumption of validity.

Minnesota zoning and planning enabling legislation delegates power to various local political units to regulate the orderly provision of public facilities and the distribution of population. Thus, growth control should not be invalid or ultra vires as a threshold objective under the law. Minnesota case law also reflects the general rules on the legitimacy of police power objectives. The police power may not be used to promote purely private interests. In addition, the police power cannot be used to secure benefits, even if public in nature; such action requires the use of eminent domain. Thus, the limits to the constitutionality of regulation designed to control the distribution of population and the location and timing of development remains unclear.

Proponents of land use controls in Minnesota, as well as nationally, must argue that the preservation of land, resources, and environment is not the securing of benefits that require compensation. Rather, it is the prevention of harm to the public welfare, an objective that can be accomplished without the use of eminent domain. The Minnesota Supreme Court recently has indicated that it is in accord with the national tendency to grant measures to preserve the ecology a higher priority than in the past by holding that the controlling of sewage and air and water pollution is one of the most important functions of government.

In summation, it is clear that growth control is not intended to promote private interests, and it is strongly arguable that growth control regulation is not an illegal substitute for eminent domain. A comprehensive growth control plan attempts to prevent the manifold harms that accompany unplanned or uncontrolled growth: land waste, resource destruction, economic

80. Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
82. MINN. STAT. § 462.357 (Supp. 1973).
84. Sanderson v. Willmar, 282 Minn. 1, 162 N.W.2d 494 (1968).
85. Minnesota Pollution Control Agency v. Hatfield, 294 Minn. 260, 200 N.W.2d 572 (1972).
waste, and socio-economic and use imbalance. To call such factors the urban norm and their absence a benefit requiring compensation is perverse.86

B. REASONABLENESS OF MEANS

If the regulation passes the hurdle of the legitimacy of the objective, it is still necessary to consider the reasonableness of the particular means chosen. This examination may focus on any of several elements: the legitimacy of the legislative classifications, the relation of the means to the objective, the alternatives available, and the impact of regulation on the affected parties as compared to the significance of the objective sought.

1. Legitimacy of the Legislative Classifications

This is essentially an issue of equal protection. It is usually stated that a valid legislative classification must not single out persons or groups for special benefits or burdens.87 Rather, the classification must include all those similarly situated, must treat objects differently only if legitimate distinctions warrant such treatment, and must neither over- nor under-classify.88 As in other areas the legislature may exercise a considerable amount of discretion in formulating the classes. A valid legislative classification may not contain "suspect" criteria, whether these are stated in its terms or apparent in its effect. Thus an ordinance which imposes a burden on race, either specifically or because of its impact, is probably invalid.89 The existence of suspect criteria triggers a judicial "strict scrutiny" test, whereby the usual presumption of legislative validity is not applicable, and the state is forced to demonstrate both a compelling state interest and an absence of viable alternatives.90 Poverty is not a suspect

90. Shapiro v. Thompson, 394 U.S. 618 (1969) (race, religion, national origin, and denial of certain fundamental interests such as the right to vote or to travel interstate can trigger the strict scrutiny test). Several Michigan intermediate appellate court decisions have utilized the strict scrutiny test for land use regulation having any potential exclusionary effect. See Sager, Exclusionary Zoning: Constitutional Limitations on the Power of Municipalities to Restore the Use of Land, 1972 LAND USE CONTROLS ANNUAL 153.
criterion per se, but many courts show hostility to land use ordinances whose effect is the exclusion of the poor. This is extremely important with respect to growth control plans, since if a scheme which substantially restricts the use of certain lands falls with differential impact along lines of wealth or race, it may prompt a more rigorous examination by the reviewing courts. However, the most recent cases on growth control indicate that differential impact along lines of wealth will not result in invalidation if the land regulated is located in rural areas well outside regions of urban concentration, or if the exclusion of poor from one area or unit is anticipated and countered by


94. Timing and sequential growth controls have been put to such a rigorous test. In Golden v. Planning Bd., 30 N.Y.2d 359, 375, 378, 285 N.E.2d 956 (1st Cir. 1972), the court stated:

There is, then, something inherently suspect in a scheme which, apart from its professed purposes, effects a restriction upon the free mobility of a people until sometime in the future when projected facilities are available to meet increased demands . . . .

What we will not countenance, then, under any guise, is community efforts at immunization or exclusion. But, far from being exclusionary, the present amendments merely seek, by the implementation of sequential development and timed growth, to provide a balanced cohesive community dedicated to the effective utilization of land (emphasis added).

But see Construction Indus. Ass'n of Sonoma County v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), which held that a numerical limitation on the number of available building permits in the city of Petaluma was an unconstitutional interference with the fundamental right to travel interstate.

95. Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972).
provisions in the area or regional plan for low and moderate income housing elsewhere.\textsuperscript{96} Thus if the overall growth control plan takes account of poverty and the need for low and moderate income housing, the exclusion of the poor from particular areas will not necessarily be fatal.

The \textit{relation} of the means to the end is also considered in evaluating the reasonableness of the legislative classification. Wide-ranging measures taken to alleviate minor or localized problems will be viewed with suspicion by a reviewing court. If the variations between the scope of the objective and the effective scope of the means is substantial, the legislation may be invalid. This particular test has been helpful in regional growth control plans as the courts seem willing to recognize that a regional regulatory plan is reasonably related in scope to the solution of area-wide problems.\textsuperscript{97}

The Minnesota law on classification follows the national pattern. Classifications cannot be drawn arbitrarily and must include those similarly situated,\textsuperscript{98} there must be genuine distinctions between classes and the classification must be relevant to the end sought.\textsuperscript{99} Minnesota has little case law on exclusionary zoning and thus has not developed a position with regard to differential impact on the poor. However, if a true regional comprehensive plan is in use, this impact should be minimal.

2. \textit{Impact of Regulation Versus the Importance of the State Interest}

The validity of a regulation may be attacked in two ways. First, a general constitutional attack may be made focusing on the legitimacy of the end and the reasonableness of the relation of the means to the end. Such attacks are generally unsuccessful since the courts ordinarily will defer to legislative discretion in this area whenever possible.\textsuperscript{100} Second, an individual land-
owner may claim the regulation is invalid as to his land. In such a case the court balances the impact of the regulation on the landowner against the significance of the state's objective. The individual is more likely to succeed with this specific constitutional attack, since the court may give relief and still leave the ordinance intact. In addition, impact is not considered a matter to be left to legislative discretion. In assessing the impact of regulation with regard to the importance of the state's objective, the courts use the taking clause of the fifth amendment and the due process clause of the fourteenth amendment almost interchangeably. Both clauses contemplate a balancing process to determine where legitimate regulation ends and where taking without compensation begins.

There are a variety of factors that make up an evaluation of impact. None of them can be deemed the critical determinant as an abstract proposition. Rather all of them can be relevant and in a given case any one might be the dominant consideration. The diminution of a plot's market value as a direct result of regulation is a commonly asserted indication of impact. Courts will frequently state that diminution, if clearly established, is a relevant but not conclusive consideration; this observation may be appropriate with regard to most factors weighed in the balancing process. Another important consideration in evaluating impact is whether the regulated land has any reasonable economic uses remaining. However, even if the per-

102. The balancing process need not occur only in challenges to specific constitutionality. It may also be used in challenges to general constitutionality when the court weighs the interests and impacts evident on the face of the legislation.
104. In another sense, the balancing process determines where the means become unreasonable and an objective is achievable only through condemnation. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
mitted uses are economical, the ordinance may be deemed an invalid attempt to avoid eminent domain if it permits only uses which are calculated to benefit the public.\textsuperscript{108} The duration of the restriction also can be relevant; temporary restrictions of reasonable, ascertainable duration will not be deemed to be as onerous as permanent ones and may be thus sustained without the necessity of compensation.\textsuperscript{108}

The nature of the regulated interest or use can have an important bearing on the legitimacy of regulation. If the owner has no recognized property right, then the regulation cannot be deemed to have produced an impact. For example, one cannot have a protected interest in a nuisance, and the police power can destroy such nuisance without the necessity of compensation.\textsuperscript{110} There are no compensable rights in the government's navigation servitude\textsuperscript{111} or in the public trust.\textsuperscript{112} On the other hand, if the owner's use is of high social utility, then the impact of regulation may be deemed greater for purposes of balancing.\textsuperscript{113} Additional uses of the property, tax relief, compensation, and the transfer of development rights all might serve to mitigate the severity of the impact on an individual landowner.\textsuperscript{114} These will be discussed in some depth below.

As courts become more aware of the widespread effects of exclusionary zoning,\textsuperscript{115} there will be an increased consideration of impact not only in terms of the regulated land owner, but also in terms of unnamed third persons who might be excluded by

\textsuperscript{109} Steel Hill Dev., Inc. v. Sanbornton, 469 F.2d 956 (1st Cir. 1972); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).
\textsuperscript{110} Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915).
means of regulation. However, an exclusionary effect may not be considered of major significance if it concerns only a specific area removed from metropolitan pressures, or if it is counterbalanced by provisions of an overall regional plan.

As noted, a threshold determination of the fundamental legitimacy of the state interest is made in evaluating the validity of a regulation. Assuming basic legitimacy, the state interest is thereafter measured in substance, and balanced against the impact of the regulation. For the regulation to be valid the state interest must be sufficient, in a qualitative or quantitative sense, to warrant the impact. Such a determination is again made using a multi-factor approach, with a number of relevant but not necessarily conclusive considerations.

Since the prevention of harm to an aspect of the public health, safety or general welfare is often said to be a legitimate state objective of the police power, it is relevant to determine the likelihood and magnitude of the harm and the immediacy of the threat. The likelihood that a harm will occur depends to a large extent on both the regulated use's propensity for harmful externalities and the nature of the area where the use is located. Magnitude, in turn, may be a function of both the inherent severity of the harm and the scope of its potential impact; if the harm threatened is death or serious bodily injury to a substantial number of persons, the state's interest in preventing it is obviously higher than if the threat is only to the property of a few isolated landowners. Whether a use with given tendencies presents an immediate threat often depends on the topography, demography, climate, and degree of urbanization of the area involved.

117. Steel Hill Dev., Inc. v. Sanbornton, 469 F.2d 956 (2d Cir. 1972).
119. "State interest" is used to indicate the governmental interest advanced by regulation. It may also be the interest of the municipality, county or regional authority, as delegates of the state's police power.
120. The wider the range of the public protected, the stronger the public interest. Lawton v. Steele, 152 U.S. 133, 136-39 (1894).
The general welfare encompasses a wide range of public interests which can be protected from harm by the police power; however, not all of these interests are weighted equally in the balancing process. Rather, there are qualitative differences that may affect the ultimate validity of the regulation. Some interests are simply deemed less substantial in public importance and so will sustain less of an uncompensated impact. The objective of preventing a harm to the public health or safety is accorded the highest priority. Regulations to prevent such harm will justify a high degree of uncompensated impact, especially if the threat is likely and of substantial magnitude.\textsuperscript{123}

On the other hand, objectives relating to aesthetics, historical considerations, and area character are all deemed legitimate,\textsuperscript{124} but of such a nature as to support only a minimal level of impact.\textsuperscript{125} Economic welfare, planned growth, and efficient service provision are deemed objectives of a slightly higher priority, and regulations designed to implement these objectives (and prevent the harm occasioned by their absence) will support a greater amount of uncompensated impact.\textsuperscript{126} Furthermore, there is a definite trend to accord the general welfare objective of preventing ecological or environmental harm a priority as high as that given the objectives of health and safety.\textsuperscript{127}

Minnesota case law on the assessment of impact and the balance of impact against state interest is basically in accord with the national pattern. However, the court has only discussed limited aspects of the problem, so that it is not possible to find precedents in all areas. The Minnesota approach to de-
terminating the validity of regulation involves the use of a multi-faceted approach to determine if it is a reasonable means to a legitimate end. Although a particular determination may often seem to focus on a single variable, this focusing merely means that the element was the most critical factor in that case. The court has given considerable weight to a substantial diminution of market value in determining impact and validity, but such a determination is not conclusive. In addition, the court has indicated that to be valid, a regulation must permit a reasonable remaining economic use suitable to the land regulated.

Minnesota cases hold that the weight accorded to the state interests will depend in part on the likelihood and severity of the threatened harm. For example, a regulation concerning discharge of water effluent was held invalid because it was based on a mere possibility rather than a likelihood of harm; this was not considered sufficient to justify a severe impact. However, the effect of the court's consideration of likelihood and severity of impact is blunted somewhat inasmuch as the legislative declaration is presumed proper and valid except in extreme cases. Other cases suggest that the court recognizes a hierarchy of public purposes, and that regulations tending to promote the public health and safety will support a greater impact than, for example, those promoting aesthetics, although all are recognized as legitimate objectives of the police power.

In the following section of this Article, a growth control regulation will be evaluated in the manner discussed above, as an awareness of the evaluation process can aid in the drafting and defense of the legislation. The importance of both proper planning and facts to support the existence of the public interest will

128. Sanderson v. Willmar, 282 Minn. 1, 162 N.W.2d 494 (1968); State ex rel. Foster v. Minneapolis, 255 Minn. 249, 97 N.W.2d 273 (1959).
129. City of St. Paul v. Chicago, St. P., Mpls., & O. Ry., 413 F.2d 762 (8th Cir. 1969), sustained a regulation which diminished the market value by almost 60 percent.
133. Naegele Outdoor Advertising Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968); Zumbrota v. Johnson, 280 Minn. 390, 161 N.W.2d 626 (1968); Alexander v. Owatonna, 222 Minn. 312, 24 N.W.2d 244 (1946).
be emphasized. The techniques to reduce impact on the land owners, and thus make the regulation less vulnerable to attack, will be suggested. Throughout the section there will be a focus on the importance of using a variety of techniques and developing data to support the existence and weightiness of the public interest involved.

V. TECHNIQUES TO ACCOMPLISH GROWTH CONTROL OBJECTIVES

The Council's physical development framework policies are a product of the need to coordinate the growth of five separate geographical areas of the region, each of which differs in terms of age, condition, type and intensity of the present development pattern.

I. Metro Centers-Downtowns of Minneapolis and St. Paul
II. Central City and Older Suburban Areas
III. Areas of Active Urbanization
IV. Rural Areas
V. Free Standing Cities and Villages

The importance of a sound factual presentation is apparent in the urban context as well. The town of Ramapo, on the outskirts of the New York Metropolitan area, successfully defended a growth control ordinance before New York’s highest court with success due in no small part to a thorough presentation of their case.

The town was able to present a vast array of planning data in their defense. In its statement of the facts in Golden v. Planning Board of the Town of Ramapo, the Court of Appeals pointed to the Town Master Plan, whose “preparation included a four volume study of the existing land uses, public facilities, transportation, industry and commerce, housing needs, and projected population trends. Additional sewage district and drainage studies were undertaken which culminated in the adoption of a Capital Budget.” Thus not only could the town rely upon a large number of formal municipal actions, adoption of a Master Plan, a Capital Budget, zoning and subdivision ordinances and the like, but they could also document each with thorough and detailed planning studies.

135. See text accompanying note 11 supra.
136. Although concentric growth is shown in the illustration in the text, it should not be thought of as a mandated form of regional planning. The five tiers can be utilized with any physical plan form. For example, the "radial corridor" plan of the Washington, D.C., area, selected to provide concentrated development, maximum prospect for mass transit, and critical open space close in to the urban core, can be just as easily represented:
The pursuit of the Council's objectives for these areas will require the balanced utilization of regulatory, compensatory and taxation techniques across all levels of government in the region as well as within each particular planning area. The implementation of a rational growth control plan for the region will involve a number of major techniques, including short term con-


A second example is the Kansas City metropolitan region's "metro-center" plan, which was developed to accommodate a lower density region with greater reliance on freeway and automobile transportation, with regional centers located at points where the major east-west and north-south freeways cross the outer bypass freeway.

Kansas City Metropolitan Region

trols, long term controls for gradual urbanization, long term controls for preservation of open space and rural areas, and permanent controls.137

A. SHORT TERM CONTROLS: PROTECTING THE PLANNING AND CAPITAL BUDGETING PROCESSES

1. Interim Development Controls

In order for a community to effectively and efficiently accomplish the task of regional growth guidance, it is essential that a comprehensive planning process be properly utilized. Only as a result of intelligent planning, including the adoption of specific goals and means for community development, capital facility formation, population density control, and social and economic balance, can a community effectively employ regulatory tools to deal with its myriad land use problems. Legal devices by which this important planning process can be encouraged and protected must be recognized and implemented. Interim development controls are an historically significant device which can be helpful in facilitating this process.138 In particular, large scale planning and regulation require some form of interim development control for maximum efficacy.

To establish interim controls, a temporary ordinance or regulation is enacted which prevents further development until the planning process has been completed and permanent controls to implement the plan have been developed. This ordinance serves three functions: first, it protects the plan during the formulation and implementation stages, and even during the continuous planning process which must follow if the land use system is to remain viable and flexible;139 second, it prevents the creation of non-conforming uses during the planning process140 (this is par-

139. United States v. City of Chester, 144 F.2d 415 (3d Cir. 1944); Tim v. City of Long Branch, 135 N.J.L. 549, 53 A.2d 164 (1947).
140. Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972); Downham v. City Council, 58 F.2d 784 (E.D. Va. 1932); Monmouth Lumber Co. v. Ocean Twp., 9 N.J. 64, 87 A.2d 9 (1952).
ticularly important for preservation of Planning Areas III and IV); and third, it permits public debate and citizen participation during the formulation and public hearing stages of the plan.\textsuperscript{141} However, formal ordinances are not always necessary. Informal techniques of administrative processing may be substituted, relying on the principle of administrative law which prohibits an administrative officer from granting a permit in violation of a proposed law implementing planning.\textsuperscript{142} While interim development controls have been used primarily by counties and municipalities, they are also being used successfully at the state and regional level through legislation to protect areas during the period within which a plan for preservation is being formulated.\textsuperscript{143} For example, in New Jersey interim controls were used by the

\textsuperscript{141} If the legislative body is unable to protect the area against the establishment of non-conforming uses during the planning process, it may all too often attempt to compensate by subterfuge. It may dispense with public discussion and participation, and enact the new plan and implementing ordinances as swiftly and silently as possible—avoiding any announcements which might spur a "race of diligence" among developers who will attempt to vest their rights before the impending legislative change. F. Chapin, \textit{Urban Land Use Planning} 98 (2d ed. 1965).

The expression "race of diligence" was made famous in the leading case of Downham v. City Council, 58 F.2d 784, 788 (E.D. Va. 1932). See also Roselle v. Moonachie, 49 N.J. Super. 35, 139 A.2d 42 (1958) and Hasco Elec. Corp. v. Dassler, 143 N.Y.S.2d 240 (Sup. Ct. 1955), in which "a race of technical advantage between the individual and the community representatives" is described. The extent and nature of the rush for building permits to acquire vested rights before the adoption of permanent controls making the proposed use nonconforming should never be overlooked or underestimated, particularly in a major metropolitan region. In one borough of the city of New York alone, the pendency of the new Building Zone Amended Resolution of the City of New York, which became effective on December 15, 1961, resulted in an increase in applications for construction of apartment house buildings from 364 buildings costing $441,900,000 in 1960 to 1,266 buildings costing $1,560,000,000 in 1961. C. Rathkoff, \textit{The Law of Zoning and Planning} 57-84 (Supp. 1965). See also J. Metzenbaum, \textit{The Law of Zoning} 1703 (2d ed. 1955).


\textsuperscript{143} In California these controls have been used by the Coastal Zone Commission, the San Francisco Bay Area Conservation Agency and the Lake Tahoe Conservation Agency. In New York the Hudson River Valley and the Adirondack State Park Commissions have relied on interim controls. See \textit{Summary of State Land Use Controls}, \textit{Land Use Planning Reports}, Spec. Rep. No. 1, Sep., 1973, at 4-5, 20.
Hackensack-Meadowland region, consisting of 13 municipalities, while a comprehensive plan was being prepared.\textsuperscript{144}

In testing the validity of interim controls, the threshold requirement is that the implementing body have legislative authorization to impose such restrictions. Most state courts have found such authorization in home rule provisions or the standard zoning enabling acts, or have relied on the implied authority to reasonably exercise police power to protect statutory planning processes.\textsuperscript{146} Assuming legislative authorization, the validity of the controls depends on the reasonableness of the approach used. The impact on landowners can be minimized and validity assured if several elements are present in the regulation: the ordinance should be reasonably limited as to time,\textsuperscript{148} the freeze should not prevent total development in the entire community, and there should be a variance procedure for those suffering unnecessary hardship.\textsuperscript{147} Controls which protect Planning Areas III and IV during the planning process, while leaving development free in Planning Areas I, II and V, soundly meet all of the above objectives. It should be noted that most so-called "stop-growth" or "freeze-growth" ordinances now in use around the country are really short-term interim development controls in the guise of developmental moratoria.\textsuperscript{148}

2. \textit{Minnesota Law on Interim Controls}

Minnesota municipalities do not have specific statutory enabling authority to enact interim controls pending rezoning, while counties have specific authority for one year interim controls if there is an impending plan or annexation.\textsuperscript{149} Municipalities have, however, attempted to use their general delegation of zoning and home rule power to enact hold orders, with little success. The Minnesota Supreme Court struck down one such

\begin{itemize}
\item \textsuperscript{145} Freilich, supra note 138.
\item \textsuperscript{146} Ordinances have been sustained for periods as long as 31 months, Campana v. Clark, 82 N.J. Super. 392, 197 A.2d 711 (1964). If they extend beyond a reasonable period they may be held to be takings without compensation. Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969).
\item \textsuperscript{149} \textit{MINN. STAT.} § 394.34 (1971).
\end{itemize}
attempt, stating that there was no authority under the enabling act to suspend zoning ordinances by hold orders, the order was indefinite as to duration, and the subsequently-passed ordinance restricting the use of a particular piece of property operated as a taking without compensation.\textsuperscript{150} Following this decision it was hypothesized that a more limited hold order might be upheld as within a municipality’s implied powers,\textsuperscript{151} but in 1966 the Minnesota Supreme Court held that an interim ordinance with a two year duration was still invalid.\textsuperscript{152} It is noteworthy that in neither case was the duration of the hold order limited by the terms of the ordinance. In the light of national experience, precise limitations of reasonable length together with a procedure for variances and a recognition of existing vested rights might compel a judicial reconsideration of the extent of a municipality’s implied authority, especially if arguments on planning necessity were well-presented.

As previously noted, interim development control can be approximated in Minnesota by administrative controls.\textsuperscript{153} In Pennsylvania, where the state supreme court expressly rejected interim controls without statutory authorization,\textsuperscript{154} the same court later accepted an ordinance authorizing the denial of building permits pending a proposed change in a zoning ordinance under the administrative control theory.\textsuperscript{155} The same result was reached in Illinois.\textsuperscript{156} In California, the state supreme court has recognized both theories, stating that the techniques are interchangeable.\textsuperscript{157} In this regard, Minnesota law recognizes that

\begin{footnotesize}
\begin{enumerate}
\item Alexander v. Minneapolis, 267 Minn. 155, 125 N.W.2d 583 (1963). The hold order in this case had been in effect for a period of nine years, clearly an abuse of reasonable time limitations.
\item See text accompanying note 142 supra.
\item In upholding an administrative control ordinance denying building permits pending a zone change to prevent creation of non-conforming uses, the court in Russian Hill Improvement Ass'n v. Board of Permit Appeals, 66 Cal. 2d 34, 45, 423 P.2d 824, 833, 56 Cal. Rptr. 672, 681 (1967), stated in n.24:
\end{enumerate}
\end{footnotesize}
building permits can be limited in duration. Administrative revocation is even possible if done prior to substantial construction and the acquisition of vested rights, as long as there has not been bad faith or fraud in the prevention of the vesting of the right.

In summation, the use of interim development controls at the county level can be quite effective in protecting unincorporated county areas during development and implementation of regional growth control plans. However, similar powers for municipalities and for the Metropolitan Council may be essential as well. Although it would be advisable to seek explicit enabling legislation before utilizing this technique on a regional basis, decisions adverse to the implied power of municipalities to enact intensive controls might be avoided without legislation by careful drafting, reasonable limit on duration, and protection of vested rights.

3. Short Term Environmental Moratoria

The initial failure to control the timing and location of development plus the extension of sewer and water installations into areas not scheduled for such capital facilities under the comprehensive plan often result in sprawl and premature subdivision. Capital facilities are often extended not in accord with the plan, but in response to pollution problems created by the initial unplanned development. The presence of such facilities invites more development and the problems of unplanned growth become cyclical. A short-term moratorium in areas lacking existing sewer and water facilities can be utilized to prevent development. Dade County, Florida has adopted a short-term moratorium on sewer hook-ups and building permits and Fairfax County, Virginia, is using a sewer moratorium to prevent issuance of building permits in excess of capacity sewage rates.

The Board of Supervisors might have proceeded otherwise: It might have chosen to adopt an "interim ordinance" to freeze the issuance of all building permits in the northern portion of San Francisco until the new law had become effective.

established by Virginia state pollution authorities. Marin County, California, and Pinellas County, Florida, have imposed moratoria on building permits to insure that critical water supplies will not be exhausted and that the use of water will proceed in accordance with sound planning.

A municipal authority or public utility is ordinarily under an equal protection duty, and possibly a common law duty, to provide sewer or water facilities to those willing to tender the going rate. Furthermore, it has been held that a short-term environmental moratorium must be temporary and within the limits of necessity, and must not be an attempt to place a general community burden on the individual. Present law generally permits temporary restraint, for a general environmental problem if the community is making good faith efforts to rectify the problem. Short-term environmental moratoria may thus

164. Marin County relies upon the California Environmental Quality Act, CAL. PUB. RES. CODE ANN. § 21000 et seq. (West Supp. 1974), and Wilson v. Hidden Valley Municipal Water Dist., 256 Cal. App. 2d 271, 63 Cal. Rptr. 889 (1967), for the principle that municipal authorities may implement municipal growth policies which recognize the protection of the environment as the guiding criterion in all public decisions. For an analysis of Pinellas County's water moratorium, see M. Stierheim, Resource Needs and Managed Growth for Pinellas County, (Position Statement No. 2, presented to Board of County Commissioners of Pinellas County, Florida, Oct. 30, 1973).
165. See Hawkins v. Town of Shaw, 461 F.2d 1171 (5th Cir. 1972).
168. Minn. Laws 1973 ch. 422 § 12, amending Minn. Stat. ch. 473B (1971). The Federal Water Pollution Prevention and Control Act, 33 U.S.C. § 1251 et seq. (Supp. II, 1972), now requires states to establish strict controls and standards of water quality for intrastate waters, and where the states fail to comply, the Federal Administrator will take over the program. The validity of withholding permits where water and sewer facilities are inadequate has been upheld by the courts. For example, in Camelot Builders, Inc. v. Board of County Supervisors (Ch. No. 38968, Fairfax Co., Va., Cir. Ct. 1973), the court held that the county could not legally issue building permits which would result in treatment capacity in excess of the figure certified by the State Water Control Board:

It appears from the certificate—that control over building permits is the safest and best way to prevent pollution and the one intended by the Control Board. Therefore, I hold that the County does have the power and the duty to refuse to issue additional permits, if it results in violation of the certificate.

be available to supplement interim development controls and permit the Metropolitan Council, together with the counties and municipalities, to develop a long range capital improvement plan which will control the timing and sequence of growth.

B. LONG TERM CONTROLS: CONTROLLING THE TIMING AND SEQUENCE OF DEVELOPMENT IN PLANNING AREA III

1. Zoning Based on a Long Term Regional Capital Plan (The Ramapo Model)

As discussed earlier, most municipalities and regions are forced to react to development in rapidly urbanizing regions with little control over where and when development takes place. The result is sprawl, leapfrog development and a waste of land, resources and energy.\textsuperscript{169} Several commentators, recognizing the extent of these problems and the inability of most municipalities to address them effectively, have suggested that the impetus of sprawl might be reversed if development were made responsive to the timed and sequential provision of public facilities.\textsuperscript{170} This theory was put into effect in 1969 in Ramapo, New York, a suburb of New York City, which was undergoing rapid growth and sprawl. Ramapo, which has an area of 89 square miles, approached the control of growth by first developing a comprehensive plan and subsequently adopting an 18 year capital budget and program which projected the staged and sequential provision of necessary municipal services to all areas within the town. The zoning ordinance was then amended to provide that all resi-
dential development must proceed in accordance with the provision of adequate municipal facilities, and would be subject to the requirement of obtaining a special permit, based upon a total of fifteen development points from five categories: (1) public sanitary sewers; (2) drainage facilities related to adequate run-off capacity at maximum development; (3) improved parks and recreational facilities; (4) improved major and secondary collector roads; and (5) fire houses within appropriate distances. Under the ordinance the town is committed to completion of sufficient public capital improvements to assure development of all areas within a maximum period of eighteen years. Reduction of assessed valuation is granted to reflect the temporary restrictions placed on the use of the land. Permits are issued presently for development at such time as the capital plan indicates the facilities will be available. Development time can be accelerated by the developer's agreement to provide the necessary facilities for the accumulation of the required points, and variance relief can be granted if the subdivision is consistent with the town's comprehensive planning.

In the 1972 case of Golden v. Planning Board of the Town of Ramapo, a case already described as a zoning "classic," Ramapo's timing and sequential controls were upheld by the New York Court of Appeals. The court rejected both the argument that the exercise of these powers was outside permissible statutory authorization and the assertion that the ordinance


173. D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT 386 (1973). A recent poll of the leading law professors on planning and zoning in the nation resulted in the Ramapo case's being voted the most significant zoning case in American history since the Euclid decision established the constitutionality of zoning in 1926. Id. at 385-86.

174. The trend as reflected by the New York Court of Appeals decision in Ramapo is to interpret the enabling act broadly enough to au-
was unconstitutionally exclusionary:

What we will not countenance, then, under any guise, is community efforts at immunization or exclusion. But, far from being exclusionary, the present amendments merely seek, by the implementation of sequential development and timed growth, to provide a balanced cohesive community dedicated to the efficient utilization of land.\textsuperscript{175}

[The] obvious purpose is to prevent premature subdivision absent essential municipal facilities and to insure continuous development commensurate with the Town's obligation to provide such facilities. They seek, not to freeze population at present levels but to maximize growth by the efficient use of land, and in so doing testify to this community's continuing role in population assimilation.\textsuperscript{176}

The Ramapo case is particularly significant in that it is the first time a state supreme court has held that an uncompensated restriction of development by means of timed and sequential phasing is within the limits of the taking and the due process clauses.\textsuperscript{177} The court emphasized the temporary nature of the restrictions and the effort the town had made to mitigate the hardship to affected landowners:

An ordinance which seeks to permanently restrict the use of property so that it may not be used for any reasonable purpose must be recognized as a taking . . . . An appreciably different situation obtains where the restriction constitutes a temporary restriction, promising that the property may be put to a profitable use within a reasonable time . . . . (emphasis added). The proposed restraints, mitigated by the prospect of appreciated value and interim reductions in assessed value, and measured in terms of the nature and magnitude of the project undertaken, are within the limits of necessity (emphasis added).

In sum, where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for "phased
growth" and hence, the challenged ordinance is not violative of the Federal and State Constitutions.\textsuperscript{178}

The principles of Ramapo may prove even more significant if states and regions use them to develop a controlled growth policy on the regional level that balances suburban development with inner-city revitalization and new community development.\textsuperscript{179} Indeed, the court of appeals in Ramapo noted that “these [timing] controls are typically proposed as an adjunct of regional planning. . . .”\textsuperscript{180} The concept of Planning Area III, staged development in accord with the provision of facilities under a regional capital improvements plan, should be legally feasible under the Ramapo rationale.

One of the key elements of the Ramapo plan was the special permit technique. This technique creates a conditional permitted use, midway between a use by right and a prohibited use. The premise on which this technique is based is that some uses are desirable but likely to cause difficult problems, and thus should be subject to special control. Therefore, the use is permitted if a specific showing is made that the special conditions have been complied with. The conditions imposed cannot be arbitrary, but rather must be specifically set out in the ordinance, especially if an administrative body passes on the permit applications.\textsuperscript{181} Minnesota recognizes the special permit technique and provides for municipal council approval on the recommendation of the planning commission.\textsuperscript{182} However, Minnesota law does not permit the council complete discretion. The standards governing the use must be listed and, if these are complied with, the permit may not be denied.\textsuperscript{183} If the standards are stated only in very general form, the council can deny the permit only if the proposed use is incompatible with the basic uses authorized within a


\textsuperscript{179} Elliott & Marcus, From Euclid to Ramapo: New Directions in Land Development Controls, 1 Hofstra L. Rev. 56 (1973); Note, Time Controls on Land Use: Prophylactic Law for Planners, 57 Cornell L. Rev. 827, 848 (1972).


\textsuperscript{182} The special permit technique is used for planned unit developments. See Chandler v. Kroiss, 291 Minn. 196, 190 N.W.2d 472 (1971).

\textsuperscript{183} Metro 500, Inc. v. City of Brooklyn Park, 211 N.W.2d 358 (Minn. 1973).
particular zone and endangers the public health, safety or welfare of the area affected or the community as a whole. These limitations should pose no substantial problem for a regional control scheme, as a plan based on the Ramapo model would provide very specific, ascertainable standards which do not depend on arbitrary or ad hoc considerations.

2. Subdivision Regulations

A primary cause of urban sprawl has been the failure to use subdivision regulations effectively and the consequent uncontrolled development of land. Since the subdivision of land is not an isolated transaction affecting only the buyer and seller, but rather a critical factor in establishing the pattern of community growth, it is most important that some control over this process be exercised so that growth can proceed in an orderly and rational manner. Subdivision regulations are a tool which can be effectively used to accomplish this task. The police power to enact subdivision regulations exists independently from but in conjunction with the power to zone. Both are means for implementing the planning process. The Court in the Ramapo case stated:

True other alternatives, such as requiring off-site improvements as a pre-requisite to subdivision, may be available for implementation of sequential development and timed growth, but the choice as how best to proceed, in view of the difficulties attending such exactions... cannot be faulted.

The vital impact that subdivision regulations can have has been further increased by a new approach that links the police power controls of zoning with environmental and subdivision regulations to assure that development does not prematurely or permanently burden the society. This approach not only emphasizes the internal requirements of the subdivision and its residents but also focuses on the relationship of the subdivision to its external environment and the community’s comprehensive plan.

187. Id. at 379, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.
In their most common form, subdivision regulations are used to regulate the installation of various necessary internal improvements. The standards set forth are enforced by requiring developers to post performance bonds. Subdivision regulations also provide a means of enforcing zoning, by establishing minimum lot sizes, set-back requirements, easements, rights-of-way, off-street parking requirements, and dedication or reservation of certain lands.\textsuperscript{189} It has generally been held to be within the constitutional and statutory authority of the reviewing body to condition plat approval on the dedication of money, land, and improvements that meet the needs generated by the new development, as opposed to needs created by the general community.\textsuperscript{190}

In the new approach to subdivision regulation, many communities are now requiring that subdivision approval be delayed or denied where there is a fair and substantial showing that the subdivision will cause serious off-site flooding or environmental degradation or will increase the burden on inadequate municipal facilities such as roads and sewers.\textsuperscript{191} The validity of these further restrictions should also be apparent. It has become fairly well established that a planning board has a duty to protect the public in general, as well as the future owners and occupiers of property in a subdivision, by requiring that reasonable conditions be met by the developer before plat approval is granted.\textsuperscript{192} These conditions can relate to the off-site protection of the entire community as well as the subdivision itself. For example, a board might require that an adequate water supply be provided for the residents of the subdivision;\textsuperscript{193} that the land be used safely for building purposes without danger to health or

\textsuperscript{189} Freilich & Levi, Model Regulations for the Control of Land Subdivision, 36 Mo. L. Rev. 1 (1971).


\textsuperscript{191} However, a line of earlier cases holds that plat approval cannot be denied because of health and safety conditions that are general to the community. Beach v. Planning and Zoning Comm'n, 141 Conn. 79, 103 A.2d 814 (1954); but cf. Melli, Subdivision Control in Wisconsin, 1953 Wis. L. Rev. 389.


peril from flooding;\textsuperscript{194} that off-site roads leading to the subdivision site be adequate in improvement and width to handle the volume of traffic which will be generated;\textsuperscript{195} that the creation of water pollution problems in areas not within the subdivision be avoided;\textsuperscript{196} and that the subdivision development not be allowed to cause the deterioration of shorelines or wetlands.\textsuperscript{197} If the duty to protect the general community is not fulfilled, the state or municipality may be liable for resulting damages. A failure to periodically inspect culverts capable of causing flooding when clogged\textsuperscript{198} and the intentional authorization of new subdivisions with knowledge that flooding and damage to area residents could result have led to holdings of public liability.\textsuperscript{199} Clearly, if courts can find municipal and state liability for failing to enforce strong subdivision standards, there must be authority for municipalities to deny subdivisions in such cases to prevent liability from occurring.\textsuperscript{200} In fact, some courts assert that there is not only a right to condition plat approval on non-degradation of the environment, but a duty.\textsuperscript{201} However, there may be a line across which denial of plat approval represents a desire for public benefit as opposed to harm prevention;\textsuperscript{202} the validity of using plat rejection as a tool of growth control may depend on how broadly harm is defined and whether the developer is left with any reasonable economic uses for his land.

Pressure for stronger subdivision regulations is also beginning to be applied by the federal government. A new regulation proposed by the Federal Environmental Protection Agency notes

\textsuperscript{196} Salamar Builders Corp. v. Tuttle, 29 N.Y.2d 221, 275 N.E.2d 585, 325 N.Y.S.2d 933 (1971).
\textsuperscript{197} Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
\textsuperscript{200} Freilich & Levi, supra note 189.
\textsuperscript{201} In Walsh v. Spadaccia, 73 Misc. 2d 866, 873, 343 N.Y.S.2d 45, 53 (Sup. Ct. 1973), quoting Natin Realty, Inc. v. Ludewig, 67 Misc. 2d 828, 831, 324 N.Y.S.2d 666, 672, aff'd, 40 App. Div. 2d 535, 334 N.Y.S.2d 483, aff'd, 32 N.Y.2d 681, 296 N.E.2d 257, 343 N.Y.S.2d 360 (1973), the court stated: "Respecting ecology as a new factor, it appears that the time has come—if indeed it has not already irretrievably passed—for the courts, as it were, to take ecological notice in zoning matters."
the importance of the location of development to air pollution, and requires states and municipalities to limit new subdivision developments in areas in which they might cause a deterioration of ambient air quality standards. In addition, there is a trend toward more stringent control of large-scale projects at the state level. Maine and Vermont now provide for state or regional control over such projects.

Minnesota has enabling legislation for subdivision regulation which allows both municipalities and urban towns to adopt subdivision regulations and procedures for plat approval. The enabling legislation is basically similar to national models and provides that plat approval can be conditioned on conformance with the official map, improvements, and the dedication of a reasonable amount of land, or money in lieu of land, for park purposes. The basis in Minnesota for regional review and/or approval of subdivision activity to support phased development in Planning Area III is well established.

3. Official Mapping

The use of the official map technique is extremely important for timing and sequential controls in Planning Area III. It facilitates the regional capital planning process by effecting a restriction on development in those areas where capital public facilities will be placed.

203. 38 Fed. Reg. 15834 (1973). The implementation plan calls for identification of "those areas (counties, urbanized areas, standard metropolitan statistical areas) which, due to current air quality and/or projected growth rate, may have the potential for exceeding any national standard within the subsequent 10-year periods" 40 C.F.R. § 51.12(e) (1973). Then within 24 months the state shall submit an analysis of the impact on air quality of projected growth and development and a plan to prevent any national standard from being exceeded over the 10-year period. The plan must include "control strategy revisions and/or other measures to insure that projected growth and development will be compatible with maintenance of the national standards throughout such 10-year period." 40 C.F.R. § 51.12(g) (1973).


205. Minn. Stat. §§ 482.351-.364 (1971). The authority permits two miles of extraterritorial control into unincorporated areas. See L. Ball, Management of Growth for Minnesota Communities 27 (Center for Study of Local Government, St. John's University, Jan. 1974), for a discussion of an effective timing and sequential growth control policy based on subdivision approval in the city of Brooklyn Park, Minnesota.
The official map technique permits a municipality to effect a present uncompensated reservation of land upon which it plans to construct future improvements. The map, which is adopted legislatively, designates certain areas for roads, and occasionally for parks and drainage areas. The designation operates as a reservation only; title and possession remain with the owner, and the city pays no compensation unless and until actual condemnation proceedings are begun. The purpose of the reservation is to keep the land substantially open, and thus facilitate planning and ensure lower condemnation costs when and if the land is eventually taken. The municipality effectuates this purpose by either denying applications for building permits in the reserved area, or by providing that compensation will not be paid for subsequent improvements if the land is condemned. Most systems have a variance procedure for the landowner unable to receive a reasonable economic return on either the restricted parcel or on the legal plot as a whole.

When the official map sets aside land for roads, most courts agree that the regulation relates to a valid public objective of economy and planning. The use of the map to reserve parks, however, is not as well established. Parks, unlike roads, represent a concentrated rather than a dispersed burden, and constitute a public benefit as opposed to a critical health and safety necessity. Therefore courts tend to hold such mapping invalid, even if temporary in effect, unless compensation for the reservation is made.

Many municipalities do not make adequate use of the official map in undeveloped areas where it could control subdivision and growth to a significant degree. If the path of future highways is determined and municipal facilities are required to follow mapped streets, then general control over the urban form is established, since subdivision plats not in accord with the office map will not be accepted.

209. Headley v. City of Rochester, 272 N.Y. 197, 5 N.E.2d 198 (1936); State ex rel. Miller v. Manders, 2 Wis. 2d 365, 86 N.W.2d 469 (1957).
LAND USE CONTROLS

However, it seems both undesirable and unlikely that an expanded use of the official map will be used to restrict large areas without compensation. The official map technique is designed to keep areas free from impediments to future municipal use—rather than to keep them free from any use at all. Such a complete restriction would be an effective condemnation of all development rights, and thus would probably require compensation.

Minnesota municipalities have statutory authority to use official maps and counties may also be authorized to use them, though this is unclear. The authority delegated to municipalities is substantially in accord with the national models. There has been no case law on such maps, but presumably decisions would be in accord with the general authority. A significant and valuable facet of the Minnesota statute is that a variance is required to be issued only if the entire legal plot, as opposed to the actual piece under restraint, has no reasonable economic use.

C. LONG TERM CONTROLS: PRESERVATION OF OPEN SPACE AND RURAL AREAS IN PLANNING AREA IV

Planning Area IV will consist of most of the land beyond the urbanizing section of the first generation regional capital improvement plan. Each year, of course, as capital facilities are constructed, new capital planning will bring some land in Planning Area IV within the sphere of Planning Area III. In addition, as modifications in the regional capital plan are made to reflect the continuous planning process of the region, certain land may be shifted from one planning area to another. But in general, land in Planning Area IV is scheduled to remain in a non-urban state for at least 15 to 20 years, the period of the regional capital improvement plan for Planning Area III. Some of the land should of course be kept permanently as open space or in a rural-agricultural state. If land in Planning Area IV is to be preserved in open space for rural or non-rural pursuits permanently or for extended periods, both regulations and incentives will be required. The law has developed a number of suitable techniques that are being used to varying extents in different jurisdictions of the country.

214. Id. § 462.359(4). See 3 R. ANDERSON, AMERICAN LAW OF ZONING § 20.14 (1968), for clarification of this important distinction.
1. Regulatory Approaches
   
a. Minimum Lot Size

Minimum lot size regulations are used to attain several objectives. A large minimum lot regulation which creates lower density and intensity of land use can protect the character and aesthetics of a rural, open space or agricultural area. The lower intensity of land use actually promotes the conservation of natural resources in this type of area, and lessens or eliminates the burden on municipal facilities which would be generated if the area were allowed to urbanize. If a sizeable zone with a large minimum lot size were used within the urbanizing area of Planning Area III, it might operate to exclude the poor. Its use in the open rural fringe, however, actually serves a useful public purpose of preventing unnecessary development. In this locus, minimum lot size restrictions have a clear relation to public health, safety and general welfare, leaving little question as to their validity.215

Densities as low as one unit per 10, 20, or even 40 acres would be ideal for Planning Area IV. They would not discourage residential use by the farmer of his land and would still permit reasonable agricultural use because of the rural nature of the land. This fact demonstrates the tremendous legal value of the timing and sequential zoning and subdivision controls used in Planning Area III. By separating the existing urban areas (Planning Areas I and II) from rural open space areas (Planning Area IV) by a belt of urbanizing land undergoing capital improvement over a 15-20 year period (Planning Area III), the landowner in the rural area does not suffer a confiscatory impact because there is no basis for suggesting that his land has a viable urban use of which he is being deprived.216 The landowner still has a reasonable remaining economic use for the rural area in which he is located, and the constitutional balancing test works out appropriately. At the same time, by keeping the restrictions on land in Planning Area III temporary and reasonable, with a maximum duration of 20 years, the constitutional prohibition on taking without compensation is not violated as to that area.217

In the late 1960's there was a trend toward invalidating large lot zoning in urbanizing suburban areas as courts became aware that large lot zoning, if used improperly, could have the second and third order consequences of direct discrimination against the poor and effective discrimination against racial minorities, a disproportionate number of whom are poor. In addition, the unwise use of large lot zones in urbanizing areas actually has a reverse effect from that intended inasmuch as it leads to wasted land sprawl, social and use imbalance, and the inefficient provision of municipal services. Such considerations prompted a number of courts to hold that municipalities cannot use exclusionary large lot zoning to avoid problems; rather, they must attempt to deal with them.

These cases have not resulted in the relegation of the large lot zone to the graveyard of outmoded ideas. Rather, it is possible to use such a zone in several growth control contexts without raising the charge of exclusionary zoning. For example, in Steelhill Development, Inc. v. Town of Sanbornton, the First Circuit upheld a large lot zone in a rural area, stating that it served a valid function as a temporary holding zone which would protect the land prior to imposition of more permanent controls. Similarly, Salamar Builders, Inc. v. Tuttle approved the use of large lot zones to control immediate environmental problems such as the safe disposal of on-site sewage. These cases upheld the use of large lot requirements as temporary measures to avoid the serious problems that might have resulted from greater density. However, in Nopro Co. v. Town of Cherry Hills Village, it was held that large lot zoning is validly used within the urban context and for the purpose of land character preservation if the comprehensive plan for the region provides elsewhere for low and moderate income housing and other uses excluded from the zone. Taken together, these cases represent a view that large lot zoning can be a valuable growth control tool if used in the proper places, for the proper purposes, and within the framework of a comprehensive regional plan. Minnesota has no contrary

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220. 469 F.2d 956 (1st Cir. 1972).
223. For a similar theory, substantiated by empirical data, see Beuscher, Judicial Zoning Through the Nuisance Power, 1955 Wis. L.
case law on the use of large lot zoning.224

b. Agricultural Zoning

Agricultural zoning is quite similar to large lot zoning. The regulation may provide for very large minimum plots and for low intensity uses such as farming, recreation, nurseries, and, perhaps, limited residential development. Agricultural zones are the least intensive and most exclusive zones of all.225

Agricultural zoning may serve several purposes. It may be used to conserve valuable agricultural land from forced, premature urban conversion; to prevent an overload on environmentally sensitive areas or on municipal facilities; or simply as a growth control device. Well-positioned agricultural zones can contain the outward spread of development and guide it into areas where the municipalities can more adequately accommodate the new growth. The area can be subsequently down-zoned when the community feels it is ready for development.226

The validity of agricultural zoning is more open to question than that of large lot zoning because of the severe impact it imposes, although there is authority upholding it.227 The public interests served clearly are valid; however, since they are not substantially linked to public health and safety they may not

Rev. 440, establishing that the judicial determination of nuisance varies widely with respect to the locus of the nuisance, i.e., rural fringe, suburban or high density urban core. See also Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926): “A nuisance may merely be a right thing in the wrong place,—like a pig in the parlor instead of the barnyard.”

224. In fact, Minnesota courts do not appear to have passed specifically on the validity of the large lot zone. However, there is case authority supporting the total exclusion of high intensity uses (mobile homes) from a rural municipality. Hay v. Township of Grow, 206 N.W.2d 19, 23 (Minn. 1973).

225. This device can, like all other zoning devices, be misused if applied in the wrong areas for exclusionary purposes. Thus the exclusive agricultural zone in the expanding urbanizing or suburban area would have drastic effects on low and moderate income housing and housing costs in general. In this respect it is like the exclusive, non-cumulative industrial zone which can be properly and improperly utilized. For a classic treatment of these techniques, see Cutler, Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe, 1961 Wis. L. Rev. 370. See also Freilich & Bass, Exclusionary Zoning: Suggested Litigation Approaches, 3 Urb. Law. 344 (1971).


support such a high degree of impact on the land owners. The severity of impact, which results from the limited use, is exacerbated where plots exist within the zone that are not physically or economically suitable for agriculture. Beyond that, owners of large scale land holdings may be subject to very high property tax burdens, as speculators, well aware of zoning's impermanence, cause the market and assessment value to rise by purchases within the zoned areas. Thus, if agricultural zoning is to be used, it would seem advisable to consider methods to lessen its potential impact. Tax adjustments could ease much of the burden. For example, an assessment at use value rather than market value would substantially lower the tax liability. In addition, a temporary agricultural zone, with a definite time limitation, is much more likely to be sustained than a permanent one. Finally, an adequate variance procedure would seem to be mandatory.

c. Minnesota Law on Agricultural Zoning

The Minnesota Supreme Court has specifically held that a municipality on the periphery of the metropolitan area may constitutionally pass a one-use ordinance to preserve the area’s character. The state legislature has recognized the utility of agricultural zones by providing that an airport to be built within a metropolitan area should be surrounded by agricultural zones to the fullest extent possible consistent with vested rights. Other varieties of exclusive use zones have also been sustained, and the court has indicated that a property owner within the zone who seeks a use variance must show, first, that he has no reasonable economic use under the ordinance and, second, that the proposed use would not affect the neighborhood plan. There is ample precedent in Minnesota for the use of exclusive agricul-

232. MINN. STAT. § 360.74(2) (1971).
tural zones, but, should such zones be used on a wide scale as part of a growth control plan in areas of intense development pressure, it may be necessary to reduce the impact by tax abatement, definite time limitations, and provisions for variances or compensation. If agricultural zones are limited to Planning Area IV, these restrictions on their use may not be necessary.

2. Compensatory Approaches

Growth control and the preservation of open space can involve very significant burdens on restricted landowners. A viable growth control scheme on a regional level may have to include provision for some form of compensation or public ownership of land interests in conjunction with regulation. The primary purpose of this compensation is to reduce the impact on restricted owners and to prevent crippling attacks on the specific or general constitutionality of the scheme. In addition, compensatory approaches may enhance the political feasibility of the growth control concept, a not unimportant consideration. Such an approach may also be necessary to prevent the "wipeouts" or "windfalls" which sometimes result from regulation. Restricting growth in one area may "wipe out" one landowner and provide a "windfall" for the owner in a development district into which the growth is diverted. It may be desirable to devise means to recapture some of the unearned windfall stemming from regulation and use it to compensate the restricted owner.

a. Zoning with Condemnation and Benefit Assessment

Several jurisdictions, including Missouri and Minnesota, have combined a restrictive land use regulation with a condemnation proceeding to avoid constitutional objection to the regulation. This approach, which uses eminent domain to condemn all rights in derogation of the ordinance, including the right to a vested non-conforming use and the right to a variance because of unnecessary hardship, has recently been held to be a valid exercise of the police power and the power of eminent domain.236 The con-

235. See LAND USE PLANNING REPORTS, Oct. 8, 1973, at 6, for a discussion of Professor Donald Hagman's study on this subject for the U.S. Department of Housing and Urban Development.
demnation costs are paid by assessing those within the planning district who were benefited by the regulation. This approach permits the regulation to operate at its full effectiveness without being vitiated by intruding non-conforming uses or constitutional attacks. In addition, the benefit assessment allows a recapture of some of the windfall planning benefits and their redistribution to those suffering injury. If the system were efficiently operated, complete control could be attained at minimal public cost. There are, however, administrative problems which appear even at a local level\textsuperscript{237} and which might be vastly more complex on a regional scale.

Minnesota has had considerable experience with zoning by use of eminent domain. Perhaps the most noteworthy statute on this subject is MINNESOTA STATUTES § 462.12, which provides for the establishment of restricted residence districts within cities of the first class.\textsuperscript{238} If 50 percent of the landowners within the district petition the city council, the district can be designated as one exclusively for residential uses. The council then can use the power of eminent domain to condemn the rights in derogation of the ordinance. A board of appraisers determines both the damages and the benefits, which are assessed to pay for the damages. This technique has been upheld\textsuperscript{239} and has been held to create property rights akin to equitable negative easements.\textsuperscript{240} Although benefit assessment may be feasible on the large scale contemplated by growth control plans, when the planning districts become too large there is apt to be an attenuation in the link between regulation and benefit that can render an assessment invalid as an uncompensated taking.\textsuperscript{241} The experience

\textsuperscript{237} See Annot., 41 A.L.R.3d 636 (1972); In re Coleman Highlands, 401 S.W.2d 385 (Mo. 1965). The Coleman Highlands-Kansas City neighborhood, making use of the technique, has witnessed a number of lawsuits over the assessment problems and the conversion of non-conforming uses required under the ordinance. See J. Dorsey, The Results of “Zoning With Compensation” in Coleman Highlands, A Subdivision in Kansas City, Missouri, March 21, 1973 (unpublished research paper filed with Professor Freilich).
\textsuperscript{238} MINN. STAT. §§ 462.12-.17 (1971). Regulations supported by the power of eminent domain are also authorized for airport zoning, MINN. STAT. § 360.76(1) (1971), and official mapping, MINN. STAT. § 462.351 (1971).
\textsuperscript{239} State ex rel. Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920), noted with approval in Berry v. Houghton, 273 U.S. 671 (1927).
\textsuperscript{241} Myles Salt Co. v. Board of Comm’rs, 339 U.S. 478 (1916) (drain-
with this statute has value, in that it establishes both a legislative and a judicial precedent for compulsory monetary transfers in the wake of regulation. This may set the stage for acceptance of still another approach, involving the transfer of development rights.

b. Development Rights Transfer

Development rights transfer is a method of land control and compensation which has been proposed as state legislation[^242] but not yet adopted. Under one model[^243], the regulatory unit or units would prepare comprehensive plans that would designate areas to be developed as residential and commercial and areas to be kept as open space or rural-agricultural fringe. The unit would next determine the number of “development rights” necessary for desired commercial or residential construction, basing the calculation on the number of development rights per unit of commercial or residential construction and on the total area allotted for the particular uses. The planning body could thus calculate the maximum number of commercial and residential development rights available within the planning area. A portion of both types of development rights would be assigned to every landowner in the planning area, even those in restricted districts[^244]. Thus, at the outset everyone in the planning area has development rights: the landowner in the restricted zone has development rights but cannot use them; the landowner in the development zone has development rights but not enough to permit full development. The plan then contemplates the buying and selling of development rights, either on the open market or through an assessment held invalid where land could not possibly benefit from drainage.

[^242]: See Costonis, Development Rights Transfer: An Exploratory Essay, 83 Yale L.J. 75 (1973); W. Cox & H. Burt, Administration of Development Control: Legal and Economic Considerations 45 (Fairfax County, Virginia, Sept. 15, 1973). Maryland, Florida and New Jersey have had bills introduced in their legislatures.

[^243]: Maryland Senate Bills 730 (1973), 254 (1972) and 792 (1971), sponsored by Maryland State Senator William J. Goodman of Prince George’s County.

[^244]: The development rights so created are to be issued to landowners of record in the district on the basis of their proportional interest (assessed valuation or acreage) in the total acreage or assessed valuation of the district. When rights are issued to an owner of developed real estate, all rights in that category attach to the improvement and cannot be sold or transferred separately. If additional development rights are issued by the governing body, they too will accrue proportionately. See Cox & Burt, supra note 242, at 46.
through a mechanism such as a commodities exchange, stock market, or development rights bank. The landowner in a development zone can develop his land fully, but must pay something for the right; the landowner in a restricted zone cannot develop but can sell rights and obtain compensation. Thus, the impact of regulation is lessened sufficiently to bring it within the limits of the police power, and the public acquires permanent open space at no public cost.

There is no direct precedent for the use of this approach to control growth, but analogous techniques have been approved in other contexts. Several cities have used transfers of air rights as a means of protecting historical landmarks, permitting the owner of a historical building below the maximum height established for the zoning district to sell his unused airspace to a developer who can then exceed the height limitation by the amount purchased.\textsuperscript{246} Similarly, many municipalities have experimented with bonus and incentive zoning whereby a developer can build to a greater height or density if he provides amenities or open space to the public.\textsuperscript{246} In addition, the United States Supreme Court has recognized the validity of private value transfers pursuant to regulation of a natural resource.\textsuperscript{247}

Because the concept of development rights transfer for land regulation is as yet untried, it is fraught with problems; however, it is certainly worth considering. The land use regulatory process needs a means of compensating restricted parties and

\begin{footnotesize}
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\item Oil reserves in a pool are allotted to field drillers on a percentage basis, Railroad Comm’n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940); Champlin-Refining Co. v. Corporation Comm’n, 286 U.S. 210, 235 (1932). \textit{See also Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885) (permitting construction of dams by private owners causing flooding of up-stream lands as long as the dam owner pays damages for the value of the land taken); Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (permitting a factory to pollute neighboring property by refusing to grant an injunction to abate the nuisance and substituting damages for value “taken”).}
\end{enumerate}
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equitably recapturing the windfalls which flow fortuitously to owners of non-restricted land. Development rights transfers are designed to accomplish both ends with, ideally, no cost to the public. However, since there is no precedent treating such transfers, it is difficult to predict how a statute or ordinance might withstand attacks. In particular, the delegation of the police power implicit in the authorization of marketable rights, the reasonableness of the exercise of police power, and the rationality of the classification and uniformity of its application might be subject to challenge.  

D. Public Ownership and Purchase of Land and Interests in Land and Preferential Assessment

1. Public Purchase and Ownership

Government ownership of undeveloped land or interests in land potentially could be the basis for a complete land use control program. Ownership could serve a protective function; scenic areas, historic monuments, recreation areas, agricultural land and aesthetic interests could all be more completely preserved than by any other means. In addition, public ownership of land interests could be the basis for growth control. Ownership would enable the government to release land or development rights when and where the comprehensive plan and the capital budget warranted, and under the proper conditions. In short, government ownership would permit a degree of land control similar to that of an urban renewal plan, but over a much larger area.

There are several methods by which government or public ownership of private land interests could be achieved. The state could purchase, condemn or acquire by gift the full fee interest in particular land. It likewise could acquire a less-than-fee interest such as a development easement or right. Less frequently, a pre-existing public interest in particular land that is inconsistent with and superior to presently asserted private rights could be asserted on the basis of historic grants, prescription and customary usage.


250. See State ex rel. Thornton v. Hay, 254 Ore. 584, 462 P.2d 671 (1969) where the state successfully asserted title to beaches, using a concept of general custom. New Jersey, Georgia and Maine have also asserted title to islands, tidal areas, and coastlines under some of these theories.
The federal government has a number of programs that make funds available for protective and open space land acquisition, as do numerous states, including Minnesota. In fact, the validity of these acquisition statutes has not been seriously challenged even when the easements are scenic, and thus arguably aesthetic. The leading case of Kamarowski v. State held that an easement is a condemnable interest in property and that protection of scenic resources and preservation of sight lines are valid public purposes in spite of their aesthetic association. The case also held there was no question of impact on the landowner since compensation foreclosed any damage claim.

When the public purpose of a condemnation or public purchase shifts from environmental protection or recreation provision to growth control, a host of practical problems arises. For instance, there may be political resistance to such a high degree of government intervention in land use decisions. In addition, since a regional growth plan implemented by public ownership would demand the acquisition of large scale interests very quickly, there might also be financial problems in acquiring sufficient land or interests to make the plan effective. An adequate acquisition would require a tremendous initial investment, even if the subsequent sale or leaseback might even the balance sheet.

The financial burden might be lessened considerably if the growth control plan made use of easements instead of fee interests. Negative easements in the nature of development rights are not only far less expensive than the full fee, but both title and possession remain with the private owner, so that the land is taxable and usable within limits of the easement. Granting


253. 31 Wis. 2d 256, 142 N.W.2d 793 (1966).

254. Petition of Dreosch, 233 Minn. 274, 47 N.W.2d 106 (1951), reaches a similar result.


256. State v. Casey, 263 Minn. 47, 115 N.W.2d 749 (1962); see also U.S. Citizens’ Advisory Committee on Environmental Quality, Com-
an easement instead of selling the entire fee can be of significant benefit to the landowner for tax purposes. If the owner makes a gift of an easement it will qualify as a deduction from his taxable income equal to the fair market value of the property rights donated.257 This would permit the landowner to retain his land profitably, resisting rising property tax assessments and the promise of profits if he sells the land for development.258 New Jersey plans to condemn a development easement on some one million acres of farm land, paying the cost through a tax on real estate transfers.259

Permanent easements may present problems concerning fragmented ownership and may constitute a barrier to replanning of the area.260 Therefore it may be wiser to use temporary easements which can accomplish most if not all the growth control objects of permanent easements, without fragmenting ownership and at a greatly reduced cost. In addition, a temporary easement might be procurable through uncompensated regulation.261

Aside from the practical hurdles where growth control is its sole object, the validity of the purchase might be questioned. The public use limitation262 on eminent domain and public purchase is not a barrier to growth control per se; the protection of sensitive land, the effectuation of planning, the preservation of health, safety and economics are all clearly valid public objectives. However, growth control by means of eminent domain and public purchase would require the acquisition of interests in land well in advance of actual use. Some jurisdictions have held, relying on state constitutional law, that excess or future condem-
nation is not a public purpose. This means that acquisition for uses well beyond those clearly foreseeable may be invalid.\textsuperscript{263} However, courts are beginning to recognize a need or even a duty to plan for the future. This would justify advance acquisitions for long range projects as being well within the public use limitation.\textsuperscript{264} Notably, the only jurisdiction that has, at present, considered a true land banking scheme found it well within the limits of public use and purpose.\textsuperscript{265}

2. Preferential Property Taxation

A critical factor involved in the decision to restrict development of land through the police power or by development easement acquisition is the constitutional requirement that the land assessment be reduced to correspond to the restriction on development placed on the property.

Taxation can be an important determinant in land use decisions, both personal and judicial.\textsuperscript{266} The property tax, in particular, can be used to foster the preservation of open space, or to destroy it. This tax can be used in conjunction with growth control plans as a means of reducing regulatory impact, or it can work at cross purposes by increasing both the impact and, therefore, the likelihood of unconstitutionality. Property tax assessments are based upon the true value of the plot on the market; thus they tend to rise as development becomes imminent.\textsuperscript{267} Even land zoned for agricultural or low density residential use will begin to rise in value as nearby areas develop, since speculators will take their chances on the impermanence of zoning and the inconstancy of zoning administrators and policy decision-makers.\textsuperscript{268} The increases in the market value and tax burden can have two disastrous consequences: the forced conversion of the


\textsuperscript{264} Rueb v. Oklahoma City, 435 P.2d 139 (Okl. 1967); Carlor Co. v. Miami, 62 So. 2d 897 (Fla. 1953).

\textsuperscript{265} Rosso v. Commonwealth, 226 F. Supp. 688 (D.P.R. 1964). However, the Puerto Rico Land Administration was under a 15 year limitation for putting the land held to use.

\textsuperscript{266} Zimmerman, Tax Planning For Land Use Control, 5 Urb. Law. 639 (1973).

\textsuperscript{267} Dopson & Miller, Effects of Urban Expansion on Ownership, Use and Taxation of Agricultural Land 907 (Univ. of Mo., College of Agriculture, Res. Bull. 1966).

open space may render the owner financially incapable of maintaining an unintensive use, or, if the land is restricted by regulation, the rising tax burden may be viewed as increasing the regulatory impact sufficiently to make the plan unconstitutional as a taking.

There are several methods available to deal with these problems. A number of states use preferential assessment, taxing open land on its actual use value rather than its potential use value. However, unless preferential assessment is combined with some type of recapture provision, this can provide a haven for speculators, permitting land to be held open for later, more profitable development while the taxpayers subsidize the operation. The regulatory impact may also be mitigated by a contract between the landowner and the municipality in which the owner agrees to keep the land open for a certain number of years in return for an assessment based on use value. Should the landowner desire to break the contract, he is generally subject to recapture of the deferred taxes plus a penalty. A similar method, called tax deferral, allows use value assessment and deferred tax recapture without the necessity of a formal contract.

There does not appear to be any serious problem with the validity of deferred taxation. Although some cases indicate that preferential assessment might violate the uniformity requirement or equal protection, if the use made is pursuant to restriction and not choice there is a reasonable basis for distinction. In addition, some state legislatures, including Minnesota's, are given broad discretion to make taxation classifications and to apply uniform rates within the classes.

The urban-rural service district may also be used to alleviate the property tax impact of use restrictions. This plan keys the rate of taxation on urban and rural land within a single tax-

ing jurisdiction to the level of services provided. Thus, if an area within a political unit is rural or agricultural in nature it can be designated as such and taxed at a lower rate.\footnote{276} Several advantages flow from this approach. First, it lowers the burden on rural areas which might otherwise face premature conversion. This reduction of the tax burden may prevent an attack based on specific constitutionality, since it may be used to counter the argument that the city must as a matter of equal protection and common-law duty extend facilities to the area.\footnote{277} Second, the plan may permit the municipality to concentrate its capital investment in the urban area.

Several other tax proposals have been suggested to counter the forces of speculation, sprawl and windfalls. An unearned increment tax could be levied on the profits that a landowner receives from the fortuitous location of a governmental installation or from the diversion of growth from a restricted area. Such a tax could then be used to compensate those restricted, thus producing an effect akin to the transference of development rights. A proposal for a land gains transfer tax designed to deter speculation and quick sellouts is currently before the Vermont Legislature.\footnote{278} The tax would be incident to land transfers and would be graduated on the basis of two variables: the number of years the owner held the land, and the profit margin as a percentage of original cost.

3. Minnesota Open Space Taxation

In Minnesota the state legislature has broad power to create classifications for the application of the property tax. As long as the classification is reasonable, the regulation is uniform within the class and the tax is collected for a public purpose, the tax is valid.\footnote{279} This broad authority has encouraged the legislature to enact a number of tax laws favoring the retention of open space. For example, any municipality\footnote{280} can divide into rural-ur-

\footnote{276. The technique was held valid in Frazer v. Carr, 210 Tenn. 565, 360 S.W.2d 449 (1962), despite the presence of a state uniformity of taxation clause. Minnesota provides for urban-rural service areas when orderly annexation processes are used and land is taken into a municipality over a three to five year period. See MINN. STAT. § 414.041(4) (a) (1971), as amended by Minn. Laws 1973, ch. 621 § 5.}
\footnote{277. Reid Dev. Corp. v. Township of Parsippany-Troy Hills, 10 N.J. 229, 89 A.2d 667 (1952).}
\footnote{278. LAND USE PLANNING REPORTS, NOV. 5, 1973, at 9.}
\footnote{279. Lyons v. Spaeth, 220 Minn. 563, 20 N.W.2d 481 (1945).}
\footnote{280. Except municipalities located in Ramsey and Hennepin Counties. MINN. STAT. § 473.02(5) (1971).}
ban service areas and tax at a different percentage of assessed valuation.\textsuperscript{281} When a district obtains services or development, it must be reclassified.

Minnesota also has several laws permitting an owner of open land\textsuperscript{282} to be taxed at use value instead of market value. If conversion to intensive use is made, the laws provide for a rollback to recapture some of the deferred taxation.\textsuperscript{283} Unfortunately, the laws have several shortcomings that may subvert their purpose. Since the landowner may convert the land from its open space use by development at any time with only a rollback penalty of the taxes and interest that he would have paid if the land were assessed at market value, the municipality cannot plan on utilizing these programs to control the timing and sequence of land development; development may occur prematurely in open space areas at the developer's sole option. Secondly, the statutes may actually encourage speculation since the developer has received a loan on his taxes for the period of the preferential assessment. Furthermore, the municipality cannot refuse development easements to landowners with the legally required minimum acreage, even if the land is located in urban areas where development of skipped-over land has a high priority. Finally, since the owner is also exempt from special assessment taxation, it encourages leapfrogging of utility extensions and may result in an inadequate revenue base for provision of municipal utility services.\textsuperscript{284} The laws should be amended to require the property owner to convey an easement to the municipality for the period of anticipated open space use, so that the land cannot be converted to a more intensive use except by the mutual consent of the parties. An Open Space Land Commission could be established to evaluate hardship cases and grant variances.\textsuperscript{285}

\textsuperscript{281} Minn. Stat. § 272.67 (1971). A closely parallel provision provides for differential taxation on annexation for up to five years to reflect the different levels of municipal facilities. Minn. Stat. § 414.041 (4) (a) (1971), as amended by Minn. Laws 1973, ch. 621, § 5. See note supra.


\textsuperscript{283} Seventeen states provide for some form of rollback provision. Land Use Planning Reports, Nov. 5, 1973, at 6.

\textsuperscript{284} Citizens League Report, supra note 10, at 28.

\textsuperscript{285} See C. Little, Challenge of the Land (1968).
E. Permanent Controls: Environmentally Critical Areas
(Flood Plains, Wetlands and Public Trust Lands)

Some lands in the region must remain permanently open or controlled, regardless of whether they are in the urban-developed or rural-open space areas. These lands are environmentally critical areas which would be severely damaged if subjected to development.

1. Flood Plains

State and local governmental units have made considerable use of flood plain zoning to restrict the nature and intensity of land use within both the stream channel and the flood plain. There are several objectives served by such zoning. Within the channel, such regulation prevents impediments to navigation and the stream's carrying capacity. It also clearly helps to avoid the threat to health, safety and welfare which is occasioned by flooding. In addition, the regulation of land use intensity adjacent to watercourses may result in open space and areas of scenic and recreational value.

In their original form most standard enabling acts do not mention the control of flood plains and channels as a purpose of zoning, but courts may be willing to imply this power. In addition many legislatures have either added such purposes to the zoning enabling act or have created special enabling legislation. Because flood plain zoning ordinances may result in such a severe impact on the land owner, they may be subject to attack as unconstitutional takings without compensation.

While it seems clear that the general objectives of flood plain zoning are legitimate, the objectives' weight in the balancing process may vary considerably. Even when public health and safety are the asserted objectives, the weight will be a function

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287. Comment, Ecological and Legal Aspects of Flood Plain Zoning, 20 U. Kan. L. Rev. 268 (1972). Minnesota has enacted a Flood Plain Management Act, Minn. Stat. §§ 104.01–07 (1971), as amended by Minn. Laws 1973, ch. 351, creating a state commission with authority to coordinate state, local and federal activities with regard to flood plains. Local ordinances must be reviewed for conformity and a failure of local initiative can be rectified.
of the likelihood of flooding and the potential severity of harm. If the asserted interests are health and safety and if there is a high foreseeability of danger, the courts seem willing to sustain a high degree of impact. Many courts are willing to defer to legislative discretion on this point. However, likelihood and severity vary not only from basin to basin, but within each particular basin. Thus, on the periphery of any given flood plain zone, the asserted interest in health and safety may be of minimal weight. In these areas, the primary objective may be open space which, though accepted as a general welfare objective, may not sustain a high degree of uncompensated impact. Courts may view the regulations as the securing of public open space at private expense.

2. Wetlands Regulation

There is an increasing national trend to protect shorelines, swamps and other areas of special ecological significance by restricting the nature and intensity of land use within a designated distance of shorelines. Although the method of protection is similar to that of flood plain zoning, most wetland regulations are not aimed at the preservation of health and safety from flooding. Rather they seek to protect water supplies and sensitive environmental areas from the impairment which may be caused by development and filling.

The validity of such regulations depends initially on the enacting body’s having adequate authority. Since the objectives and methods are fairly unique, such controls may require special legislative authorization. In recent years there has been an outpouring of wetland zoning enabling acts. Most of these acts authorize control at the state or regional level, a recognition that municipal regulation alone may not provide adequate protection of ecological concerns. Minnesota has recently adopted the

295. California, Connecticut, Delaware, Florida, Georgia, Hawaii,
Shorelands Development in Municipalities Act,\textsuperscript{296} whereby a state commission promulgates model standards for land within designated distances of lakes, ponds and flowage. Local plans not in compliance may be modified by the commission. Even with legislation granting specific authority there are some remaining problems of constitutionality. While the primary objectives of wetland zoning are valid, they come close to being public benefits, and thus courts have occasionally held such regulation without compensation invalid.\textsuperscript{297}

However, due in part to the increased recognition of the importance of preserving the environment, there is a noticeable trend towards upholding the validity of wetlands regulations. Several courts have held that a diminution of value based on development potential through changing the character of the wetland is not a factor in assessing constitutional reasonableness.\textsuperscript{298} The result in these decisions may be due in part to the doctrine of public trust, which permits additional state regulation of activities that might harm areas of special public interest.\textsuperscript{299}

Wetland regulations and flood plain zoning provide useful tools to control environmentally sensitive areas, to provide open space, and to protect health and safety. However, they are not really growth control tools as their spatial scope is limited to a defined distance from the natural feature. They are not as effective in guiding growth into certain areas as they are in keeping it out of others.

3. Public Trust

Certain natural resources such as navigable waterways, timber, minerals and some types of land are often considered to be held in trust for the people. Coastlines and navigable wa-

\textsuperscript{297} Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963).
\textsuperscript{298} In re Spring Valley Dev., 300 A.2d 738 (Me. 1973); see generally Potomac Sand & Gravel Co. v. Governor of Maryland, 266 Md. 358, 293 A.2d 241 (1972); Juanita Bay Valley Community Ass'n v. Kirkland, 9 Wash. App. 59, 510 P.2d 1140 (1973).
\textsuperscript{299} Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 671 (1972). The Minnesota wetlands statute is very similar to Wisconsin's and has the vestige of a navigable waters trust doctrine. MINN. STAT. §§ 105.-485(2), (3), 462.357(1) (Supp. 1973).
are the areas most often deemed in trust. Moreover, navigable waters are often thought to include not only those waters useable for commercial purposes but also those which are “capable of recreational use,” a much broader concept. The public trust can have significant impact on private use and ownership, since land in the vicinity of trust lands is deemed to be held subject to the trust. The public trust cannot be sold for private benefit, and the state may have constitutional and statutory power to regulate land use in the immediate area of the public trust in order to prevent harm to it. It should prove helpful to a growth control plan to fully explore the limits of public trust and determine if the land use which is desired to be regulated will directly or substantially interfere with the trust. If it has such effect, it may well be regulable without compensation.

VI. THE ECONOMIC BENEFITS OF GROWTH CONTROL AND LOW-MODERATE INCOME HOUSING

The control of growth by timing and sequential planning should result in substantial savings to the region. A comprehensive economic study of the town of Ramapo's timing and sequential controls indicates that substantial savings in municipal costs and lower rates will result from the controls. Other studies indicate that scattered site and leapfrog development and low-density zoning practices in urbanizing areas substantially in-

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300. MINN. CONST. art. 2, § 2, is the basis for this kind of a trust doctrine as navigable rivers and waters are deemed common highways and forever free. Article 8, sections 6 and 7, indicate that timber and mineral rights can also be subjects of public trust.


304. The Wisconsin Supreme Court in Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), held that the state could validly regulate wetlands as areas linked to the public trust. It was held that diminutions of value occurring from regulation were to be discounted as they reflected an increment involving changing the nature of land to the harm of the public. Thus, total restriction of intensive use and land conversion was sustained without compensation.

305. Chung, Controlling the Rate of Residential Growth, A Cost-Revenue Analysis for the Town of Ramapo, New York, (unpublished study for the Town of Ramapo, New York, March 29, 1969). The analysis shows that savings will occur in every category: general municipal, water, fire, sewers, and most substantially in the school rate and costs.
crease the cost of municipal services and housing, and that land which is developed in a contiguous manner, while providing substantial open space, is far more valuable than scattered site development with no common open space. For instance, it has been suggested that land worth $35 million if developed without regulation would produce $42 million if developed with a planned network of open space. Similarly, the court of appeals in Ramapo made conclusive findings that the land restricted in Ramapo for 18 years would have an appreciably higher value after the period of restriction due to provision of roads, sewers, water, fire service, park and recreation facilities, drainage and other public services which the community was committed to install as part of the ongoing capital improvement program.

The Metropolitan Council has found that comparable savings should result from the use of timing and sequential controls in Planning Area III. The studies also show that if timing controls are imposed, housing costs should not increase, while substantial savings should result from adequate provision of municipal facilities including sewage and drainage. In most communities undergoing rapid growth this should also produce savings in housing and tax costs for middle income families.

In most suburban communities faced with rapid urbanization the price of housing has increased so sharply that the private market is incapable of producing low-moderate income housing without substantial subsidies from the public sector. In a study of the housing market in New Jersey, it was concluded that even changes in zoning to make land available for higher den-

309. Metropolitan Development Discussion Statement, supra note 10, at 17. In addition, in both Salem, Oregon and Boise, Idaho studies of the cost of public services indicate that a large amount of randomly located vacant land in suburban areas creates higher costs in the provision of many metropolitan and local services which could be avoided through timed development. Mid-Willamette Valley Council of Governments, The Costs of Urban Growth for the Salem, Oregon Area 39 (July, 1972); ADA Council of Governments, The Urban Form (Boise, Aug., 1973).
sity single family units would not be sufficient to generate housing for low and moderate income families. Similarly, uncontroverted evidence presented to the trial court in Board of Supervisors v. DeGroff demonstrated that the median cost of housing in Fairfax, Virginia, the largest suburb of Washington, D.C., is $40,000 and that only persons with incomes of at least $25,000 can afford such housing.

The advantage of control through the timing and sequence of growth is not only that a greater, more efficient density with offsetting public open space may be provided, but also that a mix of housing and population may be promoted. The Metropolitan Council is committed to the concept of balanced housing uses throughout the region, and particularly to dispersed and scattered site housing for low and moderate income families. Under recent decisions of the federal courts, interpreting the civil rights and housing laws, publicly-supported housing for low income families cannot be built in the core cities if it results in further concentrations of low income and minority persons. One court has stated: "For better or for worse, both by legislative act and judicial decision, this nation is committed to a policy of balanced and dispersed public housing." Most industries are leaving the central cities and locating in the suburbs because of freeway construction and horizontal layouts. With the population in central cities becoming increasingly poor and non-white, industry has left its work force behind, producing extensive commuting. The provision of low-moderate income housing, par-

313. 198 S.E.2d 600, 601 (Va. 1973).
314. Metropolitan Development Discussion Statement, supra note 10, at 4, 8.
318. Blumrosen, The Duty to Plan for Fair Employment: Plant Location in White Suburbia, 25 Rutgers L. Rev. 383 (1971). The Metropolitan Council reports that there is a steady trend toward concentration of the poor and minority groups in the central cities with increasing suburbanization of employment over the past 20 years. Forty-five per-
LAND USE CONTROLS

particularly job-linked housing in the suburbs, is now necessary to avoid further concentration and blight in the core. The Metropolitan Council has adopted as one of its major goals the provision of housing opportunities for lower-income persons in new development areas. At the same time the Council desires to upgrade inner city areas and stabilize older transitional areas in the central cities and first-ring suburbs.

Timing and sequential controls, by limiting development on the urban fringe, will permit a redistribution of construction to inner city, transitional neighborhoods and new town development. Growth controls alone, however, will not sufficiently lower land or housing costs to make it feasible for private enterprise to construct low-moderate income housing without subsidy. Moreover, with the recent moratorium on federal housing subsidy programs and impoundment of funds, the Council will have to affirmatively implement programs it has already developed to stimulate construction of such housing. Some of these programs could be:

(1) A review of federal housing subsidy applications to ensure that projects are located in areas of new development;

(2) The development and implementation of regional "fair share" plans for housing of low-moderate income families in suburban and new development locations;

(3) The development of a regional housing authority with capacity to develop public and turnkey housing throughout the region;
(4). The development, through legislation, of powers to finance and construct low-moderate income housing through sale of tax exempt bonds, and with exemption from local zoning and planning restrictions;\(^{324}\)

(5). A request to regional planning authorities to review local zoning and planning to ensure that they conform to regional plans, are non-exclusionary, and make provision for low-moderate income housing.\(^{325}\)

The region could also request local and state revenue sharing to finance housing allowances or rent supplements, provide seed money, or set up other programs to encourage low-moderate income housing construction.\(^{326}\) Whatever the methods used, the region must make extensive provision for low-moderate income housing or face the grave danger that a general regional planning system of growth control will be subject to strict scrutiny and declared unconstitutional as violating the equal protection of the laws.\(^{327}\)

A major increase in the development of low and moderate income housing can be achieved through local zoning ordinances and a little used technique known as bonus and incentive zoning. Bonus and incentive zoning is a plan whereby, in return for certain features or amenities requested by the community, a developer is allowed to increase his density or extend his design in a manner that would not otherwise be permitted under

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The bonus must be of sufficient value to the developer so as to constitute an incentive to provide the amenity, that is, low and moderate income housing. Thus if the developer constructs 20 percent of his units as low and moderate income housing, he can increase his total density by 20 percent. If the developer does not wish to construct those units he can provide “money in lieu of units” which will be utilized by the community to construct low-moderate income units in the same planning district, or to provide seed money, rent supplements or housing allowances or support other housing programs desired by the community. The money-in-lieu provisions would provide that the developer pay $2,000 per unit plus 20 percent of all profit in excess of $2,000 per unit. It would work as follows:

<table>
<thead>
<tr>
<th>(140 units) Projected Sales Volume</th>
<th>Total</th>
<th>Per Unit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expenses:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Raw Land</td>
<td>775,040</td>
<td>5,536</td>
</tr>
<tr>
<td>Construction</td>
<td>3,260,040</td>
<td>23,286</td>
</tr>
<tr>
<td>Land Imp. (+other)</td>
<td>1,239,420</td>
<td>8,853</td>
</tr>
<tr>
<td>Total Expenses</td>
<td>5,274,500</td>
<td>37,675</td>
</tr>
<tr>
<td>Net Profit</td>
<td>555,100</td>
<td>3,965</td>
</tr>
</tbody>
</table>

Since his profit is $3,965 per unit, we compute the bonus payment as follows: 140 × .20 = 28 units.

<table>
<thead>
<tr>
<th>New total units 168</th>
<th>Total</th>
<th>Per Unit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Projected Sales Volume</td>
<td>$1,165,920</td>
<td>$41,640</td>
</tr>
</tbody>
</table>

| Expenses: |       |         |
|Land Improvements | 247,884 | 8,853   |
|Construction     | 652,008 | 23,286  |
|Total Expenses   | 899,892 | 32,139  |
|Net Profit       | 555,100 | 3,965   |

Density Increase Profit Per Unit $9,501
Base Density Profit Per Unit 3,965

328. N. MARCUS & M. GROVES, THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES, 131-78 (1970) (describing extensive use of such systems. For example, in New York, if a developer constructs a legitimate theatre, he can increase his FAR (floor area ratio); in San Francisco, if a developer provides access to rapid transit, a public plaza, or wide setbacks, he can increase his FAR). Comment, Bonus or Incentive Zoning—Legal Implications, 21 SYRACUSE L. REV. 895 (1970).

329. See Fairfax County Office of Comprehensive Planning, Density Bonus Incentives for Providing Low and Moderate Cost Housing for Fairfax County (Nov. 19, 1973). The provision for “money in lieu of units” is similar to “money in lieu of land” provisions for neighborhood park and recreation sites. See Freilich & Levi, Model Regulations for Control of Land Subdivision, 36 Mo. L. REV. 1 (1971).

Added Value Per Unit $5,536
$5,536 x 28
Total Added Value $155,008
Amount of Payment Due $155,008
Less 28 x $2,000
-$56,000
$99,008
x .20
$19,801.60
Plus + 56,000.00
Total “In Lieu” Payment $75,801.60

In Fairfax County, Virginia, the Board of Supervisors attempted to mandate that all developers of 50 or more units must provide a minimum of 15 percent of the units for low-moderate income housing, and thereby earn a density bonus.\(^3\)\(^\text{31}\) The creation of an overlay or floating zone generally was necessary before such a large scale project could be undertaken, and since this required legislative approval following a public hearing,\(^3\)\(^\text{32}\) the possibility of excessive pressure from demonstrative housing groups made the option to provide low-moderate income housing less likely to be exercised. It would, however, be possible to administratively grant bonus and incentive zoning without relying on zone changes, and hence without requiring specific legislative approval, through a special permit use controlled administratively either by the legislature or an administrative body.\(^3\)\(^\text{33}\)

One last consideration remains. Savings accrued from phased construction of capital facilities in the region can be released for housing in urbanizing areas or in the central cities and older suburbs (Planning Areas I and II). The region should have an active program in Areas I and II to prevent problems of abandonment, blight, resegregation, turnover of transitional areas, and block busting. This program should include:

1. Construction of new towns-in-town for areas of blight beyond renewal and rehabilitation,\(^3\)\(^\text{34}\)

2. Judicious use of code enforcement to maintain flexible standards to prevent further abandonment.\(^3\)\(^\text{35}\)

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\(^3\)\(^\text{32}\) Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1950).

\(^3\)\(^\text{33}\) Kotrich v. County of DuPage, 19 Ill. 2d 181, 166 N.E.2d 601 (1960).

\(^3\)\(^\text{34}\) M. DERTHICK, NEW TOWNS-IN TOWN (1972).

(3). Adoption of ordinances on sale signs, prevention of blockbusting and occupancy permits;\textsuperscript{336} and

(4). Utilization of benevolent quotas and insurance for property owners to prevent panic selling and to maintain racially integrated neighborhoods.\textsuperscript{337}

The last technique is particularly important. The United States has always insured the mortgage interest but not the equity in home ownership. By insuring the equity interest of both the present and future owner in racially transitional areas, panic selling for fear of loss of property values is diminished. The white buyer is also encouraged to enter the market. Since the region will be contributing funds to suburban areas to provide low-moderate income families with housing and subsidies, there is a concomitant duty to provide similar funding for code enforcement, housing, insurance and other techniques in the central cities.

With proper regional planning for land use, housing and metropolitan problems it becomes possible to solve many of the problems of the region. Certainly in the last decade we have become aware of some major solutions. If we can contain the wasteful and inefficient urban sprawl of regional areas, we can also unleash new finances and energies to return to the problems of the cities.

VII. CONCLUSION

Any attempt to formulate a growth control guidance system of timed and sequential development to counterbalance rapid and sprawling regional growth by channeling development into a pattern allowing for maximum economic, environmental, physical and social amenities will of necessity encounter many hurdles. The control of growth touches sensitive areas which arouse deep emotions and strong concerns, because the solution to the problem seems to strike at the very basis of American tradition: absolute ownership of private property.

Although the establishment of such a system is very complex and the issues it creates are controversial, it is all too evident that immediate steps need to be taken to meet the challenge and


to attempt to arrest the uncontrolled and extremely harmful growth phenomenon that is taking place in the Minneapolis-St. Paul region, as well as in other metropolitan regions throughout the nation. As this Article indicates, there are no insuperable constitutional problems which will arise in the implementation of any of the techniques discussed to carry out balanced regional growth policies. All that is needed are statutory powers which will allow an appropriate range of techniques to be employed in the system to be brought into existence. Compensatory, regulatory and financial powers are needed at the regional level to allow regions to: (1) review comprehensive planning of local communities to insure that local plans and implementing ordinances are in accord and consistent with regional planning, particularly housing and capital improvements; (2) provide for condemnation powers so that open space can be preserved through land banking, acquisition of development easements and transfers of development rights; (3) provide for financial powers to insure an adequate supply of low and moderate income housing, to rehabilitate housing in blighted areas and to provide compensation for affected communities and property owners; and (4) strengthen inter-governmental cooperation powers of regional councils of government to authorize full contracting and servicing with localities in all areas of planning and environmental concerns, including provision of technical service and assistance. Local governments may require new statutory authorizations to develop timing and sequential zoning, to utilize interim development controls, to provide for capital improvement planning, to utilize flexible zoning and subdivision powers, to grant assessment relief for restricted property, and to otherwise carry out needed legislative and administrative powers.

Much of this legislative package could be accomplished through one of three methods: (1) by incorporating power into existing legislation; (2) by seeking new legislation for regional councils; or (3) by seeking new general legislation relating to all regional planning districts and local governmental units within a state. It is also essential that further studies be made to forecast and explore questions that will undoubtedly arise once such regional systems are in place, such as the effect upon land values and housing costs, the effect upon land assessment rolls, the cost savings effected by implementation of the system, the distribution of low-moderate income housing, and the public benefits to be achieved.