

PUTTING LIMITS ON DEVELOPMENT

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I. OVERVIEW

- A. Growth management programs are intended to regulate the *timing* of development, in addition to traditional zoning concerns of location and intensity of development.
1. Rate of growth. May be tied to the ability of the community to absorb the effect of increased population upon such factors as water supply, sewage, storm water management, traffic, schools, protective services, and/or recreational services.
 2. Sequence of growth. May encourage or limit growth in particular areas in order to advance some planning consideration, *e.g.*, availability, effectiveness or cost of providing various public services or improvements.
- B. The Ohio Supreme Court has recognized that traditional planning and zoning laws already authorize regulation of the pace of development.

E.g., Gerijo, Inc. v. City of Fairfield (1994), 70 Ohio St.3d 223 (*modified in part in Goldberg Cos. Inc. v. Richmond Hts. City Council* (1998), 81 Ohio St.3d 207): Following a period of rapid population growth, the city adopted a comprehensive plan for land use management to foster relationships among the residential, commercial and industrial segments of the city, which included the objective of creating a 70:30 ratio of owner-occupied and renter-occupied housing. A revised plan stated the city's desire for 70:30 ratio of single family to multifamily dwellings. Gerijo sought rezoning to multi-family at a time where the ratio of single-

to multi-family dwellings was 50:50. In its ruling, the Ohio Supreme Court found that the underlying zoning classification was not arbitrary nor did it fail to "substantially advance a legitimate governmental interest," addressing not only the reasonableness of the specific classification but also the broader, housing mix objectives of the Fairfield plan. The court noted that the number of multi-family dwellings would have exceeded the number of single-family homes if the property had been rezoned and developed as proposed, and found that the city was acting within its authority to achieve its stated goal of a balanced housing population, stating: "Creating a goal and a zoning scheme that are both designed to preserve a balance between these types of residential uses represents a legitimate use of a municipality's police power," citing *Belle Terre v. Boraas* (1974), 416 U.S. 1, and *Euclid v. Ambler Realty Co.*, 272 U.S. 365.

The court's ruling in *Gerijo* that a successful challenge to the constitutionality of a zoning ordinance must prove deprivation of economic use in addition to meeting the generally accepted standard, failure to advance a legitimate governmental interest, was subsequently reversed in *Goldberg v. Richmond Hts.* ("... *Gerijo* established an unduly broad standard that encompassed both the standard for challenging the constitutionality of zoning regulations and the test to prove a taking. ... We reestablish the *Euclid v. Ambler* test as the appropriate standard applicable to constitutional challenges to zoning." 81 Ohio St.3d at 213.) However, the *Gerijo* court's analysis of the governmental interest prong is undisturbed by its subsequent *Goldberg* ruling, and is instructive with regard to the authority to use community planning and zoning laws to regulate the pace of growth.

- C. Core test of validity of program will be whether there is a rational relationship between appropriate public goals and the method selected to accomplish the goals.
E.g., Goldberg Cos. Inc. v. Richmond Hts. City Council (1998), 81 Ohio St.3d 207.
- D. Preconditions for establishment of growth controls.
 - 1. Zoning in place.
 - 2. Zoning based upon comprehensive plan.
 - a. Plan must reflect policy decisions.
 - b. Plan must reflect the results of a thorough and appropriate study.
 - c. Factors addressed in the study and policy making may include:
 - i. Overall population goals.
 - ii. Infrastructure and service demands.
 - iii. School demands.
 - iv. Environmental demands.
 - v. Tax-based demands, including desired mix of revenue sources.
 - vi. Other quality of life issues, such as aesthetic, historical, or "local character" issues.
- E. Interim controls can provide breathing space by temporarily preserving the status quo while the municipality puts the necessary capital and administrative infrastructure into place to accommodate a greater population.
 - 1. Interim controls themselves must be well supported.
 - a. Identify what the local growth control problem is.
 - b. Determine what methods would limit the rate of growth.

- c. Develop a plan to slow the growth rate pending preparation of the necessary permanent infrastructure.
2. Interim controls might be implemented pending development of a comprehensive plan.
 - a. Caps or even a moratorium on building permits may be upheld if short in duration and closely tied to concrete steps to implement long term comprehensive solutions.
 - b. If the resulting long term plan eliminates land use opportunities that existed previously, to which commitments have been made, be prepared for more intense scrutiny of the governmental objectives.
3. Interim controls might be implemented pending development of specific municipal services or facilities.
 - a. The municipality should be able to demonstrate meaningful progress toward resolving the deficiency.
 - b. Alternatively, developers may be offered the opportunity to provide or pay for the deficient services or facilities: "pay as you go."
 - c. But allocation of infrastructure development costs to developers may be challenged as "tax." In *Home Builders Assoc. of Dayton v. City of Beavercreek* (Oct. 23, 1998), Greene App. Nos. 97-CA-113, 97-CA-115, 1998 WL 735931 (unreported), the appellate court found that the new development fee, intended to offset the cost of new road construction, was an invalid tax. The court applied factors identified by the Ohio Supreme Court in *State ex re. Petroleum Underground*

Storage Tank Release Comp. Bd. v. Withrow (1991), 62 Ohio St.3d 111: whether the charge is imposed for a governmental service, whether the charge generates excess funds that go to the general fund rather than being segregated for the purposes related to the fee; whether a direct benefit is provided to the public; and whether the measure is regulatory or revenue-generating. The court also opined that *Goldberg* requires that there be a reasonable connection between the fee and the needs created by the development.

II. TYPES OF GROWTH MANAGEMENT PLANS

A. Basic types of growth control measures:¹

1. Adequate public facility plan.
2. Phased growth plan.
3. Rate of growth plan.
4. Urban growth boundaries.

B. Adequate public facilities plan ("concurrency").

1. Most basic and defensible type of plan. Development is permitted where and when adequate public facilities exist to support it.
 - a. Some facility capacity factors can be objectively measured, such as water, storm and sanitary sewer; others, such as traffic volume, fire protection, schools, or recreational facilities, involve policy determination of acceptable levels of service or capacity in addition

¹ These four basic types of growth management programs are identified in Patrick J. Rohan, Zoning and Land Use Controls, Vol. 1, Ch. 4 (Eric Damian Kelly, ed., Matthew Bender 1998).

to analysis of factual data. Usually tied fairly closely to basic health and safety issues.

- b. Where there is no capacity, might implement (temporary) moratorium. Where there is limited capacity, might implement allocation system to select among developers. Where developer itself can reduce inadequacy of the facility or service to acceptable level, additional growth will be permitted.
- c. Municipality must combine capacity-based restriction with concrete efforts to address the problem. "Local governments cannot use police power regulations 'to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring.'" *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*, 400 F. Supp. 1369 (D. Md. 1975) (quoting *National Land and Investment Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1970)).

- 2. Advantage: Courts will give great deference to decisions of legislative body as to how, when and where capital improvements are undertaken.

Carney v. Warren County Board of Commissioners (Aug. 26, 1991), Warren Cty. App. No. CA90-07-046, 1991 WL 164574 (unreported): Involved a challenge to "rural residence" classification by an owner who was denied a classification change to multifamily residential with a planned unit development overlay in order to build a 520 unit apartment complex. The regional planning commission recommended approval subject to certain conditions, including road improvements to the abutting public road and

making a central sanitary sewer and public water system capacity available for the project; however, the board of commissioners denied the rezoning application. The board's concerns included traffic safety, possible problems with excess sewage, and potential adverse impact on the local school district. The record evidenced that the proposed development would increase weekday traffic by more than 250%. The appellate court found that record demonstrated that the zoning regulations and the decision to deny the reclassification were valid "exercises of the county's police power to protect the residents of Warren County from the ill effects of rapid growth." at **4. The opinion does not even address any future improvements to the infrastructure.

Wilson v. Trustees Union Township (Oct. 26, 1998), Clermont App. No. CA98-06-036, 1998 WL 744089 (unreported): Developer challenged constitutionality of single-family residential and agricultural classifications of 22 acres of property, which prevented him from building a condominium complex. The township's evidence was directly primarily to growth control, showing that: "(1) current zoning limits population growth and avoids putting further strain on public resources, (2) current zoning maintains traffic and infrastructure at current levels, (3) modified zoning could make the adjacent areas less attractive to industrial developers, and (4) modified zoning would require more safety services, such as police and fire." The court found that the record would not support a finding that the classifications were arbitrary or unreasonable, or did not bear a substantial relation to the public

health, safety, morals, or general welfare of the community. Again, no mention is made of future improvements to the cited public facilities or services.

3. Disadvantage: Must complete plan and provide public facilities where you say you will.

C. Phased growth plan (*Ramapo*).

1. Direct regulation of timing and location of development. Usually geared to adequacy of facilities, but tends to designate particular area(s) of the community as preferred for development. Designation may be based upon relative ease in providing facilities or services, or perhaps upon avoiding or protecting physical elements. Strategic planning of locations where road and sewer construction will be prioritized can greatly assist in implementation or defense of a phased growth plan.
2. Early legal test of phased growth was *Golden v. Planning Bd. of Ramapo*, 30 NY2d 359, 334 NYS2d 138, 285 NE2d 291(1972), *app. dismissed*, 409 U.S. 1003.

Due to its proximity to New York City, the town of Ramapo, NY had experienced two decades of extraordinary population growth. In order to slow the pace of growth, enabling the city to provide sufficient facilities, the town first developed a master plan. The plan's preparation included extensive study of the existing land uses, public facilities, transportation, industry and commerce, housing needs and projected population trends. The town then adopted a comprehensive zoning ordinance and subdivision ordinance, as

well as a capital budget based upon sewage district and drainage studies. Next, Ramapo instituted a special permit requirement for residential development. Permits were issued based upon the "points" awarded the proposed development as a result of its access to five essential public improvements or services: (1) sewers, (2) drainage, (3) public schools and recreation facilities, (4) roads, and (5) firehouses. (Permits were not rationed or capped.) Residential development was thus coordinated with the town's ability to provide these improvements or services. The capital budget plan provided for build out by the end of eighteen years.

The New York Court of Appeals upheld the plan. Found that the state enabling statutes implicitly authorized regulation of growth by authorizing restriction of population density and land use, and facilitation of provision of adequate municipal services. Found the plan not confiscatory, since restriction on development was temporary, pending planned capital improvements. Found the plan did not violate substantive due process: "[W]here 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."

3. Advantage: Sophisticated plan.
4. Disadvantage: Complicated to implement. Administration of point system is labor intensive and requires strong staffing resources.

D. Rate-of-growth plan (*Petaluma, Schenck v. Hudson*).

1. Usually a limit upon number of new dwellings that can be build each year. Growth figures should be derived from careful study with a view toward meeting the realistic needs of the community.
2. Early approval of rate-of-growth plan in *Construction Industry Ass'n of Sonoma County v. Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). After its population more than doubled in the 1960's, Petaluma, CA adopted a five-year quota upon the number of building permits annually for projects of 5+ residential units. Building permits were allocated pursuant to a point system that favored compliance with the city's general plan and provided for low and moderate income housing units, and allocations were divided equally between east and west, single and multi-family units. A "greenbelt" line was drawn as five-year boundary for urban expansion, beyond which city services and residential growth were not allowed, to encourage in-filling around the city center.

The avowed purposes of the development controls were to insure orderly growth, protect small town character and open space, and provide diverse housing choices. Per district court's findings, the development limits were not based upon facility limitations but upon a policy judgment of the city. The Court of Appeals for the Ninth Circuit held that the concept of the public welfare was sufficiently broad to sustain the city's interest in safeguarding its small-town character and insuring that growth proceed at an orderly and deliberate pace.

3. In Ohio, Sixth Circuit Court of Appeals upheld the City of Hudson's rate-of-growth allocation system against a substantive due process claim in *Schenck v. Hudson*, 114 F.3d 590 (6th Cir. 1997), *rev'g* 937 F. Supp. 679 (N.D. Ohio 1996), *on remand*, 997 F. Supp. 902 (N.D. Ohio 1998).

As a result of a merger between the former City of Hudson Village and Hudson Township in 1994, the city increased in physical size from six square miles to 25 square miles. The population of the city itself more than tripled as a result of the merger. Moreover, from 1990 to 1996, the number of residents living within the current geographical limits of the city increased by about 25%; the population of the area had nearly doubled in the preceding two decades. The city commissioned preparation of a comprehensive plan to accommodate the needs of the existing population and to prepare for anticipated residential growth, leading to passage of a new zoning and planning law in 1996. The legislation specifically set forth the city's intent to manage residential growth so that it did not exceed the capability of the city's infrastructure, to avoid the need for new infrastructure so the current city needs could be met, to protect the city's unique character, and to encourage nonresidential development to increase the city's tax base.

Under the new law, on an annual basis, the city restricted the number of residential building permits based upon the amount of municipal infrastructure needed to service such developments and the availability of other city services. A preference was given to developments proposing affordable housing, housing for the elderly or disabled, and to lots receiving

preliminary or final plat approval prior to the effective date of the ordinance. In the first allotment, the number of applications greatly exceeded the number of permits to be allotted. A number of aggrieved plaintiffs claimed that the system was unconstitutional, and the district court preliminarily enjoined enforcement of the new system as to lots that had already received preliminary or final plat approval and were already improved with water, sewer, and roads. The court did not see a rational connection between the city's refusal to let such development proceed and its underlying concerns for infrastructure development. The court was also concerned that the permit allocation system was not an interim system, and that a specific facility improvement plan was not in place.

In a two-to-one decision, the Sixth Circuit dissolved the preliminary injunction. The court held that a cap on the number of permits for homes to be built in the city unquestionably bears a rational relationship to the city's legitimate concern of controlling growth in residential areas until such time as its infrastructure is able to meet the current and future needs. The court gave substantial deference to the legislative judgment of the city council, particularly with respect to the city's decision to use a lottery system rather than a point system to allocate the limited number of permits. The court recognized the equality inherent in the lottery system, and that administration of a point system would be cumbersome and potentially subjective. The case is now back before the Sixth Circuit following entry of summary judgment in favor of the city.

4. Advantage: Easy to administer.
 5. Disadvantage: If ordinance is not properly drafted and backed by supporting data, mechanical application may appear arbitrary or inequitable; may lead to "takings" claims.
 - a. Consider periodic review of a growth cap.
 - b. Put in mechanism for particular review and relief through variances.
- E. Urban growth boundaries. A line separating the limit of future urban growth from areas that are to remain rural. Historically, might be at the terminus of easy public water or sewer service. Such a line discourages urban sprawl, promotes in-filling. Leapfrog development makes provision of public services more expensive, leaves behind undeveloped pockets, and is more destructive to the environment, aesthetically and ecologically.

III. LARGE LOT ZONING

- A. Commonly used method of slowing residential development. Necessarily limits the number of dwellings that can be constructed and resulting overall size of community.
- B. Had been generally upheld to prevent overcrowding, preserve rural atmosphere, insure adequate light and air. But for several decades, courts in most jurisdictions have been examining large lot zoning more closely, determining whether the general welfare or just the area with the large lot zoning was benefitted by the restrictions, whether the zoning had the purpose or effect of excluding low and moderate income persons, whether it was confiscatory; whether its purpose was simply anti-growth.

- C. In Ohio, large lot zoning to regulate population density in order to protect water resources was approved by the Ohio Supreme Court in *Ketchel v. Bainbridge Township* (1990), 52 Ohio St.3d 239.

In 1979, the township zoning resolution was amended to increase the minimum lot size for the subject residential classification property from one or 1.5 acres to three acres. The stated purpose of the 3-acre minimum was protection of groundwater resources in the absence of central water or sewer lines. In 1984, the property owners were denied reclassification to a "multi-use" district in order to build a complex including multi-family dwellings, nursing homes, light industry, retail stores, and restaurants and challenged the larger lot zoning as unconstitutional.

The Ohio Supreme Court acknowledged the establishment of minimum lot sizes as a commonly recognized technique for regulating population density, a function that townships are authorized to do through zoning. Affirming the court of appeals, the court held that the township has a legitimate interest in assuring an adequate supply of safe water for its residents, found that the record supported the township's position that higher density development in that area would strain the available water supply, and upheld the constitutionality of a 3-acre minimum lot size. (The opinion does not address whether water service could have been obtained from another source.)

However, Bainbridge Township failed to establish the validity of a 5-acre minimum lot size in *Zeltig Land Development Corp. v. Bainbridge Township Board of Trustees*, 75 Ohio App.3d 302 (1991). The property owner established that, unlike the land under review in *Ketchel*, residential development of the property would

require central sewer lines and that such development would be unprofitable if the lot sizes remained 5 acres. The only basis that the township offered for the large lot requirement was the desire to maintain a rural atmosphere. The appellate court acknowledged the township's right to regulate the density of population for the purpose of promoting the public health, safety, and morals, expressly recognizing that maintaining low-density development to protect the community's citizens from "the ill effects of urbanization" is a permissible goal. Nonetheless, the court found the record to be devoid of evidence that the 5-acre lot size requirement advanced a legitimate governmental interest and consequently ruled that it was unconstitutional.

IV. THE FARMLAND PRESERVATION ACT, FORMER HB 645, HAS APPARENTLY BEEN BROKEN UP INTO SEVEN INDIVIDUAL BILLS, MOST DIRECTLY OR INDIRECTLY RELATING TO GROWTH MANAGEMENT

- A. The Planning Bill. "Certified Well Planned County." Counties can achieve favored status for funding infrastructure improvements by enacting land use programs that include comprehensive land use plans, Agricultural Security Areas, soil classes, mining plans, tougher rules re septic tanks and perc permitting. Also provides for a loan program to help borrowers purchase land in Agricultural Security Areas. [References to Concentrated Infrastructure Districts, urban growth boundaries, were removed from the legislation due to substantial amount of controversy.]
- B. The Subdivision Bill. County or municipality may expand the number of acres to which the Subdivision Law may apply from 5 to a specific number no greater than 20, if it is determined to be necessary in order to "guide proper development and to

ensure that new development does not impose an inappropriate financial burden on taxpayers."

- C. The Access Management Bill. Allows counties to plan how developments will access local roads.
- D. The State Government Bill. New duties to Farmland Preservation Office, requires transportation improvement districts to comply with county-wide comprehensive land use plans, requires ODOT to incorporate farmland preservation into process for allocating funds for new capacity projects, requires DOD to incorporate preservation of farmland into grant and loan eligibility criteria.
- E. The CAUV Bill. Changes acreage requirements for participation in Current Agricultural Use Valuation program to 20 acres (was originally 30 acres but recently changed to 10, which is now regarded as too small).
- F. The Ohio Urban Renaissance Bill. Submitted by the Ohio Home Builders Association, local laws would be rewritten: to designate zones within in counties to encourage housing by awarding tax credits for renovation of buildings within the zones; to promote compact development by changing subdivision and building codes; to limit referenda re PUDs to initial changes to the zoning map, with any subsequent actions being "administrative." Also Housing Impact Analysis, which would assess whether laws or regulations encourage inefficient use of land by determining whether they increase or decrease the cost to each unit of housing.
- G. The Brownfield Improvement Bill. Intended to encourage greater participation in the Voluntary Action Program through regulatory changes and possible lender liability enhancements.

V. ODDS AND ENDS

- A. Moratorium. A temporary moratorium upon issuance of building permits, or even upon proceeding with approved development, may be valid if it is of appropriately limited duration, and if it is in response to a sufficiently strong public necessity. *E.g.*, *Dawson Builders, Inc. v. City of Mentor* (May 11, 1981), Lake App. No. 8-062, 1981 WL 4377 (unreported).
- B. Environmental restraints. Wetlands and hillside protection, stormwater management.
- C. Eminent domain for park and open space purposes; land banking.
 - 1. Municipal power of eminent domain can be used to acquire property that might otherwise be targeted for development, in order to preserve green space or recreational areas for the community's use.
 - 2. Alternatively, land banking can be used to control the sequence of development by holding land from the market, or can be used to assemble and earmark large tracts of land for particular types of development.
 - 3. Land banking can be expensive, both because of the cost of purchasing the property, and the loss of tax revenues.
- D. "Holding zone": Zoning property for a use for which there is no current market in the community, for the purpose of delaying development rather than in the expectation that the property would be used as zoned.
 - 1. In other jurisdictions, courts have generally accepted the existence of the device of maintaining large tracts of vacant land in agricultural or low density residential classifications to hold them in reserve for as-yet undetermined future development needs. *E.g.*, *Kutcher v. Town Planning*

Commission, 138 Conn. 705, 88 A.2d 538 (1952); *Huff v. Board of Zoning Appeals*, 214 Md. 48, 133 A.2d 83 (1957).

2. Holding areas can be used to control the pace of development, either by permitting placement of public improvements in advance of development, or to reduce scatteration.
 3. Caveat: Some commentators seriously question the legality of holding areas.
- E. Land conservancies. Ohio Rev. Code Chapter 6101 permits the establishment of conservancy districts.
1. Land conservancy is a separate political subdivision of the State with the power, *inter alia*, to acquire land or easements.
 2. Purposes may include various types of water regulation, particularly flood control and resource conservation. May restrict or limit development for those purposes.
- F. Regulatory takings:
1. *Landgate, Inc. v. California Coastal Commission*, 17 Cal. 4th 1006, 953 P.2d 1188, 1998 LEXIS 2461 (Cal. 1998): Developer won ruling that state agency did not have jurisdiction to reject its plan for development of residential lot for the reason given. Then developer claimed that the two year delay in development constituted a regulatory taking for which it should be compensated. In a four-to-three decision, the California Supreme Court overturned damages award to developer, deciding (as had other courts) that land use regulations and decisions that do not deprive property of all value, which are part of a reasonable regulatory process designed to advance

legitimate governmental interests, are not takings even if they are ultimately determined to be defective. The court also rejected a subjective test of the agency's motives for the erroneous decision, adopting instead as the test "whether there is, objectively, sufficient connection between the land use regulation [or administrative decision] in question and a legitimate governmental purpose so that the former may be said to substantially advance the latter."

2. *Bormann v. Board of Supervisors*, 584 N.W.2d 309, 1998 Iowa Sup. LEXIS 214 (Iowa 1998): The Iowa Supreme Court held unconstitutional the provision of the Iowa law regarding "agricultural area designation" that established immunity from nuisance suits for farm operators for the creation of offensive noise, odor, dust, or fumes. The court found that the immunity created an easement on the neighboring properties in favor of the farm area, amounting to a regulatory taking, without establishing a mechanism for compensating the adjoining property owners for the deprivation.

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