

PROCEDURAL AND SUBSTANTIVE
LAND MANAGEMENT TECHNIQUES
OF POTENTIAL RELEVANCE FOR
THE NEW JERSEY PINELANDS

A REPORT TO THE PINELANDS COMMISSION

By

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VOLUME 3

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INTRODUCTION

This is the third of a five-volume study prepared for the New Jersey Pinelands Commission by Ross, Hardies, O'Keefe, Babcock & Parsons. The purpose of the report is to describe and provide a preliminary analysis of land planning and management techniques which have been used, or proposed, in this and other countries. This report serves as a basis for later elements of the Ross, Hardies work program in which, following an additional data-gathering stage, Ross, Hardies will work with the Commission and its staff to narrow the range of planning and management techniques which merit the Commission's consideration and will, as its final work product, draft specific legislation and regulations designed to achieve the goals and purposes of the New Jersey Pinelands Protection Act of 1979.

The first volume of this report is devoted to a summary and analysis of the entire report. Volume 2 contains detailed descriptions of a number of state and regional land use programs for the purpose of illustrating the variety of organizational and procedural approaches that can be taken to regional land planning and management. In this volume we discuss a variety of substantive approaches to land use regulation which may be useful in the Pinelands either as

regional regulations or as models for local adoption in response to regional guidelines. Volume 4 analyzes a number of land management programs which are currently used in several foreign countries and draws several lessons for the Pinelands program from this foreign experience. Finally, in Volume 5 we present a preliminary legal analysis of the fundamental constitutional principles which must be accommodated in any land use regulatory program.

CHAPTER ONE

ACQUISITION OF LAND OR INTERESTS IN LAND

I. FEE SIMPLE ACQUISITION

The most effective way for government to preserve land is to buy it outright either in a negotiated sale with the property owner or, when a negotiated sale proves to be impossible, through the use of the power of eminent domain. The power to condemn land derives from the sovereignty of the state and is not explicitly granted by the federal constitution or the New Jersey state constitution. It is limited by the constitutional requirement that a taking of private property must be for public use or a "public purpose" and must be accompanied by payment of "just compensation."^{1/}

The courts have not always been in agreement on the meaning of the term "public purpose." There is a narrow view that "public use" means use or employment by the public. In other words, the public or a public agency must have some right to use the property after it is acquired.^{2/} The broader view is that "public purpose" is synonymous with public advantage, convenience, benefit, or utility. Thus any land acquisition that contributes to the general welfare and prosperity of the community constitutes a public use.

The New Jersey courts have accepted a liberal view of the meaning of "public use."^{3/} There is, in the New Jersey decisions a disposition to accept the concept that the concept of public use may expand as social needs change.^{4/}

We must keep in mind in determining what is to be considered a public use the increasing wants of society as our economy and public welfare continue to develop and progress. Furthermore, even if there is no public use in the property taken, if there is a public benefit derived from the service rendered, free from unreasonable discrimination, we must consider the taking constitutional.^{5/}

In a 1970 decision upholding the constitutionality of New Jersey legislation that was responsive to the purposes of the federal Highway Beautification Act, the New Jersey Supreme Court sketched the authority to acquire land to preserve scenic beauty or natural environmental systems in broad, sweeping strokes.

[W]hat the legislature here sought, was the restoration, preservation and enhancement of the natural condition of land adjacent to the federal highway system. The Act contemplates that there is a certain basic beauty in natural terrain and vegetation unspoiled by the hands of man, which it proposes to recapture or maintain. Although the extent to which each individual finds a specific landscape beautiful

must be determined by a subjective test, this does not denote that there is no catholic criterion for the ascertainment of whether any scenic beauty exists in a given panorama. "Scenic beauty" is concerned with such manifold possible situations that it does not lend itself to a more specifically detailed descriptive statement. A tabulation of the various possible elements constituting scenic beauty is well-nigh impossible. The present interest in ecology and conservation demonstrates the necessity and public purpose of preserving land, as nearly as possible, in its native state. We have no hesitancy in stating that the restoration, preservation and enhancement of scenic beauty adjacent to public highways is a public use for the public welfare, filling a social need of our times. Hence, the power to acquire lands for that purpose is beyond judicial interference.^{6/}

Given the disposition of the New Jersey courts to take an expansive view of reach of the "public use" requirement, it is reasonable to predict that New Jersey would follow the decisions in other jurisdictions that have ascribed broad meaning to the concept of public use, including acquisition of a predominantly vacant, "dead" subdivision (New York),^{7/} elimination of "improper" land use (New York),^{8/} development of a center of industrial employment (Maryland),^{9/} and enhancement of employment opportunities and tax base in a central business district (Illinois).^{10/}

A management plan for the Pinelands that includes a land acquisition program will undoubtedly designate some lands as suitable for acquisition. There are hazards in this process, and the hazards increase as the designation of acquisition priorities becomes more specific because in some instances planning activity prior to condemnation has been held to be tantamount to a taking. The usual rule is that designation in a general plan of sites that are suitable for acquisition does not by reason of that designation give the landowner a right to compensation then and there.^{11/} The New Jersey Supreme Court has accepted this general rule in a case arising under the Blighted Area Act in which the Court ruled the designation of an area as blighted and eligible for acquisition does not constitute a taking despite the threat of condemnation hanging over the property.^{12/} Designation of land for ultimate acquisition has an undeniably chilling effect on the marketability of land and in some instances protracted delay between designation and the commencement of eminent domain proceedings has persuaded courts to allow the landowner to compel judicial valuation and compensation in a proceeding frequently called inverse condemnation.^{13/} There are two lessons to be drawn from this second category of decisions. First, long range land acquisition priorities should be generalized and

expressed in terms of guidelines rather than specific sites. Second, the time span between designation of particular sites for acquisition and the commencement of negotiations for acquisition and condemnation should be short. The development at an early stage of the planning process of an acquisition "wish list" of sites to be acquired over a period of years could be an invitation to needless litigation and compulsory premature acquisition.

The attempt to substitute regulation for acquisition may be even more hazardous, especially when acquisition negotiations are abandoned at mid-stream in favor of severely restrictive regulation.^{14/}

II. INSTALLMENT LAND PURCHASES

When the high cost of land acquisition makes it impossible or undesirable for a government agency to pay the entire purchase price of land at one time, an installment purchase may be used. Installment land purchases are no more than a method of spreading the cost of fee simple acquisition over a term of years. The availability of this alternative method of financing depends upon statutory authority for either conventional note and mortgage financing or conditional sales contracts.

Installment land purchases, which have been used by the Maryland National Capitol Parks Commission to buy farmland in Maryland, involve a land sale contract that obligates the governmental agency to make installment payments over a period of years. Actual transfer of title does not occur until the final installment is paid.

Acquisition through installment land purchases may be more costly than outright acquisition, however, because the unpaid installments will bear interest until paid. That interest cost may be greater on individually negotiated purchase contracts than it would be on a bond issue, the proceeds of which were to be used for land acquisition. Installment purchases do, however, avoid depleting acquisition funds for comparatively few sites and permit the same amount of initial funding to be used to reserve larger quantities of land from development. The piper will have to be paid, however, and installment purchases can create substantial amounts of long-term debt that may prove burdensome in the future.

The landowner may benefit from an installment sale by realizing a significant tax savings by spreading his capital gain over a number of years. The installment method can be used, however, only if the seller receives no more than 30% of the total sale price in the year of the sale. In addition, if the sale contract specifies

either no interest or an unrealistically low rate of interest, a portion of each year's installment payment must be treated as ordinary income. This unstated interest, sometimes called "imputed interest," is also treated as an interest deduction for the buyer rather than as part of the purchase price.^{15/}

III. PURCHASE OF EASEMENTS

Originally, programs to preserve open space have relied on outright ownership of land. However, in recent years, increasing interest has been shown in the use of a variety of programs that require the acquisition of less than a fee simple interest.^{16/} In part, interest in less-than-fee acquisition programs has been an outgrowth of the need to make land acquisition budgets stretch farther. Especially once an area has begun to develop, most local governments cannot afford the fee simple price of land, and more often than not communities lack the funds or foresight to acquire land well in advance of development. This emphasizes the importance of cluster zoning, which will be discussed in Chapter 2 of this report. In addition, government agencies have realized that achievement of public objectives may be attained by acquiring only part of the rights which comprise full ownership of a particular parcel of land. In many cases the purchase of scenic, conservation or development easements will adequately ensure the protection of land as open space.

One type of easement is a positive easement. That is, the acquisition of a right to use all or a part of a tract of land for specific activities; for example, obtaining fishing rights or a right of way for a public footpath or a hiking or bicycle trail. A negative easement prevents the landowner from engaging in specific activities on his land. For example, through a conservation or scenic easement the government can acquire a guarantee that the owner will not put up billboards, cut down trees or fill in marshland. Easements may also be used to acquire development rights so as to forbid all development or restrict the type of development which may take place. In the case of negative easements, the owner retains the right to use the land for other purposes and the right to sell or bequeath it.

There is such extensive precedent for the acquisition of a wide range of less-than-fee interests in land that it has been suggested that any interest in land that can be defined can be condemned.

Real property is subject to the power of eminent domain as are all rights or interests therein. Existing easements may be taken, or new easements carved out of the unencumbered fee, and the easements so created need not be of a character known to the common law, but may consist of any rights over real property that are appropriate to the use for which they are taken.17/

Condemnation of easements is common. For example, in Davis v. Board of Education,^{18/} a school board was permitted to condemn an easement for a right of way previously given to an adjoining landowner; in Re City of New York,^{19/} the right of access to the Harlem River was taken from a riparian landowner and the condemnation of air rights has been upheld in Jersey City Chapter of the Property Owners' Protective Association v. City Council.^{20/} The acquisition of real and personal property to preserve and enhance scenic beauty adjacent to federal highways is specifically authorized by New Jersey law^{21/} and scenic easements have been upheld in Kamrowski v. State.^{22/}

Although less-than-fee approaches to controlling development are not widely used in the United States, there are a number of major programs in use. Scenic easements have been used by the National Park Service along the Blue Ridge and Natchez Trace Parkways and by New York State and Wisconsin which have employed this technique along their parkways.

The State of Maryland has obtained easements over 2,000 acres near Piscataway Park across the Potomac River from Mt. Vernon where many residents have donated easements in order to maintain the area's natural character.^{23/} The Suffolk County Farmland Preservation Project in New York State, which is designed to preserve some 30,000 acres,^{24/}

and the New Jersey "Agricultural Preserve Demonstration Program" are examples of attempts to use easements to preserve agricultural land. Under the New Jersey program, the Departments of Agriculture and Environmental Development are authorized to create an agricultural land preserve of approximately 5,000 acres through the purchase of development easements. \$5,000,000 has been budgeted for the project area which has been delineated as four Burlington County townships which lie on the urban fringe about 25 miles from the center of Philadelphia.^{25/}

Private organizations devoted to preservation of land have made extensive and successful use of scenic and conservation easements. The Nature Conservancy, the Maine Coast Heritage Trust (which has acquired over 67 conservation easements on over 5,000 acres) and the Brandywine Conservancy (Delaware-Pennsylvania) are the most experienced in acquiring development easements.^{26/} Development rights have been donated or sold at low cost by owners who are in sympathy with the organization's goal and who derive a substantial tax benefit because of the donation.

The following table summarizes major government programs involving the purchase of scenic or conservation easements in the United States.^{27/}

MAJOR PUBLIC PROGRAMS INVOLVING PURCHASE OF
SCENIC OR CONSERVATION EASEMENTS

<u>Location and Agency</u>	<u>When Acquired</u>	<u>Acreage</u>	<u>Types of Restrictions</u>
Blue Ridge Parkway in Virginia, North Carolina National Park Service	1930's and 1940's	1,200	A, B
Natchez Trace Parkway in Mississippi, Alabama, & Tennessee National Park Service	1930's	5,000	B
Adirondack Northway Interchanges, New York New York Dept. of Environ. Conserv.	mid 1960's	< 1,000	B
Piscataway Park, Maryland National Park Service	late 1960's	2,000	C
Sawtooth National Recreation Area, Idaho U.S. Forest Service	1973-76	10-12,000	D
Wild & Scenic Rivers: Rogue River, Oregon; Clearwater River, Idaho; Eleven Point River, Missouri U.S. Forest Service	1974-75	5,000	E
Waterfowl Management Rights Easements in North Dakota, South Dakota, & Minnesota U.S. Fish & Wildlife Service	1958-	500,000	F
Great River Road & Other Highways, Wisconsin State Division of Highways	1950	17,000	G
Farmland Preservation Program, Suffolk County, N.Y. County Government	1977-	underway; 215 acres so far	H
Farmland Preservation Demonstration Project, Burlington County, N.J. State Depts. of Agriculture & Environmental Protection	1978-	underway	H

- A. No building.
- B. No building, except with permission, for farm and residential purposes, no tree cutting, no dumping, and no signs or billboards.
- C. Development only with permission of park superintendent. Residential only, and restricted to one-half or one acre in every five acres.
- D. One homesite per 200 acres.
- E. Public access along river; no building within 20-30 feet of high water mark; 2-3 houses on 50 acres permitted.
- F. No drainage of potholes or other wet areas.
- G. No new commercial development; minimum 5-acre lot or 300 ft. frontage for residences; no dumping, no tree cutting; no signs or billboards.
- H. Farming and related processing activities only.

Although the purchase of all development rights may entail payment of a purchase price that is a major share of the total value of land, the acquisition of easements rather than fee simple title will still reduce the initial cost of acquisition to some extent. Moreover, ongoing maintenance costs and responsibilities will be borne by individual landowners who will also continue to pay property taxes based on the remaining value of the land. The experience of the National Park Service and New York State, however, demonstrates that difficulties can occur in monitoring compliance with the easement agreement. Although most landowners cooperate with easement restrictions, some owners have continued to build structures or cut down trees. This problem has been attributed to a number of causes: (1) governmental agencies did not fully explain easement restrictions to the landowners; (2) some of the land has been transferred to second and third owners (many of the problems the Park Service has encountered in enforcing the easement restrictions have been caused by these subsequent owners who do not realize that their land is subject to an easement or do not fully understand the easement restrictions); and (3) many landowners had never had reason to question the idea that "a man can do whatever he wants with his property," because zoning and other types of land use regulations are not used in many of the rural areas involved. ^{28/}

In contrast to the New York and federal experience, the Piscataway Park and Wisconsin programs have had success. The success of the Piscataway easement program can be attributed, at least in part, to the fact that the program was initiated by property owners in the area who wished to preserve the landscape. Potential purchasers of property in the area are informed by the real estate agent that there are both scenic easements and restrictive covenants which run with the land.^{29/}

The scenic easement program along Wisconsin's Great River Road has also experienced few violations of easement restrictions. It is generally agreed that the program has prevented strip commercial development, a previously common occurrence in unprotected rural areas in Wisconsin.^{30/}

The acquisition of easements appears, at this time, to be a management technique that merits close study. It offers the opportunity to preserve the present agricultural and wooded character of the Pinelands without sacrificing the current level of economic activity and the employment it provides or entirely removing large tracts of land from tax rolls. At the same time it releases land from private development pressures and puts the decision as to whether land will be developed

at all, and if so when, into the hands of a governmental body. Which governmental body is a question that remains to be decided, but uniformity of acquisition policies, and release of development rights when appropriate seems to weight the scales more heavily in favor of a regional agency for the entire area of the Pinelands.

IV. BARGAIN SALE

A "bargain" sale technique is simply fee simple acquisition by another name but at lower cost because the seller takes some of his compensation as a tax saving.

What happens is that a fee simple title is transferred at less than the full market value of the property. The seller then deducts as a charitable contribution on his federal income taxes the difference between the fair market value and the price actually paid. However, the Internal Revenue Code requires that a portion of the value of the contribution must be included as a gain from a sale of a capital asset.^{31/} The following example illustrates how this tax requirement operates: If a taxpayer sold land with a fair market value of \$20,000 to a charitable organization (which was not a private foundation) at his cost of \$12,000, he would be required to allocate 60 percent of the cost (\$7,200) to the portion "sold" to the charity (\$12,000) and 40 percent of the cost (\$4,800) to the portion

"given" to the charity (\$8,000). Thus, this taxpayer would be required to include \$4,800 as gain from a sale of a capital asset in his tax return, and would be allowed a charitable contributions deduction of \$8,000. An accurate, fair appraisal of the property is essential in bargain sales to ensure that the total purchase price plus the value of the contribution does not exceed the fair market value and create a windfall for the taxpayer.

V. PURCHASE AND LEASEBACK; PURCHASE AND SALEBACK

There are two other methods by which the public can retain full control over the use of land without retaining all the responsibilities of full ownership or management. These methods are also variations of the outright fee simple purchase.

The first technique, called purchase and leaseback, requires legislative authorization and involves the purchase of land by a governmental body, followed by a leaseback to the former owner or a third person subject to restrictions in the lease on the uses of the land. The following example illustrates how purchase and leaseback works:

On the edge of a community there is a farm of 200 acres. Its days as a farm are probably numbered, and while the present owners want to keep farming it, the next time title changes hands, it will probably go to a real estate man or a developer. The community very much wants to see this property stay in farming. At the moment

there is no need for additional park space. There will be in the future, however, and the farm will be ideal for this purpose. In the meantime, the farm, simply by remaining as a farm, will provide a visual anchor of great importance. It frames the gateway of the community.

The community purchases the farm and then leases it either to the former owner or to someone else. The conditions of the lease are that the land remain in farming, and the rent will be modest enough to make the farming operation profitable and yet it will provide the community with an appreciable return on its investment. 32/

A variation of this technique is the purchase and saleback in which the government places a restriction in the deed on the use of the land and then sells the property subject to the new restrictions. The advantage of purchase and saleback, as opposed to leaseback, is that the government maintains control over use of the land and the entire value of the property returns to the tax rolls.

These techniques have not been commonly used in this country, but purchase and leaseback is used in Canada, many European countries, and has been tried on a limited basis in Massachusetts 33/ and extensively by the National Park Service. 34/ The Park Service utilizes yet another variation of purchase and leaseback, life-tenancy arrangements. Property will be bought with the proviso that the present owners can continue to use the land, subject to specific restrictions, for a period of years or for as

long as they live. In return for granting a life tenancy, the purchase price is somewhat reduced. While used with success, this program has often been the occasion for some acrimony between the federal government and the land-owners who tend to believe that the price they received for their property is too low. While living in what was once theirs, property owners must now frequently request permission from the government to make changes on their land.^{35/}

In Canada, the national government has acquired 37,000 acres since 1958 to make a green belt roughly 2-1/2 miles wide in an arc around the southern limits of the City of Ottawa. A great deal of this land has been leased back to farms under five-year leases.

VI. LAND BANKING

An alternative method of managing urban growth which is beginning to acquire advocates in this country is public land banking, a system in which a governmental entity--either an existing government body or a newly formed public corporation--acquires a substantial fraction of the land available for future development for the purpose of controlling the future growth of a region.^{36/}

By acquiring land in the path of urban expansion, and hence immunizing it from premature development, the land bank entity can observe market forces and then develop or dispose of the land at a propitious time for development and with use restrictions consonant with a publicly adopted plan for the area.37/

The goal of land banking is to promote more rational patterns of land development in lieu of urban sprawl and the reduction of the cost of land through the elimination of land speculation.

Canada, Australia, and a number of European countries, most notably Sweden, the Netherlands and Finland, have used land banking extensively.

In Stockholm, for example, large amounts of land on the periphery have been held in reserve for as long as 25 years, until planned elements of the public infrastructure have become available. Income derived from leasing the land for farming until it is needed for development has been used to pay debt service on the capital borrowed to finance the land's acquisition.

To allow the city to readily adapt to changing land use patterns without having to resort to the costly and time-consuming procedure of condemnation, Stockholm has adopted a policy of leasing the banked land to developers, under long-term contracts subject to periodic negotiation, rather than selling it. The leasehold system additionally permits the city to capture the increased value of land derived from the provision of public facilities and services and natural inflationary trends. 38/

While these foreign programs have been successful, critics in the United States of land banking proposals have argued that differing social, political and economic traditions and institutions in this country would prevent the success of the idea here. Unlike European countries, America has a strong tradition of private ownership and a tradition of using the far less costly method of exercising control through the police power.^{39/} Though some small land banking programs exist in the United States, the only U.S. governmental body which has attempted land banking on a large scale is the Commonwealth of Puerto Rico.^{40/} In 1962 the Puerto Rican legislation adopted a far-reaching, comprehensive bill^{41/} creating a public agency designed to fight urban sprawl and to implement development plans through the creation of a land bank.^{42/} As of 1977, the Puerto Rico Land Administration had acquired almost 55,000 acres of land and had disposed of 18,000 acres either by lease or sale.

Land has been acquired at the request of public agencies, either for specific projects or to hold down speculation in land around those projects so that the public sector would realize any increments in value attributable to the projects. Land from the reserve has been used for two new communities, for the construction of thousands of units of low and moderate income housing, for industrial development, and for the management of natural resources. Marinas have been built, habitat preserved, and historic areas protected. Land still

held in the reserve often is leased pending future disposal. Although some advocates of the land bank program would like to have seen a higher level of activity, the act is working effectively and the Land Administration has had considerable success.^{43/}

New York's Urban Development Corporation (UDC)^{44/} has many of the same land reservation powers as the Puerto Rico Land Administration. As of 1973, UDC held \$20 million worth of land, mostly as a reserve for its planned new communities of Radisson and Audubon, New York. Funds for land acquisition and for the construction of infrastructure come from a state non-interest-bearing loan.^{45/}

In 1973, Fairfax County, Virginia, decided to create a \$500,000 revolving fund for land acquisition.

. . . The original intent of the county board of supervisors was to buy critical sites, such as those adjacent to Metro stops, so that the county could profit from publicly caused increases in land values and so that the desired mix of development could be assured upon sale of the sites. By 1974, the county had modified its objectives to the acquisition of land for future use for low- and moderate-income housing. There now are over 100 units of subsidized housing under construction on land purchased and resold by the county.

The Fairfax County land bank initially was funded by an allocation by the county board of supervisors of \$2 million of federal revenue sharing funds to the land bank account. On further consideration, the county decided that it should appropriate its own funds for land banking, since, if revenue sharing funds were used

for land acquisition, the cost of land could not be counted as a matching contribution for other federal funds for housing development. 46/

In fiscal 1978, Fairfax County had nearly \$800,000 available for land bank acquisitions and projected a fund in excess of \$1.2 million for fiscal 1979.

In the United States, the constitutionality of the acquisition of land reserves for unspecified uses has been directly tested only in the case of Commonwealth of Puerto Rico v. Russo ^{47/} which raised the "public purpose" question discussed in Part I of this chapter. In Russo, a landowner argued that the U.S. Constitution permitted the taking of property only for a "public purpose" and did not allow the exercise of the power of eminent domain to take private property for some unspecified future use as part of a land banking system. After citing social, economic and moral justifications, the Supreme Court of Puerto Rico stated that public use is synonymous with social benefit and the common good and upheld the legislation.

The acquisition of land for a purpose that is specified but which will not arise until sometime in the future, has generally been upheld by the courts.

[I]n determining whether the taking of property is necessary for public use, not only the present demands of the public, but those which may be fairly anticipated in the future, may be considered. 48/

There are, however, cases in which the condemnation of land that was not immediately needed has been struck down. In Board of Education v. Baczewski,^{48/} the court held invalid the condemnation of land for a school that might not be erected for 30 years. However,

[G]iven the general expansion of the concept of public purpose in recent judicial decisions, it seems likely that the important public benefit of land banking will prove persuasive against an attack by a condemnee or by a taxpayer challenging the expenditure of public funds. Until a larger body of precedent has been accumulated, however, this issue will remain very much alive. 50/

An effective land banking program would require authorization for a governmental body or a specially created public corporation to acquire land, and any interest therein, both through negotiated purchase and eminent domain procedures. In addition, the land bank agency would have to be authorized to (1) carry out detailed planning; (2) install, or contract for improvements such as sewers, water mains, open spaces and principal roads; and (3) sell or lease improved sites, or rights thereto, to private developers with appropriate use, developments, and design restrictions. Financing for the land bank program could be made through direct government aid in the form of grants or loans and the bank's own obligations of indebtedness. As a public corporation, the bank should be empowered to issue negotiable

bonds and notes in amounts sufficient to finance its land acquisitions.^{51/}

The debt would be secured by a pledge of any revenues or receipts of the corporation or by a mortgage covering all or part of its holdings of land or any other security device designed to ensure marketable bonds. Interest on the bonds would be exempt from federal income taxation by virtue of the land bank's status as a "political subdivision" of the state.

Because the land bank will probably operate at a loss during its early stages, it must have a source of funds available to cover its initial debt maintenance expenses, as well as its capital outlays. Some part of the interest costs might be met by over-issuing at the time of the original bond offering--a common technique by which a public or private entity sells more debentures than necessary to finance a project, specifically intending to use the excess to pay the interest expenses on the bonds for the first few years. This technique, however, is rarely, if ever, used for a project in which revenues will not attain a level adequate to cover the debt maintenance expenses within a period of a few years.^{52/}

VII. COMPENSABLE REGULATIONS

Volume 5 contains a detailed discussion of the fine line between a highly restrictive, though valid exercise of the police power and regulation which amounts to an unconstitutional "taking" of private property without just compensation.

Under existing systems of land regulation the landowner challenges a regulation by seeking an injunction against its enforcement or a declaration of its invalidity. If he succeeds, the court permits him to undertake the development he proposes. If he fails, the regulation is held valid.

But traditional legal doctrines rarely allow [a] court to strike a middle ground by awarding the landowner such compensation as is necessary to prevent the regulation from being held unconstitutional.^{53/}

That idea is the centerpiece of the proposals for a system of compensable regulations.^{54/}

The idea of compensable regulations is not wholly new. The concept developed in the latter part of the 19th century when urban areas began to realize the need for land use controls. At that time, legislatures authorized municipalities to establish use regulations and to provide for payment to the property owners injured by the restrictions.^{55/} However, because of the expense involved and then because of judicial recognition of zoning without compensation,^{56/} the idea fell into disuse.

Occasionally, however, legislative bodies have continued to use compensation in limited geographic areas as a means of supplementing zoning regulations. In City of Kansas City v. Kindle,^{57/} for example, the ordinance upheld had restricted an area to single-family dwellings and provided compensation for the conversion of existing multiple-family dwellings.

There have been several ideas advanced for compensable regulations, each with its corresponding set of advocates.

A. The ALI Model Code

Sections 5-106 and 9-112(3) of the ALI Model Land Development Code propose a system under which a local government could choose to pay compensation for any land use regulation held to be invalid as a taking. Thus, a regulation enacted for a valid purpose could remain in effect. A court which has found that a taking has occurred could withhold relief until the local government has had an opportunity to act. Such compensation could be made through the purchase or condemnation of a development right or other interest in the affected land; however, the owner would be entitled to compensation only for the loss in value caused by the unreasonable or unconstitutional part of the regulation. The starting point for measuring damages would therefore be the fair market value of the property under the most restricted reasonable or constitutional zoning determined by the court. The amount of compensation would then be the difference between the fair market value of the land under the unreasonable regulation and under the most restrictive sustainable regulation. ^{58/}

"Most restrictive reasonable zoning" has been explained as follows:

The concept of "most restrictive reasonable zoning" is a simple one. The first premise is that zoning is constitutional, and that the municipality

may reduce the value of property if the zoning is reasonable. Then the court must decide how much the municipality could reduce the value of the property without overstepping the bounds of reasonableness. Assume that only residential uses are being considered and the dispute involves the density of housing to be permitted. The present zoning allows only one dwelling unit per acre. Plaintiff sought rezoning to permit four dwelling units per acre but was rejected. The court finds that two dwelling units per acre would have been a reasonable classification without compensation, but that one dwelling unit per acre is not. The measure of damages is the difference between the value of the property at two dwelling units per acre and the value at one dwelling unit per acre. 59/

A variation of this approach is found in Section 24-0705, Subdivision 7, of New York State's 1975 Environmental Conservation Law. Upon a court's finding that a taking has occurred because of land use restrictions imposed under authority of the Act, Subdivision 7 requires that the matter be remitted to the Commissioner of the Department of Environmental Conservation for a decision whether to grant the permit requested or to proceed under the State's Condemnation Law to acquire title. See, Spears v. Berle^{60/} for a 1978 case applying this provision.

B. Guarantee of Pre-regulation Market Value

Professors Krasnowiecki and Strong originated the proposal that after mapping regulated areas and identifying

permitted uses, each parcel of land within the regulated area be specially appraised prior to the imposition of regulations to determine its fair market value. The owners would then be guaranteed a sale price by the regulating government equal to that appraisal. The property owner would be compensated after sale of the regulated land for loss of value due to regulations as well as market conditions. However, the regulating government would not acquire any interest in the property.^{61/}

C. Compensation for a Fixed Loss of Value

A proposed Oregon program would compensate property owners for loss of value in their property based on pre- and post-regulated market value. However, compensation would be given for only the value loss in excess of 20 percent. Funds to provide compensation would come from state revenue bonds, a land value increment tax and the proceeds from the sale of public land.^{62/}

D. Compensation for Loss of any Permitted Use

A 1974 California proposal would have provided compensation to owners whose use of their property for a properly zoned purpose had been precluded by federal, state or local government restrictions. Landowners affected by such restrictions could file claims with a state agency. The agency would then have to determine whether, and the extent to which, the property was restricted and the amount

of monetary injury caused by those restrictions. The loss of any use for which property is zoned would have been compensable under this plan.

If the agency were to determine that the state should indemnify the claimant for loss of use, it would be required to approve the claim. Although the bill is unclear as to when the agency must determine if the owner should be indemnified, it is implicit in the proposed legislation that compensation is required if a preponderance of the evidence gleaned from a hearing on a claim establishes a loss.

A maximum compensable payment could not exceed the amount of ad valorem property taxes paid for the fiscal year immediately preceding the year in which the claim is filed.

Compensation would be paid from a state fund comprised of state appropriations and revenue received from a five percent transfer tax levied by the state on the un-^{63/}earned value of transferred land.

E. Zoning by Eminent Domain

A current Minnesota statute combines zoning, eminent domain and special assessments. Though limited in Minnesota to the creation of restricted residential districts, this technique offers a comprehensive approach to the compensation issue.^{64/}

Implementation of this procedure begins by zoning a particular area for defined uses and authorizing the regulating government to prohibit specific uses within the regulated areas. Next, the government appraises each parcel in the area to determine the impact of the zoning on market value. However, the standard for measuring damages and benefits is unclear in the statute. At least two methods may be available. First, the government could acquire by eminent domain the development rights for all purposes other than those permitted within the regulated areas. Compensation would then be paid the property owner for the difference between the value for the uses authorized by the zoning ordinance and the value of the property for all uses. Alternatively, the property owner could be compensated for the loss of use reflected in the difference between the value of the property after the zoning and the value of the property if the specific restrictions were not imposed. In Minnesota, for example, local governments are authorized to prohibit over thirty specific uses within the restricted residential districts. Hence, damages could be awarded to compensate only for loss of value due to the exclusion of specific uses. Under either method of computation, compensation is awarded if the damages caused by the zoning exceed the benefits to any parcel. The compensated rights for which compensation is paid pass to the government.

If, after appraisal, the government determines that the zoning has conferred benefits which exceed any damages, the value of the excess in benefits is specially assessed against the owner. Each time the zoning is changed, benefits and damages are measured and appropriate transfer payments made. In Minnesota, cities are authorized to issue special revenue bonds supported by the program's special assessments to help fund compensation payments and administrative costs.^{65/}

Proposals for compensable regulations have evoked some concern that open-ended financial liabilities might be created. Proponents of compensable regulations respond "that courts should award compensation only in cases in which the regulations would otherwise be held invalid. . . ."^{66/} The government could always "amend the regulation to eliminate the invalidity, avoiding the expense of compensation and being at least no worse off than before."^{67/}

CHAPTER 1

FOOTNOTES

1. Fifth Amendment to the United States Constitution; New Jersey Constitution of 1947, Art. I, par. 20.
2. See, e.g., Crommett v. Portland, 150 Me. 217, 107 A.2d 841 (1954).
3. State of New Jersey, by State Highway Commissioner v. Totowa Lumber & Supply Co., 96 N.J. Super. 115, 232 A.2d 655 (App. Div., 1967); Essex County v. Hindenlang, 35 N.J. 479, 114 A.2d 461 (App. Div., 1955), appeal dismissed, 24 N.J. 517, 132 A.2d 807 (1957).
4. Texas Pipeline Co. v. Snelbaker, 30 N.J. Super. 171, 103 A.2d 634 (Super. Ct., 1954).
5. Id., 103 A.2d at 637.
6. Wes Outdoor Advertising Company v. Goldberg, 55 N.J. 347, 262 A.2d 199, 202 (1970).
7. Cannata v. City of New York, 11 N.Y.2d 210, 182 N.E.2d 395 (1962).
8. Yonkers Community Development Agency v. Morris, 37 N.Y.2d 478, 335 N.E.2d 327 (1975).
9. Prince George's County v. Collington Cross Roads, 275 Md. 717, 339 A.2d 278 (1975).
10. People ex rel. Urbana v. Paley, 68 Ill.2d 62, 368 N.E.2d 915 (1977).
11. Donohoe Construction Co. v. Montgomery County Council, 567 F.2d 603 (4th Cir., 1977); Selby Realty v. City of San Buenaventura, 10 Cal.3d 110, 514 P.2d 111 (1973); and, City of Chicago v. Loitz, 61 Ill.2d 92, 329 N.E.2d 208 (1975).
12. Wilson v. City of Long Branch, 27 N.J. 360, 142 A.2d 837 (1958).
13. Benenson v. United States, 548 F.2d 939 (Ct. Cl., 1977); Drake's Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl., 1970); and, Klopping v. City of Whittier, 8 Cal.3d 39, 500 P.2d 1345 (1972). In San Antonio River

Authority v. Garrett, 528 S.W.2d 266 (Tex., 1975), the court held that a landowner could recover for a temporary taking where governmental action was designed to prevent development that would increase the cost of future acquisition.

14. See, Arastra Limited Partnership v. City of Palo Alto, 401 F.Supp. 962 (N.D. Cal., 1975), opinion vacated as a part of post-trial settlement, 417 F.Supp. 1125 (N.D. Cal., 1976). The inverse condemnation issue is now before the U.S. Supreme Court on certiorari granted from the decision of the California Supreme Court in Agins v. City of Tiburon, 24 Cal.3d 266, 598 P.2d 25 (1979). The "taking issue" is considered at length in Volume V of these reports.
15. §§ 661, 662, 681, U.S. Master Tax Guide, 1979.
16. Section 5-101(3) of the American Law Institute's A Model Land Development Code defines an "interest in land" as "a fee simple, leasehold interest, option, development right, right of first refusal, easement and any other interest in land less than a fee simple."
17. 1 Nichols, Eminent Domain, 161-62 (1964).
18. 166 Md. 118, 170 A.2d 590 (1934).
19. 168 N.Y. 134, 61 N.E. 158 (1901).
20. 55 N.J. 86, 259 A.2d 698 (1969).
21. N.J.S.A. 27:7-22.4.
22. 31 Wis.2d 256, 142 N.W.2d 793 (1966).
23. Coughlin & Plant, "The Use of Less-Than-Fee Acquisition For the Preservation of Open Space," Regional Science Research Institute Discussion Paper Series No. 101, at p. 1 (1977).
24. Id.
25. N.J.S.A. 4:1B-1 to 4:1B-15. This program is discussed in greater detail in Chapter 2 of this report.
26. Coughlin & Plant, at p. 12.
27. Id. at p. 11.

28. Id. at p. 12-13.
29. Id. at p. 14.
30. Id.
31. IRC (1954), Sections 1011(b), 170(e)(1)(B).
32. Whyte, The Last Landscape, pp. 65-66 (1968).
33. Coughlin & Plant, at p. 12.
34. Whyte, The Last Landscape, p. 66 (1968).
35. Id.
36. American Law Institute, A Model Land Development Code, Commentary on Article 6, Land Banking, p. 221 (1975).
37. Fishman, "Public Land Banking: Examination of a Management Technique," p. 61 (Scott, Vol. III, Management and Control of Growth) (1975).
38. Id. at pp. 63-64.
39. Kamm, "Land Banking: Public Policy Alternatives and Dilemmas" (Urban Institute Paper No. 112-28, 1970).
40. In High Point, Winston-Salem, and Greensboro, North Carolina, a private, non-profit housing development corporation was created in each town to buy land for future development of low- and moderate-income housing. All have local business and political backing and are dependent on the voluntary purchase of land. See, Strong, Land Banking: European Reality, American Prospect, p. 259 (1979).
41. P.R. Laws Ann. tit. 23, Section 311f(5) (1964) (originally enacted as Puerto Rican Land Administration Act of May 16, 1962, No. (3)).
42. Strong, Land Banking: European Reality, American Prospect, p. 253 (1979).
43. Id. at p. 257.
44. N.Y. unconsolidated laws, sections 6251-85 (McKinney, 1973).

45. Strong, at pp. 257-58.
46. Id. at pp. 258-59.
47. 95 P.R.R. 488 (1967), appeal dismissed, 393 U.S. 14 (1968).
48. Rindge Co. v. County of Los Angeles, 262 U.S. 700, 707 (1922); see also, Inland Waterways Co. v. City of Louisville, 13 S.W.2d 283 (1929), in which the condemnation of land by the city for ultimate use as a public wharf and landing was upheld.
49. 30 Mich. 365, 65 N.W.2d 810 (1954).
50. American Law Institute, A Model Land Development Code, Note to Section 6-101 (1975).
51. Fishman, "Public Land Banking: Examination of a Management Technique," p. 75.
52. Id.
53. Bosselman, Callies & Banta, The Taking Issue, pp. 302-303 (1973).
54. "Compensable regulations" have been defined as "a means of validating land use regulations that are so restrictive that the courts would hold them to be a taking in the absence of compensation paid to the landowner;" Id. at 302.
55. 41 A.L.R.3d 638.
56. See, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
57. 446 S.W.2d 806 (1969).
58. Bosselman, "The Third Alternative in Zoning Litigation," 17 Zoning Digest 73, 113 (1965).
59. Id. at p. 117.
60. 407 N.Y.Supp.2d 590 (1978). See also, Estuaries Properties, Inc. v. Florida Land and Water Adjudicatory Board, No. II-419, (1st Fla. DCA, filed December 17, 1979), for a case adopting a similar approach. In Estuaries Properties the court found that the denial of a development

permit on environmental grounds by the Florida Land and Water Adjudicatory Commission and Lee County, Florida, constituted a "taking" of plaintiff's land. The court then directed the defendants to either grant a development permit or commence condemnation proceedings.

61. Krasnowiecki and Strong, "Compensable Regulations for Open Space: A Means of Controlling Urban Growth," 29 Am.Inst.Plan.J. 87 (1963).
62. Oregon Executive Department, Local Government Relations Division, Inroads Toward Positive Land Use Management: A Land Value Adjustment Proposal, Aug. 29, 1974.
63. Assembly Bill 3698, 1973-74, Regular Session.
64. Minnesota Statutes Annotated, Sections 462.13-462.17 (1963).
65. Hagman, "Windfalls for Wipeouts," 126, in The American Assembly, The Good Earth of America: Planning Our Land Use (1974).
66. Bosselman, Callies & Banta, The Taking Issue, p. 309 (1973).
67. Id.

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CHAPTER TWO

ZONING AND DISTRICTING

I. AGRICULTURAL, RURAL AND TIMBER ZONING

Zoning ordinances were designed to control the manner in which land is developed. As a consequence for many years, zoning regulations paid little or no attention to questions of what regulations should be applied to land being used in its undeveloped state, although the exemption of agricultural activity from all or substantially all regulation was common in enabling legislation for rural areas. The conversion of agricultural land to urban uses put the problem in a different light. In New Jersey, for example, 600,000 acres of agricultural land have been converted to other uses in the last 20 years. Only one million acres of farmland remain in the state.^{1/} One response to the rapid conversion of agricultural land has been to preserve it by delineating zones in which agricultural activities are permitted. Timber or forestry zones and rural zones are variants of the agricultural zone in which the dominant purpose, the preservation of open land uses, is the same, but the specific activities permitted may vary slightly. Agricultural zoning is a common method used to preserve land that is well-suited to agricultural use.^{2/} In most instances the uses permitted in an agricultural zone are farming, farm-related uses, and

recreational uses of open lands. Included in "farm-related activities" are the buildings and maintenance of farm buildings -- barns, storage facilities, and equipment sheds. Related commercial and industrial activities such as intensive stock feeding, greenhouses and canneries may be but are not invariably excluded.

The decision to classify land in an agricultural zone sounds like a simple solution to the question of how undeveloped land may be best preserved, but it is not as simple as it sounds. The threshold question is what is "agriculture." Plainly it includes growing crops in the open and raising livestock on pasture land. But does "agriculture" include more intense uses that are closely limited to growing crops and raising livestock? Does the concept include feedlots, grain elevators, creameries, canning factories, cheese factories, or, to bring the point closer to home, facilities for cleaning, packaging, and shipping cranberries and blueberries? All of these uses are agricultural in one sense of the word, but some might as easily be designated agricultural industry. Some essential agricultural activities can be downright noxious. For example, peas cannot be raised for the frozen food and canning industries without separating the peas from their shells and the plants on which they grow. Pea viners do just that and are commonly located in a farm field near a road. The activity is undeniably bucolic,

but the atmosphere downwind of a viner stack on a hot summer day is anything but elysium.

Nor is it particularly helpful to say that "agriculture" ought to be limited to open land uses. Facilities for processing and packaging agricultural products are essential and in many instances the only sensible location for such facilities is close to the fields in which the products are grown. Thus, practical processing and marketing considerations may produce a more random distribution of uses in rural areas than orderly planning might seem to permit. As a consequence it can come as a surprise to some persons to learn that people whose livelihood depends upon the agricultural economy do not view many of the more commercial agricultural uses as inharmonious or out of place in a rural environment. Such characterizations occur more readily to the residents of suburban precincts where the lot sizes are uniform and the houses have a familial appearance to them.

At least agricultural zoning permits the construction of dwellings to farm dwellings. Or does it? What about the residences for the farmer's son and his wife, for the hired hand and his spouse? If they are employed on the farm, are they not farm residences? Of course. But what are they after the farmer retires, the

farmer across the road leases the fields, and the farmer's son and the hired hand take jobs in town but continue to live on the farm? Does the residential use become non-conforming? Illegal?

And what is an agricultural use anyway? Is it anybody living on five acres with an acre planted in vegetables for his own use? Is there a minimum size below which a tract of land will not be considered a farm and not eligible for the agricultural residence exemption? If so, what size is that and how may it be justified?

Agricultural zoning must have some real relationship to the quality of the land. Classification of untillable land in an agricultural zone would rather quickly be perceived as a subterfuge. However, the same logic which supports the classification of productive farmland in an agricultural zone should also support the classification of timbered areas in a zone in which the principal permitted uses are forestry and uses that are compatible with that activity.

The model Agricultural Preservation Ordinance prepared by the Twin Cities Metropolitan Council contains a representative selection of the type of restrictions that are typical in an agricultural zone.^{3/} The purpose is stated to be the preservation of land, the logical and

proper use of which is agriculture for long-term agricultural use. The model ordinance creates two zones: an agricultural preservation district and an agricultural preservation/urban expansion district. In the former "commercial agriculture," defined as growing or producing field crops, livestock, and livestock products (such as eggs and milk) and horticulture are permitted uses. Feed lots, poultry facilities, farm buildings, and one farm dwelling per farm are permitted. The issue of the size of a farm is dealt with by defining a farm as containing at least 40 acres. Non-farm dwellings are severely restricted. There may be only one non-farm dwelling for each 40 acre tract that does not already contain a farm or non-farm dwelling; it must be located on a separately owned parcel at least one acre in size, and have 100 feet of frontage on an existing road. The problem of the residence for the farmer's son or hired hand is covered by a provision that makes a second farm dwelling a conditional use.

The agricultural preservation/urban expansion district is designed to accommodate orderly expansion of the urban area into farmland. In that district single family dwellings in subdivisions are a conditional use and may be allowed only if they are to be connected to a common water distribution and sewage collection and treatment system constructed in accordance with a comprehensive

sewer policy plan.

In some states there is specific statutory authority for agricultural zoning.^{4/} In others, including New Jersey, authority to zone for agricultural purposes derives from the general state zoning enabling act.^{5/} In addition to this general zoning authority, New Jersey's "Agricultural Preserve Demonstration Program Act,"^{6/} which became effective July 22, 1976, authorizes the State Department of Environmental Protection and the State Department of Agriculture to create an "agricultural [land] preserve"^{7/} of approximately 5,000 acres within the state through the purchase of "development easements"^{8/} in order to ensure that these parcels will remain undeveloped for other than agricultural purposes. The program is conducted on a strictly voluntary basis (the use of the eminent domain power is prohibited)^{9/} and the price paid for an easement is generally the difference between the fair market value for a parcel for all uses and the agricultural fair market value.^{10/}

One New Jersey court has forcefully expressed the view that it is the public policy of the State to preserve open space and agricultural land. In Mindel v. Township Council of the Township of Franklin (1979),^{11/} the plaintiff had been denied a variance which would have permitted him to farm his 13-1/2 acre tract located in a rural area, zoned

residential. Citing the rapid growth in population New Jersey has experience since 1960 and the intent of the Farmland Assessment Act, the court concluded the "[c]learly, New Jersey now favors preservation of farmland and open spaces over that of development for residential or commercial uses. Or even over uses which maximize municipal tax revenues."^{12/} The township was therefore enjoined from prosecuting the plaintiff for farming his land.

Ordinances which are intended to preserve the present agricultural character of an area have been upheld by courts. In Morse v. County of San Luis Obispo, a California court held that an ordinance designating an agricultural district did not "take" the plaintiff's property:

Absent any showing to the contrary, we are entitled to presume that the decision of the County to preserve the agricultural nature of the area and to deny an intensification of habitation near the airport was a reasonable exercise of the zoning power designed to prevent urban sprawl. . . .^{13/}

Two factors often considered by courts in determining the reasonableness of this type of zoning are: (1) the growth rate of the area, which directly affects the future market value of the land, and (2) the existence of a comprehensive plan for the area. In County of DuPage v. Henderson,^{14/} agricultural and residential zones in a rural township were held to be constitutional because of changing growth conditions and careful planning. In Desler v. Cane County Bd. of Commissioners,^{15/} an Oregon court upheld as not

contrary to the county's comprehensive plan a zoning classification which conditionally permitted gravel operations and parks in an area designated as "agricultural."

There has been, as one might expect, a fair bit of litigation over the uses that are swept into the meaning of the terms "agriculture," "farming" and "farm" as used in zoning ordinances and, therefore, over where the line may be drawn between permissible agricultural and impermissible commercial or industrial activity.

A common definition of "farm" is a piece of land consisting of a fixed number of acres which is used primarily to raise or produce agricultural products, and the customary buildings which accompany such activities. Included in this definition are the buildings and maintenance of farm buildings -- barns, storage facilities and equipment sheds. Thus, in Moulton v. Building Inspector of Milton,^{16/} a Massachusetts court held that a silo is an agricultural use no matter how detrimental it may be to the neighborhood.

When no definition is included in the ordinance, courts have concluded that the terms must be interpreted broadly and applied in accordance with their usual and generally accepted meaning.^{17/} Generally this will produce a rather expansive view of the uses that are authorized.^{18/}

Dairy farms and greenhouses have been a source of difficulty in distinguishing between between agricul-

tural and commercial uses. In Cumberland Farms of Conn., Inc. v. Zoning Bd. of App.,^{19/} the court observed that "[a]ll agriculture conducted for profit is commercial in some degree." However, the court held that operations do not cease to be agricultural and become commercial merely because there has been an expansion of the business.^{20/} A California court, on the other hand, has held that a city could limit the growth of a dairy farm by prohibiting landowners from enlarging the extent of their land or increasing the size of the herd.^{21/}

Whether "agriculture" or "farming" permits the on-site sale of produce grown on the premises has been a subject of controversy. Although these activities are the product of agricultural activity, they are also commercial. In Hagenburger v. City of Los Angeles,^{22/} the court held that a zoning ordinance which established a residential district and permitted the use of any lot for farming, also permitted the operation of a plant nursery, fruit growing, and the raising of vegetables. However, in Town of Needham v. Winslow Nurseries, Inc.,^{23/} a "garden shop" that sold tools and equipment was said to violate the zoning code because tools are not incidental products of a greenhouse or nursery.

Where other more intensive uses in agricultural zones are concerned, the courts are in disarray. The operation of a sawmill was held by a Maryland court to be inconsistent

with an agricultural district;^{24/} the operation of a gravel pit was permitted by an Oregon court;^{25/} animal husbandry was not permitted by a New York court,^{26/} however it was allowed in Illinois.^{27/} Likewise courts are divided as to whether chicken and turkey farms are permissible uses.^{28/} The operation of livestock feed lots has been held to be an agricultural use.^{29/} The breeding of thoroughbred horses has been held to be a permitted agricultural use in New York State,^{30/} but a New Jersey court ruled that a hostel for horses was really a riding academy and therefore not permitted.^{31/} Several Massachusetts courts have held that the commercial breeding of dogs is not an accessory use of farming.^{32/} Finally, the use of agricultural land for campsites has been held acceptable in Rhode Island.^{33/}

Quite plainly, the creation of agricultural or forestry zones is an option that must be considered seriously in the Pinelands. However, technique is not free from troublesome questions that will have to be resolved in fashion that is compatible with the present character of agriculture and forestry in the Pinelands.

II. CLUSTER ZONING

Cluster zoning, sometimes referred to as "density" zoning, is a land use technique designed to help communities minimize the problems inherent in today's large-scale residential developments, while providing specific plans for the retention of open spaces.^{34/} In the traditional zoning ordinance, setback and minimum yard requirements on each zoning lot are used to provide open space between buildings. Open space secured in this fashion is necessarily fragmented into small areas of private open space on each lot. By permitting buildings such as garden apartments, townhouses or single-family detached homes, to be clustered in specified and limited areas, on smaller lots than would otherwise be required, the area occupied by buildings is reduced and the land that would otherwise be in private yards can be aggregated into larger, more useable areas of common open space.

Under the usual cluster zoning ordinance provision, the size of individual residential lots in any large or medium sized development may be reduced, provided that the overall density of the entire tract remains unchanged. Cluster zoning, then, is simply a method of increasing the acreage of common open space at the expense of the size of the zoning envelope on individual lots.

There are a number of advantages to cluster developments:

1. In enacting cluster or density zoning requirements, a legislature can prescribe specific percentages of a zone that must be utilized for open space and for residential purposes, thus allowing for aesthetically pleasing land development;

2. Clustering results in economic savings for both the developer and the community. One clustering plan^{35/} produced five times more open space while reducing the length of necessary streets by ten percent and the length of required sewer lines by 25 percent. In recent years, developers who have used clustering techniques have found that they are better able to meet the costs of the construction of roads, sewers and utility lines because of savings resulting from cluster zoning;^{36/}

3. Clustering encourages an adequate supply of housing for all income levels by providing the opportunity for planned multi-family housing developments; and

4. Clustering encourages developers to preserve open space without sacrificing overall density.

Under a well-drafted ordinance, cluster zoning provisions should not raise any serious constitutional challenge. The power to regulate density and open space is a well-recognized purpose of zoning.^{37/} However, the question of whether such provisions are authorized under a state's enabling legislation remains. In New Jersey, the

answer to that question is provided in N.J.S.A. 40:55 D-62, which authorizes "[t]he governing body [to] adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon." The section continues: "The regulations in the zoning ordinance shall be uniform throughout each district for each class or kind of buildings or other structures or uses of land, including planned unit development, . . . and residential cluster. . . ." N.J.S.A. 40:55 D-43 provides authority to a governing body to accept the dedication of land:

a. An ordinance pursuant to this article permitting planned unit development, planned unit residential development or residential cluster may provide that the municipality or other governmental agency may, at any time and from time to time, accept the dedication of land or any interest therein for public use and maintenance, but the ordinance shall not require, as a condition of the approval of a planned development, that land proposed to be set aside for common open space be dedicated or made available to public use....^{38/}

One of the most important decisions on the legal status of cluster zoning has come from New Jersey. For example, in Chrinko v. South Brunswick Township,^{39/} a cluster zoning amendment provided that both required lot sizes and frontages could be reduced if the land saved was donated to the township for public open space. The Superior Court of New Jersey upheld cluster zoning on both constitutional and statutory grounds as a reasonable method of density control

and as a means of encouraging the preservation of open space. It was also held that clustering did not violate the uniformity requirement of the State's enabling statute.^{40/} In Cheney v. Village #2 at New Hope, Inc.,^{41/} the Supreme Court of Pennsylvania endorsed the general principle of density zoning:^{42/}

[The traditional] approach to zoning fares reasonably well so long as development takes place on a lot-by-lot basis, and so long as no one cares that the overall appearance of the municipality resembles the design achieved by using a cookie cutter on a sheet of dough. However, with the increasing popularity of large scale residential developments, particularly in suburban areas, it has become apparent to many local municipalities that land can be more efficiently used, and developments more aesthetically pleasing, if zoning regulations focus on density requirements rather than on specific rules for each individual lot. Under density zoning, the legislature determines what percentage of a particular district must be devoted to open space, for example, and what percentage used for dwelling units. The task of filling in the particular district with real houses and real open spaces then falls upon the planning commission usually working in conjunction with an individual large scale developer. . . . The ultimate goal of this so-called density or cluster concept of zoning is achieved when an entire self-contained little community is permitted to be built within a zoning district, with the rules of density controlling not only the relation of private dwellings to open space, but also the relation of homes to commercial establishments such as theaters, hotels, restaurants, and quasi-commercial uses such as schools and churches.

The goal of cluster zoning is to increase substantially the amount of land devoted to open space by allowing

residential development to be grouped together more closely than normally permitted. The advantage to homeowners and the community at large is the creation of an area which preserves some of the amenities of rural living in an urban or suburban environment, preserves some of the areas' natural resources, and helps to control development in the urban fringe. As a tool for preserving open land, clustering allows a community to absorb growth in its housing stock while confining the impact of new development to smaller areas and preserving some land in its natural condition. It is not, however, a particularly useful tool for preserving a large amount of contiguous open space unless average maximum densities are low and relatively large developments are clustered so as to leave quite large tracts of land in their natural state.

III. FLOOD PLAIN ZONING

In recent years the expansion of urbanized areas has brought development to previously undeveloped flood plain areas.^{43/} Despite the hazard of flooding, many such areas have been attractive to developers because of their proximity to expanding urban areas and because their generally flat physical characteristics are well suited for all types of development. Recognizing the hazards inherent in such growth, Congress has adopted legislation^{44/} to encourage state and local governments, through monetary incentives, to focus their attention on these problems. The result has been a strong and widespread regulatory response.

Flood plain ordinances are based on enabling legislation which the states, including New Jersey,^{45/} have enacted in order to maintain their eligibility for federal funds. The purposes of those regulations are many: to prevent restriction of a river's carrying capacity, to prevent buildings from being erected which will float downstream to damage other property in case of flood, to reduce community costs for rescue and repair operations, to protect life and property of landowners from their own foolish acts, and to aid in reducing the cost of building flood control facilities.^{46/} To accomplish these purposes, flood plain ordinances generally limit utilization of land in flood prone areas to uses that are not susceptible to

flood damage -- uses such as agriculture, parks, recreation, wildlife refuges, boathouses, golf courses, riding academies, parking lots and other similar activities. Areas not adjacent to water may be zoned for a higher use, perhaps single-family homes, but probably not for industrial or high density residential development. In addition to an ordinance, it is common for a municipality, in order to have an effective program, to have its subdivision regulations and building code reflect its flood plain policy.

The manner in which flood plain regulation is enforced varies from state to state.

New Jersey has adopted legislation authorizing the state's participation in the federal flood control and flood insurance programs ^{47/} and has included the necessary authorization in its general zoning enabling act to permit local governments to regulate areas subject to flooding within their jurisdictions. ^{48/}

The Maryland Comprehensive Flood Management Program ^{49/} calls for studies and division of the state into watersheds. Each subdivision must prepare a flood management plan subject to review by the Department of Natural Resources.

In Michigan, the Shoreland Protection Act ^{50/} provides for county, city and village zoning regulation of flood-risk areas.

It also provides criteria for residential, commercial and industrial development and shoreline alteration, including building setback guidelines.

In Minnesota, the Flood Plain Management Act^{51/} calls for local land use ordinances to minimize flood hazards. Additional legislation provides authority to cities and counties to adopt regulations to control and protect flood plains.^{52/}

Finally, the New York State Environmental Conservation Law^{53/} authorizes each city, town and village to enact whatever ordinances are necessary to qualify for federal flood insurance.

A number of potential legal challenges to the validity of flood plain zoning exist and should be considered in relation to the pinelands:

(1) Like any other type of zoning, flood plain zoning is based on the police power and will be found valid only if the objectives of the statute or ordinance are considered to be reasonably related to the public welfare. Otherwise, the flood plain enabling act and municipal ordinances authorized by them will be struck down on due process grounds as a "taking" without just compensation. Arguments that flood plain regulations take private property are common because these regulations often prohibit the construction of buildings in a floodway.

(2) Questions of equal protection often arise in regard to flood plain regulations. They include:

- (a) Must existing uses be treated like future uses?
- (b) Must all future uses be treated the same?
- (c) Must uses on one side of a stream be treated like uses on other sides or at other points?
- (d) Must all streams be regulated to the same standard?

(3) Finally, a major problem in the enactment of adequate flood channel legislation is the gathering of sufficient data to provide a reasonable legal basis for the delineation of the flood plain itself, and the various zoning districts within it. These districts restrict development in varying degrees to reflect the amount and frequency of flooding.^{54/}

Flood plain zoning has both statutory and case law support. As indicated above, New Jersey has adopted legislation authorizing the State's participation in the federal flood control and flood insurance programs^{55/} and has included the necessary authorization in its general zoning enabling act to permit local governments to regulate areas subject to flooding within their jurisdictions.^{56/}

Because few cases deal with the constitutionality of

flood plain legislation per se, courts will analyze claims of a "taking" in the same manner as they review all zoning ordinances. They will uphold the ordinance itself, and then determine whether its application to a particular parcel of land would be confiscatory.^{57/} Through this process, a number of early cases found certain flood plain regulations to be solely for the benefit of the general public and to so depreciate the value of the plaintiff's land that a "taking" had in effect occurred.^{58/}

More recent cases, however, indicate a trend away from this earlier approach, in part as a result of an increased public and judicial concern with the state of the environment, and uphold the validity of wetland and flood plain ordinances even though they may be very restrictive as to the types of permissible land uses. These cases focus on the objectives of this type of zoning.

In Just v. Marinette,^{59/} the Supreme Court of Wisconsin upheld a county shoreland zoning ordinance enacted pursuant to the state shoreland protection program designed to prevent the degradation of nearby lakes and waterways. The plaintiff owned property fronting on a lake, the front half of which was covered with aquatic plants. They began filling that part of their property contrary to the ordinance. The county obtained an injunction and the plaintiff appealed. In upholding the ordinance the court recognized the serious

conflict between the public interest in stopping despoilation of natural resources and an owner's asserted right to use his property as he wishes.^{60/} The court reasoned that if the proposed use of the land would cause "public harm" no compensation need be paid. However, if the regulation were designed to produce a public benefit it would be beyond the scope of the police power. The court then concluded that:

the changing of wetlands and swamps to the damage of the general public by upsetting the natural environment and the natural relationship is not a reasonable use of that land which is protected from police power regulation. ^{61/}

Thus, public rights may be protected without compensation to the landowner even if it means private land is restricted to its "natural" uses.

The Just decision was followed in a number of New Jersey decisions during the 1970's. For example, in Cappture Realty Corp. v. Board of Adjustment (1973)^{62/} a New Jersey Superior Court upheld an interim zoning ordinance declaring a moratorium on construction in flood prone areas. In AMG Associates v. Springfield Twp. (1974)^{63/} the New Jersey Supreme Court stated in a footnote to its opinion:

It is to be emphasized that we deal in this case only with the split lot situation where there is a deprivation of all practical use of the smaller portion thereof. The approach to the taking problem, and the result, may be different where vital ecological and environmental considerations of recent cognizance have brought about rather drastic land use restriction

in furtherance of a policy designed to protect important public interests wide in scope and territory as for example, the coastal wetlands act, N.J.S.A. 13:9A-1 et seq. and various kinds of flood plain use regulations. Cases arising in such a context may properly call for a reexamination of some of the statements 10 years ago in the largely locally limited Morris County Land Case, supra (40 N.J. 539, 193 A.2d 232) 64/

In Sands Point Harbor, Inc. v. Sullivan, Commissioner, Department of Environmental Protection (1975) 65/, a New Jersey Superior Court held that the New Jersey Wetlands Act 66/ and the regulations and orders issued pursuant to it, which designated approximately 140 acres of the plaintiff's property as coastal wetlands, did not constitute a taking without just compensation. And in American Dredging Co. v. State of New Jersey, Department of Environmental Protection (1978) 67/ a Superior Court concluded that it was not a taking for the Department to prohibit the plaintiff from depositing dredge spoil in 80 acres of its wetlands. The court stated:

...while loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling. [Just v. Marinette County, 201 N.W.2d at 771 (1972.)] 68/

Finally, the line of New Jersey cases discussed above was most recently followed in New Jersey Builders Association v. Department of Environmental Protection (1979) 69/ in which the plaintiff challenged the validity of regulations adopted

by New Jersey Department of Environmental Protection which established water quality standards for the Central Pine Barrens and designated such lands as a "critical area" for sewage purposes. In its opinion, the court acknowledges that the general trend in the law has been to support legislation intended to protect certain environmentally sensitive areas even though such regulation diminishes the value of private land.^{70/}

Citing Sands Point Harbor, the court concluded:

In the instant case, the regulations were not enacted in order to create a public benefit. Rather, the restrictions on the use of citizens' property is in order to prevent a harm resulting from the change in the natural character of the property. When a regulation is enacted in order to prevent harm, it is a proper exercise of the police power and there is no right to compensation for the diminution in the value of the property.^{71/}

The New Jersey decisions are in the mainstream of current judicial responses to flood plain and wetland regulations. In Maple Leaf Investors, Inc. v. State of Washington,^{72/} a prohibition of construction of single-family homes within a flood control zone was held a valid exercise of the police power. Similarly, in Turner v. County of Del Norte,^{73/} an absolute prohibition of residential or commercial structures in a flood plain was upheld in California. In Turnpike Realty Co., Inc. v. Town of Dedham, the inclusion of plaintiff's land in a newly created flood plain zone was held not to be a taking because of the objectives included by the Massachusetts legislature in the statute.^{74/} In Sibson v. New Hampshire,

the court held that the denial of a permit to fill plaintiff's four-acre tract of saltmarsh was a valid exercise of the police power, proscribing future activities that would be harmful to the public.^{75/}

The prime objection to flood plain zoning is closely tied to the legal issue of whether or not this type of regulation goes beyond a valid exercise of the police power and would therefore be a "taking" under the New Jersey or United States Constitutions. This issue is discussed and analyzed in more detail in Volume 5 of these reports. However, the trend of recent decisions is to hold that land use restrictions imposed by a flood plain ordinance, even those restrictions which completely prohibit all development in the flood-way are not a "taking." Such regulation may cause a significant financial loss for a property owner and raises the question of whether one or a small number of property owners should be compelled to assume the entire burden of providing a benefit for the public.

One other common objection voiced to flood plain management is that compliance with federal regulations adds to the cost of developing new land and those costs are ultimately borne by purchasers of buildings and new development projects. Here, again, the benefits of regulation accruing to the community at large which has or is likely to experience serious flood damage must be weighed against burdens placed on individuals.

IV. PLANNED DEVELOPMENT

A. The Planned Development Concept

The planned development technique was devised as a planning response to changes in methods and techniques of land development that could not be readily accommodated within the restrictions of traditional zoning regulations. The technique is designed to encourage the use of innovative techniques in the design and planning of residential, commercial and mixed-use developments. The traditional zoning ordinance divides a community into a number of districts in each of which there are specific use, lot size and bulk regulations. Each new structure must be designed for and occupied by a permitted use and must be constructed entirely within the zoning envelope created by the setback, lot coverage and height restrictions. Such rigid regulations are appropriate when lot by lot development by a variety of individual owners is the course that development will follow.

When a relatively large tract of land, all of which is in single ownership or under unified control, is involved, the rigidities of traditional zoning are not only unnecessary, they may be a positive hindrance to good site design and planning. For example, the strict application of district regulations may prevent a developer from achieving maximum usable open space and recreational areas on the site, or protecting or preserving environmentally sensitive

or ecologically valuable lands by clustering structures, providing greater setbacks from streets or other site boundaries, decreasing lot sizes or increasing the height of the buildings.

Professor Daniel R. Mandelker, one of the leading authorities on land use matters, contrasted traditional zoning and planned developments in a report he prepared in 1966 for the American Society of Planning Officials as follows:

Traditional zoning is geared to controlling the placement of a single structure on a single lot--the lot is the basic regulatory unit. This approach was fostered by the development techniques of the 1920's when the gridiron street pattern was king and when development occurred one lot at a time.

Traditional zoning, at least in its original form, was also noted for its rigid separation of different uses into different zones. Residential uses, reflecting the conventional market view, were segregated from commercial and industrial uses. Single family and two family houses were segregated from apartments, which were considered a different "use."

Planned development regulations mark a substantial departure from tradition. First, they apply to entire developments rather than to individual lots. The regulations provide for the calculation of densities on a project basis and permit other adjustments based on a unified plan, adjustments which are not possible under traditional zoning. The application of controls to entire developments then, is a fundamental

characteristic of planned development regulations.

Second, planned development regulations abandon or substantially modify the traditional self-executing form of zoning regulation. In theory at least (although numerous established practices deviate from this theory), traditional zoning regulations leave no place for the exercise of official discretion when development is proposed; a developer need only obtain a building permit from the building inspector. Planned developments, on the other hand, are governed by more general standards which are applied when development is proposed. Some discretion is inevitably involved in the application of the general standards.

Finally, planned development regulations may also represent a partial or total abandonment of traditional use districting. For example, some planned development regulations authorize the approval of plans that call for commercial as well as residential uses. Still more commonly, the regulations provide for "mixed" residential developments, thus abandoning (and high time!) the "use" distinction between apartments and single family houses.^{76/}

Essentially, planned development regulations provide substantially greater degrees of flexibility in land use regulation by permitting the developer and the officials of a community to design specific land use regulations for large tracts of land in accordance with generalized standards and guidelines contained in the planned development ordinance.

Planned development regulations are generally considered to have a number of advantages, not all of which would necessarily be applicable in any particular case.

First, they permit improved land development design

by freeing the developer from the rigidities of the traditional zoning techniques. As a result it is easier for the developer to adapt his site design to topography, flood plains and wetlands, and to preserve natural vegetation, topography, and geological features on the site.

Second, if development is clustered, leaving part of the site open, land improvement costs may be lowered because the length of street frontages and utility lines may be reduced.

Third, larger tracts of open space can be preserved by concentrating permissible land use densities on only a part of the tract and reserving the rest as permanent open space. Clustered developments, discussed in the preceding section, ordinarily require the application of the planned development technique.

Fourth, where a mixture of building types is desired, it is easier to accommodate a variety of building types, including a broader range of dwelling unit types.

Fifth, the provision of recreational open space for the use of residents of the development can be encouraged.

Sixth, safe and efficient traffic circulation that insulates the development from through traffic may be easier to design.

Seventh, it is possible to zone land on a density basis, leaving it to the land owner or developer to determine how the density permitted on a particular tract of land will

actually be allocated to the site. In some communities, planned development regulations provide density bonuses for superior design or reservation of open space.

These goals are accomplished primarily by replacing stringent substantive regulation with development standards in the zoning ordinance that permit the exercise of greater discretion and control by local public officials. Developers and other interested parties are protected from arbitrary decision-making through the creation of detailed procedural requirements which define and limit the rights and obligations of the developer, municipality, and the public generally. The procedure adopted must balance the developer's need for approval prior to the expenditure of substantial sums of money on final plans and designs and the municipality's desire that the ultimate development will retain the character and amenities upon which the original approval was based. Public notice must be given and a public hearing must be held when plans are sufficiently formalized to allow rational evaluation and criticism and a substantive zoning decision by the municipality, but still prior to the investment of substantial sums by the developer. Such a public hearing is also needed to comply with statutory zoning requirements.

Planned developments are sometimes treated as districts (which is essentially a floating zone technique),

and sometimes as a type of special use for which a permit must be secured.

B. Application Procedures

The application procedure generally involves a three or four phase review as follows:

1. Pre-application Conference
2. Development Concept Plan
3. Detailed Preliminary Plan
4. Final Development Plan

The Development Concept Plan and Detailed Preliminary Plan are often combined into a single Preliminary Development Plan Application. Sometimes the Pre-application Conference is optional. Where the four step process is specified by the ordinance, the developer may be given the option of combining any two consecutive phases by submitting all information and plans required for both phases.

The Pre-application Conference phase should be designed to give the developer the opportunity to meet with the municipal planning staff to acquaint them with his contemplated development, to assess their initial reactions to his ideas and to become acquainted with the planned development procedures. The ordinance should specify how formal the conference must be, whether any materials or plans must be submitted, and whether the participation of specific officials or department heads is required. Generally,

no action will be taken at this conference, which is intended for the exchange of information and to better prepare the developer to comply with and follow the application procedures.

A public hearing is usually held during the development concept or preliminary development application phase. At the completion of either the concept or preliminary development phase, rezoning should take place or the special use permit should issue. Whichever procedure is used, approval must be expressly subject to completion and approval of the remaining phases. Once the preliminary development plan has been approved, the municipality and the developer should both be bound by that determination with neither able to make any substantial change in the development plan without the consent of the other.

Whether these procedures will discourage rather than encourage use of planned developments depends in large part upon the level of detail required by the city at the development concept or preliminary application stage. The developer would prefer to have the basic character of the proposal approved and have the assurance that the municipality will not reverse its decision prior to investing large sums of money in detailed plans. The municipality, on the other hand, wants as much information as possible before committing itself to a particular plan or development. A workable

planned development ordinance must balance these conflicting interests.

More detailed and complete plans must be submitted in connection with an application for final approval. The municipality must determine whether the final plan conforms to the preliminary plan and on that basis either approve, approve upon acceptance of specified conditions, or reject the final development plan.

The ordinance should also specify review procedures within each application phase, which procedures usually range from direct review and decision by the corporate authorities to review and recommendation by the planning commission and/or other governmental departments. Either at the concept or preliminary plan stage the municipal council should act upon the proposed plan. It is at this stage that the basic legislative decision is made. Final approval, however, can be made ministerial with approval only by an appointed official if all discretionary decisions have by then been made and the final plan is in substantial conformity with the preliminary plan. The departments that will participate in the review process will depend on whether aspects of the development within their area of expertise are up for approval.

In determining whether a detailed final development plan conforms to a prior approved plan, a municipality may choose to define the meaning of conformity or substantial

conformity or leave such a determination to the discretion of planning officials at the time of the application. If substantial conformity is defined in the ordinance, it may allow for "minor changes," disallow any change in particular aspects of the development, or fix an allowable range the developer may work within, i.e., 5%. Those aspects which are of primary concern are density or land use intensity, amount and location of open space, orientation of buildings and mix of residential and non-residential uses. Changes in landscaping, recreational facilities, architectural design, parking and traffic circulation, screening and privacy, and dedications for streets or schools may also be specifically limited.

If the developer plans to ask for final approval in stages rather than developing the parcel all at once, some provision must be made for guaranteeing the integrity of the planned development in the event the developer falters prior to completion of subsequent stages. The usual examples given are completion of portions which contain a higher proportion of nonresidential to residential or multi-family to single-family or residential to open space than exists for the planned development as a whole. The problem of a developer who develops high intensity or high density portions first has no easy remedy other than to withhold final approval

in that event or require the developer to proceed with low-density residential portions first. Developing portions with a lower than average percentage of open space or recreational facilities may be remedied by less drastic measures such as performance bonds, credit lines, escrow accounts or letters of credit. The ordinance may set forth a preferred method or give the developer a choice.

C. Substantive Standards

A planned development ordinance should set out the substantive standards which a planned development must meet to qualify for approval. These standards may pertain to, among other things, authorized density, open space, traffic circulation, parking, landscaping, perimeter screening, elevation, height and bulk regulation, permitted uses, minimum lot size or spacing requirements, or minimum area per dwelling unit.

The ordinance should be tied into other municipal ordinances such as subdivision control regulations, sign regulations, and environmental performance standards with provisions that specify the extent to which, if at all, the planned development process may override those regulations. It is particularly important that the provisions of the planned development ordinance and the subdivision ordinance not be inconsistent. It is also usually better practice to have the planned development ordinance linked to an underlying

zoning district so that there will be base regulations that will govern on any subjects which are not in the development plan. The planned development ordinance should be explicit as to the zoning requirements which may be overridden by the city in approving a development plan.

D. Other Considerations

There must be a decision as to whether planned developments will be available in all zoning districts or confined to particular locations or districts.

When the planned development is designed with private open spaces or recreational facilities for the use of the residents of the development, the municipality should determine whether adequate provision has been made for the maintenance of the facilities or open space. The most popular solution is the homeowner's association in which all residents of the development are mandatory members and maintenance is financed.

CHAPTER 2

FOOTNOTES

1. Miner, "Agricultural Lands Preservation: A Growing Trend in Open Space Planning," in Vol. III Scott, Management and Control of Growth 52 (1975).
2. See 3 Rohan, Zoning and Land Use Controls, p. 19-4 and Hagman, Urban Planning and Land Development Control Law, §56.
3. Text attached as Appendix to Chapter 2. See, for comment, Freilich and Ragsdale, "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," 58 Minn. 1 Rev. 1009 (1974).
4. Including, but not limited to:
 - California: Cal. Gov't Code §§65680, 65910, 51200, et seq.
 - Florida: Fla.Stat. Ann. §193.114.
 - Hawaii: Haw.Rev.Stat. ch. 205, §98H-1.
 - Massachusetts: Mass.Stat. Ann. ch. 40, §35.
 - Michigan: Mich.Comp.L. §§125.271, et seq.; §125.754.
 - Ohio: Ohio Rev. Code §§519.01; 519.14; 519.15.
 - Vermont: Vt.Stat. Ann. Ta. 24, ch. 91, §4302.
 - Wisconsin: Wis.Stat. §§59.97; 60.74(1)(a).
5. N.J.S.A. 40:55D-62, -65, -67.
6. N.J.S.A. 4:1B-1 to 4:1B-15.
7. Under Section 4:1B-4a., "agricultural preserve" is defined as "a significant mass of reasonably contiguous prime agricultural lands created through the state purchase of development easements to such lands."
8. Under Section 4:1B-4d., "development easement" is defined as an interest in land, less than a fee simple absolute title thereto, which interest represents the right to develop such lands for all nonagricultural purposes. . . ."
9. N.J.S.A. 4:1B-7.
10. N.J.S.A. 4:1B-8.
11. 167 N.J. Super. 461, 400 A.2d 1244.
12. Id. at 1247.

13. 55 Cal.Rptr. 710, 712 (1960).
14. 402 Ill. 179, 83 N.E.2d 720 (1949).
15. 27 Ore.App. 709, 557 P.2d 52 (1976).
16. 312 Mass. 195, 43 N.E.2d 662 (1942).
17. Fidler v. Zoning Bd. of Adjustment of Upper Macungie Twp., 408 Pa. 260, 182 A.2d 692 (1962).
18. 182 A.2d at 695 ("It is fundamental that restrictions imposed by zoning ordinances are in derogation of the common law and must be strictly construed.").
19. 359 Mass. 68, 267 N.E.2d 906 (1971).
20. Id. at 911.
21. City of Fontana v. Atkinson, 28 Cal.Rptr. 25 (1963).
22. 124 P.2d 345 (1942). See also Township of Marple v. Lynam, 151 Pa. Super. 288, 30 A.2d 208 (1943).
23. 330 Mass. 95, 111 N.E.2d 453 (1953).
24. Smith v. Miller, 249 Md. 390, 239 A.2d 900 (1968).
25. Desler v. Lane County Bd. of Commissioners, 27 Ore.App. 709, 557 P.2d 52 (1976).
26. Johnson v. Debaun, 135 N.Y.S.2d 217 (1954) (raising of pigs not allowed).
27. Lake County v. Cushman, 40 Ill. 1045, 353 N.E.2d 399 (1976) (Poultry hatchery was on "agricultural use" under statute).
28. Chudnov v. Bd. of Appeals of Town of Bloomfield, 113 Conn. 49, 15 A. 161 (1931) (poultry house not permissible); De Benedetti v. River Vale Twp., 21 N.J. Super. 430, 91 A.2d 353 (1952) (permitting a chicken farm as an agricultural use).
29. Fields v. Anderson Cattle Co., 193 Kan. 550, 396 P.2d 276 (1964).
30. Kinderhill Farm Breeding Assoc. v. Walker, 388 N.Y.S.2d 43 (1976).
31. Demarest v. Heck, 84 N.J. Super. 100, 201 A.2d 75 (1964).

32. See, e.g., Mioduszewski v. Town of Saugus, 337 Mass. 140, 148 N.E.2d 655 (1958).
33. Champagne v. Zoning Bd. of Review of the Town of Smithfield, 99 R.I. 283, 207 A.2d 50 (1965).
34. The concept of clustering is related to another land use technique, the planned unit development (PUD). Here the clustering concept is expanded to encompass a variety of uses within a single development. PUDs are areas of land which are to be developed as a single entity according to a specific plan. Commercial, service and industrial uses can be included in the PUD, as well as common open spaces and roadways.
35. See "How Will America Grow?", Citizens Advisory Committee on Environmental Quality 15 (April, 1976).
36. Rohan, Zoning and Land Use Controls, p. 12-13.
37. See Chrinko v. So. Brunswick Twp. Planning Bd., 77 N.J. Super. 594, 187 A.2d 221 (1963) and Bilbar Constr. Co. v. Easttown Twp. Bd. of Adjustment, 393 Pa. 62, 141 A.2d 851 (1958).
38. In 1976 these provisions took the place of New Jersey's "Municipal Planned Unit Development Act" which had been adopted in 1967 and been the first legislation passed in the country based on the Urban Land Institute's "Model State Enabling Act" for residential PUD's. Several other states have since passed enabling acts which authorize municipal or county governments to enact cluster zoning measures. See, e.g.:

Illinois: Ill. Stat. Ann. §18-7-4-46 (Areawide planning); Ill. Stat. Ann. §18-7-2-38 (Metropolitan planning).

Indiana: Ind. Stat. Ann. §§11-13-1 et seq. (Municipal planning).

New York: N.Y. Town L. §281, amend L. 1969 Ch. 880 (effec. 5/2/69); N.Y. Vill. L. §7-738; N.Y. Gen. City L. §37.

Ohio: Ohio Rev. Code §§713 et seq. (Municipal zoning); Ohio Rev. Code §§519 et seq. (Township zoning).

Wisconsin: Wis. Stat. Ann. §§59.97 (County zoning); Wis. Stat. Ann. §§60.74 (Town zoning). N.Y. Town L. §281, amended L. 1969 Ch. 880 (effec. 5/2/69); N.Y. Vill. L. §7-738, N.Y. Gen. City L. §37.

39. 187 A.2d 221 (Law Division, 1963).
40. Id. at 225.
41. 241 A.2d 81 (1968).
42. Id. at 83.
43. Flood plains are the flat plains next to a river which are subject to flooding when the river overflows its normal channel. See Kusler and Lee, Regulations for Flood Plains, ASPO Planning Advisory Service Report No. 277, February, 1972.
44. National Flood Insurance Act of 1968, 42 U.S.C.A. 4001 et seq.; National Federal Disaster Protection Act of 1973, 42 U.S.C.A. 4001 et seq.
45. See N.J.S.A. 40:55-62, -65, -67 (general zoning enabling authority for cities to regulate and secure safety from flooding); N.J.S.A. 40:27-2 (county enabling authority to permit master plan to include drainage facilities); N.J.S.A. 58:16A-62 (local units of government may adopt regulations for floodway and flood fringe areas more restrictive than state regulation).
46. Hagman, Urban Planning and Land Development Control Law, p. 115.
47. N.J.S.A. 58:16A-50 et seq.
48. N.J.S.A. 40:55-62, -65, -67.
49. Ann. Code of Md. §8-9A05 et seq. See also §8-901(b) (the state must exercise all necessary powers including land use controls over its state waters; §66.B-5.03(a) provides for control of sediment and protection from flooding and shore erosion control).
50. Mich. Comp. L. Ann. §§281.631 et seq. See also §89.638, 639 (cities, villages, counties and townships were given until 1975 to zone flood, high risk, erosion areas and environmental areas along the Great Lakes and all connecting waterways).
51. Minn. Stat. Ann. §§104.01 et seq.
52. Minn. Stat. Ann. §462.357.
53. N.Y. Envir. Conserv. L. §§36-0101 et seq.

54. Kusler and Lee, Regulations For Flood Plains, ASPO Planning Advisory Service Report No. 277, February, 1972 at pp. 11-18.
55. N.J.S.A. 58:16A-50 et seq.
56. N.J.S.A. 40:55-62, -65, -67.
57. 3 Rohan, Zoning and Land Use Controls, §18.03.
58. For an early New Jersey case, see Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1962). Also see Dooley v. Town Plan and Zoning Commission of Fairfield, 151 Conn. 304, 197 A.2d 770 (1964).
59. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
60. Id. at 767.
61. Id. at 768.
62. 126 N.J. Super. 200, 313 A.2d 624 (1973).
63. 65 N.J. 101, 319 A.2d 705 (1974).
64. 319 A.2d at 711.
65. 136 N.J. Super. 436, 346 A.2d 612 (1975).
66. N.J.S.A. 13:9A-1 et seq.
67. 161 N.J. Super. 504, 391 A.2d 1265 (1978).
68. 391 A.2d at 1270.
69. 169 N.J. Super. 76, 404 A.2d 320 (1979).
70. 404 A.2d at 330.
71. Id. at 330-31.
72. 88 Wash. 2d 726, 565 P.2d 1162 (1977).
73. 101 Cal. Rptr. 93 (1972).
74. 284 N.E.2d 891 (Mass. 1972).
75. 115 N.H. 124, 336 A.2d 239 (Sup. Ct. 1975).

76. Mandelker, Daniel R., Controlling Planned Residential Developments, American Society of Planning Officials, Chicago, Illinois, 1966.

APPENDIX TO CHAPTER 2

Appendices

Appendix A. Model Quarter/Quarter Ordinance:
Metropolitan Council of the Twin Cities Area

ORDINANCE NO. _____

_____, MINNESOTA

AGRICULTURE PRESERVATION ORDINANCE

An ordinance promoting the health, safety, and general welfare of the citizens of _____, Minnesota, by amending the zoning ordinance, by repealing sections _____ thereof, and by adopting new sections pertaining to agriculture districts.

I. LEGISLATIVE INTENT AND FINDINGS OF FACT

The governing body does hereby find that land lying within the boundaries of the _____ for which the logical and proper use is agriculture is threatened by rapid expanding growth and urban development. The governing body further finds that urban development must be accommodated in a logical and orderly fashion in order to minimize the conflicts between urban and agricultural uses. The governing body further finds that the development and urbanization of high-quality agricultural land is detrimental to the health and safety of the citizens of _____, Minnesota.

It is the purpose of this ordinance to identify and classify such lands lying within the boundaries of _____, Minnesota, for which the logical and proper long-term use is agriculture and to preserve and protect said agricultural land from unnecessary encroachment by nonagricultural uses.

The governing body further finds that urban development must be accommodated. The designation of those lands and areas that are, or will in the near future, become suitable for urbanization will direct urban growth within the _____

1. Since this is a model ordinance, the name of the adopting local governmental unit cannot be inserted. Fill in the appropriate blanks throughout with the name of the government adopting the ordinance; i.e., Kalamazoo County, Anderson Township.

2. Many local governmental units already have ordinances that establish an agricultural district. If this is the case, it is likely that this agriculture preservation ordinance will be replacing the existing agricultural districts. If an old agricultural district is being replaced by the new agriculture preservation ordinance, the old section is repealed. If no section of the old zoning ordinance is being replaced by this amendment, it is unnecessary to include this language in the ordinance heading and text.

3. This section sets forth the findings of fact and logic that led to the adoption of this agriculture preservation ordinance. Courts traditionally give great deference to the legislative findings and conclusions of local governmental units. For this reason, setting forth the logic behind the ordinance can be of assistance should the ordinance be challenged in court. Finally, setting forth the intent and findings can be of great assistance to those who must interpret and apply the ordinance and to those landowners who must operate under its restrictions.

to the most appropriate areas and away from prime agricultural land. It is the purpose of this ordinance to identify land currently in agricultural use which is suited to urban uses and to preserve it in agricultural use until such time as streets, sewers, water supply, and other community facilities, utilities, and services are provided or scheduled so as to ensure orderly and beneficial conversion of such lands to nonagricultural use and to prevent their premature conversion.

II. DEFINITIONS

- 1. *Accessory Structure*: A structure whose use is associated with but incidental to the main use of the parcel on which it is situated.
- 2. *Building*: Any structure used for the shelter of persons, animals, or property of any kind.
- 3. *Capital Improvement Program*: An itemized program for a five-year prospective period, subject to at least biennial review, setting forth the schedule, timing, and details of specific contemplated public improvements by year, together with their estimated cost, the need for each improvement, financial sources, and the financial impact that the improvements will have on the local governmental unit.
- 4. *Commercial Agriculture*: The use of land for the growing and/or production of field crops, livestock, and livestock products for the production of income including but not limited to the following:
 - a. field crops, including: barley, soy beans, corn, hay, oats, potatoes, rye, sorghum, and sunflowers.
 - b. livestock, including: dairy and beef cattle, goats, horses, sheep, hogs, poultry, game birds, and other animals including dogs, ponies, deer, rabbits, and mink.
 - c. livestock products, including: milk, butter, cheese, eggs, meat, fur, and honey.
- 5. *Comprehensive Sewer Policy Plan*: A plan adopted by a local governmental unit describing, designating, and scheduling the areas to be sewered by the public system, the existing and planned capacities of the public system, the standards and conditions under

4. Terms which are essential to the operation of the agriculture preservation ordinance are defined in this section. The local governmental unit adopting this ordinance should include these definitions in the definition section of the already existing zoning ordinance. Some of the terms defined will most likely be defined in the existing zoning ordinance. When this occurs, it may be possible to combine the two definitions, or it may be necessary to make slight changes. In order to ensure continuity, the definitions of Capital Improvement Program and Comprehensive Sewer Policy Plan incorporate the language of the Metropolitan Land Planning Bill.

which the installation of private sewer systems will be permitted, and, to the extent practicable, the areas not suitable for public or private systems because of public health, safety, and welfare considerations.

- 6. *Drainage System:* Any natural or artificial feature or structure used for the conveyance, drainage, or storage of surface and/or underground water, including, but not limited to, streams, rivers, creeks, ditches, channels, conduits, gulleys, ravines, washes, lakes, or ponds, and structures such as culverts, drainage tile, dams, bridges, and water-storage basins.
- 7. *Driveway:* A private road or path for vehicle access to a public road, which is wholly located on the parcel which is afforded access.
- 8. *Farm Dwelling:* A single-family dwelling located on a farm which is used or intended for use by the farm's owner or a person employed thereon.
- 9. *Farm:* Real property used for commercial agriculture or horticulture comprising at least 40 contiguous acres and which may contain other contiguous or noncontiguous acreage, all of which is owned and operated by a single family, family corporation, individual, or corporation.
- 10. *Farm Building:* Any building or accessory structure other than a farm or nonfarm dwelling which is used in a farming operation, including, but not limited to, a barn, granary, silo, farm implement storage building, or milk house.
- 11. *Feedlot:* A confined area or structure used for feeding, breeding, or holding livestock for eventual sale in which animal waste may accumulate but not including barns, pens, or other structures used in a dairy farm operation.
- 12. *Historic Site:* Structure or area of land or water of historic, archeological, paleontological, or architectural value which has been designated as a historic site in the Federal Register of Historic Landmarks, by the Minnesota Historical Society, or by a local governmental unit.
- 13. *Horticulture:* The use of land for the growing or production for income of fruits; vegetables; flowers; nursery stock, including ornamental plants and trees; and cultured sod.
- 14. *Irrigation System:* Any structure or equipment, mechanized or other, used to supply water for commercial agriculture or horticulture, including, but not limited to, wells, pumps, motors, pipes, culverts, gates, dams, ditches, tanks, ponds, and reservoirs.
- 15. *Parcel:* A separate area of land, including a lot, having specific boundaries and capable of being conveyed and recorded.
- 16. *Nonfarm Dwelling:* A single-family dwelling located on a farm or otherwise which is not a farm dwelling.
- 17. *Poultry Facility:* A confined area or structure used intensively for raising, feeding, breeding, or holding chickens, turkeys, and other poultry for eventual sale or the production of eggs.
- 18. *Quarter/Quarter Section:* The northeast, northwest, southwest, or southeast quarter of a quarter section delineated by the United States Government system of land survey and which is exactly or nearly 40 acres in size.

- 19. *Recreation Area:* A parcel which may include water bodies and incidental buildings thereto used or intended for active or passive recreation, including, but not limited to, parks, playgrounds, golf courses, hunting preserves, polo grounds, nature trails, bridle paths, beaches, campsites, ski and snowmobile trails, and canoe routes; provided that parcels on which there are located stadiums, arenas, bowling alleys, swimming pools, (except privately owned pools not open to the public), and other recreational activities conducted primarily in structures are not recreation areas.
- 20. *Road:* A public thoroughfare, including without limitation, streets, highways, freeways, parkways, thoroughfares, roads, avenues, boulevards, lanes, or places, however described; but not including private driveways or routes.
- 21. *Single-Family Dwelling:* A free-standing mobile or permanent structure used or intended for habitation by just one family.
- 22. *Structure:* Anything constructed or erected, the use of which requires location on the ground or attachment to something having a location on the ground.

III. DESIGNATION AND ESTABLISHMENT OF DISTRICTS

- 1. The following zoning districts together with the applicable requirements contained herein are hereby established as a part of the zoning ordinance of _____
 AgP-1 (Agriculture Preservation District)
 AgP-2 (Agriculture Preservation/Urban Expansion District)⁵
- 2. The locations and boundaries of the districts established by this ordinance are set forth on the zoning map(s) of this _____ and said map(s) are hereby made a part of this ordinance. Said map(s) consisting of sheets and all notations, references, and data shown thereon are hereby incorporated by reference into this ordinance and shall be made as much a part of it as if all were fully described herein. The zoning map(s) shall be kept on file in the zoning administrator's office.
- 3. With the adoption of this ordinance, the agriculture district and requirements established in sections _____ of the zoning ordinance adopted in Ordinance No. _____ on the _____ day of _____⁶
- 5. The district boundaries of the Agriculture Preservation District and the Agriculture Preservation/Urban Expansion District should be established by following the guidelines set forth in the agriculture handbook. Those areas which can be identified as long-term agriculture areas should generally be included in the Agriculture Preservation District (AgP-1). The AgP-2 District is intended for use in those agricultural areas which will become urbanized in the immediately foreseeable future as urban facilities become available. It may be that a local governmental unit would wish to establish more or fewer districts in order to better tailor its ordinances to the local situation. It is also possible that a local unit of government may want to apply a given district to more than one area of land. This is legally permissible; however, agricultural districts, like all other zoning districts, must be designated on the zoning map.
- 6. See comment number 2. If sections of an existing zoning ordinance are to be repealed, this section should be included. The repealed sections should be referenced by section number, ordinance number, and the date of adoption.

are hereby repealed. All lands within the _____ currently located in these districts are hereby rezoned to lie within the AgP-1 or AgP-2 District pursuant to the zoning maps adopted as part of this ordinance.

IV. AgP-1 (AGRICULTURE PRESERVATION DISTRICT)

1. Intent:

This district is intended to contain those areas of the _____ where it is necessary and desirable, because of the high quality of the soils, availability of water, and/or highly productive agricultural capability, to preserve, promote, maintain, and enhance the use of the land for agricultural purposes and to protect such land from encroachment by nonagricultural uses, structures, or activities.

2. Permitted Uses and Structures:

The following uses shall be permitted by right:

- a. commercial agriculture and horticulture.
- b. feedlots and poultry facilities.
- c. farm buildings.
- d. farm drainage and irrigation systems.
- e. forestry.
- f. one farm dwelling per farm.
- g. one nonfarm dwelling per each quarter/quarter section not already containing a farm or nonfarm dwelling provided:
 - 1) the dwelling unit shall be located entirely within one quarter/quarter section on a separately owned parcel which shall be at least one acre in size.
 - 2) the parcel on which the dwelling unit is located must have at least 100 feet of frontage along a road which was in use before the effective date of this ordinance.
 - 3) the driveway serving the parcel shall be separated from adjacent driveways on the same side on the road by the following distances depending upon the road types:
 - a) local road: 100 feet;
 - b) collector road: 300 feet;
 - c) county highway: 500 feet;
 - d) minimum distance from intersection of two or more of the above: 100 feet.
 - 4) the dwelling shall be set back at least 75 feet from the road right-of-way and be separated

7. The AgP-1 (Agriculture Preservation District) is, with minor exceptions, an exclusive agricultural-use district. Agricultural uses and structures are permitted by right. Residential uses are limited to the farm dwelling unit and one nonfarm dwelling unit for each quarter/quarter section (40 acres more or less) which does not already contain a dwelling unit. However, the required lot size for a residential dwelling unit is one acre. In the AgP-1 District, development is restricted by a density factor rather than by lot size. After the nonfarm dwelling unit has been built, 39 acres still remain in agricultural use through the use of density rather than large lot zoning.

8. The terms "local road," "collector road," and "county highway" are commonly used terms in most county thoroughfare plans. Before adopting this ordinance, you will want to check to make sure that these are the terms used by your county. Should your county use other terms in its thoroughfare plan, those terms should be substituted here.

at least 300 feet from the nearest farm building.

h. historic sites.

3. Permitted Accessory Uses and Structures:

The following accessory uses and structures shall be permitted:

- a. Uses and structures which are customarily accessory and clearly incidental and subordinate to permitted uses and structures, including:
 1. Private garages;
 2. Playhouses and swimming pools and storage buildings appurtenant to single-family dwellings;
 3. Landscaping items.

4. Conditional Uses:

The following conditional uses may be approved by the _____ in the AgP-1 (Agriculture Preservation District) provided that the provisions and requirements of Section IV.4 (standards for conditional-use permit) of the zoning ordinance are fulfilled:

- a. Outdoor recreation areas;
- b. Churches, cemeteries, airports, schools, local government buildings and facilities, and government-owned facilities for the maintenance of roads and highways;
- c. A second farm dwelling in the quarter/quarter section containing the farm dwelling, provided that it meets the requirements of Section IV.2.g.
- d. Agricultural service establishments primarily engaged in performing agricultural, animal husbandry, or horticultural services on a fee or contract basis including corn shelling; hay baling and threshing; sorting, grading, and packing fruits and vegetables for the grower; agricultural produce milling and processing; horticultural services; crop dusting; fruit picking; grain cleaning; land grading; harvesting and plowing; farm equipment service and repair; veterinary services; boarding and training of horses; commercial hunting and trapping; the operation of game reservations; roadside stands for the sale of agricultural produce grown on the site.
- e. Public utility and public service structures including electric transmission lines and distribution of substations, gas regulator stations, communications equipment buildings, pumping stations, and reservoirs;
- f. Home occupations.¹⁰

5. Standards for Granting Conditional-Use Permits:

No conditional-use permit shall be issued by the _____

9. Local governmental units treat applications for conditional-use permits in various ways. The body given responsibility for issuing conditional-use permits in your local governmental unit should be inserted in this blank.

10. Home occupations is a term that is commonly defined in most zoning ordinances. For that reason, it has not been defined in this ordinance. If the local governmental unit's existing zoning ordinance does not include a definition of home occupations, the term should be defined as the local government sees fit.

unless following review and written findings it determines that the proposed use satisfies the following conditions and the conditions set by Section _____ of Ordinance Number _____."

- a. Nonfarm structures shall be sited on a separately surveyed and described parcel.
- b. The use shall not be one to which the noise, odor, dust, or chemical residues of commercial agriculture or horticulture might result in creation or establishment of a nuisance or trespass.
- c. All agricultural service establishments shall be located at least _____ feet from any driveway affecting access to a farm dwelling or field and at least _____ feet from any single-family dwelling.
- d. All agricultural service establishments shall be screened on the perimeter of the establishment by a solid fence, wall, or natural vegetation not less than _____ feet in height.
- e. An agricultural service establishment shall be incidental and necessary to the conduct of agriculture within the district.
- f. Public utility and service structures shall be located and constructed at such places and in such manner that they will not segment land of any one farm and will not interfere with the conduct of agriculture by limiting or interfering with the access to fields or the effectiveness and efficiency of the farmer and farm equipment including crop-spraying aircraft.

6. Prohibited Uses and Structures:

All other uses and structures which are not specifically permitted by right or by conditional-use permit shall be prohibited in the AgP-1 (Agricultural Preservation District).

11. Several uses are permitted in the Agriculture Preservation District by conditional-use permit. If the local governmental unit has an existing zoning ordinance, they probably already have standards governing the granting of conditional-use permits. The more specific the standards are, the better the process works. Those standards are referenced by section and ordinance number in this section. If the local governmental unit does not already have standards for the granting of conditional-use permits, the following additional specific concerns should be addressed in this ordinance:

- (a) Ingress and egress to the property and proposed structures thereon with particular reference to automotive and pedestrian safety and convenience, traffic flow and control, access in conformance with the county thoroughfare plan;
- (b) Offstreet parking and loading areas where required or necessary with particular reference to the items in 1 above and the effects of noise, glare, odor, and congestion on adjoining property and properties generally in the district;
- (c) Refuse and sanitary service areas, with particular reference to areas specified in items 1 and 2 above;
- (d) Utilities, public utilities, water supply, and sewage disposal with reference to location, availability, and compatibility;
- (e) Screening and buffering where necessary with reference to type, dimensions, and character;
- (f) Signs, if any, and proposed exterior lighting with reference to glare, traffic safety, economic effect, and compatibility and harmony with property in the district;
- (g) Required yards and other open space;
- (h) General compatibility with adjacent properties and other properties in the district and the intent of the district.

7. Minimum Lot Sizes, Yard Requirements, and Structure Spacings:

- a. Lot sizes:
For permitted uses: None.
For conditional uses: One acre.
The minimum lot width at the front building line shall be _____.
- b. Yard requirements:
For permitted uses: None.
For conditional uses: 1. front yard—90 feet;
2. rear yard—50 feet;
3. side yard—15 feet.
- c. Structures spacing:
Nonfarm uses shall be separated at least 500 feet from the nearest farm building.¹²

V. AgP-2 (AGRICULTURAL PRESERVATION/ URBAN EXPANSION DISTRICT)¹³

1. Intent:

This district is intended for application to land located adjacent to existing cities and towns where agriculture is a current logical and proper use, but which in the future will gradually be required for expansion for urban uses as urban facilities and services become available. This district is intended to preserve said land in agricultural usage and in large parcels until capital funds for the extension of urban facilities and services are committed in an adopted capital improvement program.

2. Permitted Uses and Structures:

The following use shall be permitted by right:

- a. All uses and structures permitted by right in the AgP-1 District, except feedlots and poultry operations.

3. Permitted Accessory Uses and Structures:

- a. All permitted accessory uses in the AgP-1 District as specified in IV.3 herein.

4. Conditional Uses:¹⁴

The following conditional uses may be approved by the zoning board of adjustment in the AgP-2 (Agricultural Preservation/Urban Expansion District) provided that the provisions and requirement of Section IV.4 are fulfilled:

- a. All conditional uses in the AgP-1 District as specified in Article IV, paragraph 4 herein.
- b. Single-family dwellings in subdivisions.

12. These setbacks and separations are suggestions, but can be modified to meet the local situation.

13. The Agriculture Preservation/Urban Expansion District (AgP-2) is in many respects an agricultural holding zone. It is recognized, however, that this land is best utilized when preserved in agricultural use as long as possible. In addition, it is desirable to keep land in large parcels in order to facilitate subdivision when urban services become available.

14. The conditional uses allowed in the AgP-1 District are also allowed as conditional uses in the AgP-2 District. In addition, single-family dwellings in subdivisions are allowed as a conditional use in the AgP-2 District. The comments of footnote 11 apply as well in the AgP-2 District.

5. **Standards for Granting Conditional-Use Permits:**
No conditional-use permit shall be issued by the _____ unless following review and written findings it determines that the proposed use satisfies the following conditions and the conditions set by Section _____ of Ordinance Number _____:

- a. nonfarm structures shall be sited on a separately surveyed and described parcel;
- b. single-family dwellings in subdivisions shall be connected to common water distribution and public sewage treatment systems which have been constructed in accordance with a comprehensive sewer policy plan.

6. **Prohibited Uses/Structures:**

All other structures and uses which are not specifically permitted by right or by conditional-use permit shall be prohibited in the AgP-2 (Agricultural Preservation/Urban Expansion District).

7. **Minimum Lot Size, Yard Requirements, and Height Restrictions:**¹⁵

15. The minimum lot size, yard requirements, and height restrictions established in this section are mere suggestions. The intent is to apply the same restrictions applied in the AgP-1 District except that, when sewer and water service becomes available, development should be allowed to occur in urban densities. The local governmental unit adopting this ordinance may wish to reference this section to one of the residential districts included in its existing zoning ordinance. This could be

- a. **Lot size:**
For permitted uses: None.
For conditional uses other than single-family dwellings in subdivisions: One acre.
For single-family dwellings in subdivisions connected to common water and sewage systems: 10,000 square feet.
- b. **Yard requirements:**
For permitted uses: None.
For conditional uses other than subdivisions:
 - 1. front yard—90 feet;
 - 2. rear yard—50 feet;
 - 3. side yard—15 feet.
- c. **Height restrictions:**
For permitted uses: None.
For conditional uses: Maximum height 35 feet.

VI. EFFECTIVE DATE

This ordinance shall be effective on the _____ day of _____, 19____.¹⁶

accomplished by language of this type: For single-family dwellings in subdivisions connected to a common water and sewage distribution system, the lot size, yard requirements, height restrictions ... established for the _____ district in ordinance No. _____ adopted the _____ day of _____, _____ shall apply.

16. This blank should be filled in with the date the agriculture preservation amendments take effect, which is normally the date of adoption.

Appendix B. Sliding Scale Ordinance: Ravenna Township, Minnesota

100 DISTRICT PROVISIONS

100.1 Purpose

The zoning districts are designed to implement the intents and purposes of the Comprehensive Plan.

The zoning districts are based upon the Comprehensive Plan, which has the purpose of protecting the public health, safety, convenience, and general welfare. Before any amendment to the boundary lines of the established zoning districts are made, any necessary amendments must first be made to the Comprehensive Plan.

For the purposes of this Ordinance, Ravenna Township is hereby divided into the following zoning districts when the regulations outlined herein will apply.

- RR-I (Rural/Residential District)
- MWP (Marsh and Wetlands Protection District)
- FP (Floodplain District)

The locations and boundaries of the districts established by this Ordinance are hereby set forth on the zoning map of Ravenna Township, and said map is hereby made part of this Ordinance.

101 RR-I (RURAL/RESIDENTIAL DISTRICT)

101.1 Intent

This district is intended for application in those areas of the Township where whole sections of open land have become subject to increased amounts of single-family residential development. Despite the fact that poor soils, rough topography, and insufficient irrigation make sections of this land uneconomical for agricultural purposes, there are some suitable sites for single-family home construction. However, because of the fact that there are severe environmental constraints on residential development in this area, and because of the fact that urban services such as central sewer and water will not be provided for at least fifteen (15) years, and because significant amounts of residential development will adversely affect surrounding agricultural operations, residential development in this district must be kept to a reasonable rural density of five nonfarm residential homes per forty (40) acres.

101.2 Permitted Uses and Structures

The following shall be permitted uses by right:

- a. Any and all forms of commercial agriculture and com-

mercial horticulture as defined by this Ordinance, including feedlots and poultry operations.

- b. Farm buildings and accessory structures.
- c. Farm drainage and irrigation systems.
- d. Forestry, grazing, and gardening.
- e. Nonfarm single-family residential subdivisions shall be permitted on lots or parcels of land for which a deed has been recorded in the office of the Dakota County Register of Deeds upon or prior to the effective date of this Ordinance, or a lot or parcel of land that would have been a lot of record if the document conveying the lot had been recorded on the date of its execution, provided they are able to meet all applicable standards and requirements of this Ordinance and all other applicable township and county ordinances, subject to the following area and dimensional regulations. The maximum number of lots, in addition to an existing principal dwelling that may be created, shall be based on the gross area of that tract which is to be subdivided, and which constitutes the lot of record existing on the effective date of this Ordinance, as follows:

Area of Lot of Record at the Time of the Effective Date of This Ordinance	Maximum Number of Lots Permitted
2-7 acres	1
8-15 acres	2
16-32 acres	3
33-39 acres	4
40-44 acres	5
45-100 acres	1 additional unit for every 8 acres of land
101+ acres	5 additional units for every 8 acres of land

Each lot created shall contain no more than one single-family home provided it meets the following requirements:

- 1) Each lot shall be a separately conveyed parcel of at least two acres in area and described by a certificate of survey.
 - 2) The driveway serving a lot shall be separated from adjacent driveways on the same side of the road by the following distances:
 - a) Township road: 100 feet
 - b) County/state highway: 125 feet
 - c) Minimum distance from intersection of two or more of the above: 80 feet
 - 3) All nonfarm residential buildings shall be set back a minimum of 300 feet from the nearest farm building.
- f. Historic sites.
 - g. Home occupations.

101.3 Conditional Uses

The following conditional uses may be approved by the Town Board in the RR-I (Rural/Residential District) provided that the provisions and requirements of Section 066.1 of the zoning ordinance are fulfilled:

- a. Outdoor recreation areas;
- b. Churches, cemeteries, airports, schools, local government buildings and facilities, and government-owned facilities for the maintenance of roads and highways;
- c. Agricultural service establishments primarily engaged in performing agricultural, animal husbandry, or horticultural services on a fee or contract basis including corn shelling; hay baling and threshing; sorting, grading, and packing fruits and vegetables for the grower; agricultural produce milking and processing; horticultural services; crop dusting; fruit picking; grain cleaning; land grading; harvesting and plowing; farm equipment service and repair; veterinary services; boarding and training of horses; commercial hunting and trapping; the operation of game reservations; and roadside stands for the sale of agricultural produce grown on the site.
- d. Mining and extraction operations.
- e. Public utility and public service structures including electric transmission lines and distribution of substations, gas regulator stations, communications equipment and buildings, pumping stations and reservoirs.
- f. Highway-neighborhood commercial uses.

101.4 Prohibited Uses and Structures

All other uses and structures which are not specifically permitted as a right or by conditional-use permit shall be prohibited in the RR-I (Rural/Residential District).

101.5 Minimum Lot Size

For farm dwellings: None.

For nonfarm single-family dwellings: Two acres.

For conditional uses: Two acres.

101.6 Minimum Yard Dimension Requirements

- a. Lot width, 150 feet.
- b. Lot depth, 175 feet.
- c. Side yard setback for structures, 20 feet.
- d. Rear yard setback for structures, 20 feet.
- e. Structure setback from:
 - Township road, 80 feet from centerline.
 - County road, 110 feet from centerline.
 - State road, 130 feet from centerline.

101.7 Maximum Height

- a. For farm uses: None.
- b. For nonfarm and conditional uses: 35 feet.

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CHAPTER THREE

DEVELOPMENT RIGHTS TRANSFER

I. THE CONCEPT

The transfer of development rights is a topic that has received a substantial amount of scholarly attention in planning circles and has, like many planning concepts, been the subject of some misunderstanding. The term "transfer of development rights" is used commonly in two contexts, only one of which is accurate. In some instances the process of computing the total density to which a tract of land might be developed and then permitting that number of dwelling units to be built on only a portion of the tract while the remainder stays undeveloped has been loosely spoken of as a "transfer of development rights" because it effectively shifts the right to development from one portion of the tract to another. This is really, however, no more than an application of density zoning or clustering which are discussed elsewhere in this report. In the true sense of the term, a "transfer of development rights" connotes the severance of the right to develop from the bundle of rights that make up land ownership and the conveyance of that right to another person who owns a nearby or even a distant tract of land. It means, in short, a right in land which can be conveyed to another for use elsewhere.

A development rights transfer technique requires the identification through a master plan of an area or district within which development rights will be created and may be transferred, or two areas or districts, one from which rights may be transferred and a second to which rights may be transferred. In either case a basis for assigning development rights to land has to be determined and then the rights have to be allocated to individual parcels. The four principal allocation methods that have been suggested are acreage, fair market value, assessed value and development potential.^{1/} Both fair market value and development potential are more complex methods. The former suffers from the defect of being less readily ascertainable than assessed value, and the latter involves the essentially contradictory allocation of development potential to land that has been designated for no development.

Once an allocation method has been settled upon, then development rights must be assigned and certified to the owner of each tract of land both in the district from which rights are to be transferred and in the district to which the rights will be transferable. At this point it is necessary for the governing authority to decide whether the development rights in the transferee district will be scaled to the level of development that is already permitted by the

zoning ordinance or whether properties in the transferee district will be "downzoned" (i.e., zoned more restrictively) in order to insure a ready market for the development rights.

Inherent in the decision to use transferable development rights is a determination that there are some lands within the jurisdiction of the governing authority that will bear substantially more intensive development as the price of preserving some lands as open space, agricultural land, or substantially undeveloped territory. The governing authority must also decide whether there will be an upper limit on the density or intensity of development even with the use of transferred development rights.

Once the system has been set in place, then the owner of land within the transferee district who wishes to develop his land to a greater density or intensity of use than would be permitted under the terms of the zoning ordinance must acquire development rights from an owner in the transferor district at the market price. In a very rough sense this market price will tend to equal what it would cost the transferee owner to purchase an adjacent tract of land that would enlarge the size of the transferee owner's land sufficiently to permit the proposed development.

II. THE APPLICATION OF THE CONCEPT

While the concept is relatively simple, there have been very few applications of it. The current interest in the transfer of development rights stems largely from two sources. New York City has created transferable development rights in connection with its landmarks preservation program. Landmark buildings that are historically or architecturally significant may not be destroyed or altered. Most such buildings represent a very substantial underdevelopment of the site on which they are located. Under the New York City landmarks ordinance the unused development potential of sites occupied by landmark structures may be sold and transferred to adjacent and nearby properties.^{2/} The second source of the current interest in transferable development rights was the Chicago Plan devised by Professor John Costonis and Jared Schlaes as a method of encouraging preservation of landmark structures in the City of Chicago. Under that plan development rights could be transferred anywhere within a transferee district that covered most of the Chicago central business district.^{3/} Unlike the New York plan, the Chicago plan was never implemented by the adoption of an appropriate ordinance.

There have been a few other instances of experimentation with the transfer of development rights. One of the more well-known of these is the ordinance of Southampton Township in Suffolk County, Long Island. The Southampton ordinance does not, however, impose a mandatory transfer. Farmers are given an option to transfer development rights off-site and when they do the farmland is placed in a municipal land trust and must be permanently maintained as farmland. The farmer may continue to farm the land under this system. The Southampton ordinance is particularly interesting because aquifer recharge areas may be designated as lands eligible for preservation under the ordinance and the development rights for those tracts may be shifted off-site. There is, however, a limitation on the increase in density in the transferee district to a maximum of four dwelling units per acre. There is also a requirement that at the time development rights are transferred the transferor parcel must be deeded either to the township or to another government agency specified by the town. The Southampton ordinance does not create a freely conveyable development right. The development right remains tied to the land until the township accepts title to the parcel of land that is to be preserved. The use of the development right on the transferee parcel is effected by amending the zoning ordinance

so as to include the transferred right as a part of the permitted density.^{4/}

The literature contains a report of only one transfer in Southhampton that involved the shifting of the right to construct an additional 18 dwelling units from an aquifer recharge area to another parcel. The result of the transfer was that 36 acres of the recharge area were deeded to the town and the development of the transferee site took place on 40,000 square foot lots.^{5/}

Two New Jersey municipalities, Chesterfield and Hillsborough, have adopted development rights transfer ordinances that are similar to the Southhampton ordinance. The Chesterfield ordinance permits the private landowner to retain title while the Hillsborough ordinance does not. It is our understanding that there have been no transfers of development rights under either ordinance and we also understand that the Hillsborough ordinance is presently in litigation.^{6/}

In Pennsylvania Upper Makefield Township in Bucks County adopted a transferable development rights program as a method of preserving the rural character of a section of the township that contained large dairy farms and a number of country estates. The Upper Makefield ordinance

creates one development point for each 1.6 acres of undeveloped land. Rights may be transferred to any other owner of real estate in the same zoning district with no restriction on the number of rights which a landowner may acquire. The ordinance imposes sales contract terms that have the effect of making the township a third party beneficiary of the contract with rights in the preserved land if it should subsequently be the subject of a development proposal. Development rights are always assigned either to the transferor or transferee parcel and may not be owned separately from a real estate holding in the township. The ownership of each development point permits the reduction in the minimum single family lot size of 30,000 square feet to 20,000 square feet. However, the gross density of the tract may not exceed .8 dwelling units per acre. Insofar as we have been able to learn, there have not been any development transfers in Upper Makefield.^{1/}

A second community in Bucks County, Buckingham, has a development rights transfer program as a part of its effort to preserve agricultural lands. Under that program development rights may be transferred from the agricultural zone to the development zone. Rights are assigned at the rate of one development right for each acre of undeveloped land. The ordinance has an unusual

provision that requires that when rights are to be transferred from any tract of land, the land must first be subdivided and the rights from the best farmlands must be sold first and those from unbuildable portions of the tract must be sold last. There is a requirement that in connection with the transfer there be a deed restriction recorded limiting the land to agricultural use and no landowner may acquire development rights unless he owns at least 10 acres. There have apparently been a small number of rights transfers under this program, but the application of the technique in Buckingham has really been too limited for there to be any basis for assessing the success or failure of the program.^{8/}

In Delaware County, Pennsylvania, the Township of Birmingham adopted a development rights transfer program as a means of preserving agricultural land. Development rights were created for an agricultural district and landowners were permitted to transfer those rights to either of two development districts. As in Buckingham Township, development rights could only be assigned to landowners who owned 10 acres or more. Rights were created at the rate of 0.5 development rights per acre except lands in flood plains were assigned only 0.125 rights per acre. Transfers to the development district had to be to tracts of at least 50 acres in size

but the permitted increases in density in the transferee zone were greater than in the Bucks County townships. In one zone a basic density of 0.6 dwelling units per acre could be increased to 2.25 dwelling units per acre and in the other development zone a base density of 2.5 dwelling units per acre could be doubled to 5 dwelling units per acre. Birmingham Township also has a priority system for selecting lands from which rights may be transferred which starts with lands devoted to agricultural use in the past three years then moves to lands not currently farmed with a slope of 8% or less, followed, in order, by historic and scenic sites, woodland, and all remaining lands. Deed restrictions are required and the township reserves the right to acquire development rights by purchase or gift. The township is authorized to hold development rights independent of any designated parcel of land for any length of time so that such rights could be sold at a later date by the township. In essence there is authority here for the creation of a development rights bank. Our review of the literature does not disclose any reference to any transfers in Birmingham Township either.^{9/}

Collier County, Florida, has a development rights transfer plan with which it has now had some experience. The Collier County plan is designed to protect environmentally

sensitive land, but it does not forbid development of such lands. An inventory of such lands was prepared by the county and this land inventory became the basis for what was called the "ST" Special Treatment Overlay District. This is a district created by the zoning ordinance that established special regulations that are in addition to those that are otherwise applicable under the various districts created by the zoning ordinance. Lands in the ST zone are eligible for the transfer of development rights to non-sensitive lands in other zones. The Collier County ordinance does not, however, forbid development in the ST zone nor require the transfer of development rights to non-sensitive or less sensitive development areas. An early version of the Collier County ordinance required review by as many as seven advisory boards and governmental agencies and permitted the transfer of development rights only from ST land to contiguous non-ST land. Both of these provisions proved cumbersome and the ordinance was subsequently amended so as to eliminate the contiguity requirement and require review only by the Board of County Commissioners. Rights which may be transferred accrue at the rate of 0.5 residential units for each acre of ST land. Only residential development rights may be transferred. When transferred to other residential zones

the increase in density may be either 10% or 20% depending upon the zone. A 1978 amendment to the zoning ordinance created a new TDR-1 transfer of development rights multi-family district in which the base density of 6 units per gross acre could be increased to 9 units per acre with transferred development rights.

There have been two applications for development rights transfer that have involved rather substantial transfers. In one instance 353 residential development units were transferred from a 70 acre mangrove island to a 53 acre upland site. A second transfer shifted the right to build 26 condominium units from a 52 acre mangrove island to a 10.5 acre tract on the mainland. In both instances the island which was the transferor site was dedicated to the county.^{10/}

Despite the amount of interest in planning circles in the transfer of development rights, the idea has not always won instant converts. The Martha's Vineyard Commission studied the TDR idea and concluded that "the tool has more liabilities associated with it than benefits."^{11/} Of those few TDR systems that have been adopted for the transfer of development rights and of those that have been adopted the number of transfers has not been substantial. In part the hesitancy with which the idea has been greeted stems

from the uncertain legal status of the technique. In virtually every instance the system has been accompanied by either threatened or actual litigation, some of which has been settled and some of which has been disposed of at the trial court level without a reported decision.

III. THE VALIDITY OF THE CONCEPT

In New Jersey proposed legislation authorizing the use of the transferable development rights technique has been prepared and introduced in the New Jersey legislature with some regularity, but has never been passed. The proposed legislation would authorize the creation of open space preservation districts and provides that when such districts are created there must also be provision made for the transfer of development rights from the open space district.^{12/}

Of the reported decisions dealing with transferable development rights the score is presently one to one. In Fred F. French Investing Company v. City of New York,^{13/} the New York Court of Appeals held that the creation of transferable development rights as an attempt to compensate private landowners for zoning two small private parks as open space was invalid because the value of the rights created was too speculative for the court to say that the

rights had a market value that compensated the landowner for being deprived of all use of his land except as open space. In Penn Central Transportation Company v. City of New York,^{14/} both the New York Supreme Court and the New York Court of Appeals upheld the New York City Landmark Preservation Ordinance. One feature of that ordinance was the creation of development rights which could be transferred to properties on adjacent blocks. There is a suggestion in both of the Penn Central opinions that those rights have economic value which prevented the landmark ordinance from being held to be a taking. They may have been right. We understand Philip Morris Corporation paid more per foot for development rights than it would have for land when it built at the Southwest corner of 42nd Street and Park Avenue. However, on balance the adjacency requirement seems to have been a central element in what is believed to be the overall lack of success of the New York TDR program.^{15/}

IV. AN ASSESSMENT OF THE UTILITY OF THE CONCEPT

Transferring development rights is one of those concepts that has an initial attractiveness but which, upon examination, tends to be beset with complexities. It is not too difficult to define a preservation zone from which development rights will be transferred, but the assignment

of rights to the preservation zone may be very difficult. It can be even more difficult to designate zones to which the rights may be transferred and to determine the extent to which the transfer of those rights will permit increased densities in the transferee zone. Even in determining the preservation zone, considerations of reasonable density, market value of land, and rate of growth may have to be taken into account in determining development rights. There is also the question of whether land that is very suitable for building should receive the same rights as land that is only marginal for building purposes. The extent to which rights can be freely conveyed must be considered. Can they be bought and sold in the marketplace or may they only be transferred in connection with an application for approval of a specific development? The status of the transferor land after the development rights are severed must be decided. Will it be publicly owned, or will private landowners be entitled to retain title subject to strict deed restrictions? Should there be a provision for a governmental agency to acquire development rights and hold them in a development rights bank? If there is to be, then there must be a mechanism for determining how, when and where development rights will be permitted to re-enter the market. Such an ordinance must also take into account the possibility that in subsequent years the governmental agency administering the program will decide

to water the existing development rights by creating new development rights for transferor sites from which the previously created development rights have already been transferred. These are only a few of the questions that swirl around this very innovative land use control technique. The complexity of those issues has undoubtedly been a factor both in the relatively slow rate at which it has been embraced and in absence of any substantial experience with the technique in those areas where it has been adopted.

CHAPTER 3

FOOTNOTES

1. Co-operative Extension Service, Transferable Development Rights, University of Maryland, p. 4.
2. Costonis, John, Space Adrift: Landmark Preservation in the Market Place, Nat'l. Trust for Historic Preservation, University of Illinois (1974), pp. 54-60.
3. For a full description of the Chicago Plan, which is only marginally relevant here because it is an urban transfer plan, see Id. pp. 28-54. See also, Costonis, John, "The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks," 85 Harv. Law Rev. 574, January, 1972; and Costonis, John, and Shlaes, Jared, "The Economics of Development Rights Transfer," The Appraisal Journal, October, 1974, p. 526.
4. Chavoosion, B.B., and Pizor, P.J., "Non Metropolitan Transfer of Development Rights: Program Experience in the Middle Atlantic States." A paper prepared for the Lincoln Institute of Land Policy Seminar on Transfer of Development Rights, May 3, 1979, pp. 6-10.
5. Id., p. 8.
6. Id., pp. 10-14.
7. Id., pp. 15-17.
8. Id., pp. 17-19.
9. Id., pp. 20-22.
10. Spagna, Nemo J., "Transferable Development Rights: Implementing the Idea." A paper presented to the Lincoln Institute of Land Policy Seminar, May, 1979, pp. 12-15, 17-28.
11. Land Use Planning, a report of the Martha's Vineyard Commission, p. 35.
12. Chavoosion, Norman, and Nieswand, Transfer of Development Rights: A New Concept in Land Use Management, Co-operative Extension Service, Cook College, Rutgers University Leaflet 492 B (1974).
13. 39 N.Y.2d 587, 385 N.Y.S.2d 5 (1976).

14. 438 U.S. 104, 98 S.Ct. 2646 (1978), affirming 42 N.Y.2d 324, 397 N.Y.S.2d 914.
15. Costonis, Space Adrift, op. cit., p. 55.

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CHAPTER FOUR

ENVIRONMENTAL PERFORMANCE STANDARDS

The increasing concern in the last 15 years with the environmental impacts of development has focused attention on the fact that traditional land use controls such as zoning and subdivision ordinances and building codes do not fully take account of environmental concerns and are in fact not well adapted to do so. One of the principal reasons that such traditional controls are not well adapted to the achievement of environmental objectives is that they are based upon specifications with respect to the construction and location of man-made structures rather than to the effect that those structures have upon environmental functions or processes. For example, zoning ordinances control the types of uses that may be established, location of structures with respect to lot lines, the height of structures, the percentage of the land that may be covered by structures, and other similar incidents of land use. Subdivision ordinances specify standards of subdivision design and construction specifications for public improvements such as streets, sidewalks, and water and sewer mains, and drainage facilities. Building codes frequently mandate the use of particular materials, although some of the more recent codes use performance standards that are couched in terms of how building materials should perform

should perform in terms of fire resistance, load limits, and other factors. Even so the focus of the building code is upon the materials used in physical construction rather than upon the impact on environmental functions or processes.

In the early 1950s a concept of industrial performance standards was developed and included in a great many zoning ordinances. Those performance criteria determined the type of structures permitted and the kinds of uses allowed on the basis of the extent to which they would create air pollution, noise, vibration, odor, toxic or noxious emissions, glare, and so forth. Many of these industrial zoning performance standards later were supplanted by specific state or federal legislation dealing with air and water quality.

I. ENVIRONMENTAL PERFORMANCE CONTROLS

More recently communities have begun to be much more concerned with the impact of development upon environmentally sensitive areas and have begun to devise regulations that focus upon the impact of activities that disturb land on such environmentally sensitive areas. In particular such ordinances have dealt with the effects of developments on streams and creeks, aquifers, wetlands, woodlands, hillsides, and soil systems or series that have characteristics that make them unsuitable for development.

To date there has been very little literature on environmental performance standards generally, although there is a substantial body of technical literature dealing with

such topics as water courses, aquifers, wetlands and other environmentally sensitive or critical areas. The most comprehensive and useful general discussion of performance controls is a publication of the American Planning Association in the Planning Advisory Service Series entitled Performance Controls for Sensitive Lands: A Practical Guide for Local Administrators.^{1/} The report contains a detailed discussion of the scientific and technological considerations that must underlie the development of detailed regulations affecting streams and creeks, aquifers, wetlands, woodlands, and hillsides.

It appears to us that a system of environmental performance standards will need to be incorporated in any regulations that may be adopted affecting Pinelands. To develop such a system of regulation it would be necessary to identify the natural processes that are closely associated with the health, safety and welfare of the Pinelands. Specifically, it would appear that matters such as groundwater infiltration, protection of water quality in wetlands and streams and preservation of woodlands would be among the topics which would be the subject of direct environmental performance regulation. Such regulations would not be directly linked to any of the specific restrictions established in zoning ordinances but would provide the controls that would apply to all land irrespective of the zoning regulations

applicable to such properties.

The central question in evaluating environmental performance standards is the issue of whether it is in fact feasible to set standards for natural processes such as erosion, storm water runoff, groundwater infiltration, and so forth. The attempt to set such standards inevitably raises the question of whether it is technologically feasible to set quite precise numerical measurements on such natural processes because environmental performance controls must be keyed to such numerical measurements. We presume that the extensive scientific consultation that is to be provided to the Pinelands Commission will provide a body of information from which it should be possible to derive performance controls that can be translated into regulation.

In the Chicago area the regulations of the Metropolitan Sanitary District of Greater Chicago provide an example of region-wide control of surface water runoff. Using its authority over the issuance of sewer permits for new construction, the District has adopted storm water detention regulations that limit both the rate and volume of storm water runoff which local governments are required to implement. The District requires that the release rate for storm waters be limited to the carrying capacity of natural channels and that it not exceed the runoff rate from the

area in its natural state. The District requires that there be on-site detention of storm water sufficient to handle the runoff of a 100 year rainfall, for any and all durations, from the fully developed drainage area that is tributary to the reservoir less the volume that would be discharged during the same time period at the permitted release rate. Thus the result of the regulations is to require as a performance control that, even under the most adverse and heaviest rainfalls, the land must function in terms of storm water runoff just as it would under natural conditions prior to development.^{2/}

In De Kalb County, Georgia, storage and controlled release of storm water runoff is required whenever development increases the peak rate of runoff by more than 1 cubic foot per second for a 10 year frequency storm. Under those circumstances the peak release rate may not exceed the peak runoff of the land in its natural condition and for all storm intensities up to and including a 100 year frequency and all rainfall durations. There is a further limitation in the De Kalb County ordinance that relates the permitted runoff to two year frequency storms, runoff coefficients, and the slope of the land.^{3/}

The New Jersey State Soil Conservation Committee has prepared a model ordinance to control soil erosion and sedimentation. The model ordinance requires that in connection

with any land disturbance activity there must be submitted a separate soil erosion and sedimentation control plan. In addition to describing existing natural and manmade features on and surrounding the site, including topography, soil characteristics and, when available, a copy of the soil conservation district soil survey, the plan must locate and describe the proposed changes on the site, identify the measures for soil erosion and sediment control, and provide a schedule of the sequence of installation of the planned erosion and sediment control measures. The ordinance incorporates by reference the standards for soil erosion and sediment control that have been adopted by the state Soil Conservation Committee and requires that all control measures meet or exceed those measures.^{4/}

Mine Hill Township, New Jersey, has adopted a soils overlay ordinance for the purpose of preventing inappropriate development from taking place on areas characterized by certain soil types, slopes and water levels. The ordinance incorporates a table listing soil limitations and the problems and development limitations that are associated with various soil types and prohibits the construction of structures or improvements on lands that the table indicates are unbuildable. The ordinance requires that development avoid areas that have severe development problems unless corrective action is

taken to overcome those development problems. Among the types of development which are deemed inappropriate under the ordinance are those developments on soils which would permit the introduction of toxic materials into water aquifers.^{5/}

Oakland County, Michigan, has adopted a woodlands protection ordinance that requires a permit for removal or damage of any tree that has a trunk diameter of three inches or more. The planning commission is authorized to establish standards to guide the development of woodlands including standards with respect to the spacing of trees, the clearing of shrubs and brush, density of vegetation growth and preservation per acre and forestry and tree replacement practices. Each permit application is required to be reviewed on an individual basis. The ordinance requires that the preservation of woodlands, trees and related natural resources and values shall take priority over all forms of development and that the protection and conservation of irreplaceable natural resources from pollution, impairment or destruction is to be the paramount factor in the commission's determination. However, the ordinance provides that an application for a permit may not be denied solely because some trees are growing on private or public property under consideration. The ordinance provides that "other factors which demonstrate a public need for woodland preservation must be stated."^{6/}

While the Oakland County ordinance is far reaching in its implications, there must be some doubt as to the ultimate enforceability of some of its provisions. The risk that the local legislative body improperly left the establishment of standards to the plan commission is substantial. There is also a risk that a court might find in a particular case that an individual landowner was being unfairly required to provide a public benefit by preserving woodlands. There is more than a hint in the ordinance that one of its purposes is to hold down acquisition costs because the ordinance requires each permit application to be reviewed for the purpose of determining whether it is likely that any of the parcels of land in question might be required for recreation or other public acquisition purposes in the near future.

II. PERFORMANCE ZONING

A different approach to performance based land use controls is the elaborate performance zoning system that has been developed by Lane Kendig.^{7/} In performance zoning, as advocated by Kendig, traditional zoning districts and precise specification of land uses are discarded in favor of broad districts that are differentiated on the basis of function (such as agricultural, rural, ex-urban, suburban and urban) rather than the types of uses permitted.

A variety of land uses are permitted as a matter of right subject to quite specific performance standards.

Fine tuned regulation is not attempted. The crucial decisions are the transformation from one broad category of land use to another.

Mr. Kendig has embodied his performance zoning ideas in a draft ordinance for Lake County, Illinois. It is a complex system that cannot readily be capsulized. Essentially, all land is assigned one of several very broad districts. The ones proposed for Lake County include the Agricultural, Wilderness, and Rural Districts, a Holding Zone, an Estate District, and a Development District, and Urban Core and Heavy Industrial Districts. There are also special zones for developed areas. The first step in the zoning analysis is to identify the physical capacity of the site for development and to select a "land use intensity class (ranging from 1 for farming to 11 for industry) which in turn governs the standards that will apply to the proposed use. In each district open space ratios, density factors, and impervious surface ratios are specified. A series of calculations based upon these ratios plus mathematically precise natural resource protection and recreation factors and a spacing requirement called a bufferyard estimator yields the site that is available for development. Once the area available for development is determined, specific site design standards must be applied.

The model ordinance and the calculations it requires

are complicated. Whether it provides regulation that is more sensitive to environmental concerns is difficult to tell. The principal focus of the model ordinance is on the prevention of urban sprawl and the construction of housing in an orderly manner without occasioning environmental damage. As a result the model ordinance does not deal as thoroughly with the land uses concerns that attend commercial and industrial development. When it is published and generally available, the model ordinance and its accompanying commentary should be reviewed carefully for potential applicability to the Pinelands.

III. GENERAL CONSIDERATIONS

The use of environmental performance controls prior to development should assist in providing a fairer administration of environmental controls. Currently environmental protection legislation focuses on prosecution of individuals and firms responsible for pollution after the pollution takes place. Such actions may be either to restrain continuation of the pollution or to impose penalties for prior acts of pollution. Such a system has inherent in it the risk that enforcement agencies will focus on the most significant sources of pollution and that less significant sources may be overlooked in the press of dealing with the more significant cases. By enforcing environmental performance controls prior to the commencement of activities that will involve land

disturbance, the same standard is set for all development activity and each owner or developer will bear a proportionate share of the protection of natural resources and will bear that share in proportion to the problems that he creates. Thus, performance controls represent a significant advance in achieving the fairness in the environmental control process because they place the burden of compliance upon the landowner or developer who initiates the process that will result in land disturbance and environmental impacts.

The validity and effectiveness of performance controls depend upon accurate and adequate scientific data as support for the regulating standards. Without such support, performance standards are readily characterized as merely arbitrary numbers plucked from somewhere overhead. Moreover, utilization of such performance controls assumes a continuing commitment to the employment or retainer of enforcement officials or consultants who have the training and experience that is necessary to administer and apply the controls competently. Both of these considerations, plus the need for uniformity in regulation, suggest that only a regional or state agency should attempt to adopt and administer environmental performance controls.

CHAPTER 4

FOOTNOTES

1. Thurow, Toner, and Erley, Performance Controls for Sensitive Lands, Planning Advisory Service Report Nos. 307 and 308, American Society of Planning Officials, Chicago, 1975.
2. Metropolitan Sanitary District of Greater Chicago, Sewer Permit Ordinance, Section 5(B), and Manual of Procedures for Administration of the Sewer Permit Ordinance, Article 6-4.
3. Thurow, Toner & Erley, op cit, p. 104-107.
4. Id. pp. 116-118.
5. Id. p. 141.
6. Id. pp. 132-136.
7. Kendig, Lane, Performance Zoning, scheduled for publication by the American Planning Association during 1980. We are indebted to Mr. Kendig and to APA for permitting us to read a manuscript copy of this important forthcoming publication. The land use control system described by Mr. Kendig is complex and a certain understandable number of mispagnations, typographical errors, and unlabeled tables and drawings made the text somewhat more difficult to follow in its present pre-publication form than the finished product will be.

CHAPTER FIVE

MASTER PLANNING

I. DESCRIPTION AND LEVEL OF APPLICATION

A master plan has often been described as a "comprehensive, long-term general plan for the physical development of [a] community"^{1/} which embodies information, judgments and objectives intended to serve as both a guiding and predictive force. Based on comprehensive surveys and analyses of existing conditions in a geographic area, the plan directs attention to the goals established by government officials.^{2/} The purpose, then, of the comprehensive or master plan is to prevent the arbitrary and unreasonable exercise of local legislative power that may result in piecemeal or haphazard zoning.^{3/}

The traditional planning approach adopted by the Standard Planning Enabling Act concentrates on planning for long-term physical development. Master plans which adopt this approach seek to present a picture of what the planning area should look like at some arbitrary number of years in the future. The plans focus on the proper location and intensity of activities that use the land, and on the type, design and location of physical structures and facilities that serve these activities.^{4/}

A relatively recent proposal, the American Law

Institute's Model Land Development Code,^{5/} seeks to broaden the scope of the comprehensive plan by not only taking into consideration the physical development of a community, but also the environmental, social and economic characteristics of its geographic area. Under this model legislation, the emphasis is not on the final product of the planning process, but on the concept that the planning process is a continuing one, setting short-term goals which are to be re-evaluated periodically. The influence of the ALI Code can be seen in New Jersey's 1976 municipal planning and zoning enabling statute, the "Municipal Land Use Law."^{6/} That statute authorizes municipal planning boards to prepare a master plan, generally comprising a report or statement and land use and development proposals, with maps, diagrams and text, containing the following elements: (1) a statement of objectives, policies and standards upon which proposals for physical, economic and social development are based; (2) a land use plan taking into consideration, among other things, topography, water supply, flood plain areas, woodlands, existing and proposed location and intensity of development; (3) a housing plan; (4) a transportation plan; (5) a conservation plan; (6) a recreation plan; and (7) a community facilities plan.^{7/} Master plans are to be reviewed every six years.^{8/} A similar approach has been adopted in Sections 7 and 8 of the

"Pinelands Protection Act."

Until relatively recently, there had been little question but that local governments were the proper agencies to exercise the power of the states to plan and regulate land development. For this reason, master planning is a common land use technique at the local level. During the late 1960's and through the 1970's, however, attention focused on conflicts between the interests of individual municipalities and those of the public at large and on the frequent inability of the states to resolve these matters because they had delegated their power to regulate the use of land. During this period a number of states adopted legislation in which the states began to reassume themselves, or through regional agencies, some of the planning and regulatory powers they had previously delegated to local governments. Such programs, already in effect in Hawaii, Vermont and Florida, indicate a recognition by state legislatures that state government should retain legal authority to act when the overall state interest is involved. (See Volume 2 for a description of some of these regional agencies.)

In addition to authorizing municipal planning, the New Jersey statute also authorizes municipalities to enter into agreements between themselves or between an individual municipality and the county in which it is located,

or an adjoining county, for the joint administration of any of the powers authorized under the 1976 "Municipal Land Use Law," or to provide for the establishment of a regional planning board, regional board of adjustment, or a joint zoning officer in connection with any power executed under that Act.^{9/} In addition, county-wide planning and the adoption of a county master plan are authorized with the requirement that all subdivisions of land within a county which has a county planning board be reviewed by the board and all subdivisions affecting county roads or drainage facilities be approved by the board.^{10/}

II. METHOD OF APPLICATION

Section 9.c. of the "Pinelands Protection Act" provides that no application for development within the Pinelands area shall be approved by any level of government within the State or an agency thereof, unless such development conforms to the provisions of the comprehensive plan. The Commission is, however, given the authority to waive strict compliance with the plan in order to alleviate extraordinary hardship or to satisfy a compelling public need, and if such development would not result in substantial impairment of the resources of the Pinelands area.

III. POTENTIAL LEGAL CHALLENGES

Section 7 of the "Pinelands Protection Act"

requires that a comprehensive management plan for the Pinelands area containing the plan elements and goals set forth in Sections 7 and 8 be prepared and adopted by the Pinelands Commission on or before August 8, 1980. Care, however, must be taken during the consideration and adoption of the plan to satisfy the constitutional requirements of procedural due process--adequate notice and opportunity to be heard--as required by both the New Jersey and United States Constitutions and the notice and hearing provisions of the Act which require that public hearings be held "in the Pinelands area and in other areas of the State at places of [the Commission's] choosing."11/

The legal issues raised by the vested rights and the "taking" issues are discussed fully in Volume 5 of this report, but it should be acknowledged at this point that the adoption of ordinances implementing the Pinelands comprehensive management plan may generate claims of vested rights if "substantial" development rights previously obtained by individual property owners through the permitting process are adversely affected. The matter to be determined in each case will be whether "substantial" expenditures have been made by the developer in furtherance of those development rights.

The requirement in Section 9.c. of the Act that

no application for development within the Pinelands area be approved by any level of government within the state, or an agency thereof, unless such development conforms to the provisions of the Pinelands Comprehensive plan is likely to prove as productive of disagreement in this instance as it has in others. The lack of clarity regarding the relationship between planning and land use regulation in the United States was highlighted over twenty-five years ago in two well-known articles by Professor Charles M. Haar of Harvard University.^{12/} In those articles, Haar discussed the long-time debate over what the requirement "in accordance with a comprehensive plan" means.

Recent decisions and statutory law reflects three general views in regard to the relationship between zoning and the master plan:^{13/} (1) The unitary view, accepted in the majority of American jurisdictions today--including New Jersey^{14/}--which considers zoning a self-contained activity and thus does not accept the idea that a separate planning process is implicit in the concept of zoning in accordance with a comprehensive plan. (2) The planning factor doctrine which reflects an increasing judicial predisposition to grant legal status, if not controlling weight, to master plans. Under this view, while conformity with a master plan is not a sine qua non of valid zoning, land use

decisions are at least examined in light of the standards and policies set out in a planning document. (3) The planning mandate theory which represents the view of a growing minority of jurisdictions which reject outright the principle of "zoning as planning." These states adopt the view expressed by Haar that a statutory comprehensive plan should be considered a type of land use constitution on which a variety of regulatory devices are based and require consistency between regulatory action and the separately adopted comprehensive or master plan.

For example, in 1969 the state of Oregon adopted legislation which gave localities two years in which to adopt comprehensive land use plans and zoning ordinances.^{15/} In the landmark case of Fasano v. Board of County Commissioners,^{16/} decided in 1973, the Oregon Supreme Court imposed on local officials a requirement that the adopted comprehensive plan be used as the standard for reviewing proposed zoning changes. Subsequent to the passage of additional state legislation in 1973, requiring that zoning, subdivision ordinances and all state and local government actions be in compliance with city and county comprehensive plans,^{17/} the Oregon Supreme Court held, in Baker v. City of Milwaukie^{18/} that a comprehensive plan was a "constitutional" document for land use planning, was superior to zoning regulations, and thus the

defendant city was required to zone land so as to conform the regulations to the plan. That is, it could not zone for a use more intensive than that provided by the plan, though less intensive uses were permitted. A greater emphasis on planning can be also found in legislation adopted in Hawaii,^{19/} Vermont,^{20/} Maine,^{21/} Florida,^{22/} California,^{23/} and New York.^{24/}

While the New Jersey courts have adopted the unitary viewpoint, the state's county-wide planning legislation^{25/} and the 1976 Municipal Land Use Law^{26/} do emphasize the importance of planning although zoning ordinances are still permitted to override master plans.^{27/} However, some New Jersey decisions have recognized the importance and utility of comprehensive planning as a method of avoiding arbitrary and haphazard development.^{28/} The language of Section 9.c. of the Pinelands legislation clearly evinces a desire by the legislature to depart even further from the past by mandating that development be in compliance with the Pinelands comprehensive management plan.

Having adopted a planning mandate philosophy in the Pinelands legislation, a second level of questions arises: what is considered to be "strict compliance" with the plan and what standards could the Commission adopt which would fairly define "extraordinary hardship," "compelling public need," and "substantial impairment" as used in Section 9.c.

of the legislation. Section 9.c. authorizes the Commission to waive strict compliance with the Pinelands plan if "such waiver is necessary to alleviate extraordinary hardship or to satisfy a compelling public need, is consistent with the purpose and provisions of this Act and the Federal Act and would not result in substantial impairment of the resources of the Pinelands area." Both Oregon and California courts have had difficulty in defining the requirement of consistency between plans and land use regulations. For example, in Fasano, the Oregon court held that proof of conformity would require, in addition to consistency with the projections of the plan, a showing of "a public need for a change of the land in question" and, further that the "need would be best served by changing the classification of the particular piece of property in question as compared with other available property."^{29/}

In regard to the exceptions standards which the Commission is directed to adopt, care must be taken to assure they are sufficiently clear to avoid charges of vagueness which could result in arbitrary actions by the Commission or invalidation by the courts.

CHAPTER 5

FOOTNOTES

1. Haar, "In Accordance with a Comprehensive Plan, 68 Harv. L. Rev. 1154, 1155 (1955).
2. Id.
3. 5 Rohan, Zoning and Land Use Controls, 37-10.
4. ALI Model Land Development Code, commentary on Article 3, Local Land Development Process, pp. 110-114 (1975).
5. Official Draft approved by the American Law Institute, May 21, 1975.
6. N.J.S.A. 40: 55D-1 et seq., effective August 1, 1976.
7. N.J.S.A. 40: 55D-28.
8. N.J.S.A. 40: 55D-89.
9. N.J.S.A. 40: 55D-77.
10. N.J.S.A. 40: 27-4.
11. "Pinelands Protection Act," Section 7.
12. Haar, "In Accordance with a Comprehensive Plan," 68 Harv. L. Rev. 1154 (1955); Haar, "The Master Plan: An Important Constitution," 20 Law & Contemp. Prob. 353 (1953).
13. Edward J. Sullivan and Laurence Kressel assign labels to these three viewpoints in "Twenty Years After--Renewed Significance of the Comprehensive Plan Requirement," 9 Urban L. Ann. 33 (1975).
14. See e.g., Bow & Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335, 307 A.2d 563 (1973).
15. Ore. Rev. Stats. §§ 215.505-.990.
16. 507 P.2d 23 (1973).
17. Ore. Rev. Stat. §§ 197.005-.430 (1973).
18. 533 P.2d 772 (1975).
19. Hawaii Rev. Stat. §§205-1 et seq. Hawaii Land Use Law.
20. Vt. Stat. Ann. tit. 10, §§ 6001-91. Vermont Environmental Control Law.

21. Me. Rev. Stat. Ann. tit. 38, §§ 481-88; Maine Site Location Law.
22. Fla. Stat. Ann. §§ 380.012-.10; Florida Environmental Land and Water Management Act.
23. Cal. Pub. Res. Code §§ 27000-650. California Coastal Zone Conservation Act.
24. Art. 27, §§ 800-19, ch. 706, (1971) 2 N.Y. Laws. Adirondeck Park Agency Act.
25. N.J.S.A. 40: 27-1 et seq.
26. N.J.S.A. 40: 55D-1 et seq.
27. N.J.S.A. 40: 55D-62 provides that a zoning ordinance or amendments to it should take the master plan into consideration, but can be inconsistent with the plan if properly adopted by a majority vote of the governing body.
28. See e.g., Ascione v. Union City, 187 A.2d 193, 200 (1962). (A basic purpose of comprehensive zoning is to conserve the value of property and encourage the most appropriate use of land throughout a municipality.); and, Zeihring v. Township of Long Beach, 151 A.2d 425 (1959). (The requirement and purpose that zoning regulations conform to a comprehensive plan insures that unreasonable and arbitrary action resulting in discrimination in the classification of properties will not be validated.)
29. 507 P.2d at 28.

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CHAPTER SIX

GROWTH MANAGEMENT AND DEVELOPMENT TIMING

The decision of the New York Court of Appeals in Golden v. Planning Board of the Town of Ramapo ^{1/} made "growth management," "sequential development controls," and "development timing" the most popular topics on the planning lecture circuit. The idea of managing growth sensibly was not all that new -- many planners thought that planning and managing growth carefully were what they were supposed to be doing and were not at all certain what all the hubbub was about.

So, in one sense growth management was old wine in new bottles. In another sense, however, it was indeed a new idea for it provided a respectable rationale not just for managing growth but for slowing or stopping altogether the pace at which population from the central cities flowed out into the suburbs and the countryside beyond. In this chapter, we examine some of the more prominent land use control mechanisms designed to slow the rate of population growth or to freeze population at or near present levels.

I. SETTING POPULATION AND BUILDING CEILINGS

One obvious method of growth control is to establish the maximum population which will be permitted to

reside within the jurisdictional limits of a governing body. The population ceiling, or "cap," is translated into land use controls by estimating the average number of people who reside in a dwelling unit, and then using this figure to estimate the maximum number of dwelling units which will be permitted. This ceiling on dwelling units is accomplished by establishing or adjusting the densities permitted by the zoning ordinance. An absolute limit on the number of building permits that can be issued may also be necessary.

Even without the formal adoption of a population or building ceiling, conventional zoning which establishes maximum densities tends to limit population. Moreover, virtually all of the growth management programs discussed in these reports included a projection of a certain population level to which the programs were directed. The Ramapo, New York program, for example included an 18-year plan for capital facilities which would support an "ultimate" population of 72,000 living in 20,000 dwelling units. 2/ Prince George's County, Maryland, based its land classifications and decisions regarding the location of capital facilities on unofficial targets of 18,000 people and 8,000 jobs. 3/ To the extent these programs are successful, the estimated population levels would not be exceeded.

At some locations, however, the process is taken

a step further, and a population ceiling is officially adopted and is a prime determinant of the other aspects of the land use control program.

Sanibel, Florida, an island in the Gulf of Mexico, initiated a planning process immediately after it was incorporated in 1974. 4/ It undertook an extensive carrying capacity analysis 5/ which studied such questions as the island's ability to maintain a fresh water supply and its ability to treat and dispose of waste water. Another aspect of the analysis was a study of the number of people and time needed to evacuate the island in the event of a hurricane. Without formally adopting a population ceiling as such, the City used the estimated evacuation capacity and formulas estimating residents per unit to establish the maximum number of dwelling units that could safely be permitted on the island. It then adopted this number as a building ceiling, 6/ and implemented this ceiling through zoning and other land use controls contained in the comprehensive land use plan. 7/ The result was a substantial downzoning from the county zoning which had existed prior to the adoption of the plan. 8/

In Boca Raton, Florida, a population and building ceiling was initiated by private citizens rather than the governing body. 9/ The local chapter of the Audubon Society had published a study which recommended that the City's

population be limited to 105,000 people, and that the best method of achieving that limit would be to limit the number of dwelling units to 40,000. Responding to some unpopular zoning decisions, the City's voters by referendum amended the City Charter to provide that no building permit could be issued which would cause the total number of dwelling units in the City to exceed 40,000. 10/

At the time of the Charter amendment, the City had in existence approximately 15,000 dwelling units, and the existing zoning would have permitted a maximum of 62,646 units. In order to put into effect the provisions of the charter amendment, the City Council amended the City's zoning by cutting in half the permitted densities in all multi-family zoning districts. After these amendments, the City's zoning would still have permitted a maximum of 44,000 units.

Population or building ceilings are vulnerable to challenge on several grounds. First, the imposition of the ceiling may not be permitted by enabling legislation. Second, the figure chosen as a population ceiling may be arbitrary. Third, the formulas used to convert the population ceiling to a building ceiling may also be arbitrary. Fourth, the zoning amendments needed to enforce the building ceiling may be confiscatory. Fifth, the population ceiling may not be responsive to constitutionally-mandated fair share housing requirements.

A Florida trial court struck down the Boca Raton Charter and zoning amendments on the grounds that the numbers established for both ceilings were not supported by competent evidence, and that the zoning amendments were confiscatory.^{11/} The Court found the studies taken before the ceilings were imposed to be unprofessional, "crude" and "repugnant."^{12/} The Court dismissed studies taken after the ceilings were imposed as being too result-oriented.^{13/} Significantly, although the Court found the Boca Raton program illegal based on the specific facts of the case, it also stated that the use of a population or building ceiling was constitutionally permissible. This decision was affirmed by a Florida appellate court,^{14/} and the City is currently seeking leave to appeal to the Florida Supreme Court.

There have been several suits challenging the downzoning adopted as part of the Sanibel comprehensive land use plan. To date, however, the validity of the overall dwelling unit limitation has not been successfully challenged.

The Pinelands Protection Act provides that the comprehensive management plan must include:

a. A resource assessment which:

(1) Determines the amount and type of human development and activity which the ecosystem

of the Pinelands area can sustain while still maintaining the overall ecological values thereof, . . .

. . . .

i. A program for State and local governmental implementation of the comprehensive management plan and the various elements thereof in a manner that will insure the continued, uniform, and consistent protection of the Pinelands area in accord with the purposes and provisions of this act and the Federal Act, including:

(1) Minimum standards for the adoption, as required in section 11 of this act, of municipal and county plans and ordinances concerning the development and use of land in the Pinelands area, including, but not limited to, standards for minimum lot sizes and stream setbacks, maximum appropriate population densities, and regulated or prohibited uses for 15/ specific portions of the Pinelands area; . . .

It is clear that the New Jersey legislature recognized that an absolute limitation on population may be necessary in order to achieve the protection and preservation goals of the comprehensive management plan. The Act supports the utilization of a population or building ceiling in the Pinelands, subject to any limitations prescribed by the U.S. and New Jersey constitutions.

The concept of a population or building ceiling is appealing in the sense that it is one of the most straightforward and unambiguous means of controlling growth. At the same time, it introduces an element of rigidity into a land use control program and may invite attack on exclusionary grounds. However, it is by no

means clear that any part of the Pinelands would be categorized as a "developing" municipality subject to the Mount Laurel^{16/} doctrine and some parts clearly would not be considered "developing."^{17/} However, even if the Mount Laurel rule were to be applicable, a population ceiling imposed on a regional basis would appear to be less objectionable than one unilaterally imposed by a local municipality. Furthermore, the unique environmental considerations that exist in the Pinelands may justify such absolute limits.

While one commentator has criticized the Boca Raton decision on the grounds that the Court did not credit the amendments with the presumption of validity,^{18/} it is evident that lack of planning prior to the decision seriously weakened the City's defense. The studies which influenced the populace to adopt the Charter amendment were amateurish and suspect. The after-the-fact studies undertaken to support the City's zoning amendments were discredited because their results were predicted in advance. If it is determined that a population or building ceiling is desirable for the Pinelands, it should be supported by the strongest and most impartial scientific analysis possible.

Comprehensive planning, maximum density and use restrictions, capital budgeting, and other techniques,

if used properly, should achieve the desired level of population and dwelling units without setting absolute limits. A determination of the human capacity, in terms of both numbers and activities, of the Pinelands, is a part of the responsibility given to the Commission by the enabling legislation and will undoubtedly be an integral element of the comprehensive management plan. An attempt to go beyond this and set a population or building ceiling as a primary focus of the comprehensive management plan may weaken its overall viability.

II. PHASED DEVELOPMENT CONTROLLED BY A BUILDING PERMIT LIMITATION SYSTEM

The rate of development can be limited by placing a limitation on the number of building permits which can be issued in any one year. As a further refinement, the location and type of development can be controlled by using a point and allocation system to award permits to the developments which most closely conform to defined standards.

Programs with similar features exist in other locations.^{19/} According to the American Planning Association, however, the two principal locations which have implemented absolute building permit ceilings are Petaluma, California and Boulder, Colorado.^{20/}

In 1971, the City of Petaluma, located near San Francisco, adopted a General Plan, Environmental Design Plans, and a separate Housing Element of the General Plan.^{21/} These documents identified the City's planning goals, which included: (1) preserving the quality of the community; (2) preserving the open-space qualities of the City; (3) insuring the adequacy of public facilities; (4) promoting balanced geographical development; (5) promoting a variety of housing types; and (6) providing for low and moderate income housing. These policy statements were used as the basis for the Residential Development Control System, adopted in 1972.

Under the system, the maximum number of building permits which could be issued in a year was limited to 500. This number could be revised up or downward by 10 percent each year, but the total number over five years could not exceed 2500. The limit applied only to permits for development of five or more housing units.

All development proposals were first rated according to a point system which awarded varying numbers of points based on the following factors: (1) availability of existing capital facilities; (2) provision by the developer of additional capital facilities; (3) provision of low and moderate income housing; (4) provision of bicycle paths, trails and greenbelts; (5) aesthetic qualities of building and landscape design; and (6) contribution to orderly and contiguous development.

After the point system identified the most meritorious proposals, the permits were allocated on the basis of type and location. Permitted development was divided between single family and multiple residential units, and most development was allocated to the City's underdeveloped west side.

Other aspects of the City's growth control program included the establishment of urban service lines around the City,^{22/} and setting zoning densities based on a projected maximum population of 55,000 by 1985.^{23/}

The City of Boulder system is very similar to that used in Petaluma.^{24/} Permits are limited to 450 per year, and a point system is used to rate proposed development. The point system differs from that of Petaluma in that the Boulder system places greater emphasis on the availability of capital facilities and on environmental considerations. As with Petaluma, the system applies only to proposed developments of five units or more.

The Petaluma City Council adopted the Residential Development Control System and the supporting planning documents by ordinance. The permit limit number of 500 was chosen as representing the average annual number of permits issued in the previous ten years. To administer the system, the City Council established a 17-person Residential Development Evaluation board, composed of members of the City Council, Planning Commission, school boards, and private citizens. The Board considered all proposals and awarded all permits at one time, once a year. The actual awarding of permits occurred by the Board sending its recommendations to the Council, which then adopted them by resolution. Procedures were established for appeals of denials of permits to first the Board and then the City Council. There were prescribed time periods in which the Board, the City Council, and permit applicants must act.

The Boulder system was also adopted by ordinance and was administered in cooperation with Boulder County. Both the City and the County have adopted the Boulder Valley Comprehensive Plan. The permit limitation number was chosen as representing a growth rate of 2.3 percent. This was the projected growth rate of the nearby Denver metropolitan area.

The major legal objections that could be raised to a building permit limitations system such as that used in Petaluma are that (1) the number chosen as the limit on permits is arbitrary and unsupportable; (2) the standards used to award points are vague; (3) the standards are arbitrarily applied; (4) the denial of a building permit is confiscatory; and (5) the system is exclusionary within the Mount Laurel doctrine.

In Construction Industry Ass'n of Sonoma County v. City of Petaluma, ^{25/} the validity of the Petaluma system was upheld by the U.S. Court of Appeals. In reversing the trial court decision that the system violated a fundamental Federal constitutional right to travel, the Court of Appeals held that the plaintiffs did not have standing to raise that issue. The Court held that the system, and the City's goal of retaining its small town character, were a reasonable exercise of its policy power. More recently a severe limitation on building permits (no more

than four annually for owners of 50 or more acres and less for smaller tracts) was invalidated in New Hampshire.^{26/}

In Robinson v. City of Boulder,^{27/} the Supreme Court of Colorado held that the City could not refuse to extend water and sewer facilities to a developer because the City had assumed the status of a public utility. While the Court held that the City's growth control program was not a sufficient basis for denying the services, it did not invalidate the building permit limitation system.

The Pinelands Protection Act supports the use of a building permit limitation system for the Pinelands. The Act specifically provides that the Commission shall "[c]onsider and detail a variety of land and water protection and management techniques, including but not limited to, . . . permit systems, . . ."^{28/} The goals of the comprehensive management plan for the protection areas include preserving and maintaining the essential character of the existing Pinelands environment, discouraging piecemeal and scattered development, and encouraging appropriate "patterns" of development in order to accommodate regional growth in an orderly way.^{29/} These goals are similar to those approved in the Petaluma case. In the preservation area, the goals include prohibiting development incompatible with the area.^{30/} These provisions would support the implementation of a permit system which both limits the overall amount of development and considers as factors in approval the type

and location of the development. In addition, the Pinelands Protection Act requires the Commission to assess the resources of the area, including aesthetic resources, to determine overall policies to maintain and enhance these resources.^{31/} This statutory provision supports the use of an aesthetic evaluation of the proposed development as part of the permit approval process.

As noted in the discussion of other growth management techniques, the statutory grant of authority is subject to the limits prescribed by the state and federal constitutions. In this regard, mention must be made of the approach taken by the federal court in Petaluma. The Court of Appeals expressly declined to consider the interest in the general welfare of the region surrounding the City of Petaluma in determining the validity of the City's system. Although it discussed the Mount Laurel and Oakwood at Madison cases, in a footnote,^{32/} the Court stated that it is the role of the state legislature, not the federal courts, to address regional impact issues.^{33/} The New Jersey courts, of course, have not exhibited such reticence. The approach of the Court of Appeals in Petaluma, then, weakens the precedential value of the decision as it applies to the potential issue of the exclusionary effect of such a system in the Pinelands. As noted earlier, however, the Mount Laurel role may be held

inapplicable to all or part of the Pinelands because of the "developing municipality" exception.

The first thing that should be said about the building permit limitation system implemented by Petaluma is that it was largely successful in accomplishing its stated purposes. Development was reduced to less than one-half of what would have occurred based on market demand.^{34/} When interviewed several years after the system was implemented, Frank Gray, Director of the Petaluma Department of Community Development, stated that the City had effectively discouraged leapfrog development, obtained a greater variety of housing types, and balanced construction in various areas of the City.^{35/} In addition, Mr. Gray felt that the system had the intangible benefit of generating a greater sense of community among the City's residents.^{36/}

The major criticism of the system is that it was a unilateral attempt by one municipality to avoid its regional housing responsibilities. Indeed, the Court of Appeals accepted the plaintiff's contention that if all local governments in the San Francisco Bay Area adopted a similar system, there would be a shortfall of 105,000 housing units, or 25 percent of the Area's needs, during the 1970-1980 decade.^{37/} Claude Gruen, the planner who testified for the plaintiffs in the case, has published a study which details the economic consequences of such a

result in terms of inflationary effect on the cost of housing and the exclusionary effect on low and moderate income households.^{38/} An additional effect noted by Mr. Gruen is that, by limiting new housing, the existing housing stock would deteriorate more rapidly, particularly rental units in low income neighborhoods. Because of the lack of mobility and low vacancy rates caused by the housing shortage, landlords would be able to under-maintain their buildings without losing tenants.^{39/}

The use of aesthetic considerations as a factor in the permit system has also been controversial. On the one hand, the system was seen as promoting a design competition which increased the overall quality and attractiveness of development.^{40/} On the other hand, this aspect was criticized as introducing an improper subjective element into the decision-making process.^{41/} One developer argued that giving local officials the power to issue permits based in part on aesthetic considerations made them particularly susceptible to corruption.^{42/}

From a planning standpoint, that part of the system which provided that all decisions on proposed development for the next year be made at one time was considered advantageous. By having all the proposals in front of them at one time, officials could better project their cumulative impact and make better estimates of what services must be provided.^{43/}

In summary, a building permit limitation system is essentially the use of a traditional land use control in a novel manner. When a ceiling is placed on the number of permits and their issuance is made contingent on additional factors, the amount, location, and type of development is controlled in a very effective manner. However, particularly when applied unilaterally at the local level, the system is subject to those criticisms common to other growth management techniques.

III. PHASED GROWTH CONTROLLED BY AVAILABILITY OF CAPITAL FACILITIES

Development can be limited by requiring that adequate capital facilities, e.g. sewers, roads, schools, etc. be available before development proceeds. In conjunction with imposing these restrictions, the governing body adopts a program for the construction of installation of capital improvements according to a specific schedule. By controlling the timing and location of the capital facilities, the governing body obtains a high degree of control over development.

This technique has been utilized in many places, e.g. Boulder, Colorado, Fairfax and Loudon Counties, Virginia; Montgomery and Prince George's County, Maryland; Petaluma, California; Ramapo, New York; Sacramento County, California; and Salem, Oregon.^{44/} The Ramapo, New York program, which has probably received the most attention, will be described in some detail.^{45/} Each of the other programs will then be described only to the extent that it contains features significantly different from those discussed previously.

After several years of extensive studies, in 1966 the Town of Ramapo adopted a Master Plan which predicted a total ultimate population of 72,000 people living in 20,000 residences. The highest proposed density for housing under the plan was four units of single-family

housing per acre. Simultaneously with the adoption of the Master Plan, the Town adopted a capital improvements program which committed the Town to building various capital facilities over a period of eighteen years, in three six-year phases, to achieve the estimated ultimate population projected under the Master Plan.

In 1969, the Town adopted amendments to its zoning ordinance which prohibited the development of land for new housing for sale unless the developer of the housing received a "special permit," regardless of the existing residential zoning of the land. The special permits would be issued only when the developer has accumulated fifteen development "points." Points were awarded according to a schedule based on the availability or location with respect to the proposed development of (1) sewers, (2) drainage, (3) public park or recreation facilities, including public school sites, (4) roads improved with curbs and sidewalks, and (5) fire houses. For example, a public park within one-fourth mile of a proposed development would result in an award of five points; a park within one mile would add only one point. As part of the program, the developer could attain points by providing his own facilities which satisfied the requirements set out in the capital improvements plan.

The ordinance provided for a variance procedure which gave the Town Board power to issue a permit without the requisite number of points having been attained if the

development was consistent with the Master Plan. The Town also instituted a procedure through which a developer could petition for a reduction in the assessed value of his land based on the fact that he would not be able to develop it immediately.

As noted, the special permit process applied only to the development and sale of residential land. Thus, a person wishing to build a single family residence on his own land for his own use did not have to apply for a special permit. Development for industrial or commercial purposes was not subject to the special permit process. The implementation of the special permit procedure did not in any way change the existing zoning classifications in the town.

Thus, except in the case where the developer provided his own capital facilities, the Town controlled the timing and location of commercial residential development by controlling its expenditures for capital facilities.

The City of Boulder, Colorado attempted to control development of the incorporated area surrounding the city by controlling access to its water and sewerage facilities.^{46/} To protect nearby scenic foothills, it established an urban service line beyond which it would not extend its facilities. The City required that a developer seeking to attach to the sewer and water facilities independently design and construct his own facilities, which would have to be according to the ultimate design called for by the comprehensive plan.

The developer would be reimbursed for the costs of over-sizing his system beyond his own needs only as additional developers attached to the system. Additionally, the developer would have to pay a fee equal to the entire cost of attachment to the City's facilities.

Thus Boulder controlled the location of development by controlling where it would extend its own utility systems. It further restricted development through policies of limited annexation, acquisitions of land and scenic easements and a building permit limitations system.^{47/} The City has also sought to limit overall growth by a policy of discouraging industry and other primary sources of new employment from locating in Boulder.

Loudon County, Virginia limited growth based on the availability of capital facilities, but used its subdivision and zoning powers as controls.^{48/} Its subdivision ordinance prohibited approval of any subdivision proposal if the required water supply, drainage, highways, waste disposal system and educational facilities as described in the comprehensive plan were not available. The developer could provide these facilities himself or make an equivalent cash contribution. When rezoning was required for development, the County required that the developer either provide or compensate the County for the additional costs of any capital facilities caused by the rezoning. These costs were set out in a schedule

which equated the amount of additional costs to the amount of housing units in the proposed development. The County also required the dedication of school, park, and public safety facilities by the developer.

Montgomery County, Maryland used a permit system to ensure that adequate capital facilities were available prior to development.^{49/} It differed from the Ramapo system in that it used fixed definitions of what would constitute an adequate capital facility rather than using a point system based on variables. The County also tried to channel growth to existing areas through a ten-year capital improvements program. Its comprehensive plan called for urban development to occur in wedges expanding from the District of Columbia and separated by rural and agricultural corridors.

Prince George's County, Maryland, used its subdivision powers to require that development be preceded by the availability of adequate capital facilities, which by court decision have been limited principally to sewer, water, and road facilities.^{50/} To meet its unofficial targets of a population of 14,000 and 8,000 jobs, the County identified four classes of land for development purposes: (1) preferred development areas, where capital facilities were readily available; (2) economic potential areas, where the extension of capital facilities would improve the tax base

and job/home ratio; (3) limited development areas, where only minor additions to capital facilities would be made; and (4) deferred development areas, where capital facilities would be added only to correct health and environmental problems. The County then adopted a six-year capital improvements plan and a ten-year water and sewage plan based on these land designations. In the deferred development areas, accounting for 55 percent of the County's land, no water and sewer systems were planned for at least ten years.

Sacramento County, California was concerned primarily with the location of future development rather than with the rate of development.^{51/} It attempted to fill in areas left vacant by leapfrog development and avoid development of floodplain areas. In addition to zoning ordinances intended to accomplish this, it established urban service lines identifying areas within the county to which it would not extend capital facilities. The County also established a transit district with boundaries conforming to the urban service lines. While the County hoped that all development would be forced into the areas where it was willing to provide capital facilities, it identified reserve areas, currently outside the urban service lines, which could be "released" for development if growth exceeded that projected by the comprehensive plan.

In many instances, the programs described above were implemented by counties and municipalities using only previously established regulatory mechanisms, e.g. zoning and subdivision powers, capital expenditure budgets, and comprehensive plans. In other instances, an additional structure such as a special development permit or a separate phased growth program was introduced and made the focal point of overall development control policies.

A key element in the enforcement of each system was the coordination of the various decisions the governing body made related to development. Thus the success of each system was dependent on the fact that comprehensive planning, capital budgets, zoning amendments, subdivision approvals, annexations, and building permits all reflected a common policy. In this regard, the introduction of an additional structural element such as a special development permit provided a secondary check on at least some of the separate governmental functions.

The particular capital facilities used in the systems varied by location, primarily because in each case the governing body had jurisdiction over different facilities.

Only a few of the systems involved intergovernmental cooperation. The County of Boulder, Colorado adopted policies with regard to unincorporated land within its jurisdiction which complemented those of the City, and controls in the Salem, Oregon area were divided among Salem,

and Marion and Polk Counties.^{52/}

There are a variety of potential challenges to a phased growth program based on controlling capital facilities. The principal legal arguments that have been used are (1) that the governmental unit is obligated to extend public services to a proper applicant; (2) that the program constitutes a taking without just compensation;^{53/} (3) that the program violates the right to equal protection; and (4) that the program has the purpose or effect of denying housing opportunities to people of low or moderate income.

Although the decisional law is mixed, programs that absolutely deny the extension of or attachment to capital facilities are particularly vulnerable to successful legal challenge.^{54/} In Robinson v. City of Boulder,^{55/} the Supreme Court of Colorado held that, because it had assumed the status of a public utility, the City could not refuse to extend water and sewer facilities to a development located outside its City limits.

The Ramapo was upheld by the New York Court of Appeals, the state's highest court.^{56/} However, a later decision has shown that the court remains concerned with the potential exclusionary effects of local growth control programs.^{57/}

There are some reported decisions in New Jersey concerning conflicts between municipalities and developers over their respective duties with respect to the provision of capital facilities.^{58/} Many of the earlier court decisions appear to have been overruled by the enactment of the Municipal Land Use Law.^{59/} It is clear, for example, that a developer can be required to pay his pro-rata share of many types of capital facilities.^{60/}

The Pinelands Protection Act supports the adoption of many of the techniques described herein. The prescribed goals of the comprehensive management plan with regard to the protection area include preserving the character of the Pinelands, discouraging piecemeal and scattered development, and encouraging patterns of compatible residential, commercial and industrial development in or adjacent to areas already containing these uses.^{61/} The goals with regard to the preservation area, of course, call for even greater restrictions on development.^{62/} The Act requires the Commission to consider a broad range of appropriate techniques to meet the goals of the comprehensive management plan.^{63/} These and other provisions of the Act provide a broad grant of authority to implement a phased development program which could involve controls based on the availability of capital facilities.

The phased development programs discussed above have been criticized on many grounds. Some of these

criticisms are common to all growth control programs; some are specifically related to the control of capital facilities.

It has been argued that, because these programs are for the most part implemented at the local level, they do nothing to control development but merely shift it to other areas which may or may not be better able to handle it.^{64/} The limitations on capital facilities has been criticized because it had the effect of limiting the amount of land available for development, thus causing inordinate increases in housing costs.^{65/} These increases would be compounded as more and more communities attempted to insulate themselves from rapid growth. The result, according to several commentators, would be a severe exclusionary effect, as low and moderate income purchasers would be deprived of housing opportunities in communities having phased growth programs.^{66/}

A study which examined many of the programs described above concluded that, in many cases, the supporting analysis which showed developers bearing greater costs was flawed, in that it failed to recognize that developers could often pass these costs on to home purchases.^{67/}

Studies taken five years after the validation of the Ramapo program indicate that the Town was successful in limiting and channeling its growth, but at the expense

of neighboring communities. During this five year period, the number of housing starts, which had averaged 620 units per year during the previous five year period, declined to 367 units per year.^{68/} The studies indicated that this decline was offset by an almost identical amount of higher than average development in the two nearest adjacent villages.^{69/}

Most of the development that did occur in Ramapo was near the previously developed areas, which was where developers could most easily accumulate the necessary fifteen points. Of the 264 applications for special permits, 217 were granted, 12 denied, and 36 were withdrawn or pending at the time of the study.^{70/} Twenty-one developers chose to increase their point totals by providing capital facilities at their own expense.^{71/}

The Town did not live up to the capital improvements program it had committed to at the time its program was held valid. It reduced its annual capital budget three times, and in no year did it spend all the money it had budgeted. As a result, many of the construction projects envisioned in the first six year phase of the capital improvements program were not completed. The Town blamed inflated construction costs, additional expenses caused by hurricane damage, the unavailability of matching state and federal funds, and changed local priorities.^{72/}

Despite these lower expenditures, a study indicated that the residents of Ramapo bore a higher than average local tax burden.^{73/} This was attributable in part to the fact that owners of 200 pieces of property took advantage of the tax relief aspects of the program, resulting in a reduction in assessed value of those properties in the amount of four million dollars.^{74/}

The Sacramento program was criticized because the studies made to support it stated that there would be no increase in housing costs and no decrease in overall tax revenue.⁷⁵ In fact, it was argued, housing costs in areas where development was permitted increased excessively for the reasons previously stated. In addition, the values of properties outside the urban service lines suffered because of the unavailability of capital facilities, thus decreasing tax revenue. This decrease was partially offset by a California statute which provides state aid to municipalities which suffer a tax loss by retaining agricultural zoning.^{76/}

The Boulder approach was criticized primarily because of flaws in the economic assumptions used to support certain aspects of the program. For example, it was assumed that as job opportunities declined, people would move away. In fact, critics claimed, what happened

was that these people accepted lesser paying jobs, thus depressing wages.^{77/} The Boulder program has lost some public support, and the City's Chamber of Commerce has come out in opposition to it.^{78/}

A criticism of urban service lines as used in Boulder, Sacramento County, and Salem, was that they imposed radically different costs on landowners within and without the line in terms of decreases in property values and additional development costs. It was believed that the imposition of these costs was in some cases arbitrary, since the location of the lines could not always be justified.⁷⁹ A further criticism of urban service lines is that some development will still occur outside the line, but this development would be inordinately costly and involve an inefficient use of resources.^{80/}

In summary, phased growth programs based on the availability of capital facilities can be effective in controlling both the timing and the location of development. However, there must be a careful evaluation of ramifications of such programs in terms of potential exclusionary effects, higher development costs, additional costs to the community, and hardship to some individuals.

IV. PROJECTING GROWTH BASED ON CARRYING CAPACITY ANALYSIS

Carrying capacity analysis is not, in itself a growth management technique. However, in many cases it is the foundation which supports particular land use controls, including those related to growth management. Because it is probable that any growth management techniques implemented in the Pinelands will involve the results of a carrying capacity analysis (whether or not that term is used), the subject is discussed in conjunction with the other growth management reports.

Carrying capacity is the ability of a natural or man-made system to absorb population growth and various types of development without significant degradation or breakdown.^{81/} It is simply a planning tool that attempts to answer questions such as: "How many people can live in this location without depleting the water supply?" or "When will we need to expand the highway system?"

Although the use of carrying capacity analysis in conjunction with land use controls is a relatively recent development, the concept of classifying land for various ecological purposes and identifying the limits within which it can be used for those purposes is not new. For over twenty-five years the Department of Agriculture has been using detailed scientific studies to determine limits for allowable timber yield and for livestock grazing.^{82/}

Carrying capacity analysis uses the same type of scientific approval to determine limits for particular types of human activities.

While the term "carrying capacity analysis" is by no means universal, the practice of undertaking scientific studies prior to making land use decisions is widespread. A study published by the American Planning Association summarizes the use of such analyses in twenty-two locations, including Medford Township and Sparta, New Jersey.^{83/}

Generally, there are two separate reasons why a carrying capacity analysis would be undertaken. First, it might serve solely as a warning system, to identify the point in time when a critical situation will arise which may require governmental action. For example, Montgomery and Prince George's Counties, Maryland used an analysis to predict the level of population which would result in an overloading of the existing solid waste disposal and waste water treatment systems.^{84/} The State of Vermont used an analysis to identify the levels of population which would cause a degradation of water quality below existing minimum standards, and the locations in the state where degradation would most likely first occur.^{85/}

Second, a carrying capacity analysis might be undertaken not just to provide a warning system, but to provide a basis for implementing or revising a land use

control program. Pima County, Arizona analyzed the capacity of its water supply, its transportation, education and recreation systems, its housing supply, and the availability of energy, and then used the results to set densities and establish permitted uses in its zoning ordinance.^{86/} Macon County, Illinois used an analysis to support development regulations and a program of land acquisitions.^{87/}

Carrying capacity analyses have also been used to support development limitations which supplement more traditional land use controls. In the Lake Tahoe Basin, where erosion is a major concern, an analysis was used to classify land into seven capability districts. Development was then restricted according to the amount of land coverage which would occur, with different amounts permitted in different districts.^{88/} The City of Sanibel, Florida, an island in the Gulf of Mexico, used a carrying capacity analysis to predict the amount of time it would take various levels of population to evacuate the island in the event of a hurricane. It then used this analysis, along with others, to support a form of population ceiling achieved by a limit on the number of dwelling units.^{89/}

A carrying capacity analysis can be made of natural ecological systems, man-made systems, or both considered in interaction with each other. The analysis begins with

a definition of what elements are to be protected. For example, air and water quality would typically be defined as elements to be protected. The analysis then uses available data and assumptions to predict the effect on those elements of various levels of population or various types of permitted uses. Computer models are frequently utilized.^{90/} Based on the results of the study, conclusions are drawn as to appropriate densities, permitted uses, or other land use controls which should be applied.

The New Jersey Department of Community Affairs has published a "how to" manual which sets out a method, using elements of air quality, water quality, and water supply, of applying a carrying capacity analysis to a region.^{91/} Carrying capacity analysis has not been limited to studies which rely exclusively on the natural sciences. Attempts have been made to identify the carrying capacity limits of such elements as a tourist industry, educational services, recreational activities, and employment opportunities.^{92/}

Carrying capacity analysis has been applied at every level of government, including regional agencies.^{93/} The State of Hawaii has inventoried all land in the state using a carrying capacity approach.^{94/}

To date there has been no decisional law which squarely considers whether a comprehensive carrying

capacity analysis is a proper basis to support land use controls or a growth management program.^{95/} However, courts have clearly been influenced by well-done scientific studies made prior to implementing a growth management program.^{96/}

A legal challenge to the use of a carrying capacity analysis could come at either of two levels. First, the scientific studies themselves could be attacked in terms of data or assumptions used. This challenge could arise by a plaintiff simply alleging that a land use ordinance deprives him of substantive due process because it does not rest on a rational basis. He could then "prove up" his case by attacking any weaknesses in the analysis used.^{97/}

Second, the method of applying the analysis could be attacked. A developer could argue, for example, that an ordinance deprives him of procedural due process because there is no way he can rebut the conclusions reached by the analysis. The ordinance used in the Tahoe Region has averted this problem by providing a procedure whereby a landowner can show that the results of the analysis are incorrect as applied to his land.^{98/} In addition, a developer might argue that the analysis was applied to a land use control program for an improper purpose, e.g. to support exclusionary practices prohibited by the Mount Laurel doctrine.

The Pinelands Protection Act requires that the comprehensive management plan include a resource assessment which:

(1) Determines the amount and type of human development and activity which the ecosystem of the pinelands area can sustain while still maintaining the overall ecological values thereof, with special reference to ground and surface water supply and quality; natural hazards, including fire; endangered, unique, and unusual plants and animals and biotic communities; ecological factors relating to the protection and enhancement of blueberry, cranberry and other agricultural production or activity; air quality; and other appropriate considerations affecting the ecological integrity of the pinelands area;

(2) Includes an assessment of scenic, aesthetic, cultural, open space, and outdoor recreation resources of the area, together with a determination of overall policies required to maintain and enhance such resources; and

(3) Utilize soil resources information from the National Cooperative Soil Survey and the soil conservation districts in the pinelands area.^{99/}

The Act also requires that the Commission consider the application all appropriate land and water protection and management techniques^{100/} and adopt appropriate rules and regulations necessary to implement the provisions of the Act.^{101/} In short, the Commission is both empowered and required to undertake extensive carrying capacity analyses and apply them as a basis for its land use control program.^{102/}

When utilized properly, a carrying capacity analysis can provide compelling support for a program of land use

controls. However, commentators have pointed out that there are limits to the value of the concept as a planning tool, and these limits must be recognized if an analysis is to be applied properly.

First, it has been noted that there are limits to the reliability of the results of any complex scientific study.^{103/} A carrying capacity analysis must predict the interaction of a great many variables and attempt to identify limits of human activities. The limits themselves are not static, but shift with each change in variable. The results, even if based on the best scientific methodology available, must be recognized as estimates only.

Second, an analysis that is limited to any one geographical region is necessarily incomplete.¹⁰⁴ Although its well-defined physical and legal boundaries make the Pinelands an ideal subject for a carrying capacity analysis, it is still a part of a larger whole and the impact of all outside forces affecting the region cannot be estimated. Again, this must be considered in evaluating the accuracy of the results of the analysis.

Third, commentators have noted that the use of carrying capacity analysis to identify the limits of population or uses can constitute an invitation to growth up to the limits. When results indicate that a location is capable of supporting a certain level of development,

it provides support for those seeking such development. For this reason, one commentator has described carrying capacity analysis as "the antithesis of non-degradation."^{105/}

Fourth, it has been noted that the analysis is most valuable when used for matters related to the natural sciences, but of less value when additional factors are considered.^{106/} An analysis which considers economic, aesthetic, recreational or cultural elements is necessarily more subjective. At the same time, an analysis which does not consider at least some of these elements may be of limited value for planning purposes.

Finally, commentators have emphasized the fact that a carrying capacity analysis must not be viewed as a means by which hard land use decisions can be avoided.¹⁰⁷ Before a study can be undertaken, a great many value judgments must be made, for example what is an acceptable level of water degradation, or what is the minimum amount of electricity required for a household. Moreover, a completed analysis does not provide answers, but only alternatives. For example, an analysis might conclude that the air quality capacity would be reached for a region if the permitted uses were either 75 percent residential and 25 percent commercial or 50 percent residential and 50 percent industrial. This conclusion does answer the question of what the permitted uses should be.

While it does not substitute for the decision-making process, the ability of a carrying capacity analysis to identify the trade-offs and interactions of elements is seen as its greatest benefit.^{108/} It focuses attention on the ability of the environment to absorb growth. It identifies those factors which affect the environment, and provides a quantitative measure of the effect of those factors in varying combinations. When used properly, carrying capacity analysis may be the best and fairest method of supporting a program of land use controls.

V. RESTRICTING GROWTH BY GEOGRAPHICAL DISTRICTING

This technique originated in the State of Hawaii and has been of major significance in the land use development of that state.

The state of Hawaii has only four county/city municipal governments. ^{109/} Each exercises zoning and subdivision powers and two have a general plan and development plan which anticipates future development. In 1961, however, a statewide land use program was implemented under which all land in the state was classified into one of four categories: (1) urban, (2) rural, (3) agricultural, and (4) conservation. Land in the urban district, which included a reserve for growth, was available for development according to county zoning and subdivision regulations. Land in the rural district could only be developed at low densities according to state regulations. Land in the agricultural district could be used for grazing, crops, and agriculture-related industries, e.g. sugar mills. Land in the conservation district was not subject to development.

Approximately 55 percent of the state was classified in the conservation district and was subject to the regulations of the State Department of Land and Natural Resources. It was determined that much of this land had to remain undeveloped in order to protect the state's natural fresh

water replenishment system. In 1970, a 40-foot strip back from the entire coastline of the state was added to the conservation district.

A state Land Use Commission ("the Commission") was created and was given the power to first classify and then reclassify land from one district to another. Many reclassifications were sought by developers and acted upon by the Commission, and it became a recurring criticism that there were not adequate established guidelines governing Commission decisions in this area. No clear pattern of decisions developed, as is evidenced by the fact that both conservationists and developers were dissatisfied with the Commission's performance.

In 1978, the state adopted its own comprehensive plan, and a statute was enacted which required the Commission to make its reclassifications in accordance with the state plan. At the same time, the state plan was required to take into account the land use designations of the county plans. The state plan, which includes economic and social as well as land use considerations, is very general and key portions are not yet completed. It consists mainly of policy objectives and identification of priorities to be followed by the Commission.

In addition to the state and county land use controls described above, there are two statutes affecting development in Hawaii's coastal zone. Under one statute,

an environmental impact statement must be submitted by private developers. Under another, land use is controlled by a separate set of regulations using a permit system administered by the counties.

Property taxes in Hawaii are collected and distributed on a statewide basis, and property tax assessments are made by the state Department of Taxation. This department is required to give consideration to the restrictions on uses imposed by the geographical districting and the county zoning. The state has dedication provisions whereby a landowner in a non-urban district can dedicate his land to a specific agricultural use for a ten-year period, and obtain assessment according to that use.

The approval processes at the state and county level and for the coastal zone are separate. Thus it is possible for a developer to obtain a reclassification from the Commission to an urban district and still be blocked from development by the county's zoning or subdivision regulations. Conversely, development that would be permitted by the county development plan may be blocked by the Commission's refusal to grant a reclassification.

The Commission consists of nine members appointed by the governor and confirmed by the Senate, and the chairman of the board of the Department of Land and Natural Resources

and the director of the Department of Planning and Economic Development. It has no control over the urban and conservation districts other than setting their boundaries. It regulates the land uses in the rural and agricultural districts.

A reclassification of the district boundaries can occur either by a petition of a landowner to the Commission, or by the Commission on its own initiative. In addition, the Commission can grant special use permits within the rural and agricultural districts. The Commission is required to make a comprehensive review and report on its classifications every five years.

The reclassification decisions of the Commission are, by statute and court decision, quasi-judicial and subject to the provisions of the state's Administrative Procedure Act.

The major legal objections to the restricting of development based on geographical districting are: (1) that the initial designation of land as part of a particular district, or its reclassification, is arbitrary; (2) that the standards for classification are vague or inadequate; (3) that the classification of land as part of a conservation district is confiscatory; (4) that the Commission acted in violation of the state comprehensive plan; and (5) that the state comprehensive plan is void as to the property in dispute because it failed to take into consideration the

existing County general plan.

To date most litigation related to Hawaii's statewide land use program has dealt with the procedural aspects of carrying out the program. Because most of the land in the conservation district is either state or federally owned or had previously been restricted under dedication statutes from the last century enacted to preserve the water system, the program did not face major challenge as being confiscatory.^{110/} Because it is imposed on the state level, of course, the program enjoys immunity from many challenges raised against municipal land use regulation.

The Hawaii enabling legislation which authorizes land use controls based on geographical districting is specific with regard to the definition of districts and the powers and duties of the Land Use Commission. It thus differs significantly from the Pinelands Protection Act in terms of providing direct support for a geographical districting program. If it is decided that such a program would be appropriate for the Pinelands, a determination would have to be made whether the broad grant of authority in the Pinelands Protection Act is sufficient in itself to support the program, or whether more specific enabling legislation should be sought.

Geographical districting does not differ from traditional zoning, in that both restrict the permitted

uses of land within certain geographical boundaries. The significant differences in the technique as applied in Hawaii are that geographical districting is applied at the state level and it is applied as an additional structure over local zoning and other land use regulations.

Geographical districting has had a pronounced effect on the location, type, and cost of residential housing. There is a high proportion of multifamily housing and high rise buildings on the limited urban district land, and Hawaii does not suffer from "urban sprawl."^{111/} At the same time, housing costs in Hawaii are extremely high, in many areas twice those of the mainland.^{112/} A study taken eight years after the program was implemented concluded that geographical districting may have aggravated the previous housing shortage.^{113/} While critics correctly attribute this problem partly to geographical districting, other factors, such as the additional transportation costs for construction materials, also tend to inflate the state's housing costs.^{114/}

The program has been criticized as having the effect of providing an artificial subsidy for agriculture, particularly the pineapple and sugar cane industries.^{115/} Land in the agricultural district, some of which lies in the natural path of expansion of Honolulu, is taxed as agricultural land, increasing the economic feasibility of

growing crops.^{116/} Those growing the crops frequently hold only a leasehold interest, and fee owners in the agricultural district often favor a reclassification to the urban zone to permit development.^{117/}

The early criticism of the program, that it was a good control mechanism but needed to be supported by planning to be effective, has not been eliminated with the adoption of the state's comprehensive plan. Commentators have noted that the state plan is very general and does not adequately address the fundamental problem of integrating the conflicting state and county plans.^{118/} As of now, the County of Honolulu's development plan calls for much greater development than the state's comprehensive plan. There exists no mechanism, except for denials of proposed reclassifications, by which the Land Use Commission can affect county planning and land use controls. In addition, the land use regulations established by the Commission in the agricultural and rural districts are not totally reconcilable with the statutory regulations related to the coastal zones, causing confusion in cases where a landowner must satisfy both sets of regulations.^{119/}

The fact that there are so many levels of controls gives rise to the criticism that obtaining the necessary approvals is excessively costly and time consuming.^{120/}

It can take as long as three years to go through the entire administrative process before construction can begin. ^{121/}

It should again be noted that the state did not have legal difficulties in implementing its conservation area classification because it did not substantially affect pre-existing private development rights or interests. In this respect, Hawaii's experience may be unique.

In summary, when it implemented its program, Hawaii had several objectives, including (1) protecting a delicate ecosystem; (2) curtailing geographically expansive development; (3) preserving agricultural uses; and (4) solving a housing shortage. It can be said that the use of statewide geographical districting has had a generally positive effect in promoting the first three objectives, but has not been effective in dealing with the fourth.

CHAPTER 6

FOOTNOTES

1. 30 N.Y. 2nd 359, 285 N.E. 2nd 291, 334 N.Y.S.2d 138 (1972).
2. See the Report entitled "Phased Growth Based on Availability of Capital Facilities."
3. Id.
4. Ross, Hardies, O'Keefe, Babcock & Parsons has represented and continues to represent the City of Sanibel in the preparation and implementation of its comprehensive land use plan and in litigation arising under the plan.
5. See the Report entitled "Projecting Growth Based on Carrying Capacity Analysis."
6. City of Sanibel Comprehensive Land Use Plan §2.5.2 provides that it is essential that the total number of dwelling units on the island be limited to between six and seven thousand. The plan would permit over 7,000 units to be built, but it is anticipated that this maximum number will not be built during the planning period. Other provisions of the plan provide for equitable distribution of dwelling units to various areas of the island.
7. The plan has legal status under Florida law, and zoning- and subdivision-type regulations are included in it.
8. D. Godschalk et al., Constitutional Issues of Growth Management 277, 290 (Am. Planning Ass'n. 1979), (hereinafter Godschalk).
9. Descriptions of the Boca Raton program can be found in Godschalk, supra note 8 at 267-76 and M. Gleeson et al., Urban Growth Management Systems: An Evaluation of Policy Related Research 7-10 (ASPO 1975).
10. A similar growth cap referendum, calling for a maximum population of 100,000, was defeated in Boulder, Colorado in 1971. Godschalk, supra note 8 at 256.

11. Boca Villas Corp. v. Pence and Keating Meredith Properties, Inc. v. City of Boca Raton, Circuit Court, 15th Judicial Cir. of Fla., Nos. 73 106 CA (L) 01 F and 73 540 CA (L) 01 F, September 30, 1976.
12. Id. at 4.
13. Id. at 15.
14. City of Boca Raton v. Boca Villas Corp., 371 So. 2d 154 (Fla. App. 1979); City of Boca Raton v. Arvida Corp., 371 So. 2d 160 (Fla. App, 1979).
15. Pinelands Protection Act §7 (1979) (emphasis added).
16. Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975).
17. One court has already had to think through the question of when a rural municipality is "developing". See, Glenview Development Co. v. Franklin Township, 164 N.J. Super 563, 397 A.2d 384 (1978). Somewhat tortuously, the court concluded that "while [the Township] is on the threshold, it has not yet crossed that threshold."
18. Godschalk, supra note 8 at 275-76.
19. See the Report entitled "Phased Growth Controlled by Availability of Capital Facilities" in Part III of this Chapter. Many of the programs discussed in that report used permit systems which considered factors similar to those considered in this Report. One of the principal distinguishing features of the systems discussed here, however, is that an absolute limit is placed on the number of permits issued annually.
20. Conversation with Mr. Greg Longhini, Research Associate, American Planning Association.
21. Descriptions of the Petaluma system can be found in D. Godschalk, et al., Responsible Growth Management: Cases and Materials (1978); M. Gleeson, et al., Urban Growth Management Systems: An Evaluation of Policy-Related Research (ASPO 1975); Smith, R.M., Does Petaluma Lie at the End of the Road from Ramapo? 19 Villanova L. Rev. 739 (May, 1974); Hart, The Petaluma Case, 9 Cry California, No. 2, at 6-9 (Spring 1974), and the federal District Court

- opinion, Construction Ind. Ass'n of Sonoma County v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), rev'd, 522 F. 2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976).
22. D. Godschalk, et al., Constitutional Issues of Growth Management 250 (Am. Planning Ass'n. 1979) (hereinafter Godschalk).
 23. The 1962 General Plan had projected a population of 77,000 by 1985. Id.
 24. The Boulder system is described in Godschalk, supra note 4 at 255-66. The system is also discussed in the Report entitled "Phased Growth Controlled by Availability of Capital Facilities" in Part III of this Chapter.
 25. 522 F. 2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976).
 26. Beck v. Town of Kaymond, 394 A.2d 847 (N.H., 1978).
 27. 547 P. 2d 228 (Colo., 1976).
 28. Pinelands Protection Act §7(d)(1) (1979) (emphasis added).
 29. Id. §8(b).
 30. Id. §8(c).
 31. Id. §7(a)(2).
 32. 522 F. 2d at 908 n.16. The court believed that the Petaluma system was distinguishable from those invalidated in exclusionary zoning cases because the system awarded points to developers who provided low and moderate income housing.
 33. Id. at 906.
 34. 375 F. Supp. at 576.
 35. Godschalk, supra, note 22 at 254.
 36. Id.
 37. 522 F.2d at 902.
 38. C. Gruen, The Economics of Petaluma: Unconstitutional Regional Socio-Economic Impacts, in 2 Management & Control of Growth 173 (Urb. Land Inst. 1975).

39. Id. at 183.
40. Godschalk, supra note 22 at 254.
41. Id.
42. J. Hart, The Petaluma Case, in 2 Management & Control of Growth 127, 131 (Urb. Land Inst. 1975).
43. Godschalk, supra note 22 at 254.
44. M. Gleeson et al., Urban Growth Management Systems: An Evaluation of Policy Related Research (ASPO 1975) (hereinafter Gleeson). The Petaluma system is discussed in the Report entitled "Phased Development Controlled by Building Permit Limitation System."
45. Descriptions of the Ramapo program can be found in D. Godschalk et al., Constitutional Issues of Growth Management 227-42 (Am. Planning Ass'n 1979) (hereinafter Godschalk); The Ramapo Case: Five ZD Commentaries, in 2 Management & Control of Growth 32-51 (Urb. Land Inst. 1975); and the opinion of the Court of Appeals of New York in Golden v. Planning Board of Ramapo, 30 N.Y.2d 359, 265 N.E.2d 291, appeal dismissed, 409 U.S. 1003 (1972).
46. Descriptions of the Boulder program can be found in Gleeson, supra note 44 at 11-12; Godschalk, supra note 45 at 255-66.
47. Boulder's building permit limitation system is discussed in the report entitled: "Phased Development Controlled by Building Permit Limitation System."
48. A description of the Loudon County program can be found in Gleeson, supra note 44 at 15-17.
49. A description of the Montgomery County program can be found in Godschalk, supra note 45 at 309-28.
50. A description of the Prince George's County program can be found in Gleeson, supra note 44 at 21-22.
51. A description of the Sacramento County program can be found at Gleeson, supra note 44 at 21-22.
52. A description of the Salem program can be found at Gleeson, supra note 44 at 25-27.
53. A discussion of the taking issue is contained in a separate Report.

54. A collection of cases of the subject can be found at 40 A.L.R.2d 1222 (1956). The subject is also treated in Local Capital Improvements and Development Management Literature Synthesis 53-80 (ASPO 1977); and Note, Control of the Timing and Location of Government Utility Extensions, 26 Stan. L. Rev. 945 (1974).
55. 547 P. 2d 228 (Colo., 1976).
56. Golden v. Planning Board of Ramapo, 30 N.Y. 2d 359, 285 N.E. 2d 291 (1972), appeal dismissed, 409 U.S. 1003 (1972).
57. Berenson v. Town of New Castle, 38 N.Y. 2d 102, 341 N.E. 2d 236 (1975).
58. See, e.g. Reid Development Corp. v. Parsippany-Troy Hills Township, 10 N.J. 229, 89 A. 2d 667 (1952) (Reid I); Reid Development Corp. v. Parsippany-Troy Hills Township, 31 N.J. Super. 459, 107 A.2d 20 (1954) (Reid II); Deerfield Estates, Inc. v. Township of East Brunswick, 60 N.J. 115, 286 A.2d 498 (1972).
59. N.J. Stat. Ann. §40:55D-1 et seq. (West pocket part 1978).
60. Id. §40:55D-42.
61. Pinelands Protection Act §8(b) (1979).
62. Id. §8(c).
63. Id. §7(d).
64. R. Babcock, in transcript of debate between R. Babcock and R. Freilich before the American Society of Planning Officials, San Diego, Cal., April 27, 1977 (hereinafter Babcock); R. Scott, Comment, in 2 Management Control of Growth 40 (Urb. Land Inst. 1975); H. Franklin, Controlling Urban Growth: But for Whom?, in 2 Management & Control of Growth 78 (Urb. Land Inst. 1975).
65. F. Bosselman, Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?, 1 Fla. St. U.L. Rev. 234 (1973).

66. Id.; C. Gruen, The Economics of Petaluma: Un-constitutional Regional Socio-Economic Impacts, in 2 Management & Control of Growth 173 (Urb. Land Inst. 1975); R. Scott, Comment; in 2 Management & Control of Growth 40 (Urb. Land Inst. 1975).
67. Gleeson, supra note 44 at 105-06.
68. M. Emanuel, Ramapo's Managed Growth Program: After Five Years Experience, in 3 Management & Control of Growth 302, 311 (Urb. Land Inst. 1975) (hereinafter Emanuel).
69. Gleeson, supra note 44 at 98.
70. Emanuel, supra note 68 at 311.
71. Id.
72. Id. at 312-13.
73. Babcock, supra note 64 at 4.
74. Emanuel, supra note 68 at 310.
75. Gleeson, supra note 44 at 99-100.
76. Id. at 100, referring to the California Williamson Act.
77. Id. at 101-03.
78. Godschalk, supra note 45 at 266.
79. Gleeson, supra note 45 at 105-06.
80. Id. at 106.
81. D. Schneider, et al., The Carrying Capacity Concept as a Planning Tool 1 (Am. Planning Ass'n. 1978) (hereinafter Schneider).
82. R. Bailey, Land Capability Classification of the Lake Tahoe Basin, California - Nevada 4 (Dept. of Agriculture 1974).

83. Schneider, supra note 81.
84. Id. at 18-19.
85. Id. at 25.
86. Id. at 21.
87. Id. at 18.
88. Tahoe Regional Planning Agency Ordinance No. 13 §6.00 et seq. The Tahoe Program is discussed in another context in Volume 2.
89. City of Sanibel, Comprehensive Land Use Plan §§2.1.1, 2.5.2. See also D. Godschalk et al., Constitutional Issues Of Growth Management 277-94 (Am. Planning Ass'n. 1979). The City of Sanibel is also discussed in the Report entitled "Setting Population and Building Ceilings."
90. Of the twenty-two analyses studied in Schneider, supra note 81, eight made extensive use of computer models.
91. G. Nieswand and P. Pizor, A Practical Carrying Capacity Approach to Land Use Planning (1977); G. Nieswand and P. Pizor, How to Apply Carrying Capacity Analysis, Environmental Comment (Dec. 1977).
92. Schneider, supra note 81 at 11-25.
93. E.g. the Tahoe Regional Planning Agency, see note 7 and accompanying text supra, and the Association of [San Francisco] Bay Area Governments, Schneider supra note 81 at 11-12.
94. See generally, Carrying Capacity Prototype Investigations in the State of Hawaii, Summary Report (1976). The Hawaii land use control program is discussed in Part V of this Chapter entitled "Restricting Growth by Geographical Districting."
95. Schneider, supra note 81 at 9.
96. E.g. Golden v. Planning Board of Ramapo, 30 N.Y.2d 359, 285 N.E. 2d 291, appeal dismissed, 409 U.S. 1003 (1972). The program of the Town of Ramapo is discussed in the Report entitled "Phased Growth Based on Availability of Capital Facilities" in Part III of this Chapter.

97. The population and building ceiling imposed in Boca Raton, Florida was struck down in part because it was based on a study containing some incorrect assumptions. City of Boca Raton v. Boca Villas Corp., 371 So. 2d 154 (Fla. App. 1979). See the Report entitled "Setting Population and Building Ceilings."
98. Tahoe Regional Planning Agency Ordinance No. 13 §8.25.
99. Pinelands Protection Act §7(a) (1979).
100. Id. §7(d).
101. Id. §6(j).
102. It is noted that the Act does not require the Commission to use the term "carrying capacity analysis."
103. R. Odell, Carrying Capacity Analysis: Useful But Limited, in 3 Management & Control of Growth 22, 26-27 (Urb. Land Inst. 1975) (hereinafter Odell).
104. Id.
105. Malcolm F. Baldwin, director of the Environmental Impact Assessment Project of the Institute of Ecology, quoted in Odell, supra note 103 at 26.
106. Id. at 27.
107. Id.; Schneider, supra note 81 at 8-9.
108. Id. at 10. See also D. Godschalk, State Growth Management: A Carrying Capacity Policy, in 3 Management & Control of Growth 328 (Urb. Land Inst. 1975).
109. Descriptions of Hawaii's land use control system can be found in F. Bosselman and D. Callie's, The Quiet Revolution in Land Use Control 5-53 (1971) (hereinafter Bosselman); P. Myers, Zoning Hawaii (Conservation Found. 1976) (hereinafter Myers); D. Mandelker and A. Kolis, Whither Hawaii? Land Use Management in an Island State (scheduled for future publication in the U. of Hawaii L. Rev.) (hereinafter Mandelker). Ross, Hardies, O'Keefe, Babcock & Parsons represents the City and County of Honolulu for certain land use matters.

110. Myers, supra note 109 at 22.
111. Id. at 72.
112. See Bosselman, supra note 109 at 25-28; Myers, supra note 1 at 80-86.
113. Eckbo, Dean, Austin & Williams, State of Hawaii Land Use Districts and Regulations Review 95 (1969); see also Bosselman, supra note 1 at 25.
114. Bosselman, supra note 109 at 25-28; Myers, supra note 109 at 80-86.
115. Myers, supra note 109 at 101.
116. Id. at 27-29.
117. Conversation with Fred P. Bosselman, Esq.
118. D. Callies, Survey of Land Use Law (Herein of Vested Rights, Plans, and the Relationship of Planning and Controls) (Draft, July 1979, being prepared for publication in the U. of Hawaii L. Rev.); Mandelker, supra note 109.
119. Mandelker, supra note 109.
120. Conversation with Fred P. Bosselman, Esq.
121. Bosselman, supra note 109 at 29.

CHAPTER SEVEN

PROJECT REVIEW AND
ENVIRONMENTAL ASSESSMENT

This chapter covers regulatory processes which focus on the review and assessment of a particular project (generally a project having significant predetermined characteristics such as a certain minimum size or a proposed location within a sensitive geographic area) rather than processes providing substantive standards for all projects within an area or district or of a certain type. The particular review and assessment procedures described herein are arranged roughly in a progression from least stringent to most stringent. Procedures which involve little regional or state intrusion into private and local government decision-making are considered least stringent and those procedures which tend to pre-empt local government and private developer prerogatives are considered most stringent. The extremes of project review are, of course, to take no steps to review the project at all, or at the other extreme, either to ban the project entirely or develop the project exactly as the public wants it done. Typically, the non-stringent techniques merely publicize the project or require disclosure of certain information about the project. Such a requirement may be followed by a legislative decision permitting the

project to proceed or preventing it from proceeding. The more stringent procedures tend to require conformance to pre-set standards and are frequently adjudicative in nature. However, the nature of the standards to be met in such a procedure is the true determinant of stringency. Project review techniques can be combined with other techniques such as public ownership, euclidian zoning and the setting of environmental and performance standards. Project review techniques could be used to provide pre-emptive regional review for projects with a predefined significant impact on the Pinelands area.

I. DISCLOSURE MECHANISMS

Project review techniques which offer the least public intrusion into the local government and the private decision-making processes are those which merely require disclosure.

A. The Public Hearing

Purpose. A public hearing, at which specified information about a proposed project is presented, for informational purposes, to those who will be affected by the project, provides those affected persons an opportunity to be heard and to offer an informed opinion to their elected representatives, or to the body which must approve the project. A hearing intended to be merely informative results in no findings of fact and participants are not necessarily bound

by material produced at the hearing. This type of a hearing is required by the Federal Aid Highway Act^{1/} for certain federal aid highway projects.

Scope of Application. The Federal Aid Highway Act requires public hearings on plans for Federal-aid highway projects involving the bypassing of, or going through, any city, town or village, either incorporated or unincorporated.^{2/} Hearings must also be afforded to persons in rural areas through or contiguous to whose property a highway will pass.^{3/}

Procedure. The hearings must be conducted by the sponsoring state highway department. Proper notice to those affected by the highway must be furnished. When hearings have been held, the state highway department must submit to the federal department of transportation a copy of the transcript, a certificate that the hearing has been held and a report indicating the consideration given to the designated effects of the highway at the hearing.^{4/}

With respect to hearings on highways bypassing or going through a city, town or village the state highway department must report that it has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated in the community.^{5/} For rural area hearings urban planning need not be

considered.^{6/} Alternatives to the proposal raised during the hearing or otherwise considered must be disclosed in the report.^{7/} Detailed regulations for compliance with the Act have been published in the Code of Federal Regulations.^{8/}

The hearings required by the Act are basically informative in nature and not quasi-judicial.^{9/} However, failure to hold the hearings or to adhere to the procedural requirements of the Act could result in an injunction against construction of the highway project until compliance takes place.^{10/} The remedies granted by the courts for failure to comply with the requirements of the Act include a requirement of holding new hearings^{11/} and possible loss of federal funds for the project.^{12/} Because there are no findings made at an informational public hearing there is no appeal procedure. However, failure to conduct the hearing can result in judicial review of the procedural failure.

B. Disclosure Laws

Disclosure laws are designed to ensure that the consequences of a proposed project, development, or action are understood and evaluated and that the alternatives to the proposed action are identified and considered. Disclosure laws are ordinarily not regulatory in the sense that the disclosure of probable adverse consequences will of itself be sufficient to forbid the particular action in question.

1. Federal Environmental Impact Statements

The National Environmental Policy Act,^{13/} requires that an Environmental Impact Statement be prepared for certain significant projects. A number of states have enacted similar laws requiring that environmental impact statements be prepared for designated projects.

Purpose. The National Environmental Policy Act is designed to promote consideration of environmental factors in public decision-making. The Act establishes a Council on Environmental Quality^{14/} and requires that every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of human environment shall include a detailed statement by the responsible official on the environmental impact of the proposed action.^{15/} Specifically, the Act requires consideration of any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.^{16/} The required statement has come to be known as an Environmental Impact Statement ("EIS"). The several federal agencies have adopted regulations providing

greater detail as to the required contents of an EIS. As an example, the requirements for a federal aid highway EIS are attached as Appendix "A" to this section.^{17/}

Scope of Application. The term "major federal actions significantly affecting the quality of the human environment,"^{18/} is not self-explanatory and has generated considerable litigation. Each federal agency has promulgated regulations defining that term in the context of that agency's specific activities; however, the courts have insisted on a final say in the definition. The term has been interpreted to include federal issuance of permits and projects undertaken by the federal government, but not purely private development.

Procedure. Initially a draft EIS is prepared by the lead federal agency and circulated to other appropriate governmental agencies, private groups and interested citizens. In most instances a public hearing or hearings are held. The comments received at the hearing and in writing are then reviewed and incorporated into the final EIS either in the form of changes in the text of the EIS or as an appendix to the final EIS, or both.

The question has arisen as to whether the EIS process is strictly procedural or in fact offers a substantive review of a project. In Environmental Defense Fund v. Corps of Engineers^{19/} the United States Court of

Appeals for the Eighth Circuit asserted that courts may review agency decisions to determine if they are in accord with the substantive requirements of NEPA. The court stated that the standard of review was whether the record showed that the agency decision was arbitrary and capricious.^{20/} In addition to possible substantive review, it is clear that a project may be enjoined pending procedurally correct completion of an EIS. In the normal case, however, once the final EIS is submitted by the federal agency, the agency may proceed with its project without further review.

2. State Environmental Impact Statements

Many states have adopted laws similar to the National Environmental Policy Act. An example is the Washington State Environmental Policy Act.^{21/} The purposes of the Act include a declaration of a state policy which will encourage productive and enjoyable harmony between man and his environment; the promotion of efforts to prevent damage to the environment; the stimulation of the health and welfare of man and the enrichment of the understanding of ecological systems and natural resources.^{22/}

The Act requires an EIS for actions significantly affecting the environment.^{23/} Such actions must be discretionary and non-duplicative of other state governmental actions.^{24/}

The Act provides exemptions from the EIS requirement for certain actions; the Act requires the State Department of

Ecology to promulgate rules exempting certain single family home building permits and related governmental actions from the EIS requirement.^{25/} The obligations of the Act are directly imposed on all agencies of state government including municipal corporations.^{26/} The reach of the Act differs from that of the National Environmental Policy Act because many private land development projects require local governmental approval and hence are subject to the state law. For example, the state law requires preparation of an EIS before a local government approves a preliminary subdivision plat.^{27/} The EIS must be made available to the Governor, the Department of Ecology, the Ecological Commission and the public. The Department of Ecology prepares a weekly list of EIS filings.^{28/} In any action involving an attack on the determination by a governmental agency relative to the requirement for or adequacy of an EIS, the decision of the governmental agency shall be accorded "substantial weight."^{29/}

II. NEGOTIATED DESIGN

Planned Unit Development. Negotiated design, by way of contrast with project review consisting of disclosure, involves required government participation in shaping the design of the proposed project, a significant step beyond merely gathering information about it. Under

most zoning ordinances this procedure is legislative. The applicant submits plans to a legislative body (either directly or indirectly through an advisory commission or agency), negotiates design changes subject to the flexible requirements of the ordinance and then receives a zoning amendment in accordance with the final plan.^{30/}

III. ADJUDICATIVE PROCEEDINGS

Project review and environmental assessment can take the form of an adjudicative proceeding. An adjudication consists of the application of pre-existing legal standards to the facts of a particular case. Typical adjudicative proceedings are trials and the issuance of a permit of license.

A. Licensing and Permitting Techniques

Power plant siting legislation^{31/} and deepwater port licensing are sophisticated recent examples of land use control through the permit process. Deepwater port licensing affords a useful example of this technique.

The Deepwater Port Act of 1974^{32/} regulates site selection, construction and operation of off-shore port facilities for supertankers.

Scope of Application. A deepwater port is defined as any fixed or floating man-made structure or structures, other than a vessel, located beyond the territorial sea and

off the coast of the United States, that is used or intended for use as a port or terminal for the loading or unloading of oil.^{33/}

Procedure. The application (which is submitted to the U.S. Coast Guard) must describe the proposed port and proposed onshore facilities and receiving refineries, furnish an indication of the ability of the applicant to carry out the project and an outline of procedures to be used during construction and operation to prevent oil spills.^{34/}

Prior to issuance of a license there must be determinations with respect to financial responsibility; ability to comply with all applicable laws; consistency with national environmental and energy policies; non-interference with navigation; compliance with the air and water pollution laws; compliance with the anti-trust laws. Approval of the Departments of State and Defense is required.^{35/} There must also be findings: (1) that in accordance with environmental review criteria established under other provisions of the Act, that the applicant has demonstrated that the construction and operation, using best available technology, will minimize adverse impact on the marine environment; (2) that the Governor of the adjacent coastal state or states has approved the issuance of the license; and (3) that the adjacent coastal state to which the port is to be connected by pipeline has

developed or is making reasonable progress toward developing a coastal zone management program.^{36/}

The Act sets forth an outline of environmental review criteria that the Secretary is required to apply. Among other subjects, the Secretary must consider the effects of land-based developments related to deepwater port development. The environmental review of a proposed deepwater port consists of two parts. The first part is an assessment of the probable negative and positive environmental impacts which result from construction and operation of the port. The second part appraises the effort made by the applicant to prevent or minimize adverse environmental effects.^{37/}

The licensing procedure compels promptness in processing the application by establishing time limits for each phase of consideration. The application constitutes a consolidated application for all federal authorizations required for the port. Competing applicants desiring to locate a port in the same area must submit their applications within a specified time period--notice of intent to file within 60 days of publication of notice of the filing of the first application and their application 30 days thereafter.^{38/}

The Coast Guard docket each application filed. The application is reviewed for completeness and notice of

receipt of the application is then issued. An informal hearing is then scheduled. Interested persons may attend the hearing and present written or oral material. A report of the hearing is issued as soon as practicable after the hearing. After the report of hearing is issued, the Commandant of the Coast Guard determines whether there are specific and material factual issues concerning the application that may be resolved by a formal hearing. If such issues exist, a notice of formal hearing is issued, listing the factual issues to be resolved.^{39/}

The formal hearing is conducted by an administrative law judge. Participation in the formal hearing is limited to parties and persons filing petitions to intervene or petitions to present evidence. Each party to a formal hearing must be represented by an attorney. At the conclusion of the formal hearing, rulings on the contested issues are made.^{40/}

In licensing a deepwater port, compliance with NEPA is required. The Act specifically requires the applicant to submit to the Coast Guard the information required to determine the environmental impact of the project.^{41/}

B. Project Review by Court Adjudication, The Virginia Annexation Procedure^{42/}

Purpose. The purpose of this procedure is to provide a means to determine whether municipalities should be

permitted to annex a portion of the adjacent county.* While many administrative proceedings can ultimately result in a court hearing this procedure is relatively unique in that the initial hearing is in a court of law and is governed by all the normal rules of evidence and civil procedure. This procedure is expeditious.** While this procedure is not a project review procedure per se, it is illustrative of a technique which could be applied to review of projects.

Scope of Application. The boundaries of all cities and towns remain as established unless changed by the annexation procedure of the Act.^{43/}

Procedure. An annexation proceeding is initiated by a city or town council voting an annexation ordinance, which ordinance must contain the following:

- (a) Metes and bounds and size of area sought;
- (b) Information, which may be shown on a map annexed to the ordinance, of the area sought to be annexed, indicating generally subdivisions, industrial areas, farm areas, vacant areas and others, together with any other information deemed relevant as to possible future uses of property within the

*In Virginia this question takes on added significance because cities are independent units of local government which do not share functions with the adjacent county.

**Indeed, it may have proven too expeditious. For almost a decade now the Virginia legislature has found it necessary to have "temporary" restrictions on the filing of annexation petitions in force. (Va. Code. Ann. §15.1-10321) These temporary restrictions have been designed to protect urbanized counties from annexation proceedings. The teaching of these temporary restrictions may be that an expeditious, independent judicial decision-making process will not please the participants if their preference is for a more political, negotiated type of decision-making process.

area. If a map is not annexed as part of the ordinance, then such information shall be set forth in the ordinance; (c) A general statement of the terms and conditions upon which annexation is sought, and the provisions planned for the future improvement of the annexed territory, including the provision of public utilities and services therein. 44/

As an alternative to adoption by the town or city of an annexation ordinance, 51% of the qualified voters or landowners in any territory adjacent to a city may petition the circuit court of the county for annexation. 45/

The city or town must then serve notice on the county and its attorney that it will move the judges designated to hear the case to grant the annexation. The ordinance, map and a summary must be published in the territory to be annexed. 46/ Additional parties, namely any qualified voters or property owners in the territory proposed to be annexed or any adjoining city or town, may by petition become parties to the proceedings. 47/ The court may limit the time within which such additional persons may become parties.

The court, without a jury, is held by three judges consisting of the judge of the circuit court of the county in which the territory sought to be annexed lies and two judges of circuit courts remote from the territory to be annexed, to be designated by the chief justice of the Supreme Court of Appeals. 48/ The statute provides for a mandatory pretrial conference with purposes similar to a pretrial conference

in any litigation, namely the simplification of issues, amendments and filing of additional pleadings, stipulations as to facts, documents, records, photographs, plans and the like which will dispense with formal proof, including certain basic statistical information about the taxes and population of the area. The pretrial conference may also limit the number of expert witnesses.^{49/}

The Act provides a specific basis for decision by the court:

(a) The court shall hear the case upon the evidence introduced as evidence is introduced in civil cases.

(b) The court shall determine the necessity for and expediency of annexation, considering the best interests of the people of the county and the city or town, services to be rendered and needs of the people or the area proposed to be annexed, the best interests of the people in the remaining portion of the county and the best interests of the State in promoting strong and viable units of government.

(b)(1) In considering the best interests, as set out in (b) hereof, the court shall consider to the extent relevant:

(i) The need for urban services in the area proposed for annexation, the level of services provided in the county, city or town, and the ability of such county, city or town to provide services in the area sought to be annexed, including, but not limited to:

- (a) Sewerage treatment;
- (b) Water;
- (c) Solid waste collection and disposal;
- (d) Public planning;
- (e) Subdivision regulation and zoning;

- (f) Crime prevention and detection;
- (g) Fire prevention and protection;
- (h) Public recreational facilities;
- (i) Library facilities;
- (j) Curbs, gutters, sidewalks, storm drains;
- (k) Street lighting;
- (l) Snow removal;
- (m) Street maintenance.

(ii) The current relative level of services provided by the county and the city or town;

(iii) The efforts by the county and the city or town to comply with applicable State policies with respect to environmental protection, public planning, education, public transportation, housing, or other State service policies promulgated by the General Assembly;

(iv) The community of interest which may exist between the petitioner, the territory sought to be annexed and its citizens as well as the community of interest that exists between such area and its citizens and the county. The term "community of interest" may include, but not be limited to, the consideration of natural neighborhoods, natural and man-made boundaries, the similarity of needs of the people of the annexing area and the area sought to be annexed;

(v) Any arbitrary prior refusal by the governing body of the petitioner or the county whose territory is sought to be annexed to enter into cooperative agreements providing for joint activities which would have benefited citizens of both political subdivisions; however, the court shall draw no adverse inference from joint activities undertaken and implemented pursuant to cooperative agreement of the parties. It is the purpose of this subsection to encourage adjoining political subdivisions to enter into such cooperative agreements voluntarily, and without apprehension of prejudice;

(vi) The need for the city or town seeking to annex to expand its tax resources, including its real estate and personal property tax base;

(vii) The need for the city or town seeking to annex to obtain land for industrial or commercial use, together with the adverse effect on a county of the loss of areas suitable and developable for industrial or commercial uses; and

(viii) The adverse effect of the loss of tax resources and public facilities on the ability of the county to provide service to the people in the remaining portion of the county.

(c) If a majority of the court is of opinion that annexation is not necessary or expedient, the petition for annexation shall be dismissed. If a majority of the court is satisfied of the necessity for and expediency of annexation, it shall determine the terms and conditions upon which annexation is to be had, and shall enter an order granting the petition. In all cases, the court shall render a written opinion.

(d) The order granting the petition shall set forth in detail all such terms and conditions upon which the petition is granted. Every annexation order shall be effective at midnight on December thirty-one of the year in which issued; or, in the discretion of the court, at midnight on December thirty-one of the year following the year in which issued. All taxes assessed in the territory annexed for the year at the end of which annexation becomes effective and for all prior years shall be paid to the county.

(e) In any proceedings instituted by a city or town, no annexation shall be decreed unless the court is satisfied that the city or town has substantially complied with the conditions of the last preceding annexation by such city or town, or that compliance therewith was impossible, or that sufficient time for compliance has not elapsed

(f) In the event that the court enters an order granting the petition, a copy of the order shall 50/ be certified to the Secretary of the Commonwealth.

The court in making the decision must balance the equities in the case, and enter an order setting forth what it deems fair and reasonable terms and conditions and shall direct the annexation in conformity therewith. 51/

When the court renders its final order a city may decline to accept annexation on the terms and conditions imposed by the court. The three judge court which grants annexation retains its authority for 10 years, for the purpose of enforcing any orders or resolving questions which may arise under its orders. An appeal from the trial court's order may be taken to the Supreme Court of Appeals.

The Virginia annexation proceeding makes use of an existing forum for dispute resolution, i.e the court system, for a purpose not normally associated with a court of law. With appropriate jurisdictional and authorizing legislation many decisions made by a local or state government which require application of law to the facts of the case could be made by a judicial proceeding. There are no costs of creating a new administrative agency, as is the case for the Washington energy facilities' siting council law. However, the burden for generating all of the information required to make a reasoned decision (and the attendant expense) is placed on

the parties to the adjudication in the Virginia scheme. The Washington Energy Facility Siting Law provides for an assistant attorney general to represent the environment. The Virginia adjudicative procedure will work best in situations in which there is a sharply defined controversy and a relative balance of resources available to insure a vigorously contested adversary proceeding.

C. Project Licensing Coupled with Public Ownership

The fact of public ownership does not preclude licensing of private use of the publicly owned land. While this licensing procedure is similar to licensing uses on privately owned land the public may curtail permissible uses to a greater degree on publicly owned land. The National Forest Service issues special use permits for private use of national forest lands.^{52/} A "special use" of a National Forest consists of some form of permanent occupancy for purposes other than timbering.

There are two types of permits: term permits, which are not revocable except for breach of conditions, and terminable permits, which may be revoked and may be terminated at the discretion of the Forest Service as well as for breach of condition. Term permits may be issued for hotels, resorts or other structures needed for recreation, public convenience or safety; summer homes and stores; industrial or commercial purposes; and to public or nonprofit agencies for public purposes. Term permits are limited to eighty acres and may not exceed thirty years in duration.^{53/}

In regulations adopted by the Chief of the Forest Service other authorized special uses are set forth. These uses include excavation of archaeological sites, leases of land, easements for rights-of-way for communications purposes and transmitting structures, and permits, leases or easements to governments for public buildings.^{54/}

Applicants for a commercial public service permit are required to show that they are qualified by experience to operate the facility and serve the public needs and that they have the financial ability to undertake the construction and operation of the development as planned.^{55/}

IV. COORDINATION MECHANISMS

In their book, *The Permit Explosion*, Fred Bosselman, Duane Feurer and Charles Siemon analyzed the proliferation of permits, the lack of coordination and emerging coordination mechanisms for project review processes. The summary of study recommendations suggested the following coordination techniques.^{56/}

A. Strengthening Regional Agencies

The federal government has encouraged the use of regional planning agencies but these regional agencies often lack substantive power with the result that their use does not produce effective coordination. Regional agencies have a potential role in land use and environmental coordination of

control systems if given authority to conduct multi-jurisdictional planning and even to overrule local decisions that are inconsistent with regional plans.

B. Coordinating Permitting Procedures

The study found that the coordination of permitting procedures at the state and local levels offer potential for coordination. Under this process a potential developer would complete a master application and submit it to a coordinating agency of either the state or local government.

C. Reducing the Number of Government Levels Involved

This requires either pre-emption of local decisions by the state or delegation to localities of state decisions.

D. Establishing Specialized Appellate Review

Creation of specialized appellate review processes rather than requiring appeal to courts of general jurisdiction could result in greater coordination.

APPENDIX "A"

(c) A change in the environmental processing from EIS to negative declaration or negative declaration to EIS shall be footnoted in the next subsequent listing. The highway section may be removed from the next listing when the draft EIS is circulated for comment, the final negative declaration has been adopted by the FHWA Division Administrator, or the action has been abandoned or cancelled.

(d) These lists shall be available for public inspection and copying at the FHWA Washington Headquarters, Regional and Division Offices.

§ 771.18 Content of the environmental impact statement.

(a) *General.* Every effort shall be made to convey the required information in a form easily understood by those expected to comment upon the draft EIS. Substance of the information conveyed rather than the length or detail of the statement should be stressed. Succinctness and brevity, consistent with the scale and impact of the proposed action and the information to be transmitted, should be the aim of those preparing the EIS. For example, all the sections outlined in paragraphs (g) through (m) of this section are not required if the information is adequately covered in another section.

(b) *Reports and studies.* The EIS should briefly summarize and reference in the text underlying studies, reports and other information considered in preparing the statement. Referenced reports should be those readily available to commenting entities upon request or as a minimum available for review and copying at a convenient location. If supporting documents are appended to the statement, care is to be taken to insure that the statement is self-contained without the need for undue cross reference. The level of the summary should be commensurate with the scale of the proposed action and the impact.

(c) *Standard size.* The statements shall be printed on paper approximately 8½ × 11 inches and the maps, drawings, illustrations, etc., should be folded for assembly to the same size. Sheets wider than 8½ inches should be

folded so as to open to the right with identification added or showing at the right edge.

(d) *Title page.* Each environmental statement (draft or final) shall have a title page headed as follows:

Report Number: _____

(Route, Termini, County, City, etc.)

ADMINISTRATIVE ACTION DRAFT
(FINAL)

ENVIRONMENTAL IMPACT
STATEMENT U.S. DEPARTMENT OF
TRANSPORTATION

Federal Highway Administration

and

(optional)

Appropriate highway agency

Submitted pursuant to 42 U.S.C. 4332(2)(C),
23 U.S.C. 123(a) and (when applicable) 49
U.S.C. 1653(f) and 16 U.S.C. 470(f)

Date	Signature and title of appropriate FHWA official
------	--

(e) *Report number.* The number placed at the top left-hand corner of the title page on all draft and final environmental statements is as follows:

FHWA-AZ-EIS-74-01-D(F)(S)

FHWA—Name of Federal Agency.

AZ—Name of State (cannot exceed four characters).

EIS—Environmental impact statement.

74—Year draft statement was prepared.

01—Sequential number of draft statement for each calendar year.

D—designates the statement as the draft statement.

F—designates the statement as the final statement.

S—designates supplemental statement.

DS-2—designates second draft supplemental statement.

(f) *Summary.* The summary should contain the following information:

(1) Check appropriate box(es):

Federal Highway Administration Administrative Action Environmental Statement

- Draft
- Final
- Section 4(f) Statement attached.

Title 23—Highways

Chapter I—Federal Highway Administration

§ 771.18

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Highway agency

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Final statement,
draft supplement-

Summary should
information:

Box(es):
Administration Ad-
Environmental

al
attached.

(2) The names, addresses and tele-
phone numbers of the individuals at
the HA and FHWA who can be con-
tacted for additional information con-
cerning the proposal and statement.

(3) Brief description of the proposed
FHWA action indicating route, ter-
mini, type of highway, number of
lanes, length, county, city, State, etc.,
as appropriate. Also list other pro-
posed Federal actions in the area, if
any, which are in the statement.

(4) Summary of environmental im-
pacts, both beneficial and adverse.

(5) Summarize major alternatives
considered.

(6) List of all commenting entities
from which comments are being re-
quested (draft EIS), list of all com-
menting entities from which com-
ments have been requested, and identi-
fy those that submitted comments
(final EIS).

(7) For final statements, the date
the draft statement was mailed to
CEQ.

(g) *Description of the proposed
action and alternatives considered,
and the social, economic and environ-
mental context.* This section is to in-
clude, in summary form, information
such as the following listing concern-
ing the basis for the proposed action,
highway and traffic engineering fac-
tors, features to reduce or eliminate
adverse environmental impacts, esti-
mated highway costs, anticipated traf-
fic and region benefits (traffic associ-
ated), public services, and existing sig-
nificant land uses and natural and cul-
tural features in the study area.

(1) Location, type facility and length
(new and existing alignment).

(2) Traffic data and number of lanes.

(3) Predominant right-of-way width
and access control (existing and pro-
posed).

(4) Other major design features such
as the general horizontal and vertical
alignment and the location of inter-
changes, separation structures, at-
grade intersections, river crossings,
etc.

(5) Deficiencies of the existing facili-
ties and the planning basis for the pro-
posed action, including anticipated
benefits to the State, region and com-
munity, and the relationship between

this highway section and the total
transportation requirements for the
area.

(6) Anticipated safety benefits or
lack thereof if project is not built.

(7) Summary of any technical, social
and economic studies made during the
development of the proposed action.

(8) The current status of the propos-
al with a brief historical resumé and
an estimate of when the proposal may
be constructed.

(9) A general description of the sur-
rounding terrain.

(10) Inventory of pertinent economic
factors such as employment, taxes,
property value, etc.

(11) Surrounding natural and cultur-
al features such as towns, lakes,
streams, mountains, historic sites,
landmarks, institutions, developed
areas, principal roads and highways,
and similar features that are pertinent
to the study.

(12) General description of the sur-
rounding neighborhoods including
population and growth characteristics,
and ethnic composition.

(13) Vicinity and detailed maps,
sketches, pictures, layouts and other
visual exhibits should be used to show
specific involvement in order to give a
layman reviewer a reasonable under-
standing of the impact.

(14) Public facilities and services, in-
cluding religious, health and educa-
tional facilities, and public utilities,
fire protection and other emergency
services.

(15) Esthetic and other values, in-
cluding visual quality such as: "view of
the road" and the joint development
and multiple use of space.

(h) *Land use planning.* This section
should describe the scope and status
of the planning process for the area
and should discuss the relationship be-
tween the proposed action and land
use and public facility plans, policies
and controls as have been promulgat-
ed by the affected community. Exist-
ing and proposed land use (a map pref-
erable) including, where applicable,
other proposed Federal actions in the
area affected should also be discussed.
Where conflicts or inconsistencies
exist, this section should describe the
extent of reconciliation and the reason

for proceeding notwithstanding the absence of full reconciliation.

(i) *The probable impact of the proposed action on the environment.* This section is to describe the significant beneficial and detrimental environmental consequences anticipated if the proposed action is implemented. The level of importance of environmental factors and the level of the impact will vary with the nature, scale and location of the proposed action. For example, impact on the nesting grounds of an endangered species would be significant while a similar impact on the nesting grounds of a species which is in abundance may not be significant. Likewise, the significance of a high noise level is much different in a residential area than in an industrial area.

(1) Highways may stimulate or induce other actions (secondary actions) such as more rapid land development or changed patterns of social and economic activities. Impacts associated with secondary actions, through their impacts on existing community facilities and activities, through inducing new facilities and activities or through changes in natural conditions may often be even more substantial than the primary impacts associated with construction of the highway. For instance, the effect on population and area growth associated with the construction of new highways may be among the more significant impacts. Such impacts associated with anticipated secondary actions should be assessed and discussed in this section of the EIS.

(2) Direct (primary) impacts upon the narrow band adjacent to the highway may be included when significant to the whole of the region or the community. The discussions under this section should address the probable significant impacts of the action (as opposed to individual alternative locations or designs). These might include the probable impact upon elements, factors and features listed below.

(i) *Natural, ecological or scenic resources impacts.* This section will summarize the significant effects on natural, ecological and scenic resources anticipated to be associated with the implementation of the proposed action,

including a summary of consultations with the appropriate public and governmental agencies. One example of a natural resource impact would be the effect an action would have on the consumption of energy resources.

(ii) *Relocation of individuals and families impacts.* This section will briefly summarize the relocation assistance program and assess the impacts associated with significant relocation of people and businesses, including consultations with housing agencies and information on the anticipated relocation housing programs. This section will include, to the extent appropriate, information such as the following that is obtainable by visual inspection of the area and from readily available secondary sources or community sources; and estimate of households to be displaced, including the family characteristics (e.g. minorities, income levels, tenure the elderly, large families); divisive or disruptive effect on the community, such as separation of residences from community facilities or separation of neighborhoods; impact on the neighborhood and housing where relocation is likely to take place; an estimate of the businesses to be displaced and the general effect of business dislocation on the economy of the community; a description of relocation housing in the area, and the ability to provide adequate relocation housing for the types of families to be displaced; a description of special relocation advisory services that will be necessary for identified unusual conditions; a description of the actions proposed to remedy insufficient relocation housing, including, if necessary, housing of last resort; and results of consultation with local officials, social agencies, and community groups regarding the impacts on the community affected.

(iii) *Social impacts.* This section will include a discussion of the significant social impacts anticipated to be caused by the proposed action. The following are examples of groups that may have special problems and require special consideration with respect to access to jobs, schools, churches, parks, hospitals, shopping, and community services:

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- (C) those dependent upon public transportation
- (D) handicapped
- (E) illiterate
- (F) nondrivers
- (G) pedestrians
- (H) bicyclists
- (I) low income
- (J) racial, ethnic, or religious groups.
- (iv) *Air quality.*

(A) This section shall include: an identification of the air quality impact of the highway section; and identification of the analysis methodology utilized; a brief summary of the early consultation with the air pollution control agency and, where applicable, a brief summary of any consultation with the indirect source review agency; any comments received from the air pollution control agency, and, where applicable, any comments received from the indirect source review agency; and the Highway Agency's determination on the consistency of each alternative under consideration with the approved State implementation plan.

(B) Where required by 40 CFR 51.18, the preferred alternative shall be submitted to the indirect source review agency for review. The proposed final EIS shall not be submitted to FHWA for adoption if the indirect source review agency has found, as a part of the procedures established pursuant to 40 CFR 51.18, that the highway section will result in a violation of applicable portions of the control strategy or will interfere with the attainment or maintenance of the National Ambient Air Quality Standards.

(C) The final EIS should include any comments received from the air pollution control agency concerning the consistency of the proposal with the State implementation plan.

(D) The final EIS may be adopted by the FHWA only after FHWA has determined that the proposed highway section is consistent with the approved State implementation plan. The determination on consistency shall be made by the Regional Federal Highway Administrator.

(v) *Noise impacts.* If highway-generated noise is a significant factor, this section will include a discussion of the possible noise problems and a summary of the noise analysis information. The summary should include:

(A) Information on the numbers and types of activities which may be affected.

(B) Extent of the impact (in decibels).

(C) Likelihood that noise abatement measures can reduce the noise impacts.

(D) Noise abatement measures which will likely be incorporated in the project.

(E) Noise problems for which no apparent solution is available.

(vi) *Water quality impacts.* Include in this section a discussion on significant water quality impacts, including summaries of analyses and consultations with the agency responsible for the State water quality standards. Possible water quality impacts related to highways include: erosion and subsequent sedimentation problems; use of deicing, weed, rodent and insect control products; waste water disposal at safety roadside rest areas; spillage of poisons or chemicals by trucks into a water supply system; and contamination of surface and ground water supplies and of recharge areas by polluted fill material.

(vii) *Wetlands and coastal zones impacts.* This section will summarize the anticipated significant impacts on wetlands lands and coastal zones, including analyses, consultations and efforts to reduce the impact. Where applicable, the discussion should set forth any inconsistencies with wetlands or coastal zone management programs.

(viii) *Stream modification or impoundment impacts.* This section will include a summary of information which is necessary to comply with 16 U.S.C. 662(a). Briefly, 16 U.S.C. 652(a) requires consultation with the U.S. Fish and Wildlife Service and the appropriate State agency when a Federal action involves impoundment (surface area 10 acres or more), diversion channel deepening or other modification of a stream or body of water. The draft

EIS is to include a summary of the early consultation.

(ix) *Flood hazard evaluation.* When an alternative under consideration significantly encroaches on a flood plain, this section will include a summary of studies and consultation made for compliance with Part 650, Subpart A of this chapter, or information evidencing that such requirements can be met during project development.

(x) *Construction impacts.* In general, adverse impacts during construction will be less important than long-term impacts. However, if appropriate, the EIS should discuss significant impacts (particularly air, noise and water) associated with construction. Also, where applicable the impact of the proposed disposal method and the impact of borrow areas should be discussed.

(3) This section will also include a discussion of practicable and feasible measures to avoid or reduce the adverse impact, and their relative cost and benefits, where appropriate. The discussion should include the full range of reasonable measures to resolve or minimize anticipated problems and the pros and cons of each.

(j) *Alternatives.* (1) This section shall include a discussion, with maps and other visual aids, as appropriate, of the reasonable alternatives studied in detail, including those that might enhance environmental quality or avoid some or all of the adverse environmental effects. Examples of such alternatives include alternate locations and designs, not implementing the proposed action, postponing the action, providing a lower level of service, providing a reduced facility (lanes/design), and an increase or decrease in public transportation.

(2) The probable beneficial and adverse effects and costs of reasonable alternatives are to be described in a manner consistent with the scale of the proposed highway improvement and significance of the impact. The discussion of environmental impacts in this section includes significant impacts associated with the alternatives themselves, as opposed to the discussion of regional environmental im-

acts associated with implementing the action.

(3) The draft environmental statement should indicate that all alternatives are under consideration and that a specific alternative will be selected by the HA following the public hearing. The final environmental statement will be prepared for the selected alternative.

(k) *Probable adverse environmental effects which cannot be avoided.* Unavoidable impacts such as water, noise or air pollution; damage to life systems; threats to health; undesirable land use patterns; effects on minorities, etc., will be summarized in this section. These will be adverse environmental effects identified in paragraph (i) of this section for which the use of reasonable corrective or abatement measures will not reduce the impact to acceptable levels.

(l) *The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.* This section should contain a brief discussion of the extent to which the proposed action involves trade-offs between short-term environmental gains at the expense of long-term environmental losses, or vice-versa, and a discussion of the extent to which the proposed action forecloses future options. In this context, short-term and long-term do not refer to any fixed time period, but should be viewed in terms of the environmentally significant consequences of the proposed action. The gains (short-term and long-term) may be the benefits associated with a proposed highway to the area or region such as improved transportation, reduction of traffic congestion, improvement in air quality, reduction in noise, improved economic base, accessibility, improved development potential, etc. The losses (short- and long-term) may be the disadvantages associated with the proposed highway, such as use of land by the highway, use of land for highway-associated developments (residential and industrial), loss of parks and recreation areas, and increased pollution (air, water and noise) and impacts on open space, wetlands, etc.

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(m) *Irreversible and irretrievable commitments of resources.* This requires an identification of the extent to which the irreversible adverse effects (see paragraph (k) of this section) curtail the range of potential uses of the environment. "Resources" means the full range of natural and cultural resources committed to loss or destruction by the action and is not to be interpreted to mean only the labor and materials committed to the project. A transportation facility may precipitate other related actions such as land development, exploitation of resources, travel, etc., that could induce a significant irreversible commitment which would curtail other use of the area.

(n) *The impact on properties and sites of historic and cultural significance.* (1) To determine whether the project will have an effect on properties of State or local historical, architectural, archaeological, or cultural significance, the HA should consult with the State Historic Preservation Officer (SHPO), with the local official having jurisdiction of the property, and where appropriate, with historical societies, museums, or academic institutions having expertise with regard to the property.

(2) This section of the draft EIS should contain an identification of properties included in or eligible for inclusion in the National Register and an evaluation of the effect the proposed action would have on such properties. It should also contain a record of the coordination with the SHPO concerning the identification of such properties and the evaluation of effect.

(3) This section of the final EIS should also contain (a) documentation supporting a finding of no adverse effect and a record of coordination with the Executive Director, Advisory Council on Historic Preservation (ACHP), or (b) an executed Memorandum of Agreement when an adverse effect has been established, or comments from the Council after consideration of the project at a meeting of the ACHP and an account of actions to be taken in response to the comments of the ACHP.

(o) *Comments and coordination.* (1) The draft EIS shall include a summary of coordination and public and minority involvement during the development of the project and pertinent comments received during the coordination.

(2) The draft EIS shall be revised, as appropriate, to reflect the consideration given to substantive comments received. The final EIS shall include a copy of all substantive comments received (or summaries thereof where response has been exceptionally voluminous), along with a discussion of each substantive comment and suggestion. When the draft EIS is revised as a result of comments received, the copy of the comment should contain marginal references indicating the page and paragraph where revisions were made or the discussion of comments should contain such references.

(3) Any letters or material received from a commenting entity which is not legible when reproduced may be summarized by the HA. Every effort shall be made to insure that the statement will be legible when reproduced.

(4) Any unresolved environmental issues and efforts to resolve them would be discussed in this section.

(5) The final EIS should contain a summary and disposition of substantive social, economic, environmental and other comments made at the public hearing, including the alternatives which were raised.

[39 FR 41805, Dec. 2, 1974, as amended at 41 FR 9321, Mar. 4, 1976]

§ 771.19 Section 4(f) statements.

(a) The purpose of a section 4(f) statement is to document the consideration, consultations and alternative studies for a determination that there are no feasible and prudent alternatives to the use of land from a publicly owned park, recreation area, or wildlife and waterfowl refuge of national, State or local significance, as determined by the Federal, State or local official having jurisdiction thereof; or any land from a historic site of national, State or local significance as so determined by such official. The purpose of the section 4(f) statement is also to support a determination that the pro-

CHAPTER 7
FOOTNOTES

1. 23 U.S.C. §128
2. Id. §(a)
3. Id.
4. Id. §§(a) and (b)
5. Id.
6. Id.
7. Id.
8. 23 C.F.R. §790.1 et seq.
9. Linnecke v. Department of Highways, 76 Nev. 26, 348 P.2d 235, 238 (1960)
10. Swain v. Brinegar, 378 F. Supp. 753, 757-758 (S.D. Ill. 1974); rev'd on other grounds, 517 F.2d 766 (7th Cir. 1975)
11. Concerned Citizens for Preservation of Clarksville v. Volpe, 445 F.2d 486 (5th Cir. 1971)
12. County Highway Com'n of Rutherford County v. Smith, 454 S.W.2d 124 (Ct. App. Tenn. 1969).
13. 42 U.S.C. §4321 et seq.
14. 42 U.S.C. §4321
15. 42 U.S.C. §4332
16. 42 U.S.C. §4332(c)
17. 23 C.F.R. §771.18 (1979)
18. 42 U.S.C. §4321
19. Environmental Defense Fund v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972)
20. Id. at pp. 300-301
21. RCWA 43.21C
22. RCWA 43.21C.010
23. RCWA 43.21C.030

24. Loveless v. Yantis, 82 Wa.2d 754, 513 P.2d 1023 (1973)
25. RCWA 43.21C.070
26. Juanita Bay Valley Community Asso. v. Kirkland, 9 Wa. App. 59, 510 P.2d 1140 (1973)
27. Loveless v. Yantis, supra, note 26
28. RCWA 43.21C.087
29. RCWA 43.21C.090
30. See Chapter Two, Part IV.
31. RCWA 80.50.010 et seq.
32. 33 U.S.C. §1501 et seq.
33. P.L. 93-627 §3(10)
34. P.L. 99-627 §5(c)(2)
35. Id. §4(c)
36. Id. §§4(c) 4, 9, and 10
37. Id. §6
38. Id. §5
39. Bosselman, Feurer, Richter, Federal Land Use Regulation, pp. 168-169, P.L.I. (1977)
40. Id. p. 169
41. P.L. 99-627 §5(c)
42. Va. Code Ann. §15.1-1032 et seq.
43. Va. Code Ann. §15.1-1032
44. Va. Code Ann. §15.1-1033
45. Va. Code Ann. §15-1.1034
46. Id. §15.1-1035
47. Id. §15.1-1036

48. Id. §15.1-1037
49. Id. §15.1-1040
50. Id. §15.1-1041
51. Id. §15.1-1042
52. Bosselman, Feurer, Richter, supra, p. 315
53. 16 USC §497
54. 36 C.F.R. §251.1 (1979)
55. Bosselman, Feurer, Richter, supra, p. 318
56. Bosselman, Feurer, Siemon, The Permit Explosion, The Urban Land Institute (1976)

CHAPTER EIGHT

TAXATION AS A LAND USE CONTROL

I. INTRODUCTION

In its report, "Planning and Management of the New Jersey Pinelands," the Governor's Pinelands Review Committee noted:

While tax and fee systems are normally constructed to generate revenues, the power of taxation may also serve as a deterrent to development. The fact that land is usually taxed according to its highest and best use serves to encourage development, as landowners attempt to maximize returns on investment.

The Committee subsequently urged that four tax devices be studied for their potential as land use controls: (1) preferential assessment; (2) user and benefit fees; (3) urban and rural service areas; and (4) windfall taxes. This chapter will analyze each of these four techniques and discuss their possible utilization in the Pinelands.

II. PREFERENTIAL ASSESSMENT

A. Introduction

New Jersey is one of 42 states which, at the time of the Council on Environmental Quality's 1976 report

entitled "Untaxing Open Space," had adopted some form of preferential assessment.^{1/} In 1963, Article 8(1)(b) of the New Jersey Constitution was amended so as to authorize the legislature to enact statutes:

to provide that the value of land, not less than 5 acres in area, which is determined by the assessing officer of the taxing jurisdiction to be actively devoted to agricultural or horticultural use and to have been so devoted for at least the 2 successive years immediately preceding the tax year in issue, shall, for local tax purposes, on application of the owner, be that value which such land has for agricultural or horticultural use.

Any such laws shall provide that when land which has been valued in this manner for local tax purposes is applied to a use other than for agriculture or horticulture it shall be subject to additional taxes in an amount equal to the difference, if any, between the taxes paid or payable on the basis of the valuation and the assessment authorized hereunder and the taxes that would have been paid or payable had the land been valued and assessed as otherwise provided in this Constitution, in the current year and in such of the tax years immediately preceding, not in excess of 2 such years in which the land was valued as herein authorized.

In the absence of preferential assessment, property tax officials are mandated to appraise land at its fair market value, which will take into account

potential development value. This will result in a higher tax than if the parcel were assessed at its value solely for agricultural use. Higher taxes conceivably leave an individual farmer in an income "squeeze" which may force him to sell the property. Preferential assessment laws are intended to alleviate this perceived "squeeze" by authorizing assessors to appraise eligible parcels strictly in accordance with their value as farmland.

New Jersey's Farm Assessment Act has been criticized over the years by a variety of New Jersey sources, including the New Jersey courts.^{2/} The fundamental objection is that while the Act provides tax breaks to property owners, it fails to prevent the conversion of agricultural farmland. It is perceived that speculators who have no intention of preserving land for agriculture or open space have been able to take advantage of the tax breaks afforded by the Act. The same criticisms have been leveled at preferential agricultural assessment tax devices utilized throughout the country.

B. Preferential Agricultural Assessment Techniques

There is no widely used preferential agricultural assessment model being used throughout the country.^{3/} This may result from the fact that these laws are enacted as a result of different motivations. Some states have enacted these laws to bolster farm income. Others have adopted laws which seem to be narrowly addressed to preserving the tradition of the family farm.^{4/} A third source of legislative motivation is the desire to preserve raw land. While most of these statutes restrict the preferential assessment to agricultural land, approximately one-third of the states permit the use of the device to preserve land for open space or recreational purposes.^{5/}

Nonetheless, preferential assessment laws can be classified into three categories: those featuring "pure" preferential assessment; deferred taxation; and restrictive agreements.

1. "Pure" Preferential Assessment

Under a pure preferential assessment statute, farmland will qualify for the special agricultural assessment regardless of whether the property owner is willing to impose any restrictive covenants upon the use of his or her land. In some states, a property owner need not even apply for preferential treatment if the assessor is satisfied

that the property is devoted to a qualifying use. What makes these statutes "purely" preferential is the fact that, once the property is converted to another use, there is no penalty or requirement that the property owner repay any portion of previously enjoyed tax benefits.

The "pure" preferential agricultural assessment statutes clearly provide the best deal to owners of agricultural land. The owner of eligible land is free to reap tax benefits without fear of incurring future penalties. This tax system is criticized because it is capable of providing land speculators with the same "free ride" enjoyed by genuine farm interests. The only objective apparently served by these laws is that they serve to bolster net farm income by reducing tax expenses incurred in farm operation.

2. Deferred Taxation

At the time of CEQ's comprehensive survey in 1976, 28 states authorized 32 different deferred taxation programs.^{6/} Unlike "pure" preferential agricultural assessment programs, these statutes call for a "rollback" once the property is converted to non-agricultural use in order that previously enjoyed tax benefits may be recaptured. The period covered by the rollback varies from state to state.^{7/} Article 8, § 1(b) of the New Jersey Constitution, which qualifies as

a "deferred taxation" provision, calls for recapture of accrued tax benefits for a period which, in practice, amounts to three years. Some statutes also call for the payment of interest on tax benefits recaptured during the rollback period.^{8/}

The major criticism of deferred tax programs is that they fail to prevent raw land from being converted to non-agricultural purposes where the market demand for development becomes great. This criticism is more fully discussed below.

3. Restrictive Agreements

Each preferential agricultural assessment law will define eligible farmland in different ways. In New Jersey, for example, land must be at least five acres in area and produce a required amount of income per acre per year for the previous two-year period in order to qualify for the preferential assessment.^{9/} In North Carolina, the property must be at least ten acres in area, have produced an average gross income of \$1,000 per year for the preceding three years, and have been the owner's place of residence for the preceding seven years.^{10/} In Montana and Alaska, the land must produce a stated percentage of the owner's annual gross income.^{11/}

The unique feature of "Restrictive Agreement" statutes is that, in addition to the foregoing, the

property owner must enter a contract with local authorities restricting his use of land. This agreement may be capable of enforcement by means of court-ordered specific performance or injunction as well as by monetary penalties or recapture of previously enjoyed tax benefits.^{12/} These "Restrictive Agreements" differ from open space easements in that, under open space easement legislation, the property owner conveys a property interest in the form of an easement to the municipality. The assessor then appraises the fair market value of the parcel in his usual fashion, except that his appraisal must take the existence of the easement into account. Conceptually, the acquisition of open space easements in this manner does not constitute a differential tax assessment program.

"Restrictive agreement" legislation often requires that, in order to be eligible, the property first be deemed worthy of preservation. In California, the property must be in an agricultural preserve of at least 100 acres so designated in a general plan and must be suitably restricted by zoning or some other means to permissible uses within two years.^{13/}

The major disadvantage of restrictive preferential tax assessment programs is that while farm owners in more distant rural areas will be willing to enter the agreements,

farm owners near the immediate urban fringe will not. As restrictions become more rigorous, fewer agreements will be entered.

C. Criticisms of Preferential Assessment Programs

A great deal of literature addresses the shortcomings of preferential agricultural tax assessment programs. The major points of emphasis are as follows:

1. The Incentives Provided by Statute Are Insufficient to Prevent Conversion to Non-Agricultural Uses

Given the number of preferential agricultural assessment laws, there are surprisingly few empirical studies which analyze the impact of the legislation. Nonetheless, the author of one recent law review article on the subject has concluded:

. . . a significant number of those studies -- by far the majority of those done -- have concluded that such programs will not have a significant impact on the pace at which undeveloped land disappears.^{14/}

The CEQ report concludes:

With respect to the goal of retarding the conversion of farm and other open land, differential assessment is marginally effective and its cost in terms of tax expenditures is high, in most cases so high as to render it an undesirable tool for reaching this goal.^{15/}

One New Jersey analyst concludes that sewer moratoria, the impoundment of federal sewer money, or increases in interest rates play much more significant roles in deterring the development of open spaces.^{16/}

2. Restrictive Programs Fail to Enroll Farmland on the Urban Fringe

Programs which confer the preferential assessment on the condition that the property owner first enter a restrictive, enforceable agreement not to convert the property to non-agricultural uses for a specific number of years generally fail to enroll property near the urban fringe.^{17/} The CEQ report concludes that, "The clear evidence in California is that only those owners who are certain they will not convert their lands within ten or fifteen years have signed up under the Williamson Act."^{18/}

3. Stiff Recapture Provisions Are Unable to Prevent Conversion

Recapture provisions during "rollback" periods appear incapable of deterring conversion where market demand for development is high. The prevalent opinion of New Jersey property owners interviewed by the CEQ study team was that the statutory rollback tax has little if any effect on the decision to sell.^{19/} A similar conclusion

was reached in a study conducted in the state of Washington. One commentator added that, "this result is particularly significant because Washington has among the most severe recapture and penalty provisions of all the programs that have been adopted."^{20/}

4. Preferential Assessments May Cause Local Tax Rates to Increase

Individual real property tax bills are the product of the multiplication of the property's assessed value for tax purposes by the applicable tax rate for the local jurisdiction. These tax rates are determined by dividing that portion of the jurisdiction's anticipated expenses which are to be paid by means of real property tax levies by the total assessed value of real property within the jurisdiction. Because preferential agricultural tax laws lower the assessed value of property within a jurisdiction, they tend to exert an upward pressure on tax rates, particularly where there is a significant amount of eligible agricultural land within the jurisdiction.^{21/}

In 1971, California's Williamson Act was amended to permit participatory local governments to receive "subventions" from the state to replace some of the revenue which was lost as a result of the agricultural assessment. The

Council on Environmental Quality has also concluded that states which mandate differential assessment should provide at least partial compensation for the tax losses which result, on the theory that the benefits of preserving agricultural and open space extend beyond the boundaries of the local taxing jurisdiction in which the differentially assessed land is located.^{22/}

D. Advantages of Preferential Assessment and Their Potential Relevance to the Pinelands

Academic interest in the use of real property taxation as a land use control derives largely from the conclusion of some commentators that American zoning has deteriorated into a permit system which is incapable of resisting development pressure.^{23/} While one commentator suggests that zoning itself "may be able to achieve the land use objectives offered to support differential tax systems . . .,"^{24/} the Council of Environmental Quality has concluded that it is a useful component of a broader approach which should have the following characteristics:

- a. Eligible land should be designated specifically following studies of its capability for agriculture, the need for farmland and land in other open uses, and the projected demand for land for urban development, vacation houses, strip mining, etc. It is especially important that the agricultural districts designated be large enough to be functionally and

economically viable and located so that they will be relatively free from intrusion of urban and suburban activity. The designation of these areas will determine large scale land use patterns. Therefore, designation should be made by state, regional, or possibly by county government, rather than by local government.

b. Strict controls should be placed on the development of designated land. If these controls exceed the limits of police power regulation, compensation should be paid to the owners, by such techniques as public purchase of development rights or the transfer of development rights. Funds for the public purchase of rights should be raised by the level of government which designates the eligible land, the major part of the funding coming from special levies on other land when it is developed. A capital gains tax covering at least a 15-year period would be one such levy.^{25/}

III. USER AND BENEFIT FEES

A. Introduction

Since user and benefit fees are primarily cost-allocation devices, they cannot directly serve the Commission's goal of devising a comprehensive plan which will preserve appropriate agricultural land uses and discourage piecemeal development. The only way in which user and benefit fees can deter development is by becoming so onerous that a would-be developer would perceive, at the outset of his effort, that their cost cannot be effectively passed on to the consumer in the given market. As will be indicated

below, however, there are legal limits to permitted size of user and benefit fees.

B. User and Benefit Fee Techniques

1. Development Exactions

Development requires the installation of costly facilities, such as streets, street lighting, sidewalks, sewer and water utilities, parks and public schools. In developing areas, these facilities are no longer paid for by the municipalities. Increasingly, local governments are assuring that these facilities are provided by specifying that they must be installed or guaranteed by the developer before subdivision, zoning and annexation approvals are forthcoming. Exactions may range from the point where the benefit inures primarily to the particular development -- as with curbs or sidewalks -- to a point where the benefit is substantially enjoyed by the whole community. Where improvements will be off-site -- as is often the case with schools or sewage plants -- the exactions will typically be in the form of money payments.

State subdivision statutes are often the source of authority for the imposition of exactions in exchange for municipal development approval. The New Jersey Subdivision Act, for example, explicitly authorizes municipalities to require developers to supply adequately designed streets,

public water facilities, drainage, shade trees, sewerage, public land, open space, flood plain control and soil conservation measures.^{26/} Off-site water, sewer, drainage or street improvements which are necessitated by the subdivision may also be required, provided they are based upon a comprehensive utility service plan and that other property owners benefiting from the facility pay a pro-rata share of their cost.^{27/}

A significant area of dispute concerns requirements that a developer contribute raw land for schools or public use. The New Jersey Subdivision Act explicitly states that a subdivision ordinance "shall not require, as a condition of the approval of a planned development, that land proposed to be set aside for common open space be dedicated or made available for public use."^{28/} However, if the municipality's master plan or official map provides for the reservation of designated streets, public drainageways, flood control basins, or public areas in the proposed development, before approving a subdivision plat the municipality may require that these areas be shown on the plat in locations and sizes suitable to their intended uses.^{29/} But the municipality can only require such a reservation for streets, roads, flood control basins or public drainageways "necessitated by the subdivision or land development." And even

where these facilities are so necessitated, the municipality must pay for what it acquires:

Unless during such period or extension thereof the municipality shall have entered into a contract to purchase or institute condemnation proceedings according to law for the fee or a lesser interest in the land comprising such streets, ways, basins or areas, the developer shall not be bound by such reservations shown on the plat and may proceed to use such land for private use in accordance with applicable development regulations. The provisions of this section shall not apply to the streets and roads, flood control basins or public drainageways necessitated by the subdivision or land development and required for final approval.

The developer shall be entitled to just compensation for actual loss found to be caused by such temporary reservation and deprivation of use. In such instance, unless a lesser amount has previously been mutually agreed upon, just compensation shall be deemed to be the fair market value of an option to purchase the land reserved for the period of reservation; provided that determination of such fair market value shall include, but not be limited to, consideration of the real property taxes apportioned to the land reserved and prorated for the period of reservation. The developer shall be compensated for the reasonable increased cost of legal, engineering, or other professional services incurred in connection with obtaining subdivision approval or site plan approval, as the case may be, caused by the reservation. The municipality shall provide by ordinance for a procedure for the payment of all compensation payable under this section.30/

One New Jersey commentator, John M. Payne, has analyzed whether a revised state statute which explicitly authorized the practice of requiring the conveyance of raw land to a municipality would be constitutional. He concluded that it "would certainly be of dubious validity on the basis of the 'shared benefit cases'" -- that is, New Jersey cases which have held that there must be a cost allocation based on such factors as the extent of the benefit conferred on the subdivision, the cost of the improvement, and the extent to which the improvement is necessary to protect neighboring property.^{31/} He added that such a statute could only be applied in "an extremely large subdivision in which virtually all the benefits of the school, the park, or other facility would be enjoyed by the residents."^{32/} The high courts in other states are divided on the question, with a shift occurring in favor of upholding the constitutionality of park and school site dedications or payments of fees in lieu thereof. The California Supreme Court, in Associated Home Buildings of the Greater East Bay, Inc. v. City of Walnut Creek, concluded that the weight of modern decisions upholds "reasonable" conditions as constitutional, although not exclusively for the benefit of the proposed development, where they are authorized by statute.^{33/} The result in any given case

may clearly depend on the standard applied by the court. The Illinois Supreme Court takes the position that, "If the . . . burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property. . . ." ^{34/} The Wisconsin Supreme Court seeks a "rational nexus" between the exaction and the public needs generated by the new development; ^{35/} New York applies the broadest standard of all, seeking merely an "incidental relationship" between the exaction and the new development in order to uphold its constitutionality. ^{36/}

2. Impact Fees

Impact taxes usually take the form of a fixed levy upon a given unit, such as bedrooms or the square feet contained in a building. While both exactions and impact fees serve the same purpose -- to allocate the public costs of new development to the development itself -- they can be distinguished in several ways. First, they often finance different services. Exactions tend to relate to the subdivision's infrastructure, while impact taxes are often used to fund a broad range of municipal services, including operating costs of capital improvements. Second, since the impact fees are often collected before construction

begins, they provide an immediate source of revenue to the community. Third, to the extent impact taxes are spelled out in a municipal ordinance, they can provide a degree of certainty to a would-be developer attempting to estimate his costs before he begins to seek zoning or subdivision approval. The exaction system, in many states, is often more informal and open to negotiation. Despite the existence of a published fee schedule, however, impact taxes can be the subject of dispute where it is difficult to agree how much "impact" can be attributed to a single development. In contrast, exactions tend to take the form of concrete infrastructure improvements in or near a subdivision, with the result that their usefulness to the developer's property is more easily perceived. It is common for some municipalities to pursue exactions and then to charge impact taxes in addition.^{37/}

The impact tax has not avoided judicial criticism. When one New Jersey municipality dramatically increased its building permit fees despite the fact that the cost of regulating new construction had not increased appreciably, the New Jersey Supreme Court held the impact was invalid as an ordinance enacted without statutory authority. The court indicated, however, that the state could authorize revenue-raising impact taxes.^{38/}

In Utah, the state Supreme Court found an impact tax invalid despite statutory authorization.^{39/} First, it was found to violate a requirement that taxes be "uniform in respect to the class on which they are imposed." Second, the court indicated that the impact tax placed "a disproportionate burden of the cost of city government on the class of new households," thus violating constitutional guarantees of equal protection. Florida courts have invalidated impact taxes on several occasions, but have indicated that such charges might be acceptable if (1) they did not exceed the proportionate share of the capital facility properly pro-rated to the new development; (2) capital facility expansion is reasonably required; and (3) the funds collected were earmarked for the required expansion.^{40/}

3. Special Assessment Financed Eminent Domain (ZSAFED)

Professor Donald Hagman of UCLA's School of Law has found a rather unusual user/benefit approach in what he refers to as the "footnotes of zoning history."^{41/} The acronym which he calls ZSAFED -- for Special Assessment Financed Eminent Domain -- embraces zoning, eminent domain, and special assessment concepts. His first historical example of ZSAFED's use relates back to 1893, in Kansas City, Missouri, where local residents attempted to preserve

a residential boulevard by petitioning the city to exclude business uses. Property owners injured by this restriction would be paid by funds assessed against those property owners who were benefited. The scheme was carried out by ordinance, which survived a legal attack on the basis that there was no "taking" for a public use involved.^{42/} ZSAFED's application to another Kansas City neighborhood withstood a challenge before the state Supreme Court in 1969.^{43/}

A 1915 Minnesota statute, which applied only to Minneapolis, St. Paul, and Duluth, brought ZSAFED to another state.^{44/} The act provided that the city council could create restricted residential districts on petition of 50% of the property owners in the area. City-appointed appraisers then determined the amount of damages caused each parcel by the taking of non-residential development rights, and determined and assessed benefits in the district. Net benefits were then specially assessed by the City Council. While the statute was upheld against attack,^{45/} the act proved to be flawed in that it did not contemplate the need for changes in ZSAFED-imposed restrictions. In 1923, the act was amended to provide that, on petition of 50% of the property owners in a district, the restrictions could be undone with damages and benefits assessed as in

the formation of the district. Still later amendments authorized the municipalities to issue bonds secured by special assessments so that funds could be raised quickly to pay ZSAFED damages..

While legislation proposing to introduce ZSAFED to Los Angeles and the state of Oregon has been introduced in recent years, Professor Hagman notes that ZSAFED needs modernization if it is to be useful in an era where zoning is well established. He notes that ZSAFED's appraisal costs need to be lowered, while the quality of ZSAFED appraisals must be increased. In addition, he believes minor changes in value should be ignored, and that since any form of ownership involves risk, not all damage should be mitigated or recaptured. Lastly, Hagman feels ZSAFED is too static as a land use control if modifications of the restrictions can occur only upon the petition of local property owners. Hagman recommends that restrictions be amended by referendum or municipal action. Thus improved, Professor Hagman states that a modernized ZSAFED could replace "some, much, or all of special assessments for particular projects, exactions on development permissions, and impact taxes."^{46/}

C. Disadvantages of Benefit and User Fees

1. Where Properly Applied, These Fees Cannot Preserve Open Areas or Deter Growth but Merely Allocate Its Cost

As indicated above, user and benefit charges can only deter growth where their impact is so onerous that a developer is unable to successfully market his improvements to consumers. Both statutes and case law tend to restrict the size of permissible user and benefit fees, thus restricting their use for this purpose.

2. Without Proper Codification, These Fees Can Be Unfairly Applied

Unless reduced to statute or ordinance, exactions and impact fees can become a "chip" in the negotiations which take place between developers and municipalities over applicable building, zoning and subdivision restrictions. Without proper codification, the "negotiations" resemble extortion from the developer's viewpoint.

Even where impact fees are reduced to a codified schedule, there is some difficulty in determining the true extent of the fiscal impact a development may have on a community.

3. These Fees Have an Impact on the Cost of Housing to the Consumer

There can be no question that a significant portion of these fees, which are nominally charged to the developer, will be passed through to the consumer. Impact fees which have no relationship to the public impact of a new subdivision

thereby require newcomers to pay for public facilities which previous homeowners refused to build or improve for themselves. There would appear to be little equity in this technique. The practice of raising impact fees to their hilt, of course, has a particular impact upon low and moderate income homebuyers.

4. ZSAFED Is Not Necessary to Address the Needs of Rural Areas

ZSAFED was a precursor to zoning. It was utilized in urban centers such as Kansas City and Minneapolis to compensate land owners for land use restrictions at a time when the power of municipalities to zone was not widely accepted. While the modernization of ZSAFED has received some attention, it would appear to contribute little to rural areas under development pressure. In the modern era, these areas would presumably be zoned "agricultural" under existing county zoning. When development pressure begins, county authorities now have the legal tools to resist rezoning applications until such time that a comprehensive plan can be implemented. If county authorities act in a timely fashion, their planning efforts can successfully resist charges of unconstitutionality at little cost to the public. In short, ZSAFED is less necessary in the 1980s than it was in the 1890s.

D. Advantages of User and Benefit Fees; Application to the Pinelands Area

As indicated above, user and benefit charges are primarily a cost allocation device. They do not easily lend themselves to the goal of preserving agricultural uses and discouraging piecemeal and scattered development. To that extent, they cannot address the primary mission of the Pinelands Commission.

Where development appropriately occurs, however, these fees can be an effective cost allocation tool. In order to obtain reasonable contributions without incurring charges of "extortion," Nevada now authorizes cities and counties which have adopted a master plan to impose a residential construction tax for the purpose of acquiring, improving and expanding park, playground or recreational facilities in the immediate area insofar as it is "practical and feasible."^{47/} The requirement that an area have a comprehensive plan as a prerequisite to imposing the tax helps assure that the tax is necessary and will be well spent; the locational requirement provides some nexus between the source of the funds and their ultimate beneficiaries. This Nevada statute may provide useful insights to any New Jersey effort to expand the scope of permissible exactions or impact taxes in a constitutionally permissible manner.

IV. URBAN AND RURAL SERVICE AREAS

A. Introduction

As indicated above, the cost of public infrastructure is often being paid in the form of development exactions and impact fees. While these can be effective cost-allocation devices, they may fail to deter or direct the course of growth. The development of urban and rural service areas can succeed where user and benefit fees fail.

The American Society of Planning Officials has described the urban and rural service area concept as a technique which "distinguishes areas by the level of service they can be expected to receive and therefore the level of taxation to pay for those services."^{48/} In theory, the public decision to limit services to specified areas also reduces the tax burden on farmlands, thus encouraging their preservation. ASPO notes that "it is a system logically combined with other controls, such as the capital program, that specify where facilities will be made available and where they will not, or which areas will be developed and which deferred."^{49/}

B. Techniques

Before establishing precise urban and rural service areas, it is necessary to arrive upon a set of goals, study the region's physical assets and problems,

and create an effective administrative and political structure. The goals of an Urban Growth Policy Agreement recently agreed to between the City of Salem, Oregon, and Marion and Polk Counties, are to:

(1) contain urban development within planned urban areas where basic services such as sewers, water facilities, and police and fire protection can be provided efficiently and economically; (2) conserve resources by encouraging orderly development of land; (3) preserve farmland and open space; (4) make more economical use of local tax dollars in locating facilities and providing services for the benefit of all citizens within the urban growth area; (5) provide property owners greater security in long-range planning and investments; (6) make it impossible for utility extensions, transportation facilities, and schools to be designed and located so as to match population growth more closely; and, (7) preserve and enhance the livability of the area.^{50/}

In Salem, the subsequent investigation of the urban area required three years of public hearings and planning. The resulting urban/rural boundary is said to be viewed as a "policy rather than a demarcation line."^{51/} The boundary includes an area expected to accommodate projected growth in the vicinity of Salem, Marion and Polk Counties for twenty years.

In order to implement the urban/rural service area policy in metropolitan Salem, it was necessary to

rely upon intergovernmental cooperation at the municipal and county level. A state-created commission provided the impetus. In 1969, the legislature initiated the planning process by creating the Marion-Polk County Local Government Boundary Commission, which solicited ideas from local Councils of Government. Legislation in 1973 gave the Boundary Commission authority over formation and expansion of private water companies and extensions of water and sewer lines.^{52/} A statement of intent was signed in August of 1973 by the City of Salem and the boards of commissioners for Marion and Polk Counties to develop plans and policies consistent with the urban growth boundary concept. A formal Urban Growth Policy Agreement was entered on

The key elements of enforcing the Policy Agreement, according to ASPO, are controlled access to sewer and water facilities and timed and conditional annexation to the City of Salem.

Where a subdivision, rezoning, or building permit application in either county requires connection to sewer and water systems, the counties require annexation to the city or service district first. The city must agree to provide sewer and water service to the property in question before the boundary commission will give the required approval to annex.^{53/}

Before the City of Salem can agree to provide utility service, contractual agreements between the City and

utility districts require a City finding that the development conforms to the City's master plan.

In Minnesota, an independent administrative body has been created to handle municipal annexations, incorporations, consolidations and detachments.^{54/} A legislatively-created process called "orderly annexation" authorizes the Municipal Commission to:

set aside designated territory for future annexation to a municipality until such time as the annexing entity was willing and prepared to furnish urban services and the territory was or would shortly become urban or suburban in nature. When these conditions were met, the commission could permit annexation, with a concurrent tax advantage to those in the territory to be annexed. Taxes would increase over a period of three to five years until they reached the rate of the annexing unit. The commission expects the procedure to allow villages to plan for servicing future growth while not annexing land until growth actually occurs.^{55/}

New proposals in the Twin Cities area suggest the use of "tiers" of development sectors, designed for encouraging or discouraging different types and intensities of development.^{56/}

C. Disadvantages of the Urban and Rural Service Area Technique

1. Whether the Creation of the Area Results in Appreciable Tax Reductions May Depend on the Local Tax Structure

There is little doubt that the creation of urban and rural service areas can minimize "leapfrogging"

characteristic of urban sprawl. Whether the resulting economies of scale in providing urban infrastructure results in appreciable real property tax reductions depends, however, upon a number of other factors. The rural service area may cross several municipal boundaries and include both incorporated and unincorporated areas. Whether the economies of scale provided by this technique will result in a reduction in tax bills may depend on the details of intergovernmental agreements to provide services to rural areas. In addition, the refusal to extend various public services to rural service areas could conceivably result in a decrease in assessed property values and result in upward pressure on tax rates in order to finance existing rural public services. Whether this occurs depends on the amount of "rural service area" property in a given taxing jurisdiction. In short, it is impossible to generalize about the impact of the urban/rural service area device on individuals' tax bills. If the expected tax impact is important to a given analysis, one must look carefully at how revenue will be collected and expended by pertinent governmental bodies.

2. An Attempt to Explicitly Reduce Tax Rates in Rural Service Areas May Be Unconstitutional

Rural service areas do not enjoy the full range of services provided in urban service areas. Where urban

and rural service areas co-exist within the same jurisdiction, "rural service area" property may be taxed at the same rate as "urban service area" property, with the result that rural property owners may object. In 1962, the Supreme Court of Tennessee upheld the Davidson County charter which provided for taxation at one rate for a "general service district" embracing the total area of the county, and at another rate for an "urban service district" consisting of the total area of the principal city of Nashville.^{57/} Its ruling that the differential tax rate did not violate the equal and uniform taxation provision of the State Constitution, however, was based upon its interpretation of another constitutional provision authorizing the General Assembly to "provide for the consolidation of any or all of the governmental and corporate functions of a county and municipality."^{58/}

In New Jersey, any attempt to bifurcate applicable tax rates between urban service areas and rural service areas within a single jurisdiction would most likely be unconstitutional. Article 8, § 1(a) of the New Jersey Constitution states:

Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall

be assessed according to the same standard of value, except as otherwise permitted herein, and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district.

(Emphasis added.) In order to avoid this result, the boundaries of rural and urban service areas would have to become co-extensive with the boundaries of separate and distinct taxing districts.

D. Advantages of Urban and Rural Service Areas and Their Possible Application to the Pinelands

Much of the recent interest in taxation as a land use control is rooted in dissatisfaction with the ability of zoning mechanisms to deal with development pressure. Nonetheless, neither preferential assessments, user/benefit charges, nor the land gains taxes discussed below are -- by themselves -- capable of preventing the conversion of raw land or eliminating undirected urban sprawl. Perhaps the greatest advantage of the urban and rural service area concept is that it can result in a mechanism which combines zoning controls with the recent innovations in taxation.

The success of the urban and rural service area concept, however, hinges upon either a high degree of intergovernmental cooperation in the service area or, in the alternative, a reorganization of authority between

relevant jurisdictions. Zoning and annexation policies can only have a cumulative effect if they are adhered to throughout the metropolitan area. The economies of scale afforded by the urban/rural service area dichotomy can only result in lowered tax bills if urban jurisdictions cooperate in extending their existing resources to fringe areas on a reasonable basis, or if rural service areas can legally be taxed at lower effective rates.

V. WINDFALL TAXATION

A. Introduction

Professor Donald Hagman has defined a "windfall" as "any increase in the value of real estate -- other than that caused by the owner -- or by general inflation."^{59/}

Various devices have been introduced in English-speaking countries during the past century to tax "windfalls" and compensate "wipeouts" -- the latter defined by Hagman as decreases in the value of real estate other than those caused by the owner or general inflation.^{60/} This report will discuss the major devices introduced in Canada, New Zealand, England, Australia, and the United States to recapture "windfalls."

The British Housing and Town Planning Act of 1909 attempted to tax the windfalls and compensate the

wipeouts caused by planning activity.^{61/} In essence, it allowed property owners who believed they were injured by regulation to file claims for damages within a specified period of time, while local government could bring a similar action "to recover from any person whose property is so increased in value [by the comprehensive zoning plan] one-half the amount of that increase." Windfall recapture, however, was eliminated from English law as of July 1, 1948 because it was felt to be unworkable. Similar recapture provisions were eliminated from the laws of New Zealand in 1953. Four Australian states, however, subsequently authorized windfall recapture provisions in their planning acts. In New South Wales, the windfall recapture mechanism utilizes, in part, the tax assessment system already established for appraising property and handling property owner appeals. Not all of the increase in land value is taxed in order to maintain an incentive to develop and provide a margin against valuation errors.

The major failing of these "windfall" recapture experiments is that very few "windfalls" were recaptured. Few planning schemes were adopted while their recapture provisions were in effect, and the public conscience did not demand that the public reap its share of the "windfalls" that supposedly resulted. All parties concerned,

particularly assessors and landowners, were at a loss to separate the "windfall" created by the comprehensive plan from appreciation due to market demand, inflation, or from governmental activities unrelated to planning. The "wipeout" mitigation techniques encountered similar difficulties.

The idea of recapturing "windfalls," however, has persisted with a checkered history in a form adopted from the real property transfer tax. Real estate transfer taxes are a stamp tax imposed when a parcel of real property is conveyed from one owner to the other. Historically, it has been something of a fixed rate levy, not a tax on the change in the value of the parcel. Partly due to a growing desire to deter speculation in particular jurisdictions, land gains taxes labeled "special capital and real estate windfall taxes" (SCREWTS) by Professor Donald Hagman are receiving a great deal of attention. Like transfer taxes, they are payable on an event which changes the ownership or the status of the land. Unlike "windfall" recapture provisions derived from the British Housing and Town Planning Act of 1909, the SCREWTS taxes make no effort to exempt gains that are caused by inflation or general market demand, nor do they attempt to compensate "wipeouts" caused by zoning or planning regulations. Perhaps these

features, together with a stiff tax rate, have helped make the SCREWTS taxes introduced over the years in England, Australia, New Zealand and Canada so unpopular and short-lived.

B. Techniques

The motivation behind SCREWTS taxation could conceivably include the desire to raise general revenue, to recapture community-conferred increases in value, or to reduce land speculation and conversion by cooling market demand. SCREWTS intended to deter speculation will not tax gains where the property has been held by its owner for a long period of time. Windfall-recapture motivated SCREWTS, however, would not exclude long-term gains from the tax. Most SCREWTS enactments have exempted owner-occupied homes from the tax. These laws generally make the tax the responsibility of the seller and impose special liens upon the property in the event of non-payment. This results in great diligence on the part of the purchaser or his attorney to assure the tax is paid.

Two contemporary SCREWTS worthy of closer examination are presently in effect in Ontario and Vermont:

1. The Ontario Land Speculation Tax

Ontario's Land Speculation Tax^{62/} was enacted in response to spiraling land and housing prices. It was felt that the tax could stabilize land and housing prices

through reduction of speculative transactions which add no real value to the land, and that the tax could "recover for the public purse a major share of windfall gains from speculative land transactions which are not deterred by the tax."^{63/} Assuming that payment of the tax is not deductible for federal income tax purposes, the tax is levied at a rate of 20% of the gain in the value of land and improvements. The tax is based upon the difference in value at the time of the taxable disposition and the "adjusted base value." Adjusted base value includes the purchase price or value as of April 9, 1974 (if owned by the present taxpayer on that date), plus cost of improvements, net maintenance costs, and costs of acquisition or disposition.^{64/} Taxable events include:

- a. Sale or transfer of a beneficial interest in land;
- b. Sale, transfer or assignment of an option or transfer of land to comply with an opinion;
- c. Leases which, including renewals/ extensions, exceed 50 years.
- d. Transfers due to death of any person;
- e. Changes in the composition of any organization without share capital that has 50%+ of its assets in designated land, if such change alters control over a proceed from a subsequent disposition or use of land;
- f. The allotment/issue of shares of a corporation to which 50%+ of voting rights are attached when 50%+ of the assets of a corporation consist of designated land;

- g. The amalgamation, merger, or consolidation of any two or more corporations when 50% or more of the assets of any one consist of designated land and when that action has the effect of changing control over the use of the land or proceeds of subsequent disposition of land.65/

There are a number of allowed exemptions, including:

- a. Sale of mortgages;
- b. Intrafamily transfers of farm property which will remain in farm use;
- c. Disposition to a charitable organization;
- d. Disposition to a municipality or other governmental body;
- e. Where designated land is used as a tourist resort, for a commercial or industrial purpose other than renting residential units; as a principal residence of transferor, less than 11 acres; as a principal vacation property of transferor, less than 20 acres;
- f. Where the designated property includes a building or structure constructed by the transferor with a value not less than 40% of the total proceeds at the time of disposition;
- g. Where the designated property includes a building that the transferor renovated at a cost of not less than 20% of base value; where the building has a value at disposition not less than 40% of proceeds;
- h. Where designated land is included in a registered plan of subdivision, and the transferor has serviced the land so that building can commence and a building permit can be granted, and the buyer agrees to build on half the lots within 9 months and the remainder within 18 months;
- i. Where designated land is in a territory not incorporated into a municipality nor designated as a restricted

area by § 17 of the Public Lands Act;

- j. The sale of a former residence of a person over 65 years of age;
- k. Distribution of shares to shareholders upon winding up of or dissolution of a corporation;
- l. Residential investment property held for more than 10 years; if held for less time, the exemption is pro-rated.^{66/}

2. The Vermont Land Gains Tax

Vermont's Land Gains Tax,^{67/} enacted in 1973, does not contain an express statement of statutory purpose. Commentators believe, however, that the tax was imposed to deter the speculation which facilitates conversion of farmland and open space for "second home" use, and to provide revenues for financing a "circuit breaker" property tax relief system that was being introduced to limit the amount of property tax a household is required to pay to a percentage of its income. Unlike Ontario's tax, the Vermont tax excludes only increases in the value of improvements. The taxable basis and permissible deductions from the tax increment are calculated in accordance with federal law. Any transfer of title for consideration, in any form, is considered a taxable event, including leases exceeding 99 years in duration. The following are allowed exemptions from the tax:

- a. Property which is the principal residence of the transferor or purchaser, not to exceed 5 acres in size;
- b. Land owned by a nonprofit development corporation or a local public development corporation;
- c. Land held in excess of 6 years;
- d. Transfers not subject are those which occur as gifts, through death from estates, transfers to correct deeds, and straw transfers with no consideration;
- e. Sale of minerals, timber, or rights thereof;
- f. Sales by the United States;
- g. Cases where common owners partition and allocate portions of land without consideration.68/

The anti-speculation motivation behind the Vermont tax is reflected in the tax rate structure. The tax is imposed at a rate which varies with percentage of gain as compared to base value and holding period, with a range from a minimum of 5% to a maximum of 60%:

Years Land Held by Transferor	Gain, as a Percentage of Basis (Tax Cost)		
	0-99%	100-199%	200% or more
Less than 1 year	30%	45%	60%
1 year, but less than 2	25%	37.5%	50%
2 years, but less than 3	20%	30%	40% TAX
3 years, but less than 4	15%	22.5%	30% RATE
4 years, but less than 5	10%	15%	20%
5 years, but less than 6	5%	7.5%	10% <u>69/</u>

The Vermont Land Gains Tax was upheld by the state Supreme Court against charges that it violated the Equal Protection clause.^{70/} The court found the graduated structure of the tax schedule to be reasonable after observing that it was within the constitutional power of the State to deter land speculation.^{71/}

C. Disadvantages of Windfall Recapture Devices

1. Models Based upon the British Housing and Town Planning Act of 1909 Rely Heavily upon the Inexact Science of Appraising

A number of comprehensive planning statutes enacted in England, Australia, Canada and New Zealand in the past century have authorized property owners to petition for the mitigation of "wipeouts" suffered as a result of regulatory activity. These same acts have authorized governmental units to assess property owners in order to recapture "windfalls" bestowed by planning activity upon particular parcels. Most of these acts have been abandoned. Few governments attempted to capture windfalls. Perhaps more surprisingly, there was little interest among property owners in utilizing the legislative authorization to recoup "wipeouts."

A major flaw with approaches based upon the British Housing and Town Planning Act of 1909 is that

they institutionalize a cost/benefit allocation system where the particular costs and benefits are very difficult to isolate and define. To appraise the effect of these regulations, one must isolate the impact of government regulation amidst the flow of all the social, economic and geographical factors that lend to the value of real estate. Appraisers and other officials charged with this task found that they could not meet their statutory duties. Those who seek to revitalize the basic approach of these laws must count on breakthroughs in the field of appraising. The public may not believe that such breakthroughs have occurred, given continual public uneasiness with real property tax assessment practices.

In comparison, SCREWTS are much simpler taxes to administer. They do not attempt to isolate governmentally-conferred "windfalls." Most SCREWTS impose a rather stiff tax on all gain. The inequities of this approach are discussed below.

2. It Has Not Been Proven That SCREWTS Achieve Their Stated Objectives

Generally speaking, a legislature might enact a SCREWTS tax to: (1) recapture "windfalls" conferred by the public; (2) simply raise revenue, for whatever purpose deemed necessary; or (3) "cool off" speculation, and thus

deter the conversion of farmland or open space to other uses. Although a considerable number of SCREWTS have been enacted in England, Canada, New Zealand and Australia in the past century, it is unknown whether they achieved their intended purpose. Previous SCREWTS were very unpopular and thus very short-lived. The oldest contemporary SCREWTS is now about five years old.^{72/}

As indicated above, SCREWTS taxes are not designed to recapture "windfalls" bestowed by governmental zoning decisions. They collect revenue with a much broader brush, inviting the criticism that SCREWTS "double tax" the capital gains taxed by the federal government.

Based upon the data presently available, SCREWTS have not been proclaimed to be successful revenue devices. Part of the motivation behind Vermont's Land Gains tax was to fund a circuit-breaker tax relief program. As of 1978, the revenue actually collected was less than expected. Similarly, the tax has not been lucrative in Ontario.^{73/} Jurisdictions which might expect the tax to raise revenue as well as deter speculation should recognize that these goals are mutually exclusive. To the extent the tax deters speculation, there are fewer taxable events. In addition, the tax fails to catch certain transfers; i.e., conveyances of ownership interest which are "hidden" in non-taxable

form, such as transfers of trust or corporate interests. SCREWTS laws and regulations must become increasingly complex to close these loopholes. Nonetheless, Vermont has reportedly been administering the tax with a staff of four persons, and administrative costs in both Ontario and Vermont are stated to be 5%-10% of collected revenues.^{74/}

The successfulness of land gains taxes is particularly uncertain with respect to whether SCREWTS can achieve their most recently devised purpose: to deter speculation and the conversion of raw land. The enactment of SCREWTS taxes in Ontario and Vermont was immediately followed by a period of high interest rates, making it difficult to isolate the effect of the tax. Academicians have not yet analyzed the effect of these taxes from data available during the period of renewed real estate investment between 1976 and 1978. A 1978 article on the subject, analyzing data available up to 1976, concluded that "[n]one of the SCREWTS are broad enough to end all speculation in real estate; they may change its nature, amount, or direction, and actually increase the amount of speculation in some types of property."^{75/} Unfortunately for planners, most articles on the land gains taxes contain mere speculation on the effect of the tax. Opponents warn that SCREWTS taxation will result in the "squeezing out" of the small

investor, resulting in local oligarchies of large companies that can afford to either pay the tax or hold land long enough to be entitled to the exemption.^{76/} Some believe that, in holding land and assuming some of the risks of land development, speculators perform a socially useful function. These SCREWTS opponents conclude that it is preferable to deal with the problem directly by using existing planning and other control mechanisms.^{77/}

D. Advantages of Windfall Taxation and Its Application to the Pinelands

Although the data are not complete, it does appear that land gains taxes have the short-run effect of slowing the volume of land sales. Some analysts suggest that the tax has served a useful role in Vermont by simply slowing down the development process until the planners can determine how to deal with development pressure.^{78/} The long-term effects of SCREWTS taxes are less certain, partly because they were so unpopular that in Canada, England, New Zealand and Australia they were quickly repealed. Several suggestions have been forwarded to improve the longevity of a SCREWTS tax. Professor Donald Hagman has concluded that, "Neither windfalls will be recaptured nor wipeouts mitigated unless both steps are taken at the same time."^{79/} In short, the tax on "windfalls" would be more popular if the public

knew that "wipeouts" were being routinely compensated at the same time. Hagman suggests that SCREWTS be used to fund wipeout mitigation, partly because, "A good revenue raiser is required to fund wipeout mitigation."^{80/}

Second, the SCREWTS could be made more palatable by being indexed for inflation, and by exempting "retroactive" gains on land which accrued prior to the enactment on the tax. A major justification for imposing a SCREWTS is that property owners should not be entitled to community created increases in value. Where all or part of the increase is due to inflation, the community is not responsible for the increase and the seller has no real gain in purchasing power as a result of the transaction. The solution to the inequity is to adjust the owner's basis in the property according to changes in the Consumer Price Index. Objections to retroactivity can be mitigated by permitting the property owner's basis for the purpose of calculating gain to be the higher of its value on the date the tax was enacted or its acquisition price.

To the extent land gains taxes are successful in deterring rapid conversion of open space, these taxes are relevant to the work of the Pinelands Commission. As indicated above, the verdict on the long-term effect of these taxes is not in. The political acceptability of a

state-wide tax must be considered carefully in light of the unpopularity of SCREWTS taxes where they have been introduced. The Commission may want to investigate the legal, administrative, and political feasibility of SCREWTS taxation which would apply only in the Pine Barrens area. Such a tax would have to apply throughout the region, due to the fact that a locally imposed land gains tax may have the undesirable result of merely diverting speculation to other areas.

CHAPTER 8

FOOTNOTES

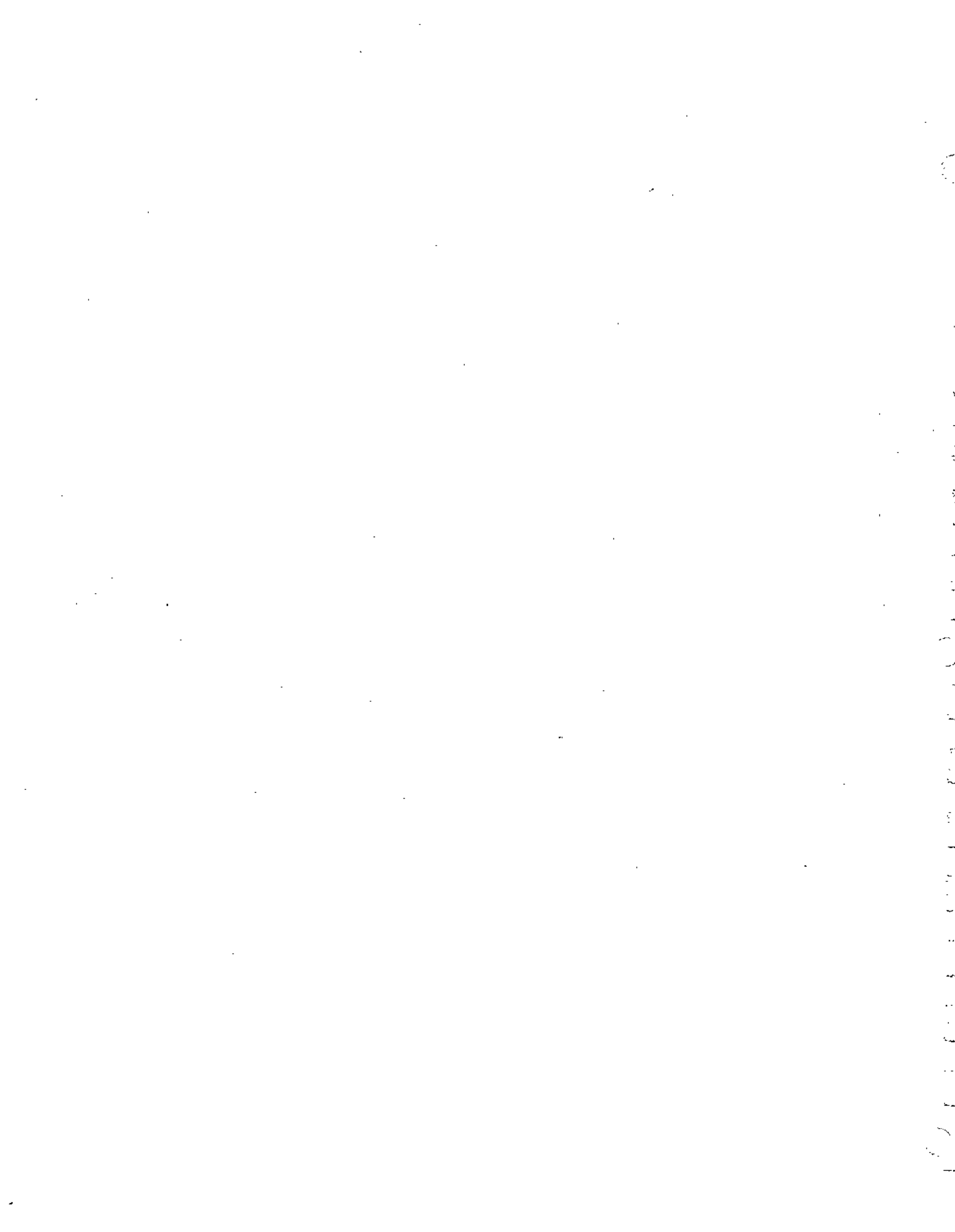
- 1 Council on Environmental Quality (CEQ), Untaxing Open Space (April, 1976) p. 5.
- 2 N.J.Stat.Ann. 54:4-23, et seq. See Kolesar and Scholl, Misplaced Hopes, Misspent Millions: A Report on Farmland Assessments in New Jersey (The Center for Policy Analysis, Princeton, N.J., 1972) for a critique. In Paz v. DeSimone, 139 N.J. Super. 102, 352 A.2d 609, Judge Gruccio of the Chancery Division of the Superior Court was called upon to settle a dispute as to whether a purchaser, a seller, or a title insurance company should be held responsible for payment of the roll-back taxes. In disposing of the case, the court cited Misplaced Hopes, Misspent Millions and noted in what can only be considered dicta that, ". . . the tax benefits of the Farmland Assessment Act serve to entice speculation and make its provisions common parlance to those involved in the buying and selling of property within its purview." 352 A.2d at 612.
- 3 CEQ, supra note 1, at 14.
- 4 In Texas, only landowners who are natural persons may qualify as beneficiaries of the preferential assessment.
- 5 Barry A. Currier, "An Analysis of Differential Taxation as a Method of Maintaining Agricultural Open Space Land Uses," 30 U. of Fla.L.Rev. 821 (1978).
- 6 CEQ, supra note 1, at 39.
- 7 See CEQ, supra note 1, at Table 1 for data on the rollback period required in various states.
- 8 See, e.g., Va. Code 58:796.10.
- 9 See N.J.S.A. 54:4-23.3-23.6 for presently applicable qualifications for agriculture and silvaculture.
- 10 See N.C.Gen'l Stat. 105-277.2 through 105-277.7.
- 11 CEQ, supra note 1, at 32.
- 12 See the discussion of California's Williamson Act in CEQ, supra note 1, at 273.

- 13 Gov't Code 51201, et seq. The 100-acre limitation, however, may be reduced by the city or county. The CEQ report indicates many counties have done so. CEQ, supra note 1, at 273.
- 14 Currier, supra note 5, at 821.
- 15 CEQ, supra note 1, at 115.
- 16 Kolesar and Scholl, supra note 2.
- 17 Gustafson and Wallace, "Differential Assessment as Land Use Policy: The California Case," 41 A.I.P. Journal 379, 381 (1975).
- 18 CEQ, supra note 1, at 43.
- 19 CEQ, supra note 1, at 158.
- 20 Currier, supra note 5, at 836, 837.
- 21 CEQ, supra note 1, at 158.
- 22 Id. at 122.
- 23 Hagman and Misczynski, Windfalls for Wipeouts (American Society of Planning Officials, Chicago: 1978), generally and at 527.
- 24 Currier, supra note 5, at 838.
- 25 CEQ, supra note 1, at 123.
- 26 N.J.S.A. 40:55D-39.
- 27 N.J.S.A. 40:55D-42. An analogous technique is municipally-imposed "tap-in," "tap-on" or "connection" charges upon property owners who will benefit from the extension of sewer or water facilities. New Jersey courts have been in agreement with the majority of other state courts in holding that while "oversizing" of these facilities may be required, it would be arbitrary and discriminatory to impose the entire cost upon the developer. See Divan Builders, Inc. v. Planning Board of the Township of Wayne, 66 N.J. 582, 334 A.2d 30 (1975). Apportionment of the cost among other property owners benefiting from the improvement is now required by New Jersey Statutes Annotated § 40:55D-42.

- 28 N.J.S.A. 40:55D-43(a).
- 29 N.J.S.A. 40:55D-44. Note a potential pitfall. A requirement that land be held out of a subdivision plat pending a decision on acquisition may require payment of the value of an option to purchase. See Lomarch Corp. v. Mayor and Common Council of Englewood, 51 N.J. 108, 237 A.2d 40 (1968).
- 30 Id.
- 31 John M. Payne, "Condemnation and Damages Without Physical Taking," 30 Rutgers L.Rev. 1113, 1199 (1977), citing cases such as Lake Intervale Homes, Inc. v. Township of Parsippany-Troy Hills, 28 N.J. 423, 441, 147 A.2d 28, 39 (1958); Divan Builders v. Planning Board of Wayne, 66 N.J. 582, 334 A.2d 30 (1975).
- 32 Id., at 1199.
- 33 4 Cal.3d 633, 94 Cal.Rptr. 630 (1971); contra, see Midtown Properties v. Township of Madison, 68 N.J. Super. 197, 172 A.2d 40 (1961), aff'd 189 A.2d 226; Pioneer Trust and Savings Bank v. Village of Mount Prospect, 22 Ill.2d 375, 176 N.E.2d 799 (1961); Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 264 A.2d 910 (1970).
- 34 Pioneer Trust, supra note 33, at 22 Ill.2d 380.
- 35 Jordan v. Village of Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 422 (1965).
- 36 Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673 (1966).
- 37 Jacobsen and Redding, "Impact Taxes," at 370 of Hagman and Misczynski, Windfalls for Wipeouts (American Society of Planning Officials, Chicago: 1978).
- 38 Daniels v. Borough of Point Pleasant, 23 N.J. 357, 129 A.2d 265 (1957).
- 39 Weber Basin Home Builders Ass'n v. Roy City, 26 Utah 2d 215, 487 P.2d 866 (1971).
- 40 City of Dunedin v. Contractors and Builders Association, 329 So.2d 314 (1976).
- 41 Hagman and Misczynski, supra note 23, at 518.
- 42 In re Kansas City Ordinance No. 39946, 298 Mo. 569, 252 S.W. 404 (1923).

- 43 City of Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969).
- 44 Minn. Laws 1915, c. 128, now Minn.Stat. Ann. §§ 462.12-
462.17.
- 45 State ex rel. Twin City Building & Inv. Co. v. Houghton,
144 Minn. 1, 176 N.W. 159 (1920).
- 46 Hagman and Misczynski, supra note 23, at 524-531.
- 47 N.R.S. 726.7:10. Jacobsen and Redding, supra note 37,
at 372.
- 48 American Society of Planning Officials, "Urban Growth
Management Systems," Report Nos. 309, 310 (1975), p. 43.
- 49 Id. at 44.
- 50 26 Land Use Law and Zoning Digest, No. 4, p. 3 (1974).
- 51 ASPO, supra note 48, at 26.
- 52 Id. at 25.
- 53 Id. at 27.
- 54 Id. at 44.
- 55 Id.
- 56 26 Land Use Law and Zoning Digest, No. 4, p. 3 (1974).
- 57 Frazer v. Carr, 360 S.W.2d 449 (Tenn. 1962).
- 58 Id. at 450.
- 59 Hagman and Misczynski, supra note 23, at 5.
- 60 Zoning by special assessment financed eminent domain
(ZSAFED), discussed above, is an example of a taxation
device designed to mitigate "wipeouts."
- 61 For an authoritative discussion of windfall recapture
devices in England, Canada, New Zealand, and Australia,
see Hagman and Misczynski, supra note 37, at 491-516.

- 62 Ch. 17 S.O., 1974, as amended by 1974, ch. 107 and
1974, ch. 121 (Feb. 1975).
- 63 Hagman and Misczynski, supra note 23, at Table 20-1.
- 64 Id.
- 65 Id.
- 66 Id.
- 67 32 V.S.A. § 1001, et seq.
- 68 Hagman and Misczynski, supra note 23, at Table 20-1.
- 69 R. Lisle Baker, "Controlling Land Uses and Prices by
Using Special Gain Taxation to Intervene in the Land
Market: The Vermont Experiment," IV Env. Affairs 427,
429 (1975).
- 70 Andrews v. Lathrop, 315 A.2d 860 (1974).
- 71 Id. at 864.
- 72 Hagman and Misczynski, supra note 23, at 481, 486.
- 73 Id. at 473, 467.
- 74 Id. at 474, Table 20-1.
- 75 Id. at 477.
- 76 Id. at 468, 471.
- 77 Id. at 402.
- 78 Baker, supra note 66, at 457.
- 79 Hagman and Misczynski, supra note 23, at 516.
- 80 Id. at 485.



CHAPTER NINE
DEVELOPMENT MORATORIA

Development moratorium has been widely used, as is evidenced by the amount of decisional law on the subject.^{1/} A moratorium is generally imposed for one of two purposes. It might be enacted as a "stop-gap" measure prior to the adoption or amendment of permanent land use controls. For example, the Township of Clark, New Jersey, adopted an interim zoning ordinance prohibiting the construction of multi-family dwellings during the period needed to adopt a master plan.^{2/} One commentator has stated that this type of moratorium serves three purposes: (1) it improves the planning process by removing pressure for emergency solutions; (2) it prevents the creation of nonconforming uses; and (3) it promotes public debate regarding the proper permanent controls.^{3/} A moratorium may also be imposed for environmental reasons---to prevent development until a dangerous or unhealthy situation can be corrected. The Borough of Elmwood Park (formerly East Paterson), New Jersey imposed a two-year moratorium on all construction in certain flood-prone areas to allow it to construct a channel and water retention basin.^{4/} The Maryland Department of Health and Mental Hygiene and the Washington Suburban Sanitary Commission imposed a five-year moratorium on sewer hookups while

additional sewers and waste water treatment facilities were constructed.^{5/} These moratoriums withstood legal challenge.

One of the most common methods used to impose a moratorium is the interim zoning ordinance.^{6/} While the term interim zoning ordinance has no universal definition,^{7/} it can be generally described as the use of the zoning power to place temporary restrictions on the use of land sufficient to prevent specified types of development.^{8/} Alternatively, the moratorium can be imposed by other methods, such as an ordinance prohibiting the issuance of building permits^{9/} or prohibiting further attachments into a sewer system.^{10/}

A development moratorium is by definition a temporary land use control technique. An attempt to impose a moratorium permanently or even for an indefinite period of time is legally objectionable as being confiscatory.^{11/} However, the time period can be expressed either in terms of specific dates, e.g. for 90 days, or of the happening of a specific event, e.g. for the period needed to construct a water treatment plant.^{12/}

Moratoriums have been imposed at every level of government,^{13/} including regional agencies. The Hackensack Meadowlands Development Commission imposed a moratorium on most forms of development while it implemented its master plan.^{14/}

The moratorium can be enacted by ordinance. In the case of an interim zoning ordinance, statutory notice and hearing requirements for zoning amendments should be adhered to preclude an attack on procedural grounds.^{15/}

The usual legal challenges to a development moratorium are: (1) that it is not authorized under the enabling legislation; (2) that procedural requirements were not followed in its implementation; (3) that it violates the right to equal protection; (4) that it is vague as to what type of development is prohibited; (5) that it is unreasonable in duration; or (6) that it is confiscatory.

An examination of the decisional law reveals mixed results on these issues, with outcome usually turning on the specific facts of the case.^{16/} However, two generalizations can be made. First, and understandably, a moratorium which does not restrict all forms of development has a greater chance of being upheld. Second, the governing body must be able to show that it has made a good faith effort to correct the situation which initially caused the imposition of the moratorium. For example, a moratorium on commercial development imposed in Gardiner, New York was declared invalid after it was found that the town had made no progress in four years toward the implementation of a comprehensive plan.^{17/}

The Pinelands Protection Act provides, in essence, that all development except for (1) agricultural or horticultural purposes, (2) single family owner-occupied residences under certain circumstances, and (3) certain hardship cases, is prohibited pending the adoption of the comprehensive management plan, which must occur by August 8, 1980.^{18/} The reasonableness of a moratorium of this duration seems to be settled in New Jersey.^{19/}

In addition, the comprehensive plan must include:

d. A land use capability map and a comprehensive statement of policies for planning and managing the development and use of land in the Pinelands area, which policies shall:

(1) Consider and detail the application of a variety of land and water protection and management techniques, including but not limited to, zoning and regulation derived from State and local police powers, development and use standards, . . . and any other appropriate method of land and water protection which will help meet the goals and carry out the policies of the management plan; . . .

. . . .

(i) A program for State and local governmental implementation of the comprehensive management plan . . . including:

(1) Minimum standard for the adoption . . . of municipal and county plans and ordinances concerning the development and use of the Pinelands area, including, but not limited to, . . . regulated or prohibited uses . . . ,20/

Also, the Commission is authorized to exercise all the powers and duties necessary to effectuate the purposes of the Act.

It is clear that the legislature intended that the Commission be empowered to utilize a broad range of land use control techniques, which would include development moratoria under appropriate circumstances. Thus, after the present moratorium terminates, this technique would still be available. Possible grounds justifying the future use of a moratorium would be the necessity of implementing additional regulations, or correcting an environmentally unsafe condition,

or amending the plan itself.

Commentators view development moratoria as a logical and necessary corollary to permanent land use controls.^{21/} However, they have been criticized because they can be abused by the governing body. For example, a moratorium may be motivated by a desire to block one particular development.^{22/} Or a governing body may attempt to prolong the moratorium for more time than is necessary.^{23/} Often, the need for a development moratorium arises from the fact that proper planning was not previously undertaken.^{24/} Another criticism of development moratoria is that they often lead to a rash of development just prior to their implementation. Because a moratorium creates uncertainty as to when and what types of development will be permitted, developers rush to get underway projects that might never have been started without the moratorium.^{25/}

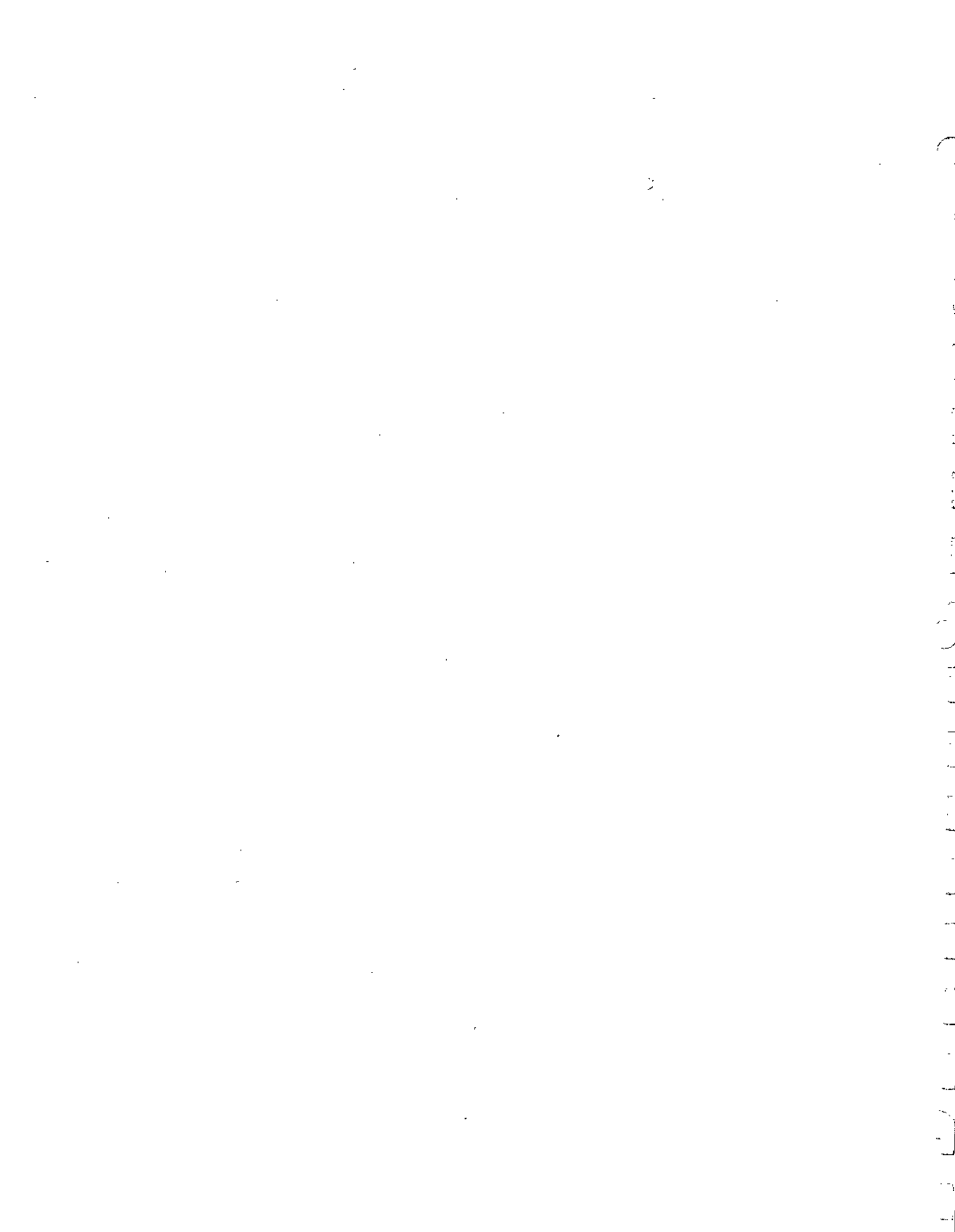
While a further comprehensive moratorium may not be necessary or desirable immediately upon the termination of the one presently in effect, circumstances may arise which may call for further use of this technique. For example, a moratorium might be necessary in a limited geographical area while a specific environmental difficulty is being addressed. When used properly, moratoriums can be a valuable adjunct to permanent land use controls.

CHAPTER 9

FOOTNOTES

1. Reported cases dealing with interim zoning ordinances are collected at 30 A.L.R.3d 1196.
2. Campana v. Township of Clark, 82 N.J. Super. 392, 197 A.2d 711 (1964).
3. Freilich, supra note 6 at 363-64.
4. Cappture Realty Corp v. Board of Adjustment, 133 N.J. Super. 216, 336 A.2d 30 (1975).
5. Smoke Rise, Inc. vs. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369 (D. Md. 1975).
6. D. Heeter, Interim Zoning Controls: Some Thoughts on Their Uses & Abuses, in 2 Management & Control of Growth 409, 409 (Urb. Land Inst. 1975) (hereinafter Heeter).
7. Id.
8. Id; Annotation, Validity and Effect of "Interim" Zoning Ordinance, 30 A.L.R.3d 1196.
9. For example, the Town of Ramapo, New York enacted an ordinance prohibiting the issuance of building permits for the period during which it prepared and implemented its growth control plan. This ordinance, called the Interim Development Law, was held valid. Rubin v. McAlevey, 54 Misc. 2d 338, 282 N.Y.S.2d 564 (1967), aff'd, 29 A.D.2d 874, 288 N.Y.S.2d 519 (1968). Ramapo's program is discussed in the Report entitled "Phased Growth Controlled by Availability of Capital Facilities."
10. See note 12 and accompanying text infra.
11. R. Freilich, Development Timing, Moratoria and Controlling Growth: Preliminary Report, in 2 Management & Control of Growth 361, 364 (Urb. Land Inst. 1975); (hereinafter Freilich); Kline v. Harrisburg, 362 Pa. 438, 68 A.2d 182 (1949).
12. Both forms of expressing the time period were used by the Town of Ramapo. See note 4 supra.

13. Freilich, supra note 6 at 364.
14. Meadowlands Regional Development Agency vs. Hackensack Meadowlands Development Comm'n, 119 N.J. Super. 572, 293 A.2d 192 (1972).
15. Although there is some decisional law to the contrary, 30 A.L.R.3d 1196 §5(a), it has often been held that an interim zoning ordinance must comply with all statutory notice and hearing required for zoning amendments. Id. §5(b). See, e.g. Lancaster Development, Ltd. v. Village of River Forest, 84 Ill. App. 2d 395, 228 N.E. 2d 526 (1st Dist. 1967).
16. 30 A.L.R. 2d 1196.
17. Lake Illyria Corp. v. Town of Gardiner, 43 A.D. 2d 386, 352 N.Y.S.2d 54 (1974).
18. Pinelands Protection Act §§13, 7 (1979).
19. The moratorium imposed by the Hackensack Meadowlands Development Commission was held to have been reasonable for a 26 month period. Meadowlands Regional Development Agency, supra note 14.
20. Pinelands Protection Act §7 (1979).
21. R. Freilich, Interim Development Controls - For Flexible Planning/Zoning, in 2 Management & Control of Growth 397 (Urb. Land Inst. 1975); Heeter, supra note 1.
22. Heeter, supra note 1 at 411.
23. Lake Illyria Corp., supra note 17.
24. Freilich, supra note 6 at 363.
25. Id.



CHAPTER TEN

INCENTIVES FOR LOW TECHNOLOGY LIFESTYLES

Contrary to the "small is beautiful" slogan of its advocates,^{1/} the periodical literature on this subject is by no means insignificant. Among many other out-of-mainstream journals there are Rain, Acorn, Agriculture Alert, Briarpatch Review, Co-Evolution Quarterly, Food Conspiracy Newsletter, New Roots, People and Energy, National Land for People, Self-Reliance, Environment and the Economy and the Power Line.

There are two or three preliminary words of caution concerning "incentives for low technology lifestyles."

First, the concept may not in fact involve "low" technology. Energy conservation may be achieved as well by solar heat as by a wood burning stove. And solar heat, of course, will require sophisticated capital investments, at least at the front end, and equally sophisticated technology. The term used more frequently is "appropriate technology," or small-scale technology. Thus, the National Center for Appropriate Technology in Butte, Montana and the California office of Appropriate Technology in Sacramento, California. There is no doubt that appropriate technology is becoming popular as a component of development strategy, in particular for many third world countries. The World Bank and the Inter-American Development Bank have special

procedures to encourage a.t. International health organizations and offshoots of the United Nations are pressing the concept. It is fair to say that even in the United States, as the energy crunch presses harder, major changes will have to be made in our extravagant way of life.

Second, there is the danger that suggestions of this type may be regarded as condescending by those to whom it is directed. We were advised by staff at Adirondack State Park that they have been reluctant to push the concept because "those who are interested in the idea are also those who most resent any government telling them what they ought to do." This attitude is also reflected in the criticism of the California Office of Technology (OAT) set up by Governor Brown:

Interestingly, it's not the established bureaucracy or big business that is making angry noises about OAT; rather it's OAT's own kind--the nation's scattering of appropriate technology adherents. Their criticisms fall into two categories: either that OAT can never work because it's a government agency, and its mission or image likely will be preempted or misused for personal gain by the politicians and entrenched bureaucrats, or that its programs are too "demonstration-oriented" and of no direct benefit to the average citizen. 2/

Finally, it should be noted that the availability of appropriate technology will depend upon the physical characteristics of the geographic area. In northern

California, the harnessing of geothermal steam may prove feasible in some areas where this resource can be tapped. On the other hand, the development of underground housing ("earth sheltered housing") is unlikely in most of the Pinelands given the water table.^{3/}

Any review of the literature in this field makes it clear that the heavy emphasis is upon energy conservation. (If this is so then the most logical first step would be to forbid the detached, single-family house and encourage modern, energy-efficient townhouses, snuggled together under a blanket of insulating earth. Such development may require more rather than less complex technology and it is certainly not quite the same style of living as is a lean-to facing a campfire, although the latter is undeniably a low technology lifestyle.) If one is to come up with suggestions for incentives to undertake conservation efforts, it is possible to construct a system that might induce developers to respond, assuming that such a goal is consistent with the Pinelands Commission's statutory mandate. The system could either be affirmative or negative. It could offer points to developers who would provide, for example, solar hot water heating, toilets with water-saving flush mechanisms, extra insulation beyond code requirements, a minimum percentage of windows on south-facing walls, small-

scale systems to treat wastewater biologically, and community garden facilities. So many points would entitle the developer to additional housing units. Or the system could be stated negatively: the developer must provide these facilities, and if he did all these things could build ten units to the acre; if, however, they built conventional houses, they could only build five units to the acre. The system could also be mandatory without options.

The other impression from a review of the literature is that while individual efforts may have some impact (decline of fuel oil dealers in New England by shift to wood stoves) any significant impact will have to come from a community effort. The National Center for Appropriate Technology has been carrying out some studies on community efforts to upgrade insulation and effect economies in electrical costs. While the net savings to each individual are not that significant, there is a gain overall because instead of exporting the costs (to the electric utility) they are deriving community benefits by creating local jobs and by purchases from local merchandisers. The Whiteaker community in Eugene, Oregon received a grant from NCAT to devise schemes involving energy, recycling, health care, food and housing.^{4/}

There is also a possible "appropriate technology" in the public sector. Roads are the best example. It has

long been suspected that most local subdivision standards are unnecessarily costly. It may be that in the Pinelands much looser standards are feasible. Indeed in many areas it may be appropriate to insist that dirt roads remain. In Bucks County, Pennsylvania there are mile-long wood-lot roads, 10-12 feet wide, dating back to the eighteenth century. The owners resisted any requirement that they dedicate a 60-foot right-of-way, even when they were proposing development. (Interestingly, the volunteer fire departments accepted the narrow lanes.) In Lake Forest and Highland Park, Illinois, there are a number of asphalt private roads 10 to 12 feet wide that service as many as a dozen houses. The Lake County subdivision ordinance has a provision authorizing a 10-foot wide road without curbs to service no more than seven houses with a minimum frontage of 120 feet. The Adirondack Agency sought authority from the New York Legislature to use funds to maintain (preserve) dirt roads. It was turned down.

In many respects, much of the Pinelands is now operating on an appropriate technology basis. A persuasive case could be made that this should be encouraged. It seems, however, that the tough question is whether such an area, cheek by jowl with areas of the most costly technology in the world, would accept such a circumstance. To impose such conditions would certainly slow growth but it would require political courage of the highest order.

CHAPTER 10

Footnotes

1. See, E. F. Schumacher, Small is Beautiful (Harper & Row, N.Y.C., 1973).
2. D. B. Cullimore, Showcase or Charade, Environmental Action, February 11, 1978.
3. See, Earth-Sheltered Housing Design, The Underground Space Center, University of Minnesota, 1978.
4. The Whiteaker Experiment: Urban Integrated Community, Rain, November, 1979.

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