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I am submitting herewith a thesis written by William H. Camp, Jr., entitled "'The Blessings of Quiet Seclusion': An Examination of Judicial Responses to Growth Management Programs and Policies." I have examined the final copy of this thesis for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Science in Planning.

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"THE BLESSINGS OF QUIET SECLUSION": AN EXAMINATION OF JUDICIAL RESPONSES TO GROWTH MANAGEMENT PROGRAMS AND POLICIES

A Thesis

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ABSTRACT

The purpose of the study was to examine selected judicial responses in terms of their impacts on growth management programs. Constitution issues examined included the taking issue, due process, equal protection and freedom to travel. Three court cases were chosen because of their relation to planning and the various issues raised during litigation. The three court cases were Golden v. Planning Board of Ramapo (1972), Construction Industry Association v. City of Petaluma (1975), and Boca Villas Corporation v. City of Boca Raton (1976).

The primary research method used in this study was a comparative analysis of the existing literature concerning growth management programs and the related legal issues raised in the specific court cases mentioned above. The research was assembled from Federal Court citations, decisions rendered in the United States Supreme Court and relevant law reviews.

The major findings of the research were that while growth management programs can promote orderly development if based on comprehensive planning, it is not a panacea for all areas or all development problems. One major obstacle in implementing a successful growth management program is a lack of a clear understanding of the constitutional issues involved on the part of elected officials and planners.

Elected officials need to understand the local problems and situations before beginning a growth management program. The role of planners is to advise them on the best course of action and present

feasible alternatives. Research in this area should concentrate on future impacts that a growth management program would have. From this research, policy-makers at the local level would be able to use that data to guide them in evaluating alternative programs and policies directed at managing additional growth.

TABLE OF CONTENTS

CHAPTER		PAGE
I.	INTRODUCTION	1
	Purpose	5
	Method	6
II.	THE ROLE OF CONSTITUTIONAL SAFEGUARDS	8
	Due Process	10
	The Taking Issue	22
	Equal Protection and the Fourteenth Amendment	31
	Freedom of Travel	36
III.	"THE BLESSINGS OF QUIET SECLUSION"	43
	Ramapo, New York	45
	Petaluma	56
	Boca Raton	66
	Impact on Growth Management Programs	73
IV.	CONCLUSIONS FROM COURT CASES	76
	Significance of Findings	80
	Potential Negative Impacts of Growth Management	81
	Impact on Future Planning	83
	Policy Considerations	84
BIBLIOGRAPHY		87
VITA		97

CHAPTER I

INTRODUCTION

Since the late 1960's and early 1970's, local governments have questioned the value of burgeoning growth within their boundaries. Rather than adopt the traditional "wait and see" approach, many local jurisdictions have become more active by enacting growth control regulations.[1] The growth management regulations enacted by local jurisdictions are aimed at controlling the primary characteristics of growth; that is, the rate, amount, type, location, and quality.[2] For example, some communities have established annual limits on the number of building permits to be issued, thus controlling the rate of growth.[3] This approach usually tries to link development with a capital improvements program. Other local programs range from "population caps," which allow for a maximum number of dwelling units to be constructed per year,[4] up to a certain number, to land banking and open space acquisitions.[5]

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[1]Robert G. Healy and John S. Rosenberg, Land Use and the States (2d. ed.; Baltimore: Johns Hopkins Press, 1979).

[2]David R. Godschalk et al., Constitutional Issues of Growth Management (Chicago: The American Society of Planning Officials Press, 1977), pp. 3-20.

[3]Golden v. Planning Board of Ramapo, 285 N.E. 2d. 291 (1972), Construction Industry Association v. City of Petaluma, 522 F.2d. 897.

[4]Robinson v. City of Boulder, 547 P.2d. 473 (1976). Boca Villas Corporation v. City of Boca Raton, 45 FLA. Supp. 65 (Fifteenth Circuit Court) 1976.

[5]Healy, p. 135.

These regulations have a far-reaching impact, not only upon the local jurisdiction, but throughout the entire region. One author has identified five major groups that are affected by local growth management systems.[6]

1. Landowner/developer—their interest derives from holding title or option to property that is regulated or restricted by a growth management program in such a way as to threaten the owners to use or derive value from the land.[7]

2. Neighbor—one whose interest derives from owning or using land adjacent to the property at issue, and within the same jurisdiction and whose rights may be affected by the use of adjoining land.[8]

3. Local Resident—one whose interest derives from being a citizen of the jurisdiction in which the growth management program operates; whose rights may be affected by the public cost imposed or by the impacts on private property or personal freedom.[9]

4. Regional Resident—one whose interest derives from being a citizen of a neighborhood community or area within the economic or geographic region; whose rights may be affected by the impact on his community of another community's growth management activities.[10]

5. Potential Resident—one whose interest derives from a desire to settle in a particular jurisdiction; whose rights may be threatened by growth management actions that limit the opportunity for migration to the jurisdiction.[11]

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[6]Godschalk, Constitutional Issues, pp. 14-15.

[7]Ibid., p. 14.

[8]Ibid., p. 14.

[9]Ibid., p. 14.

[10]Ibid., p. 14.

[11]Ibid., p. 14.

Most legal challenges will arise because of the inequities in the distribution of impacts of growth management policies on the groups mentioned above.[12] The United States Constitution contains certain limits or safeguards that protect the rights of private property. Through the language of the Fourteenth Amendment, these safeguards also apply to the states as well. Central to the discussion of land-use regulations is the taking clause. The taking clause of the Fifth and Fourteenth Amendments states, "nor shall private property be taken for public use without just compensation." The problems with the taking clause are centered around the meaning of "public use" and "just compensation." The taking issue is but one constitutional safeguard that has an impact on growth management regulations. Other constitutional principles such as due process, equal protection of the laws, and freedom to travel also have an impact on land-use regulations. Increasingly, environmental protection is having an impact on growth management regulations. These concepts are incorporated into the "doctrine of vested rights."

> Between 1873 and 1898, the United States Supreme Court revolutionized the historic interpretation of due process of law and thus established the Fourteenth Amendment as the specific constitutional authorization for the doctrine of vested rights. The doctrine of vested rights was originally a product of eighteenth-century natural rights theory and compact philosophy. Certain rights were so fundamental as to be derived from the very nature of justice, even from the very nature of God. It was the purpose and function of organized society to protect these rights; indeed, constitutional government existed to assume their protection.

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[12] Ibid., p. 15.

> Not the least of such rights was that of private property. The new association between due process and vested rights gave due process a substantive content and made it a guarantee against unreasonable legislative interference with private property. The due process clause in the Fourteenth Amendment was a federal guarantee against arbitrary state action interfering with individual rights.[13]

Since the landmark decision of Golden v. Planning Board of Ramapo,[14] the court's role in growth management litigation has become as important as the issues themselves. In many instances, the courts are examining growth management issues for the first time. The role of the courts as defined by Euclid v. Ambler Realty Co.[15] has been of reluctance to superimpose their wisdom on local legislatures, thus allowing for local governments to make their own laws. In other words, the courts have granted a presumption of validity to local laws that are not arbitrary or capricious. As one observer has noted:

> The judicial role is important because most constitutions consist of general principles written in broad terms which they (the courts) must interpret and then apply to the facts of the case. This allows for the courts to have a wide range for discretion in going from the general principle to the specific application.[16]

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[13] Alfred H. Kelley, "The Revolution in Due Process of Law," The American Constitution: Its Origins and Developments (New York: Growman, 1970), pp. 502-503.

[14] 285 N.E. 2d. 291 (1972).

[15] 27 U.S. 365 (1926).

[16] Godschalk, Constitutional Issues, p. 15.

Purpose

The objective of this thesis is to provide an understanding of the judicial responses brought forth by legal challenges to growth management regulations and programs. This examination includes not only the specific constitutional safeguards mentioned previously, but also the relative weights the courts have placed on both the quality and the elements of planning incorporated into the local community's approach to growth management. The three major court cases, Golden v. Planning Board of Ramapo (1972), Construction Industry Association v. City of Petaluma (1975) and Boca Villas Corporation v. City of Boca Raton (1976) is the focus of the research. The long range purpose of the thesis is to assist planners, local officials, attorneys, and citizens to reach a better understanding of the constitutional requirements placed on growth management programs.

Although much has been written on growth management, there is a need to acquaint planners with policies and programs that will become acceptable to the courts as fair and legally defensible. As one author has written, "Programs (growth management) explicitly based on constitutional protections for affected parties are more likely to be defensible under legal challenges, as well as socially responsible in terms of equitably allocating the costs and benefits of growth."[17]

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[17]David R. Godschalk et al., Responsible Growth Management: Cases and Materials (Chapel Hill: Center for Urban and Regional Studies, 1978), pp. I-IV.

When designing an effective growth management program, planners need to be aware of the policies and tools available to them.[18] To assess the legal and constitutional implications of growth management proposals, attorneys need to understand the potential impacts on affected parties.[19] Elected officials need to understand the social, economic, and environmental trade-offs involved in using alternative tools and techniques when deciding on proper form of growth management for their jurisdiction.[20]

Method

Stated earlier, this thesis will examine judicial responses to growth management plans. In order to accomplish this, the first step is to show the role of constitutional requirements that frame growth management. This thesis will incorporate a brief explanation of the principles of due process, equal protection and freedom to travel as they affect growth management programs. Once this is completed, the author will then examine litigation of the three court cases mentioned earlier. These three cases, it is believed, will demonstrate the role of constitutional safeguards in protecting private property, and also demonstrate the judicial weight or importance placed on the quality of planning that formulates growth management plans. Secondly, because these cases explore different planning as well as legal issues,

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[18] Godschalk, Cases and Materials, p. I.

[19] Ibid., p. I.

[20] Ibid., p. I.

it will be possible to examine where potential challenges stem from and what the courts are finding as legally defensible.

Lastly, the author would intend to theoretically demonstrate how challenges occur, what the issues are, and determine what, if any, the impacts will be on affected parties.

Research will involve both federal and state citations, relevant documents such as law reviews, court cases, and decisions rendered in the United States Supreme Court. Therefore, most of the research needed for this thesis will be carried out in the Law School Library.

CHAPTER II

THE ROLE OF CONSTITUTIONAL SAFEGUARDS

This chapter reviews the constitutional issues that frame growth management programs. The research will examine the Fifth and Fourteenth Amendments of the United States Constitution. The key elements of these amendments are the due process clause, the taking clause, and the equal protection clause. Also included is a discussion of the freedom to travel doctrine as it applies to the regulation of growth.

Examination of the Fifth Amendment focuses on due process and the taking clause. This review covers both aspects of due process, substantive and procedural. The review of the taking clause focuses on the government's role in regulating private property. Emphasis is given to the role of police power as a regulatory tool.

The concept of the Fourteenth Amendments' equal protection clause also is examined. The equal protection clause states that similar treatment to persons and property similarly situated with respect to the purpose of the law must be carried out. Because most equal protection challenges arise from unfair treatment, the rational basis test and the compelling state interest test are the focus of this research.[1]

Even though the right to migrate and settle (freedom to travel) is not a specific constitutional provision, this safeguard has been

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[1] Hawkins v. Shaw, 303 F. Supp. 1162 (N.O. Miss. 1969); and 437 F.2d. 1286 (1971); Robinson v. City of Boulder 547 P.2d. 228 (1976).

referred to various sources within the United States Constitution, including the Fourteenth Amendments' equal protection clause. However, both federal and state courts tend to view freedom of travel as a fundamental right[2] guaranteed by the Federal Constitution in general. This concept is examined because it has an impact on the regulation of growth.[3]

Growth management by definition attempts to regulate the primary aspects of growth in a municipality. The primary aspects of growth are the rate, amount, type, and location of future development.[4] Growth management programs incorporate various strategies into a comprehensive growth plan. Some of their tools would be a growth policy, a development plan, capital improvement programs, zoning and sewer moratoriums, and in some cases, a land acquisition policy.

Because the impact of growth management plans tend to be widely felt by affected landowners, these programs are usually taken to court for final arbitration. One commentor, in a policy statement, stated:

> Growth controls will affect more than racial groups and the lowest-income persons. Thus policies on growth, if mismanaged, could strike directly at a large proportion of the American public . . . and indirectly on the general economy, on the costs of housing and transportation and on the life styles of nearly all our citizens.[5]

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[2] Shapiro v. Thompson 394 U.S. 618 at. 634 (1969).

[3] Construction Industry Association of Sonoma County v. City of Petaluma, 522 F.2d. 897 (1975).

[4] David R. Godschalk et al., Constitutional Issues of Growth Management (Chicago: The American Society of Planning Officials Press, 1977), pp. 3-20.

[5] Royce Hanson, "Growth Control: The Role for Regionalism," Report given to Maryland National Capital Park and Planning Commission, 1974, p. 2.

Growth management tools and programs should be framed by constitutional safeguards. Federal and State courts will scrutinize the purpose of the regulations to make sure the policies are "reasonable," based on the general police power and not just "fairly debatable."[6] By using constitutional safeguards as a standard to measure growth management programs and policies, it is possible to determine if the plan will be upheld in court.

Due Process

The power of the states to regulate stems from the police power. This power is delegated to local municipalities by the states through statutes and state constitutions. This power is guaranteed to the states through the Tenth Amendment of the Federal Constitution.

> The powers not delegated to the United States federal government by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.[7]

The Fifth and Fourteenth Amendments of the United States Constitution guarantee to the citizens that they will not be deprived of life, liberty or property by government action without due process of law. There are two parts of the due process clause, substantive and procedural. While due process has a broad definition, it essentially requires that governments act in a rational manner in dealing with its citizens. This means there must be a rational basis for

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

[7] Alfred H. Kelley, The American Constitution: Its Origins and Developments (New York: Growman, 1970), U.S. Constitution, Article X.

the government regulation.[8] Generally, this procedure is implemented through the police power of the city or state.

The police power has been defined as the power to make reasonable laws to regulate individual behavior, in order to protect the health, safety, morals or general welfare of the community.[9] In determining the guidelines for testing reasonableness, the Supreme Court stated,

> To justify the state in interposing its authority in behalf of the public, it must appear first, that the interests of the public require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon the individual.[10]

The traditional standard for judicial review of a general due process or reasonableness challenge, is based on three specific areas. The first area of review is proper objectives of the police power. Traditionally, the courts have upheld ordinances if based on the health, safety, morals and general welfare of the community. The Supreme Court in defining public welfare has stated,

> The concept of the public welfare is broad and inclusive, the values it represent are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful, as well as healthy, spacious, clean, well balanced and carefully patrolled.[11]

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[8]David R. Godschalk et al., Constitutional Issues of Growth Management (Chicago: The American Society of Planning Officials Press, 1977), pp. 43-52.

[9]Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), Berman v. Parker, 348 U.S. 26 at 32 (1954).

[10]Lawton v. Steele, 152 U.S. 133 at 137 (1894), Goldblatt v. Town of Hempstead, 369 U.S. 594 (1962).

[11]348 U.S. 26 at 32 (1954).

In other cases, the Supreme Court has incorporated additional values to be protected by the police power. By upholding comprehensive zoning in the Village of Euclid v. Ambler Realty Co.[12] the Court stated,

> The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions . . . Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use . . . is to be determined not by an abstract consideration of the building or of the thing considered apart, but by considerating it in connection with the circumstances and the locality . . . If the validity of the legislative classification for zoning purposes be fairly debatable the legislative judgment just be allowed to control.[13]

The courts have also included as proper objectives of the police power wetland regulations,[14] the right of a town to grow at a deliberate pace,[15] and for cities to allow for specific life style characteristics.[16] If a court finds the purpose of the regulation, outside the scope of the police power, then the court will find the ordinance unconstitutional. The court would have to show that the ordinance has no substantial relation to the public health, safety, morals or general welfare of the local municipality.[17]

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[12] 272 U.S. 365 at 370 (1926).

[13] 272 U.S. 365 at 370-372 (1926).

[14] Sibson v. State of New Hampshire, 336 A. 2d. 239 (1975).

[15] Golden v. Planning Board of Ramapo, 285 N.E. 2d. 291 (1972).

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

[17] 272 U.S. 365 (1926).

Recently, some courts have invalidated zoning ordinances because of its impact on the general welfare of the region.[18] The Washington State Supreme Court struck down a zoning ordinance from the City of Bothell, because the city, when adopting it, failed to consider the impact the ordinance would have on the general welfare of the region. The court reasoned that the police power of the state must be used for the general welfare of the entire area affected by the regulation, not just the city itself. Traditionally the courts have held that the cities' regulatory power were responsible only for the general welfare within their own jurisdiction. Therefore, any impact that a local regulation had on a regional area went unnoticed by most courts.

The Pennsylvania Supreme Court struck down four acre zoning in a township because the ordinance went beyond the scope of proper objectives of the police power. In the case of National Land and Investment Co. v. Easttown Township Board of Adjustment, the Court said, "The ordinance was an attempt to avoid future burdens, economic and otherwise, by excluding future residents and therefore not a proper use of the zoning power."[19]

> Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and cannot be used by those officials as an instrument by which they may shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future—it may not be used as

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[18] Save v. City of Bothell, 576 P.2d. 401 (1978); David J. Brower, "Courts Move Toward Redefinition of General Welfare," Land Use Law and Zoning Digest, 31, No. 5 (1979), pp. 5-8.

[19] 215 A.2d. 597 at 612 (1965).

> a means to deny the future. Zoning provisions may not be used to avoid the increased responsibilities and economic burdens which time and natural growth invariability bring. Such authority must be used to benefit the state as a whole and cannot be used by one political subdivision to shift its burdens onto another subdivision. Zoning power must be used for the general welfare.[20]

The second area of judicial review involving a general due process challenge entails appropriate means. This requirement states that the means established by the regulation cannot be arbitrary, capricious or unreasonable, but must be reasonably related to the stated objectives. In some courts, a legislative determination that the law does serve a proper general welfare purpose, is sufficient to meet that requirement. However, if a court finds that the means to a state objective does not benefit the general welfare, then the law will be held unconstitutional. Traditionally, this concept of judicial deference has been granted to legislative bodies since the Euclid case. In Euclid, the Supreme Court stated that "fairly debatable questions as to reasonableness, wisdom and propriety are left for the determination of the legislature."[21]

More recently some courts have upheld various growth management systems as appropriate means to a stated objective. The Town of

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[20] 215 A.2d. 597 at 613-614 (1965); also see for example: Robert M. Washburn, "Apartments in the Suburbs: An Re-Appeal of Joseph Grish," 74 Dickenson Law Review 634 (1970); NOTE: "Regional Impact of Zoning: A Suggested Approach" 114 University of Pennsylvania Law Review 1251 (1966).

[21] 272 U.S. 365 (1926); Paul Paulsen, "The Persistence of Substantive Due Process in the States," 34 Minnesota Law Review 91 (1950); Jerome G. Rose "Should the Courts Control Growth?" Planning 40 (November 1974), p. 18.

Sanbornton wanted to preserve its rural character, and their "forest preserve" district for the preservation of open space. Located in the hills of New Hampshire, Sanbornton was subjected to seasonal growth demands that added a 1000 people in both the summer and winter seasons. Steel Hill Development Company had wanted to increase their development by adding 500 units onto 510 acres.[22] The local planning board approved the first phase, which included thirty-seven lots, but approved rezoning changes which placed 70 percent of Steel Hill's land in a six acre minimum lot size and prohibited "cluster development."[23]

The development company appealed the rezoning, saying that it was unreasonable because it bore no rational relationship to the health, safety, morals or general welfare, as required by the Constitution. The Court then reviewed the reasons for which the town's rezoning ordinance was approved:

> We recognize, as within the general welfare, concerns relating to the construction and intergration of hundreds of new homes which would have an irreversible effect on the area's ecological balance, destroy scenic values, decrease open space, significantly change the rural character of this small town, pose substantial financial burdens on the town for police, fire, sewer, and road service, and open the way for the tides of weekend 'visitors' who would own second homes. If the Federal government itself has thought these concerns to be within the general welfare, we cannot say that Sanbornton cannot similarly consider such values and reflect them in its zoning ordinance. Many environmental and social values are involved in a determination of how land would best be used in the public interest. The choice of the voters of the city is not lacking in support of this regard.[24]

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[22] 469 F.2d. 956 (1972).

[23] 469 F.2d. 956 at 960 (1972).

[24] 469 F.2d. 956 at 961 (1972).

However, the Court was concerned with the manner in which the town reached its objectives. The Court stated that "it had serious worries whether the basic motivation of the town meeting at which the decision was made, was not simply to keep out outsiders, since they wished to come in numbers."[25] The Court then went on to treat the ordinance as an interim measure:

> But at the same time of uncertainty as to the right balance between ecological and population pressures, we cannot help but feel that the town's ordinance, which severely restricts development, may properly stand for the present as a legitimate stop gap measure.[26]

Another case where the courts upheld zoning as a legitimate permissible objective is Village of Euclid v. Ambler Realty Co.,[27] where the Supreme Court sustained the validity of zoning ordinances as a means of planning orderly growth. The principle of phased development, as a growth management tool, used in conjunction with a capital improvements program, has been upheld in Golden v. Planning Board of Ramapo.[28] The concept of an annual permit system, which allows for an actual number of units to be built each year, has been upheld as an appropriate means to limit growth by the Ninth Circuit Court of Appeals in California.[29] (The latter two cases will be discussed in depth in Chapter III.)

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[25] Ibid., p. 961 (1972).

[26] 469 F.2d. at 962 (1972).

[27] 272 U.S. 365 (1926).

[28] 285 N.E. 2d. 359 (1972).

[29] Construction Industry Association v. City of Petaluma, 522 F.2d. 897 (9th Cir. 1975).

In regards to the third aspect of judicial review, the courts are determining if the means are so unduly oppressive upon the individual as to invalidate the due process clause. The courts are looking to the effect of the regulation. The judiciary system may find that a town's regulation has a proper police power objective, and that those regulations are reasonable for the accomplishment of that objective, but it may invalidate the ordinance, if in the courts' judgment, the means would impose a burden on an individual which is greater than deemed necessary.

Essentially, the issue here is how far a town can go in regulating private property before it becomes a taking.[30] Arvo Van Alstyne has noted there is a correlation between the nature of the public purpose and the willingness of judges to uphold the regulation.[31]

> Novel and nontraditional policy goals, perceived as lacking in broad community acceptability, have sometimes failed to obtain judicial approval. Objectives with a strong historic pattern of social approval are thus more likely to survive constitutional attack.[32]

A classic example of the courts upholding a police power regulation even though it placed a heavy burden on the property owner is Hadacheck v. Sebastian.[33] In that case, the Supreme Court upheld a city ordinance

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[30]Arvo Van Alstyne, "Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria," 44 Southern California Law Review 1, (1971); Joseph L. Sax, "Takings, Private Property and Public Rights" 81 Yale Law Journal 149 (1971).

[31]Van Alstyne, p. 7.

[32]Ibid., p. 8.

[33]329 U.S. 394 (1915).

that outlawed the operation of a preexisting brick yard within the newly expanded city limits. The Court held that the brick yard produced excessive smoke and odor. The Court conceded that the value of the brick yard was diminished from $800,000 to $60,000, but found that the ordinance was a justifiable exercise of the police power.[34]

Another well known Supreme Court case dealing with nuisance regulations was Goldblatt v. Hempstead.[35] In that case the Supreme Court upheld an ordinance prohibiting the operation of a gravel pit in an urbanized area. In deciding to uphold the ordinance, the Supreme Court cited Pennsylvania Coal v. Mahon to provide the applicable test.[36]

> While an ordinance may otherwise be a valid exercise of a municipality's police power, the restrictions which it imposes may be so onerous as to effect a taking which constitutionally requires compensation.[37] But the line between a valid restriction on private land use and confiscation requiring compensation is often difficult to draw.[38]

In finding for the town of Hempstead, the Supreme Court went on to its classic conclusion by stating,

A regulatory ordinance that promotes some legitimate public

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[34] Ibid., p. 398 (1915).

[35] 369 U.S. 590 (1962).

[36] Pennsylvania Coal v. Mahon 260 U.S. 393 (1922).

[37] Ibid at 415 (1922).

[38] Joseph Sax, "Taking and The Police Power" 74 Yale Law Journal 36, at 38-46 (1964); Frank I. Michelman, "Property, Utility and Fairness: Comments on Ethical Foundations of 'Just Compensation Law,'" 80 Harvard Law Review 1165, 1184, 1202 (1967).

> interest is not confiscatory merely because it operates to reduce the value of the burden property, or prevents such property from being put to its most profitable use. However, as the public gain diminishes and the damage suffered by the property owner mounts, regulation turns into a taking. And if the restriction becomes unduly burdensome, the power exercised by the legislature will be deemed a taking regardless of the countervailing public benefit.[39]

The leading case for a growth management program was upheld by the New York Court of Appeals in the case of Golden v. Planning Board of Ramapo.[40] The plaintiffs contended that the eighteen year restriction on the development of their property was an unreasonable burden, and therefore, unconstitutional as it violates the due process clause. The Appeals court in answering their challenge found that "the restrictions were reasonable, though substantial in nature and duration, because they were of a clearly limited duration."[41]

> Perhaps even more importantly, timed growth, unlike the minimum lot requirements recently struck down by the Pennsylvania Supreme Court as exclusionary, do not impose permanent restrictions upon land use. Every restriction on the use of property, entails hardships for some individual owners. Those difficulties are invariably the product of police regulation and the pecuniary profits of the individual must in the long run be subordinated to the needs of the community. Without a doubt restrictions upon the property in the present case are substantial in nature and duration. They are not, however, absolute. The amendments contemplate a definite term, as the development points are designed to operate for a maximum period of 18 years and during that period the town is committed to the construction and installation of capital improvements.[42]

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[39] Goldblatt v. Hempstead 369 U.S. 590 at 594 (1962); See generally, 260 U.S. 393 at 415 (1922).

[40] 285 N.E. 291 (1972). [41] Ibid., at p. 300.

[42] Ibid., at p. 301; Note, "A Zoning Program for Phased Growth: Ramapo Township's Time Controls on Residential Development" 47 New York University Law Review 723 (1972).

There are two parts that are generally recognized in the due process clause. The first part, substantive due process, has been discussed above. The second half is concerned with procedural matters. Procedural due process requires that affected parties have a constitutionally protected right to a hearing, if there has been a violation of their rights. It also requires that notices of changes in the zoning plan, and public hearings, be sent to the affected land owners so that they can have access to the evidence and records of any hearings on these matters. Essentially, procedural due process requires that legislative bodies act in a reasonable manner and treat affected parties fairly.

In a growth management context, this would require that records of the base studies surrounding a comprehensive plan are drawn up. Included in these studies would be land use, population, housing, employment, transportation, economy, energy, public facilities, social services, environmental and fiscal policies. These studies would then be used to show the court that extensive planning has been incorporated into the formation and selection of a growth management plan.

Secondly, there is a need for the records of the public hearings to demonstrate to the courts that there has been citizen participation in the hearings. Records should be kept at these hearings to show what the issues were, what citizen groups were notified, and the response, if any, of the local officials.

Third, a record should be kept of the decision-making body. This record would demonstrate that the body did review the evidence presented by the public; that the decision-making tried to achieve a set

of legitimate objectives and that the means it adopted where reasonably necessary to achieve those objectives.

In most cases, when a general due process challenge is made, it will usually be accompanied by one or more specific constitutional challenges, such as taking, freedom to travel or equal protection. The plaintiff would alledge that through the government action their constitutional rights were violated and they were denied due process of law. An example of a violation of substantive due process would be where a government takes an individual's property without compensation. This would be a violation of the Fifth Amendment on the taking ground as well as a violation of substantive due process. When this occurs the court would look to the specific constitutional challenge and base its standard of review established for that guarantee.[43] One author, who has written about the role of due process and the police power has said,

> Due process is a term that is used as a bridge between unconstitutional, forbidden actions to constitutional and permissible exercises of police power. If a court views the police power as sufficiently broad to span the gap, property rights may be limited; if the court deems the power insufficiently broad, property rights are "vested" and may not be impaired. Due process is the bridge that spans the chasm between state power and private right. Thus due process protects, defines, and limits "property" while defining and limiting legislative capacity or police power.[44]

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[43] David R. Godschalk et al., Constitutional Issues of Growth Management (The American Society of Planning Officials Press), pp. 43-52 (1977).

[44] John E. Donaldson, "Regulation of Conduct in Relation to Land—The Need to Purge Natural Law Constraints from the Fourteenth Amendment." 16 William and Mary Law Review 189 at 195 (1974); Cook, "What is Police Power?" 7 Columbia Law Review 322 (1967).

The Taking Issue

The Fifth Amendment of the United States Constitution contains the safeguard against a governmental taking of private property.

> . . . nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.[45]

This requirement applies to the federal government through the Fifth Amendment and applies to the states through the Fourteenth Amendment. In terms of growth management programs, this safeguard has three major issues: public use, taking, and just compensation. Public use requires that the government, acting on its police powers, benefits the public's interest. The courts will allow for this if it promotes the health, safety, morals and general welfare of the community. This is a general due process challenge and therefore carries a strong presumption of validity, unless, as stated in Euclid v. Ambler Realty Co., "The regulation is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals and general welfare."[46]

Just compensation requires that if a government action, takes a property, then compensation must be paid to the land owner. The problem here arises from the question of how the value is to be measured.[47] The land owner must be left with a reasonable use of his/her property. This situation would arise if the ordinance requires

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[45]Kelly, U.S. Constitution, Article X.

[46]272 U.S. 365 at 380 (1926).

[47]Sax, "Takings and Police Power," pp. 40-46.

only a small amount of the land, rather than the entire parcel. The question is, therefore, how to measure the value of the remaining land.

The myth of the taking issue is balanced between the private property rights of the land owner on one side and government regulation of the use of land without paying compensation on the other side.[48] If, for example, the government wanted to build a highway through private property, the land owner would have to be paid for the value of the land taken for this public use. However, there are certain police power regulations that restrict the use of property, such as height, bulk, set back limits, and side yard requirements, that do not require compensation. Joseph Sax has written, "though all agree (the courts) that compensation is required only for a governmental taking of property and not for losses occasioned by mere regulation, the theory is hard to come by."[49] Justice Holmes cited in the famous Pennsylvania Coal Co. v. Mahon Case stated that, "The general rule at least is, that while property may be regulated to a certain extent, if regulations go too far it will be recognized as a taking."[50]

Since that case, the Supreme Court has relied on Justice Holmes' theory as the basis for its decisions regarding a taking challenge. Whether a plaintiff is asking for invalidation of the ordinance or for compensation, the court will determine if a taking has occurred. If

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[48]Fred Bosselman et al., The Taking Issue: A Study of the Constitutional Limits (Washington, D.C.: Council on Environmental Quality, U.S. Government Printing Office, 1973).

[49]Sax, "Takings and The Police Power," pp. 45-70.

[50]260 U.S. 393, at 415 (1922).

the plaintiff seeks invalidation of the regulation, a taking would be found if the ordinance places a burden so severe as to violate the due process clause. When asking for compensation, the plaintiff will usually claim that the government has appropriated the property through regulation, and not eminent domain.[51]

The courts have developed four tests that have allowed them to analyze the taking issue. However, there is not a conclusive test that all courts use. Examining each test or standard of review used by the courts would provide for a better understanding of the considerations weighed, and how the courts have reached their decisions. Generally, the four tests are:

1. The physical invasion theory,
2. The harm-benefit theory,
3. financial loss theory, and
4. balancing test theory.[52]

The physical invasion test states, that if through a governmental regulation, there is an actual physical encroachment on the use of the land, then compensation must be paid. Being the oldest of the four tests, this concept of physical invasion was reached in 1871 by the Supreme Court.[53] The Supreme Court in the case of Pumpelly v. Green

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[51]Bosselman et al., The Taking Issue, pp. 139-212; Godschalk et al., Constitutional Issues of Growth Management, p. 57.

[52]Sax, "Taking and Police Power," pp. 48-60; Godschalk et al., Constitutional Issues of Growth Management, pp. 53-65.

[53]Ibid., The Taking Issue.

Bay Co.,[54] ruled that a physical invasion of the plaintiff's land had occurred because of the construction of a dam to control floods. The state, Massachusetts, had allowed by statute, the dam to be constructed, thus flooding the plaintiff's land. The Court held for the plaintiff because the government had claused his land to be taken.

> It would be a very curious and unsatisfactory result if, in constructing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable permanent injury to any extent, can in effect, subject it to total destruction without making any compensation, because in the narrowest sense of the word, it is not taken for the public use.[55]

In later cases, the Supreme Court held that the Pumpelly decision holds only to situations in which there has been a permanent direct encroachment of private land. This test is not used as often in the more recent cases, primarily because the scope of direct physical invasion is too narrow. However, this test could still be used if through government action private property has been either occupied, used and or otherwise invaded upon without compensation.

The second test is called the harm and benefit test. It has also been called the "nuisance abatement theory."[56] This is based upon the

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[54] 80 U.S. 166 (1871).

[55] 80 U.S. 166 at 177 (1871) as cited in Bosselman, The Taking Issue (1973).

[56] Godschalk et al., Constitutional Issues of Growth Management, p. 58.

theory of common law which states that no man may use his property so as to injure his neighbor.

> We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.[57]

The courts, in reviewing the challenge, have looked to see if the regulation seeks to prevent private actions from harming the public. This theory holds that if by preventing private actions from harming the general public, then no compensation is required. One of the more famous cases used to uphold this principle was Mugler v. Kansas.[58] In that case, the Supreme Court upheld a Kansas law that prohibited the manufacture and sale of liquor, and therefore made Mugler's brewery worthless. The Court held that no compensation was needed, because,

> The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.[59]

The court said that because this was accomplished through a valid act of the legislature to protect the general welfare of the people of

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[57] Commonwealth v. Alger (1853).

[58] 123 U.S. 623 (1887).

[59] 123 U.S. 623 at 669 (1887).

Kansas then no compensation was required.[60]

This theory is used by today's courts primarily in environmental questions, especially on matters that concern critical areas for the enjoyment of future generations. In New Hampshire, the State Supreme Court upheld the denial of a permit to fill in wetlands, as being within the scope of the police power and therefore the denial did not constitute a taking under the eminent domain clause.[61] Using Just v. Marinette County, the State Supreme Court held that,

> In part the findings concluded that plaintiff's four acres were part of a valuable ecological asset of the seacoast area and that the proposed fill would do irreparable damage to an already dangerously diminished and irreplaceable natural asset.[62]

The court in Just v. Marinette County[63] stated:

> An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for it was unsuited in its natural state and which injures the rights of others. Nothing this court has said or held in prior cases indicate that destroying the natural character of a swamp or wetland so as to make that location available for human habitation is a reasonable use of that land when the new use, although of a more economical value to the owner, causes a harm to the general public.[64]

The third theory is called the balancing test. The balancing

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[60] Also see Hadacheck v. Sebastian 239 U.S. 394 at 408-409 (1915); Village of Euclid v. Ambler Realty Co. 272 U.S. 365 at 388 (1926); Goldblatt v. Town of Hempstead 369 U.S. 590 (1962).

[61] Sibson v. State of New Hampshire, 336 A.2d. 239 (1975).

[62] Ibid., at 244 (1975).

[63] 201 N.W. 2d. 761 (1972).

[64] 201 N.W. 2d. 761 at 768 (1972).

test is used to determine if it is fair to burden an individual to achieve a public benefit. The courts will balance the private detriment against the overall gain to the public, to determine if compensation is required. If the actual benefits gained, far outweighs the burden placed on an individual land owner, then no compensation is required because no taking has occurred. However, the courts will rely on more than just dollar value lost because it is difficult to measure "public gain" and "private loss."

In looking beyond dollar value, the courts first assess the impact the regulation has on the owner's land. This assessment deals with the length of time the burden is imposed. The State Court of Appeals of New York upheld an eighteen year restriction on property because the burden was "of a certain duration and founded upon estimate determined by fact."[65] However, if a court finds the regulation burdensome on the individual's property by leaving him no reasonable use, the court will invalidate the ordinance on the theory that "the public benefit could never outweigh this severe individual reduction in value."[66]

Last, the courts will look to the benefits gained by the state from the regulation. The judiciary system has given weight to many cases regarding public welfare. These included the prevention of

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[65] Golden v. Planning Board of Ramapo, 285 N.E. 2d. at 304 (1974).

[66] Bruce Ackerman, Private Property and the Constitution (New Haven: Yale University Press, 1977), p. 3; also see Stever, "Land Use Controls, Taking and the Police Power—A Discussion of The Myth" 15 New Hampshire Bar Journal, (1974), p. 149.

nuisances, air and smoke pollution, and in situations where the benefits are likely to be enjoyed by the entire community rather than benefit a narrow segment of the population.[67] Thus, if the regulation has a wide base of support or it is supplemented by scientific planning studies, the courts are more likely to uphold the regulation.

> That the way to distinguish between compensable and noncompensable impositions is to ask whether the imposition simply restrains conduct which is harmful to others or whether, on the other hand, it aims at positive enrichment of the public good from private property. The idea is that compensation is required when the public helps itself to good at private expense, but when the public simply requires one of its members to stop making a nuisance of himself, no compensation is required.[68]

The fourth test used by the court is based on financial loss. This theory holds that if there is a serious loss of value which in turn leaves the owner without a reasonable use of his land, then a taking has occurred and either the regulation will be held unconstitutional or compensation must be paid to the land owner. The courts usually determine if there is a profitable use of the remaining land left for the land owner. Therefore, some profitable value in economic terms, must be left for the land owner.

When the courts are looking at a loss of economic value, they have allowed for substantial decreases in property before ruling an ordinance unconstitutional.[69] In the Hadacheck case, land values went

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[67] Bosselman et al., The Taking Issue, p. 203.

[68] Frank I. Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation," 80 Harvard Law Review 1169 (1967).

[69] Hadacheck v. Sebastian, 239 U.S. 623 (1887); also Jan Krasnowiecki and Ann Louise Strong," Compensable Regulations for Open Space," Journal of the American Institute of Planners 24 (1963), p. 89.

from $800,000 to $60,000. While monetary considerations have an important role for the courts' decision, they are not the only factors considered.

The most important concern of the court is the benefit received by the public. If there remains some economic value or profitable use of the land, and the public stands to gain from the regulation, the courts will generally uphold the regulation.[70]

In review, there are three factors that are similar in all four tests used by the courts to determine if compensation is required. They all agree that the restriction must not be absolute. There must be some reasonable use left to the landowner. Reasonable use is generally determined by the courts to mean an economically profitable use for which the land is suited for.

The second aspect states that the restriction must not be permanent as to allow the landowner a reasonable use of the land in the near future. The Court of Appeals in New York upheld an eighteen year restriction because it was reasonably necessary to implement the town's growth management program.[71] Also interim zoning measures and sewer moratoria have been upheld as reasonable by the courts.[72]

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[70] Golden v. Planning Board of Ramapo, 285 N.E. 2d. 291 (1974); Robinson v. City of Boulder, 547 P.2d. 228 (1976); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Village of Euclid v. Ambler Realty Co. 272 U.S. 365 (1926); Arverne Bay Construction Co. v. Thatcher 15 N.E. 2d. 587 (1938).

[71] Golden v. Planning Board of Ramapo 285 N.E. 2d. 291 (1974).

[72] Steel Hill Development Co. v. Town of Sanbornton 469 F.2d. 956 (1972).

One commentator has noted different factors which the courts will base their determinations on:

> Among the variables considered by the courts are the seriousness of the problem the delay is designed to alleviate; whether this delay is to enable comprehensive planning, whether the wait is imposed in accordance with a comprehensive plan, and whether the delay is of certain duration.[73]

The third similarity to be found in the four tests is based on the due process clause of the United States Constitution. The courts look to determine if there is a strong justification for the regulation. This means that the objective of the regulation must be for a legitimate purpose, that the means are reasonably necessary to accomplish that purpose, and that the means used are not unduly burdensome on the individual. Because there is not a comprehensive standard used by the courts to determine if a taking has occurred, the courts are reminded by Justice Holmes in the Pennsylvania Coal case, when he stated, "There is no set formula to determine where regulation ends and taking begins."[74]

Equal Protection and the Fourteenth Amendment

The Fourteenth Amendment of the United States Constitution contains the equal protection standard as it applies to the states and their political subdivisions.

> . . . nor shall any state deprive any person of life, liberty,

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[73]Godschalk et al., Constitutional Issues of Growth Management, p. 60.

[74]260 U.S. 393 at 414 (1922).

> or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[75]

This constitutional safeguard contends that when state or local governments use classifications as a means to distinguish either people or property, the classification must give similar treatment to persons or property similarly situated as to the purpose of the law.[76]

Like due process, governments are granted a certain amount of judicial deference when it comes to the use of classifications, as long as they are not arbitrary or unreasonable, or curtail a fundamental right or based on suspect criteria. Fundamental rights have included interstate travel, voting, personal privacy and any implied or expressed freedom contained within the Constitution.[77] Suspect criteria would involve discrimination based upon race, sex, national origin and alienage.[78]

Essentially, the equal protection clause demands that governments equally protect the rights of its citizens. Where it is not possible to classify all persons the same, then those classifications must be reasonable and not arbitrary or capricious. This concept also applies to classifications of land, based on zoning.

With regards to land use regulations, zoning was upheld as a reasonable classification for different uses of land. The Supreme

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[75]Fourteenth Amendment, U.S. Constitution, 1868.

[76]Joseph Tussman and Jacobus ten-Brock, "The Equal Protection of the Laws" 37 California Law Review 341 at 346 (1949).

[77]Shapiro v. Thompson 394 U.S. 618 at 634 (1969).

[78]Ibid at 633 (1969).

Court viewed this as a reasonable use of the police power to promote the general welfare.[79] However, if the power to zone is used to exclude certain minorities, or low-income groups, through minimum lot requirements and other restrictive devices, the courts have declared the zoning ordinances as unconstitutional, as it violates the equal protection clause.

When an equal protection challenge is raised, the courts rely on a two-tier test for the standard of judicial review.[80] One test, the rational basis, allows for a grant of judicial deference into complex matters the courts normally reserve for the legislature. In regards to the second test, compelling state interest, the burden of proof shifts to the government and involves a more rigorous analysis of the classification by the courts.

Before the court decides on which test to use, the fact that an equal protection challenge does exist must be found. Once this has been found, the court then proceeds to examine the objectives of the classification, the nature of the classification, and if the classification affects a fundamental interest or is based on a suspect criteria, (race, for example), the courts use the compelling state interest test. The rational basis test will be used if the courts find that the classification was based on standards other than suspect criteria and fundamental interests.

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[79] 272 U.S. 365 (1926).

[80] Thomas McCoy, "Recent Equal Protection Decisions—Fundamental Right to Travel or Newcomers as a Suspect Class?" 28 Vanderbilt Law Review 987, 993 (1975).

For example, in order to invoke the compelling state interest test, the plaintiff would have to prove that the class of people excluded is primarily determined by race and that the locality had the intent to classify by race.[81] If this is proven, the burden of proof then shifts to the government to prove that it has a compelling state interest to classify in such a manner, and that the classifications are necessary to accomplish the compelling state interest.[82] Here, the courts look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.[83] The state must show that the legislative classifications bear an overwhelming benefit to the public that would make the individual interest yield to the public welfare.[84] Even if a compelling state interest could be provided, the second half of the test requires that the means used are necessary to effectuate the compelling state interest. This requires that the least restrictive means must be used on the individual

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[81] Hunter v. Erickson, 393 U.S. 385 (1969) In this case the Supreme Court stated that "distinctions based upon race, bear a far heavier burden of justification than other classifications."

[82] David Godschalk et al., Responsible Growth Management: Cases and Materials (Chapel Hill: Center for Urban and Regional Studies, 1978), Chapter IV; also McLaughlin v. Florida, 379 U.S. 184 at 194 (1964). This case said that no set of facts have yet been presented to the Supreme Court that exhibited the compelling interest said to be required.

[83] Tussman and ten-Brock, "The Equal Protection of the Laws" (1949), p. 346.

[84] Godschalk et al., Constitutional Issues of Growth Management, p. 85.

interests being classified and generally, no state could carry this burden of proof.[85]

The second test used by the courts is called the rational basis test. This text provides for a minimal scrutiny of the classification used by the legislature. Under this test, the legislative bodies are presumed to have acted within their constitutional power if any facts can be used to justify the classification.[86] The courts in applying the rational basis test will ask three questions. The first being, does the classification serve some permissible state objective, and if it does, then this is enough to grant judicial deference.

The second question asked, is the classification rationally related to permissible state objectives, will be answered in the affirmative, if the classification promotes the objectives it supposedly serves.[87] The courts will strike down the classification only on the grounds that it does not achieve the state's objective.

The third question asked is whether the classification is applied in a nondiscriminatory manner.[88] Each of the first two questions must be answered in the affirmative, to reach this point. A court may find the classification is valid up to this point and then finds that the classification is applied in a discriminatory fashion. If the

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[85] McCoy, p. 994.

[86] Note, "New Standard for Equal Protection," 53 Nebraska Law Review 312 at 313 (1974).

[87] Godschalk, Constitutional Issues of Growth Management, p. 86.

[88] Ibid., p. 86-87.

classification is applied in a nondiscriminatory manner, and the other questions have been answered yes, then the rational basis test is satisfied and the classification does not violate equal protection.[89]

In terms of growth management, the two important challenges arising from the equal protection clause are the violation of the fundamental right to travel, and under suspect criteria, the exclusion of minority groups. In the next section of this chapter, the freedom to travel will be examined.

Freedom of Travel

While the freedom of travel doctrine is not explicitly stated in the Constitution, it has been upheld as a fundamental right that cannot be violated.[90] The courts have noted several areas within the Constitution as possible sources for this fundamental right. They are:

1. Article IV—privileges and immunities clause,
2. due process clause of the Fifth Amendment,
3. equal protection clause of the Fourteenth Amendment,
4. the commerce clause, and
5. the Constitution in general.

As early as 1849, the Supreme Court noted the right to travel in the

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[89]Ibid., p. 87; Note, "Developments in the Law—Equal Protection," 82 Harvard Law Review 1065-1192 (1969); Note, "Exclusionary Zoning and Equal Protection," 84 Harvard Law Review 1645 (1971).

[90]Shapiro v. Thompson, 394 U.S. at 634 (1969).

Passenger Cases.[91] Chief Justice Taney, in his dissent, stated,

> For all the great purposes for which the Federal Government was formed, we are one people, with one common country. We are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our States.[92]

In a more recent case, the Supreme Court in reviewing a restriction on the commerce clause in California stated,

> The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of several States must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.[93]

In the 1960's the Supreme Court struck down various regulations because they violated the right to migrate and settle. Some cases involved residency restrictions on voting,[94] welfare benefits,[95] others involved migration of indigents,[96] across state lines. The Court described in the Dunn case that the freedom to travel throughout the United States was a basic right under the Constitution.[97] The Court placed a "heavy burden of justification on the State to show compelling interest" to justify restriction on the fundamental freedom

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[91] 48 U.S. 283 (1849).

[92] Ibid., at 300.

[93] Edwards v. California 314 U.S. 160 at 173-174 (1941).

[94] Dunn v. Blumstein 405 U.S. 330 (1972).

[95] Shapiro v. Thompson 394 U.S. 618 (1969).

[96] Edwards v. California 314 U.S. 160 (1941).

[97] 405 U.S. at 336 (1972).

to travel.[98] In each of these cases where the Supreme Court used the compelling state interest justification, the restrictions were held to be unconstitutional based on the equal protection clause of the Fourteenth Amendment.[99]

When a local government, through a growth management program, restricts the amount of market growth that would normally occur, some restraints are placed on the entry of potential residents. Regulations such as development timing or moratoria on sewer hook-ups could have this effect.

While the courts have recognized the right to travel doctrine, as it affects fundamental interests, the issue is not as clear in land use regulations. The judiciary is reluctant to impose its judgment into local land use decisions. The judicial standard of review in a right to travel challenge generally favors the growth restriction. There is a minimal standard of review used by the courts. This means that if the regulation is reasonable and not arbitrary or capricious and, serves a permissible governmental objective, then the courts will usually uphold the growth regulation. However, the major obstacle to raise a right to travel challenge is legal standing.[100]

First, in order to bring suit in a federal court, the party challenging the regulation must be a proper plaintiff. The Supreme

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[98]Ibid. at 337.

[99]See, for example, Memorial Hospital v. Maricopa County 415 U.S. 250 at 254 (1974).

[100]Warth v. Seldin 422 U.S. 490 (1975).

Court in the Warth case said that the question of standing "is whether the litigant is entitled to have the court decide on the merits of the dispute or of particular issues."[101] This is based on Article III of the Federal Constitution and deals with the scope of judicial power.

Under Article III, the scope of judicial power exists to redress or otherwise to protect against injury to the complaining party. A federal court's jurisdiction can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the illegal action."[102]

Therefore, the party bringing the suit must raise a "case or controversy" outlined under Article III. If the litigant cannot do this, then the federal courts will dismiss the case for a lack of standing. Once the litigant has proven proper standing for the court to hear the case, the plaintiff then must prove specific harm and that they would benefit from the court's intervention:

> We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention.[103]

The Warth v. Seldin case is important in a growth management context for two reasons. First, by using a rigorous test for standing, the Supreme Court has made it more difficult for interested parties to

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[101] Ibid. at 498 (1975).

[102] Ibid., p. 499.

[103] Ibid., p. 508.

raise their interests to assert a right to travel challenge. Acting under the "case or controversy" requirement of Article III of the Constitution, the Court noted that because the developers and interested organizations had not been obstructed in efforts to migrate and settle, they did not have legal standing to bring suit for themselves.[104] In order for potential residents to raise the challenge, they had to show either demonstrable injury or harm to themselves, because they could not obtain housing due to the zoning ordinance. The Court noted that their problems to obtain housing were not caused by the effect of the zoning ordinance, but the housing market itself. Therefore, the plaintiffs could not show or prove harm or injury to themselves.

The second reason being, the court further limited standing by referring to the rule that plaintiffs cannot assert the rights of others in order to obtain relief for themselves.

> But even if we assume that the plaintiffs could establish that Penfield's zoning practices harm them, their complaint nonetheless was properly dismissed. Petitioners do not, even if they could, assert any personal right under the Constitution or any statute to be free of action by a neighboring municipality that may have some incidental adverse effect on Rochester. In short the claim of these petitioners falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves.[105]

The importance of the Supreme Court's decision in the Warth case

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[104] Ibid., 507.

[105] Ibid., 509.

can be shown by the decision of the Ninth Circuit Court of Appeals in the case of Construction Industry Association of Sonoma County v. City of Petaluma.[106] The Federal Appeals Court overturned the decision of the Federal District Court[107] because the plaintiffs (home builders, land owners, and potential residents) did not have the proper legal standing to bring the suit based on the requirements set forth in Warth v. Seldin.

Most federal courts will abide by the requirements founded in the Warth decision because the right to travel doctrine has its roots in the Federal Constitution. Often, while the direct question of the freedom to travel issue is not raised, the issues are implicitly stated. Most cases arise from exclusionary zoning measures, usually aimed at three and four acre minimum lot sizes.[108] If the courts judge that these zoning practices are primarily designed to restrict growth otherwise would occur in the area, the court then would invalidate the zoning restrictions.

It is apparent from the research, that each case will be decided on its own merits and facts. If a plaintiff can pass the threshold of legal standing, and the court invokes the compelling state interest test, then the restriction on the right to travel will be struck down.

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[106] 522 F.2d. 897 (1975).

[107] 375 F. Supp. 574 (1974).

[108] Steel Hill Development, Incorporated v. Town of Sanbornton, 469 F.2d. 956 (1972); Associated Home Builders v. City of Livermore, 577 P.2d. 473 (1976).

Secondly, there has only been one major case explicitly based on the freedom to travel doctrine in a growth management context, and it was overturned by a higher federal court. Therefore, it is not clear how the courts will decide on a specific growth regulation. But because of the minimal standard of review used by the courts, the regulations stand a good chance of success if based on a proper general welfare objective.

CHAPTER III

"THE BLESSINGS OF QUIET SECLUSION"

In the case of Village of Belle Terre v. Boraas,[1] the Supreme Court upheld a zoning ordinance that had the effect of limiting the housing needs of the Village of Belle Terre to single family residences. The court reasoned that the village's police power was sufficiently broad to uphold the desire of the village to preserve its small town character. Justice O'Douglas, writing the majority opinion, stated:

> Lines drawn by legislators in economic and social legislation will be respected by the Supreme Court against the change of violation of equal protection, if the law is reasonable, not arbitrary and bears a rational relationship to a permissible state objective. Permissible objectives have been held to include low density, reduced traffic flow, clean air and quiet.
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> A quiet place where yards are wide and people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. The police power is not confined to the elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.[2]

This chapter reviews three court cases in regards to each city's attempt to regulate growth within their respective political boundaries. The research briefly examines the background conditions that eventually guided the planning and formulation of a growth management plan. The three cases adjudicated are Golden v. Planning Board of

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[1] 416 U.S. 1 (1974).

[2] 416 U.S. 1 at 9 (1974).

Ramapo,[3] Construction Industry Association of Sonoma County v. City of Petaluma,[4] and Boca Villas Corporation v. City of Boca Raton.[5]

Each case is significant in that all three cases tested different approaches to somewhat similar problems incorporating growth management techniques. Ramapo's growth management scheme involved a phased development program based on a comprehensive master plan with a capital improvements program. Petaluma's approach to regulate growth used an annual permit system, which restricted the total number of units that could be constructed in any one year. Boca Raton's plan called for a population cap that would have frozen the population level of the city.

Examination of these cases demonstrates the judicial scrutiny placed on the soundness of planning that composed the growth management system. Since courts have traditionally granted a presumption of validity to local legislative acts promoting the general welfare, courts have needed to rely on more than the wisdom of the legislature. In pronouncing judgment in these cases, the courts needed to rely on the comprehensive planning that developed the growth management system. By involving a comprehensive planning process into the growth management system, the courts tend to have a better understanding of the plan and its policies.

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[3] 285 N.E. 2d. (1972).

[4] 375 F. Supp. 574 (N.D. Calif. 1974).

[5] 15 Fla. Supp. 65 (Fifteenth Circuit Court, 1976).

Because of a lack of judicial expertise in complex land use matters, and also, for lack of legal precedent, there is not a clearly defined reasoning the courts move through to reach a final decision. A municipality must demonstrate to the courts that their growth management plan is more than just legally defensible, but also has incorporated into its design a wide range of social responsibilities.[6] This range of social responsibilities should include regional, environmental, socioeconomic, and fiscal concerns that the plan would have an impact upon.

Ramapo, New York

Ramapo is a town in Rockland County, located within commuting distance of New York City. With the completion of the New York Thruway and the Palisades Parkway in the mid 1950's, the population of Ramapo rose from 35,000 to 76,702 in 1970. The town of Ramapo, faced with tremendous growth pressures and subsequent urban sprawl, amended its zoning ordinance to control the location and rate of growth within the unincorporated areas of Ramapo.

In 1964, Ramapo launched a new planning effort for the development of a master plan. After a two year study involving citizen groups and numerous public meetings, the Master Plan was adopted by the city countil in 1966. Incorporated into the Master Plan was a four-volume study of the existing land uses, public facilities,

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[6]David R. Godschalk et al., Responsible Growth Management: Cases and Materials (Chicago: The American Society of Planning Officials Press, 1978), pp. 8-15.

transportation industry and commerce, housing needs and projected population trends.[7]

Included into the Master Plan were a series of development policies that would later be used to form the basis of their growth management plan. Those development policies stated in part:

1. Every effort should be made to preserve those natural features of the town which give it a pleasant, open setting and which serve as an attractive background to the more developed areas of the Town.

2. The population increase provided for in the Town's Development Plan should be kept to a moderate level so that the existing rural, semi-rural and suburban character in different parts of the Town can be maintained and so that the existing and projected public facilites will not be overburdened.

3. Commercial development should conform with the existing pattern of development, providing for essentially local population needs.

4. Provision should be made for adequate public facilities, including transportation, circulation, education and recreation consistent with the anticipated needs of a growing population.

5. Continued efforts should be made to strengthen the tax base of the Town and local employment opportunities by encouraging properly planned and located light industrial establishments, research buildings and business and administrative offices.[8]

These policies were implemented into a comprehensive Zoning Ordinance (December 1966), an Official Map (August 1967), Development Easement Laws, (1967) and Subdivision Regulations, (July 1968).[9] Additional

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[7]285 N.E. 2d. 291 at 292 (1972).

[8]Godschalk, Cases and Materials, Chapter 7, p. 2.

[9]Ibid., p. 3.

studies of drainage and sewer development were undertaken in 1967. Therefore, all of these studies, plans and ordinances were used as the core of Ramapo's growth management plan.

The plan to control the location and rate of growth was based on two fundamental elements. The first was a capital budget and program, and secondly, adequate public facilities on site as a prerequisite to build, based on the zoning ordinance adopted in 1969.

In 1968, Ramapo developed a capital improvements budget, designed to finance the needed public facilities and services over a six year period. In conjunction with the capital improvements budget, the town adopted a capital improvements program that provided for the location and sequence of public services and facilities. This capital improvements program, due to last for twelve years, followed the first capital budget. Thus, the two plans together, covered a period of eighteen years and in detail, outlined the capital improvements projected for maximum development and conformed to the regulations founded in the Master Plan, Official Map and drainage plan.[10]

The second element of the growth management plan, based on the 1969 zoning ordinance, precluded development in any area until supported by adequate public facilities. This tool was used to implement the capital improvement budget and program. By adopting and defining "Special Permit Use" and "Residential Development Use," a developer

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[10]Melvin R. Levin et al., New Approaches to State Land Use Policies (Lexington, Mass.: D. C. Heath and Company, 1979), pp. 15-21; Thomas O'Keefe, "Time Controls on Land Use: Prophylactic Law for Planners," 57 Cornell Law Review 846 at 848, (1972).

who desired to build houses had to obtain a special permit from the Town Board. These permits were granted to anyone who wished to build if certain conditions were first met. Specifically, no residential development could occur unless or until a developer could show that certain capital improvements were available, or would be, either constructed by the town or the developer by the time the project was completed.[11]

The issuance of the special use permit to develop was conditioned upon the availability to the proposed subdivision plan of five essential facilities and services. The five facilities and services are:

1. public sanitary sewers or approved substitutes;
2. drainage facilities;
3. improved public parks or recreation facilities, including public schools;
4. state, county or town roads—major, secondary, or collector;
5. firehouses.[12]

No special permit was to be issued by the Town Board until the residential development had accrued fifteen (15) development points based on a specific scale of values.[13]

1. Sewers
   a. Public sewers available in RR-50, R-40, R-35, R-25, R-15 and R15-S Districts ..... 5 points
   b. Package sewer plants ..... 3 points

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[11]William K. Rielly et al., The Use of Land: A Citizen Policy Guide to Urban Growth (New York: The Rockefeller Brothers Fund, 1973), p. 92.

[12]285 N.E. 2d. 291 at 293 (1972).

[13]Stephen L. Urbanczyk, "Phased Zoning: Regulation of the Tempo and Sequence of Land Development," 26 Stanford Law Review 585 at 588 (1974).

c. County-approved septic system in an RR-80 District ..... 3 points
d. All others ..... 0 point

2. Drainage. Percentage of required drainage capacity available
   a. 100% or more ..... 5 points
   b. 90% to 99.9% ..... 4 points
   c. 80% to 89.9% ..... 3 points
   d. 65% to 79.9% ..... 2 points
   e. 50% to 64.9% ..... 1 point
   f. Less than 50% ..... 0 point

3. Improved public park or recreation facility, including public school sites
   a. Within one-fourth (1/4) mile ..... 5 points
   b. Within one-half (1/2) mile ..... 3 points
   c. Within one (1) mile ..... 1 point
   d. Farther than one (1) mile ..... 0 point

4. State, county or town, major secondary or collector roads improved with curbs and sidewalks
   a. Direct access ..... 5 points
   b. Within one-half (1/2) mile ..... 3 points
   c. Within one (1) mile ..... 1 point
   d. Farther than one (1) mile ..... 0 point

5. Firehouse
   a. Within one (1) mile ..... 3 points
   b. Within two (2) miles ..... 1 point
   c. Farther than two (2) miles ..... 0 point[14]

The purpose of Ramapo's growth management plan was to phase residential development to the Town's ability to provide the designated public facilities and services in order to slow the rate of premature land development and the prevention of excessive urban sprawl.[15] Under

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[14] Ibid., p. 589.

[15] See, for example: Henry Fagin, "Regulating the Timing of Urban Development," 20 Law and Contemporary Problems 298 (1955); David J. Brower et al., Growth Management Through Development Timing (New York: Praeger Publishers, 1974).

the Ramapo approach, a developer would know the eventual use and allowable density classification of every parcel, while, in some instances, subdivision development would be postponed until a future date.

On October of 1969, Ruth Golden brought suit against the Town of Ramapo, seeking to annul the planning board's decision and therefore to invalidate the zoning ordinance. The plaintiff, Mrs. Golden, was joined in her complaint by a local builders association, engaged in residential construction, and a development corporation that owned twelve acres in Ramapo. The legal challenge was based on four areas:

1. The power exercised by the Town to regulate the rate of development had not been delegated to it by the state, and therefore the zoning ordinance was unconstitutional.

2. Even if the town had the authority to do so, the zoning laws had not been adopted in accordance with a comprehensive plan, as required by state law.

3. All of the plaintiffs claimed that their Fifth and Fourteenth Amendment's right to due process had been infringed upon because the zoning plan was both exclusionary and tantamount to a taking without just compensation.

4. The classifications contained in the ordinance were alleged to be unjustifiably discriminating and therefore violative of the equal protection clause.[16]

In 1972, the State of New York's Court of Appeals upheld the Ramapo ordinance. While upholding the phased growth regulation, the court of appeals examined the violation of substantive due process claim in two contexts. The first area of review, the court examined

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[16]Note, "A Zoning Program for Phased Growth: Ramapo Township's Time Controls on Residential Development," 47 New York University Law Review, 723 at 727 (1972).

whether the effective ends served by the employment of time controls were included in the states' police powers and whether the Ramapo ordinance did in fact constitute exclusionary zoning and therefore, exceeded constitutional bounds. Secondly, the court had to determine whether the time controls upon land use were a means so unreasonable as to effect a taking of the plaintiff's property without compensation.[17]

The majority opinion, written by Judge Scileppi, answered the first claim of improper objectives served by the zoning ordinance and beyond the scope of the police power by saying:

> In enacting the challenged amendment, the Town Board has sought to control subdivision in all residential districts, pending the provision (public or private) at some future date of various services and facilities. Our concern is, as it should be, with the effects of the statutory scheme taken as a whole and its role in the propagation of a viable policy of land use and planning.
>
> Even so, considering the activities enumerated by section 261 of the Town Law, and relating those powers to the authorized purposes detailed in section 263, the challenged amendments are proper zoning techniques, exercised for legitimate zoning purposes. The power to restrict and regulate conferred under section 261 includes within its grant by way of necessary implication, the authority to direct the growth of population for the purposes indicated, within the confines of the township. It is the matrix of land use restrictions, common to each of the enumerated powers and sanctioned goals, a necessary concomitant to the municipalities' recognized authority to determine the lines along which local development shall proceed, though it may divert it from its natural course.
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> To this end, subdivision control (Town Law, Section 276, 277) purports to guide community development in the directions outlined here, while at the same time encouraging the provision of adequate facilities for the housing,

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[17] Ibid., p. 739.

> distribution, comfort and convenience of local residence. It reflects in essence, a legislative judgment that the development of unimproved areas be accompanied by provision of essential facilities.[18]

Next, the court of appeals approached the question of exclusionary zoning in the Ramapo ordinance by looking to the purpose of the regulation, finding it reasonable and not exclusionary. The court said, "The Ramapo approach does not attempt to freeze development so as to avoid the added final burdens resulting from an increased demand for municipal facilities."[19] By looking at the purpose of the regulation, the court balanced the benefits to the general welfare against the burden placed on the landowner. Viewing the benefit gained by the entire community the court stated:

> It is the nature of all land use and development regulations to circumscribe the course of growth within a particular town or district and to that extend such restrictions invariably impede the forces of natural growth. Where those restrictions upon the beneficial use and enjoyment of land are necessary to promote the ultimate good of the community and are within the bounds of reason, they have been sustained. It (zoning) is inextricably bound to the dynamics of community life and its function is to guide, not to isolate or facilitate efforts at avoiding the ordinary incidents of growth. What segregates permissible from impermissible restrictions, depends in the final analysis upon the purpose of the restriction and their impact in terms of both the community and general public interest. The line of delineation between the two is not a constant but will be found to vary with prevailing circumstances and conditions.
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> What we will not countenance, then, under guise is community efforts at immunization or exclusion. But, far from being exclusionary, the present amendments merely

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[18] 285 N.E. 2d. 291 at 293-294 (1972).

[19] Ibid., p. 294.

> seek, by the implementation of sequential development and timed growth, to provide a balanced, cohesive community dedicated to the efficient utilization of land. The restrictions conform to the communities' considered land use policies as expressed in its comprehensive plan and represents a bona fide effort to maximize population density consistent with orderly growth. We only require that communities confront the challenge of population growth with open doors. Where in grappling with that problem, the community undertakes, by imposing temporary restrictions upon development, to provide required municipal services in a rational manner, courts are rightfully relunctant to strike down such schemes.[20]

The Court then analyzed the question of a taking. The plaintiffs had contended that the eighteen year restriction on their property was a physical invasion of their property rights and, thus, constituted a violation of substantive due process protected by the Fifth and Fourteenth Amendments. The Court noted that the eighteen year restriction was reasonable, though "substantive in nature and duration, they are not, however, absolute."[21]

> The proposed amendments have the effect of restricting development for onwards to eighteen years in certain areas. Whether the subject parcels will be so restricted for the full term is not clear, for it is equally probable that the proposed facilities will be brought into these areas well before that time. Assuming, however, that the restrictions will remain outstanding for the life of the program, they still fall short of a confiscation within the meaning of the constitution.
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> An ordinance which seeks to permanently restrict the use of property so that it may not be used for any reasonable purpose must be recognized as a taking: The only

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[20] 285 N.E. 2d. 291 at 297-298 (1972); also see, Note, "A Zoning Program for Phased Growth," 47 New York University Law Review, 723 at 740 (1972); Fred P. Bosselman, "Can the Town of Ramapo Pass a Law to Bind the Right of the Whole World?" 1 Florida Law Review, 234 (1973).

[21] 285 N.E. 2d. 291 at 300 (1972).

> difference between the restrictions and an outright taking in such a case is that the restriction leaves the owner subject to the burden of payment of taxes, while outright confiscation would relieve him of that burden. An appreciably different situation obtains where the restriction constitutes a temporary restriction, promising that the property may be put to a profitable use within a reasonable time.
>
> Without a doubt restrictions upon the property in the present case are substantial in nature and duration. They are not, however, absolute. The amendments contemplate a definite term, as the development points are designed to operate for a maximum period of eighteen years and during that period, the Town is committed to the construction and installation of capital improvements.
>
> Considered as a whole, it represents both in its inception and implementation a reasonable attempt to provide for the sequential, orderly development of land in conjunction with the needs of the community, as well as individual parcels of land, while simultaneously alleviating the blighted aftermath which the initial failure to provide needed facilities so often brings.[22]

Because of an absence of any proof to the contrary, the court noted that the Town of Ramapo will implement its long range capital improvements program. The court also left open the door for possible future litigation if the town fails to provide for the municipal improvements by stating "that there will be ample opportunity to undo the restrictions upon default."[23]

The Court of Appeals in summary, held that the Town's ordinance was constitutional because the plan was within the boundaries of reasonableness.

> The proposed restraints, mitigated by the prospect of appreciated value and interim reductions in assessed value, and measured in terms of the nature and magnitude of the

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[22] 285 N.E. 2d. 291 at 299-300 (1972); also see; Arverne Bay Construction Co. v. Thatcher 15 N.E. 2d. 587 at 592 (1938).

[23] 285 N.E. 2d. 291 at 301 (1972).

> project undertaken, are within the limits of necessity. In sum, where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for "phased growth," and hence, the challenged ordinance is not violative of the Federal and State Constitutions.[24]

In review, the major issue of the case was if development could be conditioned on the provision by the Town of Ramapo of specified services and facilities. The Court of Appeals held that phased growth was well within the meaning of the existing enabling legislation. The court reasoned that whether the town itself or the developer provided the improvements, the objective was similar—to provide for the adequate public facilities. In either case, the right to develop a subdivision was not denied, only conditioned upon the accumulation of the necessary points. Further, the Court of Appeals held that the purpose of Ramapo's phased growth program was not aimed at the exclusion of additional population growth, but at population assimilation.

The Town of Ramapo was able to demonstrate to the Court the concept of the phased growth program was based on a comprehensive master plan. The master plan outlined the provision of the adequate public facilities and was implemented through the capital improvements budget. Thus, Ramapo could show a consistency through a well defined

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[24] 285 N.E. 2d. 291 at 301 (1972).

plan for the coordination of public facilities and utilities, and the rate of development.[25]

The next section of Chapter III deals with the growth management plan for Petaluma, California.

Petaluma

The city of Petaluma, California, is located within Sonoma County, approximately forty miles north of San Francisco. This area is considered as part of the San Francisco Bay area metropolitan region. Up until the mid-1960's, Petaluma was known primarily for its dairy and poultry resources. In the twenty year period between 1950 and 1970, Petaluma's population more than doubled in size. This represented a 77 percent change in the rate of growth during those twenty years.

While the members of the city council of Petaluma had been strong advocates of growth, these same members started questioning the wisdom and the desirability of additional growth.[26] During a two year period between 1970 and 1971, almost 1500 new housing units were constructed in Petaluma, more than had been completed in the preceeding four years.[27]

The citizens and the city council started conducting studies to determine ways in which to temporarily slow residential growth within the city limits. The city council studied the adequacy of public

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[25]Robert H. Freilich, "Golden v. Town of Ramapo: Establishing a New Dimension in American Planning Law," 4 Urban Lawyer 9 (1972).

[26]Note, "Zoning Growth Controls for the General Welfare," 55 Nebraska Law Review 522 (1975 and 1976).

[27]Godschalk et al., Cases and Materials, Chapter 8, p. 1.

facilities and services, while citizens participated in a community questionnaire and various governmental task force study groups. Therefore, in June, 1971, the city council adopted an "Official Statement of Development Policy for the City of Petaluma." Two major objectives that influenced the development policy was the preservation of the small town character of Petaluma, and to avoid any undesirable growth.[28]

In 1972, the city council implemented the official Development Policy through the adoption of the Petaluma Plan. This plan included the following ordinances:

1. Environmental Design Plans and Maps
2. A Residential Development Control System
3. the Housing Element of the Petaluma General Plan
4. the Residential Development Evaluation Board[29]

The intended effect of these ordinances was two-fold. The first was to limit the demographic and market growth rate of housing, and secondly, to limit the immigration of new residents. Thus, the Petaluma Plan would have allowed for roughly five hundred units to be constructed each year for a five year period beginning in 1973 and ending in 1977.

Through these ordinances, the city adopted an urban extension line, which marked the boundary line for the city's future expansion. The urban extension line was a boundary that marked the outer limits

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[28]Note, "Zoning Growth Controls," p. 523.

[29]Construction Industry Association v. City of Petaluma 375 F. Supp. 574 at 577 (Northern District, California, 1974).

of expansion for the city over a twenty year planning horizon. The city, with the help of Sonoma County, wanted to prohibit any residential growth outside this line. Thus, future growth was directed into the urban areas of Petaluma itself. The planning staff then conducted studies that formulated policy that would permanently preserve open space to help shape the urban form.

Petaluma based its plan on three compelling interests which would justify the restrictive ordinances.[30] Those interests were, the inability to supply adequate sewage facilities, the inadequacy of the town's water supply, and finally, the desire of the community to protect its small town character.[31] Petaluma claimed that they had an inherent right to control its own rate of growth through its zoning powers.[32]

The Construction Industry Association of Sonoma County and two land owners challenged the Petaluma Plan in Federal Court. The plan was found unconstitutional by District Judge Lloyd H. Burke.[33] The Construction Industry claimed that the question of where a person should live is within the exclusive realm of that individual's prerogative, not within the decision-making power of any governmental unit. Also, the plaintiffs claimed that since Petaluma has assumed

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[30]Comment, "The Right to Travel as a Limitation Upon the Exercise of the Zoning Power," 36 Ohio State Law Review, 128 (1975).

[31]Ibid., p. 128 at 133.

[32]Ibid., p. 134.

[33]375 F. Supp. 574 at 579 (N.D. Calif. 1974).

the power to make such decisions on the individual's behalf, that the city had violated their (future residents) right to travel.[34]

The District Court ruled the plan unconstitutional on the ground that it affected a guaranteed fundamental right, that is, the freedom to travel, migrate and settle. Because the plan sought to restrict growth, the court found that it was

> an effort to avoid the problems that accompany contemporary trends in population growth. Through the plan, the defendants purpose to address themselves to such problems by limiting the number of people who will hence forth be permitted to move into the city. The express purpose and the intended and actual effects of the Petaluma Plan have been to exclude substantial numbers of people who would otherwise have elected to immigrate into the city.[35]

Petaluma tried to answer this in court by stating that through the virtue of its zoning powers, it had an inherent right to control its rate of growth and to protect its small town character.[36] The Federal District Court saw this as the primary issue and rejected the city's argument as a violation of the right to travel, unsupported by any compelling state interest, which could not be served by using other alternatives.

Judge Burke based the court's decision on two earlier cases, Dunn v. Blumstein[37] and National Land and Investment Company v.

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[34] 375 F. Supp. 574 at 579 (N.D. Calif. 1974).

[35] 375 F. Supp. 574 at 581 (N.D. Calif. 1974).

[36] 375 F. Supp. 574 at 582 (N.D. Calif. 1974); also see, Comment: "Constitutional Limitations Placed on Controlled Growth Zoning," 5 Golden Gate Law Review 485 to 486 (1975).

[37] 405 U.S. 330 (1972).

Kuhn.[38] In the Dunn case, the United States Supreme Court noted that there has to be a finding of fact of a compelling state interest in order to affect a fundamental interest.

> Thus, Dunn stands for the proposition that a classification which operates to penalize those persons . . . . who have exercised their constitutional right of interstate migration must be judged by a compelling state interest.
>
> It is not sufficient for the state to show that (the rules implemented) further a very substantial state interest. In pursuing that important interest the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision" and must be "tailored" to serve their legitimate objectives. If there are other reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If a State acts at all, it must choose "less drastic means."[39]

The court examined Petaluma's three compelling interest and held, after a finding of fact, that their justification was invalid. Then the court turned to a Pennsylvania Supreme Court case that dealt with exclusionary zoning used as an attempt to avoid the burdens that increased growth brings, for a precedent.[40] In that case, the Pennsylvania Supreme Court, invalidating a town's four acre minimum lot size, used to protect its small town character, stated:

> Appellants denominate this goal as falling within the ambit of promoting the "general welfare." Unfortunately, the concept of the general welfare defies meaningful capsule

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[38] 215 A. 2d. 597 (1965).

[39] 405 U.S. 330 at 340 (1972) as quoted in 375 F. Supp. 574 (N.D. Calif. 1974).

[40] 215 A. 2d. 597 (1966).

> definition and constitutes an exceedingly difficult standard against which to test the validity of legislation. However, it must always be ascertained at the outset whether, in fact, it is the public welfare which is being benefited or whether, disguised as legislation for the public welfare, a zoning ordinance actually serves purely private interests. The question posed is whether the township can stand in the way of the natural forces which send out growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic or otherwise, upon the administration of public services and facilities cannot be held valid.
>
> It is clear that the general welfare is not fostered or promoted by a zoning ordinance designed to be exclusive or exclusionary.[41]

Relying on the decision reached by the Pennsylvania Supreme Court in the National Land case, Justice Burke concluded that the Petaluma Plan was unconstitutional because it tended to limit the natural population growth of the area.

> The sole issue in this case is whether or not people currently excluded from Petaluma have the right to immigrate into the area. If so, relief will be granted, and their rights will be enforced, after which the matter of dealing with the natural burdens that the exercise of those rights places upon the municipality falls entirely within the discretion of city officials, or the city electorate.
>
> Since the population limitation policies complained of are not supported by any compelling governmental interest, the exclusionary aspects of the "Petaluma Plan" must be, and, are hereby declared in violation of the right to travel and, hence, are unconstitutional.
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> Such holding is intended to encompass, not only the outright numerical limitations upon the issuance of building permits, but also any and all features of the plan which, directly or indirectly, seek to contact population growth by any means other than market demands.[42]

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[41] 215 A. 2d. 597 at 612 (1966) as quoted in 375 F. Supp. at 381 (N.D. Calif. 1974); also see, Appeal of Kit-Mar Builders, 268 A. 2d. 765 (1970); and, Appeal of Girsh, 263 A. 2d. 398, 399 (1965).

[42] 375 F. Supp. 574 at 381 (N.D. Calif. 1974).

The city of Petaluma appealed the Federal District Court's decision to the Federal Court of Appeals, (Ninth Circuit), and the Federal Court of Appeals overturned the lower court's decision.[43] The Court of Appeals, relying on two recent Supreme Court decisions, Village of Belle Terre v. Boraas[44] and Warth v. Seldin,[45] upheld the constitutionality of the Petaluma Plan.

First, using the Warth v. Seldin case as appropriate legal precedent, the Court of Appeals determined that the plaintiffs lacked legal standing to raise the right to travel suit. The Court stated that:

> According, appelles' right to travel claim "falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from damage or injury to themselves."[46]

Because the Construction Industry Association originally brought the legal challenge on the behalf of others, while they could not prove a direct harm to themselves because of the Petaluma Plan, the Court of Appeals held the Association did not have the required legal standing outlined under Article III of the United States Constitution, and thus, overturned the lower court's opinion.

Then, relying on Justice O'Douglas's majority opinion in Village of Belle Terre v. Boraas, the Court of Appeals ruled on the right to

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[43] 522 F. 2d. 897 (Ninth Circuit, 1975).

[44] 416 U.S. 1 (1974).

[45] 422 U.S. 490 (1975).

[46] 522 F. 2d. 897 at 904 (Ninth Circuit, 1975).

travel issue. The plaintiffs in the Belle Terre case alleged a violation of their freedom to travel and migrate as a result of Belle Terre's zoning ordinance. The Supreme Court held that because the zoning ordinance was not directed at transients, the zoning ordinance did not affect this right.[47] Thus, based on the Supreme Court's reasoning, the Court of Appeals stated:

> The Supreme Court held that since the ordinance was not aimed at transients, there was no infringement of anyone's right to travel. Although due to appellee's lack of standing we do not reach today the right to travel issue, we do note that the Petaluma Plan is not aimed at transients, nor does it penalize those who have recently exercised their right to travel.[48]

The Court of Appeals also relied on the Belle Terre decision for the constitutionality of the Petaluma Plan based on the general welfare concept. The Court of Appeals found that, "The concept of the public welfare was sufficiently broad to preserve the small town character, its open spaces and low density of population, and to grow in an orderly and deliberate fashion, and therefore, justified the exclusionary effect of the plan."[49]

However, the Federal Court of Appeals did find several serious regional housing problems associated with the Petaluma Plan. The housing market in the San Francisco area was described as a "self

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[47] 416 U.S. 1 at 7 (1974).

[48] 522 F. 2d. 897 at 907 (Ninth Circuit, 1975).

[49] 522 F. 2d. 897 at 909 (Ninth Circuit, 1975); also see YBarra v. City of Town of Los Altos Hills, 503 F. 2d. 250, 254 (Ninth Circuit, 1974).

contained" and "unitary" market.[50] This meant that if potential residents could not find adequate housing in one area of the region, they would go elsewhere in the region. But, the Court of Appeals still upheld Petaluma's growth management plan, arguing that the complex issues raised during litigation were better left to state legislative bodies, and not the federal court system.

> According to undisputed expert testimony at trial, if the Plan were to be adopted by municipalities throughout the region, the impact on the housing market would be substantial. For the decade 1970 to 1980, the short fall in needed housing in the region would be about 105,000 units (or twenty-five percent of the units needed). Further, the aggregate effect of a proliferation of the plan throughout the San Francisco region would be a decline in regional housing stock quality, a loss of the mobility of current and prospective residents and a deterioration in the quality and choice of housing available to income earners with real incomes of $14,000 per year or less. If, however, the plan were considered by itself and with respect to Petaluma only, there is no evidence to suggest that there would be a deterioration in the quality and choice of housing available there to persons in the lower and middle income brackets. Actually, the Plan increases the availability of multi-family units and low-income units which were rarely constructed in the pre-Plan days.
>
> Although we assume that some persons desirous of living in Petaluma will be excluded under the housing permit limitation, and that, thus, the Plan may frustrate some legitimate regional housing needs, the Plan is not arbitrary or unreasonable. We agree with appellees' that unlike the situation in the past most municipalities today are neither isolated nor wholly independent from neighboring municipalities and that, consequently, unilateral land use decisions by one local entity affect the needs and resources of an entire region.
>
> If the present system of delegated zoning power does not effectively serve the state interest in furthering the

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[50] 375 F. Supp. 547 (N.D. Calif. 1974); also see Note, "Growth Restrictions v. The Right to Travel: The Petaluma Plan," 35 Louisiana Law Review 676 (1975).

> general welfare of the region or entire state, it is the state legislature's and not the federal courts' role to intervene and adjust the system. As stated before, the federal court is not a super zoning board and should not be called on to make the point at which legitimate local interests in promoting the welfare of the community are outweighted by legitimate regional interests.[51]

The Federal Court of Appeals also ruled that the plaintiffs' due process rights, both substantive and procedural had not been violated. The court found that there was a reasonable basis in fact to support the legislative judgment, and that the Plan was not arbitrary or unreasonable and, therefore, a valid exercise of the police power. This presumption of validity has been given to legislative acts since Village of Euclid v. Ambler Realty Company.[52] The court determined the reasonableness of the Plan by balancing the public interest gained against the private burden. The court concluded that the public interest prevails in this case because the Plan promotes the public safety, health and welfare of the entire community.[53] Finally, the Court of Appeals found that "the Petaluma Plan was an exercise of legislative wisdom by the City of Petaluma to fulfill its obligations as a responsible public body."[54] In other words, the Court of Appeals, by rejecting the plaintiffs' legal standing to raise the challenge, was able to invoke the traditional rational basis test. Thus, the Court of Appeals

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[51] 522 F. 2d. 897 at 910, 911 (Ninth Circuit, 1975).

[52] 272 U.S. 365 at 388 (1926).

[53] 522 F. 2d. 897 at 912 (Ninth Circuit, 1975).

[54] 522 F. 2d. 897 at 912 (Ninth Circuit, 1975).

was able to uphold the constitutionality of the Petaluma Plan.[55]

Under the context of procedural due powers, the city was able to prove that through their review process outlined in the Residential Development Control System, and outlined in the Rules and Regulations of the Residential Development Evaluation Board, that every opportunity was given to all applicants who submitted an application for housing allotments. Thus, the Court of Appeals found that there had been no violation of procedural due process.

The next section of Chapter III deals with the growth management plan for Boca Raton, Florida.

Boca Raton

The city of Boca Raton is located in the southeastern end of Palm Beach County, about forty miles north of Miami and twenty miles south of West Palm Beach. This area has experienced large amounts of growth, due in part, to favorable climate and an active annexation program. In 1950 the population of the city was 992 and by 1974 it had exceeded over 45,000 people.[56]

Efforts were made by concerned citizens groups to restrain the rapid, high density development that had occurred within the City's boundaries. The first effort resulted in density reductions in 1965.

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[55]Note, "Freedom of Travel and Exclusionary Land Use Regulation," 84 Yale Law Review 1564 (1975).

[56]Michael E. Gleeson et al., "Urban Growth Management Systems: An Evaluation of Policy-Related Research," Planning Advisory Service Report Numbers 309-310 (Chicago: The American Society of Planning Officials Press, 1975), p. 7.

This downzoning lowered densities from 145 dwelling units per acre to 96. In 1969, this density was reduced to 50.7 dwelling units per acre. Finally, in 1972, it was further reduced to forty dwelling units per acre. These reductions were followed by a charter amendment to set the ultimate population level for the city at 105,000 people.

The charter amendment was an out growth of a study concluded by the Conservation Committee of the Royal Palm Audubon Society.[57] The study was entitled "The Problems of Growth" and it examined five problem areas: water quality and quantity, schools, social impacts of population growth, economic impacts of growth, and finally, the proposed planned unit development ordinance. The final conclusion reached in the report was to limit the city's population to 105,000 people. In order to accomplish this, the report concluded, the city needed to limit the number of dwelling units constructed to forty thousand.[58]

Because the city council refused to place the growth cap charter amendment on the ballot, citizen groups used the initiative and referendum provisions in the city charter to place it on the ballot. Through the efforts of a citizen group entitled, "Citizens for Reasonable Growth Committee," the amendment did pass on November 7, 1972. This committee summed up the motive behind controlling development by stating, "rapid, uncontrolled, and mindless population growth

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[57] Ibid., p. 7.

[58] Godschalk et al., Cases and Materials Chapter 10, p. 2.

would mean the destruction of our way of life in this lovely city."[59] As a result of the growth cap charter amendment, the city council was compelled to enact ordinances which would implement the growth cap amendment. The city decided on two growth restriction techniques, downzoning and land banking. Within one year after passage, the city had purchased sevety-four acres of beach front property at a cost of seventeen million dollars.

After the cap ordinance passed, a study showed that if residential development was carried out at current levels, there was a potential for a total of 62,646 dwelling units.[60] This meant that in order to comply with the approved amendment, the city had to reduce the allowable densities of multi-family units by an across the board cut of 50 percent, rezone a portion of the remaining multi-family land to single family, and rezone residential land for commercial and industrial purposes. A series of moratorium ordinances were passed in order to gain time to implement the cap amendment. A comprehensive plan update, started before the passage of the cap amendment, was revised to provide a plan based on a maximum of forty thousand dwelling units.[61] Downzoning was the primary method chosen to implement the new population cap level.

As a result of the downzoning and subsequent moratoriums and

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[59]Gleeson et al., p. 7.

[60]Godschalk et al., Cases and Materials, Chapter 10, p. 7.

[61]Ibid., Chapter 10, p. 3.

implementing ordinances, two major land owners and developers challenged Boca Raton's population cap in court. The plaintiffs claimed the growth management program for Boca Raton violated both Federal and State Constitutional guarantees of due process and equal protection under the Fifth and Fourteenth Amendments. In addition, both landowners claimed the downzoning of their land amounted to a taking without compensation.[62]

The trial court judge, Justice Sholts, agreed with the plaintiffs and found the population cap unconstitutional, as it violated the Fifth and Fourteenth Amendments, and the downzoning was tantamount to a taking.[63] The city appealed this decision to the Florida Fourth District Court of Appeals. The Court of Appeals, in a Per Curiam (short, oral decision) affirmed the lower court's decision.[64] Thus, the ruling of the trial court had the effect of rolling back to all previous existing densities prior to the passage of the cap amendment in 1972.

The trial court used the rational basis test to determine the reasonableness of the population cap. Traditionally, this type of judicial review favors the plan, but in this instance, the court found several problems with the plan. If the cap could promote public

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[62] Boca Villas Corporation v. City of Boca Raton. 45 Fla. Supp. 65 (Fifteenth Circuit Court, 1976).

[63] 45 Fla. Supp. 65 (Fifteenth Circuit Court, 1976).

[64] Boca Villas Corporation v. City of Boca Raton, No. 75-772, (State Court of Appeals, Fourth District, 1977).

welfare rationally and without unnecessary and unreasonable consequences to private property rights, then it would be legal for the city to carry out its mandate. However, after examining the underlying purposes to be served by the cap, the court noted:

> Imposition of a Cap without adequate consideration of present and future consequences is evidence, but not sufficient proof alone, of irrationality. Therefore, the court carefully considered the purposes allegedly served by the Cap. In Florida, zoning legislation may be intended to preserve and protect:
>
> a. Patterns and density of development
> b. Adequacy of municipal utilities and services
> c. The character of subject properties and surrounding areas
> d. The potential for beneficial use of subject properties.
>
> When legislative judgment is determined to be rationally related to these and other legitimate interests, the court should not substitute its judgment for that of zoning officials. But here, the court believes there is no real substantial relationship between the Cap and the public purpose allegedly protected and preserved by it. The evidence presented by the city simply failed to establish a sufficient substantial benefit to the public welfare of Boca Raton.[65]

The court, in determining reasonableness, studied the post-cap professional studies and found no justification based on those reports. Even though the court noted that the traditional, lenient standard of review applied to legislative acts if its relation to the public welfare is "fairly debatable," this cap must fail.[66]

> If a fixed limit on housing substantially and rationally promotes public welfare, it may well pass constitutional muster. Regrettably, in Boca Raton, such is simply not

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[65] 45 Fla. Supp. 65 at 70 (Fifteenth Circuit Court, 1976).

[66] 45 Fla. Supp. 65 at 70 (Fifteenth Circuit Court, 1976).

> the case. The evidence concerning the Cap's emotional and arbitrary birth, its unreasonable effects and the lack of a material, factural and substantial relationship to public welfare is so compelling that fair debate should not really be expected. Although the Cap may represent the desires of a majority of the city's voting population, that choice must not and cannot override a constitutional imperative . . . the electorate may only act to promote substantial public welfare without exceeding the bounds of necessity.[67]

The court then turned to the question of equal protection. The court found the downzoning program was unfair to land zoned multi-family as compared to land zoned single family. Also, the court found the City of Boca Raton's actions in downzoning to be arbitrary and unreasonable as the reduction in density applied only to multi-family zoned land.

> As part of implementation the city set single-family densities by comparing "as built construction" in existing subdivisions. Without consideration of effect, multi-family classifications were slashed 50 percent after previously having been reduced by approximately 30 percent in October, 1972, one month before Cap adoption. In its zeal to accomplish the absolute mandate called for by the Cap, the city made no good faith attempt to determine whether multi-family implementation densities were reasonable. If "across-the-board" 50 percent density reductions in multi-family zoning classifications imposed under cap implementation bears any reasonable relationship to characteristics of the properties or areas involved, it is by pure accident.[68]

Finally, the court turned to the issue of taking without just compensation. In finding that a taking had in fact occurred, the court used the balancing test to answer this question.

> After reviewing the consequences the Cap imposed upon the city's housing needs and burdens on the regional general

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[67] 45 Fla. Supp. 65 at 71-72 (Fifteenth Circuit Court, 1976).

[68] 45 Fla. Supp. 65 at 76 (Fifteenth Circuit Court, 1976).

> welfare, and the relationship it bears to legitimate governmental purpose, the court considered its present and potential detrimental effect on private property rights. Plaintiffs offered appraisal testimony in an attempt to estimate minimum loss ($50,000,000) of property value imposed after implementation. Of itself, a loss of property value city-wide, is not sufficient to invalidate the Cap. However, validity of the Cap city-wide must be assessed against the degree to which individual property rights are affected. In its best light, the Cap's real public benefit is to clearly and concretely focus the community's choice upon low density. At worst, such community choice is seen as an attempt to eliminate individual zoning density decisions from the normal legal process. Whether or not the loss in property value was $50,000,000 or less, it is certainly enough to outweigh any minimal benefit.
>
> Turning to the subject property, the court finds the Cap implementing ordinances prevent Plaintiffs from beneficially utilizing their property under present allowable uses. Further, the City's appraisers were unable to testify when either Plaintiff might foreseeably expect a return of their out-of-pocket investment in the properties. Confiscation has accordingly resulted to both Plaintiffs.[69]

In review, the court overturned Boca Raton's population cap for many reasons. First, the court found that the studies conducted by the citizen committees to be unprofessional, superficial and without expert coordination or assistance.[70] After studying the professional planning studies, the court discounted these as being "ex post facto" and "under pressure."[71] The court records also indicated from official testimony at the trial, that Boca Raton did not suffer from any shortages in public facilities, thus denying the need for the population cap.

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[69] 45 Fla. Supp. 65 at 77 (Fifteenth Circuit Court, 1976).

[70] Godschalk et al., Cases and Materials, Chapter 10, p. 14.

[71] Ibid., p. 14.

Even though the court did not decide the case on issues concerning regional general welfare and the resulting exclusionary effect of the cap, it nevertheless stated, " . . . that its effect on housing supply has been to eliminate the possibility of private construction of low and moderate income housing."[72] The court concluded that the cap, "viewed in this manner, it (the cap) imposes an unnecessary low and moderate income housing burden on neighboring communities and Boca Raton's neighbors are presently unable to fulfill this demand."[73] Essentially, the Court found that the cap restricted low and moderate income housing starts to the neighboring communities and raised the price of a new single family house to over $50,000.

Finally, Justice Sholts, in concluding the verdict of the court, stated:

> When one is confronted with Boca Raton's Cap, the impression is unmistakable, the legislation is of the "I'm aboard, Jack. Pull up the ladder," variety.[74]

The last section of Chapter III deals with the impact that these cases have on growth management.

Impact on Growth Management Programs

The major issue in each case was whether or not each respective city had a right to control growth within their own boundaries. The outcome of each case was dependent on how well each city was able to

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[72] 15 Fla. Supp. 65 at 74 (Fifteenth Circuit Court, 1976).

[73] Ibid., at 75.

[74] Ibid., at 78.

demonstrate its planning that formulated each growth management policy to the court.

The first two cities were able to show the courts an extensive array of plans and policies conceived before the implementation of a restrictive growth policy. Boca Raton, however, was not able to prove to the court its need for a restrictive growth ordinance. Additionally, the trial court in Boca Raton found the cap amendment to be rooted in motives not designed to enhance the general welfare of the region.

The second major impact from these cases for growth management policies is directed towards constitutional safeguards. Ramapo and Petaluma both incorporated these legal safeguards into their planning process. The impacts of a growth management plan are far-reaching, usually affecting the entire region. The affects of Ramapo and Petaluma's decision were made to include moderate and low income housing, and the granting of permits to subdivide were only conditioned upon the provision of adequate services and facilities. On the other hand, Boca Raton sought to reach a certain population level, and then, no more dwelling units were to be constructed.

The third major impact on growth management schemes is the courts' ability to balance the benefits received by the plan to the general welfare against the burden carried by the private sector. This is in keeping with the traditional principle of judicial review. As stated earlier, many of these land use decisions are complex social and legal questions. In many instances, the courts are reviewing these issues for the first time. Therefore, in order to have a successful growth

management program, in terms of implementation and fairness to affected landowners, it is important to incorporate into the growth management plan the needs of the residents, the region and constitutional safeguards.

CHAPTER IV

CONCLUSIONS FROM COURT CASES

The efforts of the three cities in the previous chapter are representative of local government actions in response to and attempts in managing growth. It is impossible to isolate any single dominate motive for local opposition to growth because so many different motives are involved. However, the most generally recognized problems stemming from burgeoning growth are:

1. destruction of the environment
2. inefficient use of resources
3. inequality of housing opportunities
4. inadequate financing of public improvements[1]

Some communities, wishing to preserve their small town character, will enact exclusionary zoning ordinances. State and federal courts in evaluating the reasonableness of growth management programs are relying on comprehensive planning studies to answer the complex, often interrelated social and economic issues raised during litigation.

The research has shown that the general theme that runs through these cases was the role of the police power to protect or promote the public welfare. This means that governments must act in a reasonable fashion, and there must be a rational basis for the government regulation. Also, the regulation must be a legitimate objective of

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[1]Lance Marston, "No Growth: Panacea or Problem?" Management and Control Growth, III, ed. Randall W. Scott et al. (Washington, D.C.: Urban Land Institute, 1975), p. 444.

the police power. The exercise of the police power is limited by constitutional principles of due process, equal protection, and unlawful taking. However, because of changing community values, courts are in favor of a case by case review to determine the validity of police power activities.

Since the Euclid case, a strong presumption of validity has been given to legislative acts by the courts. Regulations that have been designed to legitimately benefit the public health, safety, morals and general welfare have been routinely upheld. The exception, as pointed out in the Euclid case, are regulations that are capricious, arbitrary, or unreasonable, and do not serve a permissible government objective.[2]

In the Golden case, the court upheld the phased growth ordinance as a permissible government objective. Using the reasonableness test, the court granted its presumption of validity on a legislative judgment that development could be conditioned upon the provision of adequate public facilities. The Court of Appeals concluded that "there is a rational basis for phased growth and hence, constitutional."[3] The reasoning was balanced on the overall benefit gained by the general welfare of the community, and therefore upheld as a reasonable attempt to manage growth.

Ramapo was able to support its growth management program on a

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[2] Euclid v. Ambler Realty Company, 27 U.S. 365 (1926).

[3] 285 N.E. 2d. 291 at 301 (1972).

comprehensive master plan. Ramapo's plan for phased growth called for the integration of several separate tools into a well-defined, coordinated planning approach to manage growth. The importance of the Ramapo case was that the court's decision highlighted a successful integrated planning approach for the first time.

The decision in the Petaluma case clearly broadens the scope of police power regulations that promote the general welfare.[4] In upholding the Petaluma Plan, the Court of Appeals stated that the concept of public welfare was "broad enough to uphold the desire of Petaluma to preserve its small town character, its open space and low density of population, and to grow in an orderly and deliberate fashion."[5]

Even though the District Court's opinion was overturned by a higher court, the decision is important for future growth management programs. The lower court's decision was primarily decided on the right to travel issue. Future growth management policies that restrict the mobility of potential residents could be challenged as a violation of a right to travel. Because the right to travel is a fundamental freedom guaranteed by the constitution, any restriction of that right must be supported by a compelling state interest, which traditionally has been difficult to prove.[6]

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

[5]522 F. 2d. 897 at 909 (Ninth Circuit, 1975).

[6]McLaughlin v. Florida, 379 U.S. 184 (1964).

Like Ramapo, Petaluma had conducted numerous public hearings and planning studies prior to the formulation of the Petaluma Plan. The Petaluma Plan consisted of various elements designed to limit, annually, the number of building permits allowed over a five year period. Even though the Court of Appeals upheld the Petaluma Plan, it noted several problems remained—the most serious being a regional housing shortage. But the court noted that the regional solution to the housing problems must be legislative, not judicial.[7] As long as the courts find regulations reasonable, and rationally promote the general welfare, the judicial system will be reluctant to overturn legislative decisions.

The case of Boca Villas Corporation v. City of Boca Raton[8] highlights the problems of trying to implement hurriedly prepared regulations without adequate planning studies to support the growth cap ordinance. The type of judicial review found in this case could possibly be the standard in future growth management litigation. Even though the trial court noted that legislative acts are usually afforded a lenient standard of review, the growth cap was simply unreasonable and bore no rational relationship to the general welfare.[9] The court also noted the exclusionary problems associated with the cap and its impact on the region. Thus, the court declared the growth cap unconstitutional.

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[7] 522 F. 2d. 897 (Ninth Circuit, 1975).

[8] 45 Fla. Supp. 65 (Fifteenth Circuit Court, 1976).

[9] 45 Fla. Supp. 65 at 71-72 (Fifteenth Circuit Court, 1976).

Significance of Findings

The significant findings of this research can be summarized around several issues. These points are significant because they are common to each case that was studied in this thesis.

The first issue addresses the purposes or motives behind the enactment of a growth management program. The dominant motive was the desire to develop at a deliberate pace. These three cities developed a growth rate below what the market would support. In attempting to control their growth rates, these cities affected the primary characteristics of growth, that is, the rate amount, as well as location. Ramapo and Petaluma were able to accomplish this through the permit process and by controlling the location of new public facilities such as sewer and water. Once enough development points accrued, the actual building could proceed. In this fashion, Ramapo and Petaluma were now able to set the pace of development.

The major purpose of their growth management programs was to provide for a balanced community, in terms of providing a place to work and a place to live. They also included plans for the additional development of low and moderate income housing. However, before a growth management program was enacted, comprehensive planning studies were carried out to assess the needs and requirements of each city. Thus, based on these comprehensive planning studies, each city formulated a growth management strategy that balanced the fiscal, social and environmental impacts against potential challenges from affecting parties. Thus, comprehensive planning integrated several techniques

into one program that defined and set a deliberate rate of growth.

The efforts of Boca Raton, however, were not as successful as Ramapo or Petaluma. The implications found in the Boca Raton case clearly outline the importance of comprehensive planning prior to the drafting of a growth management program. In this case two important points were made by the trial court and later upheld by a Federal District Court. In effect, the court stated that protection of a way of life or protection of a small town atmosphere could not be a legitimate goal if not supported by a public necessity. (Public necessity in this instance refers to a lack of adequate water supply, inadequate schools, housing and so on.) Secondly, any land use regulations or restrictions that significantly affect property values and regional equity must be supported by careful, coordinated planning and be fundamentally sound in implementation.

Potential Negative Impacts of Growth Management

As stated above, growth management is not a panacea for all areas or development problems. Because a growth management program has the potential to affect a large number of factors in the community, it would be impossible to satisfy everyone.

One negative impact that could occur as a result of growth management is the transfer of development costs to the potential residents. As land is taken off the market, the remaining land would increase in value, making it more cost effective to develop expensive housing. Thus, costs that were internalized over the entire community are now passed directly on to the developer. Because of his

higher development costs for land and "front-end improvements," the price of new housing could well be out of reach for many families that wished to live in this area.

Second, exclusionary practices under the guise of growth management could occur if the needs of the low and moderate income population are not taken into account. For example, if a city zones vacant land with certain minimum lot requirements, such as one or two acres, low and moderate income housing could essentially be zoned out. One way to mitigate this situation would be to allocate a percentage of all residential development to low and moderate income housing. This could also be accomplished with density bonuses and tax incentives.

Last, by ignoring regional needs, potential residents into the community could be forced elsewhere. By failing to consider the larger area of which a community is a part, the burden shifts to other localities within the region that might be worse off in terms of additional growth than the original community.

Potential hazards of growth management could be lessened by analyzing the surrounding regional needs and designing a program that would best fit the local situation. It is not enough to consider only the traditional concepts of private property rights, for the impacts must be balanced fairly among all affected parties. If a legal challenge were to arise because of the implementation of a growth management program, then this program must be able to withstand close judicial scrutiny by the courts.

Impact on Future Planning

The role of growth management in the future has been established by the judicial policies set in the mid-1970's. The course of future action will be one of continual refinement of policies, programs and procedures. Growth management is a logical concept based on allocating resources determined by the carrying capacity and fiscal ability of a community to provide an acceptable level of services and facilities, while accommodating additional growth.

While it would be impossible to accurately predict the actual impact of growth management in terms of planning, various assumptions can be drawn from this study.

Planners and lawyers as well as elected officials will learn from the past as to what is more effective in terms of managing the primary characteristics of growth. Accordingly, planners and lawyers will develop more effective and equitable programs for managing future growth. This approach calls for a constant evaluation and refinement of existing programs.

The judicial system will continue to play an important role as the final guardians of what is legally defensible and socially responsible. The courts have made it clear that comprehensive planning must precede any growth management program. As long as new growth management programs are framed by the basic constitutional safeguards, and impacts are balanced equally among affected parties, the program should be able to withstand close judicial scrutiny.

There is one technique that seems to warrant additional attention.

The technique itself is not new, but the application of it would be. The tool is the carrying capacity analysis and when combined with a computer, the results seem almost limitless. The carrying capacity tool is a technique which helps to determine the capacity of an area to absorb the demands for additional growth. Using this approach, a city could theoretically determine an appropriate level of growth. It might even be possible that someday courts could mandate a community-wide impact analysis of additional growth. Included would be such topics as social, economic, environmental and regional issues. Of course, many of the variables used in this analysis would not lend themselves to an easy qualification of type and therefore public participation would have to play an important role at this point.

This case is significant because it highlights the importance of comprehensive planning prior to the formulation of a growth management plan. Hurriedly prepared regulations are usually harmful, not only to the community that experiments with them, but to others that may be deterred from trying strategies because of the failure of the hastily prepared regulations. In growth management decisions, there is a real need for technically sound, equitable regulations founded in constitutional protections that are well understood by the entire community.

Policy Considerations

Manifestly, growth management is not a panacea for all land use problems. In any regulatory system, the important issue is the extent

to which the use of land may be regulated or restricted without violating constitutional rights. Growth management faces some potential questions, and additional research is needed to answer these questions.

The research should focus on the regional "fair share" issue of housing and growth. In each case, the court noted problems that could develop if the entire region were to adopt growth management programs. Perhaps one answer would be to increase the amount of fair share housing, especially for low and moderate income groups. This would possibly satisfy courts that are reviewing the impact of the growth management plan on the region.

As new approaches are tried and new techniques implemented, legal questions will arise. Because of the wide impact on affected parties, additional research could be conducted into the constitutional issues such as taking, due process, and equal protection. Growth management programs should be more than legally defensible. These programs should reflect the goals and objects of the entire community, without burdening the resources of the region. Research should be conducted to answer the classic question of who pays and who benefits.

Communities faced with increased taxation, limited budgets, and a fixed carrying capacity, can no longer afford the fragmented, uncoordinated policies and programs to guide growth. Growth requires plans and policies which will phase it in a rational manner. Growth management is a positive attempt by a local jurisdiction to facilitate growth in a manner most consistent with community needs and limitations.

It is only through the actual development of a growth management program with a comprehensive framework encompassing community objectives and land use planning that growth management strategies can be properly evaluated. Therefore, additional research should be conducted to evaluate long-term impacts and implications of existing growth management programs. If growth management is to become more effective in guiding future growth, these questions will need to be answered.

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