

Chapter 9. Growth Management

- Controlling maximum population of community and rate of growth is not a goal of traditional zoning and subdivision ordinances
- Controlling growth is result of concern for:
 - Environmentally sensitive areas
 - Crowding of public facilities
 - Economic and social effects of energy crisis
 - Decrease of federal money allocations to local and state governments for land use and public facilities
- Growth management (today) provides the primary theme for land use regulation and environmental protection
- Two trends in government policy toward land use:
 - Regulation should respond to specific development proposals
 - Development standards should be predictable
- Translating the impact of development into land use regulation
 - Linkage—developer is required to build something else
 - Mitigation—developer is required to counterbalance impact (e.g., wetlands creation)
 - Transfer—development is conditional on the extinguishment of equivalent right to develop elsewhere

Smart Growth as Antidote to Sprawl

- Principles
 - Mixed land uses
 - Communities where transportation options including walking, biking, and mass transit
 - Decreasing traffic congestion
 - Density
 - Protecting open space, wetlands, and prime agricultural land
 - Urban revitalization
 - Decreasing taxes and costs of infrastructure
- Closely linked to “New Urbanism”
- APA developed 2 volumes on Smart Growth including model statutes



Growth Management Approaches

- 1) Timed or phased growth control measures--more palatable for courts than population caps
 - Timed or phased growth programs limit the number of residential or commercial units to be built within specified period of time
- Reasons for regulating timing of development
 - Economize costs of municipal facilities and services
 - Retain municipal control over eventual character of development
 - Maintain balance among various uses of land
 - Achieve greater specificity in development regulations
 - Maintain high quality community services and facilities
- 2) Population cap--the maximum number of dwelling units that can be built is specified
- 3) Delineates area or areas for future growth
- 4) Condition future issuance of building permits or plat approval on existence of public improvements or capital facilities or require developers to pay fees to be used for infrastructure or services—require that new development be “concurrent” with adequate public services
- Of 4 approaches, concurrency is most basic and easily defensible
- Most land use regulation and control concepts can be used in growth management
 - Moratoria
 - Impact fees
 - TDRs

Power of Local Govt. for Growth Management Programs

- Police power based on home rule or specific delegation is sufficient
- But many local governments seek special legislative delegation to buttress growth management activities
- Courts have not found that growth controls improperly impinge on “right to travel” or right to migrate
- Doubtful that Supreme Court would find that a growth control measure violates the constitution
- Regional perspective is needed for effective planning
- Regional planning agency can be:
 - Advisory
 - Granted powers to require actions from local governments to be consistent with the region’s plan

Growth Management Techniques

- Required dedications
 - Original approach to developer funding
 - “in lieu” fee developed as refinement of required dedications when dedications not feasible
- Impact fees
 - Charged by local govt. on new development to pay proportionate share of capital costs of providing infrastructure
 - Can be used to fund facilities and capital expenses that not normally subject of dedication requirements
 - Can be applied to platted developments to apply to incoming residents
 - Can be collected at time building permits or certificate of occupancy are issued
- Linkage and mitigation fees
 - A form of “soft” or “social” infrastructure such as child care facilities, low income housing, art in public places, and environmental mitigation
 - Judicial attitude mixed with California and New Jersey most enthusiastic
 - Validity of linkage fees is similar to validity of impact fees
 - Authority of local govt. to enact linkage programs
 - Illegal tax rather than land use regulation
 - Violation of due process
 - Equal protection or takings provisions of Constitution
 - Standard of reasonableness of the exercise of police power

Impact Fees

- Impact fees have advantages over in lieu fees
 - Impact fees can be used to fund facilities and capital expenses not normally the subject of in lieu fees
 - Impact fees can be applied to developments platted before required dedications thus imposing fair share of fees on incoming residents
 - Impact fees can be applied to condominium, apartment, and commercial developments that generally escape dedication or in lieu fees
 - Impact fees can be collected at time building permits or certificates of occupancy are issued rather than at time of plating
- Positions on impact fees
 - “exclusiveness of benefit” argument
 - Only those facilities that can be provided for the exclusive benefit of the individual paying the cost should have impact fees
 - Argue that general impact fees are “taxes”
 - “but not for” argument
 - Argue that if facilities would not have to expand but for new development, then new development should be required to pay for the expansion
 - Most courts have accepted “but not for” position
- Two part “rational nexus” test of reasonableness for judging validity of impact fees
 - Impact fees may be no more than the govt.’s infrastructure costs that are reasonably attributable to the new development
 - New development required to pay impact fees must benefit from the expenditure of those fees

Impact Fees (cont’d)

- Supreme Court has several decisions related to impact fees/development exactions
 - Nollan v. California Coastal Commission
 - **Facts:** The Nollans own a beachfront property. They want to demolish the current house and build a new one. However, the California Coastal Commission says they must allow an easement for the public to get to the beach in order to get the permit. The Nollans didn’t want to.
 - **Issue:** Is the denial of the permit a compensable taking?
 - **Rule:** A “permanent physical occupation” constitutes a compensable taking, and requiring such an occupation as a condition for a building permit also must be compensated in order to be constitutional.
 - **Analysis:** The majority says, in essence, that if the means and ends of the condition on the permit are not in line, the condition will become an unconstitutional uncompensated taking. If the state of California thinks an easement is a good idea and a valuable public purpose, they should use eminent domain and pay for it.
 - The dissent says that on the contrary, it’s not the public that’s taking a right from the private landowners but rather the private individuals who are taking away a right from the public that is protected by the California Constitution. They claim that the state has taken no property from the landowners.
 - **Conclusion:** The lower court is reversed and the Commission’s denial of the permit is found unconstitutional.
 - Dolan v. City of Tigard
 - Oregon Supreme Court used “reasonable relationship” test to uphold the validity of the city’s requirement that a landowner dedicate land for improvement of a storm drainage system and for a bicycle/pedestrian pathway. Court considered it’s “reasonable relationship” test consistent with Nollan’s “essential nexus”. But Supreme Court reversed. Adopted test of “rough proportionality”—city must determine that the required dedication is related both in nature and extent to the impact of the proposed development

Chapter 12. Agricultural Land Protection and Preservation

- Historically, farmland or agricultural uses received little attention from land use planners
 - Generally viewed as a temporary use or holding category
- Today, farmland increasingly recognized as important and is granted a permanent use category in plans
 - Growing recognition of need to extend special preservation and protection concepts
- Interest in protecting farmland near urban areas historically grounded in concerns about food and fiber production
 - Nation’s capacity for production would be compromised
- Characteristics of ideal agricultural land and development land are almost identical
- Normal economic conditions place much higher value on land used for development
 - Predetermines victory of development interests
 - Estimated 35,000 acres lost each week to development
 - Between 1989 and 1994, about 3.3 million acres of farmland lost each year
 - Rural lands are urbanized at rates that exceed population growth rate

Changing Need to Protect Farmland

- Food and fiber production argument undermined by evidence showing increases in productivity due to technology; nation has more capacity now than it did 10 or 20 years ago
- Shift in focus from losing food production to having cities surrounded with open, less developed areas
- Four emerging concerns
 - Demographics of farming changing—small farms on urban fringe are particular vulnerable to urban pressures
 - Farmers on urban fringe are increasingly targets of nuisance actions
 - Urban residents are discovering need for open space for psychological well-being
 - Interest of urban dwellers in open space include recreational use
- There are fewer farms, farmers are older, there is great disparity between large and small farms, significant move toward corporate agriculture
 - Only 20 percent of farms produce over 85 percent of the nation's agricultural output
- A number of jurisdictions have adopted restrictions on the types of businesses that are allowed to own farmland or engage in farming
- Virtually every state now has "right-to-farm" laws that seek to shield farmers from nuisance claims. Attempt to codify "coming to nuisance" defense: 3 types:
 - Set a specific time within which nuisance claims must be brought against ag. Operations
 - Create a rebuttable presumption that the operation is not a nuisance
 - Exempt particular kinds of agricultural operations

Right to Farm Statutes

- Growing trend to interpret statutes as having relevance only in nuisance disputes between farmers and non-farmers
- Right to farm statutes as continuation of law of nuisance challenged in court decision
 - *Bormann v. Board of Supervisors*—court found Iowa version of Right to Farm statutes unconstitutional using rationale that immunity from nuisance effectively imposed an easement on the neighbors to bear the burden of an activity that otherwise would be prevented a nuisance
- Some states shield farms through zoning exceptions
 - Nonconforming uses are acceptable
 - Rationale is that lack of pressure to conform to zoning will result in farm operations staying
 - Zoning exceptions can be invoked to protect large, commercial hog operations
 - Should these zoning exceptions protect agricultural regardless of size/type?
- One of key motivations to protect agriculture is maintaining open space and recreational opportunities
- Recreation use statutes, found in most states, reduce the liability exposure of landowners for injuries suffered from recreational use (duties equivalent to those owed a trespasser)
 - Appears to be good for farmers and urban dwellers

Farmland Preservation

- Farmland is pressured even in areas that are dominated by agricultural uses
- Every mile of highway costs 40 acres of prime farmland
- In rural America, the non-farm population exceeds farm population by 8 to 1 margin
- In farming areas, goals of farmland preservation are pitted directly against goals of rural development
- Primary factor contributing to loss of prime agricultural land is increasing land values
 - Farmers are likely to take profits and leave farming
- Urbanites, investors, syndicates, retirees, and corporations have entered agricultural land market
- There is common assumption among planners that farmland preservation programs will inherently appeal to farmers
 - But most effective preservation efforts are most intrusive and are resisted by the farmers themselves
- The impact of general development in the area affects whether farmers continue to farm
 - Must be "critical mass" for farming services
 - Domino effect—if some farmers leave, so will others
 - Most planning fails to account for vast support structure farming needs
- Farmland conversion on urban fringe may have reached advanced stage where there is no real prospect of halting the conversion
- Agricultural districts
 - Voluntary, receive special tax treatment from eminent domain
 - Empirical evidence indicates that lands that need protection the least are placed in districts
- Cluster zoning, PUDs, and open space zoning can help provide buffers that make farming more viable

Farmland Preservation (cont'd)

- Although PUDs often received greater developer enthusiasm, local land use control authorities are less enthusiastic since combinations of land use conflict with tradition zoning—separation of uses
- Large lot zoning can discourage development by increasing cost of land
- The use of TDRs is relatively recent
- Conservation easements increasingly important to farmland preservation
 - Most successful program in Massachusetts
 - Similar programs now exist in 34 states
- Land banking involves purchase of farmland by government or public organizations for the purpose of insuring that the land remains in agricultural protection; no widespread acceptance of the idea
- Differential taxation for farmland exists in 48 states
 - Evidence indicates that differential taxation based on property taxes has had little, if any, effect on keeping land in agricultural production
 - Differential taxation for estate, gift, and inheritance tax purposes is considered much more important
- Most farmland preservation approaches have survived complaints of a constitutional "taking"