Implementing Effective Planning in the 21st Century

Sponsored by Paul, Hastings, Janofsky & Walker

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Forum, Sturm College of Law

Weaving together the strands of Ramapo, New Urbanism, Smart Growth and Sustainable Development, national leaders present their thoughts on what it will take to effectively plan in the 21st century.

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**Panelist:** Elizabeth Plater-Zyberk
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Smart Growth Planning and New Urbanism:  
Compatible Systems For 21st Century Land Use

Robert H. Freilich

I. INTRODUCTION

This article stems from collaborative work that Elizabeth Plater-Zyberk and I were engaged in for the preservation of the Redlands agricultural area in south Dade County, Florida. The system that evolved in developing the plan for the area required a synthesis of growth management techniques, sustainable development and clustering of development into “new urban” mixed use centers. It became clear to both of us that “new urbanism” and “smart growth” were not antagonistic to each other but were each necessary to deal with the total environment with each fully integrated into developing the plan. While these planning concepts overlap to a significant extent, they both differ at their outer extremities.

II. SMART GROWTH

Smart growth in the U.S. has primarily developed out of concepts for dealing with the availability of adequate public facilities with development. In developing the Ramapo Plan and successfully defending it before the New York Court of Appeals and the U.S. Supreme Court, I utilized zoning, subdivision regulation and capital improvement programming to time and sequence growth based on the availability of adequate public facilities at the time of development, initiating growth management and smart growth in America.

Ramapo shifted the whole nature of land use planning in America:

“The Ramapo decision shifted the balance of power from the developer to public use agencies. The developer no longer has an absolute right to
proceed with development, irrespective of whether public facilities can reasonably accommodate the development. Instead, the developer can be made to wait a reasonable period to allow public facilities to catch up or expend funds to ripen the land for development. At the same time the *Ramapo* case has expanded the judicial view of just what incidental public costs affiliated with development may be shifted to the developer – the *Ramapo* decision and rationale also permanently altered the courts’ perception of the land use regulatory process, and paved the way for subsequent decisions that have favored public regulation over the developer’s immediate right to develop property….” Rohan, 1 Zoning and Land Use Controls § 4.05 (1984).

*Ramapo* has led to tier systems and regional growth plans nationwide from San Diego to Baltimore and from Seattle to Miami during the 1980s and 1990s to counter urban sprawl. Nevertheless, for 30 years, critics on the left and right, focusing primarily on perceived negative effects on affordable housing costs, have attacked state, regional, county, and city growth management and smart growth plans for the control of sprawl.

On the contrary, growth management and smart growth communities have been the major providers of affordable housing in America if only for the dual reasons that: (1) such plans will inevitably be attacked for alleged exclusionary effects on affordable housing and must therefore contain significant housing elements to meet such challenges, and (2) these plans contain much higher average densities and mix of housing types than sprawl development.

Moreover, smart growth and new urbanism plans must be based upon a rigorous comprehensive plan including an affordable housing element together with capital facility, environmental, open space, agriculture, economic development, transit, transportation, energy, historic preservation, design, safety, noise and educational elements. Without a comprehensive treatment of all of the needs of a community and all of the disciplines focused on solutions, smart
growth management cannot be accomplished. Ramapo was the first suburban town in New York
State to voluntarily develop, as part of its planning, over 800 integrated public and subsidized
housing for low-income families and had to defend these programs in the courts. As the
New York Court of Appeals stated:

“[Ramapo] utilized its comprehensive plan to implement its timing
controls and has coupled these with provisions for low and moderate
income housing on a large scale.”

Utilization of growth management and new urbanism is critical to the solution of
America’s regional and urban problems. Every effort in the 21st Century must be made to obtain
legislative and judicial support for the principle that only implementation of sound
comprehensive planning underlies all efforts to utilize techniques to solve urban problems.

The Growing SmartSM Legislative Guidebook (hereinafter “the Guidebook”) by the
American Planning Association (APA) has advanced many excellent proposals for revision of
state planning and zoning laws to provide support for growth management techniques including,
*inter alia*, the timing and sequencing of capital improvement planning linked to adequate facility
ordinances and development rights transfer to save agricultural land.

III. AUTHORITY

Cities, counties, and regional agencies require simple, direct, and general authority in
order to carry out appropriate smart growth. State legislation and home rule authority must be
broadened to reject archaic doctrines requiring a specific grant of authority for each step needed
to implement comprehensive planning as if the ill-advised 19th century Dillon’s Rule is still a
guiding principle in 21st century America.

To counter such a narrow view, some recent decisions have utilized a basically simple
premise. The authority to plan and to implement the plan has already been delegated through the
standard state planning and city zoning enabling acts (or recently enacted equivalents). Cities and counties should therefore have the authority to implement planning power without any need to have express statutory authority for each technique utilized.

In 1976, I was the principal planning and legal consultant in developing the Minneapolis-St. Paul Metropolitan Council Development Framework. The Town of Marshan, located in Dakota County, was placed in Tier IV of the development framework, which mandated that urban growth be deferred until after the 20-year period of the plan, and that agricultural land and rural character be preserved. Subsequent to the enactment of the development framework, but before the town could amend its own comprehensive plan and zoning regulations to implement the framework, two subdivision applications proposing over 400 units in prime agricultural land were filed. The town adopted a moratorium to defer consideration of the applications until it could revise its plan and regulations. A lower court found the moratorium to be a regulatory taking, but I was successful in having it reversed in the Minnesota Supreme Court.13

The critical issue was authority. The state’s county and city planning enabling acts authorized use of moratoria. The Town Act was silent on moratoria. The district court relied upon Dillon’s Rule to find the moratoria unauthorized. The Supreme Court reversed, based upon an article I had written in 1971,14 which suggested that the standard township planning enabling act provides the requisite authority to plan and to implement the plan, including moratoria and interim controls designed to protect the planning process.15

Similar concerns have surfaced with regard to the use of impact fees. Many states have adopted express impact fee enabling legislation; in a number of those states, the state legislation places severe limits on the authority of local governments.16 A few state courts have concluded that, absent such express legislation, cities and counties may enact impact fee ordinances under
the provisions of the standard planning and zoning enabling acts and/or home rule providing for
capital facility elements and adequate provision of transportation, school, park, sewer, water,
drainage, and other improvements.\textsuperscript{17}

Nevertheless, many local government attorneys, fearful of counseling affirmative local
government authority have sought specific state legislation for such programs; unfortunately,
such legislation may more severely restrict local government authority than confirm it. Recently,
that was the experience of the Texas Municipal League, whose authorizing legislative proposals
ended up, under intense homebuilding lobbying, with severely depleted authority under a
catastrophically bad piece of legislation,\textsuperscript{18} despite having broad judicial authority under the
general planning acts to act without further legislation.\textsuperscript{19}

\section*{IV. UTILIZATION OF BROADER ECONOMIC INITIATIVES TO ACHIEVE SMART GROWTH MANAGEMENT}

The spate of inverse condemnation lawsuits, statutory compensation restrictions on
government regulation (Florida’s Bert Harris Act and Oregon’s recent Measure 37), and state
supreme court decisions increasing scrutiny over economic development and redevelopment
projects under the Fifth Amendment and state constitutional public use clauses have raised the
specter of diminishing government planning and regulation despite increasingly significant land
assembly problems in cities and older neighborhoods.\textsuperscript{20}

\subsection{Regulatory Takings Claims}

Most regulatory takings kings claims involve permanent restrictions on agricultural,
natural resource or environmentally constrained lands. Government often fails to utilize
economic techniques to eliminate these takings claims. Greater use of mandatory cluster zoning,
transfers of development rights (TDRs), mitigation fees, and open space assessment district
compensation will usually be successful in defeating *Lucas* or *Penn Central* takings claims for agricultural lands, historic preservation, floodplains, hillsides, wetlands, or coastal management. Similarly, I was able to reverse a decade of judicial holdings that preservation of the future right-of-way of transportation corridors was a per se facial take by convincing the Florida Supreme Court that such takings claims were premature and would require an as-applied review of these same economic techniques as part of administrative exhaustion and finality.

. **Public Use Challenges**

Utilization of condemnation for large-scale development and redevelopment projects has come under increasing scrutiny in state courts. In a recent decision, overruling the excessive use of eminent domain 20 years earlier, wiping out a Detroit neighborhood of 4,100 homes, to build a General Motors plant, the Michigan Supreme Court held that an economic development project cannot in and of itself constitute a public use simply because it provides employment and fiscal benefits. Nevertheless, the court indicated that, if the government retains either regulatory, contractual, or ownership controls, public use will be found.

It becomes critical then for local governments in achieving economic development to utilize a series of steps to achieve proper public use:

1. Insure that mixed-use, walkable projects replace conventional, economically segregated development. These mixed-use, New Urbanism projects require that government utilize complex development agreements in order to retain significant regulatory and contractual controls. Current law approves development agreements against illegal delegation to private interests if the government retains regulatory land use controls.

2. Government needs to utilize greater public-private development in a whole series of economic development projects (e. g., transit stations, riverfront, and transportation corridors)
in which government retains significant ownership through assemblage of the land with long-
term leasehold dispositions. Public-private economic development is absolutely critical for the
continued renewal and revitalization of central cities and suburbs and through which proper
planning and regulatory controls can be sustained.

3. Blight and redevelopment studies must be kept up to date, be supported by
appropriate findings and, most importantly, have plans that incorporate as wide an area as
possible involving multiple developers.

4. Requiring that condemnees be given the opportunity to participate in the project
through contributing the land, provided they comply with the redevelopment plan, will assure
appropriate public use.

Neighborhood Infill

In order to achieve traditional neighborhood development and new urban transit oriented
development in existing built up area, planners must achieve greater ability to convince
neighborhood residents that infill development, both residential and mixed use, can be
accomplished with proper compatibility and preservation of the character of the neighborhood.
Objections will often occur based on traffic congestion, loss of property values and, occasionally,
subliminally on racial and ethnic fears.

The use of some surprising techniques can overcome many of these objections. The fear,
discussed earlier, where residents cannot determine whether a project is the first of one or a first
of a hundred, can be met with better neighborhood and area planning. Too often, this aspect of
planning is lost due to inadequate budgeting limiting staff involvement to development
application processing. The use of numerical quotas, accepted in critical environmental and
growth management systems, proved to be very effective by this author in developing the
Champaign, Illinois, In-Town Development Project in which, after determining the actual need for townhouse development, an area of four square blocks for townhouse development was deemed sufficient for an 88-square-block area. Neighbors and property owners responded by finding eight square blocks.

Most interesting of all is the use of insurance to maintain neighborhood property values to meet concerns that higher densities will result in lowering property values. Other measures are the greater use of design standards and new urban, walkable, mixed-use district overlays to reduce traffic congestion.

**CONCLUSION**

Planning reform in the 21st century will require state and local governments to effectively adopt new urbanism and smart growth needed to control sprawl; protect environmentally sensitive land; produce new, urban, mixed-use communities; revitalize neighborhoods; create transit-oriented development to reduce air pollution and transportation congestion; and meet the social, housing, and economic needs of citizens.
ROBERT H. FREILICH ENDNOTES

1 Thomas Pelham, From the Ramapo Plan to Florida’s Statewide Concurrency System: Ramapo’s Influence on Infrastructure Planning, 35 Urb. Law. 113 (2003).


4 See Robert H. Freilich, From Sprawl to Smart Growth: Successful Legal, Planning and Environmental Systems (Chicago: American Bar Association, 1999), describing San Diego; Minneapolis-St. Paul; Baltimore County; Lexington-Fayette County; Palm Beach County; Puget Sound Four County Area (Seattle to Tacoma); Ada County-Boise; and a host of other tier systems. Regional and county smart growth tier systems generally utilize four-tiers: (1) the urbanized built-up area encouraging infill; (2) a planned urbanizing area using Ramapo’s timed and sequenced growth for the 20-year period of new growth; (3) the future urbanizing area proscribing urban growth during the 20-year life of the plan; and (4) a permanent rural/agricultural/environmentally sensitive lands area. These plans are able to incorporate full growth, meet affordable housing needs, and revitalize Tier I downtown and existing built-up areas by eliminating subsidies for new growth on the fringe through charging full cost for infrastructure needs generated by new growth. See also Richard Briffault, Smart Growth and American Land Use Law 21 St. Louis U. Pub. L. Rev 253 (2002); Symposium, Managing Growth in the 21st Century: Philosophies, Strategies and Institutions, 19 Va. ENVTL L.J. 239 (2000); Jane Shaw and Ronald Utt, A Guide to Smart Growth Shattering Myths, Providing Solutions (2000).

Stuart R. Shamberg and Adam L. Wekstein, The Local and Regional Need for Housing and the Ramapo Plan, 35 Urb. Law. 165 (2003): “Golden v. Town of Ramapo marked an important step in the evolution from an insular judicial point of view as being strictly local in nature to a philosophy recognizing it as a regulatory requirement that must consider the housing needs of the regional residents . . . thus the Court considered [assimilation] of population and related housing growth in the region [as a critical] factor in reaching its result.”


Golden, id., supra n. 15, at 153; see The National Commission on Urban Problems (Douglas Commission, 1968): “New types of controls – including timing and location of development – are needed if basic metropolitan scale problems [of controlling sprawl] are to be solved.”

See Udell v. Haas, 235 N.E.2d 897 (N.Y. 1968): “In our view sound zoning principles were not followed in this case . . . because zoning can only be a vital tool for maintaining a civilized form of existence . . . if it conforms to a well considered or comprehensive plan [in which] consideration is given to the needs of the community as a whole.”


The traditional rule governing local regulatory authority, known as Dillon’s Rule (named after the chief judge of the Iowa Supreme Court in the mid-19th century, who was later convicted of securities fraud after resigning his judicial post), provides that local governments possess only the powers expressly delegated to them by the state legislature and those extremely limited ministerial powers that are necessarily implied and encompassed within the expressed power. See, e.g., Hoepker v. City of Madison Planning Commission, 563 N.W.2d 145 (Wis. 1977) (municipalities have no inherent or home rule power to enact land use regulations; any power they have is derived from state enabling status and strictly construed.)
13 See Almquist v. Town of Marshan, 245 N.W.2d 819 (Minn. 1976).


15 The 1971 article was also recently cited by the U.S. Supreme Court in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), as a principal authority in finding that a 31-month moratorium designed to protect the planning process did not constitute a regulatory taking. See Robert H. Freilich, Time, Space and Value In Inverse Condemnation: A Unified Theory For Partial Takings Analysis 24 U. Haw. L. Rev. 589 (2002).


17 Contractors and Builder’s Association v. City of Dunedin, 329 So.2d 314 (Fla. 1976) (home rule); Call v. City of West Jordan, 606 P.2d 217 (Utah 1980) (standard planning enabling act).


19 City of College Station v. Turtle Rock, 680 S.W.2d 802 (Tex. 1984).


See *Palm Beach County v. Wright*, 641 So.2d 50 (Fla. 1994), reversing judgment of per se taking through use of flexible zoning techniques.


In *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), the Connecticut Supreme Court, however, upheld an economic development project despite an absence of blight so long as the public purpose contributes to the revitalization of the city and the U.S. Supreme Court affirmed. 125 S. Ct. 2655 (June 23, 2005). This author contributed an amicus brief on behalf of 15 law professors, supporting the city’s position and requesting the Court to reject the petitioner’s call for higher scrutiny, provided the local government retains regulatory, contractual, or ownership control. See also Robert H. Freilich, *Kelo v. City of New London, How The Supreme Court Decision Affects Commonwealth For Economic Development and Municipal Revitalization; 6 N.Y. Zoning Law and Practice Report*, (Aug. 2005).


Robert H. Freilich, *Sprawl or Smart Growth, Analysis of High Speed Rail Alignments in California* (July 26, 2004, California High Speed Rail Authority); See Michael S. Bernick and Amy E. Freilich, *Transit Villages and Transit Based Developments: The Rules Are*


34 Direct racial integration quotas are forbidden, U.S. v. Starrett City Associates, 840 F.2d 1096 (2d Cir. 1988), but insurance for neighborhood residents against the lowering of property values has been both upheld and successful. See The Illinois Urban Property Insurance Act, Chapter 215 ILCS, upheld in Clayton v. Village of Oak Park, 453 N.E.2d 937 (Ill. App. 1983).

Robert H. Freilich

Robert H. Freilich, professor of law and special land use counsel in the nationally recognized law and planning firm of Paul, Hastings, Janofsky & Walker LLP in Los Angeles, California, is at the forefront of land use law, planning, and litigation. During his distinguished career, Dr. Freilich has represented more than 200 cities, states, and counties, as well as countless private developers.

Dr. Freilich received his A.B. degree from the University of Chicago, holds a J.D. degree from Yale Law School, an M.I.A. degree from Columbia University School of Public Administration, and LL.M. and J.S.D. degrees from Columbia University School of Law. In 1968, he became Professor of Law of the University of Missouri - Kansas City School of Law. He has served as visiting professor of law at Harvard Law School (1984-1985), the London School of Economics (1974-1975), and the University of Miami School of Law (1996-1997). Dr. Freilich specializes in smart growth and growth management, development of master planned communities, financing of capital infrastructure, and regulatory taking litigation, and he frequently serves as an expert witness. He is the author of *From Sprawl To Smart Growth: Successful Legal, Planning and Environmental Systems* (Chicago, American Bar Association, 1999), the coauthor (with David L. Callies and Thomas E. Roberts) entitled *Cases and Materials on Land Use* (4th ed.) (West Group, American Casebook Series, 2004), and the forthcoming *A 21st Century Land Development Code* (Chicago: American Planning Association, 2006) (with S. Mark White).

Dr. Freilich is national editor of The Urban Lawyer, the national quarterly journal on state and local government law of the American Bar Association; director of the Annual Planning and Zoning Institute, American Center for National and International Law; past-chair
of the Planning and Law Division of the American Planning Association; and a member of the Federalism Committee of the International Municipal Lawyers Association, the Advisory Board of the Land Use and Environment Law Review, the Urban Land Institute, Congress of New Urbanism, Lincoln Institute of Land Policy, and the American Institute of Certified Planners. Dr. Freilich is a member of the California, Florida, Missouri and New York Bar Associations.
Concentric Growth/Tiers

This pattern was evident in the Minneapolis/St. Paul Plan (above), with the downtown areas (I) and the established neighborhoods (II), surrounded by a more focused and sequenced urbanizing fringe and free standing growth areas (III). Rural areas (IV) were outside of the concentric growth ring.


Initially, the plan divided the state into seven tiers. See the reprinted map below. As adopted, the plan divided the state into five areas: two growth areas (metropolitan urban and outer suburban) and three limited growth areas (agricultural, environmentally sensitive, and urban fringe). The plan emphasizes compact development in "communities of place," which are mixed use centers of varying sizes. See Buchbaum, supra at 181. From a rather grandiose beginning, the plan, as adopted, reveals the hard reality of the politics of state versus local control. It does not mandate that local plans be
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The New Jersey Preliminary Cross-Acceptance Map shown below contained seven tiers covering the entire state. In a significant attempt to manage growth on the state level, the New Jersey State Planning Commission was charged in 1986 by the state legislature with the task of producing a State Development and Redevelopment Plan. The planning process went through a series of mandated preliminary, interim, and final stages. The commission adopted the plan in June, 1992. See Buchbaum, The New Jersey Experience, in State and Regional Comprehensive Planning: Implementing New Models for Growth Management 178-80 (Buchbaum and Smith eds., 1993).

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Urban Activity Centers

Maryland's population has increased by twenty-two percent over the last twenty years. The population is expected to increase by 1 million by the year 2020. Much of Maryland's population lies within heavily traveled transportation corridors, near major passenger and freight railroads and interstate highways which cover its length on the east coast. See David L. Winetman, Secretary of Transportation—Maryland, Smart Growth, Smart Transportation: A New Program to Manage Growth in Maryland, 30 Urb. Law. 537 (1999). While the older central cities and urban areas have declined in population, much farm land and forest has been devoted by suburban development. Abandoned urban areas and loss of open space created great concern in Maryland. In 1997, the legislature reacted, adopting a "Smart Growth" initiative. See Chapter 769, Md. Code Ann. (1997). Because transportation is a prevalent factor in controlling growth in Maryland, the plan emphasizes system maintenance to achieve greater mobility from rail and other modal systems. The legislation also has a provision for redevelopment of contaminated sites and tax incentives to create a better mix of housing and jobs. See Frisch, Smart Growth: Why Local Governments Are Taking a New Approach to Managing Growth in Their Communities, Public Mgmt. 5 (May 1996), 1998 WL 103228353.

While Maryland is a home-rule state, where local governments have much control over land-use decisions, the State has given itself a new role in controlling urban sprawl. Maryland's Smart Growth initiative is designed to encourage compact development and direct capital facilities financing to "priority funding areas." Md. Code Ann. State Fin. & Proc. §§ 5-78-10. Under the Smart Growth initiative, localities have the power to designate these funding areas within state mandated restrictions that generally require the areas be capable of supporting growth (the Industrial in nature or already served by sewer systems). Similar to the Kano system, discussed supra, the Smart Growth initiative allows Maryland the opportunity to influence, if not control, local land decisions by only funding projects in priority and smart locations—those in urbanized areas where adequate public facilities are prevalent or can be easily provided. For a discussion of Maryland's growth initiative, see Frege and Leahy-Ficheck, Smart Growth and Neighborhood Conservation, 13 Nat.Res. & Envt' L 319 (1998).

Baltimore County, Maryland in undertaking its growth management program stressed Town and Community Urban Activity Centers as it Tier III areas for accelerated growth. These centers included existing or designated commercial and town centers and their surrounding residential areas. The county was divided into the following tiers: (1) Existing Communities (all other areas of the county that are largely urbanized); (2) Fringe Growth areas (areas presently served or planned to be served within 10 years); and (3) Rural and Agricultural Areas (areas not planned for sewer extensions or with soils with high agricultural productivity). New Development Areas recommended for staged accelerated growth included three urban and one rural area which were particularly suited as development centers. Baltimore County Growth Management Program, 1979–1990 Baltimore County, Maryland.
Urban Growth Boundaries

Portland, Oregon: State Authorized Regional Coordination

With its longstanding urban growth boundary (UGB) and well-developed transit system, Portland, Oregon is one of the most frequently cited and best examples of smart growth. Oregon’s system relies upon a series of statewide land use management goals and is truly one of the pioneers of state-directed regional planning. See Chapter 6 infra; see also Lang & Horsman, Planning Portland Style: Pitfalls and Possibilities, 8 Housing Pol’y Debates 1 (1997); Sullivan, Oregon Blazes a Trail, State and Regional Comprehensive Planning: Implementing New Methods for Growth Management 51 (Buschbaum and Smith eds. 1993). The Portland region has been innovative in regional growth management strategies. Between 1963 and 1971 the Portland

Metropolitan Study Commission identified several regional issues caused by the growth of urban and suburban populations. These problems were considered regional because they extended beyond, and were unable to be solved by, the individual local governments. Problems were found in the area’s water supply, sewage disposal, transportation, parks, police and fire protection, air pollution, planning, and zoning. See Freilich and White, Regional General Welfare and Intergovernmental Planning 9 (Jan. 16, 1998). See generally Nelson and Duncan, Growth Management Principles and Practices (1996); Knaap and Nelson, The Regulated Landscape: Lessons on State Land Use Planning from Oregon (1992).

Representatives from many governments and agencies play critical roles in the growth management of this region. In 1978, voters in Multnomah, Washington and Clackamas counties created an elected regional government called the “metropolitan service district” to oversee issues that confronted the traditional city and county boundaries. It became popularly known as Metro. See the Regional Framework Plan—Portland, Oregon, (Dec. 11, 1997). Metro’s partners in the region are 24 cities, three counties and more than 130 special service districts, the State of Oregon, Tri-Met, the Port of Portland and the Portland Area Boundary Commission. Metro was established in an effort to eliminate duplication of services and overlapping jurisdictions by consolidating the regional governments into an elected governing body to allow accountability and responsiveness to the citizenry. (Or.Rev.Stat. § 268.015) Its responsibilities include amending the regional Urban Growth Boundary (UGB) and adopting planning goals and objectives for the region called the Regional Urban Growth Goals and Objectives (RUGGOs) that are consistent with state goals.

Oregon’s UGB program is the first statewide requirement that local governments designate enforceable UGBs. The Land Use Goals and Guidelines Regulations encourage the utilization of existing transportation facilities and require a distinction between urbanized land and rural land before public facilities and services can be extended. Local governments are required to design, phase and locate transportation facilities, including air, marine, rail, mass transit, highways, bicycle and pedestrian facilities) in such a manner as to encourage growth in urbanized areas while discouraging growth in rural areas. As a general rule, a local government is not permitted to establish an urban growth boundary containing more land than the locality “needs” for future growth. See City of Salem v. Families for Responsible Government, 688 P.2d 395, 396-399 (Or.App.1983).

In 1999, the Oregon Constitution was amended to allow Metro jurisdiction over all matters of “metropolitan concerns” as set forth in the charter which was adopted in November 1992. The state legislature authorized Metro to define and apply a planning procedure in the areas of air quality, water quality and transportation. In addition, Metro may adopt functional plans to control the impact on air and water quality, transportation and other aspects of metropolitan development the council may identify. The new charter required adoption of the Regional Framework Plan (Plan) in which the 2040 Growth Concept was included. Local officials brought together several past plans into the Plan which is a comprehensive set of policy guidelines for managing the region's future growth. It will help create an integrated land use, transportation, parks and open space planning program for the region.
The Region 2040 Growth Concept program is a fifty year planning process designed to look at the problems and potential of actively shaping growth. The new Metro’s responsibilities include regional coordination, comprehensive regional planning, and the delivery of regional services in the Portland Metropolitan area. While these efforts will still only control growth up to the UGB, the density levels must be addressed. If Portland were to utilize timing and sequencing within the Urbanizing Tier concentrating growth near developed public facilities, growth would not be sprawling past the urban area fringes.

Local governments are required to establish and implement local plans including twenty-year growth boundaries. Oregon’s state requirement of UGBs has established a clear limit to long-range urban sprawl, however, because of the abundance of open space within the boundaries early on, orderly development of infrastructure is at issue. Twenty years ago, the lack of planning and sequencing, when the UGBs were first used in Oregon, did not appear detrimental. Populations were steady and growth remained around developed infrastructure. However, in the Portland region, where the population is expected to increase by 500,000 by 2017, local officials are currently facing significant growth issues. While Portland has many supporters of its UGB, a problem exists as to whether enough capacity exists within the UGB to accommodate the substantial and newly expanded increase in population. Remarks from John M. DeGroote, “Visions and Visioning: What’s It All About? And Is It Important? Can You Get Where You Want To Go Without It?”, ALL-ABA Course of Study Materials, Land Institute, Planning, Regulation, Litigation, Eminent Domain and Compensation, Aug. 14–16, 1997 (Vol. II). The current UGB area is approximately 238,000 acres. The region is also currently debating whether to expand the UGB up to 10,000 acres to accommodate growth. Pressures are developing from commercial developments on prime farmland which results from the ever-tightening urban boundary. Oliver and Nokes, Land Use Law Showing Its Age, The Sunday Oregonian, B-1 (May 31, 1998). See also Ehrenhalt, The Great Wall of Portland, Governing, at 26 May 1997. Despite these critical issues, Metro has successfully addressed and established regional strategies under the Oregon state growth management law ahead of most other regions in the United States. See Porter and generally Langdon, How Portland Does It, Urb. Design (Nov. 1992); Nokes and Oliver, Urban Growth Boundary Unites Future of 24 Cities, The Sunday Oregonian, B-4 (May 31, 1998).

For further coverage of Oregon’s statewide system of land use control, see infra Chapter 8 A. 2.

Tennessee

In 1998 Tennessee enacted a new law incorporating many smart growth themes including urban growth boundaries and planned growth areas. The Act was created to create a comprehensive growth strategy for the State that, among other things, more closely matches the timing of development and the provision of public services and minimizes urban sprawl. Each county was required to create a coordinating committee to recommend a growth plan by January 1, 2000, which shall be revised and/or ratified no later than January 1, 2001. (Public Act 1101 (1998); S.B. 3278/H.B. 3295) In August 1998 a comprehensive Guide on Growth Policy for Community Leaders was published.


California has used urban growth boundaries for many years. Alameda County adopted an urban growth boundary in 1954 covering some 418 square miles as part of the county’s general plan. In November of 2000 the electorate approved on initiative ordinance that revised the general plan by shifting the urban growth boundary to lessen the amount of developable land and shifting the removed lands to agricultural use.

In Shea Homes Ltd. Partnership v. County of Alameda, 2 Cal.Rptr.3d 789 (Cal.App.2003), the court upheld the initiative as a valid measure to preserve agricultural and open space lands. The court rejected an exclusionary zoning challenge finding that state law provisions relating to housing requirements were fully met by the land remaining within the boundary including the channeling of development into already populated areas that have additional capacity to receive housing.

New Urbanism

NEW URBANISM—PLANNING AND STRUCTURE OF THE TRADITIONAL NEIGHBORHOOD DEVELOPMENT

Doris B. Goldstein

Property & Property, November/December 2003

New Urbanism turns the rules of conventional subdivision development upside down.

Security gates and cul-de-sacs are out; a grid network of streets that seeks connection with adjacent neighborhoods is in. Forget the expensive clubhouse to be owned and maintained by the homeowners’ association. Instead, persuade the local YMCA to build recreational facilities within walking distance of the residences and establish a corner grocery where people can get into their neighbors while they pick up a gallon of milk. Trade the three car garages dominating house facades for a spacious front porch and a garage in the back, accessed by an alley. And if the kids from the next subdivision join a pick-up game of touch football on the green, don’t call the security guard. Instead, smile and enjoy the return of a more inclusive sense of community.

New Urbanism is a land planning philosophy advocating compact, mixed-use, pedestrian-friendly development. Although only a small percentage of current development qualifies as new urban, the movement is gaining ground. New Urban News, a specialized publication devoted to the subject, counted 272 projects built or under construction in the United States in 2002—an increase of 28% from the previous year—another 200 in planning. Robert Steuteville,

* Reprinted by permission.
New Urbanism Rocks, Despite Sluggish National Economy, Ch. 7 New Urban News No. 8 (Dec. 2002), at 6. There are also many hybrid projects that incorporate some but not all of the New Urbanism’s principles.

New Urbanism can be applied at different scales, from the village to the most congested city. New Urbanists strive to build environments that accommodate the automobile but encourage people to get out of their cars and walk.

At the village scale, New Urban development projects are often referred to as Traditional Neighborhood Developments, or TNDs. Ranging in size from a dozen or so acres to thousands of acres, TNDs seek to rediscover the principles of small towns built before World War II. Unlike conventional suburban neighborhoods, which prohibit commercial uses, TNDs have a town center with shops where residents can walk from their homes to buy the basic necessities of life. TNDs also encourage a mix of housing types in close proximity—detached houses, row houses, and apartments. Garage apartments behind houses are encouraged in order to provide affordable housing and, in many instances, may be used for small businesses as well. In the town center, apartments are built above the stores.

Seaside, the first New Urban community, began development in 1981 on Florida’s panhandle. Designed by architects Andres Duany and Elizabeth Plater-Zyberk (now known as DPZ Architects) and developed by Robert Davis, it packs into its 50 acres hundreds of homes, commercial area with shops and restaurants, an amphitheater, a charter middle school, and a nondenominational chapel and cemetery. The subject of intense media coverage—Time magazine said that Seaside “could be the most astounding design achievement of its era”—Seaside became both financially successful and the icon for a new way to design communities. Best of the Decade, Tues., Jan. 1, 1990, at 102.

The term “New Urbanism” did not appear until 1993, with the first meeting of the Congress for the New Urbanism (CNU), a conederation of architects, planners, and other professionals. Closely related to the Smart Growth movement, the New Urbanists have forged alliances with, among others, the Department of Housing and Urban Development, which adopted New Urban principles for rebuilding low-income housing under its Hope VI program; the Institute for Traffic Engineers, with which CNU has developing a new street design manual; and even the Centers for Disease control, which sees a link between the obesity epidemic and over-reliance on the automobile.

For the early New Urbanists, zoning codes and street engineering standards presented significant hurdles, requiring numerous variances. But barriers have not been completely eliminated, and skirmishes continue, particularly concerning density, street width, turn radii, street trees, and placing of utilities. But a growing number of communities specifically enable—some cases, require—New Urban Development.

This article explores some of the particular legal planning issues for the developer’s attorney—the mixture of uses both horizontally and vertically; special considerations for the town center and common areas; and the urban approach to architectural control—and offers ways in which covenants and restrictions can be drafted to anticipate and account for these issues.

Sec. 12 TIER SYSTEMS AND URBAN GROWTH BOUNDARIES 725

Structuring Owners’ Associations for Mixed Uses

TNDs can be divided into two parts: the town center, which is primarily commercial, and the area surrounding the town center, which is primarily residential. In some TNDs the boundary at which that transition occurs is clear and permanent. The ideal, however, would allow the boundary to move, following the growth patterns of older towns, where commercial uses gradually expand into the adjacent residential neighborhoods as town grows.

Residential units, whether apartments or condominium units, are distributed throughout the town center, usually on the upper floors of buildings that have commercial space below. Such residential units are created for a variety of reasons: to enliven the commercial area, to offer a variety of housing choices, and to make use of the upper floors of buildings where commercial use is not viable. Special issues related to these mixed-use buildings are discussed later in this article.

Even in the primarily residential sections, a mixture of uses is possible. Small businesses may be allowed in the garage apartments in the alley. In a very large TND, corner groceries or other small businesses may be scattered in residential areas.

TNDs often use the transition between the town center and residential areas with a zone of live/work buildings, which are scalable mixed-use buildings designed for commercial space at street level and a residential unit or two upstairs. Live/work buildings are small enough to be owned and financed by an individual owner. Ideally, an individual could run a business downstairs and live in the same building. Such buildings are intended to be flexible in their use, so that the commercial use can expand or contract with the market.

Although New Urban communities are town-like in appearance, very few are incorporated as municipalities. Instead, they rely primarily on covenants and restrictions and property owners’ associations. On the one hand, the use of private covenants and restrictions offers opportunities for creative drafting to meet the specialized needs of the community. On the other hand, the mixed-use nature of New Urban communities tests the limits of the property owners’ association structure.

Despite the fact that uses are closely intertwined in a TND, combining residential and commercial uses in a single association is troublesome for a number of reasons:

- Maintenance Standards. The interests of commercial and residential owners tend to be different. Commercial areas invite the public. They get a lot of traffic and must be maintained to a high level of care.
- Protection of Commercial Uses. Because they will be outnumbered, commercial uses need to be protected from overzealous regulations by homeowners.
- Statutory Regulation. In most states, residential property owners’ associations are subject to laws regulating such matters as developer turnover, participation in meetings, and similar consumer rights. The trend toward such legislation is increasing. A commercial property owners’ association that contains no residential property is usually not
subject to the same kind of legislative intervention and could be
controlled by the developer for an extended time.

- Income Tax Treatment. Homeowners' associations commonly choose
treatment under code § 528, which exempts the association from being
taxed on assessments. To qualify under Section 528, substantially all of
the property must be residential. "Substantially all" is defined as 65%.
Although skillful accounting can compensate for the loss of Section 629,
the drafter should be aware of the issue.

The recomposed solution is to create two separate associations, one
that is strictly residential and another for the commercial portions. This
solution is admittedly imperfect, because it does not allow a common forum
for issues concerning the entire community. Furthermore, drawing member-
ship boundaries for the associations can be awkward. Ideally, parcels would
be sorted into one association or the other by use, not by legal description of
the individual parcel. But many statutes are not sufficiently flexible to allow
classification in this manner or to allow property to be moved from one
association to the other when uses change.

One alternative places all property, residential and commercial, within
a single association, but does not permit the association to operate the town
center common areas or to interfere with commercial operations. In such a
case, a separate set of provisions creating an additional association or other
management entity for commercial property would also be recorded. Special
considerations for the town center are discussed later in this article.

Residential units within the town center are usually made part of the residential
association. This unity is particularly appropriate if the residential
association owns significant recreational amenities to which the residential
units should have access.

Some New Urban developers have created institutes or other voluntary
membership organizations to provide cultural activities, education, and other
community building services. These supplement rather than replace the
property owners' association. Such organizations generally seek tax-exempt
status under Code § 501(c)(3).

Common Areas

Treatment of TND common areas differs significantly from conventional
subdivision development. In a conventional subdivision, open space is often
leftover land used as a buffer between one subdivision and the next,
contrast, a New Urban community's open space is carefully planned, formal-
ized, and prominently placed.

In the residential sections, open space may take the form of a
conveniently located parks where people can meet and mingle. Particularly
near the center of town, plazas, squares or greens will be intended as open
marketplaces, with special events, farms' markets, pushcarts, kiosks, or even
small semi-permanent store buildings.

The function of these various spaces has legal implications, and
practitioner must understand for each common area how the developer
intends the parcel to be used and what potential uses may occur in the future.
Although standard covenants and restrictions prohibit commercial
common areas, documents for a New Urban community should anticipate
commercial use of certain open space. The plat is another potential source of
problems if conventional labels are used. Case law suggests that labeling open
space as "park" may prohibit any commercial use. McConnaughy v. Keyton
63 So.2d 905 (Fla. 1953).

TND developers are less likely than conventional developers to create
association-owned recreational facilities. Commercial gyms or YMCAs fill
some of this gap. A church building may serve as a meeting hall. The town
center itself, with its shops and restaurants is viewed as an amenity of sorts,
providing entertainment and activity.

Because they are not gated, TNDs are more likely to dedicate their streets
to the public. In some cases, parks and greens will be dedicated as well.
Municipal willingness to accept dedication varies considerably from place to
place. Municipalities are often reluctant to accept alleys for dedication. Street
trets, which are often in the right of way may cause hesitation as well.
Whenever such properties are dedicated, the association should reserve the
right to provide additional maintenance if municipal maintenance is unsatis-
factory.

Town Center

The town center generally has substantial, commercially oriented
improvements that must be maintained in common. Shops in the town center
are pulled up close to the street and do not have their own parking lots.
Although some on-street parking may be available, additional parking is
usually provided in shared parking lots behind the shops, allowing the patron
to park once and visit several shops. Other common improvements include
sidewalks, plazas, lighting and street furniture.

Either a developer-controlled management entity or an association of
commercial property owners may manage and maintain the town center.
The choice between the two depends on large part upon the developer's
long-term commercial objectives.

- Management Entity. When the developer or a third party is inter-
ested in retaining a long-term financial interest in the town center,
a management entity may be considered. The management entity owns
the town center common areas and usually owns and leases out most or all of
the commercial properties. The management entity charges common area
maintenance charges, similar to those of a shopping mall, and may strictly
control the mix of tenants.

- Owners' Association. When the developer would rather sell the
town center as individual building parcels, a property owners'
association, in conjunction with a merchant association, may be
established to own and maintain the common area.

Depending on the degree of control the developer believes is desirable, the
town center documents may contain detailed provisions concerning com-
mmercial operation, such as hours of operation and shop appearance.
Although assessments are usually based on square footage, an assessment
scheme may be based on use or gross income or on factors combined
with square footage. Placing these provisions in a separate document
allows the residential documents to be relatively conventional, improving acceptance by residential buyers and their lenders.

**Specialized Building Types**

New Urban communities generate certain building types not found in typical subdivisions. This section discusses some special considerations for successful operation of these building types.

**Mixed-use buildings**, which occur primarily in the town center, usually have the following characteristics:

- **Layered Use.** A typical town center building might have commercial space on the first floor and residential units on the upper floor. Office space is sometimes placed on the second floor: because it is generally quiet at night and on weekends, it serves as a good buffer between commercial and residential uses. Although residents need to appreciate that some noise and activity are to be expected, certain uses, such as full-service restaurants or nightclubs, may not be compatible with residential units unless there is some ability to buffer the uses.

- **Few Common Elements.** Typically, residential units in a mixed-use building have no recreational facilities of their own and may not even have their own parking. Instead, these amenities are part of the community facilities and are maintained by the property owners' association or the town center association.

- **Small Scale.** Except in highly urbanized areas, buildings in a New Urban community, including its town center, are usually modest in scale, both in height (rarely more than four stories) and footprint. They may, however, be larger than the live/work building, which is comparable to a single-family home in size and price. This scale can create financial challenges or lenders that are not accustomed to this intermediate size.

Flexibility in both building design and legal documentation allows users to change with the market. Upper-floor flats, for example, can be conversely from office to residential space and back again. Usually, only commercial uses are permitted on the first floor to encourage a lively streetscape. Mixed-use buildings can be owned by a single entity, or ownership may be divided between the commercial and residential units, depending on the developer's objective. Here are some possibilities:

- **Sell Off Residential Units.** Often the developer wants to retain control of the commercial space yet sell off the residential units for cash. The form of ownership is highly dependent on state law, but choices typically include either formation of a mixed-use condominium or creation of an airspace condominium ownership. Particularly for buildings with a single unit upstairs, it may be in some instances be possible to divide the building horizontally, by use of maintenance and easement agreements, without forming a condominium. Whenever ownership is divided within a building it adds a layer of complexity and administration that needs to be weighed against the financial advantage.

- **Commercial Ownership.** If a developer or commercial property owner has the financial strength to retain ownership of the entire commercial and residential units can be rented. This ability gives the owner the considerable advantage of total control over the building, including the ability to convert residential and commercial space if needed.

- **Investor Ownership.** To raise cash yet retain control of the commercial portion of small-scale mixed-use buildings, the developer may sell a small building to a private investor. One such scenario would give the investor the ability to use or rent out the residential unit upstairs and would give the developer the right to manage the commercial portion for a stated number of years. The developer would control the choice of tenant and amount of rent to be charged and would pay the investor a percentage of the rent.

Even residential buildings present special considerations in a New Urban community. To allow the most efficient use of narrow lots while complying with governmental setback requirements, houses may bow space on one side and lend space on the other, through the use of specialized easements. Attached houses that share a roof or other structural elements should have special maintenance and assessment provisions. For certain building types that are to be built along a property line but that do not share structural elements, easements may permit roofs, gutters, soffits, and downspouts to overhang the property line and may allow footings and rain leaders to intrude below the surface of the property line.

**Architectural Control**

New Urban communities rely on carefully designed codes that control the placement of the building on the lot as well as the scale and materials of the building itself. New Urbanists think of the street as an outdoor room that needs to be properly enclosed to be comfortable to pedestrians. Their research has shown that the street invites pedestrians when the houses are pulled up close to the curb, with shallow front yards. Therefore, rather than minimum setbacks, a New Urban code may have a mandatory "build-to" line where the front of the house, or the front porch, must be placed.

Such requirements typically vary by lot type, with different types of houses permitted on different lot types. For instance, certain very narrow lots may be intended for Charleston-style side-yard houses, with a porch running the length of the house on one side and the house at or near the property line on the other.

New Urbanists usually establish an architectural code that explains and codifies design and building rules. This is sometimes done in the form of a pattern book, which illustrates the various architectural elements and how they may be properly combined. Restrainment, simplicity, honest building materials, and good proportion are emphasized, although it may be hard to persuade builders and buyers to leave off the gingerbread. Some TNDs, most notably Prospect in Longmont, Colorado, have experimented with contemporary building styles while retaining the grid streets, narrow lots, alleys, street trees, and other elements of pedestrian-friendly design.

Covenants and restrictions should establish effective architectural review and enforcement processes, including the right to enjoin construction that has not been approved or that varies from approved plans. At least until initial
construction is complete, the developer should control the architectural review board.

Depending on state law, it may be beneficial to establish architectural control in master deed restrictions, recorded before the declaration that creates the association. This may improve the likelihood of keeping turnover of the architectural review board out of any statutory turnover requirements for the board of directors of the association.

TNDs frequently impose time limits on construction, requiring completion of the main building within a designated time, typically two years. Such requirements are often enforced with a buy-back option. Time limits discourage purchase of lots for speculation, but, more importantly, allow the streetscape to develop without gaps for vacant lots.

Working with Builders

Custom builders, working for individual clients, construct most of the homes in the early TNDs. Production builders have entered the field, as more and larger, TNDs are developed, and developers strive to make TNDs living more affordable.

Production builders generally must modify their stock plans to suit TND requirements. To get appropriate buildings, developers may provide considerable assistance with architectural design services. Developers must oversee construction on the site, to make sure that what is being built complies with the approved plans.

Prices in TNDs may escalate quickly once the first few streets are completed and buyers can see the streetscape in place. Take-down agreements should be considered in the contract. The TND developer may structure lot sales so that the lot price to the builder is discounted, but the developer then gets an additional payment if the ultimate price of the completed home exceeds a certain formula. This can help overcome some of the reluctance of builders, who are risk-averse in general and who may be unhappy being required to build to specifications other than those to which they are accustomed.

Public/Private Issues

Unlike gated communities, a New Urban community invites the public. Its streets are meant to interconnect with neighboring communities, providing alternative routes and shortcuts for both pedestrians and drivers. Its open space, in the form of plazas or greens, looks like a public park, even when it is owned and maintained by an owners’ association. This may require adjustment in perspective for some property owners, who have conditioned themselves to live in their own subdivision and their own common areas.

Even the name of the community reflects the tension between public and private issues. The developer of Seaside trademarked, and vigorously (successfully) defends, its name, even after it began appearing on maps. Some other developers have chosen not to register the names of their communities because of the TND’s town-like attributes.

Conclusion

TNDs, a small but growing and influential segment of the market, significantly from conventional development. These differences include:

- A mixture of uses and housing types, the treatment of the common area, and the creation of the streetscape. The documents that create the community must recognize, and accommodate, these special considerations.

Notes—New Urbanism

1. Patterns of growth have been dramatically impacted over the past decade by a new consortium of ideas on developing more compact, walkable, mixed use and energy/environmentally sustainable communities designed to combat urban sprawl and promote revitalization of cities and older suburbs. The “New Urbanism” movement has a dazzling array of architects, economists, designers, planners, transit proponents, housing specialists, ecologists, builders, engineers and lawyers working on hundreds of new urbanist projects from “conservation subdivisions” in rural areas, new suburban “walkable communities” and “town centers”; to city center “town squares” and “grayfield conversions of older malls, industrial buildings and warehouses. For useful literature in the field, in addition to the monthly journal “New Urban News,” see Francesca Ortiz, Smart Growth and Innovative Design: An Analysis of the New Community, 34 EnvTLR 10003 (2004); Calhoun, The Next American Metropolis (Princeton, 1993); New Urbanism: Comprehensive Report and Best Practices Guide (New Urban News, 2001); Watson, An Introduction to Urban Design, 43 Planning Commissioners Journal 6 (Summer 2001); and Dusenbys-Zyberk & Company “Smart Code” (Municipal Code Publishers, 2003) (an inclusive new urban code for community form, thoroughfares, civic places, urban zones, site plans, terms and definitions).

2. Research shows that better interconnectivity of streets in lieu of cul-de-sacs, block length, proximity to light rail, new traditional design including porches and rear garages and pedestrian accessibility to shops and other commercial users has created a class of buyers willing to pay more to live in a new urban community. See New Urbanism and House Values, National Center for Smart Growth Research and Education, University of Maryland (2003).

3. The major problem that the legal profession faces in addressing new urbanism relates to the need to radically modify zoning and subdivision codes to permit by right new urbanism standards.

Some of the key subject matters that need to be changed are:

1. Reduction in parking requirements;
2. Permitting residential to be built above and mixed with commercial and office structures;
3. Reducing front yard setback requirements;
4. Placement of garages in the rear;
5. Interconnection of subdivisions;
6. Reduction of access points on arterials;
7. Creating “sustainability” codes for swales in lieu of culvert drainage systems to promote water reuse;
8. Increasing use of development transfers and mandatory clusters;
9. Big box and McMansion restrictions;
10. Creating “transit-oriented” development zones;
11. Drafting meaningful design standards;
12. Replacing zoning provisions that encourage large lot sprawl.
13. Increasing public open space and amenities including biking and walking corridors.

4. In a recent report written for the National Governors Association entitled "New Community Design to the Rescue: Fulfilling Another American Dream" (2001), authors Joel E. Zwick and Paul Souza, ask these questions, among others, as to how we judge whether a project is sprawl or smart urban growth:

1. Is it located in an already developed area?
2. Is there a mix of housing, office space, schools, retail shopping, outdoor recreation and civic open space?
3. Does the housing include multiple types, from single family detached to multifamily condominiums, and does it have a range of prices from luxury to affordable?
4. Does the project convert prime agricultural land or environmentally sensitive land, or does it consume less agricultural and environmentally sensitive land than the average sprawl development?
5. Does the project use compact energy-efficient and green building methods?
6. Is there access to public transit?
7. Does the design and layout of buildings and streets promote real neighborhood interaction and compatible style?
8. Has the local government adopted zoning codes that give as much support for mixed use communities as it does for segregated single use Euclidean zoning?

5. For a duo of interesting neo-traditional planning cases, see Restigouche v. Town of Jupiter, 68 F.3d 1208 (11th Cir.1995) (rejecting traditional auto use on planned new traditional Main Street); Dallen v. City of Kansas City, 822 S.W.2d 429 (Mo.App.1991) (protecting neotraditional corridor overlay district from gas line sale).

6. A useful chart to compare the legal problems that are presented by traditional neighborhood development is as follows:

<table>
<thead>
<tr>
<th>Conventional Development</th>
<th>Traditional Neighborhood Development</th>
</tr>
</thead>
<tbody>
<tr>
<td>Separation of uses</td>
<td>Mixed use</td>
</tr>
<tr>
<td>Maximum densities</td>
<td>Minimum density</td>
</tr>
<tr>
<td>Street standards designed for cars</td>
<td>Street standards designed for pedestrian</td>
</tr>
<tr>
<td>Curvilinear and cul-de-sac streets</td>
<td>Interconnected streets</td>
</tr>
<tr>
<td>Private open space</td>
<td>Public open space</td>
</tr>
<tr>
<td>Large lots</td>
<td>Small lots</td>
</tr>
<tr>
<td>Wide setbacks</td>
<td>Build to lines</td>
</tr>
<tr>
<td>Private orientation</td>
<td>Public orientation</td>
</tr>
<tr>
<td>Minimum parking</td>
<td>Maximum parking</td>
</tr>
</tbody>
</table>


Sec. B TIER SYSTEMS AND URBAN GROWTH BOUNDARIES

Utilization of the Tier Concept to Promote Urban Infill

San Diego Plan: Techniques selected to manage growth on the urbanizing fringe will often stimulate growth in the central city and vacant areas in the urban service area. A prime example of this phenomenon is found in the San Diego experience. In its Progress Guide and General Plan, San Diego in 1979 adopted a tier approach to its growth management program. The plan incorporated three major areas exclusive of environmentally sensitive zones for which separate objectives and techniques are utilized: Urbanized Area (UA), Planned Urbanizing Area (PUA) and Future Urbanizing Area (FUA). The growth management system was designed to redistribute growth with a specific objective to transfer a greater proportion of new growth to the Urbanized Area.

The FUA is zoned agricultural and is primarily vacant land which is part of the urban reserve. Tax relief is provided to landowners in the FUA by preferential tax assessment under the Williamson Act. See discussion infra subsection D. 3. (d), this chapter. The PUA and the UA together provide adequate land for development according to projected population growth. In the FUA, additional public investment is necessary to complete development and to allow growth of communities already served by capital facilities. Land is to be opened for urbanization in a staged, contiguous manner through orderly extension of public facilities. Developers are required to bear the prime responsibility for financing the infrastructure (facilities benefit assessment) as was discussed in Chapter 3, supra.

Objectives for the UA included strengthening the viability of the central areas through renewal, redevelopment, and new construction; attracting more intensive and varied land uses including office, administrative, residential and entertainment; and conserving the socio-economic character of older neighborhoods.

Prior to 1979, the estimated proportion of growth was 90% in the PUA and 10% in the UA. A goal was established to change the percentages to 60% in the PUA and 40% in the UA in order to more efficiently utilize existing public facilities and services. These goals were surpassed according to a June 24, 1983 Planning Department Information Report (No. 85-283):

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>46,233 UA (60%)</td>
<td>15,921 UA (62%)</td>
</tr>
<tr>
<td>28,116 PUA (38%)</td>
<td>9,956 PUA (38%)</td>
</tr>
<tr>
<td>2,951 FUA (4%)</td>
<td></td>
</tr>
</tbody>
</table>

Total 77,400
Total 25,879

The major factor contributing to the dramatic reversal in the location of growth was the fiscal incentive favoring the UA. Building in older areas where public services were available reduced housing costs in comparison to new growth areas where development was required to finance needed capital infrastructure.

Several tools and techniques are available for encouraging infill: utilization of sustainable environmental development practices, stimulating developer interest by publicity and design competition; removing obstacles created by government including delays in project review; correcting excessively high or
inappropriate standards; improving zoning balance by including more land for mixed residential use; creating neighborhood support for infilling by holding project review meetings; including in the neighborhood plan, strategies for dealing with vacant lots; addressing market weaknesses or uncertainty in poor areas; managing "below-market" financing through mortgage and industrial development bond programs and loan guarantees; addressing site-specific problems by reducing the high cost of infill land, increasing land availability, and correcting infrastructure problems. See Tugwell, The Challenge of the Environmental City: A Pittsburgh Case Study, in Mazmanian and Kraft, Toward Sustainable Communities (1992); Real Estate Research Corporation, Infill Development Strategies (1992).

Urban/Rural Service Areas

Certain municipal services are essential to the orderly and rational development of rural, undeveloped areas in the urban fringe. Municipalities attempting to deal with runaway growth are faced with municipal expenses which rise on a per capita-per-acre basis as municipal services are extended to areas increasingly distant from the urban center.

A relatively simple technique for channeling urban growth and managing the soaring costs of utilities associated with leapfrog development was pioneered by Ladisio, Segue & Associates in several Wisconsin cities and in Lexington, Kentucky. Basically, the technique involves designing an urban services area which planning studies show to be most adaptable to the extension of municipal services such as streets, sewers, and water, and a rural service area where development is restricted. Lexington, Kentucky established an urban service area line to achieve the following goals: (1) make the most efficient use of public tax money providing necessary service to areas; (2) maintain and extend rural services, especially protection of the natural beauty of the Lexington-Fayette County service areas; (3) efficient municipal or county services; and (4) promotion of public health through sewer services.

In 1973, voters of the City of Lexington and Fayette County elected to merge into an urban county government effective January 1, 1974 as authorized by the state legislature. See Ky.Rev.Stat. § 67A.610 (“in order to facilitate the operation of local government, to prevent duplication of services, and to promote efficient and economical management of the affairs of local government.”). In the same year, the state passed enabling legislation for the establishment of urban/rural service areas.

The territory of an urban county government may be divided into service districts. Each service district shall constitute a separate tax district within which the urban county government shall levy and collect taxes, in accordance with the kind, type, level and character of the services provided by the urban county government in each of these districts. The legislative body of the urban county government may abolish or extend districts, or create new districts ...


Sec. D TIER SYSTEMS AND URBAN GROWTH BOUNDARIES

As of 1977, Lexington's strategy had proved extremely successful in directing growth. The urban service area expanded from its original 67 square miles to 74.4 square miles in a 1973 update, which represents only 26% of the county's 283 square miles. Within the urban services area, only 50% of the land was developed, with the remaining 50% vacant or in agricultural use. The Board consistently followed the Plan, which was based on careful comprehensive studies and surveys of the community. Freibich, Statutory Authority for a Growth Planning System in Kentucky, Fayette County, Kentucky, February, 1977.

In 1980 a new Comprehensive Plan was developed to focus on growth management strategies as a tool to coordinate public and private development in order to effect urban infill, as well as distinguishing functional subareas within two major categories of development and non-development areas. The Plan became an integral part of the community's overall Growth Planning System and represented the combination of county and city cooperation. Freibich & Leitner, 1980 Comprehensive Plan—Growth Planning System (November 30, 1980). The 1980 Plan was created to deal with the explosive population growth then occurring in an attempt to prevent sprawl from encroaching upon horse farms, agricultural lands and environmental lands. The Plan proposed six new functional areas located within the urban service areas consisting of a downtown employment centers, urban center activity centers, urban growth areas, existing neighborhoods and horse farms. The Plan found that Ramapo's sequential timing of growth in accordance with the public facilities was the next step to providing the necessary linkage between the concepts of planning and regulating with regard to the private sector size of growth management, and between planning and budgeting on the public sector side by providing for an urbanizing tier within the urban service area.

In the years following the 1980 comprehensive planning revision little change was made in the Urbanizing Tier policies. Emphasis shifted toward adding rural and green space policies. In the 1993 to 1995 plan revision, the Lexington-Fayette County Region has shaped its land use controls for the next twenty to fifty years. The key Ramapo techniques are utilized throughout the expansion area criteria for housing, public facilities, infrastructure, boulevards, highways, and open space. Lexington-Fayette County continues to represent a successful example of utilizing the Ramapo approach through an Urbanizing Tier growth boundary system. See Joice, Planning at the Edge of Lexington: Urban Service Area Boundary at 40 years of Age, Planning and Zoning for Community Land Use Management, Madison, Wisconsin, (May 4-5, 1998).

In Long Beach Equities, Inc. v. County of Ventura, 282 Cal.Rptr. 877 (Cal.App.1991), Long Beach Equities (LBE) sought to build 249 single-family residences on 225 acres adjacent to the City of Simi Valley (City). LBE contended that the land use regulations of Ventura County (County) and the City, on face and as applied, so greatly delayed its development plans as to render them economically infeasible. The California Court of Appeal held in favor of the County, finding validity in the urban/rural distinction created by the City and County:
Local government legislation is constitutional on its face if it bears a "substantial relationship to the public welfare ..." and inflicts no irreparable injury on the landowner. Agins v. Tiburon, supra, 447 U.S. 255, 261 (1980); Euclid v. Ambler Realty Co., 272 U.S. 365, 395-397 (1926). This is true even where a substantial diminution in value of the property is alleged. Agins, supra, 447 U.S. at p. 261.

Both County's Guidelines and City's Growth Management Ordinance satisfy this test. The County enacted the Guidelines to promote the efficient and effective delivery of community services and to conserve the resources of County by encouraging urban development to occur within cities. The Guidelines emphasize annexation as a means to accomplish these purposes. City enacted its ordinance "to protect the unique, hill-surronded environment; enhance the quality of life, promote public health, safety or welfare and the general well-being of the community ..." By limiting the rate, distribution, quality and type of residential development on an annual basis, with periodic reviews of the ongoing situation, City seeks "to improve local air quality, reduce traffic demands ... and ensure that future demands for such essential services as water, sewers and the like are met...." 3.

3. TECHNIQUES TO LIMIT OR STOP GROWTH: QUOTAS AND POPULATION CAPS

CONSTRUCTION INDUSTRY ASSOCIATION OF SONOMA COUNTY v. CITY OF PETALUMA
522 F.2d 897.

CIRCUIT JUDGE:
The City of Petaluma (the City) appeals from a district court decision vacating as unconstitutional certain aspects of its five-year housing and zoning plan. We reverse.

STATEMENT OF FACTS
The City is located in southern Sonoma County, about 40 miles north of San Francisco. In the 1960's and 1960's, Petaluma was a relatively self-sufficient town. It experienced a steady population growth from 10,315 in 1960 to 24,870 in 1970. Eventually, the City was drawn into the Bay Area's metropolitan housing market as people working in San Francisco and Sonoma County became willing to commute longer distances to secure relatively inexpensive housing available there. By November 1972, according to Petaluma's population was 30,500, a dramatic increase of almost 600 per cent in little over two years.

The increase in the City's population, not surprisingly, is reflected in an increase in the number of its housing units. From 1964 to 1971, the following number of residential housing units were completed:

<table>
<thead>
<tr>
<th>Year</th>
<th>Units</th>
</tr>
</thead>
<tbody>
<tr>
<td>1964</td>
<td>270</td>
</tr>
<tr>
<td>1965</td>
<td>440</td>
</tr>
<tr>
<td>1966</td>
<td>321</td>
</tr>
<tr>
<td>1967</td>
<td>234</td>
</tr>
</tbody>
</table>

In 1970 and 1971, the years of the most rapid growth, demand for housing in the City was even greater than above indicated. Taking 1969 and 1971 together, builders won approval of a total of 2000 permits although only 1482 were actually completed by the end of 1971.

Alarmed by the accelerated rate of growth in 1970 and 1971, the demand for even more housing, and the sprawl of the City, the Council adopted a temporary freeze on development in early 1971. The construction and zoning change moratorium was intended to give the City Council and the City planners an opportunity to study the housing and zoning situation and to develop short and long range plans. The Council made specific findings with respect to housing patterns and availability in Petaluma, including the following:

That from 1960-1970 there had been in almost unvarying 6000 square-foot lots laid out in regular grid patterns; that there was a density of approximately 4.6 housing units per acre in the single-family home area; that during 1960-1970, 88 percent of the permits issued were for single-family detached homes; that in 1970, 63 percent of Petaluma's housing was single-family dwellings; that the bulk of recent development (largely single-family homes) occurred in the eastern portion of the City, causing a large deficiency in moderately priced multi-family and apartment units on the east side.

To correct the imbalance between single-family and multi-family dwellings, curb the sprawl of the City on the east, and retard the accelerating growth of the City, the Council in 1972 adopted several resolutions, which collectively are called the "Petaluma Plan" (the Plan).

The Plan, on its face limited to a five-year period (1972-1977), places a housing development growth rate not to exceed 500 dwelling units per year. Each dwelling unit represents approximately three people. The 500-unit figure is somewhat misleading, however, because it applies only to housing units (hereinafter referred to as "development-units") that are part of projects involving five units or more. Thus, the 500-unit figure does not reflect any housing and population growth due to construction of single-family homes or even four-unit apartment buildings not part of any larger project.

The Plan also places a 200 foot wide "greenbelt" around the City, to serve as a boundary for urban expansion for at least five years, and with respect to the east and north sides of the City, for perhaps ten to fifteen years. One of the most innovative features of the Plan is the Residential Development Control System which provides procedures and criteria for the award of the annual 500 development-unit permits. At the heart of the allocation system is the urban extension line (see text infra) and the agreement to purchase from the Sonoma County Water Agency only 9 million gallons of water per day through 1990. This flow is sufficient to support a population of 75,000, if the City were to grow at a rate of about 500 housing units per year (approximately three persons per unit), the City would reach a population of 50,000 by the year 1990. The 50,000 figure was mentioned by City officials as the projected optimal (and maximum) size of Petaluma. See, e.g., R.T. at 135-45, 145-46.

8. The allotment for each year is not an inflexible commitment. The Plan does provide for a 10 percent variance (50 units) below or above the 500 unit annual figure, but the expectation of the Council is that not more than 500 units will be constructed during the five-year period.

9. At some point in the urban extension line is about a quarter of a mile beyond the present City limits.
procedure is an intricate point system, whereby a builder accumulates points for conformity by his projects with the City’s general plan and environmental design plans, for good architectural design, and for providing low and moderate income dwelling units and various recreational facilities. The Plan further directs that allocations of building permits are to be divided as evenly as feasible between the west and east sections of the City and between single-family dwellings and multiple units (including rental units), that the sections of the City closest to the center are to be developed first in order to cause “infilling” of vacant area, and that 8 to 12 percent of the housing units approved be for low and moderate income persons.

In a provision of the Plan, intended to maintain the close-in rural space outside and surrounding Petaluma, the City solicited Sonoma County to establish stringent subdivision and appropriate acreage parcel controls for the areas outside the urban extension line of the City and to limit severely further residential infilling.

**PURPOSE OF THE PLAN**

The purpose of the Plan is much disputed in this case. According to general statements in the Plan itself, the Plan was devised to ensure that “development in the next five years, will take place in a reasonable, orderly, attractive manner, rather than in a completely haphazard and unattractive manner.” The controversial 500-unit limitation on residential development units was adopted by the City “(in order to protect its small town character and surrounding open space).” The other features of the Plan were designed to encourage an east-west balance in development, to provide for variety in densities and building types and wide ranges in prices and rentals, to ensure infilling of close-in vacant areas, and to prevent the sprawl of the City to the east and north. The Construction Industry Association of Sonoma County (the Association) argues and the district court found, however, that the Plan was primarily enacted “to limit Petaluma’s demographic and market growth rate in housing and in the immigration of new residents.”

**MARKET DEMAND AND EFFECT OF THE PLAN**

In 1970 and 1971, housing permits were allotted at the rate of 1000 annually, and there was no indication that without some governmental control on growth consumer demand would subside or even remain at the 1000-unit per year level. Thus, if Petaluma had imposed a flat 500-unit limitation on all residential housing, the effect of the Plan would clearly be to retard to a substantial degree the natural growth rate of the City. Petaluma, however, did not apply the 500-unit limitation across the board, but instead exempted all projects of four units or less. Because appellants failed to introduce any evidence whatsoever as to the number of exempt units expected.

**Sec. D**

**TIER SYSTEMS AND URBAN GROWTH BOUNDARIES**

To be built during the five-year period, the effect of the 500-development-unit limitation on the natural growth in housing is uncertain. For purposes of this decision, however, we will assume that the 500-development-unit growth rate is in fact below the reasonably anticipated market demand for such units and that absent the Petaluma Plan, the City would grow at a faster rate.

According to undisputed expert testimony at trial, if the Plan (limiting housing to approximately 6 percent of existing housing stock each year) 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 shortfall in needed housing in the region would be about 105,000 units (or 25 per cent 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 (owner-occupied and rental units) and low-income units which were rarely constructed in the pre-Plan days.

**COURT PROCEEDINGS**

Two landowners (the Landowners) and the Association instituted this suit (28 U.S.C. §§ 1331, 1332 and 42 U.S.C. § 1983 against the City and its officers and council members, claiming that the Petaluma Plan was unconstitutional. The district court ruled that certain aspects of the Plan unconstitutionally denied the right to travel insofar as they tended to limit the natural population growth of the area.” The court enjoined the City and its agents from implementing the unconstitutional elements of the Plan, but the order was stayed by Justice Douglas pending this appeal.

Editors note: The Ninth Circuit held that while the builders’ association and individual landowners suffered injuries in fact from the plan, they could not raise the right to travel argument for unknown third parties who might be excluded from Petaluma by the plan.

Although we conclude that appellants lack standing to assert the rights of third parties, they nonetheless having standing to maintain claims based on violations of rights personal to them. Accordingly, appellants have standing to challenge the Petaluma Plan on the grounds asserted in their complaint that the Plan is arbitrary and thus violative of their due process rights guaranteed by the Fourteenth Amendment and that the Plan poses an unreasonable burden on interstate commerce. The fact that one of the Landowner’s property lies wholly outside the present City boundaries and that the other’s property lies mostly outside the boundaries is no bar to their challenging the City’s Plan which has a direct, intended and immediate effect on the property.

**OTHER CHALLENGES TO THE PLAN**

Although the district court rested its decision solely on the right to travel claim, all the facts and legal conclusions necessary to resolve appellants’ other
CLAIMS ARE PART OF THE RECORD. THUS, IN ORDER TO PROMOTE JUDICIAL ECONOMY, WE NOW DISPOSE OF THE OTHER CHALLENGES TO THE PLAN.

SUBSTANTIVE DUE PROCESS

Appellants claim that the Plan is arbitrary and unreasonable and, thus, violates the due process clause of the Fourteenth Amendment. According to appellants, the Plan is nothing more than an exclusionary zoning device, designed solely to insulate Petaluma from the urban complex in which it finds itself. The Association and the Landowners reject, as falling outside the scope of any legitimate governmental interest, the City's avowed purposes in implementing the Plan the preservation of Petaluma's small town character and the avoidance of the social and environmental problems caused by an uncontrolled growth rate.

In attacking the validity of the Plan, appellants rely heavily on the district court's finding that the express purpose and the actual effect of the Plan is to exclude substantial numbers of people who would otherwise elect to move to the City. The existence of an exclusionary purpose and effect reflects, however, only one side of the zoning regulation. Practically all zoning restrictions have as a purpose and effect the exclusion of some activity or type of structure or a certain density of inhabitants. And in reviewing the reasonableness of a zoning ordinance, our inquiry does not terminate with a finding that it is for an exclusionary purpose. We must determine further whether the exclusion bears any rational relationship to a legitimate state interest. If it does not, then the zoning regulation is invalid. If, on the other hand, a legitimate state interest is furthered by the zoning regulation, we must defer to the legislative act. Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation. The reasonableness, not the wisdom, of the Petaluma Plan is at issue in this suit.

It is well settled that zoning regulations "must find their justification in some aspect of the police power, asserted for the public welfare." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387, 47 S.Ct. 114, 118, 71 L.Ed. 290 (1926). The concept of the public welfare, however, is not limited to the regulation of noxious activities or dangerous structures. 

In determining whether the City's interest in preserving its small town character and in avoiding uncontrolled and rapid growth falls within the broad concept of "public welfare," we are considerably assisted by two recent cases, Belle Terre, supra, and Ybarra v. City of Town of Los Altos Hills, 58 Cal.2d 250 (9th Cir.1974), each of which upheld as not unreasonable a zoning regulation much more restrictive than the Petaluma Plan, is dispositive of the due process issue in this case.

In Belle Terre the Supreme Court rejected numerous challenges to the village's restricting land use to one-family dwellings excluding lodging houses, boarding houses, fraternity houses or multiple dwelling houses. By about the same time that the California Supreme Court upheld the validity of the Belle Terre regulation, the Court of Appeals for the Ninth Circuit in Ybarra v. City of Town of Los Altos Hills, 58 Cal.2d 250 (9th Cir.1974), found the ordinance at issue to be a legitimate exercise of the police power to protect the public welfare. In this connection we would note that a necessary element of "reasonableness" in a zoning ordinance is the presence of a "legitimate governmental interest." A zoning ordinance must be "rationally related to a legitimate governmental interest." That a zoning ordinance is unreasonable because it is not the "least restrictive means of effectuating a valid governmental interest" is not a basis for invalidating a zoning ordinance. In Belle Terre, supra, and Ybarra v. City of Town of Los Altos Hills, the Court of Appeals for the Ninth Circuit found the ordinances at issue to be a reasonable exercise of the police power. Thus, the Court held that the ordinances were a reasonable exercise of the police power.

Both the Belle Terre ordinance and the Los Altos Hills regulation had the purpose and effect of permanently restricting growth; nonetheless, the court in each case upheld the particular law before it on the ground that the regulation served a legitimate governmental interest falling within the concept of the public welfare: the preservation of quiet family neighborhoods (Belle Terre) and the preservation of a rural environment (Los Altos Hills).

Every less restrictive or exclusionary than the above zoning ordinances is the Petaluma Plan which, unlike those ordinances, does not freeze the population at present or near-present levels. Further, unlike the Los Altos Hills ordinance and the various zoning regulations struck down by state courts in prohibiting the construction or conversion of a building to other than single-family dwelling, the village ensured that it would never grow, if at all, much larger than its population of 700 living in 220 residences. Nonetheless, the Court found that the prohibition of boarding houses and other multi-family dwellings was reasonable and within the public welfare because such dwellings present urban problems, such as the occupation of a given space by more people, the increase in traffic and parked cars and the noise that comes with increased crowds. According to the Court, a quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within Bernstein v. Parker, supra. The police power is not confined to 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.

416 U.S. at 0, 94 S.Ct. at 1541. While dissenting from the majority opinion in Belle Terre on the ground that the regulation unreasonably burdened the exercise of First Amendment associational rights, Mr. Justice Marshall concurred in the Court's express holding that a local entity's zoning power is extremely broad.

Local zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here: restricting uncontrolled growth, solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families. The police power which provides the justification for zoning is not narrowly confined. And, it is appropriate that we afford zoning authorities considerable latitude in choosing the means by which to implement such purposes. 416 U.S. at 13-14, 94 S.Ct. at 1543 (Marshall, J., dissenting) (emphasis added) (citations omitted).

Following the Belle Terre decision, this court in Los Altos Hills had an opportunity to review a zoning ordinance providing that a housing lot shall contain not less than one acre and that no lot shall be occupied by more than one primary dwelling unit. The ordinance as a practical matter prevents people from living in Los Altos Hills and restricted the density, and thus the population, of the town. This court, nonetheless, found that the ordinance was rationally related to a legitimate governmental interest—the preservation of the town's rural environment—and, thus, did not violate the equal protection clause of the Fourteenth Amendment.

Both the Belle Terre ordinance and the Los Altos Hills regulation had the purpose and effect of permanently restricting growth; nonetheless, the court in each case upheld the particular law before it on the ground that the regulation served a legitimate governmental interest falling within the concept of the public welfare: the preservation of quiet family neighborhoods (Belle Terre) and the preservation of a rural environment (Los Altos Hills).
recent years, the Petaluma Plan does not have the undesirable effect of walloing out any particular income class nor any racial minority group.

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 appellants 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. See, e.g., Golden v. Planning Board of Town of Ramapo, 30 N.Y.2d 359, 294 N.Y.S.2d 138, 285 N.E.2d 291, appeal dismissed, 403 U.S. 1003, 93 S.Ct. 1455, 36 L.Ed.2d 394 (1973); National Land & Investment Co. v. Kahn, 419 Pa. 504, 215 A.2d 597 (1965); Note, Phased Zoning: Regulation of the Tempo and Sequence of Land Development, 26 Stan.L.Rev. 685, 605 (1974). It does not necessarily follow, however, that the due process rights of builders and landowners are violated merely because a local entity exercises in its own self-interest the police power lawfully delegated to it by the state. See Belle Terre, supra; Los Altos Hills, supra. If the present system of phased zoning power does not effectively serve the state's interest in furthering the general welfare of the state or entire state, it is the state legislature's and not the federal courts' role to intervene and adjust the system. As stated supra, the federal court is not a super zoning board and should not be called on to mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests.

We conclude therefore that under Belle Terre and Los Altos Hills the control of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace.

Reversed.

Notes: Population Quotas

1. A unique aspect of Petaluma's plan was its annual design competition which the 500 building permits were issued. Although design criteria might be subject to abuse because of the subjectivity of some of the standards, they do have the advantages of encouraging better planning in the layout and character of residential development and providing the community with the opportunity to examine all proposed developments at one time, providing a basis for evaluating their impact. See Gray, The City of Petaluma: Residential Development Control, in 2 Management & Control of Growth 149, 154 (Scott ed 1973); addition to those supra cited physical considerations, Petaluma developed social and fiscal goals. See Hart, The Petaluma Case, Cal. California, Spring 15, reprinted in 2 Management & Control of Growth 127 (Scott ed 1973).

2. Pitkin County (Aspen), Colorado has implemented a Growth Management Quota System regulation, under its Land Use Act, that provides for the validity of population density, phased development of services and facilities and land use regulations based upon the impact on the community or surrounding areas, establishes an annual quota system for new building permits based on a formula against which each development application was tested and scored. The scores are granted on the basis of their score, the high score is granted a permit first, and then the rest are granted in descending order until the annual growth management quota is filled. This elaborate system for phasing development was upheld in Wilkinson v. Pitkin County, 872 P.2d 1269 (Colo.App. 1993).

3. Note that in addition to limiting the issuance of building permits to 500 dwelling units per year for a 5 year period, the Petaluma Plan also established, and the court upheld, an urban extension or "greenbelt" line around the city as a boundary for urban expansion for a stated number of years. A similar plan was upheld in Norbeck Village Joint Venture v. Montgomery County Council, 254 A.2d 700 (Md. 1969), which established a greenbelt of open spaces and parks to shield the area from the "ever-lengthening and overcrowded suburban sprawl" coming from Washington, D.C., and rezoned "applicant's" lands from 1 acre lota to 2 acre lots. The court upheld the plan, noting that it was in conformity with the regional General Plan and was a "carefully thought out, carefully implemented policy" to preserve a suitable area as a self-identified community. 254 A.2d at 705.

4. In Pardee Construction Company v. Camarillo, 208 Cal.Rptr. 228 (Cal. 1984), the Supreme Court of California, in a strongly worded opinion, upheld a growth control ordinance with an annual quota of building permits despite the fact that the City and developer had entered into a consent judgment vesting the developer's zoning under the general plan. The Supreme Court found that neither the judgment nor the general plan referred to any time schedule or rate of development. The judgment reserved to the City the police power to adopt any ordinances not inconsistent with the judgment. The court held that the growth control ordinance, adopted by an initiative measure after entry of the judgment, regulated the rate of development but did not change the underlying zoning or alter the general plan. Thus it did not infringe on the company's rights under the judgment.

5. The validity of quotas often depends on the quality of the planning effort used to justify a need to limit development and the rationality of distinctions drawn by the controls. See, for example, Rancourt v. Town of Barrstead, 523 A.2d 55 (N.H. 1986), where a denial of a subdivision application based on a three percent growth rate contained in a master plan was overturned. The town had not enacted a capital improvements program and the court was not convinced that the town's decision was based on solid scientific, statistical data. Sturgis v. Town of Chilmark, 402 N.E.2d 1348, 1354 n. 16 (Mass. 1980), upheld a rate of development by-law "in the absence of a contrary showing, that a period of ten years is reasonably necessary to complete all necessary studies and implement recommendations and that the town will proceed with its studies in good faith." Begin v. Inhabitants of Sebastias, 409 A.2d 1259 (Me. 1979), recognized the validity of restrictions limiting the number of construction permits in the light of availability of municipal services. The court, however, struck down the ordinance because it applied to environmental and no rational basis for such discrimination. In Giuliano v. Town of Edgartown, 531 F.Supp. 1076 (D.Mass. 1982), an ordinance limiting to ten the number of lots in a subdivision which could be conveyed or built upon without a special permit in any one year was upheld. The planning board balanced the benefits of subdivision versus burdens on schools, public facilities, traffic and pedestrian travel, availability of public water and sewer, recreational facilities, open spaces, agricultural resources, preservation of unique natural features, the planned rate of development, and housing for senior citizens and people of moderate income.
6. Consider Schneck v. City of Hudson, 114 F.3d 590 (6th Cir.1997), where a slow growth ordinance that limited the number of zoning certificates the city would issue annually was upheld. The City of Hudson's comprehensive plan addressed concerns about its ability to accommodate the rapid growth and the desire to maintain its historic qualities. The plan noted significant shortcomings in the City's basic infrastructure such as water, sanitary sewers, storm sewers, transportation and emergency services. Pursuant to the plan, the City enacted a slow growth ordinance to curb its 3.5 percent annual growth rate which had persisted for 15 years to a level of 1 to 1.5 percent annually. A key limiting factor is the issuance of zoning certificates, which are required before a property owner can receive a building permit. Under the ordinance the City determines how many residential zoning certificates or allotments should be issued each year. For the first allotment after the adoption of the ordinance, the city set the limit at 100 with the ability to grant 30 additional allotments for special projects, such as housing with 25% of the units reserved for the elderly and disabled and those who mixed commercial and residential uses located in the downtown area. The allotments are distributed twice a year by a lottery system. Eighty percent of each distribution is for the "priority development pool," which includes the following: (1) Affordable housing; (2) Housing reserved for the disabled and those over the age of sixty-two; (3) Lots that were created and received preliminary or final plat approval before the ordinance's effective date; and (4) Lots of five acres or more with access to a public street, public water, and sewer systems. While the plaintiffs were qualified for the priority development pool, the city had 350-376 lots that had already had preliminary or final plat approval and were also qualified for the priority pool. The District Court invalidated the ordinance and criticized the city for not following the Ramapo approach. The Court of Appeals reversed the district court, stating that the city's concerns of slowing the rate of growth to improve its infrastructure is rational and the Florida Keys. One major problem has been damage to the unique tropical environment. The island host over twenty-five thousand plant and animal species listed as endangered, threatened, or under some other form of protected status. Another problem more growth from the population growth was the hurricane evacuation time, which was one of the least in the country. In a small where hurricanes are very real, the consequences of a loss of time are exacerbated by the elongated configuration of the Keys and the fact that the 12 mile evacuation route is a low-lying highway prone to flooding before the hurricanes even arrive. To resolve these problems the County had to reduce its growth rate and better plan for future growth, which it attempted to do by following the Ramapo approach and the courts decision.


8. What about the right to travel argument that was not addressed Pethelama due to lack of standing? See Associated Home Builders of the Greater Bay Area, Inc. v. Livermore, 136 Cal.Rptr. 41 (Cal.1976) (holding the indirect effect of growth controls on the right to travel does not call for an outright scrutiny finding no constitutional violation). See Note, That Old Due Process Mistake Growth Control and the Federal Constitution, 86 Mich.L.Rev. 1246 (1990) stating that the right to travel, the privileges and immunities clause are commercial clause, not due process, are the appropriate constitutional measures to test growth controls.

Note: Population Caps

1. Boca Raton, Florida attempted to control its growth by placing an absolute limit on its population. In lieu of a limit on the number of permits it would issue annually or a limited number of people, Boca Raton used a population cap limiting the number of building permits it would ever issue. The numerical cap in Boca Raton was arrived at “backwards.” Citizens who were concerned about the rapid growth of the city, used initiative and referendum provisions to submit to the voters a charter amendment question limiting the total number of units to 40,000. Once the voters then passed the charter amendment, the city was faced with implementing the “cap.” Almost 17 months later, the city council enacted new zoning ordinances. Although the city used the services of two consultants to aid in developing techniques to implement the cap, the final result was a simple across-the-board 50 percent density reduction—downstoring. Furthermore, most of the studies cited to support the cap were undertaken after the cap was established; there was no convincing evidence of utility shortages. The court invalidated the cap. City of Boca Raton v. Boca Villas Corp., 471 So.2d 154 (Fla.Ct.App.1979). See Gestwicki, Howar, Harr, and Vestal, Responsible Growth Management: Cases and Materials X-1 (1978).

2. Compare a cap instituted on the number of permits allowed over a ten year span, which was instituted by Monroe County, Florida. Monroe County is situated at the southern tip of the Florida Peninsula in the Gulf of Mexico and includes the low-lying chain of small islands known as the Florida Keys. Numerous problems have evolved from the unchecked overwhelming explosion of population growth and development in Monroe County and the Florida Keys. One major problem has been damage to the unique tropical environment. The island host over twenty-five thousand plant and animal species listed as endangered, threatened, or under some other form of protected status. Another problem more growth from the population growth was the hurricane evacuation time, which was one of the least in the country. In a small where hurricanes are very real, the consequences of a loss of time are exacerbated by the elongated configuration of the Keys and the fact that the 12 mile evacuation route is a low-lying highway prone to flooding before the hurricanes even arrive. To resolve these problems the County had to reduce its growth rate and better plan for future growth, which it attempted to do by following the Ramapo approach and the courts decision.
CHANGING FROM SPRAWL TO SMART GROWTH Ch. 7

Annual Institute of Planning, Zoning and Eminent Domain, Matthew Bender, Ch. 9 (1996).

In a recent far-reaching decision, the Florida District Court of Appeals endorsed the County’s measures to add environmental and infrastructure limitations on residential growth in a sensitive island area. Monroe County v. Ambrose, 2003 WL 2999947 (Fla.App.2003).

3. Contrast the approach of another Florida city which also established a cap on dwelling units, primarily through citizen activism. Sandibel, an island off the gulf coast of Florida, was connected to the mainland by a causeway in 1963. Subsequently, the island’s population grew dramatically and its sensitive environmental system was threatened. Initially, Sandibel was unincorporated and fell under the authority of the Lee County Commission which had zoned the island for over 20,000 dwelling units. Numerous condominiums were built on the dunes and around manmade lakes created by dredging and filling interior wetlands. In November of 1974, the citizens of the island voted to incorporate the island into a city.

Whereas, residents of Sanibel Island in Lee County, Florida, desiring to have the rights of self-determination, to the fullest extent allowed by law, in the planning for the orderly future development of an island community known far and wide for its unique atmosphere and unusual natural environment, and to assure compliance with such planning so that unique and natural characteristics of the island shall be preserved, do seek the benefits conferred on municipal corporations by the Constitution and laws of the State of Florida.

City Charter, City of Sanibel, cited in Responsible Growth Management: Cases and Material XI-3-4, supra.

Studies of the island’s ecosystems resulted in the classification of the island into ecological zones: beaches, interior wetlands, ridges, and mangroves. These ecological zones had differing levels of tolerance for development and thus, formed the basis of determining appropriate densities and land uses. Limita on Sanibel’s growth were related to the public health and safety. Because of the threat of hurricanes, Sandibel was required to determine how many people could safely be evacuated in the event of a hurricane. Other significant limits to development were continued water quality and waste water treatment. The environmental, safety, health and fiscal implications associated with each planning alternative were considered. The final plan included a limit of an additional 2000 dwelling units on the island. These additional units were allocated throughout the island in a formula similar to the one allocated to Estero but which also took into account relative development tolerances of the ecological zones. For further reading on Sanibel story, see Godschalk, Brower, Herr and Vestal, Responsible Growth Management: Cases and Materials XI-1 (1978); and Babcock and Simon, Zoning Game Revisited, Ch. 6 (1985).


E. PRESERVATION OF AGRICULTURAL LAND & OPEN SPACE

1. AGRICULTURAL PRESERVATION: THE DEBATE

Does the conversion of farmland threaten this country’s food supply? Does the need for farmland outweigh the need for developable land on the urban fringe? Can effective agricultural preservation policies assist in formulating rational growth management policies which benefit developing areas by viewing the urbanizing area as a whole? From an economic standpoint, to what extent should we attempt to halt the development of agricultural lands? Agriculture is still the widest use of land in America, comprising about two-thirds of the private land in the country. These are tough questions, with no clear-cut answers. Our land must be understood as a resource with a potential for a variety of uses. While it may appear that agricultural land is plentiful, premature development of these lands may have adverse consequences which are difficult to fix at best.

Unquestionably, our country’s agricultural land base shrinks every year. Nearly one million acres of farmland are converted to non-farm uses annually, which amounts to around 2,700 acres a day. The current private land base in American farms is about 940 million acres, down from around 987 million acres since 1982. Of this land about 360 million acres is cropland, and another 50 million acres is potential cropland. The American Farmland Trust estimates that 70 percent of prime or unique farmland is currently in the path of rapid development. See Daniels and Bowers, Holding Our Ground: Protecting America’s Farms and Farmland 5-8 (Island Press 1997). See also The Sierra Club Report on Sprawl: The Dark Side of the American Dream—The Costs and Consequences of Suburban Sprawl, 1998.

The problem of development on agricultural land is more complex, however, than the loss of agricultural lands to development and other uses. Indeed, while a large amount of land is taken out of agricultural use each year, new land is converted to agricultural use. The development and growth of our cities is imminent, and some land will eventually have to be converted. The major problem rests within the question of which land to convert. Agricultural lands have different grades. Some lands are extremely fertile and quite productive, while other lands are not. All of the agricultural land in America, only about 43 million acres is flat, fertile class I farmland, which is the highest yielding farmland. Often these lands are adjacent to metropolitan areas and are most in danger of being developed. The lands that are most suitable for farming, or prime farmland, are usually gently sloping lands with good water run-off. These characteristics are also quite desirable in building development, which creates a conflict.

According to a 1993 study by the American Farmland Trust, land on the fringes of densely settled urban areas, land the Trust calls “urban influenced,” represents a mere 5 percent of the nation’s farmland but produces 56 percent of the food we eat. The lack of effective growth control measures to prevent sprawl development makes the loss of these lands for agricultural use imminent. See The Christian Science Monitor, July 28, 1993, at 13. A prime example of this is in the central valley of California, an area which produces
around 20% of all the crops we consume, mostly in fruits and vegetables. Yet it is seriously threatened by urban sprawl, and the population in the region is expected to triple by the year 2040. And in Florida, approximately 150,000 acres a year are taken out of agricultural use, the highest in the nation. This is significant since Florida is the world's leading producer of citrus products such as grapefruit and oranges. See Benbrook, The World Must Eat, Wall Street Journal, at A-19 (Dec 4, 1996).

In 1979, the U.S. Department of Agriculture and the President's Council on Environmental Quality co-sponsored a study on the availability of the nation's agricultural land. The study, known as the National Agricultural Land Study (NALS) (1981), was undertaken for the following purposes:

1. To determine the nature, rate, extent and causes of conversion of agricultural land to non-agricultural uses.
2. To evaluate the economic, environmental and social consequences of agricultural land conversion.
3. To recommend administrative and legislative action to reduce potential losses.

The study identified the key ingredients for successful programs: (1) farmer participation from the outset; (2) adequate technical and financial support; (3) strong local leadership; (4) patience; and (5) timing—start before development pressures become too strong.

Finally, the study made several recommendations for the federal government:

- The President or Congress should enunciate a national interest in the protection of agricultural land.
- Government should refrain from subsidizing or financing projects that occur on fertile agricultural land.
- Federal loan programs should provide positive incentives in the form of lower interest rates to encourage development away from prime land.
- The estate tax provisions and the tax code to provide more incentives to farmers.
- Support state and local efforts.

There has been some criticism of the NALS study for projecting the future loss of agricultural land too liberally, and there has been considerable debate as to how much land is actually lost each year. For criticism of the report see Fischel, The Urbanization of Agricultural Lands: A Review of the National Agricultural Land Studies, 58 Land Econ. 236, 256-58 (1982). The report and its critics are analyzed in Malone, Environmental Regulation of Land Use, § 6.03 (1992).

Nevertheless, the 1981 NALS study inspired a number of programs which have recently been implemented that are helping to alleviate the problems on agricultural community faces. The NALS study inspired the creation of the American Farmland Trust, which has worked toward the preservation of prime and unique farmlands. The Federal Farmland Protection Program was enacted in 1981, and other programs have been implemented which help determine where our most valuable farmlands are from a technical perspective.

The U.S. Department of Agriculture has developed a policy which supports its major role as an advocate of retaining land to produce food, fiber and...
timber. In June 1976, Secretary Ritz committed the USDA to factoring agricultural land retention goals into its own decisions.

The Council of Environmental Quality (CEQ) oversees the efforts of other federal agencies in preparing environmental impact statements required by the National Environmental Policy Act. As of August 11, 1980, the CEQ requires federal agencies to determine the effects of a proposed project on unique agricultural land and to incorporate the findings into environmental impact statements.

The Environmental Protection Agency (EPA) in September 1978 adopted an internal policy to protect environmentally significant agricultural land from irreversible conversion. The EPA has also offered to provide technical assistance to states and local governments that want to factor agricultural land considerations into environmental planning efforts. See Schmidman, Agricultural Land Preservation: The Evolving Federal Role in Land Use Regulation & Litigation 105 (1984).

Congress passed the Farmland Protection Policy Act (FPPA) as part of the Food and Agricultural Act of 1981. 7 U.S.C.A. § 4201 et seq. The following sections provide a good overview of its provisions:

FARMLAND PROTECTION POLICY

Sec. 4202. (a) The Department of Agriculture, in cooperation with other departments, agencies, independent commissions, and other units of the Federal Government, shall develop criteria for identifying the effects of Federal programs on the conversion of farmland to nonagricultural uses.

(b) Departments, agencies, independent commissions, and other units of the Federal Government shall use the criteria established under subsection (a) of this section, to identify and take into account the adverse effects of Federal programs on the preservation of farmland; consider alternative actions, as appropriate, **.

**.

EXISTING POLICIES AND PROCEDURES

Sec. 4203. (a) Each department, agency, independent commission, or other unit of the Federal Government, with the assistance of the Department of Agriculture, shall review current provisions of law, administrative rules and regulations, and policies and procedures applicable to it to determine whether any provision thereof will prevent such unit of the Federal Government from taking appropriate action to comply fully with the provisions of this subtitle.

(b) Each department, agency, independent commission, or other unit of the Federal Government, with the assistance of the Department of Agriculture, shall, as appropriate, develop proposals for action to bring programs, authorities, and administrative activities into conformity with the purpose and policy of this subtitle.

**.

SECT. 4208. (a) This chapter does not authorize the Federal Government in any way to regulate the use of private or non-Federal land, or in any way affect the property rights of owners of such land.

(b) None of the provisions or other requirements of this subtitle shall apply to the acquisition or use of farmland for national defense purposes.

PROHIBITION

Sec. 4209. This chapter shall not be deemed to provide a basis for any action, either legal or equitable, by person or class of persons challenging a Federal project, program, or other activity that may affect farmland.


3. STATE AGRICULTURAL PRESERVATION LAWS

(a) Zoning Exemptions

Agricultural exemptions from zoning provisions was an early, and is a continuing, means of favoring farming. See, e.g., Kansas Stat. Ann. § 19-2921 (“regulations adopted pursuant to this act shall not apply to the use of land for agricultural purposes, nor for the erection or maintenance of buildings thereon for such purposes so long as such land and buildings erected thereon are used for agricultural purposes and not otherwise”); and Iowa Code § 356B.2 (1989) (“no regulations shall be applied to land, farm houses, farm barns, farm outbuildings or other buildings or structures which are primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used...

Do the ambiguous definitions of agricultural land contained in these statutes preserve prime farmland for agricultural use or do they encourage premature urban speculation on the fringe? Is the definition of agriculture too broad? What is an agricultural use so that it is exempt from zoning? See Olson v. Ada County, 665 P.2d 717 (Idaho 1983) (agricultural exemption did not give agricultural land used for agricultural purposes a carte blanche exemption from all county zoning ordinances); see also VanGundy v. Lyon County Zoning Bd., 699 P.2d 442 (Kan.1984) (blasting for an irrigation pond was an agricultural use exempt from zoning); Kansas v. Scherer, 721 P.2d 743 (Kan.App.1986) (operation of salvage yard on property did not necessarily make land out of agricultural use exemption); Corbet v. Board of Shawnee County Comm’rs, 783 P.2d 1310 (Kan.App.1989) (burning preserve was agricultural use); Tuftee v. County of Kane, 394 N.E.2d 896 (Ill.App.1979) (raising show horses was agricultural use); Town of Libertyville v. Continental Illinois Nat. Bank and Trust Co., 543 N.E.2d 350 (Ill.App.1989) (condemnation of agricultural land not possible when present use was primarily agricultural, even though property owners might be planning nonagricultural...

THOMPSON v. HANCOCK COUNTY
Supreme Court of Iowa, 1995.
539 N.W.2d 181.

CARTER, Justice.

Hancock County, its zoning officials, and members of its board of supervisors appeal from a declaratory judgment exempting hog confinement facilities owned and operated by plaintiffs, David A. Thompson and Holly L. Thompson, from compliance with county zoning ordinances. The district court concluded that the facilities in question were exempt from zoning restrictions pursuant to the provisions of Iowa Code section 335.2 (1995). Appellants challenge that conclusion and, in the alternative, assert that the exemption provided in section 335.2 is a general statute superseded in the present circumstances by the specific requirements of Iowa Code section 172D.4(1) (1995), which provides "[a] person who operates a feedlot shall comply with applicable zoning requirements." After reviewing the record and considering the arguments of the parties, we affirm the judgment of the district court.

Plaintiffs, David R. and Holly L. Thompson, have been farming in Hancock County since 1973. They own a forty-acre tract of land, which is subdivided into the "home place," and they additionally lease 577 acres of land. They farm both a portion of the "home place" and all of the leased land. The grain produced by the Thompsons is stored both on the "home place" and at a local grain bank. In addition to their farming activities, the Thompsons also operate a forage-to-finish hog operation that is located on the "home place." This operation consists of 220 to 250 sows, which in turn produce approximately 4,180 to 5,000 hogs per year.

At the center of this controversy is the Thompsons' proposed construction of a hog confinement facility, which would consist of five hog confinement buildings. This proposed facility would also be located on the "home place," and each building would be about forty-one feet by 180 feet and each would be designed to accommodate 900 feeder pigs. The feeder pigs would remain at the Thompsons' facility until they reach market weight. A contract was entered into between the Thompsons and Land O' Lakes pursuant to which, Land O' Lakes is to provide the Thompsons with the feeder pigs for this operation. Land O' Lakes will own the pigs, and the Thompsons will be paid a fee for their services. This contract is to expire in June 2003, at which time the Thompsons are free to use the facility for their own hogs.

The proposed hog confinement facility does not qualify for construction under existing county zoning ordinances. The board of supervisors refused to recognize that the facility fell within the agricultural purposes exemption. After a district court had determined that the board of adjustment had the authority to intervene in the supervisors' decision, this declaratory judgment action was initiated in which the Thompsons prevailed on their exempt claim. We separately consider on this appeal issues presented by the count...

and its officials concerning (1) the county's authority to zone, (2) the agricultural exemption contained in section 335.2, and (3) the effect of section 172D.4(1) on the section 335.2 exemption.

I. THE COUNTY'S AUTHORITY TO ZONE

At the outset, we consider the claim of the hog producers that the county lacks power to adopt zoning ordinances affecting livestock operations. That claim is predicated on the final sentence in Iowa Code section 172D.4(1), which states: "Nothing in this chapter shall be deemed to empower any agency described in this section to make any regulation or ordinance." The statute in which this sentence is contained refers to zoning requirements and the agencies identified therein include cities and counties. Notwithstanding the hog producers' argument to the contrary, we do not believe that the quoted language in any way restricts the power of counties to enact zoning regulations under the general authority contained in Iowa Code chapter 331. Ordinances enacted pursuant to this authority, however, may be subject to applicable exemptions found elsewhere in the Code.

II. THE SECTION 335.2 AGRICULTURAL EXEMPTION

An agricultural purpose exemption is contained in Iowa Code section 335.2. That statute provides:

Except to the extent required to implement section 335.2, no ordinance adopted under this chapter applies to land, farm houses, farm barns, farm outbuildings or other buildings or structures which are primarily adapted, by reason of nature and area, for use for agricultural purposes, while so used. However, the ordinances may apply to any structure, building, dam, obstruction, deposit or excavation in or on the flood plains of any river or stream.

Iowa Code § 335.2 (1995) (emphasis added). This exemption has been incorporated into zoning regulations enacted under chapter 331 by language contained in section 331.304(6). In determining what are agricultural purposes within the scope of this exemption, we have concluded that agriculture is the art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock. Parkwood Prod., Inc. v. Humboldt County, 190 N.W.2d 454, 457-58 (Iowa 1971). Using this definition, we have held that the exemption extends to facilities to be used in connection with agricultural functions. DeCoste v. Franklin County, 497 N.W.2d 849, 853 (Iowa 1993) (livestock waste stations being used in connection with hog finishing facilities held exempt).

The Thompsons have been farming some portion of the land that they currently own or lease for the past twenty years. They have other types of livestock in addition to the hogs. They do, and will continue to, raise crops on the land, some of which will be used as feed for the hogs. They own and operate machinery for the planting and harvesting of crops and for the spreading of manure. Their farming operation contains grain storage facilities capable of holding 16,000 bushels of grain. The proposed hog operation is an expansion of the livestock operations that have been carried on by the Thompsons for several years. We are convinced that the challenged hog confinement facilities are part of the evolving agricultural functions associat...
ed with a particular farming operation. As such, these facilities enjoy the exemption from county zoning ordinances provided in section 335.2.

III. THE EFFECT OF SECTION 172D.4(1) ON THE SECTION 335.2 EXEMPTION.

Section 172D.4(1) provides:

A person who operates a feedlot shall comply with applicable zoning requirements. The applicability of a zoning requirement shall be as provided in subsection 2 of this section. A person complies with this section as a matter of law where no zoning requirement exists.

This statute was enacted as 1976 Iowa Acts chapter 1121, section 4, effective November 1, 1976. The provisions of section 335.2 at issue here were first enacted in 1947. Appellants argue that because section 172D.4(1) is specific as to feedlots and was enacted after the agricultural exemption of section 335.2 it supersedes and overrides that general exemption statute. Although we find that argument to be persuasive, it does not avail the appellants of much unless the proposed hog confinement facilities in the present case meet the definition of feedlot as used in section 172D.4(1). The definition of "feedlot" for purposes of section 172D.4(1) is contained in section 172D.4(2). That statute defines "feedlot" as "a lot, yard, corral or other area in which livestock are confined, primarily for purposes of feeding and growth prior to slaughter."

Appellants argue that the proposed hog confinement facilities fall within the "other area" language of the feedlot definition. We disagree. The common dictionary definition of "area" is as follows:

1. a: a level or relatively level piece of unoccupied or unused ground: a clear or open space of land b: a definitely bounded piece of ground set aside for a specific use or purpose.

Webster's Third New International Dictionary 115 (1993). This definition only extends to open land areas and does not include enclosed structures. The same conclusion must be drawn if the section 172D.4(1) definition is interpreted according to settled legal rules for statutory interpretation. We have recognized that, when specific words of the same nature are used in the statute followed by the use of general ones, the general terms take their meaning from the specific ones and are restricted to the same genus. Bostrom v. Dieters, 334 N.W.2d 734, 738 (Iowa 1983); Fleur de Lis Motor Inn, Inc. v. Bair, 301 N.W.2d 685, 690 (Iowa 1981). The words "lot, yard, and corral" all refer to outdoor or open-air facilities. Thus, under the rule of interpretation last referred to, the "other area" language must be limited to an area of the same character. The proposed hog confinement facilities do not fall within the statutory definition of a feedlot. Consequently, nothing contained in section 172D.4(1) abrogates the exempt status of the challenged facilities under section 335.2. We have considered all issues presented and conclude that the district court's declaratory judgment should be affirmed.

AFFIRMED.

Note: The Feedlot Problem

Recently, feedlots have come under increasing pressure from the government and from individuals. The odor from feedlots can be smelled for miles, and sewerage from animal waste can become dangerous if not properly treated. This is true particularly with hog farming. The problem has become even worse with the advent of Concentrated Animal Feeding Operations (CAFOs), the latest trend in hog farming for producing pork as quickly and efficiently as possible. Whereas the typical family farm usually holds around 500 hogs, CAFOs frequently hold over 10,000 hogs, and farms with over 17,000 are not unusual. CAFOs are different from family farms in that the hogs are kept and fed indoors. The waste from the animals falls through grates to a flushing system which ejects the water into large lagoons holding as much as 30 million gallons of liquid animal waste. The waste is then chemically broken down, spread on field or injected into the soil. The effect is to reduce the air quality in the area, emitting high, and possibly dangerous levels of hydrogen sulfide, ammonia and methane gas into the air. Additionally, leaks in lagoons are responsible for numerous incidents of water contamination.

Many citizens and local governments have felt powerless against the CAFO industry. Since most agricultural states have drafted exemptions to protect farming from zoning, the CAFO operations have been allowed to operate as an agricultural use. Several states have ruled the operations may not be regulated. See DeCoster v. Franklin County, 497 N.W.2d 849 (Iowa 1993), cited in Thompson, supra; Kuehl v. Cass County, 555 N.W.2d 686 (Iowa 1996); Board of Supervisors v. VaalCo, 104 N.W.2d 267 (Minn.1993); Premium Standard Farms, Inc. v. Lincoln Township of Putnam County, 546 N.W.2d 234 (Mo.1995). As quickly as the cases have come down ruling in favor of CAFO operations, however, innovative municipal attorneys have found new ways to enjoin or curb their use. The advent of the health ordinance is gaining popularity. See, e.g., Blue Earth County Pork Producers, Inc. v. County of Blue Earth, 558 N.W.2d 25 (Minn.App. 1997). Under this scheme, the local government enacts ordinances regulating the local air and water quality. Such a plan may not eliminate the CAFO altogether, but it may greatly limit the number of animals in a given facility or ensure that the CAFO produces less pollutants. The greater regulation in turn has two main effects. First, the environmental quality of the area is improved, and second, prospective CAFO operators are deterred from the area. See generally Bartlett, Hog-Tied By Feedlots, Zoning News, The American Planning Association, October 1996; Burns, Comment, The Eight Million Little Figs: A Cautionary Tale: Statutory and Regulatory Responses to Concentrated Hog Farming, 31 Wake Forest L.Rev. 651 (1996).

Most states have so-called "right to farm" statutes. See, e.g., Ariz Rev. Stat. § 3-112 and Iowa Code Ann. § 176B.11. See Campbell-Mohn, Breen, and Putrell, Environmental Law: From Resources to Recovery 323, n.160 (1995). The statutes can generally be broken into two separate groups. The "right to farm" for general agricultural operations provides that a farming operation cannot be declared a nuisance if it was not a nuisance at the time it began operation. See N.D.Cent.Code 42-04-02 ("An agricultural operation is not a nuisance unless it become; * * *(a) nuisance by any changed conditions in or about the location of such operation after it has been in operation for more
than one year, if such operation was not a nuisance at the time the operation
began." § 5-308(a).

The second type of statute serves to protect specific types of agricultural
activity. For example, Maryland protects only the following specific agricul-
tural activities: cultivation of land, production of agricultural crops, raising of
poultry and protection of eggs, milk, fruit or other horticultural crops, and/or

These laws are quite effective when metropolitan areas begin to encroach
on outlying farm communities, and prevent urbanites who want to "get away
from it all" from thereafter rethinking their decisions when the wind picks
up, bringing with it airborne pesticides, odors and dust. Recall also from basic
Property class the concept of "moving to the nuisance." See Blox v. Donner-
Hanne Coke Corp., 258 N.Y.S. 229 (1932), supra Ch. 1. People who chose
to relocate near farms must live with their new and well-established surround-
ings. Protecting farms from suits for nuisance is widely recognized as impor-
tant for preservation of farmland from residential developments located
adjacent to farming operations, but it does not effectively confront the
underlying problem of the incompatibility of the uses. Thus, for example,
when neighbors challenged Iowa's "Right to Farm" law (which grants agricul-
tural areas immunity from nuisance suits) in Bormann v. Board of Supervi-
sors In and For Kosnuth Cty., 544 N.W.2d 309 (Iowa 1996), cert. denied 525
U.S. 1172, 119 S.Ct. 1096, 143 L.Ed.2d 96), the court held that the state
cannot regulate property so as to insulate the users from potential private
nuisance claims without providing just compensation to persons injured by
the nuisance. Therefore, the portion of the Iowa statute that provides for
immunity against nuisances was unconstitutional.

For an overview of the use of Right to Farm laws, see Thompson,
Defining and Protecting the Right to Farm, 5 Zoning & Plan.Law Report 87,
65 (1982); Comment, Right to Farm Statutes—the Newest Tool in Agricultur-
al Land Preservation, 10 Fla.St.U.L.Rev. 415 (1982). The problem of incom-
patibility also arises between farmers. Disputes between farmers are often
more related to economics than nuisance, however (i.e. loss of crops, death or
illness of livestock), and usually turn on a question of negligence. See, e.g.,
Bloomquist, Applying Pesticides: Toward Reconceptualizing Liability to Neigh-
bors For Crop, Livestock and Personal Damages From Agricultural Chemical

(c) Agricultural District Enabling Laws

Several states have enacted agricultural district statutes, whereby agricul-
tural landowners can voluntarily form special districts if they meet certain
acreage minimums and other criteria and if the county or state approves
inclusion in the district. New York is the only state which mandates participa-
tion if the farmland involved is considered unique or irreplaceable. See,
N.Y. Agriculture and Markets Law § 304 (McKinney 1997). For a critique
of the statute, see Nolon, The Stable Door is Open: New York’s Statutes To
Protect Farm Land, 67 N.Y. State Bar J. 36 (February 1995). The districts are
created for renewable periods of time ranging from four to ten years to
create mutual obligations and benefits for the participating public entities
and landowners. Although the laws vary from state to state, the landowner,

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exchange for agreeing to restrict his land to agricultural use for a set period of
time and to utilize sound soil conservation practices, receives certain ben-

1. Differential property tax based on agricultural use value.
2. Exemption from special assessments unless they use the ser-

vices.
3. Restrictions on local governments to regulate farming practices
unless public health and safety is concerned.
4. Purchase or transfer of development rights.
5. Limitations on capital improvement expenditures promoting
nonfarm development.
6. Limitations on acquisition of land by eminent domain.
7. Conformance of state agency regulations and procedures to
support agriculture within districts.
8. Limitations on annexation of land.
9. Limitations on rate of tax increases.
10. Zoning of adjacent lands to reduce conflict.
11. Anti-nuisance provisions.

Additionally, in some states, the local government is compensated for
property tax losses. Julian Juergensmeyer has identified the advantages of
districting laws:

- Retention of landownership in the farmer.
- Emphasis on voluntary compliance and local initiative.
- Avoidance of taking issue problems because of the voluntary nature of
the restrictions.
- Emphasis on local control making it responsive to local needs.

However, he also identified its disadvantages:

- It is entirely voluntary.
- Special tax treatment hampers the revenue raising authority of local
government.
- Limitations placed on local governments’ ability to regulate the land in
districts or extend public facilities may interfere with comprehensive
planning.

See Juergensmeyer and Roberts, Land Use Planning and Development Regu-
lation Law § 13.9 (2003). See also Nolan and Bolloway, Preserving Our
Heritage: Tools To Cultivate Agricultural Preservation In New York State, 17
Pace L. Rev. 501 (1997); Duncan, Agriculture As A Resource: Statewide Land
Use Programs For the Preservation of Farmland, 14 Ecology L.Q. 401 (1987);
Popp, A Survey of Agricultural Zoning: State Responses to the Farmland
Crises, 24 Real Prop.Prob. & Tr.J. 371 (1989); Sheronic, Note, The Accretion
of Cement and Steel onto Prime Iowa Farmland: A Proposal for a Comprehen-
sive State Agricultural Zoning Plan, 76 Iowa L.Rev. 583 (1991); Juergens-
smeyer, Farmland Preservation: A Vital Agricultural Law Issue for the 1980’s, 21
Washburn L.J. 443, 455-57 (1992); Geier, Agricultural Districts and Zoning: A
State-Local Approach to a National Problem, 8 Ecology L.Q. 655 (1980);
(d) Taxation Techniques

Beginning with Maryland in 1956, 48 states have enacted statutes or constitutional provisions for differential assessment of ad valorem taxes which provide that farms and open space lands be assessed at a different rate than other property. How successful have these programs been?


Although many states have used property tax relief as a tool in protecting agricultural land, only a small fraction of farm estates or farms which enjoy the tax benefits of differential assessment meet all the conditions necessary to make this incentive effective. The benefits of reduced taxation, however, are conferred broadly, with no proof required of each recipient that the public policy of protecting farmland is being promoted. For this reason, tax policy is often viewed as a shotgun approach. Furthermore, unless differential assessment programs are combined with agricultural zoning and/or with agreements that restrict the land to agricultural use and/or purchase of development rights, there is no assurance that the beneficiaries of tax reduction or abatement will keep their land in agricultural use. Owners may simply enjoy reduced taxes until the time comes when they want to sell. In the case of death taxes, significant tax benefits are made available to large farm estates, even though they are not in serious jeopardy of being converted because of high death taxes.

In isolation, then, differential assessment is largely ineffective in reducing the rate of conversion of agricultural land. It does not discourage the incursion of non-farm uses into stable agricultural areas; it simply enables owners of land under development pressure to postpone the sale of their land until they are ready to retire. The incentives are not keyed to actual need, except in the case of the tax credit programs of Wisconsin and Michigan.

Nevertheless, differential taxation is a valuable component of a comprehensive agricultural land protection program. As a matter of equity, if a program prevents agricultural land from being developed, the owner should pay taxes only on its agricultural use value. Further, benefits such as these may serve as incentives to encourage farmers to participate in an integrated agricultural land protection program.

BOREL v. CONTRA COSTA COUNTY

California Court of Appeals, First District, 1990.
269 Cal.Rptr. 465.

HOLMQUIST, Associate Justice.

Property owner challenges the method used to assess his property.

The judgment of the trial court is reversed, with directions to return matter to the Assessment Appeals Board of Contra Costa County for further proceedings in accordance with this opinion.

Sec. 6. PRESERVATION OF AGRICULTURAL LAND & OPEN SPACE 759

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case involves a dispute over the assessed value of a 12.34 acre parcel of land located within the City of Danville (hereafter, Danville). Appellant Armand Borel's family purchased the property in 1923. The property is zoned for agricultural use (A-3), and is used for a walnut orchard. However, Danville's general plan designated the property for future zoning as AO—administrative offices.

Appellant's father, Joseph Borel, died on May 20, 1963. Joseph Borel bequeathed the property to appellant. The transfer of ownership triggered reassessment of the property for tax purposes. The property assessor for respondent Contra Costa County (hereafter, County), assessed the value of the property at $5,850,000 for the 1964-1965 tax year. Prior to reassessment, the entire 42.412 acre parcel owned by Joseph Borel, was valued at $790,009. The assessor disregarded the agricultural zoning restriction, and valued the property based on its use for administrative offices.

Appellant paid the increased property tax under protest. On August 30, 1966, appellant sought a reduction of the assessed value of the property by filing an "Application for Changed Assessment" with County. On November 7, appellant asked Danville to designate the property as an agricultural preserve, pursuant to the California Land Conservation Act of 1965 (the "Williamson Act"—Gov.Code, §§ 51200-51290). The Williamson Act provides for the creation of agricultural preserves by cities or counties (Gov.Code, § 51230). Appellant contended his property qualified for agricultural preserve status because it was located within a "scenic highway corridor." (Gov.Code, § 51205.1.)

County's Assessment Appeals Board (hereafter, AAB), on October 3, 1985, held a hearing in response to appellant's application for changed assessment. The AAB accepted the assessor's valuation method, but reduced the value of the property to $4,878,000.

On March 17, 1986, Danville denied appellant's application for agricultural preserve status.

On March 27, 1986, appellant challenged the action of the AAB by filing a complaint in Contra Costa County Superior Court. A stipulated judgment was entered in that action, returning the matter to the AAB for a rehearing.

The rehearing took place on May 7 and May 14, 1987. Witnesses for County testified that appellant's property was not eligible for agricultural preserve status, because the parcel was too small. The AAB again upheld the assessor's valuation method, and this time fixed the value of the property at $5,070,000. The AAB found that though the property was zoned A-3 ("heavy agriculture"), the zoning would be changed to AO ("Administrative Offices") within the predictable future (e.g., within approximately 3 to 5 years). Further, the AAB concluded the property did not appear suitable for agricultural preserve status. 1. The parcel is the subject of this action is actually a portion of 42.412 acres purchased by the Borel family in 1923. 2. In fact, the property was rezoned in 1987 to provide for commercial and residential development.
On July 22, 1987, appellant filed the instant action. Appellant alleged the assessor had used an improper valuation method, and that the AAB had erred in upholding the assessor's method. Following a brief court trial, in March, 1988, the trial court sustained the AAB's decision and findings, and entered judgment for County.

Appellant filed a notice of appeal on June 1, 1988.

According to appellant, on February 23, 1989, Danville reversed its earlier decision, and granted appellant's request for agricultural preserve status, for the 1989-1990 tax year forward (citing Danville, Ordinance No. 89-3). County confirms that Danville granted appellant's application. Appellant states he has paid the increased property taxes for every year in dispute (1984-1985 tax year through 1988-1989 tax year).

DISCUSSION

Appellant challenges the method used by County to value his property. He contends County erred by valuing his property by comparison to sales of non-agriculturally restricted property. Appellant's position rests on his insistence that his request for agricultural preserve status precludes valuation of his property based on its use for commercial purposes.

The AAB's decision is analogous to the judgment of a trial court. When the taxpayer challenges the result reached by a sound valuation method, the substantial evidence standard of review applies. But, when the taxpayer challenges the method, manner, or technique of valuation, the reviewing court is presented with a question of law.

Appellant is challenging the valuation method, thus, this case presents a legal question.

Revenue and Tax Code section 402.5 provides that when valuing property by comparison with sales of other properties, the properties sold should be sufficiently similar to the property being valued in respect to, among other things, zoning. Revenue and Tax Code section 402.1 provides that the assessor, when valuing property, must consider enforceable restrictions to which the use of the land may be subject, with zoning probably being the most familiar type of restriction. Section 402.1 establishes a rebuttable presumption that any enforceable restrictions are permanent, and that the value of the land is substantially equivalent to the value attributable to its permissible use or uses. (Meyers v. County of Alameda (1977) 70 Cal.App.3d 799, 804, 139 Cal.Rptr. 165.) In order to rebut this presumption, "the assessor must show by a preponderance of the evidence that the restriction will be lifted in the predictable future." (Id. at p. 805, 139 Cal.Rptr. 165.)

On the valuation date in this case, May 20, 1983, appellant's property was zoned for heavy agriculture. Thus, the property had to be valued based on its use for agricultural purposes, unless the County could prove the existing zoning was going to change in the predictable future. In the hearing before the AAB, County successfully showed the property would be rezoned in a predictable future by introducing evidence of Danville's general plan, history of surrounding pieces of land, and sales price of surrounding agricultural land. Also important to County's case was Danville's insistence that property did not qualify for agricultural preserve status under the Williamson Act.

The Williamson Act "is implemented by a city or county through the establishment of agricultural preservs consisting of agricultural and other vacant lands, and the execution of long term contracts with land owners who are willing to restrict the land uses of their property to agricultural and similar endeavors; thereafter, the lands must be assessed for city or county tax purposes according to the restricted land use, not necessarily the highest and best use. (Citations.)" (Kelley v. Colwell (1973) 30 Cal.App.3d 590, 592, 106 Cal.Rptr. 420; see also Sierra Club v. City of Hayward (1981) 28 Cal.3d 840, 860-861, 171 Cal.Rptr. 619, 623 P.2d 180.)

Appellant believes his entitlement to agricultural preserve status is established by Government Code section 51205.1. However, section 51205.1 is somewhat ambiguous. It could be interpreted to mean a city or county must offer a contract, but only after an agricultural preserve has been designated in a general plan. Before section 51205.1 was enacted, one appellate court held cities and counties were not required to establish agricultural preserves. (Kelley v. Colwell, supra, 30 Cal.App.3d at p. 595, 106 Cal.Rptr. 420.)

Legislative history appears to show Government Code section 51205.1 requires a city or county to establish a preserve and offer a contract, upon the request of the owner of property located within a scenic highway corridor without regard to the size of the parcel. "Under existing law, land within a scenic highway corridor may be included in an agricultural preserve and may be put under a contract at the discretion of the city or county. This bill would require a city or county to include land within a scenic highway corridor in a preserve, if an owner so requests, and require the city or county to offer the owner a contract." (Assem. Com. on Gov. & Admin. Affairs, Final Analysis of Assem. Bill No. 2117 (1981-82 Reg. Sess.) p. 14.)

Though it does not explicitly embrace Danville's later decision to grant appellant's property agricultural preserve status, County, in its brief on appeal, does not dispute that Danville's original determination was wrong. Instead, County argues that since appellant had not applied for, let alone received, agricultural preserve status on the valuation date, its assessment properly valued the property based on its use for administrative offices.

County's argument is incongruous. Under County's argument, appellant would be prevented from showing he intended to maintain the agricultural use of the property for at least 10 years (Gov. Code, § 51244), yet County would be allowed to show that, in the near future, the use of the property would be non-agricultural. In the instant case, every action taken by appellant...

5. Article XIII, section 8 of the California Constitution provides, in relevant part: "To promote the conservation, preservation and controlled existence of open space lands, the Legislature may define open space land and shall provide that when this land is otherwise restricted, in a manner specified by the Legislature, to recreation, enjoyment of scenic beauty, use or conservation of natural resources, or production of food or fiber, it shall be valued for property tax purposes only on a basis that is consistent with its restrictions and uses."

6. Government Code section 51205.1 provides, in relevant part: "Notwithstanding any provisions of this chapter to the contrary, land within a scenic highway corridor, as defined in subdivision (b) of Section 51201, shall, upon the request of the owner, be included within an agricultural preserve pursuant to this chapter. When such land is included within an agricultural preserve, the city or county within which it is located shall contract with the owner for the purpose of restricting the land to agricultural use. . . ."

indicated he intended to maintain the agricultural use of the property. He timely challenged the reassessment, and well before the first AAB hearing, he applied for agricultural preserve status. Since his property is located within a scenic highway corridor, Government Code section 51205.1 gave appellant control over the use of his property for the near future. It seemed absurd to allow County to rebut the Revenue and Tax Code section 402.1 presumption, by predicting a future that accurate legal analysis on the part of Danville or County, at the time of the AAB hearing, would have shown was false.

County cites section 430.5 of the Revenue and Tax Code. That section provides: “No land shall be valued pursuant to this article unless an enforceable restriction meeting the requirements of Section 422 is signed, accepted and recorded on or before the lien date for the fiscal year to which the valuation would apply. To assure counties and cities time to meet the requirement of this section, the land which is to be subject to a contract shall have been included in a proposal to establish an agricultural preserve submitted to the planning commission or planning department, or the matter of accepting an open-space easement or scenic restriction shall have been referred to such commission or department on or before December 15 preceding the lien date to which the contract, easement or restriction is to apply.”

This section precludes considering enforceable restrictions when valuing property, before those restrictions are in place. However, the point is not that appellant was entitled to agricultural preserve status on May 20, 1983, but that County could not overcome the Revenue and Tax Code section 402.1 presumption, given that appellant manifested no intent to have his property rezoned from agricultural use and his property was entitled to agricultural preserve status. In its brief on appeal, County constantly asserts the zoning of appellant’s property would have been changed from agricultural use upon appellant’s request. This assertion carries little weight when every action by appellant demonstrated a contrary desire.

At oral argument, County suggested that any overpayment of taxes resulted from Danville’s erroneous rejection of appellant’s request for agricultural preserve status. Therefore, according to County, appellant’s remedy is to seek damages from Danville. This argument must be rejected because Count relied on Danville’s decision to overcome the section 402.1 presumption, and then collected the taxes. County should not benefit from Danville’s error.

As appellant argues, and as noted in Sierra Club v. City of Hoyt, supra, 28 Cal.3d at p. 859, 171 Cal.Rptr. 619, 623 P.2d 189, County’s actions lead to a self-fulfilling prophecy. County increases the assessed value of appellant’s property, based on its assessor’s prediction of conversion of appellant’s property to non-agricultural use. Significantly higher taxes are imposed, and appellant is forced to abandon his agricultural use of the property. In the present case, the assessor’s prediction was wrong.

The judgment is reversed, with directions to the trial court to order a matter resubmitted to the AAB of County, for reassessment of the property at the valuation date, May 29, 1983, in accordance with the use for agricultural purposes. Appellant is entitled to a refund of any overpayment taxes caused by the incorrect assessment of his property, for the tax years 1984-1985 tax year through 1988-1989 tax year.

**Notes:**

1. The Williamson Act approach, which is a sort of restrictive agreement, has the greatest likelihood of preventing conversion of farmland for set periods of time, but its effectiveness is questionable because most of the land enrolled in this type of program has already been committed to continued agricultural use. See Buck, Note, Beyond Williamson Act: Alternatives for More Effective Preservation of Agricultural Land, 15 Pac.L.J. 1161 (1984); Ribbeck, Environmental Protection: Agricultural Land Conservation Easements, 29 Pac.L.J. 707 (1996) (finding the Williamson Act ineffective). People ex rel. Department of Conservation v. Triplett, 48 Cal.App.4th 233, 55 Cal.Rptr.2d 610 (1996). Two other approaches have been even less successful. Under the pure differential assessment approach, agricultural land is assessed at its use value for agricultural purposes rather than its actual market value. However, the farmer who converts suffers no penalty and is not required to pay back past tax savings. The general concept has been upheld against uniformity of taxation challenges. See Knight v. Department of Revenue, 446 P.2d 1343 (Or.1969). Another problem with differential assessment is in allotting the tax benefits between true commercial farming operations, the ones which need the tax preference, and land-consuming "ranchettes." Often, "cappucino cowboys" who choose to live on hobby farms in rural areas are given the differential tax treatment as well, helping to subsidize their rural, yet agriculturally unproductive, lifestyle. Some have suggested that participation in differential tax treatment programs should be contingent on the production of a certain amount of goods or on a given amount of net income, or should be coupled with the use of agricultural districts. See Daniels and Bowers, Holding Our Ground: Protecting America’s Farmland 94-96 (1997).

2. The second approach incorporates a deferred taxation concept. Used by 29 states, deferred taxation utilizes a differential assessment based on use versus market value, but requires landowners to pay a penalty if they convert to a nonagricultural use. Some states require that interest be paid on the tax savings. Taken alone, the program has major difficulties. Developers may purchase the land at a relatively low price, and lease it back to the farmer, thereby receiving the tax savings. Even if the taxes must be repaid when the land is developed, the owner has essentially received an interest-free loan. A deferred compensation/differential tax assessment law was upheld in Hoffmann v. Clark, 372 N.E.2d 74 (Ill.1977). In Nebraska, Neb.Rev.St. § 77-1343-1348, deferred taxation is allowed only in areas zoned by counties for exclusive agricultural use and in Florida, West’s Fla.Stat.Ann. § 193.461, landowners will not be eligible for tax benefits if they apply for rezoning.

3. Although more than 16 million acres of pasture and farmland were placed under Williamson Act contracts over the first nine years, resulting in tax savings of $8.7 million for farmers, the state Conservation Department director reported that most of the land was from rural areas as opposed to areas closer to the cities. Tax savings to the farmer have been reduced dramatically because of Proposition 13. See Rupp, Farmers See Williamson Act Losing Value, San Diego Union, July 5, 1981 at A-18.

The Williamson Act was amended in 1981, to limit cancellation to extraordinary circumstances. Nevertheless, the amendment expands the ability of a local government to approve a cancellation by requiring that the government find that the cancellation is consistent with the legislative purpose or would be in the public interest. See Cal.Govt.Code §§ 51280 et seq.; Survey, Property: Agricultural Use of Land—Cancellation of Contracts, 13 Pac.L.J. 749 (1982).
3. Two unusual taxation techniques have been adopted by a few states. Both Michigan and Wisconsin have enacted “circuit breaker” tax credit programs. The Wisconsin plan, enacted under the Farmland Preservation Act of 1977, requires that the county adopt agricultural zoning ordinances or agricultural land preservation plans so that farmers can receive the tax credit. The landowner pays property taxes based on market value assessment, but then receives an income tax rebate, the amount of which is based on acreage and income. Although the costs to the state amount to eight to ten dollars per acre, the program encourages support for farm land use regulation among the least likely constituency—the landowners. See Mich.C.L.Ann. § 21.1257(11)-(12) and § 7.557 and Wis.Stat.Ann. § 91.01-91.79. Vermont has enacted a vigorous capital gains tax on land held for a short period of time. The tax decreases as the length of time the land has been owned by the seller increases. See Note, State Taxation—Use of the Taxing Power to Achieve Economic Goals: Vermont Taxes Gain Realized from the Sale or Exchange of Land Held Less Than Six Years, 32 Vt. Stat. Ann. §§ 10061-10 (1973), 49 Wash. L.Rev. 1159 (1974).

Federal tax laws can have a direct effect on the preservation of agricultural land. In 1976, Congress provided a tax option for qualifying heirs inheriting smaller family farms. Amended in 1981, the act essentially allows the farm property to be assessed for estate tax purposes at its agricultural use rather than at its “highest and best” use provided that the heirs keep the land in agricultural production for a specific period of time. The maximum value reduction is limited to $750,000. See I.R.C., 26 U.S.C.A. § 2032A. Charitable deductions are now allowed by the IRS for contributions of easements for conservation purposes. The contributions must be made to a governmental entity or a qualified charitable organization in perpetuity. Qualifying purposes over the preservation of open space, including farm and forest land pursuant to a clear governmental policy which will yield a public benefit. See I.R.C., 26 U.S.C.A. § 170(h).


Notes: The Role of Zoning in Agricultural Preservation

1. Non-exclusive agricultural zoning ordinances allow non-farm dwellings of right or conditionally, but agricultural uses are preferred. Within this broad approach, three main techniques have been used:

- Large-lot ordinances which require substantial minimum lot sizes. This technique has generally been upheld in areas premature for development, e.g., Glaeser v. City of Madera, 112 Cal.Rptr. 919 (Cal.App.1974) (10 acre minimum lot size upheld in agricultural zoning ordinance); and County of Ada v. Hest, P.2d 994 (Idaho 1983) (agricultural zoning with an 20 acre minimum lot size). Lot sizes ranging from 3 to 5 acres tend to be ineffectual in preserving land and actually have the opposite effect—breaking up the land into parcels too small to be effectively farmed, but creating urban sprawl through “ranchettes.”

The New Jersey Pinelands Protection Act, discussed in Chapter 8, provides that homes may be constructed at a density of one unit per forty acres, but only if the residences are clustered on one or two acres and the remaining thirty-nine acres are dedicated to agricultural use by a recorded deed restriction. This provision was upheld in Gardner v. New Jersey Pinelands Commission, 593 A.2d 251 (N.J.1991), set out in Chapter 8 B.

The use of large-lot zoning has been attacked under the Fair Housing Act (FHA), 42 U.S.C. § 3601 et seq., as excluding minorities. The argument is that where rural, large-lot zoning denies the ability to build multi-family dwellings, there may be either 1) discriminatory intent (disparate treatment cases) or 2) discriminatory effect (disparate impact cases) in the zoning, the two ways of showing a violation of the FHA. To show disparate impact, proof of discriminatory purpose is needed, which may be found through a wide range of tests applied by the courts. Under the disparate impact approach, actions having a discriminatory effect, even if there is no discriminatory intent, are proscribed by the FHA. However, courts have upheld refusals to rezone agricultural lands to multifamily dwellings where there are not adequate facilities or utilities, such as sewer and road capacity, lack of shopping centers, retail services, public transportation and emergency facilities. See In re Malone, 692 F.Supp. 1135 (E.D.N.Y.1984). In any event, the FHA challenge to agricultural zoning in rural communities may be defeated with a strong comprehensive plan. What is needed is a showing that the plan contains an element which addresses housing and contains sound reasons for staying rural (i.e., inadequate public facilities and services to absorb the impact of multifamily housing), and that the zoning applies equally and with the same effect to everyone. Further, under a regional general welfare approach, recall Village of Euclid v. Ambler Realty Co., Chapter 2A supra if rural communities can accommodate the region’s fair share of growth as documented in the city’s comprehensive plan, rural zoning should be upheld. Further, rural areas may be considered an integral part of an area’s regional general welfare provision, providing a buffer zone between the city and agricultural areas. Analysis under regional general welfare standard may be determinative, however, because conservation and agricultural areas must be allowed to implement stronger growth restrictions than areas in the path of growth. See Southern Burlington County NAACP v. Township of Mt. Laurel, 456 U.S. 390 (1983).

- Area-based allocation ordinances do not require large minimum lot sizes but rather allow owners to build one dwelling unit for each unit of land of a specified area that they own. In a fixed area based ordinance, the allowance is predeterminate. For example, in “quarter/quarter” zoning ordinances, one non-farm dwelling unit can be built on each quarter of a quarter section of land. The dwelling must typically be on a small lot, ranging in size from one-half to three acres. In the variable area-based ordinance, the allocation is based on a sliding scale under which the number of buildings permitted per acre decreases as the farm size increases. These area-based allocation ordinances have the advantage of allowing dwellings to be built on small lots which may be clustered together, thereby retaining agricultural land in large blocks. Such a scheme was constitutionally upheld in Boundary Drive Associates v. Shrewsbury Township Board of Supervisors, 491 A.2d 86 (Pa.1985).

- Conditional use zoning allows non-farm dwellings as a conditional use if they are compatible with surrounding agricultural uses.
2. Exclusive agricultural zoning ordinances do not allow non-farm buildings; a performance definition of a farm use is utilized, and each request to build a farm dwelling requires individual review. Agriculture is perceived as a long-term, permanent land use. Oregon has the most comprehensive plan in the country. Goal 3 of the statewide planning program requires identification of agricultural land and their preservation by use of an Exclusive Farm Use Zone. Or.Rev.Stat. § 215.243. Black Hawk County, Iowa in 1982 enacted a comprehensive agricultural land preservation and zoning ordinance which incorporates both exclusive and non-exclusive agricultural districts. See Black Hawk County, Iowa, Agricultural Land Preservation and Zoning Ordinance, Ordinance No. 11 (Nov. 18, 1982).

However, for pure size and relative breadth, it is hard to top Hawaii's state agricultural zone, one of four set out in Hawaii's Land Use Law, in which nearly half the state's land is classified. See Callies, Preserving Paradise, Ch. 2 (1994). See discussion of Hawaii's Land Use Law in Chapter 8 supra.

(3) Compensatory techniques used include land banking, and the purchase of interests in land and transferable development rights.

- Land banking involves an agricultural preservation program in which the local government or a private organization purchases the agricultural land in fee simple and re-leases it to farmers. The farmer can sell his land voluntarily or the governmental entity may use the power of eminent domain to condemn the land, subject to meeting public purpose requirements. The technique has not been widely used by governmental units in the United States, primarily because of the large amounts of money required and the administrative expertise needed to effectively manage the purchased land. The technique is widely used in Canada and Europe. See Bocken, Housing: The Environmental Issue, Sierra (Sept./Oct. 1979); Letwin, Municipal Land Banks in Land Reserve Policy for Urban Development 236-376 (1975); Young, The Saskatchewan Land Bank, 40 Sask.L.Rev. 1 (1975).

- Purchase of development rights involves the acquisition of a development easement to preserve nonurban use. The purchase price is usually based on the difference between the value of the land for development and its value for agriculture. This approach has been utilized in a number of areas including Pittsfield County, N.Y.; Maryland; Massachusetts; Burlington County, N.J.; King County, Wash.; New Hampshire; Southampton, N.Y.; and Hunterdon County, N.J. The concept may be most effective for the purchase of prime farmland to save agricultural land which is threatened by development. The concept was upheld in the state of Washington in Lounan v. King County, 617 P.2d 977 (Wash.1980). See Daniels, The Purchase of Development Rights: Preservation of Agricultural Land and Open Space, 27 Am. Planners 421 (1979); Baldwin, Conservation Easements: A Viable Tool for Land Preservation, 32 Le & Water L. Rev. 89 (1972); Honsinger, Conservation Easements: A Plausible Tool for Land Preservation, 29 Envt'l L. 157 (1979). In spite of their high cost (sometimes the same purchase-purchasing entity will pay nearly all of the highest value of the land), agricultural preservation easements have been praised by the farmer retains all of the basic property elements in the "bundle of rights" which we call ownership except the right to develop. The owner gets the cash front, the land is still owned in fee simple, and it is restricted from development perpetually. In addition, the taking issue is avoided. See why this could be a problem if the land were downzoned to a strictly agricultural use?

- Transfer of development rights is a significant and complex technique that has been used in historic, environmental and agricultural preservation.
Comment: Conservation Subdivisions

Note the effective use of "Conservation Subdivision" as a concept made popular by Randall Arendt's book Rural By Design (1997). In a recent case, the Pennsylvania Supreme Court approved conservation subdivision when prime agricultural or other environmentally sensitive lands must be preserved against allegation of taking and exclusionary zoning. The Court held:

It must also be emphasized that the Dolington Group presents no challenge to the Joint Zoning Ordinance insofar as it restricts the development of floodplains, floodplain soils, wetlands, steep slopes and mature woodlands. Only the restriction of development on prime agricultural soils is the subject of particular objection together with the challenge to the aggregate effect of the regulations as a whole. We first reject the contention that prime agricultural soils are less deserving of zoning protection than are other sensitive environmental lands and resources. Just to the contrary, the MPC expressly requires that each municipal and multijurisdictional zoning ordinance "[t]o preserve prime agriculture and farmland considering topography, soil texture and classification, and present use." MPC § 604(3), 53 P.S. § 10604(3). Moreover, zoning ordinances shall protect prime agricultural land.

- MPC § 603(g)(1), 53 P.S. § 10603(g)(1). (The term "Prime Agricultural Land" is defined in the MPC, just as it is in the JZO, as "land used for agricultural purposes that contains soils of the first, second or third class as defined by the United States Department of Agriculture natural resource and conservation services county soil survey." In C & M Developers, Inc. v. Bedminster Township Zoning Hearing Board, 573 Pa. 1, 529 A.2d 143 (Pa. 1982), we acknowledged the legitimate interest in preserving ... agricultural lands.)

- 820 A.2d at 156; accord Boundary Drive Associates v. Shenandoah Township Board of Supervisors, 507 Pa. 431, 491 A.2d 86 (Pa. 1985). The recent expressions of a legislative and executive intent to preserve the Commonwealth's farms and agricultural lands serve only to underscore the significance and propriety of the Jointure's efforts in this regard.

Similarly, the regulations at issue in C & M Developers required the owners of agricultural tracts greater than ten acres in area to set aside 60% of the prime farmland and 50% of any remaining farmland as a "non-buildable site area." Id., 820 A.2d at 149. We agreed with the tribunals below that this "set-aside" regulation was justified by the municipality's intent to preserve its agricultural lands and activities. However, the regulations at issue additionally required the creation of "one clear acre" for each proposed lot in which could contain no floodplain, floodplain soils, wetlands, lakes, ponds, or watercourses. The combined effect of these requirements was to reduce the development potential of the 100 acre tract from 461 lots of 10,000 square feet as proposed by the landowner to 51 one-acre lots as permitted by the challenged regulations—an 89% reduction in development intensity. Moreover, the owners of parcels less than ten acres in area could subdivide their lands with no such limitations.

The CM district regulations . . . have their primary activity in the design or layout of the development of a particular property; that is, in the location . . . This can be seen most clearly in the method of calculation of the maximum number of permitted dwelling units applicable to each of the subdivision types allowed in the CM district. In each instance, the context, cluster, and performance subdivision, the maximum number of permitted dwelling units is calculated with reference to the base site area; that is, the tract area before deducting any of the areas of natural constraint and before deducting the prime agricultural lands. The degree to which tract development is constrained by floodplain, floodplain soils, wetlands, water bodies, steep slopes, mature woodlands, and prime agricultural soils, therefore, has no necessary impact on the maximum number of permitted dwelling units.

To be sure, the Dolington Group vigorously argues that it is precisely the effect of the CM district regulations in reducing the permitted intensity of development of the Subject Property to which the challenge is addressed. It is clear from the Dolington Group's evidence, however, that the inability to achieve the maximum development potential under the CM district regulations with respect to the Subject Property is a function primarily of the presence of natural constraints with which the Property is burdened (emphasis added). By the Dolington Group's evidence, the Subject Property could have been lawfully developed in February 1996 as a performance subdivision containing 186 single-family lots, including 35 lots of 10,000 square feet, 67 lots of 6,000 square feet, and 66 lots of 4,000 square feet. This number, shown by plan to be achievable on the Subject Property and conceded to be less, by at least "another lot or two" than the actual maximum achievable on the site, is more than 95% of the maximum calculated without reference to any of the tract's natural constraints or agricultural soils.

The inability to achieve the maximum permitted developmental intensity by means of a conventional or cluster subdivision does not support a contrary conclusion. As we have indicated, it is the purpose of the CM district regulations to preferentially encourage the use of cluster development over conventional subdivision and performance subdivision over cluster with respect to tracts constrained by environmentally sensitive features or prime agricultural soils. The fact here demonstrated by the Dolington Group's proofs that 95% of the maximum permitted developmental intensity could be achieved on the Subject Property by use of a performance subdivision (notwithstanding the degree of its constraint by natural features), while conventional subdivision would permit the achievement of only about one-third of the permitted developmental intensity, establishes only that the regulations are functioning as they were intended: providing to the developer of this extremely constrained tract containing substantial areas of prime agricultural soils, very strong encouragement for the use of performance subdivision and, thereby, for the preservation of the agricultural soils and of significant areas of open space. The Dolington Group failed to rebut the presumption of legality applicable to the CM district regulations and we affirm the decision of the courts below to this effect.

CHARTER OF THE NEW URBANISM

THE CONGRESS FOR THE NEW URBANISM views disinvestment in central cities, the spread of placeless sprawl, increasing separation by race and income, environmental deterioration, loss of agricultural lands and wilderness, and the erosion of society's built heritage as one interrelated community-building challenge.

WE STAND for the restoration of existing urban centers and towns within coherent metropolitan regions, the reconfiguration of sprawling suburbs into communities of real neighborhoods and diverse districts, the conservation of natural environments and the preservation of our built legacy.

WE RECOGNIZE that physical solutions by themselves will not solve social and economic problems, but neither can economic vitality, community stability, and environmental health be sustained without a coherent and supportive physical framework.

WE ADVOCATE the restructuring of public policy and development practices to support the following principles: neighborhoods should be diverse in use and population; communities should be designed for the pedestrian and transit as well as the car; cities and towns should be shaped by physically defined and universally accessible public spaces and community institutions; urban places should be framed by architecture and landscape design that celebrate local history, climate, ecology, and building practice.

WE REPRESENT a broad-based citizenry, composed of public and private sector leaders, community activists, and multidisciplinary professionals. We are committed to reestablishing the relationship between the art of building and the making of community, through citizen-based participatory planning and design.

WE DEDICATE ourselves to reclaiming our homes, blocks, streets, parks, neighborhoods, districts, towns, cities, regions, and environment.
We assert the following principles to guide public policy, development practice, urban planning, and design:

The region: Metropolis, city, and town

1. Metropolitan regions are finite places with geographic boundaries derived from topography, watersheds, coastlines, farmlands, regional parks, and river basins. The metropolis is made of multiple centers that are cities, towns, and villages, each with its own identifiable center and edges.

2. The metropolitan region is a fundamental economic unit of the contemporary world. Governmental cooperation, public policy, physical planning, and economic strategies must reflect this new reality.

3. The metropolis has a necessary and fragile relationship to its agrarian hinterland and natural landscapes. The relationship is environmental, economic, and cultural. Farmland and nature are as important to the metropolis as the garden is to the house.

4. Development patterns should not blur or eradicate the edges of the metropolis. Infill development within existing urban areas conserves environmental resources, economic investment, and social fabric, while reclaiming marginal and abandoned areas. Metropolitan regions should develop strategies to encourage such infill development over peripheral expansion.

5. Where appropriate, new development contiguous to urban boundaries should be organized as neighborhoods and districts, and be integrated with the existing urban pattern. Noncontiguous development should be organized as towns and villages with their own urban edges, and planned for a jobs/housing balance, not as bedroom suburbs.

6. The development and redevelopment of towns and cities should respect historical patterns, precedents, and boundaries.

7. Cities and towns should bring into proximity a broad spectrum of public and private uses to support a regional economy that benefits people of all incomes. Affordable housing should be distributed throughout the region to match job opportunities and to avoid concentrations of poverty.

8. The physical organization of the region should be supported by a framework of transportation alternatives. Transit, pedestrian, and bicycle systems should maximize access and mobility throughout the region while reducing dependence upon the automobile.

9. Revenues and resources can be shared more cooperatively among the municipalities and centers within regions to avoid destructive competition for tax base and to promote rational coordination of transportation, recreation, public services, housing, and community institutions.

The neighborhood, the district, and the corridor

1. The neighborhood, the district, and the corridor are the essential elements of development and redevelopment in the metropolis. They form identifiable areas that encourage citizens to take responsibility for their maintenance and evolution.

2. Neighborhoods should be compact, pedestrian-friendly, and mixed-use. Districts generally emphasize a special single use, and should follow the principles of neighborhood design when possible. Corridors are regional connectors of neighborhoods and districts; they range from boulevards and rail lines to rivers and parkways.

3. Many activities of daily living should occur within walking distance, allowing independence to those who do not drive, especially the elderly and the young. Interconnected networks of streets should be designed to encourage walking, reduce the number and length of automobile trips, and conserve energy.
4. Within neighborhoods, a broad range of housing types and price levels can bring people of diverse ages, races, and incomes into daily interaction, strengthening the personal and civic bonds essential to an authentic community.

5. Transit corridors, when properly planned and coordinated, can help organize metropolitan structure and revitalize urban centers. In contrast, highway corridors should not displace investment from existing centers.

6. Appropriate building densities and land uses should be within walking distance of transit stops, permitting public transit to become a viable alternative to the automobile.

7. Concentrations of civic, institutional, and commercial activity should be embedded in neighborhoods and districts not isolated in remote single-use complexes. Schools should be sized and located to enable children to walk or bicycle to them.

8. The economic health and harmonious evolution of neighborhoods, districts, and corridors can be improved through graphic urban design codes that serve as predictable guides for change.

9. A range of parks, from tot-lots and village greens to bailfields and community gardens, should be distributed within neighborhoods. Conservation areas and open lands should be used to define and connect different neighborhoods and districts.

The block the street, and the building

1. A primary task of all urban architecture and landscape design is the physical definition of streets and public spaces as places of shared use.

2. Individual architectural projects should be seamlessly linked to their surroundings. This issue transcends style.

3. The revitalization of urban places depends on safety and security. The design of streets and buildings should reinforce safe environments, but not at the expense of accessibility and openness.

4. In the contemporary metropolis, development must adequately accommodate automobiles. It should do so in ways that respect the pedestrian and the form of public space.

5. Streets and squares should be safe, comfortable, and interesting to the pedestrian. Properly configured, they encourage walking and enable neighbors to know each other and protect their communities.

6. Architecture and landscape design should grow from local climate, topography, history, and building practice.

7. Civic buildings and public gathering places require important sites to reinforce community identity and the culture of democracy. They deserve distinctive form, because their role is different from that of other buildings and places that constitute the fabric of the city.

8. All buildings should provide their inhabitants with a clear sense of location, weather and time. Natural methods of heating and cooling can be more resource-efficient than mechanical systems.

9. Preservation and renewal of historic buildings, districts, and landscapes affirm the continuity and evolution of urban society.

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A New Theory of Urbanism

New Urbanists are best known for redesigning conventional suburban developments as small towns. But their principles are equally important for urban, rural and regional planning.

by Andrés Duany

The word "growth" once had positive connotations for Americans: better jobs, better schools, better education, better quality of life. But mention the word today, and you are likely to hear frowning faces over congested traffic, higher taxes, crowded schools and the paving-over of the landscape. How did it come to pass that a nation proud of three centuries of growth, one whose people built the constellations of beautiful villages, towns and cities that span a continent, should have so radically changed its outlook?

The reason is that the urban pattern has shifted. Before World War II, when a green field was a place for the next one, it was an even trade. But today when an open space is built on, a housing subdivision, a shopping center or a business park replaces it. For most Americans, it seems like a losing transaction. Whereas prior developers were generalists — they set out to build entire villages or urban neighborhoods — today's developers are specialists. One builds only shopping centers, another office parks, another houses. Traffic engineers design only the roads; environmental analysts worry only about the open space. An armature of zoning codes minutely describes the details of this process, but no one looks out for the big picture. The result is a collection of monocultures: a disaggregation of the elements of community into specialized areas.

Individuals, the decisions that these specialists make, are quite plausible, but collectively, they lead to a pattern that is dysfunctional. Wide residential streets, for example, seem like a reasonable way to speed emergency vehicles on their way. Yet wide streets are more dangerous for pedestrians, particularly children, and often allow for fewer road interconnections, which may actually make it more difficult for fire trucks to get where they need to go. Whether it is street width, housing density, building placement or landscape layout, no design decision should come in isolation. This is the fundamental insight of the New Urbanists: paying careful attention to how the urban design coheres, drawing on the lessons of prior developers. Some have criticized New Urbanism as too suburban; they do not want to live in a modern version of the traditional American small town. They may also prefer the bustle of city or the quiet of the countryside. But New Urbanism is now general enough to take in a diverse range of human habitats. It has a comprehensive design strategy that works for the full continuum of development, from remote wilderness to dense downtown. The system, known as the transect, now guides many new towns and is in the process of being adopted as code by several counties in the U.S.

The transect is a concept drawn from ecology. It is a geographical cross section through a sequence of environments — for example, from wetland to upland, or tundra to foothill. The transect extends the natural environments to the human habitat by increasing density and immersive urban character. The gradient spans from the villa in the woods to the large suburban lots in a common lawn.

TRANSECT is an idealized geographical slice from the countryside to the city, shown in cross section (top row) and plan view (bottom row). A set of design principles applies to each increment in density. served by a sparse network of roads and on to urbanized sectors of ever greater complexity and continuity. Villages and towns are connected by the radial corridors of these environments. Cities extend the range to an urban core made of buildings with little if any nature. All sections fulfill the set of human needs and desires. Based on our observations of vibrant communities, we find a commonality among the design principles for each section of the transect. At the boundaries between sections, including that from the natural to the man-made, an overlap of the envisioned characteristics allows them to fit together smoothly. The transect does not eliminate the standards embodied in present zoning codes. It merely assigns them into the sections of the transect where they belong. Thus, the existing requirements for street width are not deemed to be right or wrong but rather correct or incorrectly allocated. Wide streets may be appropriate where speed of movement is justified even at the expense of the pedestrian environment. Similarly, current standards for closed drainage systems are not wrong; it is just that they are appropriate only for urban areas with curbs and sidewalks. In rural areas, rainwater can infiltrate through deep, green setbacks and swales. In fact, the transect widens the range of design options. Under conventional codes, for example, front setbacks must either be a 25-foot grass yard or a paved parking lot. The transect offers at least six more options.

Not all possible environments fit into the transect. Civic buildings such as religious, educational, governmental and cultural institutions often demand special treatment. Airports, truck depots, mines and factories are also better off in their own zones. But the transect does away with other, unjustified forms of single-use zoning whereby any attempt to unite the places of daily life—the dwellings, shops and workplaces—is considered an aberration that requires variances. In this regard, a transect-based code reverses the current coding system, forcing the specialists to integrate their work. It is a new system that, as the architect Le Corbusier said in a different context, makes the good easy and the bad difficult. And in so doing, it may reconcile the American public to the growth that is inevitable.

ANDRES DUANY is one of the most influential town planners in the U.S. He and his wife, Elizabeth Plater-Zyberk, are the founding partners of Duany Plater-Zyberk & Company, an architectural and planning firm based in Miami. He says he was introduced to the concept of the transect in 1983 by his brother, Douglass, who showed him a natural transect on the beach at Grayton, Fla.
II. CONCLUSION

The agricultural industry contributes and is expected to continue to contribute significantly to the economic health of Miami-Dade County. Preserving sufficient agricultural lands therefore is fundamental to enhancing and perpetuating a viable agricultural industry in the County. According to the UF Report, the total economic impact from all production and agriculture sales originating in Miami-Dade County exceeded $1.07 billion dollars for the 1997-98 crop years.\(^1\) The agricultural industry is in transition from one traditionally based on direct production, and driven mainly by major row crops, to one based increasingly on certain fruits and nursery crops and service-based activities associated with sourcing, import, and distribution.

As this transition occurs within the industry, Miami-Dade County’s population will increase by as much as thirty percent (30%).\(^2\) This convergence of demographic and economic influence is resulting in steady increases in agricultural land values and increased pressure for farmers in the Study Area to convert their land to non-agricultural uses. However, agriculture remains viable in Miami-Dade County and IFAS predicts that the transition may not necessarily be accompanied by a decline in its overall contribution to the local economy.\(^3\) This Report, and the recommended “Preferred Development Scenario,” describes an approach that will allow significant preservation of agriculture and rural lands while the farming industry adjusts to the current marketplace and economy. The Team has considered three different development scenarios in order to determine which will provide the most equitable means of preserving the farm lands necessary to enhance the County’s transitioning agricultural economy. Both the Rural Scenario (continued, unchecked 1:5 development patterns) and the Suburban Scenario (unrestricted residential development at 4.5 units/acre) result in the ultimate elimination of the farmland necessary to support ongoing agricultural practices. Both scenarios would have the further effect of eliminating the rural/open lands that currently typify South Dade and that residents countywide value and wish to see protected.

The Team therefore recommends that the County adopt the Preferred Development Scenario, which will preserve approximately 75% of the agricultural lands remaining in the Study Area. The program is incentive-based and will protect the equity investment of property owners within the Study Area, spreading proportionately the costs of agriculture and rural open space among all who benefit from its preservation.

The major components of the Team’s final recommendation are as follows:

1. a funded Purchase of Development Rights (PDR) Program;
2. a proportionate Open Space Mitigation Fee on new development;
3. a restructured Severable Use Rights (SUR) program;
4. limited residential development within the Study Area consistent with historic annual rates;
5. hiring for the position of a new Rural Communities Coordinator; and

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\(^1\) Id. at 19.
\(^2\) Id. at 86.
\(^3\) Id. at 55-56.
6. interim restrictions on building permit issuance within the Study Area to preserve the status quo and to implement the Team’s recommendation.

Implementation of these six components will effectuate the transfer or purchase of about 75% of the remaining development rights within the Study Area. The remaining 25% (approximately 3,372 units) will be developed over a fifteen- to thirty-year period at a rate generally consistent with recent trends.

With an adequately funded PDR program in place, many growers who wish to continue farming – or who for other reasons wish to retain current undeveloped land holdings - will be able to petition the County for purchase of the development rights from their property. This will allow property owners within the Study Area to realize a return on their current investment while simultaneously protecting valuable agricultural lands and rural open space.

The restructured SUR program will increase further the value of development rights within the Study Area as well as the demand for these rights within the UDB, thereby encouraging their transfer out of the Study Area. As the population of Miami-Dade County continues to increase, so to will the demand for SURs as urban developers are required to transfer development rights from the Study Area in order to meet growing demands for units within the UDB. In fact, if future growth within the UDB is restricted to SURs, then development rights severed from the Study Area today will increase significantly in value and may represent an increasingly valuable future investment.

Should the bond issue proposed by the Team not pass, the remaining tools described herein can and should be implemented independently. In fact, the PDR program may be funded in part by mitigation fees and other funding sources discussed in this Report. However, without a dedicated and secure funding source equivalent to or exceeding the $130 million bond issue recommended here, the ability to protect effectively agricultural and rural open space will be undermined significantly, leaving density reductions within the Study Area as the only viable option for widespread preservation.

The Preferred Development Scenario, driven by an adequately funded PDR/SUR program, will provide reasonable opportunities to property owners who wish to continue farming as well as those who wish to undertake some limited residential development. Although the Preferred Development Scenario involves a significant funding obligation on the County’s part, the impact of that burden will expire within the next thirty years, while the development pattern that ensues will be permanent. If the Preferred Scenario is implemented in the manner recommended by the Team, this portion of Miami-Dade County will be preserved forever and will protect necessary agricultural lands, as well as the rural open space that current and future residents of Miami-Dade County demand.
History of Study Process

- **Scope:**
  - To retain agriculture and enhance its economic vitality

- **Study initiated early 1997**
  - County’s Planning Department
  - Agricultural Practices Study Advisory Board

- **University of Florida Agriculture Economy Study:**
  - Began 04/00, completed 04/02 = 24 months
  - Results: fundamental nature of agriculture is changing

- **DPZ + Consultants Develop Land Use Scenarios:**
  - Began 05/01, completed 09/03 = 28 months
  - Goal: Develop recommended Scenario

- **Citizens’ Advisory Committee (CAC)**
  - Representing broad distribution of interests
Highlights of UF Report

- Globalization of markets
- Level the playing field
- Exotic pests
- Flood control & water management
- Production technologies
- Technological developments
- Weather & market information
- Marketing
- Collaboration
- Land value
- Preservation of agricultural lands
- Review & revision of local regulations
- Coordination w/ County government
- Conclusion: Shift from direct production – service-based agri-business
Business of Agriculture / Business of Land

- Interrelated but must be considered separately.
- Base information for business not reciprocated by information for land.
- Agriculture
  - Outside forces are determinant
  - Need for predictability of conditions and context
- Land
  - Maintain land value
  - Maintain undeveloped land with rural character
- GIS studies show ag and real estate suitability coincide.
CAC Executive Summary

- Do not restrict farmers’ ability to sell their land
- Do not unnecessarily burden farm operators
- Growth management programs must recognize importance of agriculture - $1 billion / year
- Maximize land values while retaining rural character & environmental sustainability of area
- Improve road network and address flooding
- Recognize urban sprawl as threat to agriculture
- Create an agricultural liaison position in County Manager’s Office.
## Research

<table>
<thead>
<tr>
<th>County</th>
<th>Farmland Total</th>
<th>Eased or Purchased Total</th>
<th>Per Year</th>
<th>Zoning</th>
<th>$/Acre</th>
<th>Market Value Ag.</th>
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<td>Sonoma</td>
<td>302,000</td>
<td>10,000</td>
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<td>Lancaster</td>
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<td>94%</td>
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<td>Berks</td>
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<td>7,000</td>
<td>Sliding scale (?)</td>
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<tr>
<td>Bulington</td>
<td>23% county</td>
<td>350</td>
<td>1/2</td>
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<td>600 million</td>
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<tr>
<td>Bucks</td>
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<td>44,000</td>
<td>25%</td>
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<tr>
<td>Miami-Dade</td>
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<tr>
<td>Palm Beach</td>
<td>80,000</td>
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</tbody>
</table>

Stewardship practice: management for soil conservation, forestry, invasive species

1. in 1996
2. Lancaster Farm Trust 1,400 / year
3. Rural Legacy Program – land trusts
4. 530m county bond year 2000
5. Co. PDR – 18,500 ac, Brawdywits Conservancy 27,000 ac.
6. SFVMD
Charrette Results

- Preserve rural character and lifestyle
- Support business viability and protect land availability
- Do not down-zone
- Hold UDB
- Explore TDR’s & PDR’s as options
- Goals, Objectives and Policies developed and later set aside
Preferred Development Scenario Recommendations

1. A funded PDR Program

- Voluntary program
- Maintain 1 unit/5 acre density
- Area-prioritization for PDR program
- Development rights valuation & prioritization

- Funding sources:
  - County bond issue for $130 million
  - Open Space Mitigation Fee Program
  - Federal funding
  - State funding
  - Documentary Stamp tax / Real-estate transfer tax
  - Not-for-Profit assistance, i.e.: TPL
2. A restructured SUR Program

- Voluntary program
- Maintain 1 unit/5 acre density
- Prioritize sending areas – consistent w/ prioritization factors
- Upzone sending areas to allow transfer up to 2 times original density
- Designate receiving areas to support County planning & urban design goals

**Additional recommendations**
- Seek cooperation of municipalities to designate receiving areas
- Discourage alternative means of increasing density
- Extinguish purchased rights at point of origin
- Amend CDMP and stabilize UDB
3. Development within Study Area

- Voluntary program
- Maintain 1 unit / 5 acres density
- Preserve rural life-style
- Allow historic levels of development for 25% of Study Area

Conservation Subdivision Ordinance
- Cluster residential development within single properties
- Define major components
- Agricultural / residential conflicts – buffers & disclosures
- Public facility provision – maintain rural LOS
- Increase impact fees
4. Interim restrictions needed

- **Building permit allocation system equal to historical trends**
- **Interim development ordinance**
  - Limited duration: 18-36 months
  - County to allocate needed resources to ensure timely adoption of amendments to CDMP
  - Delegation of responsibilities to County Staff
  - Plan to ensure meaningful public participation
  - Identify appropriate growth policy for interim time
  - Extent of land to be developed in interim
Preferred Development Scenario Recommendations

5. Amendments to CDMP

- Provide for implementation of Preferred Development Scenario
- Develop specific Goals, Objectives and Policies that reflect intent of Preferred Scenario
6. New Rural Communities Coordinator

- Responsibilities to include:
  - Facilitate transition of Study Area
  - Staff for Ag’s Practices Study Advisory Board
  - Oversee administration of PDR / SUR programs
  - Aid in implementation of CDMP amendments
  - Liaison between Agriculture community & County
  - Represent Ag. Industry for inter-governmental coordinated activities
  - Aid in development of non-traditional agricultural markets
Additional Topics

- Supportive & complementary uses
- Appropriate agritourism
- Economic development incentives & strategies
- Environmental compatibility
- Phytosanitary issues
- Lobbying efforts – Federal level
- Lobbying efforts – State level
Conclusions

- Ag. Industry expected to continue to contribute to County economy
- Protecting agricultural lands vital to future agricultural viability
- Adopt Preferred Development Scenario
  - Mutual support of business of farming and business of land
  - Program is incentive-based
  - Program will protect equity investment of land owners
  - Share costs / benefits of farmland and rural open space preservation