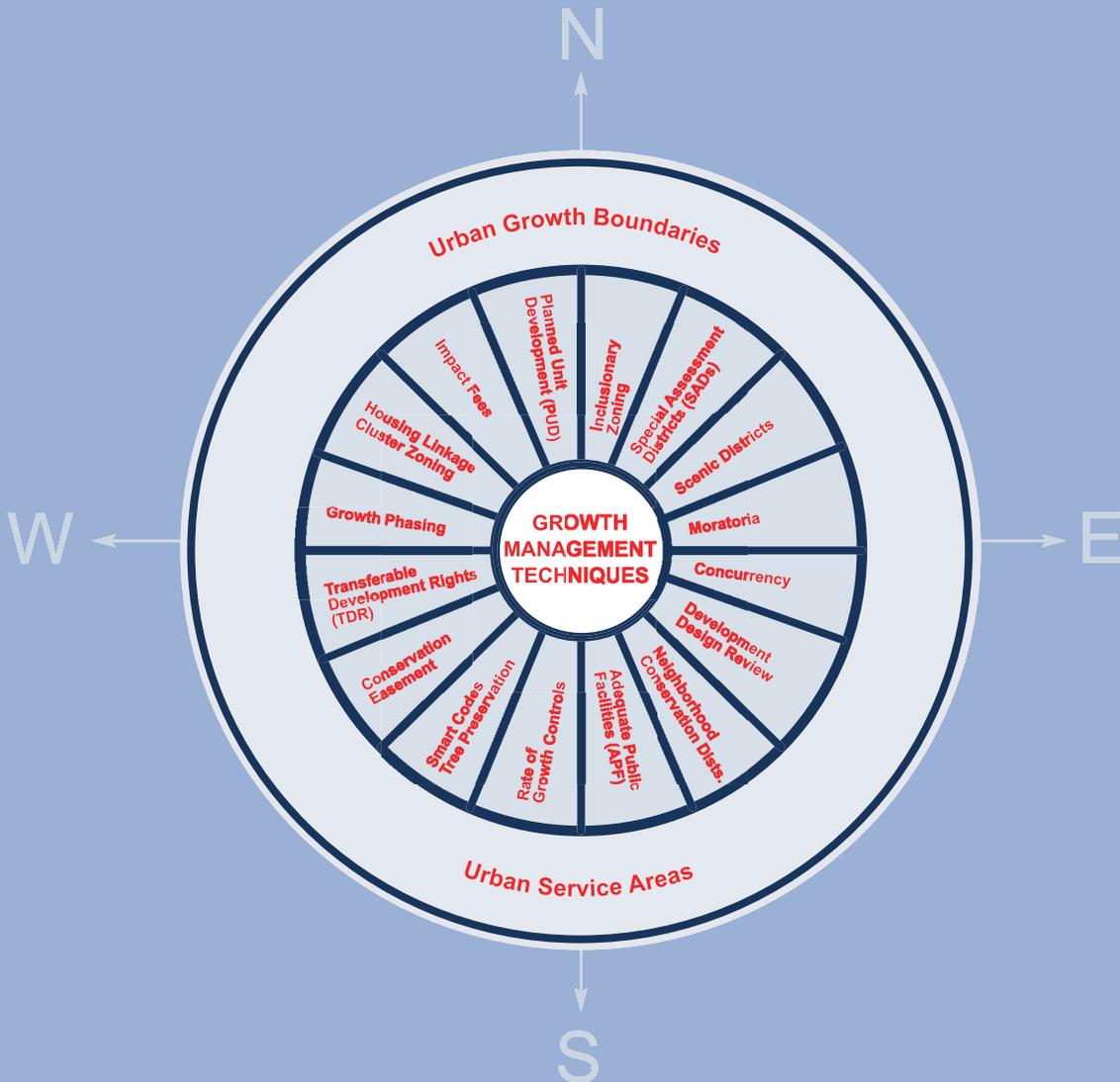


# ON COMMON GROUND

REALTORS® & Smart Growth

## Growth Management Fact Book



NATIONAL ASSOCIATION OF REALTORS®

# Growth Management Fact Book

PREPARED BY



ROBINSON & COLE<sup>LLP</sup>

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## **PREFACE**

The *Growth Management Fact Book* has been prepared by Brian Blaesser, Michael Giaimo, Robert Sitkowski, Greg McCracken and Linnea McCaffrey of Robinson & Cole LLP, consultant to NAR, in order to help REALTORS<sup>®</sup> at the state and local level better understand growth management initiatives in their communities. It is the latest resource in NAR's Smart Growth program.

We hope that this slim volume will provide a handy reference for REALTOR<sup>®</sup> associations and their government affairs directors on smart growth issues. This Fact Book supplements, but does not substitute for, the more focused assistance provided by NAR through its Land Use Initiative Program. Its purpose is to provide NAR's member associations with a basic framework and reference source for engaging their fellow citizens and local officials in a productive dialogue about how, when and where growth should take place in their communities.

**Robinson & Cole LLP**  
*April 2001*

## SECTION 1: INTRODUCTION AND OVERVIEW OF GROWTH MANAGEMENT TECHNIQUES

The preparation of a Growth Management Fact Book may seem presumptuous to some since, as noted below, the “facts” in the debate over *sprawl* are continuing to be revised and updated as proponents and opponents of smart growth initiatives produce ever more literature and case studies on the subject.

Findings from the 2000 Census suggest that the term *sprawl* is too simplistic a term to describe the land use and population trends in our country. The census data indicate three principal phenomena. First, except in the Midwest, the expansion of the suburbs slowed in the 1990s. A comparison of the periods 1980-1990 and 1990-2000 indicates that the land area with suburban population density in the West decreased from 23% to 7%; in the South it decreased from 29% to 19%; and in the Northeast it decreased from 15% to 7%. Only in the Midwest did the suburban land area increase from 10% to 12%. Second, although suburban growth rose in the Midwest, both the Midwest and the Northeast experienced significant population increases in the cities compared to the previous decade. Overall the country’s population is now 12% more urban than it was in 1990. Demographers explain this phenomenon by pointing to several trends: Not only are older suburbs themselves reaching urban density, but families and immigrants are moving back to central cities. Cities such as Chicago, Atlanta, Denver and Boston that experienced declines prior to 1990, saw growth in the last 10 years.

Third, and perhaps most important, the land use and population trends evident from the 2000 Census are a direct result of each region’s particular development history, as affected by geography and immigration patterns.<sup>1</sup> If we combine these 2000 Census findings with the recent acknowledgment by the U.S. Department of Agriculture that approximately 30% less prime farmland was lost to development during the period 1992 through 1997 than previously thought, the “sprawl crisis” that has spawned smart growth initiatives throughout the country does not seem as one dimensional, nor as severe, as originally estimated.<sup>2</sup>

The reality is that no matter how objective particular facts may seem in the debate over sprawl, the literature and public discussions on smart growth often reflect preconceptions and unstated values. Whether *smart growth* is truly the antidote for sprawl may be debatable. There is, however, one undisputed fact: growth management, whether called “smart growth” or by some other name, is here to stay. Communities increasingly want to know and control when, where and how growth will take place.

The purpose of growth management is to control the *rate, amount, type, location* and *quality of growth*. The purpose of this Fact Book is to provide REALTOR® associations and their members with a concise volume of definitions and facts pertaining to the “toolbox” of growth management techniques that governments use to address these issues. The Fact Book is organized into five parts each of which covers one of the basic objectives that growth management techniques seek to address. These are:

- Location, density and rate of growth
- Public facilities and infrastructure
- Protection of natural resources and environment

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<sup>1</sup> David Firestone, “The New-Looks Suburbs: Denser or More Far Flung,” *The New York Times* (April 16, 2001).

<sup>2</sup> See Lesley Hensell, *Realty Times* (February 6, 2000). According to these revised figures, during the 6 year period from 1992 through 1997, approximately 11.2 Million acres of farmland were developed as opposed to the 16 Million originally suggested in the U.S.D.A’s *National Resources Inventory* published in 1997. According to U.S.D.A’s revised figures, only 6.6% of the United States was developed as of 1997. This means that developed land actually constitutes the smallest category of land types, such as forest, crop, and range.

- Preservation of community character
- Affordable housing

As detailed in the Table of Contents, each of these broad categories is followed by sections describing specific government regulatory techniques utilized to address the issues involved. In order to make this Fact Book a practical guide for REALTORS<sup>®</sup>, the discussion of each growth management technique focuses on the following key questions and concerns that REALTORS<sup>®</sup> should have regarding these techniques:

- Purpose and Key Terms
- Effectiveness in Achieving Stated Purpose(s)
- Impact on Property Value
- Impact on Development Costs
- Impact on Amount and Patterns of Land Development
- Impact on Housing Affordability
- Summary of Pros and Cons
- Incentive-Based Alternatives

The discussion under each of these subsections is based upon the best available factual information and, where appropriate, theoretical reasoning, to help REALTORS<sup>®</sup> understand and assess the implications of using specific growth management techniques in their communities.

Key terms pertaining to each growth management technique are defined or explained in the context of the discussion. In order to assist the reader in locating and referencing these terms, they are **bolded** in the text and also listed in a *Glossary of Key Terms* in the Appendix to this book. Also in the Appendix, is a *Summary Chart* that summarizes for each technique the effectiveness of the technique, and its likely impact on property values, development costs, the amount and patterns of land development, and on housing affordability.

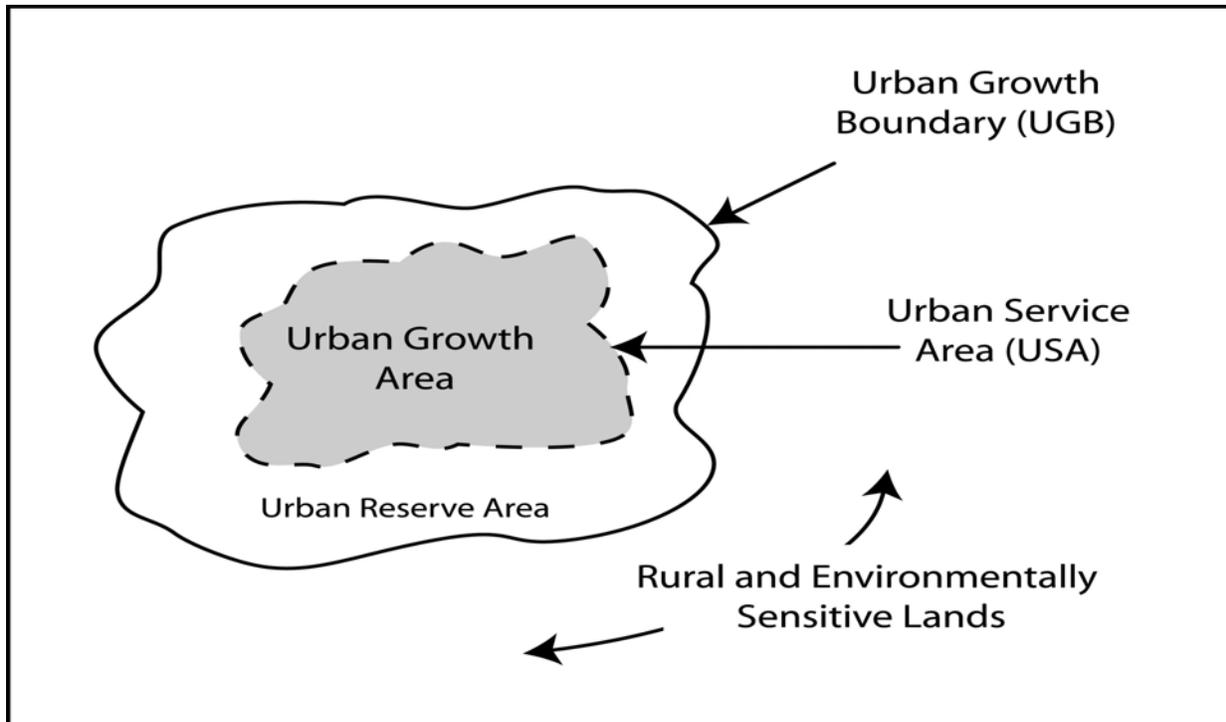
# PART I: LOCATION, DENSITY AND RATE OF GROWTH

## SECTION 2: URBAN GROWTH BOUNDARIES (UGBS)

### 2.01 PURPOSE AND KEY TERMS

An **Urban Growth Boundary (UGB)** is a line drawn on a map to contain urban growth and separate it from rural and environmentally sensitive lands. It is the most direct technique for implementing urban containment policies as part of growth management or smart growth. From the planner's perspective, urban containment has two basic purposes:

1. To promote compact and contiguous development patterns that can be efficiently served by public services; and
2. To preserve open space, agricultural and an environmentally sensitive areas that are not currently suitable for urban development.<sup>3</sup>



### URBAN GROWTH BOUNDARY

The area within the UGB is referred to as the **Urban Growth Area**. By definition, it is the area in which urban growth is encouraged. It should be of sufficient size to allow densities sufficient to accommodate the urban growth that is projected based upon population forecasts. Within the UGB is also frequently established an **Urban Service Area (USA)** which is an area within, but not beyond which, urban services (roads, water, sewer, etc.) will be provided. In theory, the USA should be extended in conjunction with planned public facilities set out in a Capital Improvements Program (CIP).<sup>4</sup> Another area outside the

<sup>3</sup> Arthur C. Nelson and James V. Duncan et al. *Growth Management Principles and Practices* (Planners Press: 1995) at 73.

<sup>4</sup> *Id.* at 75. Because the USA is made up of the combination of services to be made available in accordance with the CIP, its boundary is not necessarily uniform, and may vary depending upon the configuration of the particular

USA, but within the UGB, is the **Urban Reserve**. This is an area in which future development, including extension of services, is planned. In summary, the Urban Service Area and the Urban Reserve, taken together, make up the Urban Growth Area within the UGB. (See Figure above)

As an “urban containment technique,” the Urban Growth Boundary is, in effect, a strategy to manage space. Spatial management of land has not been part of the American land use planning tradition, although it has been a central element of land management programs in other countries such as Great Britain, where the British Green Belt Program has been in place for almost half a century.<sup>5</sup>

## 2.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

When assessing the effectiveness of UGBs, it is important to distinguish between *local* urban growth boundaries and *regional* urban growth boundaries. When an individual local community draws a UGB within its own borders and constrains future development to within that boundary, and establishes rules and regulations within the UGB that are designed to slow local growth, the local UGB can result in higher density and less extensive new growth within that community than would have occurred if no such UGB were adopted. Hence, viewed solely from the perspective of the local community, the UGB can be an effective tool for slowing and/or stopping growth.

However, when a number of local communities draw their own UGBs within a metropolitan area, the effect will be to divert future growth away from these communities themselves to other communities in the same market area that may not have established UGBs or adopted other growth limiting measures. This will result in increased growth pressure on those communities. If a large number of communities within a region adopt local UGBs, the net result may be to divert future growth to more remote locations, thereby spreading out development into a pattern of “sprawl,” contrary to the basic purpose of an urban growth boundary.

Where the urban growth boundary is established on a *regional* basis, this usually requires the coordination of state, county and local officials. Typically, such a boundary is drawn through the efforts of a Council of Governments (COG) or similar specially elected metropolitan body (such as Portland, Oregon) or by a body appointed by the state governor (as in the Twin Cities area of Minnesota) or with the oversight of an agency of the state government (as in New Jersey). The extent to which these *regional* UGBs are effective depends upon how stringently growth is restricted outside the UGB line. For example in Florida, developers who are willing to pay for the necessary infrastructure can develop new projects outside the *regional* UGB (if they receive local planning commission approval). In Oregon, most development outside the regional UGB is prohibited, even if developers are willing to pay the costs of all the additional infrastructure required.

Generally, a *regional* UGB can be effective in accomplishing the following multiple objectives:

1. Preventing developers from creating new subdivisions outside the built-up areas;
2. Reducing the total amount of land needed to accommodate a given total *regional* population while preserving agricultural lands and environmentally sensitive lands around the periphery;

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service (e.g., water, sewer etc.) that is planned to be provided. The Figure is merely an illustration of the relationship of the Urban Service Area to the UGB.

<sup>5</sup> Daniel R. Mandelker, “Managing Space to Manage Growth” (Draft Paper: 1999) at 4.

3. Increasing the average density of new development and reducing the average size of individual lots. This can reduce the infrastructure costs of serving a given total population within the region.

It is generally agreed that Urban Growth Boundaries or Urban Growth Areas are not very effective in rural areas with a diffuse population and no real urban center. Also, because of the often counterproductive results that can result from local UGBs, the American Planning Association in its *Growing Smart<sup>sm</sup> Legislative Guide Book*, recommends strongly against establishing local UGBs.<sup>6</sup>

### **2.03 IMPACT ON PROPERTY VALUES**

The extent to which the UGB will affect property values depends upon how expansively the UGB is drawn. If it is drawn to include only a small amount of vacant, developable land in relation to the amount of land that has been absorbed by new growth historically, property values *within* the UGB will increase. This is because the UGB reduces or eliminates the potential for market competition between owners of land inside the UGB and those with property outside the UGB. In effect, the UGB confers a market advantage on the owners of land within the UGB. Outside the UGB, it can be expected that the value of property will decrease because of the loss of its potential to be developed. However, land immediately adjacent to the UGB may experience an increase in value. It has been the experience in Portland, Oregon, and in some other jurisdictions where UGB's have been imposed, that a market develops for large, single family "ranchettes" or "martini farms" on large lot acreages. These lots experience an increase in value because they provide their owners with the amenity of open space that has been created by means of the UGB. "Hobby farms," the term used to describe this same phenomenon in Minnesota, have also sprung up outside the urban service area in the Twin Cities.

This rural residential development on the fringe of a UGB acts as an impediment to future urbanization of these areas. In Oregon, these so-called rural "exception" lands exist with one- to five-acre home site developments that compete with the urban land supply and create long term impediments to the expansion of the boundary. These exception lands are those that are unsuitable for farming or forestry because of their small size or nearness to existing developments. Residents in this urban fringe area oppose boundary expansion to accommodate new development at higher densities. The result is that the UGB becomes politicized as these residents voice their objections to any expansion of the UGB.

### **2.04 IMPACT ON DEVELOPMENT COSTS**

Because the price of land increases within the UGB, this factor along with zoning regulations allowing greater density should lead to an increase in the density of urban development within the UGB. Generally speaking, where increased density is possible infrastructure costs are lower, thereby reducing overall development costs. Development costs may be further reduced if the UGB development approval process is streamlined.

### **2.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

The UGB, if adopted locally by many municipalities within a region, will have the effect of deflecting future growth to further out locations, thereby increasing sprawl and undermining the purpose of an UGB. By contrast, the *regional* UGB has the potential to minimize this "deflection" effect and reduce the potential for the "leap-frogging" of development to areas where land is cheaper provided that the affected region is large enough to encompass all of the market area in question.

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<sup>6</sup> American Planning Association, *Growing Smart<sup>sm</sup> Legislative Guide Book Phase 2, Interim Edition*, Chapter 6 at 6-53.

## 2.06 IMPACT ON HOUSING AFFORDABILITY

Because housing densities tend to increase within UGB's, the higher land prices that also occur within the UGB will not necessarily result in higher housing prices. In Portland, for example, the state Land Conservation and Development Commission "LCDC" adopted the so-called "Metropolitan Housing Rule" setting specific standards for housing density and housing mix and made applicable to all local jurisdictions in the Portland Metropolitan Area. Specifically, the rule mandated that each of the Portland region's 24 cities and 3 counties zone as buildable land for 6, 8, or 10 units of housing per acre depending on each jurisdiction's location. It also required that new construction be mixed 50/50 in each jurisdiction between multifamily or attached single-family units, and single family detached units. In 1990, the Homebuilders Association and the 1000 Friends of Oregon analyzed data on housing projects approved in the Portland Metropolitan Area from 1985 through 1989. For each project, actual developed density was compared with the density that theoretically could have been achieved on the site under the local comprehensive plan. Their research indicated that overall, housing projects have achieved 79% of the density required by the Metropolitan Housing Rule, with single family developments averaging 66% of planned densities and multifamily projects reaching 90% of planned densities.<sup>7</sup>

However, while the mandate of the Metropolitan Housing Rule may have created higher densities, recent data on housing prices suggests that the UGB has been a significant if not the sole factor in the increased cost of housing over the last decade. For example, figures for the first quarter of 2001 indicate that the median home price in Portland is \$167,000. This is up from \$123,400 in the last decade. According to the National Association of Homebuilders, Portland ranks 176<sup>th</sup> out of 180 cities for affordability.<sup>8</sup>

Finally, a *regional* UGB increases price pressure on land within the boundary, home values in inner-city neighborhoods will rise, causing poor households to be displaced from such areas because they cannot pay required taxes, and forcing them to move further out of the urban area where affordable housing may or may not be available.<sup>9</sup>

## 2.07 SUMMARY OF PROS AND CONS

### PROS:

- A *local* UGB, from the perspective of the community, allows it to constrain future development within a boundary and thereby slow local growth.
- A *local* UGB, from the perspective of the community, can create higher density that results in a more compact community, in the short run.
- A *regional* UGB, if accompanied by stringent controls outside the UGB, can prevent developers from creating new subdivisions outside built up areas.
- A *regional* UGB can reduce the total amount of land needed to accommodate a given total regional population while preserving agricultural lands and environmentally sensitive lands around the periphery.

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<sup>7</sup> Charles A. Hales, "Higher Density + Certainty = Affordable Housing for Portland, Oregon" *Urban Land* (September 1991) at 14.

<sup>8</sup> See information and figures cited in Jim Robbins, "Oregon: Two Sides of the Anti-Sprawl Line," *The New York Times* (April 22, 2001).

<sup>9</sup> *Id.* at 35.

- A *regional* UGB can increase the average density of new development and reduce the average size of individual lots, resulting in lower infrastructure costs necessary to serve the population within the region.
- The increased land prices within the UGB, along with zoning regulations allowing greater density, result in an increase in the density of urban development within the UGB, that allows for a reduction in overall development costs.

CONS:

- A UGB is not effective in rural areas with diffused population and no real urban centers.
- An UGB will slow the market for land and confer a market advantage on owners of property within the UGB, as opposed to owners of property outside the UGB.
- Properties outside UGB will decrease in value because of the loss of their potential to be developed.
- The potential for a UGB to be expanded can be frustrated by the phenomenon experienced in some jurisdictions of large single family ranchettes, or hobby farms, being developed on the periphery of the UGB. This, in turn, leads to political opposition by the owners of these properties who do not want to see the expansion of the UGB allow higher densities and thereby threaten their open space amenities.
- The increased land prices within the UGB can be expected to raise housing prices and therefore negatively impact housing affordability, except to the extent that the increased density allowed within the UGB may limit the degree to which housing prices rise.
- A *local* UGB will deflect future growth away from the community to other nearby communities. This will increase growth pressures on those nearby communities that do not adopt local urban growth boundaries.
- If a large number of communities adopt individual *local* UGBs within a region, the net result may be to deflect future growth to more remote locations, thereby increasing sprawl and defeating the purpose of an urban growth boundary.
- Because the UGB causes the lowering of land prices outside the boundary, and those lands are not developable in the near future, the UGB imposes unexpected losses on landowners.<sup>10</sup>
- Because a *regional* UGB increases price pressure on land within the boundary, home values in inner-city neighborhoods will rise, causing poor households to be displaced

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<sup>10</sup> National Association of Industrial and Office Properties; National Growth Management Taskforce, *Growing to Greatness: A Growth Management Manual* at 30.

from such areas because they cannot pay required taxes, and forcing them to move further out of the urban area where affordable housing may or may not be available.<sup>11</sup>

## 2.08 INCENTIVE-BASED ALTERNATIVES

The most logical incentive-based alternative to the use of urban growth boundaries to preserve agricultural and environmental sensitive lands is **transferable development rights (TDR)**. If studies and proper planning are done to identify and map areas of a community or region that are considered to contain prime farmland and/or environmentally sensitive resources, a TDR program can be effective in preserving such areas by providing landowners with a adequate incentive to retire their development rights in exchange for compensation, at close or equal to fair market value. From the property owner's perspective a *voluntary* TDR program is preferable to a mandatory program, since the latter typically involves a downzoning of property in order to encourage owners to transfer their development rights to receiving zones. TDR is addressed in Section 8.

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<sup>11</sup> *Id.* at 35.

## SECTION 3: GROWTH PHASING, RATE OF GROWTH SYSTEMS AND MORATORIA

### 3.01 PURPOSE AND KEY TERMS

The growth management techniques of growth phasing, rate of growth controls and moratoria all have one concern in common: The *timing* of when growth occurs. Under conventional zoning, so long as a use is permitted, it can occur at any rate. The technique of **growth phasing** can be used to phase the growth of an entire community or to sequence the order in which areas of a community will develop. Growth phasing is typically tied to a community's desire to plan for investment in new public facilities such as sewer and water. The planning concept underlying growth phasing is relatively simple: Development is desirable if it occurs as an extension of an existing urban area accompanied by incremental expansion of existing public facilities. Stated differently, growth phasing is little more than translation of basic civil engineering principles into development controls designed to minimize the cost of public facilities.

The most well known example of growth phasing is the program that was adopted in 1969 in Ramapo, New York. Under that program, the town adopted a 6-year capital budget for providing municipal facilities such as street, parks and sewers. It also adopted a capital improvements program, (CIP) which set out the location and sequence of capital improvements for the 12 years following the completion of the first 6-year plan. Over this eighteen year period, the town expected to become fully developed in accordance with its master plan. The regulations implementing this eighteen year build-out utilized a special permit concept under which the issuance of a special permit for a subdivision depended upon the developer demonstrating the immediate availability to the proposed subdivision of five essential public improvements and services: (1) public sanitary sewer or approved substitutes; (2) drainage facilities; (3) improved public recreation facilities in schools; (4) roads; and (5) fire houses. No special permit would issue unless the proposed residential development accumulated fifteen development points based upon values assigned to these specific categories of improvements under the ordinance.<sup>12</sup>

This development timing provision was applied in combination with the town's traditional zoning ordinance based upon use districts, over 90% of which in the unincorporated area were zoned for residential use. The effect of this timing provision in combination with the basic zoning district scheme was to postpone or phase the development of every vacant parcel in the town. This meant that development of a parcel could be delayed, in an extreme case, for 18 years. The ordinance establishing this type of growth phasing was upheld by the New York courts as a valid exercise of local zoning power under the delegated powers and permissible purposes provisions of the New York Town Law.<sup>13</sup>

**Rate-of-growth systems**, unlike growth phasing, are not always tied to a budget and plan for provision of public facilities. Rather, they tend to be adopted for the purpose of achieving locally desired rates of growth, with the availability of public facilities being a secondary consideration. Rate-of-growth systems come closer to outright growth *control*, as opposed to growth management, because they attempt to impose quantitative limits or quotas on residential and/or nonresidential development.

One of the earliest rate-of-growth programs is that of the City of Petaluma, California. The so-called "Petaluma Plan" was adopted in 1971. Under the plan, a "green belt" boundary was drawn around the city. All residential growth and the extension of city services were prohibited beyond this line. This aspect, by itself, is similar to an **urban growth boundary**, discussed in Section 2. However, the City of Petaluma combined this boundary with a Residential Development Control System in order to regulate

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<sup>12</sup> See Amendments to Town of Ramapo Building Zone Amended Ordinance of 1969 described in Landman, "No, Mr. Bosselman, the Town of Ramapo Cannot Pass a Law to Bind the Rights of the Whole World: A Reply (Part I)," 10 *Tulsa L.J.* 169 (1974).

<sup>13</sup> See *Golden v. Planning Bd.*, 334 N.Y.S. 2<sup>d</sup> 138 (1972).

the actual number of building permits issued. In accordance with the Petaluma Plan, the number of building permits was limited to 500 dwelling units per year for a 5 year period beginning in 1972. This figure was applied only to housing units in developments consisting of 5 units or more. The Residential Development Control System used a point system that gave preference to projects that conformed to the city's general plan and that included low- and moderate-income housing units. The plan also provided that permits should be issued on an essentially equal basis between single-family dwellings and multifamily residential units, and also equally between the west and east sections of the city.

This rate-of-growth regulation was challenged by builders and land owners in federal court on constitutional grounds, namely, that it denied the right to travel to people whose ability to settle in Petaluma would be hindered by the limitations placed on the issuance of building permits, and that the city's growth control policy violated due process and equal protection because of its alleged exclusionary purpose or effect. The federal court upheld the regulation as reasonable and did not reach the right to travel issue.<sup>14</sup> Rate-of-growth controls have subsequently been adopted in other jurisdictions.

A **moratorium** is a type of **interim zoning control** that either prohibits all development, or certain types of development, for a defined period of time. A moratorium is typically adopted by local government ordinance and, if adopted in good faith, is intended to provide a community with the time to conduct and review studies necessary for adopting or revising a land use plan and related regulations. Because such planning activities are time consuming, the moratorium allows for a "planning pause" period during which period land development activity is frozen or limited until permanent regulations implementing the plan can be adopted.

### 3.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

**Growth Phasing.** The Ramapo, New York growth phasing program was not particularly effective in achieving its objectives. One of the problems with the program was that the town did not have control over two components of its public facilities and services program, namely, fire protection services and sanitary sewer.<sup>15</sup> Consequently, when faced with a delay in the completion of the regional sewage collection system, it was forced to decide to award an automatic 5 points to each development for sewer service, with the result that each project received one-third of the points that it needed for approval.<sup>16</sup> The program was ultimately repealed. However, growth phasing is currently being used in various forms in other jurisdictions around the country. For example, Montgomery County, Maryland utilizes an annual growth policy (AGP) as a guide for the planning board's implementation of its adequate public facilities ordinance (APFO). The AGP includes (1) the current level of service conditions for major public facilities; (2) an estimate of the service demands resulting from un-built, but approved, subdivisions; and (3) recommended growth capacity (residential and employment) ceilings for defined policies areas, based on alternative scenarios of future public facility growth. This growth phasing system is part of a larger more complex growth management system that includes agricultural land preservation, functional and area master plans and land development regulations.<sup>17</sup>

San Jose, California has applied growth phasing controls for specific areas since the early 1970's and currently utilizes a residential development permit allocation system based on transportation capacity for

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<sup>14</sup> See *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522F.2d 897(9<sup>th</sup> Cir. 1975) *rev'g* 375F Supp. 574 (N.D. Cal. 1974), *cert. denied*, 424 U.S. 1934 (1976)

<sup>15</sup> Hammer, Siler, George and Associates, *Impact on Ramapo Fiscal and Economic Conditions of the Town's Growth Control Ordinance* (Washington: Hammer, Siler, George and Associates 1977). This study was prepared for the National Association of Homebuilders (NAHB).

<sup>16</sup> *Id.*

<sup>17</sup> Arthur C. Nelson and James B. Duncan, *Growth Management Principles & Practices* (Planners Press: 1995) at 101.

the city's east side.<sup>18</sup> In 1977, Westminster, Colorado adopted a growth phasing system designed to address capacity constraints in the community's water and waste-water systems. These systems established the number of water and wastewater service commitments that were to be granted for each year for the next two and a half years before new capacity would be available. Service commitments were awarded competitively and were valid for up to two years. This system was re-adopted in 1980 and the criteria for awarding service commitments were revised to give greater emphasis to the design quality of projects.<sup>19</sup>

Livermore, California enforces a growth phasing system adopted in 1987 known as the Housing Implementation Program (HIP) based on 3-year cycles of analysis and implementation. The factors taken into consideration in the preparing each new HIP are water, wastewater, air quality, traffic, parks and open space, schools and emergency services. Projects having fewer than four units are exempt from the growth phasing program. Project-specific evaluation criteria such as street layout, open space, landscaping, architectural design, solar access, facility contributions, innovation and adequate facilities, are used to determine which projects will be approved.<sup>20</sup>

To the extent that all of these growth phasing programs are effective in achieving their stated objectives, it appears that their success depends in significant part upon the degree of sophistication in their capital improvement programming, the use of growth phasing in the context of other growth management programs, and the avoidance of arbitrary point-award systems for features or facilities, emphasizing instead the specific characteristics of particular projects.

**Rate of Growth Systems.** The effectiveness of the Petaluma Plan, the purpose of which was to restrict growth for aesthetic reasons,<sup>21</sup> is not clear. The rapid growth that occurred between 1970 and 1972 that led to the adoption of the growth phasing program did not continue at that rate. In fact, in the majority of the years since 1972 the actual growth rate has been below the maximum permitted under the growth phasing program.<sup>22</sup> The rate of growth program in Boulder, Colorado, which was also established in the 1970s, originally applied a three percent annual growth rate. That growth rate was subsequently reduced to two percent. While it appears that the rate of growth program has been effective in limiting the actual growth rate in Boulder, its effect has been to cause "leap frog" development into surrounding communities. Demographic data and anecdotal evidence also indicate that the program has pushed families with children into nearby communities such as Longmont, Louisville and Lafayette.<sup>23</sup> San Diego, California has also imposed annual limits on building permits through its zoning code. This rate of growth regulation appears to have been effective and also withstood legal challenge because it was consistent with the city's planning and other regulatory provisions.<sup>24</sup>

**Moratoria.** By definition, a moratorium, when adopted, achieves its immediate purpose of halting all development or limiting development to certain uses for a specific period of time. However, the true measure of its success depends upon what is accomplished in the planning process during that interim control period. A moratorium can rationally serve its purpose only if it is preceded and supported by a planning process that identifies and evaluates the community's needs and objectives and uses the time period when the moratorium is in effect to develop permanent regulatory mechanisms to address the

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<sup>18</sup> *Id.* at 102.

<sup>19</sup> *Id.* at 103-104.

<sup>20</sup> *Id.* at 105.

<sup>21</sup> *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522F.2d 897, 909 (9th Cir. 1975).

<sup>22</sup> See Kelly, E. *Managing Community Growth: Policies, Techniques and Impacts* (Praeger, Westport 1993) at 208-209.

<sup>23</sup> Kelly at 54-59.

<sup>24</sup> See *Building Indus. Ass'n of San Diego v. Superior Court, County of San Diego*, 211 Cal. App. 3d 277, 259 Cal. Rptr. 325 (1989).

desired objectives and policies. The defensibility of a moratorium from the judicial perspective depends on whether the interim controls were adopted in good faith and for a reasonably short period of time and whether the local government proceeded diligently in completing whatever study or analysis was deemed necessary in adopting permanent regulations.<sup>25</sup> It is also important that there be reasonable and beneficial economic uses possible during the period of the moratorium.<sup>26</sup>

### 3.03 IMPACT ON PROPERTY VALUES

**Growth Phasing.** The impact of a growth phasing program on property values depends, in large part, on how it is structured. For example, if the program attempts to set priorities for areas that will develop first, it can be expected that those areas will increase in property value by comparison with areas that have not received priority designation. If a growth phasing program seeks to phase growth throughout the entire community, whether or not particular parcels increase in value will depend upon their proximity to available public facilities or to facilities that are planned within a specific capital improvements program timeframe.

**Rate of Growth Systems.** Because rate of growth systems are based less upon analysis of public facility availability, but rather reflect locally desired rates of growth, they become growth *control* measures that tend to limit the available supply of land, thereby creating a shortage of buildable land and driving up land prices. When changes to a rate of growth system depend upon a political decision by the governing body, the rate of growth percentage or the numerical allocation system tends to become rigid and, similar to an urban growth boundary, can result in a constraint on supply versus demand, thereby leading to an overall increase in land prices.

**Moratoria.** Because moratoria impose bans on all or specific types of development, they virtually always have the effect of down zoning property. The extent of value diminution would depend on the extent of the moratorium. This diminution of property value raises the issue of a *temporary taking*. The U.S. Supreme Court has ruled that when a regulation is found to have taken property, just compensation must be paid for the period of time which the regulation denied all use, even if the deprivation is temporary.<sup>27</sup> If the moratorium allows at least a limited economically beneficial use of property during the interim when the moratorium is in place, it is unlikely that a court would find that the diminution of value amounts to a temporary taking. Some courts have questioned whether the term “temporary taking” as employed by the U.S. Supreme Court was intended to apply to planning moratoria. These courts have concluded that the Supreme Court was referring to *retrospective* temporary takings, that result from regulations subsequently declared invalid, and not *prospective* temporary regulations such as a moratorium.<sup>28</sup>

### 3.04 IMPACT ON DEVELOPMENT COSTS

If a growth phasing program ensures that capital facilities are available at the time a development is approved, it will likely result in a reduction in the cost of new development compared to comparable development requiring private financing of the same infrastructure. This is the same likely result under an adequate public facilities program or concurrency. Growth phasing may also make the planning of new subdivisions and receipt of approvals to build more predictable because of the linking of infrastructure with development approval. Because rate of growth programs are not necessarily tied to the availability of public facilities, the potential benefits of reduced cost for infrastructure and greater predictability are

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<sup>25</sup> See Rohan, *22 Zoning and Land Use Controls* §22.02 [2] at 22-15n. 17 (Matthew Bender & Company, Inc.: 2001).

<sup>26</sup> See Robert Meltz, Dwight H. Merriam and Richard M. Frank. *The Takings Issue* (Island Press: 1999) Chapter 17 at 278.

<sup>27</sup> *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 42 US 304 (1987).

<sup>28</sup> See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 213 F.3<sup>d</sup> 364 (9<sup>th</sup> Cir. 2000).

not present to the same degree. Because a moratorium effectively halts development, it does not have an immediate effect on development cost. However, if a moratorium continues beyond a short period of time, it can be expected that development costs, assuming normal inflation, would be greater at the point that development is ultimately allowed to go forward.

### 3.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

To the extent that a **growth phasing** program prefers development in one part of a community rather than another based on aesthetic reasons or to protect lands containing wetlands, steep slopes or other constraints to development, such a program will alter the potential amount and patterns of development. Because growth phasing is tied closely to the availability of public facilities, the pattern and amounts of development will follow the priorities and locations set out in the capital improvements program (CIP). Capital facilities such as highways and sewer lines have been termed “the growth shapers”.<sup>29</sup> **Rate-of-growth** systems also alter previous building patterns, although the shape of such patterns is not tied as closely to the availability of public facilities. For example, in Petaluma, the requirement that housing permits be evenly divided between single-family and multifamily units, presumably was in recognition that appropriate sites for these two different kinds of residential units were different. The resulting development patterns would not necessarily be the same as if the market were allowed to determine the location and timing of single family versus multifamily development. Whether a **moratorium** affects the amount and pattern of land development depends upon the results of any planning and regulatory decisions taken during the period of the moratorium. Because a moratorium typically results in decisions to downzone certain areas, or to change the priority of growth areas, the ultimate effect of the moratorium will be to change the amount and patterns of land development.

### 3.06 IMPACT ON HOUSING AFFORDABILITY

To the extent that **growth phasing** programs and **rate of growth** systems drive up land prices, they also raise housing costs and negatively impact housing affordability. However, because these kinds of growth timing programs can be coupled with policies giving preference to affordable housing projects, such programs need not necessarily have a negative effect on the cost of housing. Nevertheless, in the case of the Petaluma Plan the effect of the plan has been to significantly reduce the availability of affordable housing.<sup>30</sup> Also, it is generally acknowledged that permit allocation systems have a potentially exclusionary effect because such systems tend to encourage developers to build large, expensive houses in order to generate greater profits.<sup>31</sup> If a **moratorium** exempts development proposals for residential housing, then, assuming no change in other factors affecting the affordability of housing, the moratorium, would not impact housing affordability because it would not change land supply. If, however, one of the purposes of the moratorium is to halt residential development, then the resulting constraint on land supply would increase land prices and correspondingly increase housing prices.

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<sup>29</sup> Urban Systems Research & Engineering, Inc., *The Growth Shapers; The Land Use Impacts of Infrastructure Investments* (Council on Environmental Quality, Washington, 1976).

<sup>30</sup> See Rohan, *Zoning and Land Use Controls* §4.04 [1] at 4-45. 17 (Matthew Bender & Company, Inc.: 2001).

<sup>31</sup> Arthur C. Nelson and James B. Duncan, *Growth Management Principles & Practices* (Planners Press: 1995) at 106.

### 3.07 SUMMARY OF PROS AND CONS

#### PROS:

- A *growth phasing* program enables the timing of development with the availability of capital facilities.
- A *growth phasing* program allows a community to tie capital facilities to areas of a community considered most suitable for development.
- A *rate-of-growth* system enables a community to decide upon its locally desired rate-of-growth.
- A *moratorium* gives a community time to do proper planning and obtain public participation in deciding upon policies and regulations to manage future growth.

#### CONS:

- A *growth phasing* program can result in increased land prices and can have an exclusionary effect.
- A *rate-of-growth* system can result in increased land prices and have the effect of excluding less wealthy residents from the community.
- *Rate-of-growth* controls adopted by individual communities can induce sprawl by causing “leap frog” development and increasing growth pressures on surrounding communities that have not enacted rate-of-growth controls.
- A *moratorium* typically results in the downzoning of property and can, in certain instances, result in a temporary taking of property.

### 3.08 INCENTIVE-BASED ALTERNATIVES.

As an alternative to growth phasing programs, a **special assessment district (SAD)** that allows landowners within a district to decide how infrastructure needed for development is to be financed and constructed, has attributes that are less regulatory in nature and allow for cooperative efforts for mutual benefit. Special assessment districts are discussed in more detail in Section 6. To the extent that a community has identified certain land with characteristics such as wetlands or other constraints on development, it can adopt **transferable development rights (TDR)** as a market-based incentive program for owners to “retire” any development rights they may have in those lands and, in exchange for compensation, transfer those rights to lands more desirable for development. The TDR concept is discussed more fully in Section 8.

## PART II: PUBLIC FACILITIES AND INFRASTRUCTURE

### SECTION 4: ADEQUATE PUBLIC FACILITIES (APF) AND CONCURRENCY

#### 4.01 PURPOSE AND KEY TERMS

**Adequate Public Facilities (APF)** systems, also known as **concurrency management** systems, tie or condition development approvals to the availability and adequacy of public facilities. Public facilities typically made subject to APF requirements based on adopted **level of service (LOS)** standards are those relating to roads, sewer systems, schools, water supply and distribution systems, and fire protection.<sup>32</sup>

The reason a local government adopts an APF ordinance is to ensure that before new development occurs its public facilities will have sufficient available capacity to serve the development at a predetermined acceptable level of service.<sup>33</sup> This technique is intended to guarantee that public facilities are either in place already or that they will be provided as impacts occur from new development. In that way, a county or municipality can be assured that new development will not place excessive additional loads on existing infrastructure until necessary capacity has been added to that infrastructure.<sup>34</sup> Unlike impact fees and in-kind exaction requirements, APF programs do not require that developers pay for public improvements, but only that such improvements be made before or when development occurs. As a practical matter, though, in those instances where public funds are not available, growth may occur only if the developer pays for needed public facility improvements.<sup>35</sup>

APF is related to, but different from, **growth phasing** and **rate-of-growth** programs. All three techniques attempt to balance the timing and amount of development with the ability or willingness of a community to accommodate it. Growth phasing systems limit the total amount of new development that can be approved over the course of a year or other definite period of time, in an attempt to address some of the shortcomings of performance-based APF systems. Rate-of-growth systems have annual development caps similar to growth phasing systems, but are less closely linked to public facility constraints, and instead are typically adopted based on locally desired rates of growth rather than on an analysis of facility availability.<sup>36</sup> Growth phasing and rate-of-growth programs are discussed in Section 3.

APF requirements include two main components: (1) an identification of the types of public facilities and related levels of service that are needed to permit new developments; and, (2) a clear policy about when the public facilities must be in place relative to the impact of development.<sup>37</sup> Implementation of these requirements requires an ordinance and a map that together spell out the required existing or planned

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<sup>32</sup> Michael Davidson and Faye Dolnick, eds., *A Glossary of Zoning, Development, and Planning Terms*, Planning Advisory Service Report Nos. 491/492 at 28 (American Planning Association 1999).

<sup>33</sup> American Planning Association, *Local Land Development Regulation*, Draft of Chapter 8 in *Growing Smart™ Legislative Guidebook* (APA, March 2, 2000) at page 8-157.

<sup>34</sup> National Association of Industrial and Office Properties National Growth Management Task Force, *Growing to Greatness: A Growth Management Manual* (NAIOP, 2000) at 25.

<sup>35</sup> Colorado Department of Local Affairs, *Colorado Growth Management Toolbox: Appendix to Smart Growth and Development Summit White Paper* (Prepared by Clarion Associates, January 1995) (<http://www.dlg.oem2.state.co.us/fs/toolpref.htm>).

<sup>36</sup> James Duncan and Associates and Eric Damian Kelly, *Adequate Public Facilities Study: An Analysis of APF/Growth Management Systems*, Prepared for the Montgomery County Planning Department and the Maryland-National Park and Planning Commission (November 1991).

<sup>37</sup> Oregon Transportation and Growth Management Program, “Adequate Public Facilities Requirements,” Chapter in *TGM Tools of the Trade* (ODOT/DLCD Transportation and Growth Management Program, 1995) (<http://www.lcd.state.or.us/issues/tgmweb/pub/tools.html>).

levels of service; coordination among planning agencies and service providers; a system designed to measure and monitor the levels of public services; and a permit process.<sup>38</sup>

#### 4.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

To date, those communities that have applied APF or concurrency are mostly located in Florida, Maryland, California and Washington; a few communities in Colorado are investigating the use of the technique.<sup>39</sup> Concurrency management has had the longest tenure in Florida. In January 1999, the Florida Transportation and Land Use Study Committee issued a report in which it identified “major shortcomings” with that state's implementation of this technique because of its focus on transportation capacity. These shortcomings include:

- The methods used to establish and measure levels of service are focused on automobile mobility, to the exclusion of other modes of travel;
- When development cannot occur due to roadway deficiencies, property owners who cannot develop may seek reductions in their tax assessments. As a consequence, the community's property tax base may be compromised;
- The system can cause uncertainty for local governments in those cases where developers and their financiers become reluctant to undertake projects that would benefit the community but might not enable the community to meet its stated transportation requirements; and
- Transportation concurrency must be based on realistic and financially feasible capital improvement programs, but in some cases these programs do not maintain their feasibility over time.<sup>40</sup>

The Florida report does not draw express conclusions about the effectiveness of the concurrency program because its investigation was largely based on anecdotal evidence. Rather, it makes specific recommendations to the legislature for amendments to the state concurrency program statutes and rules.

In 1991, the Montgomery County (Maryland) Planning Department and the Maryland-National Park and Planning Commission studied the effectiveness of the Montgomery County APF system in comparison to other APF systems around the country. After studying seven of these systems, located in Colorado, California and Florida, the study concluded that the concurrency management system in Broward County, Florida, is the best example of a "pure" APF approach. The Broward County concurrency management system is virtually self-administering, and focuses exclusively on traffic. It uses the system to maintain all roadway links in an arterial system at a uniform level of service, county wide. The study observed that, despite the fact that Broward County's concurrency provisions were fairly new in 1991, the traffic model that formed the basis of this system had been in place for twelve years. The study concluded that during that time period, many of the problems with the system had been worked out and it had become accepted by the development community.<sup>41</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> *Colorado Growth Management Toolbox.*

<sup>40</sup> Florida Transportation and Land Use Study Committee, “Get Concurrency Right,” Chapter 2 in *Final Report of the Florida Transportation and Land Use Study Committee* (Tallahassee, Florida: January 15, 1999) ([http://www.dot.state.fl.us/planning/land\\_use/final.htm](http://www.dot.state.fl.us/planning/land_use/final.htm)). See also Ivonne Audirac, William O’Dell and Ann Shermeyen, *Concurrency Management Systems in Florida, BEBR Monographs*, Issue No. 7 (Gainesville, Florida: University of Florida, Bureau of Economic and Business Research, March 1992).

<sup>41</sup> *Adequate Public Facilities Study* at 9.

#### **4.03 IMPACT ON PROPERTY VALUES**

Since it controls the pace and location of development based on the availability of public facilities, APF regulations could have the effect of increasing property values in those areas where facilities are in place or designed to be in place in the near future.<sup>42</sup> Conversely, one would expect property values to decline with the adoption of an APF system, all else being equal, in those areas where no facilities are scheduled to be provided in the near future.

#### **4.04 IMPACT ON DEVELOPMENT COSTS**

APF would not be likely to impact "hard" development costs such as material and labor, except to the extent that a developer provides the facilities required under the APF system as a way to accelerate its ability to develop its property. However, because it delays development in areas lacking the necessary public facilities, APF would be expected to have a negative impact on "soft" development costs, specifically carrying costs in those areas. APF systems tend to be complex and involve additional permitting. Complexity and additional permitting programs will raise the cost of compliance for developers.

#### **4.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

Because the purpose of APF is to affect the amount and location of land available for development based on the availability of the necessary infrastructure, it directly impacts the amount and patterns of development. APF can also affect the allowable density of development.

#### **4.06 IMPACT ON HOUSING AFFORDABILITY**

Depending on how such a system is implemented, housing costs may be affected by development delays resulting from the APF system. If infrastructure development does not allow housing development to keep pace with demand, housing prices may be driven higher by supply shortages—scarcity of buildable sites. Furthermore, direct costs of the APF system on developers and builders either will be passed on to homebuyers, thereby raising housing costs, or absorbed by builders and developers as lower profits, potentially leading to a scarcity of housing supply. For example, if a builder has to wait for several months or years more than it had anticipated in order to construct its development, its carrying costs would be greater and, depending on the market, these costs may help to drive up new house prices. Alternatively, if APF compliance reduces anticipated profits to less than an acceptable minimum, builders will not build and the result will be lessened supply and growing scarcity. Scarcity will tend to result in increases in prices making housing less affordable.

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<sup>42</sup> See A. C. Nelson, J. E. Frank and J. C. Nicholas, "Positive Insulence of Impact-Fees in Urban Planning and Development," *Journal of Urban Planning and Development*, Vol. 118, No. 2 (1993) the authors found just such a price elevation.

#### 4.07 SUMMARY OF PROS AND CONS

##### PROS:

- An APF ordinance allows control over the timing of development and clarifies the local government's role in providing public infrastructure.<sup>43</sup>
- An APF ordinance can help direct growth to suitable areas where there is a capacity for growth and thereby contribute to the fiscal stability of the government as well as support the revitalization of urban areas where existing facilities have the ability to absorb growth.<sup>44</sup>
- APF policy can act to prevent leapfrog development patterns and the concomitant costs of infrastructure extensions in this type of pattern.<sup>45</sup>

##### CONS:

- APF can be used as a no-growth measure when “acceptable” levels of adequacy are set above current levels, which works to automatically put a brake on future development until the condition is improved.<sup>46</sup>
- APF works best with a volume of development that far exceeds the ability of the local government to keep up with the demand for public facilities; otherwise the complexity and administrative costs of enacting and maintaining such a program are not justifiable.<sup>47</sup>
- An APF system creates a certain amount of bias in favor of larger projects that are more able to marshal resources and control development timing.<sup>48</sup>

#### 4.08 INCENTIVE-BASED ALTERNATIVES

There are alternatives to an APF system that will allow development to proceed in accordance with market conditions, while addressing the government’s concern that necessary facilities are available for that development. These alternatives are “market based” to the extent that they provide the ability for the developer to determine whether the market warrants private investment in the necessary infrastructure or whether it is preferable to wait for public investment to occur.

For example, if state law enables local government to allow private sector control over infrastructure development, a **Special Assessment District (SAD)** may be a viable alternative to APF. Special Assessment Districts are discussed in Section 6. In a Special Assessment District the landowners within the district decide how infrastructure needed for development is to be financed and constructed.

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<sup>43</sup> American Planning Association at 8-157.

<sup>44</sup> Maryland Office of Planning, *Managing Maryland’s Growth: Models and Guidelines -- Adequate Public Facilities* (1996).

<sup>45</sup> *Colorado Growth Management Toolbox*.

<sup>46</sup> American Planning Association at page 8-157, citing Porter, Douglas R., *Managing Growth in America’s Communities* (Washington, D.C.: Island Press, 1997) at 130.

<sup>47</sup> Maryland Office of Planning.

<sup>48</sup> *Colorado Growth Management Toolbox*.

Another alternative is for the local government to allow developers to actually construct the needed infrastructure in those cases where the government has not scheduled the public facility improvements needed for development to proceed, and to recover the expenditures that are made in excess of their proportionate share, through a reimbursement or “recapture” agreement with other property owners whose subsequent developments will benefit from the improvements. This is a practical approach only where the return on the investment in the infrastructure makes financial sense for the developer.

## SECTION 5: IMPACT FEES

### 5.01 PURPOSE AND KEY TERMS

A **development impact fee** is a form of **exaction** that is assessed by local government upon new development in order to cover the capital cost of primarily off-site infrastructure (capital facilities) necessary to serve the new development. Simply put, "exactions" or "developer exactions" are conditions to development approval. Exactions may take the form of mandatory dedications of land for roads, schools, or parks as a condition to plat approval, fees in lieu of mandatory dedication, water or sewer connection fees, and development impact fees.

Impact fees were conceived as a mechanism to offset the cost of growth resulting from the need for large-scale public improvements located off-site of new developments. These fees were also intended to address the developer's need for more predictable development costs as compared to negotiated developer contributions. An impact fee is a type of exaction that is:

1. in the form of a predetermined money payment;
2. imposed as a condition to building permit issuance;
3. pursuant to local government powers to regulate new growth and development and provide for adequate public facilities and services;
4. levied to fund large-scale, off-site public facilities and services necessary to serve new development;
5. in an amount that bears some reasonable proportion to the need for the public facilities generated by new development.<sup>49</sup>

In other words, impact fees are designed to require that each development pay its proportionate share of the cost of providing off-site public services and facilities generated by new development. The purpose of an impact fee is to have those persons who benefit from specific new developments pay their proportionate share of the costs associated with those developments.<sup>50</sup>

The rationale for impact fees is that the proponent of new development should incur the cost of capital improvements needed to serve the new development, rather than having the cost paid by the public at large through taxes, or assumed by the users of the service through user fees. Impact fees may only be used to pay for the provision of new facilities and the expansion of existing facilities that are made necessary by the development project. These may include roads, schools, parks and recreation facilities, sewer (storm and sanitary) and water utilities, solid waste, fire/EMS, police and library services. Some impact fee systems allow local government to recoup a portion of the capital costs of previously built systems having excess capacity that will be devoted to the new development.<sup>51</sup> But impact fees may not be used to pay for the maintenance of existing facilities or to cover operating expenses.<sup>52</sup> A properly designed impact fee system fairly accounts for the infrastructure costs incurred by the local government to serve a new development, and shifts all or a proportionate amount of those costs to that new development. Payment of impact fees may be required at the time of development approval, at the building permit stage

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<sup>49</sup> Blaesser and Kentopp, "Impact Fees: The Second Generation," 38 *Journal of Urban and Contemporary Law* 401 (1990).

<sup>50</sup> Bauman, Gus and William H. Ethier, "Development Exactions and Impact Fees: A Survey of American Practices," 50 *Law and Contemporary Problems* 51, 62 (1987).

<sup>51</sup> Nelson, Arthur C. and James B. Duncan, *Growth Management Principles & Practices* (APA, 1995) at 123.

<sup>52</sup> American Planning Association, "Local Land Development Regulation," Draft of Chapter 8 in *Growing Smart™ Legislative Guidebook* (APA: March 2, 2000) at 8-132.

or upon issuance of the certificate of occupancy. The timing of the required payment can have a significant impact on the financial feasibility of a development.

As a result of the U.S. Supreme Court's decisions in the *Nollan* and the *Dolan* cases,<sup>53</sup> there has developed a constitutional test for exactions frequently referred to as the *Dual Nexus Test*. But litigation over impact fees generated its own constitutional test long before these two cases shaped American land use and takings jurisprudence. Much of the impact fee litigation was in the state of Florida, and resulted in what is called the *Dual Rational Nexus Test*. There are two prongs to this test. The first prong requires that there be an identified "nexus" (connection) between the new development and the need for the improvements for which a fee is imposed. In order to satisfy the first prong, the nexus must be substantial, rationally linked and direct between the new development and the identified need for the improvements. The second prong requires that the development that has been assessed the cost (fee) must receive a substantial benefit from the improvements constructed with a fee. This is the constitutional test followed in the majority of the states in which impact fees are legally authorized. The Supreme Court's decision in the *Nollan* case reinforced the use of the Dual Rational Nexus Test by state courts in assessing the validity of impact fee programs.

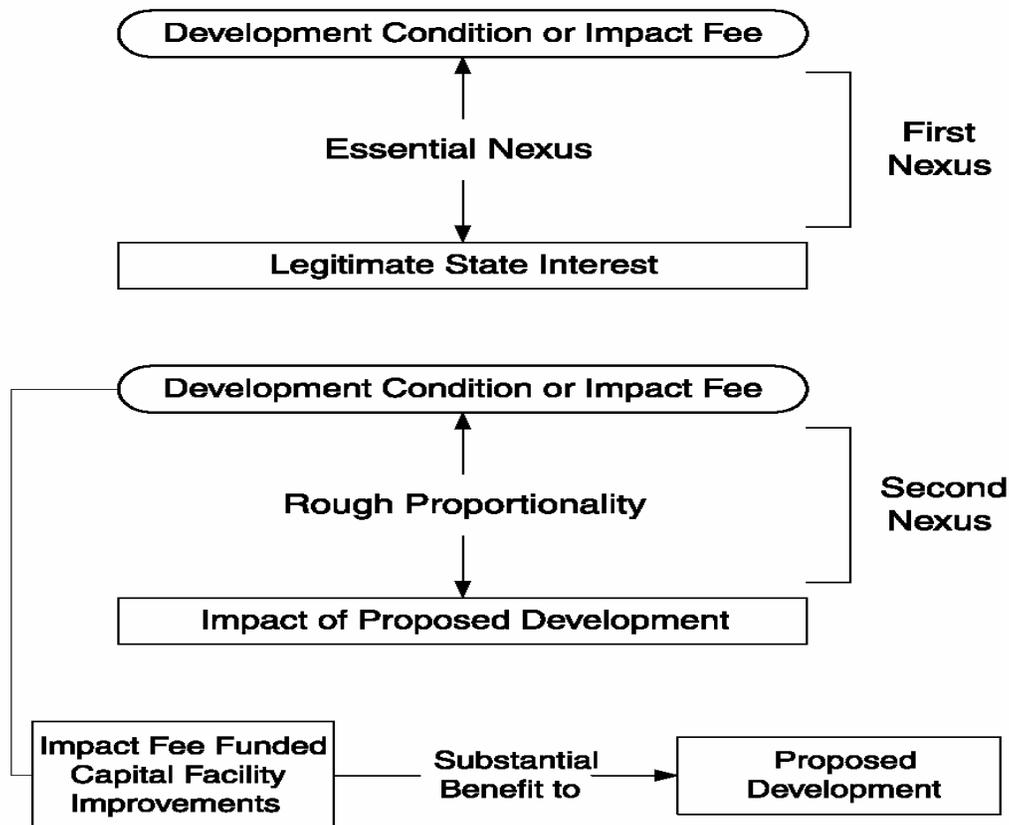
As illustrated in the diagram on the following page, the Supreme Court said in *Nollan* that a development condition or impact fee must have an essential nexus to some legitimate governmental purpose in order to satisfy the first prong or first nexus. If that stated purpose is not really a legitimate objective based on a court's review of the objective as stated, then the Supreme Court has said that lack of a substantial relationship between the exaction and a legitimate state interest may constitute a taking of property.

The second prong, or the second nexus, as illustrated in the diagram, is that there must be a "rough proportionality" between the exaction or impact fee and the impact of, or need created by, the proposed development. As that second prong was articulated in the Supreme Court's decision in the *Dolan* case, it means that local government, not the developer, has the burden of substantiating the purpose and the amount of the impact fee. The connection between development impact and fee amount need not be mathematically precise. But a court must be able to determine whether there is a methodology and if that methodology supports the condition imposed upon the development. (*See Diagram*)

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<sup>53</sup> *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, (1994).

## The *Nollan/Dolan* Dual Nexus Test



As indicated at the bottom of the diagram, the capital facility improvements funded with the impact fee must substantially benefit the proposed development. This concept has always been embedded in modern impact fee systems and is consistent with the impact fee case law as it developed at the state level before *Nollan* now called the rough proportionality test. In other words, it is not enough to demonstrate some connection between a fee and the kind of need that this development is creating. It is also necessary to show that the fee payer, the developer, will receive the benefit of that improvement. The discipline of making sure that the feepayer actually receives the benefit of the fee is critically important in an impact fee program. This is typically done by establishing zones and requiring that fees paid for development within a zone are spent for improvements in the same zone.

### 5.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

As applied in some jurisdictions, impact fees have been seen as a “pro-growth tool because of their ability to defuse rising no-growth sentiments, ensure facility adequacy, and facilitate development approval.”<sup>54</sup> Impact fees can add speed and predictability to the development process, are more equitable than a negotiated exaction or “proffer” process, and are considered likely to generate more revenue.<sup>55</sup> Impact fees are seen as more equitable than other means of financing infrastructure improvements, because they

<sup>54</sup> Nelson and Duncan at 123.

<sup>55</sup> *Id.*

impose the financial burden of a particular development on those who benefit from it the most. Impact fees are also considered to be politically more acceptable in many jurisdictions.<sup>56</sup> An impact fee system only works to internalize the costs of development if the impact fee is less than or roughly equal to the public expense it is supposed to cover. If an impact fee is set too high, it is not a tool to recover costs, but can be an instrument to exclude development.<sup>57</sup>

Historically, impact fee and other types of exactions have been prevalent in high growth states like California and Florida that are burdened with highly restricted tax systems. However they are increasingly being applied in other growth areas of the country. In part, this is because they are perceived to be more politically acceptable than other potential revenue sources.

### **5.03 IMPACT ON PROPERTY VALUES**

The effect impact fees have on property values will depend on the nature and extent of the local impact fee system and the particular nature of the local market for land. In general, the imposition of impact fees may decrease the price a developer would otherwise be willing to pay for raw land in an area subject to the impact fee, because the impact fee will increase the cost of development. This would have the effect of shifting the impact fee back to the landowner. Conversely, imposing impact fees in some areas may make land in other areas not subject to the fee more attractive for development and hence more valuable. This would have the effect of creating land scarcity in the impact fee area until prices rose in those areas to restore relative price and cost equilibrium between impact fee and non-impact fee areas.

### **5.04 IMPACT ON DEVELOPMENT COSTS**

Various studies have examined the effect of impact fees on development and other costs in Illinois,<sup>58</sup> California,<sup>59</sup> and Texas.<sup>60</sup> These studies conclude that impact fees increase the cost of housing, primarily because they result in higher development costs. Developers, in turn, attempt to pass the higher costs along to the ultimate homebuyer. Based on these studies, one should expect land development costs to rise in those jurisdictions in which impact fees are imposed, even where they are imposed fairly and consistently.

Another relevant factor is who ultimately bears the increase in development costs. In jurisdictions that are growing and are desirable places to live, any increase in development costs can be more easily passed on to consumers. Growth and desirability will tend to introduce a degree of inelasticity in the demand for housing, especially new construction, and this inelasticity allows costs to be shifted forward to consumers. If the impact fees are imposed in distressed, non-growing or less desirable areas, however, there is greater risk that builders and developer will not be able to recover their increased costs and will have to absorb the fees.<sup>61</sup> The lack of growth and desirability introduce a degree of elasticity to demand with the result that price increases are difficult, if not impossible, to impose. In these situations builders and developers will have to absorb any fees as lower profits.

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<sup>56</sup> National Association of Industrial and Office Properties National Growth Management Task Force, *Growing to Greatness: A Growth Management Manual* at 111 (NAIOP, 2000).

<sup>57</sup> American Planning Association at 8-132 to 8-133.

<sup>58</sup> Baden, Bret M., Don L. Coursey, and Jeannine M. Kannegiesser, *Effects of Impact Fees on the Suburban Chicago Housing Market*, Heartland Institute Policy Study No. 93 (November 19, 1999).

<sup>59</sup> Dresch, Maria and Steven M. Sheffrin, *Who Pays for Development Fees and Exactions?* (Public Policy Institute of America, 1997).

<sup>60</sup> Dotzour, Mark, *Fiscal Impact Studies: Does Growth Pay For Itself?* on the National Association of Home Builders webpage: ([http://www.nahb.net/growth\\_issues/fiscal\\_impact/growth\\_pays.html](http://www.nahb.net/growth_issues/fiscal_impact/growth_pays.html)).

<sup>61</sup> Dresch at 75.

To the extent that an impact fee system results in a more predictable and fairer system for imposing infrastructure capital costs and securing development approvals, costs associated with development uncertainty may be reduced as compared with alternatives that operate on a project-by-project basis such as proffers or ad hoc exactions. Additionally, a “one stop” impact fee system can greatly reduce the time involved with permitting as well as compliance costs. If the alternative is additional reliance on regulatory APF programs, impact fees will tend to have less effect on costs and prices. If the alternative is broad based taxation, impact fees will have greater effects on costs and prices.

### **5.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

Because impact fees increase development costs, they would be expected to have an effect on where and how land is developed. For example, other things being equal, if impact fees are imposed in one jurisdiction but not in a neighboring jurisdiction, one would expect the jurisdiction without the fees to experience more development. If higher impact fees are imposed in one jurisdiction than in another, all else being equal, developers will tend to favor the jurisdiction with the lower fees. Of course, all else is not always equal, and if the jurisdiction without impact fees instead imposes other less predictable forms of exactions, or compensates for a lack of sufficient infrastructure by denying or scaling back development proposals, a developer may view the impact fee as the “lesser evil.”

### **5.06 IMPACT ON HOUSING AFFORDABILITY**

To the extent that the imposing impact fees serves to increase the market price for new construction, prices may also rise for existing development or for new development in areas not subject to the impact fee.<sup>62</sup> Market prices for new and existing homes are a result of competition between the two. When the cost of new construction rises, existing homes become increasingly preferred. As demand shifts away from new to existing homes, the prices of existing homes will be bid up until relative equilibrium is re-established.

Results of an empirical study in Illinois show that impact fees increase the price of new and existing homes.<sup>63</sup> Thus, they have a direct negative effect on housing affordability. At an extreme, impact fees could be set so high that more affordable housing development becomes unprofitable (and thus not built), while more expensive housing developments could still be profitable.<sup>64</sup>

### **5.07 SUMMARY OF PROS AND CONS**

There are a number of advantages to well-devised impact fee programs and a number of disadvantages, particularly, to those that are not well founded.

#### **PROS:**

- Impact fees help communities pay for the infrastructure required to support new development projects, without forcing elected officials to levy new taxes on the public as a whole;
- Impact fees create a situation where new development arguably “pays its own way”;
- A well-devised impact fee system can add speed and predictability to the development process, as compared to negotiated exactions;<sup>65</sup>

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<sup>62</sup> National Association of Industrial and Office Properties National Growth Management Task Force, *Growing to Greatness: A Growth Management Manual* at 39 (NAIOP, 2000).

<sup>63</sup> Baden at 46.

<sup>64</sup> American Planning Association at 8-133.

<sup>65</sup> Nelson and Duncan, at 123.

- Properly created and applied, impact fee systems can attribute specific costs to specific developments in a rational and predictable manner.

CONS:

- An impact fee requirement increases the costs of new development, especially for residential projects and consequently may reduce the number of projects that are economically feasible.
- The increased costs resulting from such impact fees may make it harder for low-and-moderate income households to afford to purchase residential units in new developments. Impact fees can also result in higher prices for existing homes, thus making all homes less affordable.
- Impact fees may be favored by local officials and residents who see them as a mechanism for keeping their own taxes low by passing on government expenses to new residents who do not yet have a voice in the community;<sup>66</sup>
- Impact fees can result in double taxation for buyers of new houses. In many cases, those who are forced to pay impact fees to secure their building permits pay not only for their new public facilities, but also for facilities serving existing residences and businesses. The reason is that, in addition to incurring impact fees as a cost of their new housing, these residents also pay regular taxes at sufficient levels to pay for the same or other facilities used by existing residents that are financed through general revenues.<sup>67</sup>
- Impact fees are an unstable source of funding since they depend directly on new housing starts.

## 5.08 INCENTIVE-BASED ALTERNATIVES

Impact fees themselves can be used to create incentives to encourage development to locate in areas with facilities that are less costly to serve. For example, San Diego is a jurisdiction that encourages growth through the use of lower impact fees in areas already well-served with public facilities, and discourages growth through the use of higher impact fees in areas lacking infrastructure.<sup>68</sup>

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<sup>66</sup> *Id.* at 8-133.

<sup>67</sup> South Carolina Policy Council, *Assessment of Impact Fees as Means of Financing Government Infrastructure* (1997).

<sup>68</sup> Nelson and Duncan at 123.

## SECTION 6: SPECIAL ASSESSMENT DISTRICTS (SADS)

### 6.01 PURPOSE AND KEY TERMS

A **Special Assessment District (SAD)** is a sub-area of a community designated by ordinance to assess a tax for the construction or installation of public facilities that directly benefit the property owners within that district.<sup>69</sup> Also known in various states as **Local Improvement Districts**, **Special Benefit Districts**, or **Benefit Assessment Districts**, SADs are a means of paying for improvements over a period of time through proportionate assessments on benefiting properties.<sup>70</sup>

A “special assessment” is a dedicated tax on real property used to defray all or part of the cost of a public improvement. The assessment is apportioned according to the estimated benefit that will accrue to each property. This apportionment based on the projected benefit to the individual property is the distinctive feature of a special assessment. This feature distinguishes SADs from property (or “ad valorem”) taxes levied for the purpose of collecting general revenues that permit the local government to fund a variety of programs and projects throughout the locality.<sup>71</sup>

An SAD is distinguishable from a Special District. A Special District is a limited-purpose unit of local government created to carry out a specific function, such as the provision of sewer or storm drainage facilities.<sup>72</sup> A special district is accorded full power to provide the service for which it is created and, as such, is authorized to tax, issue bonds, and to enter into contracts for service. A SAD, on the other hand, is generally not independent of the government that creates it. It is a designation for a cluster of properties that are subject to a special assessment for the purpose providing a specific benefit.<sup>73</sup>

Despite those differences between an SAD and a special district, the two are similar in effect. They are discussed in this section interchangeably for purposes of evaluating their effectiveness at financing public improvements, since both of these mechanisms provide local governments with a means of separately financing improvements within a limited geographic area. In fact, a 1992 Urban Land Institute (ULI) report on Special Districts noted that independent districts like SADs, “are increasingly important for the provision of infrastructure.”<sup>74</sup>

Finally, an SAD or a Special District, in this context, should not be confused with a “Special Zoning District” which is a name given to districts created by municipalities under the zoning powers to implement flexible site-specific development regulations. These types of regulatory districts are

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<sup>69</sup> See definition of “Special Benefit District” in Michael Davidson and Faye Dolnick, eds., *A Glossary of Zoning, Development, and Planning Terms*, Planning Advisory Service Report Nos. 491/492 at 213 (American Planning Association 1999).

<sup>70</sup> Municipal Research and Services Center of Washington, “What is a Local Improvement District?,” Chapter in *Local Improvement District Procedural Outline* (<http://www.mrsc.org/pubworks/lidoutl.htm#whatlid>). The Trust for Public Land has established on its website a “Matrix of Local Finance Tools” that does a good job of explaining the full variety of these types of financing mechanisms, albeit in the context of establishing parks. ([http://www.tpl.org/tier3\\_cdl.cfm?content\\_item\\_id=1071&folder\\_id=825](http://www.tpl.org/tier3_cdl.cfm?content_item_id=1071&folder_id=825)).

<sup>71</sup> National Association of Home Builders, “Stage III: Assess Financial Resources,” an excerpt from *Building Together: Investing In Community Infrastructure*, produced jointly by the National Association of Home Builders, the National Association of Counties, The Urban Land Institute, the Lincoln Institute of Land Policy and the Government Finance Officers Association. ([http://www.nahb.net/growth\\_issues/fiscal\\_impact/growth\\_stage\\_III.html](http://www.nahb.net/growth_issues/fiscal_impact/growth_stage_III.html)).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Douglas Porter, et al., *Special Districts: A Useful Technique for Financing Infrastructure*, at v. (Urban Land Institute, 1996).

variously referred to as “Special Design District,” “Special Area Protection District”, “Special Purpose Development Districts”, “Special Development Review District”, and “Special Mixed Use District.”<sup>75</sup>

## **6.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)**

The principle behind an SAD is straightforward: If a segment of the community desires to have infrastructure beyond that provided by the local government, it should foot the bill. For example, an SAD may be created to provide a centralized water system to replace individual wells. These districts allow local control over spending because the money can only be used for specific projects, so they are generally well-suited to meet their designed purpose. They also are an available source of revenue for tax constrained areas, such as California, after Proposition 13, where communities may be unable to provide basic infrastructure improvements out of general tax revenues.

SADs and Special Districts are enabled in at least 24 states,<sup>76</sup> and go by various names, such as Municipal Utility District (Texas) and Mello-Roos District (California). The ULI reports that according to the 1987 Census of Governments, 29,427 independent special districts were active in the United States, representing over one-third of all local government entities providing public services. The ULI also noted that no census was taken of dependent Special Districts, which, it concluded, must number in the tens of thousands and also provide important services.<sup>77</sup>

Although SADs vary in their details, they have several principles in common:

- The use of a Special Assessment enables a group of property owners to pay for a public facility that specially benefits them. Since individuals will not necessarily agree on the value of the project, the process for establishing a district also includes a process for considering objections to its establishment from among those to be charged.
- The assessed cost is distributed among many property owners according to the proportionate benefits to each owner’s land.
- Standards for the public facilities are established by the governmental unit responsible for their future operation and maintenance. Each project is usually part of a larger system that must be functionally adequate for the entire community.
- The facility is built in accordance with a final, permanent standard. Property owners are not easily persuaded that a new special benefit is received from reconstruction of a project that is already in place.
- A developer may be granted the privilege of special assessment financing for facilities that the developer would otherwise pay for directly. Using the lower interest rate on municipal borrowing reduces the developer’s cost. Some units of government either do not allow, or place limits, on this use of special assessment.

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<sup>75</sup> See, e.g., Edward H. Ziegler, Jr., “Shaping Megalopolis: The Transformation of Euclidean Zoning By Special Zoning Districts and Site-Specific Development Review Techniques,” Chapter 3 in Kenneth H. Young, Ed., *1993 Zoning and Planning Law Handbook* (Clark Boardman Callaghan, 1993).

<sup>76</sup> “Figure 16: District Powers in Selected States and Districts,” in Porter at 19.

<sup>77</sup> Porter at 1.

- State enabling legislation typically establishes when, where, how and by whom an SAD can be formed and administered. Generally, the establishment of an SAD is subject to a vote of affected property owners.<sup>78</sup>

The procedures under which an SAD is established are usually very detailed and must be followed carefully in order for the district to survive challenge. The *Florida Special District Handbook*, published by the Florida Department of Community Affairs describes the process for establishing a special district in Florida.<sup>79</sup>

In 1981, Burlington, Vermont created a redevelopment district to bolster its downtown, the Church Street Marketplace. Administered by a city agency and funded by a special assessment based on a combination of frontage on Church Street and overall building square footage, the district is considered a success. During its first five years, the assessment basis was considered equitable, but as adjacent areas of downtown rebounded, equity issues surfaced. For example, property on streets perpendicular to Church Street paid no fees, but arguably benefited from spill over success. These and other issues caused the city to periodically reexamine the boundaries and management of the SAD.<sup>80</sup>

A report by the Planning and Conservation League of California credited benefit assessment districts in that state with enhancing that State's quality of life by providing residents with necessary police, fire, public transportation, roads, flood control, sewer lines, libraries, parks, open space, and economic development efforts. The use of this technique generated \$304 million in revenue in 1992-93, up from \$28 million only 15 years earlier.<sup>81</sup>

### **6.03 IMPACT ON PROPERTY VALUES**

If the SAD assessment truly reflects the benefit accruing to the property from the infrastructure provided, one would expect there to be little positive or negative impact on property values from the creation and implementation of a SAD. To the extent that the use of a SAD makes it possible to develop property that it would not otherwise be feasible to develop to the same extent, the SAD may increase property values within the district, all else being equal. Shifting costs to new development will tend to decrease property values, but making infrastructure available will tend to increase property values.

### **6.04 IMPACT ON DEVELOPMENT COSTS**

SADs should have no direct impact on development costs, except to the extent that they make possible the provision of necessary infrastructure as a shared expense (i.e., shifted to future owners) that would otherwise have to be brought to the site at the developer's cost.

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<sup>78</sup> Bureau of Governmental Research and Service, School of Community Service and Public Affairs, University of Oregon, *Financing Local Improvements by Special Assessment*, BGRS No. 82-1 at 4 (January 1982).

<sup>79</sup> Available at <http://www.dca.state.fl.us/fhcd/programs/sdip/Handbook/handbook.pdf>. To see how California's Proposition 218 affects assessment district procedures see "Special Assessments," Chapter 3 in *A Planners Guide to Financing Public Improvements* (California Governors Office of Planning and Research, June 1997) (<http://ceres.ca.gov/planning/financing>).

<sup>80</sup> "Church Street Marketplace, Burlington, Vermont," Urban Land Institute Development Case Study No. C016013 (1986).

<sup>81</sup> <http://www.pcl.org/store/benereport.html>.

## 6.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

SADs can make it possible to provide infrastructure and services to areas that might not otherwise receive public investment, thereby potentially opening up new areas to growth or allowing faster growth in developing areas.

## 6.06 IMPACT ON HOUSING AFFORDABILITY

The amount of the special assessment will be assumed by homeowners in the district as an increased cost of housing. The effect on housing prices is more difficult to predict. Depending on market factors, the effect of this additional assessment, all else being equal, may be to reduce housing demand and consequently prevent higher housing prices in the affected area. However, in places where SADs are not common, consumers are frequently unaware of the existence of any obligation to pay SAD charges, despite disclosure requirements, and do not show market resistance to such districts. In places where SADs are common, consumers are aware of the districts, and their costs are factored into the prices consumers are willing to pay. This market resistance tends to capitalize future SAD charges as lower prices, which will tend to be borne by builders and developers.

## 6.07 SUMMARY OF PROS AND CONS

### PROS:

- SADs can provide important services in areas where local governments have limited financial and/or administrative capabilities.<sup>82</sup>
- The creation of SADs offers the government an opportunity to avoid increases in property taxes, thereby avoiding public controversy<sup>83</sup> or legal constraints on the ability to raise tax levies.
- Because of their narrow focus, SADs allow greater control over spending for specific infrastructure projects than general fund revenues.
- If the purpose of the assessment is properly described and attainable, and the assessment itself is competently administered, all in the district proportionately share the burden of the tax and all would proportionately benefit from the eventually-constructed improvement.

### CONS:

- Where there is a belief that the ability to construct new infrastructure is constrained by a city bureaucracy that wastes tax revenue, SADs, one argument goes, simply enable this dysfunctional system to consume dollars while producing less and less.<sup>84</sup>
- To the extent that infrastructure and amenities serving new developments in the district are spread equally among all properties in the district, the system is unfair to existing users.
- When the assessments are limited to new developments, it may take decades for sufficient funds to accumulate and construct desired amenities.

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<sup>82</sup> Porter at 41.

<sup>83</sup> *Id.*

<sup>84</sup> Lisa D. Ross, "Special Tax Districts Are A Tough Sell: They Can Work If They Are Fair And Have A Well-Defined Purpose," *San Diego Union Tribune*, Thursday, July 27, 1995.

- Where fiscal oversight and control is inadequate, funds generated by the special assessment can be spent elsewhere.<sup>85</sup>

#### **6.08 INCENTIVE – BASED ALTERNATIVES**

SADs are an alternative to the customary process of relying on funding from general public revenue sources to provide needed or desired infrastructure improvements. Under an SAD, infrastructure investments may be possible on a timetable that comports with market needs, whereas investment that relies on general revenue sources may not be able to count on those revenues being available at all or on a schedule that is predictable.

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<sup>85</sup> *Id.* Ross relates the example of Carmel Valley, California Community Park FBA funds being spent by the city on a highway.

## PART III: PROTECTION OF NATURAL RESOURCES AND ENVIRONMENT

### SECTION 7: OPEN SPACE PRESERVATION TECHNIQUES

#### 7.01 PURPOSE AND KEY TERMS

Open space tracts are valued for their scenic attributes, for recreational purposes, as wildlife habitat and ecological preserves, as a means of protecting the public against risks posed by development in unsafe areas such as steep slopes and floodplains, for the protection of water supplies, and as a way of preserving a rural “character” and creating “buffers” between developed areas. There are a variety of mechanisms by which local governments can attempt to protect open space from development, ranging from market-based techniques such as open space acquisition programs, development rights purchases, and transfer of development rights, to design techniques such as cluster subdivisions, to exactions requiring the dedication of parkland or payment into an open space fund, to restrictive regulations such as large lot zoning and riverfront buffer zones.

Many state and local governments have undertaken open space purchase programs by which parcels of land identified as valuable for open space purchases are acquired with public funds. Properties acquired under such programs may be purchased in *fee* after which the purchasing entity owns the property outright. Fee purchase is commonly used to acquire land for parks, where it is desired that the public entity have both ownership and control over the property.<sup>86</sup>

Alternatively, a local or state government may acquire a conservation easement, scenic easement or similar development restriction under a **Purchase of Development Rights (PDR)** program. Under these programs, ownership, as well as, usually, the responsibility for operating and maintaining the property, remains with the fee owner. The fee owner may make whatever use of the property is not prohibited by the restriction or easement. PDRs are often used in the context of agricultural land, where they are sometimes called Purchase of Agricultural Conservation Easement or “PACE” programs.<sup>87</sup> Development or other use restrictions may be imposed through a *purchase and sale* or *purchase and leaseback* arrangement whereby restrictions are imposed through conditions placed on the disposition of land acquired by a public entity for resale or lease.

Site planning techniques such as **cluster development** can be used to set aside tracts of open space within a development plan, while consolidating buildings and infrastructure on only a portion of the site. Under such techniques, a property slated for development is evaluated to identify the most desirable areas for preservation, such as wetlands, land bordering a water course, or an area that provides a scenic view to abutters. The development is then designed to protect the area of interest from development impacts. These techniques can be imposed through subdivision or zoning law as mandatory requirements, or can be offered to landowners as an option under such laws, either with or without density bonuses or other incentives for their use.<sup>88</sup>

Low density or large lot zoning is often used in developing suburban and rural jurisdictions to minimize development densities. This is often done in an attempt to preserve rural character by ensuring that development lots include large open areas. Zoning and non-zoning environmental regulations may

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<sup>86</sup> Colorado Department of Local Affairs, *Colorado Growth Management Toolbox: Appendix to Smart Growth and Development Summit White Paper* (Prepared by Clarion Associates, January, 1995)

[<http://www.dlg.oem2.state.co.us/fs/toolpref.htm>]

<sup>87</sup> See discussion in Section 9, Farmland Preservation Techniques.

<sup>88</sup> Cluster development is further discussed in Section 10.

establish “no build” buffer areas within which development is prohibited for environmental protection or public safety reasons, such as within floodplains, adjacent to water bodies and riverways, on steep slopes, or in other protected or difficult terrain.

**Transfer of Development Rights (TDR)** is a technique by which property owners within a “sending” area that the jurisdiction wants to protect from development are allowed to sell development rights to third parties. The development rights can be used to increase permissible development densities on other properties within a “receiving” area. The receiving area is one in which development is encouraged. TDR is discussed in detail in Section 8.

Some jurisdictions use **exactions** imposed on development approvals as a way of ensuring that open space is set aside. These exactions can take the form of requiring the dedication of land within a development for open space purposes such as parkland. They may also be imposed as **fees in lieu** by which the jurisdiction collects a financial payment for deposit into a fund dedicated to the purchase of open space elsewhere in the community.

## **7.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)**

### **Purchase of Land in Fee or Purchase of Development Rights**

The effectiveness of programs for the purchase of land or development rights in land depends upon how well the program does at identifying its priority sites for acquisition and focusing its expenditures on those priority sites. Such programs are constrained by the limited funding made available for open space purchases, and the need to identify and plan for the most effective use of these financial resources. Acquisition of a tract of land, or the development rights in such land, is generally thought to be the most effective way to ensure that the land is set aside for open space purposes forever. Although it is possible in theory that the government entity could resell the property or the easement rights, it would be unlikely to do so except under the most unusual circumstances.<sup>89</sup>

### **Cluster Development**

Cluster development can be very effective in preserving contiguous open space within a development site. For example, the Town of Southampton, New York is identified as a jurisdiction that has encouraged scenic preservation and the perpetuation of agricultural use by limiting the area of new development to 25 percent of the development parcel, thereby allowing the remaining areas to be left undeveloped and leased to agricultural users.<sup>90</sup> However clustering is not effective at transferring growth away from preservation areas, because it is restricted to redistributing development within a single development site.<sup>91</sup>

### **Downzoning and No-Build Buffers**

Restricting development density through the imposition of large lot or low density zoning can be effective in preserving tracts of open space and protecting environmental resources. But reserving extensive areas for large lot zoning is often criticized as being one of the principal causes of urban “sprawl” in growing areas. Non-contiguous or “leapfrog” development can result if growth pressures create demand for development beyond the city limits, but density limits prevent that demand from being met in contiguous areas. Likewise, no-build buffers along riverfronts or in areas with other natural features can be very effective in preventing the encroachment of development and its impacts on the resource to be protected, but raise significant property rights concerns.

<sup>89</sup> R. Pruetz, *Saved by Development* (Arje Press, 1997) at 69-70.

<sup>90</sup> *Colorado Growth Management Toolbox*.

<sup>91</sup> Pruetz at 78.

## Transfer of Development Rights (TDR)

A TDR program can be an effective means of preserving open space in circumstances where there is a viable market for the development rights created. In the Pinelands area of New Jersey, for example, more than 12,000 acres of agricultural and environmentally sensitive land were preserved from development in the first 14 years of that region's well-known TDR program.<sup>92</sup> The market for purchase of development rights in that case is created by allowing development rights to be used in the sending area at a 4:1 ratio (four units created for every one unit given up in the sending area) and in part through the use of a publicly funded development rights "bank" to purchase and hold development rights for resale. In theory a TDR program can be effective in setting aside preserved open space in sending areas even if the program is a "voluntary" one in which the transfer of development rights is not coerced by the application of drastic development restrictions, but rather is offered as an option to sending area property owners who otherwise would be free to develop their property at reasonable densities. However the Pinelands program, like many TDR programs described as being successful, is premised in part on strict growth controls in the sending area that strongly encourage the sale of development rights for use elsewhere.

## Exactions or Fees in Lieu

Fees and Dedication requirements are limited in their effectiveness at preserving open space because they are necessarily tied to development approval. They are therefore limited in scope to what is reasonably necessary to offset the impacts of a development and are limited in extent to an amount that is roughly proportional to the development's impact. Many states have dedication requirements calling for the set-aside of park land within a subdivision, and some jurisdictions have adopted requirements allowing payment of a fee in lieu of such dedication that could be used to purchase recreational land within proximity to the development.<sup>93</sup>

### 7.03 IMPACT ON PROPERTY VALUES

It is logical to think that programs for the preservation of open space can lead to higher property values for properties that abut that open space. Data from Amherst and Concord, Massachusetts show that cluster development properties appreciate faster than residential properties with larger private yards but no protected open space.<sup>94</sup> A study from Boulder, Colorado showed that proximity to the city's greenbelt was correlated to residential property prices.<sup>95</sup> Where open space is created through techniques that do not preserve development rights, however, the affected owners will suffer a loss in property value. For example, downzoning will reduce the development value of affected properties, even as it may increase the comparative value of other properties in the market area that have not been downzoned, or where development has already taken place. Properties that are encumbered by "no build" buffers and similar environmental requirements can be significantly diminished in value.

**TDR** depends on the manipulation of property values in order to encourage the transfer of rights from "sending" to "receiving" areas. Requirements that a developer donate open space or pay into a fund for open space purchases reduces the value of that property from what it would be worth if it could be developed in its entirety or if no payment has to be made. The effect of **cluster development** requirements on property values will depend on whether the market values such development as highly as

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<sup>92</sup> Pruetz at 217-223; See Section 8 for additional discussion of TDR programs.

<sup>93</sup> *Colorado Growth Management Toolbox*

<sup>94</sup> Jeff Lacy, An Examination of Market Appreciation for Clustered Housing With Permanent Open Space (1990), available at <http://www-unix-oit.umass.edu/~ruralma/Lacy/Market.html>

<sup>95</sup> Mark R. Correll, et al., *The Effects of Greenbelts on Residential Property Values: Some Findings on the Political Economy of Open Space*, *Land Economics* 54(2):207-217 (May 1978).

more traditional forms of project design, or whether the jurisdiction incorporates an incentive provision that allows higher density, and hence more developer profit, for clustered projects. One can presume that if cluster development were the most profitable type of development, developers would provide it. It follows that *requiring* developers to provide a type of development that is less preferred in the marketplace would lead to lower property values.

#### **7.04 IMPACT ON DEVELOPMENT COSTS**

**TDR** or **cluster development** programs involving discretionary approvals, and negotiations over open space dedication requirements or fee in lieu payments can increase developer transaction costs, including carrying costs associated with the time it takes to get development approvals and uncertainty over project outcome. On the other hand, cluster development options can result in development cost economies, including reduced infrastructure costs. Likewise, increased densities allowed for projects incorporating TDR can potentially reduce the hard costs of development on a per unit basis.

#### **7.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

Each of the techniques discussed in this section is intended to affect the patterns of development by resulting in the reservation of large tracts of undeveloped land. With TDR, development density is transferred from one property to another, and with cluster development, density is transferred from one part of a lot to another. Downzoning to large lot minimums decreases the potential development density in the downzoned area, which may or may not be compensated for in other parts of the jurisdiction or market area. Low density zoning can be a contributing factor to non-contiguous development, as growth that cannot be accommodated in more urban areas, either for land supply or cost reasons, is forced to “leapfrog” over restricted areas to less restrictive jurisdictions beyond. No-build buffers and similar techniques keep development a specified distance away from the protected resources, and can reduce the total amount of development that takes place in proximity to the resource area. With PDR, land is removed from the development market altogether. Taking property out of the development market through the use of PDR can also interrupt logical growth corridors if planning considerations are not incorporated into the identification of target properties for purchase.

#### **7.06 IMPACT ON HOUSING AFFORDABILITY**

Open space preservation strategies may result in upward pressure on housing prices to the extent that growth in the relevant market area cannot be or is not accommodated at other locations, for example, because there is an inadequate supply of land zoned and available for development. Downzoning and purchase of development rights programs can have the effect of reducing the supply of available, developable land, thereby making the remaining developable land more expensive and existing housing stock more valuable. To the extent that the effect of downzoning or development rights purchases are offset by allowing the reduced density to be transferred elsewhere through a **TDR program**, increases in allowable density in the receiving area may result in increased housing stock in those areas and consequently more affordable housing prices, all else being equal. Development cost economies and reduced infrastructure costs can translate into more affordable housing in **cluster developments**, depending on market conditions. The cost of a development exaction or fee-in-lieu will be passed more or less directly to the purchaser of the housing or absorbed by builders and developers, depending upon the nature of the local housing market.

## 7.07 SUMMARY OF PROS AND CONS

### PROS

- Open space preservation techniques provide a way to protect desirable community assets from the negative impacts of development.
- Proximity to preserved open space can increase the value of developed or developable land.
- Techniques such as voluntary TDR programs and PDR result in the payment of fair market value to property owners for the loss of development rights and are preferable to regulatory programs from a property rights standpoint.

### CONS

- Techniques such as downzoning and no-build buffers have significant implications for property rights.
- PDR and low density zoning can lead to “leapfrog” development depending upon how they are implemented.

## 7.08 INCENTIVE BASED ALTERNATIVES

Voluntary TDR programs, discussed in more detail in Section 8, provide an incentive for the preservation of open space by offering the property owner the ability to sell development rights for a desirable return. Such a program can be designed so that selling the development rights may be even more profitable than developing the property would have been. Mandatory TDR programs, which follow downzoning of the affected property, are not really an incentive-based alternative for preserving open space, because the property owner is left with no other choice after the downzoning but to sell the development rights if the owner wants to realize value from its property.

PDR can also be seen as providing an incentive to preserve open space, because it typically results from an arms-length transaction by which the rights are acquired for fair value, providing the property owner with the ability to obtain an immediate return on investment, rather than await what may be speculative future development.

In some jurisdictions, cluster subdivisions are allowed a “density bonus” by which more units can be built on a parcel of a given size under a cluster configuration that preserves open space, than if the parcel were developed using standard subdivision design.

## SECTION 8: TRANSFERABLE DEVELOPMENT RIGHTS

### 8.01 PURPOSE AND KEY TERMS

**Transferable Development Rights** or “**TDR**” is based on the legal concept that ownership of real property, in actuality, is ownership of a combination of rights that pertain to that property. For that reason, ownership of real property is frequently analogized to owning a “bundle of sticks.” Each stick in the bundle represents one of the rights of ownership, such as the right to possess, including the right to minerals below the surface, the right to exclude others from one’s property, and, of course, the right to make productive use of one’s property, usually understood as the right to develop, or **development right**. Ownership of the *entire* “bundle” of rights is known as ownership in **fee simple absolute**. However, because each property “right” is a separate “stick” in the bundle, each such right can be conveyed to another person or entity. One way that a property right may be conveyed separately without conveying the entire fee simple interest in property, is to grant certain rights in the form of an **easement**. An easement is frequently the instrument used when a property owner grants to an adjacent property owner the right to use a road that runs across his or her property.

TDR is a market-based mechanism intended to discourage development of property within a designated “sending zone.” The “sending zone” contains attributes that the community wants to protect from development such as valuable environmental resources, wildlife habitat, large tracts of open space, farmland, or historic landmarks. Under a TDR program, a property owner in the “sending zone” can agree to restrict development on its property by entering into a conservation easement or similar deed restriction that is noted on the land records and encumbers the property forever. A **conservation easement** means that the property owner records a **covenant** against the property that prohibits the disturbance of natural resources areas identified on the property. Typically this grant of conservation right in the form of an easement is granted to a third party such as a not-for-profit organization that is given the right under the terms of the easement to enforce the restrictions against use and disturbance of the natural resource areas. In effect, the conservation easement “extinguishes” the right to develop the natural resource areas of the property, usually in perpetuity. Conservation easements are discussed in Section 13.

In exchange for this restriction, the property owner receives one or more **development rights**. These “transferable development rights,” as the term suggests, can be transferred (sold) to a property owner in a “receiving zone” who wants to build more than would otherwise be allowed by the development regulations applicable in that zone. The “receiving zone” is a designated district where denser development is appropriate and encouraged. (See figure below) The receiving zone should be desirable for development from a market perspective, and the necessary infrastructure should be available.<sup>96</sup> Typically the use of TDRs in the receiving zone is based on a “density bonus” by which the TDRs can be used to create, for example, up to 20 percent more dwelling units on a particular property than would be allowed under the established base zoning. The premise of such programs is that the purchase price for the TDR compensates the seller for the development rights relinquished. Ensuring that there is a market for the purchase of transferable development rights is one of the most difficult aspects of devising a workable TDR system. This requires careful market analysis for the designation of appropriate receiving zones.

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<sup>96</sup> Peter J. Pizor, “Making TDR Work,” (*APA Journal, Spring, 1986*), at 210.



Ideally under a TDR program, all parties end up ahead. The development rights purchaser ends up enhancing the value of its development project by more than the cost of the additional development rights. The seller of the development rights receives fair value for the foregone rights. The community secures the permanent protection of land that has high environmental, heritage or open space value at little or no direct cost, while directing additional development to an area more suited for it. When successful, TDR “offers a way for communities to achieve their land use goals without having to find the money for acquisition.”<sup>101</sup> Viewed strictly through a “property rights” lens, however, a TDR program may be viewed more cynically—as confiscating property from “sending zone” owners by imposing severe restrictions on development intended to coerce the transfer of development rights, and by exacting from “receiving zone” property owners the purchase of these development rights.<sup>102</sup>

While environmental, farmland or historic protection in some form is the predominant purpose for most TDR programs, the technique is robust enough that it can be applied to a wide variety of purposes. For example, some jurisdictions have used TDR to discourage development of existing lots in antiquated subdivisions that would be difficult to build-out under current standards.<sup>103</sup> The ability to sell a development right gives the lot owner some economic value for its property and presumably alleviates the incentive to press ahead with construction on the original lot. TDR is used to mitigate the economic impact of restrictions intended to protect scenic views of Big Sur in Monterey County, California.<sup>104</sup> Seattle uses TDR to help protect low-income housing and performing arts centers from redevelopment.<sup>105</sup> TDR is also used in some jurisdictions as an incentive to move development away from areas with significant infrastructure limitations.<sup>106</sup>

## **8.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)**

TDR programs have existed in this country since 1968, when New York City adopted its Landmark Preservation Law, which incorporated the concept of allowing development density to be transferred from a lot containing an historic structure to an adjacent parcel.<sup>107</sup> One study identifies 107 TDR programs in existence as of 1996,<sup>108</sup> and the pace of new TDR proposals seems to have accelerated since then as communities have become increasingly concerned about growth and community character issues. Montgomery County, Maryland has had a TDR program for twenty years, and its program is often cited as being among the most successful examples of this technique. A number of states have in recent years proposed or adopted legislation authorizing or setting parameters for the local adoption of TDR programs.<sup>109</sup>

Many local TDR programs were established under home rule authority without the benefit of statewide enabling legislation, or under statewide legislation that offered little specific guidance on program development. Some of these are generally viewed as being successful. However, well-drafted state enabling legislation can increase the likelihood that a local TDR program will be successful. For example, the Long Island Pine Barrens of New York is frequently cited as a TDR program that has been relatively successful. The Long Island Pine Barrens TDR program is authorized in state legislation that is

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<sup>101</sup> Pruetz at 1.

<sup>102</sup> Andrew J. Miller, "Transferable Development Rights in the Constitutional Landscape: Has Penn Central Failed to Weather the Storm?" 39 *Natural Resources Journal* 459, 471 (1999).

<sup>103</sup> Pruetz at 29.

<sup>104</sup> Pruetz at 29.

<sup>105</sup> Frankel at 833.

<sup>106</sup> Pruetz at 27.

<sup>107</sup> Pruetz at 9.

<sup>108</sup> Pruetz at 14.

<sup>109</sup> See e.g. Ky. Rev. Stat. §100.208; Tenn. Code Ann. §13-7-201; Idaho Code §67-6515A; 24 Vt. Stat. Ann. §4407(16).

specific to the Pine Barrens. Recognizing the success of this TDR program, the New York legislature enacted similar TDR enabling legislation to more broadly authorize the implementation of TDR programs at the local level by cities, villages, and towns.<sup>110</sup>

The following provisions should be part of state TDR enabling legislation:

1. Comprehensive definition of terms.
2. A requirement that there be specific local program objectives for identifying *sending* zones.
3. A requirement that there be clear standards for delineating *receiving* areas and regulating development within receiving zones. Receiving areas must have sufficient demand for new development to absorb TDRs.
4. A requirement that local TDR programs follow steps to guide the initial allocation of TDRs and to measure and establish values. Standards should require a *market analysis* to ensure a reasonable balance between the supply of TDRs and the demand for them, so that there is an economic incentive for use of TDRs.
5. Standards to guide the administration of local programs so that programs are equitable, simple to administer, and have clearly defined procedures for the acquisition, transfer, and use of TDRs.
6. A requirement that the local government responsible for program implementation have or hire the expertise necessary to design, implement, and monitor the program.
7. If the state enabling legislation authorizes exceptions to standard restrictions placed on property following the sale of TDRs, the legislation should include provisions defining the circumstances under which such exceptions may be permitted.
8. A requirement for variance provisions to ensure the flexibility of local TDR programs and provide a way to address undue hardships.

Not all TDR programs are successful in providing sufficient incentive for a substantial number of development rights transfers to take place. Transfers will only occur where the jurisdiction is successful in creating a market for development rights.<sup>111</sup> Frequently, TDR programs utilize a TDR “bank” that is administered by a governmental agency to buy and aggregate development rights from sending area properties, and sell them for use in receiving area properties. The use of a bank can be a way to reduce transaction costs that might discourage participation in the TDR program if potential buyers had to seek out potential sellers and vice versa. It can also help to overcome market timing gap issues by providing a ready purchaser for development rights during economic downturns, and a source of development rights available for purchase when the real estate market has recovered.<sup>112</sup> This can help to stabilize the value of TDRs. Local TDR banks, however, can face a range of complex issues, such as funding and appraisal

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<sup>110</sup> (N.Y. Gen. City Law 20-f);(N.Y. Village Law § 7-701); (N.Y. Town Law, § 261(a)).

<sup>111</sup> Pruetz at 50.

<sup>112</sup> Frankel at 829; see also Pizor at 207.

issues, which are outside the realm of expertise of many local government officials and staff. These complexities can be viewed as disadvantages to having a TDR bank as part of a local TDR program.

### **8.03 IMPACT ON PROPERTY VALUES**

TDR programs are variations on cluster development. Both programs begin with the premise that some properties should not be developed and that the community will be better off if development is moved from one site to another. If both sites are within the same parcel, it is “cluster.” If the two sites are in different parcels, it is a transfer of development. Depending upon how they are implemented, TDR programs can have significant impacts on property values in both the sending and receiving zones. Indeed, the entire premise of a viable TDR program is that transfers will take place only if both the sending zone property owner and the receiving zone property owner will benefit from the transaction. TDR programs “use zoning restrictions to create a contrived market for development rights.”<sup>113</sup> Put another way, the TDR process relies upon the manipulation of land values through regulation as the premise to a workable scheme.

As noted above, in some jurisdictions a TDR program is a component of a downzoning scheme for the “sending zone” that would tend to reduce the development value of property and create an incentive to turn to TDR for compensation. Frequently the “downzoning” is achieved by refusing to rezone properties to more intensive uses without the use of TDRs. TDR can enhance both the political prospects and the legal justification for extreme low density zoning such as agricultural preservation and conservation zoning districts. Under the ideal circumstances of a well-conceived and implemented TDR program, with sufficient demand for the development rights created in the “sending zone,” payments to property owners for development rights will offset the development value lost through the downzoning. But where a mandatory TDR program is premised on downzoning and there is not enough demand to purchase all the development rights created, there will be property owners who are unable to sell their rights and suffer an economic loss.

In addition, under nearly all TDR programs, the value of the TDRs are supported by density bonuses that permit additional development at a “receiving zone” site. But the effectiveness of these density bonuses is premised on keeping “low baseline density limits in receiving zones, to ensure that these limits can only be exceeded by TDR and to encourage higher density development.”<sup>114</sup> For example, assume, as is commonly the case, that demand for TDR is encouraged by downzoning receiving zone properties, or by adopting a policy forbidding upzoning (zoning to higher densities). Analyzed from a post-downzoning viewpoint, the ability to use TDRs presumably makes the property more valuable than it would be under the same regulatory constraints, without the ability to increase density. Indeed, a developer will not purchase development rights unless the price of the rights is less than the value of the additional density that the rights authorize, so that the development is profitable.<sup>115</sup>

But looked at from the perspective of the property owner prior to a TDR accommodating downzoning, the analysis reaches a different result. If a property owner were entitled to build at a density, say, of eight units per acre, its property would presumably be worth more, all else being equal, than if the owner is entitled to build at a density of only four units per acre and had to purchase the right to the additional four units because the property had been downzoned or kept at an artificially low zoning density. In cases where receiving area property is downzoned as a way to create demand for development rights transfers, the need to use TDR to restore allowable development density amounts seems little different than imposing an exaction on a “receiving area” developer. This exaction is used to pay for development rights ceded by the “sending zone” property owner, and the need to pay the exaction to achieve the desired

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<sup>113</sup> Miller at 471-472.

<sup>114</sup> Pruetz at 56.

<sup>115</sup> See Pizor at 209.

development density makes the receiving area property less valuable than it would be if it were not necessary to purchase development rights. Where receiving area properties will not be upzoned without TDR, the effect on property value would depend on how the land market valued those properties. If the market assumed upzoning, the TDR requirements would reduce market prices for land. Alternatively, if the market did not assume upzonings, then TDR could increase land values.

#### **8.04 IMPACT ON DEVELOPMENT COSTS**

The complexity of TDR programs can increase transaction costs associated with development involving TDRs. In particular, those TDR programs that incorporate a discretionary approval process for the use of TDRs in a development, can result in delays, uncertainty of success, and the imposition of costly conditions of approval that might not be imposed on a “by right” project.<sup>116</sup> The flip side of this concern is that programs that are too intricate and time-consuming will be avoided by developers, who will prefer to develop in areas or at densities that do not involve such complications.<sup>117</sup> On the other hand, depending on the nature of the site and the development design, the increased development density allowed in receiving areas with the use of TDRs may result in lower per unit development costs, as compared with development at base densities.

#### **8.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

TDR is a mechanism intended to alter the patterns of land development by redirecting development from “sending areas” to “receiving areas.” Whether a TDR program affects the amount of overall land development should depend on a variety of factors. These include the nature of local land markets in sending and receiving areas; the design and effectiveness of the TDR program, including the transfer ratio; the permissible density bonus within the receiving area, and the extent to which base densities in the receiving area are set at artificially low levels to encourage development rights transfers. For example, if base densities are reduced in receiving areas as part of a TDR program, and there is not an effective market for transfer of development rights, development in the receiving area may be constrained below what would otherwise have taken place without the downzoning.

#### **8.06 IMPACT ON HOUSING AFFORDABILITY**

Whether a TDR program has any effect on housing affordability, and what that effect is, will depend on the design of the TDR program and the nature of the relevant housing markets. Depending on market factors, one could foresee a TDR program resulting in localized increases in housing prices within “sending areas” as it discourages development in that area and supply becomes insufficient to meet demand. Similarly, a TDR program, to the extent that it results in greater development density than would otherwise be possible in “receiving” areas, may lead to increased housing stock in those areas and consequently more affordable housing prices. Some TDR programs allow greater density bonuses for projects that include housing units satisfying standards for “affordability,” while others, such as Seattle’s, use TDR expressly to preserve housing for low income residents. Depending on market factors, a developer who is able to reduce per unit development costs by taking advantage of TDR to construct denser projects in receiving areas may be able to sell housing for less than comparable developments at lower density. Conversely, increased administrative costs associated with navigating a complicated TDR process may drive development costs up and create upward pressure on housing costs.

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<sup>116</sup> Pruetz at 58-59.

<sup>117</sup> Pizor at 210.

## 8.07 SUMMARY OF PROS AND CONS

### PROS:

- A well-designed TDR program can be a way to help preserve environmental, historic and other resources, while also protecting property rights.
- The ability to transfer development rights for value can offset development value lost through a downzoning or other restriction on sending area properties.

### CONS:

- It is difficult to design an effective TDR program; they can be complex to administer, and not all programs are successful in creating a market for development rights.
- TDR programs also typically involve downzoning or similar restrictions in “receiving areas” in order to generate demand for the use of development rights.

## 8.08 INCENTIVE-BASED ALTERNATIVES

A voluntary TDR program provides an incentive for the protection of desirable environmental or built features in the sending area by offering the property owner the ability to sell development rights for a desirable return. Such a program can be designed so that selling the development rights may be even more profitable than developing the property would have been. Similarly, under a TDR program, development in a “receiving area” is allowed at densities that are higher than allowed under otherwise applicable development regulations in order to provide transferable development rights with value and encourage “receiving area” property owners and developers to participate in the program. A variety of jurisdictions using TDR have incorporated additional incentives to make TDRs more attractive for developers. For example, Pacifica, California exempts projects using TDR from parkland dedication requirements, capital improvement fees and traffic impact mitigation fees.<sup>118</sup> St. Mary’s County, Maryland allows reductions in the required open space ratio and landscape ratio requirements. Sunderland, Massachusetts relieves receiving site developments from minimum lot size and frontage requirements.<sup>119</sup> At least in theory, providing incentives for participation by “receiving zone” property owners has the effect of creating or enhancing the market for transferable rights, thereby encouraging greater participation by “sending area” property owners and furthering the primary goal of protecting the sending zone from development.

Some jurisdictions provide an additional incentive for “sending zone” property owners to place their properties under development restrictions by allowing transfer ratios greater than 1:1. For example, in Montgomery County, Maryland, a property owner who gives up the right to develop one unit in a sending zone is entitled to TDRs worth five units in a receiving zone. Encouraging the use of TDRs through this type of a “carrot” approach is vastly preferable from a property rights standpoint to the “stick” approach of using drastic development restrictions to force property owners to turn to TDRs as the only practical way to obtain value from their property. Mandatory TDR programs that follow downzoning of the affected property are not really an incentive-based alternative for preserving open space because the property owner is left with no other choice after the downzoning but to sell the development rights if it wants to realize value from its property.

## SECTION 9: FARMLAND PROTECTION TECHNIQUES

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<sup>118</sup> Pruetz at 63.

<sup>119</sup> Pruetz at 64.

## 9.01 PURPOSE AND KEY TERMS

**Farmland preservation techniques** are intended to slow the conversion of productive agricultural land to residential and commercial uses. The American Farmland Trust (“AFT”) an organization that is influential in encouraging farmland protection efforts nationally, asserts, broadly, that “[e]conomic opportunity, environmental protection, community infrastructure and quality of life are among the most compelling reasons to save farmland.”<sup>120</sup> Saving farmland is perceived as critical to ensuring continued American advantage in world food markets and ensuring “food security” — that is, the ability of America to put food on the table of its citizens at reasonable prices.<sup>121</sup> From the standpoint of environmental protection, saving farmland is encouraged on the grounds that “well-managed farmland protects soil and water resources and can prevent flooding. It absorbs and filters wastewater and provides groundwater recharge.”<sup>122</sup> Proponents also point to the role that privately owned farm and ranch lands have in sustaining wildlife populations, and note that energy crops have the potential to replace reliance on fossil fuels.<sup>123</sup>

With respect to “community infrastructure,” AFT notes that people increasingly “view natural resources, including agricultural land, as vital for the well-being of our communities, rather than as ‘free’ material to be disposed of at will.”<sup>124</sup> From that perspective, the role played by agriculture in local economies, including secondary markets such as food processing and tourism, provides a reason to defend against farmland conversion. Additionally, AFT cites studies showing that tax revenue from farmland more than pays for the municipal services it requires.<sup>125</sup> Finally, and probably most compellingly for many people concerned with the loss of agricultural land in their own communities, “farm and ranch land maintains scenic, cultural and historic landscapes” which “create identifiable and unique community character and add to our quality of life.”<sup>126</sup> Farmland also plays an integral role in our national heritage as an agrarian population.<sup>127</sup>

There are a variety of tools used by state and local governments to protect farmland. Some of the most common are discussed here.

- **Exclusive Use or Agricultural Protection Zoning (APZ)** refers to the designation by a county or municipality of zones in which agriculture is the exclusive or principal allowed use, and in which uses that could be incompatible with farming, including non-farm residential developments, are prohibited.<sup>128</sup> These zones typically require much larger lot sizes or allow much lower development densities than other zones.<sup>129</sup> APZ ordinances in some jurisdictions place limitations on the ability to subdivide agricultural parcels, often with an exemption for agricultural worker housing or family members of the farmer.<sup>130</sup> APZ provisions may also make it more difficult than usual to rezone land from the

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<sup>120</sup> American Farmland Trust, *Saving American Farmland: What Works* (hereinafter “SAF”) 1997 at 3.

<sup>121</sup> SAF at 5-6.

<sup>122</sup> SAF at 7.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> SAF at 7-8.

<sup>126</sup> SAF at 8.

<sup>127</sup> SAF at 9.

<sup>128</sup> See SAF at 49.

<sup>129</sup> Coughlin, “Formulating and Evaluating Agricultural Zoning Programs,” *57 APA Journal* 183 (Spring, 1991). See also Arthur C. Nelson and James B. Duncan, *Growth Management Principles & Practices* (Planners Press: 1995) at 52.

<sup>130</sup> See SAF at 61.

agricultural protection zone to a classification in which development is allowed.<sup>131</sup> APZ ordinances may include provisions addressing the conflict between farming and non-farming uses, including enhanced setbacks, site design review of non-farming development, required buffers, or mechanisms designed to protect farmers against nuisance claims.<sup>132</sup> Ideally, the designation of Agricultural Protection Zones is based on consideration of soil quality as well as other factors concerning the location, character and current use of the land.<sup>133</sup> APZ has a number of purposes, including protecting areas with prime agricultural soils from development, protecting against conflicts between farming and non-farm land uses, and maintaining a “critical mass” of agricultural land in a jurisdiction. APZ is used to forestall land speculation by non-farmers. APZ is also used to “promote orderly growth” and as a means of preserving open space and scenic landscapes.<sup>134</sup>

- **Purchase of Agricultural Conservation Easement (PACE)**, also known as **Purchase of Development Rights (PDR)** is a program by which a state or local government pays a farmer for the development rights in a parcel of agricultural land.<sup>135</sup> Under a PACE program, the right to develop or use a specified agricultural property for non-farming purposes is severed from the right to use the land for agriculture. This occurs through the imposition of a **conservation easement** which “runs with the land” either permanently or for a specified period of time. Depending on local real estate laws, in some states the government purchases a **covenant** against development of the burdened parcel.<sup>136</sup> Such restrictions are sometimes called **Agricultural Preservation Restrictions (APR)**. In terms of the “bundle of sticks” analogy for the rights of a fee simple property owner, the development “sticks” are acquired by the government for compensation, while the farmer retains the remaining property right “sticks.” In addition to the right to reside and continue farming on the property, these retained rights include the right to exclude others, the right to pass the property to descendants or to sell it to another agricultural user, as well as, often, the ability to provide housing for workers or family members. The price paid for the easement is generally, but not always, set by an appraisal.<sup>137</sup> Funds for the purchase of development rights may come from general appropriations, or from specific revenue sources including property taxes, specialized taxes, such as a tax on real estate transfers, or bonding. PDR is also discussed in Section 7 above pertaining to Open Space Preservation. The several purposes of a PACE or PDR program for acquiring easements on agricultural land include retaining land in farming use, and providing an infusion of capital that can help maintain the economic viability of the farm or ranch.<sup>138</sup>
  
- **Transfer of Development Rights (TDR)** programs are another mechanism that is sometimes used to preserve farmland by creating a private market for development rights on agricultural properties. The definition and purpose of TDR is discussed above in Section 8, and will not be further addressed here.

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<sup>131</sup> SAF at 65-66.

<sup>132</sup> See SAF at 62-63.

<sup>133</sup> SAF at 49, 56-57.

<sup>134</sup> See SAF at 50.

<sup>135</sup> SAF at 83.

<sup>136</sup> SAF at 83, note.

<sup>137</sup> SAF at 98-99.

<sup>138</sup> SAF at 83.

- **Mitigation Ordinances and Policies** require the permanent set-aside of agricultural land as a condition of allowing the conversion of agricultural land to other uses. One example of this technique is an ordinance that requires developers to permanently protect an acre of farmland through conservation easement or other mechanism for every acre that is converted to other uses. Developers may also pay a fee in lieu of the land set-aside. An alternative approach is to require “no net loss of farmland” on a jurisdictional basis.<sup>139</sup> These types of provisions are less common and of more recent vintage than the other mechanisms discussed above.
  
- **Right to Farm Legislation** is intended to strengthen a farmer’s legal defense against suits by neighbors for private nuisance, and to protect farmers from local regulations that would constrain farming practices.<sup>140</sup> These provisions may be imposed at the state or local levels. There are two broad types of nuisance protection that state statutes provide. About half of the states have codified the “coming to the nuisance” defense so that farmers who have been in operation before an area develops residentially cannot generally be forced to curtail operations because the new neighbors complain about odors, noises or other impacts. The second type of nuisance protection insulates farmers from lawsuits challenging the effects of their operations so long as they are operating using “generally accepted agricultural and management practices” in accordance with applicable regulations.

## 9.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

Farmland Preservation Techniques seem to be most effective in achieving their purpose of preventing the conversion of farmland to urban development when used in combination with one another.<sup>141</sup> However some farmers dispute that approaching urban development causes a reduction in farmland. High water and labor costs and low commodity prices also reportedly are major factors in encouraging farmers to sell their land for development rather than continuing in business.<sup>142</sup> Federal farm policy and its effect on profitability is probably more important in determining whether farming in an area survives in the long run than the implementation of farmland preservation measures.<sup>143</sup> Furthermore, there is considerable doubt whether the “loss” of farmland is really the crisis that farm advocates claim it is. A U.S. Department of Agriculture study reports that the amount of land used for growing crops is virtually the same today as it was fifty years ago, and the same agency has said that “losing farmland to urban uses does not threaten total cropland or the level of agricultural production.”<sup>144</sup>

### Exclusive Use or Agriculture Protection Zoning (APZ)

According to the AFT, APZ “is the only farmland protection technique that can prevent development of large tracts at low public cost.”<sup>145</sup> APZ has reportedly been successful in maintaining the agricultural land base in predominantly rural areas of the Midwest and West where it was enacted before significant development pressures and where land prices therefore reflected the value for farming so that residents

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<sup>139</sup> SAF at 33.

<sup>140</sup> SAF at 169, 174-175.

<sup>141</sup> SAF at 39.

<sup>142</sup> Russell, Kiley “State Report Shows Open Space Disappearing” Associated Press, 10/12/2000, read at <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2000/10/12/state0304EDT0318.DTL>.

<sup>143</sup> Daniels, "The Purchase of Development Rights," 57 *APA Journal* 421, 430 (Autumn, 1991).

<sup>144</sup> National Association of Home Builders *Smart Growth: Building Better Places to Live, Work and Play* at 8, read at [http://www.nahb.com/main\\_features/smart.pdf](http://www.nahb.com/main_features/smart.pdf).

<sup>145</sup> SAF at 71.

did not perceive a significant economic burden from the regulation. AFT reports that farmers in those areas support APZ because “most have no desire to sell land for development, and they see zoning as a means of preventing any of their neighbors from doing so.”<sup>146</sup> A ten year study in one Pennsylvania jurisdiction found that the adoption of APZ shifted the pattern of land sales for development from the agricultural district to land outside the agricultural district. The author of the study concluded that “the adoption of agricultural zoning significantly reduced the flow of land in the agricultural district from owners who generally intend to keep it in rural use to owners whose ultimate intention is development.”<sup>147</sup> The same author notes that the would-be developers clearly considered the agricultural zoning in that case to be relatively permanent.<sup>148</sup> A frequent criticism of agricultural zoning as a farmland preservation tool is that zoning can be easy to change, so that APZ is a “temporary fix” and land zoned for agriculture can be rezoned for development given sufficient economic or political pressure.<sup>149</sup>

AFT states that in rapidly growing communities, “APZ alone cannot address the economic challenges that farmers face.”<sup>150</sup> It has been more successful in those areas where it is combined with PACE and TDR programs.<sup>151</sup> APZ is used to protect land from development until funds are available for the purchase of development rights.<sup>152</sup> AFT cites a conversion rate of only 3,100 acres of farmland per year during the 1987-1994 time period in the state of Oregon where all 36 counties have enacted APZ as part of the state’s growth management program.<sup>153</sup> In a national survey of farmers and ranchers, APZ was preferred (58%) over the purchase of agricultural conservation easements (PACE) (16%) as a mechanism for avoiding the conflicts between non-farmers and agricultural uses that result when homes are built in agricultural areas.<sup>154</sup> Area- or density-based APZ can be more effective in preserving farmland because it allows development on smaller lots, providing more flexibility in site planning, and potentially allowing dwellings to be placed where they cause the least intrusion on the active farming use, and where soils are the least conducive to agriculture.<sup>155</sup> By contrast, farm advocates caution that residential/agricultural zoning that results in “large lot” requirements of one to five acres does little to protect commercial agriculture and, in fact, often hasten its decline by increasing land consumption for non-farming purposes.<sup>156</sup>

In urban areas, APZ may result in the creation of non-agricultural “ranchettes” or “estates.” For example, in western Marin County, where APZ requires 60 acre zoning, wealthy San Franciscans built country houses on 60 acre lots.<sup>157</sup> Such developments fragment agricultural land, tend to bid up land prices, and defeat one of the principal purposes of farmland protection measures, which is to maintain a viable agricultural community.<sup>158</sup> Oregon’s zoning approach to preserving farmland has also been criticized as leading to the creation of thousands of “hobby farms” on parcels too small to be viable for commercial agriculture, yet competing with commercial farmers for the land base.<sup>159</sup>

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<sup>146</sup> *Id.*

<sup>147</sup> Coughlin at 190-91.

<sup>148</sup> Coughlin at 191.

<sup>149</sup> See SAF at 52.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> SAF at 69.

<sup>153</sup> SAF at 52.

<sup>154</sup> Esseks, J., Kraft, S., McSpadden, L, *Owners’ Attitudes Towards Regulation of Agricultural Land*, May, 1998, American Farmland Trust, at [www.farmlandinfo.org/cae/wp/98-3/98-3full.html](http://www.farmlandinfo.org/cae/wp/98-3/98-3full.html).

<sup>155</sup> Coughlin at 184.

<sup>156</sup> SAF at 49.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Daniels at 428.

According to the 1997 AFT report, “APZ is most widespread in Pennsylvania, Maryland, parts of the Midwest, and along the Pacific Coast.”<sup>160</sup> In a national survey of all counties and some municipalities, AFT identified 24 states with local jurisdictions that had adopted APZ zoning.<sup>161</sup> In particular, AFT found a concentration of APZ ordinances in Wisconsin and Pennsylvania, accounting at that time for 75 percent of the jurisdictions surveyed having APZ zoning.<sup>162</sup>

### **Purchase of Development Rights (PDR) and PACE Programs**

Programs that involve the **purchase of development rights** are considered to be successful in accomplishing the set aside of farmland, and are thought to be popular with farmers and with the community at large.<sup>163</sup> More than 819,000 acres of farmland were protected through PACE programs as of 1997.<sup>164</sup> Such programs are also considered to be more advantageous than regulatory measures because they provide a more permanent form of protection for farmland. The principal criticisms of these programs’ effectiveness are their cost and the resulting slow pace of acquisitions.<sup>165</sup> AFT reports that state and local programs had enough funding to purchase from only one out of every seven landowners wanting to sell easements in 1995.<sup>166</sup> Because limited funds are available to acquire land, the ability of these programs to preserve contiguous agricultural area is constrained. It is critical for jurisdictions to target farms for preservation in a strategic manner in order to meet program goals.

Because PACE programs are voluntary, a low rate of participation can result in protection of land in scattered parcels that is not conducive to protecting farms from non-compatible abutters or preserving a critical mass of farm enterprise. Isolated islands of preserved land can actually attract development to abutting parcels because of the proximity of the permanently preserved open space.<sup>167</sup> AFT reports that Forsyth County, North Carolina sold back an agricultural preservation easement on a farm that had become surrounded by housing development, making it impossible for the farmer to lease enough additional land to maintain a viable operation.<sup>168</sup> Depending on the terms of the restriction, PACE properties are sometimes also purchased by wealthy individuals who desire an estate property but do not intend to keep it in active agricultural use — the arguable effect is that they have had their land purchase subsidized by public funds.<sup>169</sup> Nineteen states and at least 34 local jurisdictions had PACE programs in effect as of February 2000, according to an AFT survey.<sup>170</sup> Some states have been very aggressive with their purchase programs. For example, New Jersey appropriated \$29 million for farmland preservation purposes in December 2000. This followed an appropriation of \$36 million in June 2000 for the same purpose.<sup>171</sup> In addition to local and state governments, non-profit organizations also operate PDR programs focused on preserving agricultural property, and very often these non-profit groups partner with governmental entities in acquiring development restrictions on such properties.

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<sup>160</sup> SAF at 52.

<sup>161</sup> SAF at 40.

<sup>162</sup> SAF at 51.

<sup>163</sup> SAF at 107.

<sup>164</sup> *Fact Sheet - Status of State PACE Programs*, American Farmland Trust Farmland Information Center, March, 2000.

<sup>165</sup> *Id.*

<sup>166</sup> SAF at 88.

<sup>167</sup> Daniels at 424.

<sup>168</sup> SAF at 106.

<sup>169</sup> SAF at 88-89.

<sup>170</sup> *Fact Sheet - Status of State PACE Programs*, American Farmland Trust Farmland Information Center, March, 2000; *Fact Sheet- Status of Selected Local PACE Programs*, American Farmland Trust Farmland Information Center, March, 2000.

<sup>171</sup> P.L. 2000, c. 176; P.L. 2000, c. 169; P.L. 2000, c. 168; P.L. 2000, c. 49.

## Transferable Development Rights (TDR) Programs

The 1997 AFT Report notes that TDR has failed to live up to its promise as a mechanism for the protection of farmland, with only 55,000 acres protected at that time.<sup>172</sup> A number of reasons are given for TDR falling short. They include the reluctance of some jurisdictions to implement such programs because of uncertain legal authority and lack of political support. The major reason given, though, is the difficulty of creating a market for development rights. In particular, TDR will not be successful in a “no growth” environment, because the mechanism relies on growth in the “receiving zones” for the success of the program. For example, AFT reports on Calvert County, Maryland which implemented a growth management program that depressed the market for development rights so that few transfers occurred.<sup>173</sup> The other point made by observers of TDR programs is that even those that are successful take a considerable amount of time to get to that point. Montgomery County, Maryland established a 89,000 acre “agricultural reserve” as a TDR sending area in 1980. Transactions began in 1983 after receiving areas were designated. But it took until 1997 before the supply of development rights in the sending area fell below the county’s capacity to use development rights in the receiving area – the point at which the market for transferable rights theoretically can provide compensation to sending zone landowners for their foregone development potential.<sup>174</sup> According to the AFT survey, by 1997, more than 30 local jurisdictions had TDR programs for the protection of farmland.<sup>175</sup>

## Mitigation Ordinances and Policies

AFT reports on only two Mitigation Ordinances and Policies, a one-for one mitigation ordinance in Davis California, and a “no net loss” policy in King County Washington.<sup>176</sup>

## Right to Farm

All fifty states have some form of nuisance protection for farm operations, and a number of counties and municipalities also have adopted local ordinances to supplement state law protections for farmers.<sup>177</sup> AFT concludes that “right to farm laws often seem to promise more than they deliver” but remain very popular with farmers.<sup>178</sup> However these laws have come under attack when applied to protect large scale animal feeding operations or corporate agriculture that may be less accountable to the local community.<sup>179</sup> AFT quotes the former director of the University of Iowa Agricultural Law Center as seeing “Iowa’s right to farm laws as a threat to rural ‘neighborliness.’”<sup>180</sup> Right to farm laws do not protect against the conversion of farmland for development, but do provide support to the agricultural community in the form of protection against nuisance litigation.

### 9.03 IMPACT ON PROPERTY VALUES

Typically land markets treat farmland as a reserve for future development. In most instances, agricultural zoning is considered to be temporary or a “holding zone.” APZ can have a significant negative impact on property values within the agricultural zone, as the ability to develop land is constrained by large minimum lot sizes and restrictions on use. Farmers may oppose APZ on those grounds, making it

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<sup>172</sup> SAF at 138.

<sup>173</sup> SAF at 138-139.

<sup>174</sup> SAF at 135.

<sup>175</sup> SAF at 122-124.

<sup>176</sup> SAF at 33.

<sup>177</sup> SAF at 169.

<sup>178</sup> SAF at 184-85.

<sup>179</sup> SAF at 186.

<sup>180</sup> *Id.*

difficult to pass such provisions in rural jurisdictions.<sup>181</sup> Depending upon market factors, one would expect the institution of APZ zoning to increase property values in areas not subject to such restrictive zoning, as development is redirected to those areas.

**PACE/PDR** programs should have no net impact on the values of affected properties, provided that the price paid for the restriction reflects fair market value. Some programs use other mechanisms, such as point systems, to determine the price that will be paid for an agricultural easement.<sup>182</sup> One would also not expect an agricultural easement purchase program to have an effect on the value of property not placed in the program. However, to the extent that PACE programs are used as a strategic means of placing obstacles to development on other property, they could certainly have a negative effect on some property values. For example, the Montgomery County Maryland PACE program reportedly prefers and pays higher prices for farms located within one quarter mile of its urban growth boundary as a means of erecting “a legal and economic barrier to possible water and sewer extensions” to more outlying properties.<sup>183</sup> There is also an indication that if such preserved farms are removed from active agricultural use, the value of land surrounding such “estate” settings may increase.<sup>184</sup>

The extent to which **TDR** programs will impact property values depends on how they are implemented. Theoretically, TDR compensates property owners for restrictions on their ability to develop land. However if the market for development rights is depressed or non-existent, the TDR does not represent a viable option for recovering lost development value. The success of a TDR program will depend on the market value of a TDR and that value, in turn, depends on there being meaningful development options in growing receiving areas.

**Right to Farm Legislation** is considered by some to be an impairment of property rights because it amounts to a limitation on the property rights of non-farmers by constraining their ability to sue for damages caused by the effects of abutting farm operations on their property values. In an Iowa Supreme Court case, the court found that a right to farm law making farmers immune from nuisance suits effected an unconstitutional taking of property by effectively giving farmers an easement over the property of others to conduct activity (noise, noxious odors) that would be considered a nuisance in the absence of the legislation.<sup>185</sup> Some farmers, who may be equally as affected as their non-farming neighbors by a noxious agricultural operation nearby, also feel that right to farm laws act to take their property rights.<sup>186</sup>

#### 9.04 IMPACT ON DEVELOPMENT COSTS

**Mitigation requirements** will increase development costs on lands converted from agriculture by causing the developer of those protected agricultural lands to commit to forego development rights on other land as a condition of development approval. The large lot sizes or low development densities that are typically required under **APZ** ordinances would be expected to increase the cost of development in those zones, and APZ ordinances may also include extraordinary setbacks and design requirements that could make development more costly. The complexity associated with some **TDR** programs can increase transaction costs associated with development involving TDRs.<sup>187</sup> The other farmland preservation techniques discussed above would not necessarily be expected to have an impact on development costs.

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<sup>181</sup> SAF at 50.

<sup>182</sup> SAF at 98-100.

<sup>183</sup> SAF at 92.

<sup>184</sup> SAF at 230.

<sup>185</sup> *Bormann v. Board of Supervisors in and for Kossoth County* 584 N.W. 2d 309 (Iowa 1998) *cert denied*, 119 S. Ct. 1096 (1999).

<sup>186</sup> SAF at 185.

<sup>187</sup> Rick Pruetz, *Saved by Development*, Arje Press (1997) at 58-59.

It would be expected that any higher development costs would be shifted back to the property owner through a reduction in the price a developer is willing to pay for the affected land.

### **9.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

**APZ, PACE** and **TDR** as Farmland Protection techniques are specifically designed to limit the amount of development that takes place in land designated for agricultural use. Many urbanizing jurisdictions use these techniques in conjunction with other growth management techniques in implementing urban growth boundaries or directing growth away from farmlands and towards other areas. As discussed above, **APZ** has been shown to be effective in altering development patterns where the zoning was perceived as being relatively difficult to change.

### **9.06 IMPACT ON HOUSING AFFORDABILITY**

To the extent that **APZ** or **PACE** limits the availability of land for residential development to levels below that needed to keep up with the demand for new housing, there is likely to be upward pressure on land costs and consequently housing prices. This may be avoided by the community maintaining an adequate supply of appropriately zoned land for development.

### **9.07 SUMMARY OF PROS AND CONS**

#### **PROS:**

- The farmland protection techniques described above can be successful in protecting agricultural lands from development, particularly when they are used in combination with one another.
- **PACE** in combination with **APZ** is thought to be particularly effective at protecting agricultural land from development pressures.

#### **CONS:**

- The effectiveness of farmland protection techniques at protecting farmland can have negative consequences from the standpoint of real estate interests. **APZ**, in particular, can result in drastic reduction in property values. Farmers themselves sometimes oppose **APZ** on that ground.<sup>188</sup>
- Placing permanent development restrictions on land currently used for agriculture through **PACE** or **TDR** can have negative consequences for a region's future development, if protected parcels are selected indiscriminately or, worse, used to block logical growth corridors.

### **9.08 INCENTIVE-BASED ALTERNATIVES**

**PACE** is an incentive based mechanism for protecting farmland in that it pays a property owner fair market development value to retain its land in agricultural use. Properly designed and implemented, **TDR** can be an incentive-based mechanism. Other incentive-based mechanisms for the preservation of farmland include differential tax assessment for farmland so that it is taxed at the agricultural value of the land rather than the development value and "circuit-breaker" tax programs by which farmers receive tax credits that are often based on farm income and the state reimburses the local taxing authority for the lost

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<sup>188</sup> SAF at 50; Daniels at 421.

revenue.<sup>189</sup> Agricultural district laws in many states allow farmers to receive various benefits by voluntarily forming areas within which commercial agriculture is protected and encouraged. Right to farm laws protect farmers from lawsuits based on impacts from farming operations as an incentive to remain in the farming business.

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<sup>189</sup> SAF at 34-39.

## SECTION 10: CLUSTER ZONING AND PLANNED UNIT DEVELOPMENT

### 10.01 PURPOSE AND KEY TERMS

**Cluster zoning** and **planned unit development (PUD)** came into use during the 1960s as alternatives to traditional zoning. Traditional zoning treats each parcel of land in a community as a distinct unit, regardless of its size, based on the assumption that a different owner or builder will develop each parcel. That approach has the disadvantage of being too rigid and cumbersome when applied to large pieces of land, and in large-scale development, it tends to discourage creativity and flexibility.<sup>190</sup>

Cluster zoning applies the concept of concentrating development on smaller lots in order to preserve larger open spaces.<sup>191</sup> It is defined as:

an innovative land use control device for grouping or “**clustering**” buildings to increase densities on some portions of the development area in order to open the remaining area to recreational or other purposes.<sup>192</sup>

It is also called “**open space**” or “**density**” zoning.<sup>193</sup>

Cluster zoning is designed to meet the need for community development while providing specific plans for the retention of open spaces and preservation of natural beauty. In residential development, it can make large open tracts of land available for use as either improved or undeveloped open space to replace the small private yard of traditional zoning, while keeping the overall population density of the development at the same level as traditional zoning.<sup>194</sup> Thus, cluster development groups residences to increase dwelling densities on specific portions of a development and leaves other portions free of dwellings.<sup>195</sup>

Although PUD and cluster development are similar, they are not identical. Cluster development is often an essential element of the broader concept of a PUD.<sup>196</sup> The simplest form of PUD, which may be termed a **cluster zoning or density transfer PUD**, maintains the overall density of a development, for example, by allowing an increase in the density of the housing in one part of the PUD in return for setting aside open space elsewhere in the development.<sup>197</sup>

PUDs have several purposes. They allow the flexible development of large parcels of land as a single unit with a mixture of buildings and land uses. They accomplish these purposes by using varying lot sizes and integrating different structures and uses in ways that would be considered incompatible under traditional zoning principles. The ability to mix structures with varying bulks and uses allows the developer to use aesthetics or site conditions, rather than a zoning map, as a basis for arranging areas of common open space and recreational facilities with different building types or land uses.<sup>198</sup>

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<sup>190</sup> 2 Patrick J. Rohan, *Zoning and Land Use Controls* §§ 12.01[1], 12.03[1] (1994) (hereinafter “Rohan”).

<sup>191</sup> 2 Rohan § 12.01[1].

<sup>192</sup> 2 Rohan § 12.01[2]; see also Donald G. Hagman & Julian Conrad Juergensmeyer, *Urban Planning and Land Development Control Law* § 7.15, at 221 (2d ed. 1986) (hereinafter “Hagman & Juergensmeyer”) (defining cluster development as “a device for grouping dwellings to increase dwelling densities on some portions of the development area in order to have other portions free of buildings”).

<sup>193</sup> 2 Rohan § 12.01[2].

<sup>194</sup> 2 Rohan § 12.01[2].

<sup>195</sup> 2 Rohan § 12.02[1].

<sup>196</sup> 2 Rohan § 12.02[1].

<sup>197</sup> Daniel R. Mandelker, *Land Use Law* § 9.24, at 411 (4th ed. 1997) (hereinafter “Mandelker”).

<sup>198</sup> 5 Rohan § 32.01[2].

The PUD combines elements of cluster zoning and subdivision platting,<sup>199</sup> and PUD regulations incorporate elements of zoning and subdivision controls. Like a zoning ordinance, planned unit development regulations regulate land use density and site development. They also may include internal design and thoroughfare requirements, such as those contained in subdivision ordinances.<sup>200</sup>

A PUD has been defined in formal terms as:

an area of land, controlled by a landowner, to be developed as a single entity for a number of dwelling units, and commercial and industrial uses, if any, the plan for which does not correspond in lot size, bulk, or type of dwelling or commercial or industrial use, density, lot coverage and required open space to the regulations established in any one or more districts created, from time to time, under the provisions of a municipal zoning ordinance enacted pursuant to the conventional zoning enabling act of the state.<sup>201</sup>

Another way of expressing this concept is that a PUD is a mixed use development that is approved as an *integral unit* based on a plan for the overall development rather than through the application of typical use and dimensional regulations to individual parts of the development. One of the basic premises of the PUD is that planning is best done at the “community” or “neighborhood” level, rather than at the level of the individual lot. This results in applying prevailing density regulations to the project and parcel of land as a whole rather than to each lot and component of the project.<sup>202</sup> In other words, a PUD allows “**density zoning**”:

Density zoning allows lots to be grouped for development, rather than being subjected to the lot-by-lot approach of Euclidean techniques. Individual parcels within the group may be developed more intensely than otherwise allowed by the comprehensive plan as long as the total development of the grouped lots together does not exceed the allowable level. Under this approach, lot size is not the primary regulating factor; when applied to an entire development, density zoning results in the development of a maximum number of units per acre. Consequently, density zoning allows a developer to plan a fixed number of dwelling units on a property to secure the greatest land use.<sup>203</sup>

Without PUD, traditional zoning of a large scale planned development could require two or more zoning districts if the development includes, for example, single-family and multi-family dwellings, or even ancillary commercial or service uses. This would make it impossible to implement a coordinated set of land use controls for the development.<sup>204</sup>

PUD regulations provide standards for the approval of a PUD plan in an administrative review process. A unit of local government can approve a PUD plan as an integrated set of land use controls that apply to an entire development. Unlike traditionally zoned areas, PUDs are not divided into districts—conditions

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<sup>199</sup> Hagman & Juergensmeyer § 7.15, at 220.

<sup>200</sup> Mandelker § 9.26, at 412.

<sup>201</sup> Hagman & Juergensmeyer § 7.15, at 220, *citing* U.S. Advisory Commission on Intergovernmental Relations, ACIR State Legislative Program, 1970 Cumulative Supp. 31-36-11 at 5 (1969).

<sup>202</sup> 5 Rohan § 32.01[2].

<sup>203</sup> 5 Rohan § 32.02[1].

<sup>204</sup> Mandelker § 9.24, at 410.

may vary from parcel to parcel.<sup>205</sup> Because the development is planned and reviewed in its entirety, a developer can achieve better site planning by varying lot sizes, setbacks, and other site development requirements. The preservation of open space and natural areas in one part of the development can offset higher densities in another part.<sup>206</sup> However, providing open space is not necessarily the primary objective, particularly in non-residential PUDs.<sup>207</sup> As an alternative to traditional zoning, a PUD's primary advantage is its ability to provide for a mixture of uses. Depending upon whether there is a minimum or maximum acreage size for a PUD, it potentially can allow the development of an entire neighborhood or even town based upon a single approved plan.<sup>208</sup>

The PUD represented an early attempt, preceding approaches such as concurrency and adequacy of public facilities—to address the timing dimension of development. Traditional zoning was historically unable to control development to keep pace with the growth of public facilities and services and to restrict development from certain areas until others were built out. The site plan review process of PUD strengthened the control of local government over the pace and sequence of development.<sup>209</sup>

Property within a PUD usually is sold by the developer on either a common ownership basis or to individual owners in fee, subject to restrictive covenants on each owner's use of the land. These ownership forms are frequently mixed within a PUD. The owners are subsequently required to pay collectively for the maintenance of the PUD's common areas, such as recreational areas and, potentially, roads. A board of directors, which may delegate managing duties to managing agents, supervises land use within an operating PUD.<sup>210</sup>

## 10.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

The stated purpose of cluster development is straightforward. Clustering allows the grouping of buildings at higher densities on some portions of a development in order to keep the other portions clear of buildings. Cluster development results in the setting aside of land in its natural state, open space, or recreational areas wherever it is employed.

Cluster development forms the basis of the related technique known as **conservation subdivisions**. Conservation subdivisions use cluster development for the primary purpose of environmental protection by explicitly linking the built environment to the carrying capacity of the underlying land. Buildings and roads are placed at the locations on a parcel that are best suited to handle them, so the remaining areas can be preserved in their natural state. Prairie Crossing in Grayslake, Illinois is an example of this type of development.

When conventional cluster regulations limit the number of dwelling units to no more than what would otherwise be permitted in a standard subdivision, as is typical, developers have little incentive to use them. This is particularly the case when houses in cluster subdivisions sell for less than houses in standard subdivisions. Consequently, many developers would prefer to build larger single-family homes in standard subdivisions, limiting the availability of choices in the stock of housing.

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<sup>205</sup> Hagman & Juergensmeyer § 7.16, at 222-23.

<sup>206</sup> Mandelker § 9.24, at 410-11.

<sup>207</sup> 2 Rohan § 12.02[1]; 5 Rohan § 32.01[2].

<sup>208</sup> Hagman & Juergensmeyer § 7.15, at 220-21.

<sup>209</sup> Fred P. Bosselman, "Alternatives to Urban Sprawl: Legal Guidelines for Government Action" at 233-34 (1968), cited in George Sternlieb, et al., *Planned Unit Development: Theoretical Origins, Evolutionary Framework* 33-34 (1972).

<sup>210</sup> 5 Rohan § 32.01[4][a].

In light of those shortcomings and in an effort to increase the diversity of its housing stock, the Town of Lexington, Massachusetts recently enacted an “impact-incentive” cluster regulation. Essentially a form of performance zoning, Lexington’s regulation relates maximum allowed development to the development’s impacts, rather than its density as measured by dwelling units per unit of area. The total density of the development under the impact-incentive regulation may exceed the density available in a standard subdivision. In Lexington, smaller housing units with fewer bedrooms had lower impacts on traffic generation, occupancy, school-age children, site coverage, and impervious surface than larger single-family houses. Therefore, the regulation permits developers to build more smaller houses in an “impact incentive” development than the number of larger houses that would be allowed in a standard subdivision on the same parcel. Moreover, the regulation includes bonus provisions that permit more development when such development offers significant public benefits, such as historic preservation, provision of extraordinary amounts of open space, rental housing, affordable housing, and housing oriented to age groups that are not adequately served by standard subdivision housing. Lexington’s impact-incentive development is available by special permit with site plan review.<sup>211</sup>

### 10.03 IMPACT ON PROPERTY VALUES

Data from Amherst and Concord, Massachusetts show a higher appreciation rate for cluster development with open space than for residential properties with larger private yards but no protected open space.<sup>212</sup> In Boulder, Colorado, a decrease in the price of a residential property was found for each foot one moves away from the city’s greenbelt, which suggests that the existence of substantial open space may have an impact on adjacent property values.<sup>213</sup>

The requirement of a fixed amount of open space in every cluster development or PUD may not bring added value to the parcel or to individual lots within the development where such developments are located near existing parks or community centers, or are located on parcels lacking in significant aesthetic or recreational value.<sup>214</sup>

### 10.04 IMPACT ON DEVELOPMENT COSTS

Both a developer and a community can realize economic savings from the use of clustering. Compared to a conventional subdivision of equivalent property, a clustering plan can yield more open space, reduce the total length of necessary streets, and reduce the total length of required sewer lines. One model clustering plan yielded five times more open space, reduced the length of necessary streets by 10 percent, and reduced the total length of required sewer lines by 25 percent.<sup>215</sup>

If a PUD ordinance allows developers to build at higher overall densities, development costs can be spread over a larger number of units.<sup>216</sup>

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<sup>211</sup> Erica Levine Powers & Robert A. Bowyer, *Diversification of Housing Supply to Accommodate Smaller Households: Can Single and Multiple Households Exist in Suburban Settings?* Zoning & Planning L. Rep., Nov. 2000, at 81-92.

<sup>212</sup> Jeff Lacy, *An Examination of Market Appreciation for Clustered Housing With Permanent Open Space* (1990), available at <http://www-unix.oit.umass.edu/~ruralma/LacyMarket.html>.

<sup>213</sup> Mark R. Correll, et al., *The Effects of Greenbelts on Residential Property Values: Some Findings on the Political Economy of Open Space*, Land Economics 54(2):207-217 (May 1978).

<sup>214</sup> Builders Association of the Twin Cities & Center for Energy and Environment, *Fees, Infrastructure Costs, And Density...Their Impact Upon The Twin Cities Regional Growth Strategy* (1997), available at [http://www.batconline.org/cost\\_study/coststudy.htm](http://www.batconline.org/cost_study/coststudy.htm).

<sup>215</sup> 2 Rohan § 12.01[3][ii], *citing How Will America Grow?* Citizens Advisory Committee on Environmental Quality 15 (Apr. 1976).

<sup>216</sup> Municipal Research & Services Center, *Affordable Housing Techniques*, Report No. 22 (Mar. 1992), available at <http://www.mrsc.org/textaht.htm>.

Although PUD can make use of clustering, it also can introduce a new element of cost. Because PUDs frequently include commonly owned facilities and space, complicated restrictions and covenants are necessary to manage the facilities and space. Indeed, the elaborate negative and affirmative restrictions, covenants, conditions, and easements are typically so extensive that an association or corporation must be established to administer the provisions.<sup>217</sup> Preparing the property interests and establishing the association or corporation add to the initial development costs, and operating the association or corporation creates an ongoing cost for the residents of PUDs.

#### **10.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

Cluster development and PUD do not necessarily alter the total amount of land developed, but rather affect the pattern in which it is developed. As discussed earlier, clustering increases building density in some areas of a development in order to make it possible to keep other areas open. With cluster development, an entire community can be built within a single zone, and density requirements regulate the relationship between residences and open areas to achieve a desirable balance.<sup>218</sup>

PUD has a broader range of impact on patterns of land development. It can fulfill the need for well-designed communities by improving population distribution because it allows greater density in some areas of a development in return for greater open space elsewhere on the parcel.<sup>219</sup> The developer of a PUD can improve the land as an integral unit, with considerable flexibility, instead of being forced to build on a lot-by-lot basis with required setback and yard limitations. PUD encourages innovations in land development, such as the integration of recreational, living, working, and commercial facilities wholly within the same community under a preexisting approved plan.<sup>220</sup> Design flexibility permits the concentration of buildings on the portions of a site that are most suitable for building, resulting in a more environmentally sensitive development that preserves open space and natural features.<sup>221</sup>

Other impacts of PUD are more incidental to its basic nature. It can be used to overcome topographical problems. It allows a developer to capitalize on a region's unique characteristics and to sustain transition zones or uses.<sup>222</sup> It can offer a "psychological advantage" as a community center similar to the European village concept and serve the social requirements of its residents and neighboring areas.<sup>223</sup>

#### **10.06 IMPACT ON HOUSING AFFORDABILITY**

Developments, including PUDs, that incorporate clustering have available a flexible land use concept for providing low- and moderate-income housing. The concept can combine higher density development with more traditional suburban aesthetics.<sup>224</sup> The most effective features of cluster development and PUD for encouraging affordable housing are the development cost economies that can be achieved through the clustering of buildings and the related savings in site development costs for items such as streets, sidewalks and utility lines. Reducing the amount of required infrastructure also helps reduce the costs of maintaining it.<sup>225</sup> Some jurisdictions allow for the provision of one or more affordable housing units, in addition to the number of market rate units allowed by the base zoning density, as an "incentive" for using a cluster rather than standard subdivision design.

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<sup>217</sup> Hagman & Juergensmeyer § 7.19, at 232.

<sup>218</sup> 2 Rohan § 12.01[3][i].

<sup>219</sup> 5 Rohan § 32.02[1].

<sup>220</sup> 5 Rohan § 32.02[2].

<sup>221</sup> Affordable Housing Techniques, *supra*.

<sup>222</sup> 5 Rohan § 32.02[2].

<sup>223</sup> 5 Rohan § 32.02[1].

<sup>224</sup> 2 Rohan § 12.01[3][iii].

<sup>225</sup> Affordable Housing Techniques, *supra*.

On the other hand, developments in which land is set aside as open space other than a homeowner's backyard or a public park or recreational area require the creation of a homeowner's association to maintain the open space. Requiring entry-level homebuyers to pay a fee for the work of such an association adds a financial burden on those who are least able to pay for it.<sup>226</sup>

#### 10.07 SUMMARY OF PROS AND CONS

##### PROS:

- PUDs allow a mixture of land use and building types within a single development.
- Both PUDs and Cluster Developments afford the flexibility to develop land as an integral unit.
- Both techniques provide a mechanism for preserving open space and natural areas.
- Cluster developments can result in developer savings on infrastructure costs.
- Open space preserved through these techniques can increase the value of adjacent property.

##### CONS:

- Both techniques may require a homeowners' association, with creation and maintenance costs, with responsibility for open space and other common areas.
- Both techniques require greater attention to a development's planning and design, including reviews by municipal planning staffs, planning commissions, and legislative bodies.<sup>227</sup>

#### 10.08 INCENTIVE-BASED ALTERNATIVES

In situations where cluster development is mandatory, as with conservation subdivisions, for example, a program for the **purchase of development rights (PDR)** or for **transfer of development rights (TDR)** offers an incentive-based alternative to the preservation of open space. Typically, however, PUD is not mandatory under land use regulations. Also, because the PUD has the potential to allow for a comprehensive approach to site plan issues and development impacts, individual incentive-based alternatives do not provide the comprehensiveness of PUD. Performance-based zoning and ordinances that allow for neo-traditional development probably represent the closest alternatives, whether regulatory or incentive-based, to PUD.

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<sup>226</sup> Fees, Infrastructure Costs, And Density, *supra*.

<sup>227</sup> Affordable Housing Techniques, *supra*.

# PART IV: PRESERVATION OF COMMUNITY CHARACTER

## SECTION 11: DEVELOPMENT DESIGN REVIEW

### 11.01 PURPOSE AND KEY TERMS

In their efforts to implement “smart growth” initiatives directed at the location and quality of development and the preservation of “community character,” communities are embracing concepts and techniques that involve a high degree of discretionary decision-making. One such discretionary review procedure is **development design review**.

Development design review processes usually take three forms: (1) **urban design review**, (2) **appearance review**, and (3) **architectural review**. Urban design review is a review process and term more typically employed in the large built environment of cities, where the focus is the urban fabric---light, air, view protection, open space, and spatial and functional relationships within the city. In a survey published on design review practice, the following definition of design review was used:

Design Review refers to the process by which private and public development proposals receive independent scrutiny under the sponsorship of the local government unit, whether through informal or formalized processes. It is distinguished from traditional (Euclidean) zoning and subdivision controls, in that it deals with urban design, architecture, or visual impacts.<sup>228</sup>

Of the three terms used in this definition of design review---urban design, architecture, and visual impacts---the term "urban design" is perhaps least understood. One explanation that is helpful describes urban design as:

. . . the composition of architectural form and open space in a community context. The elements of a city's architecture are its buildings, urban landscape, and service infrastructure just as form, structure, and internal space are elements of a building. . . Like architecture, urban design reflects considerations of function, economics, and efficiency as well as aesthetic and cultural qualities.<sup>229</sup>

Stated differently, from a city planning policy perspective, urban design is "designing cities without designing buildings."<sup>230</sup>

By contrast, appearance review, primarily a suburban and small town phenomenon, is more directed at preserving and enhancing a perceived community identity or "character" and emphasizes compatibility with existing architectural styles and visual harmony throughout the community through review of site plans, landscape plans and signage. Architectural design, of course, is an important component of these community appearance review programs. The third form of discretionary design review is the result of communities focusing primarily upon architectural design. To do this they establish architectural review boards. The architectural design review conducted by these boards can have varying missions. For example, in some communities, the board's mission is to disapprove *excessive similarity* to any other existing or approved structure within a certain distance. A mission of other such boards is to avoid *excessive differences* between structures. There are also architectural review boards whose mission is to prevent *inappropriate* design.

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<sup>228</sup> Survey by Professor Brenda Case Lightner, cited in Brenda Case Scheer & Wolfgang F.E. Preiser. *Design Review: Challenging Urban Aesthetic Control* (Chapman & Hall 1994).

<sup>229</sup> R. Tseng-yu Lai. *Law in Urban Design and Planning* (New York: Van Nostrand Reinhold Company, 1988) at 1.

<sup>230</sup> J. Barnett. *An Introduction to Urban Design* (New York: Harper & Row 1982) at 55.

One movement that is at the heart of smart growth, and that recognizes the various physical, social and economic elements that can give meaning to the “character” and sense of “community,” is **New Urbanism**. In its “Charter of the New Urbanism,” the Congress for the New Urbanism states that it “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.”<sup>231</sup> However, the main thrust of New Urbanism is the physical—to provide a “coherent and supportive physical framework” that the New Urbanists believe will, in turn, sustain economic vitality, community stability and environmental health.

New Urbanists are committed to “reestablishing the relationship between the art of building and the making of community, through citizen-based participatory planning and design.”<sup>232</sup> Design—architecture and landscape design—is the principal planning and implementation tool of the New Urbanism. The design of neo-traditional communities emphasizes compact, higher density, pedestrian friendly, mixed use communities, with single family homes on small lots interspersed with multifamily townhouse and apartment developments. A “grid pattern” of streets is favored over cul-de-sacs in order to provide better connectivity between different neighborhoods and land uses.

#### **11.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)**

Generally speaking, the effectiveness of design review depends upon the extent to which a community has taken the time to think through clearly and articulate the goals that it wishes to further through the combination of zoning and design standards or guidelines purposes of the review process. This includes setting forth the basic characteristics of its community form and organization that should inform the development design review process. With respect to Traditional Neighborhood Developments (TND), the New Urbanism can point to the successes of developments such as the resort community of Seaside, Florida, the Kentlands in Gaithersburg, Maryland, and Celebration in suburban Orlando, Florida. However, if New Urbanism is ultimately to be successful and effective in encouraging pedestrian-friendly communities, mixed land uses, town centers and other design elements that give communities a sense of place, the standard zoning enabling legislation in most states must be amended to allow these key elements of Traditional Neighborhood Design. For example, the uniformity requirement found in most zoning enabling statutes requires that, while regulations within one zoning district may differ from those in another district, regulations must be uniform throughout any single district. But the flexibility design needed for a village may call for accommodating a more intensive use in a way that might be considered impermissible “spot” zoning under traditional zoning regulations. Amendments to zoning and subdivision enabling legislation may also be necessary to allow New Urbanist developers to use grid street patterns, alleys, and porches as ways to achieve pedestrian-friendly subdivisions and villages. To date, few states have made these statutory enabling changes.

Another measure of the degree to which TND has been effective in achieving its stated purposes is the existence of an emerging market for traditional neighborhood developments that have smaller lot sizes and clustered housing to preserve open space. This new market consists of empty nesters, smaller families, singles and seniors, and their demand is consistent with the general trend nationally towards smaller lot sizes and the increasing acceptance of mixing lot sizes and housing types (e.g., townhouses and single family homes) both within developments and even within streets and blocks.<sup>233</sup> A 1997 study found that housing lots could shrink from twenty to twenty-five percent before purchasers objected<sup>234</sup>.

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<sup>231</sup> Michael Leccese and Kahtleen McCormick, eds. *Charter of the New Urbanism* (2000) at v.

<sup>232</sup> *Id.* at vi.

<sup>233</sup> See survey conducted by American LIVES, Inc. (1995)

<sup>234</sup> Robert W. Burchell, *Modeling the Cost of Sprawl: Land, Infrastructure, Transportation, Fiscal and Social Cost*, prepared for the Full Cost Accounting Committee in South Florida (New Brunswick, New Jersey: 1997).

### **11.03 IMPACT ON PROPERTY VALUES**

Design standards—whether imposed through a development design review process, or as part of an overall community design solution, such as proposed by the New Urbanists—can generally be expected to increase property values, particularly if the requirements for site layout and building design are viewed by local residents and consumers as being consistent with and enhancing the perceived character of a neighborhood. Where a Traditional Neighborhood Development (TND) constitutes a departure from surrounding development patterns, the degree to which property values within the TND remain stable, increase or decrease, would depend in significant part upon the particular jurisdiction and the strength of the market in that jurisdiction for the types of housing and mixed uses typical of TND development.

### **11.04 IMPACT ON DEVELOPMENT COSTS**

Design requirements placed upon development proposals through a design review process typically add to the cost of development, particularly when such conditions are imposed through vague standards or guidelines and could not have been anticipated by the developer. This result is especially true in the case of requirements pertaining to individual building designs. In the case of design requirements imposed to achieve community design solutions, such as TND, increased upfront planning and engineering costs can be offset by reduced construction costs resulting from fewer roads and utilities and more compact development. At the same time, however, some developers have observed that New Urbanist development provides a lower rate of return to then because it is more time consuming than conventional development.<sup>235</sup>

### **11.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

Development design review to achieve or preserve community character does not in and of itself affect the amount and patterns of land development. Only when design considerations are imposed through a particular approach such as neotraditional, or traditional neighborhood development, does the result impact the typical patterns of land development. Specifically, the traditional neighborhood developments change the pattern of low density, single-family subdivisions and large-lot homes. Instead, bungalows, town homes, apartments and other residential units are developed in a mixed use context. Better planned mixed use communities can reduce travel distances and offer greater choices in travel modes, especially walking and transit, than more traditional single-purpose developments.<sup>236</sup>

### **11.06 IMPACT ON HOUSING AFFORDABILITY**

Development design review can have an exclusionary effect when it requires more costly processes and methods of design and construction. As one commentator has noted:

Because of the open-endedness of design review, it could be used as an easy subterfuge to block unwanted housing for low- and moderate-income people. . . . Furthermore, design review is a way to increase development cost just in order to insure that all new housing in a community must bear “snob appeal” price tags. If such abuses were tolerated, they would undermine the legal basis for design review and discredit the entire concept.<sup>237</sup>

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<sup>235</sup> Dowell Meyers and Alicia Kitsuse, “The Debate Over Future Density of Development: An Interpretive Review,” (Lincoln Institute of Land Policy Working Paper: 1999) at 25.

<sup>236</sup> Urban Land Institute. *Smart Growth: Myth and Fact* (1999) at 14.

<sup>237</sup> Remarks of George Lefcoe in American Institute of Architects, *Design Review Boards*, at 15.

But to the extent that design requirements require or allow for a mixture of housing types and a mixture of uses, it may be possible to create affordable housing. For example, TND may encompass the construction of residential apartments above retail shops. To the extent that land and infrastructure costs are financed in whole or large part by such retail shops, the housing can be provided at a much lower costs than housing-only development, thereby, enhancing affordability.

One way a community can avoid the potential exclusionary effect of its design review process is to simply exempt housing developments from design review. However, perhaps the more practical solution, would be to ensure that design review can not be used as a basis to deny the approval of a residential development proposal.

#### **11.07 SUMMARY OF PROS AND CONS**

##### **PROS:**

- Development design review, if applied to implement planning and design policies derived from careful study of a particular area, can enhance property values.
- Community design solutions such as traditional neighborhood development (TND) can provide an alternative housing solution in the marketplace that can also be cost effective because the mix of land uses, open spaces and transportation options are integrated with services and infrastructure.

##### **CONS:**

- Development design review, if based upon vague standards or guidelines, can result in arbitrary decisions that increase development costs without enhancing community character.
- Development design review can impose a costly process and require methods of design and construction that increase development costs.
- Development design review can have an exclusionary effect when used as a means of blocking affordable housing solutions that may not comply with “community design” principles.

#### **11.08 INCENTIVE-BASED ALTERNATIVES**

The most obvious incentive-based alternative to design review is the marketplace itself, where developers and designers, driven by competition for their products and by examples of good design, will propose design solutions consistent with community character and adopted standards that do not require the scrutiny of a design review panel. Most developers and their designers believe that the solutions they propose are grounded in principles of good design and in the practical realities of the marketplace and consumer preferences, and that discretionary design review is unwarranted.

## SECTION 12: NEIGHBORHOOD CONSERVATION DISTRICTS

### 12.01 PURPOSE AND KEY TERMS

Two solutions for sprawl—infill development and development within existing urban areas—often create unintended and unwanted impacts on the character of existing neighborhoods. Increased densities and bulk, incompatible uses and the introduction of contextually inappropriate architecture contribute to a decline in neighborhood character, loss of a “sense of place” as well as the loss of historic structures. In an effort to preserve those qualities, over 30 local governments across the country have enacted **neighborhood conservation districts**.<sup>238</sup>

The neighborhood conservation zoning district is a technique that has been in use since the mid-1970s, when Boston established a Landmarks Commission.<sup>239</sup> It became prominent in the late 1980s in response to the economic boom and the National Historic Preservation Act prompted by the expansion of local government preservation activities. Its purpose is primarily to preserve neighborhood character, as defined by its historic, architectural or aesthetic features, or by the nature of its use (e.g., residential); and sometimes to act as a catalyst for rehabilitation.<sup>240</sup>

The broadest definition of this technique, offered in 1993 by Robert E. Stipe, Professor Emeritus of Design, North Carolina State University, encompasses the effect on neighborhood identity of all aspects of the built environment, not just the architecture:

A conservation area possesses form, character, and visual qualities derived from arrangements or combinations of topography, vegetation, space, scenic vistas, architecture, appurtenant features, or places of natural or cultural significance, that create an image of stability, comfort, local identity, and livable atmosphere.<sup>241</sup>

While Professor Stipe argued for a non-regulatory approach,<sup>242</sup> this technique as typically practiced is regulatory, following either a “historic preservation” or “neighborhood planning” model.<sup>243</sup> Where the focus is historic preservation, the overlap between a “conservation” and a “historic” district can be confusing and the distinctions are often blurred.<sup>244</sup>

Three types of neighborhoods, or “conservation areas,” have been identified as appropriate for this technique:

1. Areas surrounding or bordering an existing or proposed local historic district, providing a “buffer” or “transitional” area of protection;

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<sup>238</sup> Mark S. Dennison, “Conservation Districts: Latest Zoning Tool to Preserve Neighborhood Character,” *Zoning News* November 1992, p. 1; Marya Morris, *Innovative Tools for Historic Preservation*, Chicago: 1992 American Planning Association, Planners Advisory Service (PAS) Report No. 438, p. 13.

<sup>239</sup> Dennison at 1.

<sup>240</sup> Morris at 13.

<sup>241</sup> Robert E. Stipe, “Conservation Areas: A New Approach to an Old Problem” in *Issues Paper: Conservation Districts* distributed by the National Park Service Cultural Resources Partnership Notes, p. 2, available at <http://www2.cr.nps.gov/pad/partnership/ConsDist699.pdf>.

<sup>242</sup> Stipe at 4.

<sup>243</sup> Carole Zellie, “A Consideration of Conservation Districts and Preservation Planning, Notes from St. Paul, Minnesota,” distributed by the National Park Service, Cultural Resources Partnership Notes at. 2; available at <http://www2.cr.nps.gov/pad/partnership/ConsDist699.pdf>.

<sup>244</sup> Morris at 17.

2. “Pre-natal” historic districts that cannot meet the 50-year rule or otherwise lack sufficient character or support for such designation; and
3. Areas of social or economic value, for example utility for affordable housing, with no “historic” status.<sup>245</sup>

The scope of review in a conservation district varies according to the purpose and the administering agency. Districts with an historic preservation goal tend to mimic the historic district “certificate of appropriateness” model. Districts administered by planning and zoning commissions, whose purpose is broader than historic preservation, consider uses, aesthetics, neighborhood character and property values.<sup>246</sup> Elements of the built environment that are regulated because they contribute to neighborhood identity include lot frontage, lot size, building entrances, building height and building placement on a lot. Building design elements of concern include roof shape, proportion and rhythm of openings, building materials, textures and color.<sup>247</sup> Districts vary in the extent to which they regulate alterations, demolitions and new construction.

Neighborhood conservation districts are also used to implement neighborhood plans, which are often a prerequisite to adoption of the district. Effective plans will incorporate neighborhood history, land use inventory, description of housing stock, inventory of the character of the built environment, capital improvements needs, commercial development or revitalization activities, and an architectural survey of the area’s architectural and urban design elements and patterns that distinguish the neighborhood.<sup>248</sup>

The following are some key terms in understanding the neighborhood conservation technique:

- **Design review** is the regulatory mechanism for controlling change to the built environment, whether the district regulates new construction only, or includes review of alterations and other exterior improvements.
- **Overlay district** is a means of adding or “overlying” regulations over an existing zoning district, adding provisions that supersede the underlying zoning standards or procedures if inconsistent;
- **Downzoning** is often undertaken in the form of a reduction in the allowed density, height, FAR or other standards of existing zoning regulations that may exceed what is actually present in a particular neighborhood.
- **Contextualism** refers to the overriding theme in many districts. New buildings must meld with the old rather than imitate. They may stand out for their uniqueness, but not for their newness. As noted in Nashville’s guidelines for new construction, “new buildings should not imitate past architectural styles. . . it is usually impractical to imitate the architecture of the past. . . it creates “pseudo-old” buildings. . . New buildings should continue this tradition [of reflecting change in building tastes and technology over the years] while complementing and being compatible with other buildings in the area.”<sup>249</sup>
- **Downtown and Corridor Plans.** These plans rely heavily on the use of design guidelines and, sometimes, incentives to achieve renovation of older

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<sup>245</sup> Stipe at 4.

<sup>246</sup> Dennison at 2.

<sup>247</sup> Dennison at 3.

<sup>248</sup> Morris at 19.

<sup>249</sup> Quoted in Morris at 22.

downtowns or commercial corridors. Prominent examples include the downtown plan for Scottsdale Arizona, the series of overlay zones for the airport, watershed and state park and five gateway highway corridors in Raleigh, North Carolina; and the creation of special highway districts to encourage employment opportunities in Plano, Texas.<sup>250</sup>

- **Special Zoning/Design Districts.** These “tailored” zoning districts are created to meet the needs of an existing area (as opposed to setting parameters for future build-out). They are an “emerging phenomenon” related to neighborhood conservation districts.<sup>251</sup> Examples are New York’s “Special Midtown District” and Chicago’s “Planned Manufacturing District.”

Preserving community character and “livability” through control of an area’s design aspects has been referred to as “the ‘soft’ side of growth management.”<sup>252</sup> Neighborhood Conservation districts, like other design-oriented “community character” techniques, are not stand-alone, and must be closely interrelated with other growth management efforts in order to be effective. Also, they depend on a strong development market for their efficacy: “Fine points of project and building design are significant only if and when development takes place. Even historic preservation is dependent on attracting profitable uses for old buildings and neighborhoods.”<sup>253</sup>

## 12.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

Neighborhood conservation districts are considered by planners who work with them to be effective in achieving their purpose. A 1992 survey of 18 such districts conducted for St. Paul, Minnesota concluded that:

architectural and historic preservation oriented districts with limited design review can be a useful supplement to the traditional historic district. They function best. . . when applied to areas with a history of good maintenance and little exterior change and/or where residents are strongly opposed to full fledged design review. In areas where there is a pattern of low maintenance and unsympathetic exterior alterations, conservation districts with limited design review are less effective at preserving neighborhood character.<sup>254</sup>

Where a neighborhood conservation district has a broader purpose, beyond strictly historic, aesthetic concerns, it has also been effective. The Phoenix, Arizona “Special Planning District” (adopted in 1978 as a conservation district, amended and renamed in 1987) succeeded in averting incompatible development, especially in neighborhoods adjacent to high-rise commercial development.<sup>255</sup> That ordinance specifically states that its purpose is to “tailor the zoning ordinance to the unique needs of the neighborhood” and to “initiate and implement programs for the conservation and revitalization of neighborhoods.” “Tailoring” has been accomplished by ‘downzoning’ to reduce allowable density as a way to prevent demolitions and incompatible infill development.<sup>256</sup> The Lockeland Springs – East End neighborhood of Nashville has been cited as an example of a neighborhood with consecutive waves of architectural styles (turn of the century bungalows, 1950’s urban renewal, 1980’s duplexes) that in the

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<sup>250</sup> Douglas R. Porter. *Managing Growth in America’s Communities* (Washington D.C. Island Press, 1997) at 164.

<sup>251</sup> *Id.* at 165.

<sup>252</sup> Porter at 173.

<sup>253</sup> *Id.*

<sup>254</sup> Zellie at 15.

<sup>255</sup> Morris at 19.

<sup>256</sup> Morris at 19.

late '80's was moving toward "demolition by neglect." The city adopted an overlay conservation district guided by the theme of contextualism: "that is, new buildings must mold with the old. They may stand out for their uniqueness, but not for their newness."<sup>257</sup> As of 1991, the district was credited with having stabilized property values and ending incompatible infill development.

A dramatic example of obtaining "contextual" development occurred in New York City in 1989. Many of the city's low-density neighborhoods were experiencing the effects of incompatible infill development:

Older houses were being torn down and replaced with boxy row houses. . . . new development included curb cuts for [restricting on-street parking] driveways and unattractive paved surfaces where one would expect a front yard. . . . The general sentiment . . . was that a low-density neighborhood embodies a certain character that was worth preserving.<sup>258</sup>

Zoning was amended to reduce allowable Floor Area Ratio (e.g. down zoning), and thereby eliminate the incentive for tearing down existing homes. Other design guidelines were added to encourage new construction to be "contextual."<sup>259</sup>

While these examples and others in the literature reflect the experience of the late 1980s, the concept is still current. When combined with the federally funded "Main Street" program, current planning for neighborhoods, and a commitment by municipal government to shore up aging neighborhoods, neighborhood conservation districts can be very effective. A current issue is integrating locally preferred architectural style with the existing community of national chains and "super stores" returning to inner-city markets.<sup>260</sup> For example, the City of Springfield, Massachusetts developed design criteria for its "X" neighborhood retail area. These neighborhood-specific design criteria have been credited with molding a national franchise store's presence to the local character. For example parking was limited to the rear of the site, setting the building close to the street; height and signage were also controlled to mimic what was already in the neighborhood.<sup>261</sup>

Examples of jurisdictions that have adopted conservation districts are: Raleigh, North Carolina where a Neighborhood Conservation Overlay District, tied to a neighborhood plan, controls "built environmental characteristics." The district may apply only to areas of 15 contiguous acres or more which are 75 percent developed, and where development began at least 25 years prior to adoption of the overlay zone. The Annapolis, Maryland Eastport Residential Conservation Overlay District uses design standards to encourage traditional urban design, a diversity of uses historically present in the community, standards governing building bulk, setbacks, height, scale and massing and facade articulation. The Portland, Oregon Ladd's Addition Conservation District closely follows the Secretary of the Interior's historic preservation guidelines. The Kansas City, Missouri's Neighborhood Conservation Program for funding neighborhood improvements represents a non-regulatory commitment of public funds to neighborhood Conservation.<sup>262</sup>

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<sup>257</sup> Morris at 22.

<sup>258</sup> Morris at 29.

<sup>259</sup> *Id.*

<sup>260</sup> Sprawl Watch Clearinghouse "Best Practices" report on "Prevention of Superstore Sprawl and Small Town Decline" notes that many small towns have devised strategies for dealing with multi-national retailers, and locating them in town centers rather than on the suburban fringe (website – <http://www.sprawlwatch.org/superstore.html> for sources).

<sup>261</sup> Conversation with Kim Galluzzo, City of Springfield Planning Dept. (November, 20000); see "Design Guidelines" for the X overlay zone.

<sup>262</sup> Morris and review of select ordinances from these cities.

Connecticut’s legislature passed in 1998 the “Village District Act,” enabling local government to establish “village districts” in “areas of distinctive character, landscape or historic value.”<sup>263</sup> The Village District approach includes “maintenance of public views” and “design, paving materials and placement of public roadways” as well as more typical architectural elements. Two towns have adopted this district concept to date.

A neighborhood conservation district is most likely to succeed where, a “limited number of architectural styles help create an identifiable character for a neighborhood. In such cases, planners, preservation board members and citizens find it easier to agree that the neighborhood and its character are worth preserving.”<sup>264</sup>

### **12.03 IMPACT ON PROPERTY VALUES**

To the extent that neighborhood conservation districts are effective at improving the quality and appropriateness of alterations and new construction, they support property values and can stabilize a downward cycle. However, they often protect existing development patterns by reducing allowed density, which typically has a negative impact on the speculative, or development, value of property.

### **12.04 IMPACT ON DEVELOPMENT COSTS**

Design review can be a significant component of Neighborhood Conservation Districts, increasing cost by adding time for agency or administrative review and calling for large amounts of information to be submitted before a building permit will issue.

### **12.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

When downzoning is a component of a neighborhood conservation district, it will affect the amount and pattern of development, for example, by reducing available density or the allowable range of uses in existing neighborhoods, and shifting development to other neighborhoods or other jurisdictions.

### **12.06 IMPACT ON HOUSING AFFORDABILITY**

Housing preservation is often an objective of Neighborhood Conservation Districts. Where it conserves older housing stock, this technique contributes to housing affordability. To the extent that it adds to the cost of new development through larger and more involved development review processes, this technique would likely contribute to increased housing costs.

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<sup>263</sup> C.G.S. § 8-2j and Public Act 00-145, An Act Concerning Village Districts.

<sup>264</sup> Morris at 16.

## 12.07 SUMMARY OF PROS AND CONS

### PROS:

- When a neighborhood lacks sufficient support for a full fledged local historic district, a neighborhood conservation district offers a viable alternative for historic preservation.
- This technique is more “lenient,” susceptible to local definition, more flexible, melds with the local planning process and administrative structure, and involves “associative values” beyond historic or architectural merits.<sup>265</sup>
- Design and appearance initiatives “can play a significant role in supporting and reinforcing other elements of growth management programs . . . .”<sup>266</sup>

### CONS:

- Neighborhood conservation districts typically add review steps and restrictions and/or involve downzoning to achieve their purpose. There are potential legal pitfalls that beset architectural review and design standards, generally related to the legality of “aesthetic zoning” and due process concerns because of standards or guidelines that are vague as to their meaning. Restrictions on building appearance may raise First Amendment freedom of expression challenges. Factors to consider are whether the state recognizes aesthetic regulation as valid, whether the ordinance is vague and allows too much discretion, and whether the restrictions imposed are a valid means of furthering neighborhood conservation.<sup>267</sup>

## 12.08 INCENTIVE-BASED ALTERNATIVES

In proposing a “conservation area” without a regulatory mechanism, Professor Stipe argued in 1993 that “it is time to supplement this traditional [historic preservation] regulatory stick with a proactive carrot. . . the ideal conservation area becomes a device by which a city or county imposes on itself a special responsibility to undertake ambitious, specifically defined planning and design tasks targeted to the maintenance and improvement of the area so designated.”<sup>268</sup> Such a scheme is neither regulatory, nor necessarily incentive based. It does, however, recommend public initiatives, including revolving loan funds to promote home ownership or improvements to historic buildings.

Many communities have sought to promote improved design and appearance through regulatory provisions that provide incentives to encourage response to specific public design objectives.<sup>269</sup> The best known examples affect major city downtowns rather than residential neighborhood conservation districts: New York’s bonuses for pedestrian plazas and other amenities; Seattle’s density bonuses for 25 “public benefit” features; Hartford, Connecticut’s “downtown development district” for 17 features offering incentive density bonuses; Bethesda, MD’s preference for special quality projects around its metro station, to name a few. With the exception of Bethesda, these incentive programs operate in tandem with a prior downzoning. As one expert observes, “the problem with all incentive zoning programs is that they depend on real estate market activity and pricing levels to produce results. During the office heyday of

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<sup>265</sup> Stipe at 2.

<sup>266</sup> Porter at 173.

<sup>267</sup> Dennison at 4.

<sup>268</sup> Stipe at 2.

<sup>269</sup> Porter, at 165-166; See also Terry Lassar, *Carrots and Sticks: New Zoning Moves Downtown* (Washington, D.C.: Urban Land Institute, 1989); Richard F. Babcock and Wendy U. Larsen, *Special Districts: The Ultimate in Neighborhood Zoning* (Cambridge, MA: The Lincoln Institute of Land Policy, 1990).

the 1980s, developers used incentives to build as much space as quickly as possible. . . . In many cities, however, sharp reductions in market activity and profit levels in the late 1980s yielded far fewer public benefits through incentives. . . . Incentives also raise the issue of ‘zoning for sale’ and highly discretionary decision making. . . . The essential ingredients for achieving a fair result in such negotiations are well-conceived design objectives and detailed guidelines to guide decisions.”<sup>270</sup>

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<sup>270</sup> *Id.* 167.

## SECTION 13: SCENIC DISTRICTS AND CONSERVATION EASEMENTS

### 13.01 PURPOSE AND KEY TERMS

**Scenic districts** and **conservation easements** are “another approach to preserving community character...[by] protect[ing] key views from key areas to prominent features.”<sup>271</sup> A 1999 report on aesthetics and community character notes:

The concern over view protection is not a new one and regulatory efforts to protect scenic views date back to the 1800’s...In the 1930’s, a scenic roadway movement swept the country and resulted in the creation of the Blue Ridge Parkway and Skyline Drive, among others...[V]iew protection is being rediscovered and reawakened with a vengeance. Polls show that protection of view sheds, view corridors, and scenic roadways enjoys wide political support.<sup>272</sup>

The purpose of this type of growth management technique is the preservation of significant natural or built features valued by a community. Aesthetic or preservation objectives often dovetail with the environmental goals of protecting “sensitive lands,” for example in ridgeline and mountain protection programs.<sup>273</sup>

A scenic district is usually a zoning technique, while a “conservation easement” (or “restrictive covenant”) is a non-regulatory tool which can limit specific development rights while leaving other property rights and ownership intact. Conservation easements are often gifted by or purchased from property owners. However, easements are sometimes the subject of exactions imposed as a condition to discretionary development approvals.

The most common terms and techniques used in protecting scenic areas are:

**Easement:** A grant of one or more of the property rights by the property owner to and/or for use by the public, a corporation, or another person or entity. An **affirmative easement** gives the holder a right to make some limited use of land owned by another. A **negative easement** is an easement that precludes the owner of the land from doing that which the owner would be entitled to do if the easement did not exist.<sup>274</sup>

**Conservation Easement:** A conservation easement is “an example of a negative easement...[which] can prohibit all future development or it can specify particular development activities that are prohibited.”<sup>275</sup> The authority to purchase development rights through a conservation easement must be granted by state enabling legislation.<sup>276</sup> Depending on how the easement is created, it may be enforceable only in equity, by injunction, or at law, with monetary damages.<sup>277</sup> Certain characteristics of common law easements make them ineffective for conservation purposes. Rules for enforcing easements vary among states, so that enforceability and assignability of conservation easements is sometimes uncertain. To resolve this

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<sup>271</sup> Douglas R Porter, *Managing Growth in America’s Communities* Washington, D.C.: 1997 Island Press, p. 168.

<sup>272</sup> Christopher J. Duerkson and R. Matthew Goebel, *Aesthetics, Community Character and the Law* (Chicago: 1999 American Planning Association, Planners Advisory Service Report 489/490) at 40.

<sup>273</sup> Duerkson at 47.

<sup>274</sup> Harvey S. Moskowitz and Carl G. Lindbloom. *The New Illustrated Book of Development Definitions* (Rutgers 1993) at 99-100.

<sup>275</sup> *Id.* at 9-61.

<sup>276</sup> *Id.* The American Planning Association *Growing Smart Legislative Guidebook* includes in Section 9-402, a model Purchase of Development Rights statute.

<sup>277</sup> APA at 9-61 – 9-62.

difficulty, the National Conference of Commissioners on Uniform State Laws adopted in 1984 a “Uniform Conservation Easement Act” that has been adopted by several states.<sup>278</sup>

**Viewshed Protection Ordinance:** This approach is usually enacted through a zoning regulation and may incorporate tools such as height restrictions, setback requirements, design review, sign controls, landscaping and environmental impact standards.<sup>279</sup>

### 13.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

There are numerous examples of effective scenic districts. The State of Washington’s Shoreline Management Act of 1971 required preservation of access as well as public views to the waterfront. Austin, Texas, protects scenic views of hill country to the west of the city along five highway corridors by restricting development. Denver imposes height limits so buildings do not block views of the Rockies. Similarly, Burlington, Vermont protects views of Lake Champlain.<sup>280</sup> Cincinnati’s Environmental Quality-Hillside Overlay District has been used to protect natural features and views along the Ohio River Valley.<sup>281</sup> In Pittsburgh, building heights are restricted adjacent to the Monongahela River to protect river views.<sup>282</sup> Other examples are Colorado Springs’ Hillside Overlay District and Salt Lake County’s Foothills and Canyons Overlay District. These districts typically regulate both the visual impacts of development and the disturbance of the land form.<sup>283</sup>

An example of a successful conservation easement program is Wisconsin’s “Great River Road” where easements were purchased beginning in the 1950’s to protect views of the Mississippi River from adjacent highways. The program has been successful and endured for the following reasons: (1) limited rights were acquired; (2) the area experienced low development pressure; and (3) the Wisconsin Department of Transportation maintained its commitment to enforcing the easements.<sup>284</sup>

Austin, Texas has created a “Desired Development Zone” in which “greenways” along creek corridors and new parks are being created to attract development. The destination parks are expected to protect important resources, and serve as “green” infrastructure to attract developers—and ultimately residents—to the area. By using this land investment as an incentive, the city also hopes to encourage affordable housing.<sup>285</sup>

Preserving scenic areas often requires an intergovernmental, regional effort. In the Hudson River Valley, the organization Scenic Hudson reports:

New organizations like the Northern Dutchess Alliance, the Southern Western Alliance and the Housatonic River Towns of Westchester are demonstrating the power of partnership among municipalities and diverse interests to further economic goals by preserving and promoting regional assets. Dutchess

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<sup>278</sup> *Id.* at 9-62. The states are Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Maine, Minnesota, Mississippi, Nebraska, Nevada, North Carolina, Oregon, South Carolina, South Dakota, Texas, Utah, Vermont and Washington.

<sup>279</sup> Duerkson at 44.

<sup>280</sup> Porter at 168.

<sup>281</sup> Duerkson at 41.

<sup>282</sup> *Id.* at 44.

<sup>283</sup> *Id.* at 49.

<sup>284</sup> Brian W. Ohm, “The Purchase of Scenic Easements and Wisconsin’s Great River Road: A Progress Report on Perpetuity” *Journal of the American Planning Association*, 66:2 at 186.

<sup>285</sup> Mayor Kirk Watson, quoted in “Greenprint for Growth, Trust for Public Land,” <http://www.tpl.org/greenprint/Austin.html>.

County just completed a draft Greenway Compact to help communities link together and incorporate “smart growth” tools.<sup>286</sup>

### **13.03 IMPACT ON PROPERTY VALUES**

Because they protect scenic attributes considered to be valuable community assets, such as mountain or ocean views, scenic districts and easements can have a positive overall impact on property values in the affected area. But to the extent that development rights are limited by restrictions on height, location, lot occupancy or other standard, they may impose an undue burden on individual property owners. From a property rights standpoint, a conservation easement for which the property owner is compensated is preferable to zoning and other regulatory restrictions on development imposed to preserve scenic qualities.

### **13.04 IMPACT ON DEVELOPMENT COSTS**

Where scenic districts require design review, they will add time, complexity and uncertainty to the permitting process, increasing a developer’s costs.

### **13.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

To the extent scenic districts are adopted to limit impacts on view corridors, view sheds or other regulated areas, they will affect the patterns of development.

### **13.06 IMPACT ON HOUSING AFFORDABILITY**

Scenic districts and conservation easements do not have a direct relationship to the cost of housing. However, by preserving valued amenities, they may contribute to price stability or appreciation.

### **13.07 SUMMARY OF PROS AND CONS**

#### **PROS:**

- Protecting scenic attributes through the acquisition of easements or by regulation within a scenic district can help to enhance property values in the affected areas by preserving significant natural or built features
- Easements are flexible and can be tailored to the protection requirements of the particular property and to the desires of the individual landowner
- Easements keep property in private hands and on the tax rolls and also carry a lower initial price tag than outright acquisition.<sup>287</sup>
- Easements can serve as a planning implementation tool for agencies with no regulatory authority such as a land trust or state transportation department<sup>288</sup>

#### **CONS:**

- Scenic districts that involve zoning restrictions can have a significant burden on individual property rights and development costs

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<sup>286</sup> *Scenic Hudson News*, Vol. 21, No. 1 Spring 2000 “Hudson Valley Communities at a Crossroads—Strengthen Town Centers or Witness Sprawl?” Deborah Meyer DeWan [http://www.scenic Hudson.org/news/archives/nl\\_6/](http://www.scenic Hudson.org/news/archives/nl_6/).

<sup>287</sup> Janet Diehl, *The Conservation Easement Handbook* Alexandria, VA 1988: Land Trust & Exchange at 2.

<sup>288</sup> Ohm at 178; 186.

### 13.08 INCENTIVE-BASED ALTERNATIVES

Providing for cluster development in areas where, for example, vistas or ridgeline protection are a concern, is a non-confiscatory way to protect the resource while allowing development. Section 10 discusses cluster development. Performance standards rather than inflexible, absolute height or other design criteria are also preferable to rigid design standards.

**Transfer of development rights (TDR)**, while not strictly an incentive, is a market-based mechanism that addresses the loss of value resulting from the property restriction and allows it to be transferred to another parcel. TDR is discussed further in Section 8. TDR has been used to protect sensitive lands (e.g. the New Jersey Pine Lands and Hackensack Meadowlands) preserving rural character and farmland (e.g. Montgomery County, MD Rural Density Transfer), and critical areas (e.g. the Santa Monica Mountain TDR program of the California Coastal Commission and the Severable Urban Rights program used to protect the Florida Everglades outside the National Park.)<sup>289</sup>

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<sup>289</sup> These programs are discussed in James C. Nicholas and Brian D. Leebuck, “Transferable Development Rights and Alternatives after *Suitum*,” *The Urban Lawyer* Vol. 30, No. 2 Spring 1998 at 441-475.

## SECTION 14: TREE PRESERVATION

### 14.01 PURPOSE AND KEY TERMS

Communities adopt **tree preservation ordinances** and regulations in an effort to protect trees for their environmental, aesthetic and economic benefits. Among the environmental purposes asserted for tree preservation efforts are: (1) protection against soil erosion through stabilization of the soil and the creation of wind breaks; (2) stabilization of steep slopes and a reduction in water pollution; (3) enhancement of air quality; (4) energy conservation through the cooling effects of tree canopy; (5) water conservation through reducing evaporation and decreasing the amount of water that runs off a site rather than infiltrating back into the ground; (6) serving as buffers against noise; (7) the maintenance of woodland and wetland wildlife habitat and ecology; and (8) providing resistance against colonization of an area by non-native plant species.<sup>290</sup>

Among the aesthetic benefits that trees are said to provide are a “scale” and “sense of place.”<sup>291</sup> Trees are said to “foster psychological well-being”<sup>292</sup> and to make an area “pedestrian friendly.”<sup>293</sup> Trees also are protected to evoke other community character concerns like an association with a particular historic event or period, or a rural cultural heritage.<sup>294</sup>

Tree preservation proponents cite economic studies showing that people are willing to pay more for treed lots than for ones that have been cleared, and, conversely, assert that clearing trees impairs the stability of property values.<sup>295</sup> Other economic benefits attributed to considering tree preservation in the development process are a reduction in the cost of providing landscaping and stormwater detention. At a larger scale, attention to tree preservation is said to enhance an area’s “quality of life” and “image” as part of an overall economic development strategy.<sup>296</sup>

With such a wide range of purposes attributed to tree protection, it is perhaps not surprising that tree preservation regulations themselves vary widely in scope and applicability. A common early form of tree protection laws, still in effect in many communities, focused on protecting against and compensating for the removal of public trees, such as those within street rights of way or on parkland.<sup>297</sup> Subsequently, communities shifted their attention to trees located on private property. Some of these communities focused their tree protection regulations only on large trees or trees of a particular species or “specimen” trees. However, others looked also, or instead, at preserving tracts of woodland by regulating the percentage of tree canopy that must be preserved on a private development site. The percentages used around the country range from as low as 15% in some jurisdictions, to as high as 70% in others. Many of these regulations impose costly and time-consuming permit application requirements, such as a

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<sup>290</sup> Duerksen/Richman at 10-15; 36, 40; Brabec, at 99 in Duerksen/Richman; Thomas Hayden, *Hot Ways to Cool Down our Cities*, City Trees, Vol. 36, No. 6, November/December 2000 [read on line at [www.urban-forestry.com/citytrees](http://www.urban-forestry.com/citytrees)]; E. Gregory Mc Pherson, James R. Simpson, Paula J. Peper, and Qingfu Xiao, Benefit-Cost Analysis of Modesto’s Municipal Urban Forest, 25 *Journal of Arboriculture* 235, September 1999; Michael F. Galvin, Becky Wilson, and Marian Honecny, “Maryland’s Forest Conservation Act: A Process for Urban Greenspace Protection During the Development Process,” 26 *Journal of Arboriculture* 275 (September, 2000).

<sup>291</sup> Duerksen/Richman at 9-10.

<sup>292</sup> McPherson et al at 235.

<sup>293</sup> Richard P. Thompson and James J. Ahern, *The State of Urban and Community Forestry in California*, Urban Forest Ecosystems Institute, California Polytechnic State University San Luis Obispo, Technical Report No. 9, March, 2000 at 10.

<sup>294</sup> See Duerksen/Richman at 40.

<sup>295</sup> Duerksen/Richman at 15; McPherson et al at 239; Jon C. Cooper, Legislation to Protect and Replace Trees on Private Land: Ordinances in Westchester County, New York 22 *Journal of Arboriculture*, 270, 273 (1996).

<sup>296</sup> Duerksen/Richman at 15-16.

<sup>297</sup> See e.g., Massachusetts Scenic Roads Act, General Laws c. 40, sec. 15C.

comprehensive inventory of vegetation existing on a development site. Some regulations govern ongoing maintenance of trees, including restrictions on pruning privately owned trees, and limitations on the use of vehicles or other activities near trees targeted for protection. Regulations vary in their geographic scope, as well. Some apply throughout a jurisdiction, while others apply only in specific areas such as along designated riverways or roadways.<sup>298</sup>

Many tree conservation ordinances require mitigation for trees removed from a site. This may take the form of on-site replanting of several smaller trees for each large tree removed, or requiring payment into a fund for planting elsewhere in the jurisdiction.<sup>299</sup> Some jurisdictions, such as the state of Maryland, impose an affirmative obligation of “afforestation” or the planting of trees on development sites falling below a certain ratio of tree-coverage to lot area — regardless of whether the developer is responsible for the shortfall of trees, or whether it purchased the site in that condition.<sup>300</sup>

It is helpful to an understanding of tree protection regulations to be aware of the meaning of terms that are frequently used in such provisions:

- **Afforestation** is the conversion of open land into forest, and refers to the requirement that open land be planted with trees to increase vegetative cover.<sup>301</sup>
- **Canopy** or “crown” is the above-ground parts of a tree consisting of the branches, stems, buds, fruits and leaves.<sup>302</sup>
- **Dbh** refers to a tree trunk’s “diameter at breast height,” which is typically measured at four and a half feet above the ground.<sup>303</sup>
- **Dripline** is (an imaginary) vertical line extending from the outermost edge of a tree canopy to the ground.<sup>304</sup>
- **Specimen tree** is one of several terms used to denote trees of a particular size or species that are the subject of special protection under a tree protection regulation. One source cites the definition from Montgomery County Maryland: “[I]ndividual trees which are healthy which have a diameter at breast height of 24 inches or greater, or which otherwise are noteworthy because of species, age, size, or other exceptional quality, such as uniqueness, rarity or status as a landmark or species specimen.”<sup>305</sup>

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<sup>298</sup> See Duerksen/Richman at 3,7, 38-39, 41; Cooper.

<sup>299</sup> Duerksen/Richman at 29.

<sup>300</sup> Galvin et al.; MD Code Ann. Natural Resources, Title 5, Subtitle 16.

<sup>301</sup> Duerksen/Richman at 46.

<sup>302</sup> Duerksen/Richman at 105 – Appendix C.

<sup>303</sup> Duerksen/Richman at 105 – Appendix C. Selected Sample Definitions.

<sup>304</sup> Duerksen/Richman at 105 – Appendix C.

<sup>305</sup> Duerksen/Richman at 36.

## 14.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

The wide range of approaches to tree preservation regulations make it difficult to draw generalizations about how effective such measures are at achieving their intended purposes. One recent study of California jurisdictions found that the most effective ordinances were those that required tree planting in new commercial and residential development (thought to be effective by more than two-thirds of respondents), while those directed at abating tree hazards or otherwise protecting trees on private property not undergoing development were less effective, and those directed at protecting forest during development were thought to be the least effective of all.<sup>306</sup> A leading study of the subject, written in 1993, finds “some successes, but just as many failures” among the first communities to adopt tree protection regulations.<sup>307</sup> The study drew some conclusions, however, that seem likely to have continuing validity.

Most importantly, regulations that are adopted without regard for the particular ecological, climatic, topographic and other characteristics of the jurisdiction are unlikely to be successful. For that reason, local governments should be discouraged from “borrowing” regulations from dissimilar jurisdictions.<sup>308</sup> An ordinance that is helpful in maintaining native palm species in Florida may not be beneficial or workable in a New England town concerned for its native hardwoods.

Similarly, requirements should be developed with a mind towards precisely what the jurisdiction is seeking to protect, taking care not to be over or under-inclusive. For example, while many tree ordinances use trunk size as a criteria for deciding whether a particular tree is subject to regulation, a uniform trunk size is not always an appropriate reference point across all species. An ordinance that protects trees one-foot in diameter will cover a large number of oak trees, but very few dogwoods, even though the latter may be a species of more concern to local planners. Simply lowering the size threshold will likely encompass even more oaks, even as it picks up a few dogwoods. Mt. Pleasant, New York is an example of a community that has adopted size criteria that depend on the species of tree.<sup>309</sup> Tampa, Florida is cited as an example of a community that uses a point system to target trees with desirable characteristics depending on species.<sup>310</sup>

The better regulations provide planning staff with specific guidance as to what areas to preserve while at the same time leaving discretion and flexibility to work with the developer to achieve community goals in the context of particular site constraints. A flaw identified in some ordinances is that they provide insufficient guidance to planning staff and developers concerning what vegetation should be retained. Without guidance, the development review process may not result in preserving vegetation of a type and at locations that are important to the purposes of the ordinance. Ordinances lacking sufficient guidance are subject to legal challenge, and are seen as being neither fair nor effective.<sup>311</sup>

A further consideration regarding the effectiveness of a tree preservation ordinance is the extent of administrative burden that it places on the local jurisdiction. Many ordinances exempt single residential lots or small-scale development. Where tree removal is controlled on all parcels, no matter how small, the burden on local government and the regulated public may be more than the incremental benefits to be

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<sup>306</sup> Thompson at 29.

<sup>307</sup> Duerksen/Richman at 7.

<sup>308</sup> Duerksen/Richman at 7, 35, 50.

<sup>309</sup> Cooper at 274.

<sup>310</sup> See Duerksen/Richman at 39.

<sup>311</sup> Duerksen/Richman at 41.

gained for tree preservation.<sup>312</sup> One survey of California jurisdictions found that barely half of the jurisdictions surveyed thought that their ordinances were adequately enforced.<sup>313</sup>

A number of jurisdictions have gained attention for their particular approaches to tree conservation. The state of Maryland passed legislation in 1991 requiring forest preservation, and afforestation or reforestation on both private and public lands.<sup>314</sup> Maryland's Forest Conservation Act is credited with there being 120% more forest retained and planted than cleared for development during the first five years of the Act.<sup>315</sup> The New Jersey Pinelands Act requires all local governments in the district to enact ordinances that address vegetation protection during land clearance.<sup>316</sup> Lake County, Illinois is known for its requirement that 70 percent of mature woodlands on a site be protected from development.<sup>317</sup> Freeport, Maine is cited for an unusual approach involving a limitation (7,500 square feet) on the size of any opening in the forest tree canopy.<sup>318</sup> Thousand Oaks, California requires a permit for any pruning of live oak trees.<sup>319</sup>

#### **14.03 IMPACT ON PROPERTY VALUES**

Proponents of tree preservation requirements defend them on economic grounds with the observation that trees can add considerably to the value of property. Indeed, a large specimen tree has been said to be worth thousands of dollars.<sup>320</sup> One Georgia study is cited as finding, based on comparable sales, that each large front yard tree created an increase in sales price on the order of \$500.<sup>321</sup> Whether tree preservation ordinances themselves enhance property values, however, is open to question. Ordinarily, one would expect restrictive regulations to have a negative effect on property value in that they limit the extent to which the property can be used for development purposes, thereby making the land less valuable in the market. At the extreme, such ordinances can be viewed as downgrading the ownership interest in private property by confiscating the traditional property right to cut timber.<sup>322</sup> Prohibitions on the removal of specimen or historic trees could, at an extreme, have a drastic effect on property value by rendering it impossible, as a practical matter, to develop a property containing such features. In such a case, the landowner would need to evaluate its prospects for making a regulatory *taking* claim against the jurisdiction.

#### **14.04 IMPACT ON DEVELOPMENT COSTS**

Some common tree preservation regulations have a significant effect on development costs. Requirements for afforestation impose a costly burden on a developer to take affirmative steps to remedy a situation that it did not even create, by planting trees to increase forest cover. Likewise requirements to replace removed trees, either on or off-site, can add to development costs. One study of California municipalities and counties found that developers paid for and planted 90 percent of the trees added to the urban landscape in 1997, and that this percentage represented an increase from 75 percent ten years earlier.<sup>323</sup> Viewed purely from a development cost perspective, any prohibition or limitation on tree

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<sup>312</sup> Duerksen/Richman at 43, 46.

<sup>313</sup> Thompson et al at 29.

<sup>314</sup> Duerksen/Richman at 3. MD Code Ann. Natural Resources, Title 5, Subtitle 16.

<sup>315</sup> Galvin et al at 278.

<sup>316</sup> Duerksen/Richman at 3.

<sup>317</sup> Duerksen/Richman at 40-41.

<sup>318</sup> Duerksen/Richman at 41.

<sup>319</sup> Duerksen/Richman at 44.

<sup>320</sup> Duerksen/Richman at 5 and Appendix B.

<sup>321</sup> McPherson et al. at 239.

<sup>322</sup> Brian W. Blaesser. *Discretionary Land Use Controls: Avoiding Invitations to Abuse of Discretion*, 3<sup>rd</sup> ed., (West Group: 2000) at 42.

<sup>323</sup> Thompson et al., at 10.

clearing, and even requirements for best management practices to avoid damaging trees during construction, can prevent a developer from undertaking the lowest cost methods of development, for example by making it more difficult to bring in large construction equipment or constraining site design. Many modern tree preservation ordinances mandate detailed tree surveys encompassing every part of even a large development parcel. Typically these surveys must be completed and certified to by a qualified professional. Such efforts can add considerably to the “soft” costs of development. The additional time it takes to complete the review and approval process is another source of increased “soft” costs associated with some tree preservation ordinances.

#### **14.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

Tree preservation ordinances impact the amount and patterns of land development by limiting the extent to which a developer can clear trees from a property to accommodate new buildings and paved surfaces. Plan review provisions can have the effect of reconfiguring a development on a site to avoid forested areas. Those provisions that require a certain percentage of tree canopy to be retained, or that require afforestation or replacement planting on site, function as density restrictions that can serve to increase the size of the parcel that is required for any particular magnitude of development, (to the extent that development density is not already limited by zoning or other land use regulatory provisions).

#### **14.06 IMPACT ON HOUSING AFFORDABILITY**

Tree preservation, reforestation or afforestation requirements will generally increase development costs, and those increased costs will be passed on to the purchaser to a greater or lesser extent depending on the structure of the local housing market, thereby affecting the affordability of housing. Despite the potential for negative impacts on individual property rights discussed above, one of the main purposes cited by communities that impose tree preservation requirements is the preservation of property values across the community as a whole. All else being equal, neighborhoods or jurisdictions in which trees are preserved and planted will tend to be more attractive and desirable and consequently support higher housing prices than equivalent neighborhoods lacking trees. In regions where attitudes towards tree preservation vary from jurisdiction to jurisdiction, these market effects may make it more difficult to provide affordable housing in communities with strict mandates concerning trees, without the use of other regulatory techniques such as density bonuses or inclusionary zoning to counteract these market effects.

#### **14.07 SUMMARY OF PROS AND CONS**

##### **PROS:**

- Proponents of tree preservation ordinances have identified a number of benefits to maintaining tree cover on public and private property, many of which accrue to society as a whole, rather than to a particular property owner.
- Even to an individual property owner, tree ordinances can have significant beneficial effects. For example, my property value may be enhanced if my neighbors are prevented from clear-cutting their lots.

CONS:

- Ordinances that impose extensive restrictions on cutting trees on private properties, represent a significant intrusion into what is traditionally considered to be a core attribute of private property ownership.
- Such ordinances typically complicate and add cost to the development process.

#### 14.08 INCENTIVE-BASED ALTERNATIVES

Commentators and communities have been creative in seeking to alleviate the burden imposed by intrusive tree preservation regulations. *Development rights credits*, also known as *transferable development rights* (TDR) have been suggested as a means of alleviating hardship that could result from the imposition of tree preservation requirements in a way that reduces or eliminates development potential. Special property tax status for land set aside as a result of a tree preservation mandate is another suggested way to alleviate the fiscal burden on a property owner that is prevented from developing a portion of its property.<sup>324</sup>

It is also possible to devise a tree preservation ordinance that has incentive-based provisions built into it. The most common incentive approach is to reward the preservation of existing tree cover within new developments by reducing landscaping requirements on a proportional or higher basis.<sup>325</sup> Another approach taken by some jurisdictions is to provide development bonuses, including increased densities and building heights and reduced setbacks, when the applicant is able to present a plan that preserves more trees than the ordinance would require.<sup>326</sup>

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<sup>324</sup> Duerksen/Richman at 27, 62.

<sup>325</sup> Duerksen/Richman at 61.

<sup>326</sup> Duerksen/Richman at 62.

## PART V: AFFORDABLE HOUSING

### SECTION 15: INCLUSIONARY ZONING/HOUSING

#### 15.01 PURPOSE AND KEY TERMS

Inclusionary zoning is a technique that originated in the 1970s to generate affordable housing via private development. But it relates to “Smart Growth” objectives in several ways. By providing housing for all market levels, it furthers the social goal of sustaining a balanced, diverse community.<sup>327</sup> When new development includes affordable housing, then development of cheaper, outlying land to achieve affordability is, in theory, curbed. Where growth management/growth control measures either encourage gentrification of older areas or increase the cost of housing by severely limiting land available for development, inclusionary zoning attempts to ensure that affordable housing gets built, countering the exclusionary effects of growth management programs.<sup>328</sup>

The National Association of Homebuilders (NAHB) comments:

In many high-growth markets, teachers, police officers, fire fighters and other public servants are commuting 50 to 100 miles to work each day because they can't find affordable housing to rent or buy close to their jobs...Growth boundaries, large-lot zoning and resistance to infill development are pushing people to satellite cities in search of homes that are affordable to middle income families.<sup>329</sup>

Underscoring the importance of this issue, the Fannie Mae Foundation captioned its November 2000 conference “Fair Growth: Connecting Sprawl, Growth Management and Social Equity.” Noting that smart growth has been primarily concerned with protecting open space, curbing sprawl and improving regional transportation, the Foundation advocated “Fair Growth” as “a set of land use practices that attempt to curb urban sprawl without endangering housing affordability and access to jobs for minorities and low income residents.”<sup>330</sup>

The interrelationship of sprawl and affordable housing in high-growth areas is succinctly outlined in a 1999 study of the Basalt/Glenwood Springs, Colorado area.<sup>331</sup>

[H]ousing prices have been escalating at a faster rate than income...rents have increased 48 percent faster than wages, and for-sale housing has increased

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<sup>327</sup> Angela Glover Blackwell, President of Oakland (CA) based Policy Link, states that while the smart growth movement aims to promote “the three “E”s of sustainable development ... Environment, Economy and Equity” thus far the discussion has focused on the first two. (Quoted by Andrew LePage in the *Sacramento Bee*, 9/25/00, “Downside to Fixing Up Cities: ‘Smart Growth’ Policies May Hurt Poor Residents”.

<sup>328</sup> The Colorado Department of Local Affairs, Division of Local Government finds: “At their worst, some growth management plans are thinly veiled attempts to exclude affordable, multi-family housing or large-scale commercial or industrial development from a community. ...Fair share provisions can help keep land costs reasonable by ensuring that there are adequate supplies for all types of development.”  
<http://www.dlg.oem2.state.co.us/fstoolgm.htm>.

<sup>329</sup> NAHB “Growth Restrictions Push Cost of Housing Higher” 10/17/00; <http://www.nahb.com/news/growth%20htm>.

<sup>330</sup> Fannie Mae Foundation, November 1, 2000, Press Release; “Fair Growth Conference Connects Sprawl, Smart Growth and Social Equity.” <http://www.fanniemae.foundation.org/news/release/fairgrowth110100.html>.

<sup>331</sup> “Regional Affordable Housing Initiative” <http://www.rof.net/wp/HMC/Executive%20Summary.htm>.

roughly 2.5 times faster than wages... The fallout from these patterns can be numerous . . . [M]any households end up devoting a high proportion of their income to housing, or move to areas further down valley where housing is cheaper. Additional impacts... can include:

- increased traffic
- loss of community
- delayed homeownership
- overcrowding
- high rates of households with unrelated roommates (to split housing costs)
- inability of employers to fill jobs
- turnover in the population due to a disadvantageous housing situation relative to other communities.

Inclusionary zoning responds to these problems by “requiring housing developers to dedicate a certain percentage of their constructed projects to low or moderate income housing.”<sup>332</sup> This technique may be applied to both rental and owned units, and single and multi-family housing.<sup>333</sup> Inclusionary zoning can rely on mandatory or incentive features to achieve its purpose but, in either case, requires dedication of a percentage of units being proposed in a housing development.

Inclusionary zoning is often confused with **housing linkage**. They are both mechanisms for producing affordable housing through new development. Linkage, which is further addressed in Section 16, “refers to the practice of requiring developers to contribute either in-kind or by payment to the off-site construction of low or moderate income housing or other ‘needs’ of the community.”<sup>334</sup> One authority notes that, while “the initial impetus for inclusionary housing programs was clearly suburban in nature, [by the ‘80’s] . . . developments in America’s central cities . . . created a new form of inclusionary program, grounded in the linkage between downtown office and commercial development and the rise and fall of surrounding urban residential neighborhoods.”<sup>335</sup> In practice, the distinctions are often blurred, with many “inclusionary” programs allowing payments to housing trust funds or other alternative measures.

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<sup>332</sup> Theodore Taub, “Exactions, Linkages and Regulatory Takings: The Developer’s Perspective” in Frielich & Bushek, *Exactions, Impact fees and Dedications: Shaping Land Use Development and Funding Infrastructure in the Dolan Era* (American Bar Association, 1995) at 125-163.

<sup>333</sup> Municipal Research and Services Center (“MRSC”), p. 12, “Affordable Housing Techniques – A Primer for Local Government Officials” March 1992 Report No. 22, <http://www.mrsc.org/textaht.htm>.

<sup>334</sup> Taub, p 125.

<sup>335</sup> Alan Mallach, *Inclusionary Housing Programs, Policies and Practices*, (Rutgers 1984) at 179; and, generally, Dwight Merriam, et al., editors, *Inclusionary Zoning Moves Downtown* (Chicago: American Planning Association Planners Press, 1985)

The purposes of an inclusionary zoning regulation are:

1. Creation of low and moderate income, “affordable,” housing units;
2. Private sector subsidy for construction, achieved either by distributing the cost of affordable units among the market rate units and/or by lowering the per-unit development cost by increasing density;
3. Sometimes, achieving economic integration by making affordable units indistinguishable from market rate units and locating them within market rate developments.

Inclusionary zoning programs typically include the following elements:

- A density or other bonus to those who participate (for voluntary programs, the bonus is the incentive; for mandatory programs, it is used as compensation to avoid a “takings” claim);
- Income limits for eligibility of buyers;
- A distribution mechanism (lottery or other method);
- Pricing criteria for the affordable units;
- A period of control over resale price on rental increase;
- Building standards, including how affordable units are designed and located.<sup>336</sup>

Key terms in the area of affordable housing and inclusionary zoning are:

**Affordable Housing:** Affordability is usually defined as “affordable” to a family whose income is at or below median income for a defined locale. For example, a recent RFP for development of affordable housing issued by the Town of Cary in Wake County, North Carolina, states: “At least 85% of the units must be priced as affordable to households earning 80% or less than the most recent HUD area median income levels.”<sup>337</sup> The NAHB’s Housing Opportunity Index measures the percentage of homes sold that a family earning the median income can buy.<sup>338</sup> As the NAHB notes in its quarterly news report,<sup>339</sup> affordability is also greatly affected by mortgage rates. The NAR’s Housing Affordability Index “measures affordability factors for all home buyers making a 20% down payment, with an index of 100 defined as the point where a median income family has the exact amount of income needed to purchase a median-priced existing home.”<sup>340</sup> Another common standard is that a family pay no more than 30% of its annual income.<sup>341</sup>

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<sup>336</sup> Joyce Siegel, “Inclusionary Zoning Around the Country” made available at the Innovative Housing Institute website: <http://www.inhousing.org/USA%20Inclusionary/USA%20Inclusion.htm>. (Siegel).

<sup>337</sup> <http://www.townofcary.org/depts/pio/affordhouse.pdf>.

<sup>338</sup> [http://nahb.com/news/hoi\\_qtr2-2000.htm](http://nahb.com/news/hoi_qtr2-2000.htm).

<sup>339</sup> *Id.*

<sup>340</sup> <http://nar.realtor.com/news/2000Releases/November/143.htm>.

<sup>341</sup> For example, this standard is used in Connecticut, C.G.S. Section 8-30g(6), Affordable Housing Land Use Appeals (Chapter 126a), to define the affordable units to be set aside. This statute, like many others, also defines income eligibility as 80% of area median income.

**Incentive Zoning:** The use of zoning bonuses originated in New York City and Chicago during the 1950s and 1960s, when those cities wanted certain public amenities (such as plazas and arcades) or design features (such as greater building setbacks) without the expenditure of public funds. Incentive zoning offers bonuses, usually in the form of increased density of units, floor area ratio or building height, in exchange for the provision of specified amenities, which now encompass infill or mixed-use development and transit oriented development, as well as affordable housing.<sup>342</sup>

**Inclusionary Zoning:** An ordinance that either ties development approval to, or creates regulatory incentives for, the provision of low and moderate income housing as part of a proposed development.<sup>343</sup>

**Moderate, Low and Very Low Income:** Most state and local programs that address affordable housing rely on definitions and income levels established by the U.S. Dept. of Housing and Urban Development (“HUD”). However, between programs there is some variance in the distinctions between “moderate,” “low” and “very low” income. For example, the federal tax credit for low-income housing refers to “very low income” as “at or below 50 percent of the area median gross income” and low income as at or below 80 percent.<sup>344</sup> In another document,<sup>345</sup> HUD defines income levels as follows:

Middle – 81 to 100% of area median income

Moderate – 51 to 80% of area median income

Low – 31 to 50% of area median income

Extremely Low – less than 30% of area median income

## 15.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

The key elements for an effective inclusionary zoning program are:

- “The ordinance must establish a reasonable and non-excessive goal for the development of low and moderate income housing and must establish other land use standards which do not interfere with the achievement of that goal.”<sup>346</sup> Non-excessive would mean that no more than 5 to 15 percent of the units would be required to be affordable.
- The ordinance should provide for alternatives (such as in-lieu fees) for developments that cannot satisfy the inclusionary requirement due to an unusually high cost of construction for a particular site. But in-lieu fees, if too low, may not generate enough housing to construct housing units.
- Up-zonings and other land use changes to increase residential development capacity should accompany inclusionary zoning. This will help offset the financial impact of inclusionary requirements and fees.

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<sup>342</sup> Mary Morris, “Using Zoning Bonuses for Smart Growth and Development,” *Zoning News* at 1-4, (American Planning Association, July 2000).

<sup>343</sup> Mallach, cited by White at 17.

<sup>344</sup> U.S. Treasury “Low Income Housing Credit,” available at [http://www.irs.ustreas.gov/prod/bus\\_info/lihc-10.html](http://www.irs.ustreas.gov/prod/bus_info/lihc-10.html).

<sup>345</sup> HUD Consolidated Plan Training Manual 2000, Housing and Homeless Needs Assessment, at 2-2. These income levels apply to all categories of housing.

<sup>346</sup> Mallach at 107.

- Inclusionary units should be integrated within the project so as not to be distinguishable from the market rate units. In this regard, it has been found that “income mix works or does not work according to whether the mix occurs in a well-designed, well-constructed, and well-managed development. These latter factors are the crucial determination of satisfaction. Income mix and racial mix are, in themselves, of no particular relevance.” Nonetheless, “the smaller the scale and the finer the grain of economic integration, the more problematic it is likely to be.”<sup>347</sup>
- An appropriate threshold for development size subject to an inclusionary requirement should be established. In California, it has typically been 5 to 25 units.<sup>348</sup> In Maryland, the threshold is 50 units or more.
- The time period for retaining affordable units varies widely. In Maryland, there is a ten-year control period on sale units and 20 years for rental units.<sup>349</sup>

### ***Creation of Affordable Housing***

When the inclusion of affordable units is mandatory, this technique has been effective in creating affordable housing units. Voluntary programs are effective where the underlying density is much lower than the bonus allowed, but typically produce housing affordable to moderate, not low, income households. Montgomery County, Maryland is the most successful example of these programs, having produced 11,000 moderately priced dwelling units since its inception in 1973.<sup>350</sup>

Other jurisdictions where this technique has succeeded in producing affordable housing are:

*California:* 54 cities and 10 counties had produced over 25,000 units by 1992, with 66% of the programs mandatory.<sup>351</sup> A 1991 survey by the California Association of Realtors® provides evidence that voluntary programs were not successful in producing affordable units. Riverside County’s higher density bonus produced units that were not priced low enough to meet the county’s needs. The city of Chula Vista had offered density bonuses, mortgage credit certification and non-profit support, but found it was not generating sufficient low income units.<sup>352</sup> The study also found that: “[I]n order to counter allegations that growth controls exclude low-and moderate-income buyers from a community’s housing market, many cities which have such ordinances have incorporated an inclusionary component.”<sup>353</sup>

*New Jersey:* As a result of two exclusionary zoning lawsuits, Mount Laurel I in 1975 and Mount Laurel II in 1983, the state required all jurisdictions to develop and implement mandatory “fair share” housing programs targeted to people below 80% of median income. Although 55,000+ units reportedly had been produced as of 1999, a recent report estimates that only 15,000 affordable homes have actually been built.

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<sup>347</sup> Mallach at 100, citing Ryan William, “All in Together, An Evaluation of Mixed-income Multi-family Housing.”

<sup>348</sup> Siegel at 2.

<sup>349</sup> Siegel at 6.

<sup>350</sup> David Rusk, “Overcoming America’s Core Problem: Concentrated Poverty” p. 18, in *Cities in the 21<sup>st</sup> Century*, Urban Land Institute, 2000, Washington, DC. (Rusk)

<sup>351</sup> Siegel.

<sup>352</sup> California Association of Realtors® “Land Use Planning/Inclusionary Zoning” October 1991, available at: [http://www.car.org/legislation/land\\_use/inclusionary.html](http://www.car.org/legislation/land_use/inclusionary.html), pp. 3-4.

<sup>353</sup> *Id.* at 5.

Of those, 6,300 were built in high poverty urban neighborhoods, contrary to the anti-exclusionary intent of the Mount Laurel decisions.<sup>354</sup>

The ineffectiveness of the New Jersey program has been attributed to the fact that the regional fair share housing allocation is not mandatory. “[A]s in California, much of the early progress made in bringing municipalities into compliance with the court’s ruling came at the hands of local legal action. In dozens of cases, community advocates sued local governments which had failed to outline effective plans to meet their housing needs...Ironically, it is now developers—seeking density bonuses from reluctant zoning boards—who bring most of the Mount Laurel cases to court.”<sup>355</sup> The New Jersey experience is unusual in that the emphasis is on producing units “rather than the intrinsic value of inclusion,” so that rehabilitation, municipally-sponsored construction, accessory apartments and group homes count, and offer a wider range of options.<sup>356</sup> The North Carolina Low Income Housing Coalition also finds, “as in other programs featuring voluntary participation, results have been mixed. Only 200 of the state’s 566 municipalities are compliant with COAH’s standards. Since 1987, 21,000 new units have been produced, 14,000 rehabbed, 6,200 transferred and 14,000 are approved or under construction.”<sup>357</sup>

*Virginia:* The state authorized a voluntary inclusionary program in 1990 and a mandatory one in 1997. After Fairfax County’s 1970 inclusionary zoning ordinance was declared unconstitutional, a system of “proffers” was used until 1997. The current program is modeled on Maryland’s MPDU System. In Arlington County, where construction costs and rents are high, the County’s incentive density bonus is not profitable for a developer because the additional affordable units would sell at half the market rate. In Loudoun County, an Affordable Dwelling Unit program begun in 1995 has produced 140 ownership and 82 rental units serving 50-80% of median income buyers.<sup>358</sup>

*Florida:* Sanibel Island passed an inclusionary zoning ordinance in 1984 using a density bonus incentive. “As is the case with almost all incentive-based programs, no housing units were produced by the private sector...Sanibel, like Vail, Colorado, and other resort communities share the problem of providing shelter for needed employees who will support the resort based economy...in areas of excessively high priced land.”<sup>359</sup>

*Colorado:*<sup>360</sup> Boulder’s mandatory program, adopted in 1983, requires a 10% set-aside of units within city limits and 15% within areas annexed.

Longmount adopted a fee waiver and density bonus program in 1995, which produced no affordable units as of December 1999.

*Washington:* Bellevue had a mandatory program for six years that produced 600 units, affordable at 80 to 105% of the area median income. After switching to a voluntary program in 1997, only one project has included affordable units.<sup>22</sup>

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<sup>354</sup> Rusk, “Mt. Laurel – More Honored in the Breach” sidebar in Rusk, at 20.

<sup>355</sup> North Carolina Low Income Housing Coalition, Fair Share Housing: New Jersey, <http://www.mindspring.com/~nc/Ihousing/fairshare/newjersey.html>.

<sup>356</sup> *Id.*

<sup>357</sup> North Carolina Low Income Housing Coalition, Sources: <http://www.state.nj.us/dca/coah>. Contact: Sidna Mitchell, COAH Dep. Dir. 609-292-4553.

<sup>358</sup> Siegel at 7.

<sup>359</sup> *Id.*

<sup>360</sup> King County Housing Development Corporation “Implement[ing] Inclusionary Zoning” [http://www.hdc-kingcounty.org/inclusionary\\_zoning\\_feature.html](http://www.hdc-kingcounty.org/inclusionary_zoning_feature.html).

### ***Private Sector Subsidy***

Two factors determine how effective inclusionary zoning generates private sector subsidies: the strength of the market and whether requirements are mandatory. It is generally acknowledged that “poor economic conditions make it hard to have an effective inclusionary zoning program.”<sup>361</sup> Inclusionary zoning relies on a strong housing market to support production of below market rate units. Montgomery County, Maryland may be the one exception to this rule. Developers there reportedly have an incentive to produce affordable units, even in a down-cycle, for purchase by the housing authority.<sup>362</sup>

In California, roughly three-quarters of jurisdictions (as of 1991) relied solely on for-profit developers. In Montgomery County, Maryland, private developers have constructed all the units, but the public housing agency or other nonprofit has the option of purchasing them. This is a provision adopted by many other jurisdictions as well, guaranteeing a market for the units and long-term control over resale and affordability. Combining voluntary inclusionary measures with incentives such as density bonuses and restrictive underlying zoning is more likely to produce results.

The fundamental question underlying inclusionary zoning is whether it is right to place the burden of producing affordable housing on the developer rather than the community at large, particularly where an existing housing shortage is to be rectified.<sup>363</sup> Proponents find inclusionary zoning to be a feasible way for developers to assist with a community problem while opponents charge that it will raise the cost of existing and new homes and shift a problem created by government policies to the developers. The debate continues to this day.<sup>364</sup>

### ***Economic Integration***

Inclusionary zoning achieves the purpose of creating economically integrated communities when affordable units are constructed within a market rate project. Allowing housing fund contributions or off-site developments to meet fair share goals or merit an incentive bonus diminishes the integration effect, but may still have a positive impact where off-site development supports the mixed-income goal.<sup>365</sup> Many inclusionary programs in California require the affordable units to look like the market-rate units. Dispersal throughout the project and equal site access are also common requirements that help achieve the goal of integration.<sup>366</sup>

In New Jersey, only seven percent of the new suburban affordable housing is occupied by former city residents. “Most suburban affordable housing is occupied by elderly suburbanites or children of current residents seeking “starter homes in the communities where they grew up. These are worthwhile goals, but they are not the primary goals of the New Jersey Supreme Court’s Mt. Laurel decision which sought to eliminate exclusionary zoning.”<sup>367</sup>

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<sup>361</sup> Housing Development Consortium of Seattle–King County, “Implement[ing] Inclusionary Zoning” at 1-3, 1999, [http://www.hdc.kingcounty.org/inclusionary\\_zoning\\_feature.htm](http://www.hdc.kingcounty.org/inclusionary_zoning_feature.htm).

<sup>362</sup> Rusk at 19: “When demand for market-rate housing slumps, Montgomery County’s more progressive builders keep their crews busy building MPDU’s – for which there is always a market.”

<sup>363</sup> For a detailed discussion of this issue see Merriam, et al., *Supra*, or the summary of this edited panel discussion, “Inclusionary Zoning: Who Pays?” *Planning*, August 1985.

<sup>364</sup> See: “Taking sides: Should Pleasanton Require Affordable Housing and New Projects?”, Pleasanton (CA) weekly online edition, 4/21/00 at [http://www.pleasantonweekly.com/morgue/2000\\_04\\_mark\\_21\\_yandn21.html](http://www.pleasantonweekly.com/morgue/2000_04_mark_21_yandn21.html).

<sup>365</sup> Rusk at 20, citing a recent Seton Hall University study.

<sup>366</sup> Siegel at 3.

<sup>367</sup> Rusk at 20.

A decade ago, another commentator observed that the beneficiaries of inclusionary zoning are not the urban poor, but:

‘subsidy seekers’ - young couples, divorced single mothers, the elderly, and other middle-class people who are knowledgeable enough to take advantage of the system...In reality, it makes absolutely no difference whether the few winners of subsidized units are ‘low-income,’ middle-income’ or even ‘upper-income.’ Housing is housing, and the only way to have more of it is to build more of it. The only benefits of Mt. Laurel will come from the density bonuses, which will allow more housing units to be built.<sup>368</sup>

The legal authority for a mandatory inclusionary program must be established by the state enabling legislation.

### **15.03 IMPACT ON PROPERTY VALUES**

In its 1993 review of affordable and high density housing “myths and facts,”<sup>369</sup> the California Planning Roundtable observed that no study in that state had shown that affordable housing projects reduce property values. The Innovative Housing Institute analyzed trends in Montgomery County, Maryland and Fairfax County, Virginia market rate housing re-sale prices between 1992 and 1996, to test whether the presence of below-market rate housing would lower the value of non-subsidized homes in the vicinity. The study report concluded that “the presence or proximity of subsidized housing made no difference in housing values as measured by relative price behavior in a dynamic market.”<sup>370</sup>

### **15.04 IMPACT ON DEVELOPMENT COSTS**

Like linkage and impact fees, inclusionary zoning relies on private sector subsidy of construction. In a survey of its members, the NAHB found that 10 to 20 percent of the cost of building a new home can be attributed to regulations.<sup>371</sup> By including density bonuses, other zoning waivers, and/or fast track permitting, most inclusionary zoning ordinances attempt to offset the developer’s subsidy of affordable units by reducing the per-unit cost of the development.

### **15.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

Unlike growth boundaries, urban services areas, transfer of development rights or other techniques which direct the location and pattern of growth, inclusionary zoning does not directly affect patterns of land development. However, where demand for housing is elastic, and other jurisdictions do not impose mandatory inclusionary measures, development would be likely to move to the less costly, less regulated area.

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<sup>368</sup> William Tucker, “Zoned Out: How an Effort to Protect the Health and Welfare of Neighborhoods Has Become Legally Enforced Segregation,” *Reason*, May 1990; <http://www.spinnoker.com/liberty/docs/zone.txt>.

<sup>369</sup> “Myths and Facts about Affordable and High Density Housing.” Newport Beach, CA; 1993. California Planning Roundtable at 7.

<sup>370</sup> Innovative Housing Institute “The House Next Door.” A full text and executive summary of the report are available at <http://www.inhousing.org/housenex.html>.

<sup>371</sup> NAHB, 1998, “The Truth About Regulatory Barriers to Housing Affordability,” at 4; available at [http://www.nahb.com/housing\\_issues/regulate.pdf](http://www.nahb.com/housing_issues/regulate.pdf).

## 15.06 IMPACT ON HOUSING AFFORDABILITY

The purpose of inclusionary zoning is to increase supplies of affordable housing (*see above discussion of effectiveness*). Where it may have a negative effect is in the distribution of subsidy costs among market rate units, but no data is available in published sources to quantify that effect. Still, it is logical to assume that, depending on market conditions, market rate units are priced higher to account for the developer subsidy of the inclusionary units. Two key factors contributing to affordability are increasing density and streamlining the permitting process. A 1991 report from Portland demonstrated that higher density and a mix of housing types mandated by the 1981 Metropolitan Housing Rule combined with the 120-Day Rule for local action on discretionary permits had created “a climate in which the private sector still produces housing that is affordable for most homebuyers.”<sup>372</sup> Incorporating such features in an inclusionary program would benefit the affordability of both market and below-market rate units.

## 15.07 SUMMARY OF PROS AND CONS

### PROS:

- Affordable units in a mixed income housing development can be made indistinguishable from adjacent market rate housing, thus avoiding the stigma often attached to affordable housing.
- By using incentives (density bonuses, special permitting treatment) inclusionary zoning achieves the social good of developing affordable housing while actually reducing the developer’s project costs.
- While many government subsidized housing programs have the effect of concentrating affordable housing in certain areas of a community or region, inclusionary zoning fosters mixed socio-economic neighborhoods by integrating affordable housing throughout the community.
- Integrating affordable housing within new residential developments gives equal access to better schools, better commercial centers, good parks, and a higher quality of life often found in newer neighborhoods.
- Mandating the provision of affordable housing gives local governments another tool to meet the housing needs of the full spectrum of residents.
- Resale controls insure long-term affordability of units.
- Where applied, in-lieu fees and equity recaptures provide local governments with the revenue to purchase or build more affordable units or to finance renter assistance programs.<sup>373</sup>
- Mandatory provisions may be more acceptable in communities opposed to up-zoning (increased density) as a solution to affordable housing shortages.<sup>374</sup>
- Inclusionary zoning is a local technique subject to local control, not dependent on state or federal subsidies or the direct involvement of outside

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<sup>372</sup> Charles A. Hales “Higher Density + Certainty = Affordable Housing for Portland, Oregon,” at 12-15, *Urban Land* (September 1991).

<sup>373</sup> The above “PROS” (1-7) were identified by the California Association of Realtors® statement of “pros and cons” for inclusionary zoning, <http://www.car.org/legislation/landuse/inclusionary2.html>.

<sup>374</sup> Municipal Research and Services Center “Affordable Housing Techniques—A Primer For Local Government Officials” March 1992 Report Number 22, <http://www.mrsc.org/textaht.htm>.

agencies. There is greater certainty as to affordable housing requirements, which over time, may result in lower land costs.

- Inclusionary programs that rely on voluntary incentives have the benefit of allowing the developer to determine participation and whether it will be cost effective.<sup>375</sup>
- At a time when financial resources to compensate for the high cost of development are shrinking, inclusionary zoning provides another means of encouraging the construction of affordable housing.<sup>376</sup>

#### CONS:

- It is unfair to place the burden of providing affordable housing solely on developers. The lack of affordable housing is a societal problem, and all of society should share the responsibility of addressing it.
- Inclusionary zoning does not address the factors that contribute to the high cost of market rate housing, i.e., high land costs, lack of available sites, developer fees and exactions, cumbersome permitting process, etc.
- Inclusionary zoning places financial hardships on developers. Ultimately, they will no longer be able to provide housing in the community because the costs are too high or they will pass the cost on to market rate buyers thus making it more expensive for those buyers to acquire a home.
- Resale price controls eliminate homeowners' ability to realize a reasonable profit on the resale of their home and therefore takes away the incentive for them to maintain their home. This makes it harder to resell inclusionary units, and therefore, hurts the real estate market.
- The cost of implementing an inclusionary zoning ordinance for a local government entity is significantly high. Most local governments cannot afford the amount of staff resources and experience required to implement and administer an effective program.
- Incentives such as reduced land costs and land restrictions, increased availability of housing sites, and reduced fees make the development process less costly and time-consuming, and are a more effective way for local government to provide affordable housing.
- The practice of in-lieu fees is a tax on homeowners and renters.<sup>377</sup>
- Inclusionary zoning programs are generally not effective at producing low-income units, nor do they have the "anti-exclusionary" effect where the beneficiaries are existing residents or middle to middle-upper income residents.

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<sup>375</sup> These two "PROS" are cited at <http://www.abag.ca.gov/planning/housingneeds/RHNA/housingstrat.../inclusionaryzoning.htm>.

<sup>376</sup> Westchester County, New York, "Inclusionary Zoning Helps Build Housing" at <http://www.co.Westchester.newyorkny.us/housing/inclzoning.htm>.

<sup>377</sup> All of the above are "CONS" identified by the California Association of Realtors.<sup>®</sup>

## 15.08 INCENTIVE-BASED ALTERNATIVES

Some examples of incentive-based alternatives are:

**Community Land Trusts:** In areas where gentrification is an issue, nonprofit housing organizations can form community land trusts, or buy land and build below-market housing. The trust could permanently own the land and sell only the structures. This tactic would stabilize the cost of homes by separating the cost of the units from the value of the land.<sup>378</sup>

**Maximum Floor Area:** Carrboro, North Carolina adopted an innovative alternative to affordable housing. Rather than regulate price, on June 22, 1999, the town amended its land use ordinance to require “that at least 25 percent of the single-family dwelling units within any residential subdivision approved under a conditional use permit be 1,350 square feet or less in size.”<sup>379</sup> This ordinance establishes a maximum house size on the assumption that cost would be reduced by reducing size. The ordinance applies to residential subdivisions of more than 12 lots. While not providing a density bonus, the ordinance does allow lots that are large enough and are not limited by restrictive covenants to house the largest number of duplex or multi-family units that could be approved. The purchaser is allowed to expand the home after one year.

**Expedited Review of Affordable Housing Proposals:** “Fast track permitting” is a preferable alternative to mandatory programs and is offered in Fort Collins, Colorado and Monterey County, California.<sup>380</sup> The advantages of this approach are that it signals that the municipality is serious about affordable housing because it has put those types of projects “first in line,” and it has the potential to be a sufficient incentive to attract residential developers who are frustrated with a cumbersome or time-consuming review process.

**Development Fee Waivers or Reimbursement of Fees:** In some cases, all fees (school and traffic impact fees, water and sewer fees, park fees, building permit fees, etc.) are waived. Examples of jurisdictions that use this technique are:

Arvada, Colorado - a development fee waiver “for all housing developments which will be granted a federal subsidy for rent or mortgage payment.”

Longmont, Colorado - up to 100 percent waiver of certain fees, using a five-year affordability period for single-family development, ten-years for multi-family.

Hillsborough County, Florida - Impact Fee Relief Program waiving water, sewer, rights-of-way, parks and transportation fees. In one affordable apartment project, almost \$500,000 in fees was waived.

Santa Fe, New Mexico - fee waivers for development proposals offering 75 percent of the units to households at or below 80 percent of the median family income.

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<sup>378</sup> LePage at 2 (*Sacramento Bee* Article).

<sup>379</sup> North Carolina Low-income Housing Coalition report on Carrboro, North Carolina at <http://www.mindspring.com/~nclihousing/fairshare/carr.html> citing as a source Alderman Alex Zaffron, 919-942-2617(h).

<sup>380</sup> <http://www.townofcary.org/depts/dsdept/housingreport/tkhigh.htm>, at 3.

Orange County, North Carolina - school construction impact fee rebates (\$3,000 per unit in Chapel Hill and Carrboro, \$750 elsewhere) to nonprofit groups building affordable units for first-time home buyers.

**Growth Control Exemptions:** In high-growth areas which have enacted moratoria, growth caps, Adequate Public Facilities Ordinances, or other growth management/growth control tools, allowing exemptions for affordable housing is a strong incentive.

Arvada, Colorado—exempts “low/moderate income housing,” from its residential building permit allocation system.

The Town of Cary, North Carolina—allows 5 percent additional development above the adequate public facilities ordinance limit for affordable housing projects.<sup>381</sup>

**Higher Density:** Tandem houses, zero lot-line zoning and accessory apartments are a means of extending the current housing stock or allowing existing development sites to absorb higher-density housing. Increasing density is the most commonly recognized way to reduce housing cost and thereby create affordable housing units. The National Association of Home Builders has repeatedly called for federal, state, and local measures to facilitate the development of multi-family housing as a way to address the need for affordable housing.<sup>382</sup>

Orlando, Florida - “pioneered” allowing subdivisions to include “tandem single-family development” as a conditional use on lots that allow duplex development.

Babylon, New York - passed a two-family dwelling law that allows owners of existing houses to add a second living space which may be either sold or rented.

**State Mandated Special Treatment of Affordable Housing Applications:** Special procedures provide an incentive to developers to include affordable housing.

Massachusetts’ “Anti-snob Zoning Act”<sup>383</sup>, (also known as the Comprehensive Permit Statute or Chapter 40B) has since 1969 provided expedited review of low and moderate income proposals through the use of a “comprehensive permit” process that centralizes development review in the Zoning Board of Appeals. The Zoning Board of Appeals on a comprehensive permit application may override local regulatory requirements where the requirements would preclude development that

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<sup>381</sup> “High Priority Affordable Housing Tools” <http://www.townofcary.org/depts/dsdept/housingreport/tkhigh.htm>, at 6.

<sup>382</sup> “NAHB urges Congress to enact strong housing affordability legislation.” <http://www.nahb.com/news/affordtestimony.html> “Every community needs good multi-family housing,” “The Benefits of Multi-family Housing” published by NAHB’s housing policy department, at <http://www.nahb.com/housinglower-issues/multi.html>.

<sup>383</sup> G.L. 40B, §§ 20-23.

would be used to satisfy statutory thresholds for affordable housing within the municipality.<sup>384</sup>

Connecticut's Affordable Housing Appeals Act of 1990, as amended, provides an expedited appeals procedure for a developer who has been denied an application which meets criteria for an affordable housing project. The Connecticut Statute "reverses the presumption of the validity ordinarily accorded to land use decisions" so that the burden is on the local commission to justify its decision in denying or requiring unreasonable modifications of a proposed application.<sup>385</sup>

**Using Government Funds:** Leveraging or subsidizing the production of affordable units with public money is an effective technique. One approach links municipal deposits to financial institutions which provide loans and other resources for affordable housing development. For example, Loudoun County, Virginia linked a proportion of the county's deposit in local financial institutions with the affordable housing activities of those institutions.<sup>386</sup> Activities included affordable housing mortgages, marketing, first-time homebuyer seminars, home mortgage fund with no private mortgage insurance, residential construction funds, targeted residential construction funds, and other housing activities initiated by the bank. Atlanta, Georgia, Charlotte, North Carolina and Durham, North Carolina either have or are considering similar programs. These are excellent examples of public-private partnership which extend beyond the limits of inclusionary housing provisions. Another method is to provide grants to affordable housing developers. Columbus, Ohio in 1995 partnered with two developers and a state savings bank to produce mixed income housing within the city's school district. This program has been cited in a HUD report entitled "Models That Work." Highpoint, North Carolina operates an "Infill Housing Reimbursement Program" which subsidizes at \$10,000 per home the construction of homes for first-time buyers in inner city neighborhoods.

There are numerous programs which assist on the demand side by providing either down payment or closing cost or second mortgage assistance or supporting employee home ownership all of which assist the buyer.<sup>387</sup>

**Modifying the "Regulatory Barriers" to Affordable Housing:** Zoning and subdivision controls affect the cost of housing by restricting density, thereby restricting the supply of housing as well as the cost per unit of land. Substantive standards such as limiting construction to single-family dwellings, setback, minimum lot size, minimum floor area, and other design restrictions often increase housing costs or permit fewer dwellings to be placed on particular land parcels. The increasingly common requirement of offsite facilities as a condition of rezoning or development approval passes costs on to the consumer (see sections on impact fees and development exactions). A recent report recommends innovative zoning techniques such as zero lot line, cluster and mixed-use zoning as ways to reduce the cost effects of traditional zoning standards.<sup>388</sup>

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<sup>384</sup> Richard Huber, et al. "Low - and Moderate - Income Housing: The Anti Snob Zoning Act, Linkage, Inclusionary Zoning and Incentive Zoning" Chapter 5, *Massachusetts Zoning Manual*, Supp. 1999 §§ 5.3 and 5.4.2.

<sup>385</sup> Julie M. Solinski "Affordable Housing Law In New York, New Jersey, and Connecticut: Lessons for Other States" in *Journal of Affordable Housing*, Volume 8, #1 Fall 1998, p. 63. Ms. Solinski finds that the Connecticut and New Jersey statutes have been more effective than New York's enabling legislation authorizing density bonuses for affordable housing, p. 52.

<sup>386</sup> "High Priority Affordable Housing Tools" "Town of Cary, NC.

<sup>387</sup> *Id.* at 8-12.

<sup>388</sup> S. Mark White, *Affordable Housing: Pro-Active and Reactive Planning Strategies*, Washington, DC: 1992 PAS Report 441, American Planning Association at 14 and 41.

## SECTION 16: HOUSING LINKAGE

### 16.01 PURPOSE AND KEY TERMS

**Housing linkage** is a type of local regulation that requires or induces developers of office buildings or other, typically “downtown” non-residential uses to build housing, to pay a fee in-lieu of construction into a housing trust fund, or to make equity contributions to a low-income housing project.<sup>389</sup> The *exaction* may be either a condition for permit approval or a prerequisite for receiving some type of development incentive, such as a density bonus.<sup>390</sup> The concept arose, in part, as a response to a decrease in federal housing subsidies in the 1980s.

Linkage can be viewed as an employee-centered device for the production of affordable housing, the modern equivalent of the “company town” concept.<sup>391</sup> The underlying rationale for a housing linkage program is that new non-residential development creates a need for housing by attracting employees to an area.<sup>392</sup> The new workers need places to live, transit systems, day-care facilities, and the like.<sup>393</sup>

The term **inclusionary zoning** has often been used interchangeably with housing linkage. However, these two concepts are different. Inclusionary Zoning refers to the practice of requiring *housing developers* to dedicate a certain percentage of their housing construction project to low- or moderate-income buyers or renters or to support other “needs” of the community. Inclusionary zoning is addressed in Section 15. Housing linkage, on the other hand, refers to the practice of requiring *developers of office and commercial space* to contribute, either in-kind, or by payment to a fund used for off-site construction elsewhere, of low- or moderate-income housing or other “needs” of the community.<sup>394</sup>

### 16.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

It is critical for the implementation of a linkage program that the local commercial real estate market be strong. Therefore, it is no coincidence that housing linkage regulations were prevalent in the mid-1980s. These programs emerged in the nation’s largest cities, such as San Francisco, Boston, Seattle, and Miami, which, at the time, were experiencing significant increases in commercial development. Numerous smaller cities, among them, Santa Monica, Sacramento, Hartford and Cambridge, also experimented, to varying degrees, with linkage programs. The relative success of these programs hinged largely on the strength and duration of the building “booms” in particular cities.

A critical requirement affecting the legitimacy of a housing linkage program is that it possess a “rational nexus” between the proposed development and the amenity to be funded, in this case housing. This relationship is necessary for the linkage program to survive a constitutional challenge on due process grounds. One of the rationales commonly asserted in support of linkage programs is that large-scale

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<sup>389</sup> S. Mark White, *Affordable Housing: Proactive & Reactive Planning Strategies*, Planning Advisory Service Report No. 441 at 26 (American Planning Association, 1992).

<sup>390</sup> Municipal Research and Services Center of Washington, *Affordable Housing Techniques: A Primer for Local Governments*, Report No. 22 (March 1992) (Found at <http://www.mrsc.org/textaht.htm>).

<sup>391</sup> Jane Schukoske, “Housing Linkage: Regulating Development Impact on Housing Costs,” 76 *Iowa Law Review* 101, 1064 (1991).

<sup>392</sup> White at 26.

<sup>393</sup> Christine I. Andrew and Dwight H. Merriam, “Defensible Linkage,” *Journal of the American Planning Association*, at 200, Spring 1988.

<sup>394</sup> Theodore C. Taub, “Exactions, Linkages and Regulatory Takings: A Developer’s Perspective,” 20 *The Urban Lawyer* 515, 535 (1988).

commercial developments bring in middle- and upper-income dwellers, who displace lower-income dwellers and that the creation of lower income housing is necessary to offset these effects.<sup>395</sup>

Housing linkage programs should address the following issues:

- Whether the program is mandatory or voluntary;
- The type of development that triggers the obligation;
- The target group for whom housing is to be created;
- The formula by which the housing impact will be calculated;
- The rate of the housing linkage fee;
- The mechanics of the program; and
- The administration of the program.<sup>396</sup>

The two largest linkage programs in the country, San Francisco, California and Boston, Massachusetts, have been reviewed for their effectiveness.

In 1981, San Francisco became the first U.S. city to adopt linkage policies, for several reasons: growing community opposition to continue downtown development (based on the argument that it was having an adverse effect on San Francisco's expensive housing market and troubled mass transit system); the city was seeking new revenue sources to offset property tax loss caused by the passage of Proposition 13 in 1978; active community based coalitions were pressuring the city to develop and preserve affordable housing and to improve its municipal transit system; and a decline in federal aid for housing.<sup>397</sup>

Under the program, known as the Office Housing Production Program (or OHPP), all developers of buildings exceeding 50,000 square feet in the central business district were required either to provide new or rehabilitated housing or to pay an in-lieu fee of \$5.00 per square foot to the city for housing. A complex formula gave developers more credit for producing or subsidizing low and moderate income housing than for market rate housing.<sup>398</sup>

From 1981 to 1985, office developers agreed to subsidize 3,793 residential units and 44% of those units had been completed as of April 1985.<sup>399</sup> In August 1985 the City adopted its "Downtown Plan," which incorporated expanded linkage policies for housing and transit. The Plan also established the Office of the Affordable Housing Production Program or OAHPP, which required that if office developers themselves produced units 62% of the them must be affordable; if the office developers pay in-lieu fees, then 100% of the units must be affordable; and, a system of credits contained in the Affordable Housing Production Program was eliminated. The exaction fee was set at \$5.34 per square foot.

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<sup>395</sup> Richard G. Huber, et al., "Low- and Moderate-Income Housing: The Anti-Snob Zoning Act, Linkage, Inclusionary Zoning and Incentive Zoning," Chapter 5 of the *Massachusetts Zoning Manual* at 5-32 (Supp. 1995).

<sup>396</sup> Schukoske at 1015.

<sup>397</sup> Dennis W. Keating, "Linking Downtown Development to Broader Community Goals: An Analysis of Linkage Policy in Three Cities," 52 *Journal of the American Planning Association* at 135 (February 1986).

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

From 1986 to 2000, this linkage program collected approximately \$10 million for the provision of affordable housing.<sup>400</sup> In February 2001, the Board of Supervisors enacted an ordinance which changed the name of the program from the Affordable Housing Production Program to the Jobs-Housing Linkage Program; expanded the reach of the program to include hotels, entertainment space, retail space and research and development space over 25,000 square feet; increased fees; and required a study every five years to determine the demand for housing created by commercial development.<sup>401</sup>

The Boston linkage program, enacted in 1983 and modeled on San Francisco's, requires a \$5.00 per square foot "housing exaction fee" from any larger commercial development requiring zoning relief for its completion. The fee applies to any "development impact project" falling within a zoning classification known as Development Impact Projects ("DIPs"). The linkage program applies to projects requiring some special zoning relief, such as a variance or conditional permit; involving more than 100,000 square feet of new construction or rehabilitation work; and containing certain specific commercial uses or directly resulting in a reduction of the supply of low or moderate income housing.<sup>402</sup>

Any project deemed to be a DIP requires the approval of a plan by the Boston Redevelopment Authority ("BRA"). To gain the required zoning relief, such a plan must meet two requirements: the BRA must find after public hearing that the plan conforms to the general needs of the city and will not harm the neighborhood; and an agreement between the developer and the BRA must be in place obligating the developer to pay a linkage fee or making an in-kind contribution of low or moderate income housing. The fee is paid to an administrative agency known as a Neighborhood Trust in twelve equal annual installments.<sup>403</sup> As of October 1984, nine projects had been approved and it was estimated that developers of the nine projects would pay \$24.5 million in linkage fees after their completion.<sup>404</sup>

In May, 2000, the BRA issued a report in which it concluded that its linkage program has produced more funds for affordable housing creation than any other program in the country—more than \$45 million have been allocated for the construction of nearly 5000 housing units.<sup>405</sup> The BRA attributed the strong performance of its program to four factors:

- Higher fees than most cities;
- Full-city coverage;
- Broad coverage of development types; and
- Flexibility to reduce disincentives of development.<sup>406</sup>

### 16.03 IMPACT ON PROPERTY VALUES

One would expect that property values in an area subject to a linkage program would be lower than the value of the same property absent the linkage requirement, because linkage represents a direct additional cost of development in that area. Of course, by their very nature, commercial development projects on properties in urban cores generally have high property values already, and indeed one premise of linkage

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<sup>400</sup> Boston Redevelopment Authority, Office of Policy Development and Research, *Survey of Linkage Programs in U.S. Cities With Comparisons to Boston* at 3 (May 2000).

<sup>401</sup> Ordinance 28-01, codified at Section 313 of the San Francisco Municipal Code.

<sup>402</sup> John J. Griffin, Jr., "Inclusionary Zoning and Linkage in Boston and Cambridge, Massachusetts", Chapter in Douglas Porter, ed. *Downtown Linkages* (Urban Land Institute, 1985).

<sup>403</sup> *Id.*

<sup>404</sup> Keating at 137.

<sup>405</sup> *Survey of Linkage Programs in U.S. Cities With Comparisons to Boston* at 3.

<sup>406</sup> *Id.*

programs is that the additional cost of the linkage requirement will be low enough compared with other pro forma entries not to discourage the new development or cause it to move elsewhere.

#### **16.04 IMPACT ON DEVELOPMENT COSTS**

Housing linkage programs directly and measurably increase development costs because they require that direct expenditures be made on housing construction or in-lieu of payments for housing.

#### **16.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

A successful linkage program should increase the amount of affordable housing constructed in a jurisdiction with such a program. Except to the extent that they may serve to discourage some development because of their impact on developer profit, housing linkage programs otherwise probably have little effect on the amount or patterns of land development.

#### **16.06 IMPACT ON HOUSING AFFORDABILITY**

Since the premise of housing linkage programs is to promote low and moderate income housing, these programs presumably provide housing affordable to those in the low and moderate income range. There is no reason to expect that linkage programs targeted only at commercial development would have any significant effect on the general housing market. However, to the extent that linkage is applied to market rate or luxury housing developments, the costs of the linkage program will likely be passed along to buyers or tenants of units in the affected developments if the local market will allow such price increases. Absent a shifting of these costs to consumers, the costs would be borne by developers or landowners.

The goal of linkage programs is to provide affordable housing in the lower price ranges. This is done by either reducing the value of developable land or by increasing the prices of “other” housing. One aspect of affordable housing will have been enhanced (i.e., lower housing cost) but this could be at the expense of another important component of affordable housing: supply.

#### **16.07 SUMMARY OF PROS AND CONS**

##### PROS:

- Assuming that the local government can show the required nexus between the commercial or other nonresidential development and its impact in terms of housing, a linkage program could lessen the negative effects associated with downtown gentrification and help to create affordable housing.

##### CONS:

- Housing linkage will not succeed if the local market does support increased commercial development.<sup>407</sup>
- It is unfair to single out new commercial development as the cause of general and complex transit and employment issues in the inner city.<sup>408</sup>

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<sup>407</sup> Andrew and Merriam at 200.

<sup>408</sup> Keating at 140.

- If the housing linkage exaction fees are set too low, then revenue generated will be insufficient to provide enough of the facilities or services to solve the problems ostensibly caused by the development.<sup>409</sup>
- If the housing linkage exaction fees are set too high, the resulting increase in development costs and commercial rents may deflect commercial development from the central city to the suburbs.<sup>410</sup>
- The argument has been made that housing linkage is no more than a cynically veiled effort to tax one segment of society for redistribution to another while the “getting is good.”<sup>411</sup>

## 16.08 INCENTIVE-BASED ALTERNATIVES

There are at least two incentive-based alternatives that achieve the same goals as those sought to be achieved by housing linkage programs.

**Incentive Zoning** would allow downtown developers who want to exceed maximum floor area ratios or obtain density bonuses to agree to provide housing in exchange for receiving these incentives. Incentive zoning differs from linkage policies in that developers receive a trade off, such as additional rentable space, under the former but not under the latter.<sup>412</sup>

**Special Downtown Assessment Districts** can be created to cover all or most downtown businesses and the revenues generated by special assessments could be used for the same purposes as linkage exaction fees. This would spread the cost burden to all downtown businesses instead of imposing them on specific developments.<sup>413</sup> Special Assessment Districts are discussed in Section 6.

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<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> Jerold Kayden and Robert Pollard, “Linkage Ordinances and Traditional Exaction Analysis: The Connection Between Office Development and Housing,” 50 *Journal of Law and Contemporary Problems* at 129 (1987).

<sup>412</sup> Keating at 140.

<sup>413</sup> *Id.*

## SECTION 17: SMART CODES

### 17.01 PURPOSE AND KEY TERMS

**Smart codes** are a recent innovation that provide alternatives to traditional building and zoning code standards that prevent rehabilitation of older buildings, reinvestment in older neighborhoods or creation of compact new developments. These codes are smart growth tools because they facilitate alternatives to sprawl development. To date, only New Jersey and Maryland have enacted such codes.

In April 2000, the Maryland General Assembly and Governor Parris N. Glendening enacted Maryland's "Smart Growth Codes Program". This two-part initiative consists of the Maryland Building Rehabilitation Code Program and the Models and Guidelines Program for Infill and Smart Neighborhood Development. The former will be administered by the Maryland Department of Housing and Community Development, and the latter will be administered by the Maryland Department of Planning. The programs are currently being developed and expected to be fully implemented in early Spring 2001.<sup>414</sup> Both programs are designed to further the goals of Maryland's 1997 Smart Growth Areas Act.

The Building Rehabilitation Code Program is based on a model developed by the U.S. Department of Housing and Urban Development ("HUD") and the National Association of Home Builders,<sup>415</sup> and a rehabilitation code adopted in 1997 by New Jersey.<sup>416</sup> These codes promote the rehabilitation and reuse of existing buildings by imposing different and arguably less stringent standards for rehabilitation than those for new construction. The New Jersey code distinguishes four types of rehabilitation work: repair, renovation, alteration, and reconstruction to which different sets of requirements apply.<sup>417</sup>

The Maryland initiative was crafted to overcome the following impediments to redevelopment of existing buildings:

- *Lack of Uniformity* among ten often overlapping, sometimes contradictory, construction codes;
- *Unpredictability* of code interpretation and applicability among various jurisdictions and administering officials;
- *Lack of Reasonableness* when applied to existing structures; and,
- *Need for Training* on a statewide basis for code officials, design professionals and building contractors.<sup>418</sup>

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<sup>414</sup> See "Smart Codes for Maryland's Smart Growth" on the Maryland Department of Housing and Community Development Smart Codes webpage (<http://www.dhcd.state.md.us/smart/codes/index.html>). See also "Smart Codes Update," on Governor Paris N. Glendening's Smart Growth in Maryland webpage (<http://www.op.state.md.us/smartgrowth/smartcode/smartcode00.html>).

<sup>415</sup> Angela Paik, "Change Proposed in Building Rules" *Washington Post* 1/26/00. HUD's "Nationally Applicable Recommended Rehabilitation Provisions" are available at its website: <http://www.huduser.org/publications/destech/rehabpr.html>.

<sup>416</sup> "Rehabilitation Subcode" on the State of New Jersey Department of Community Affairs, Division of Codes and Standards webpage (<http://www.state.nj.us/dca/codes/rehab>).

<sup>417</sup> See New Jersey Community Affairs Dept. Division of Codes and Standards, Guide to Rehabilitation Subcode at 6 <http://www.state.nj.us/dca/codes/rehab/rehabguide.htm>.

<sup>418</sup> Maryland Department of Housing and Community Development ("DHCD") "Rehabilitation Code Program Overview" ([www.dhcd.state.md.us/smart/codes/rehab.htm](http://www.dhcd.state.md.us/smart/codes/rehab.htm)).

The City of Wilmington, Delaware adopted New Jersey's rehabilitation code in 1999<sup>419</sup> and the Rhode Island Legislature considered a rehabilitation code bill in the year 2000. A trend may be developing where states are looking to Maryland and New Jersey as models for rehabilitation codes.<sup>420</sup>

According to the Maryland Department of Planning, the Models and Guidelines for Infill and Smart Neighborhood Development are designed to promote infill development in existing communities and compact new development in communities that are beginning to develop.<sup>421</sup> Under this program, the Department of Planning is to draft model development tools with flexible development standards to facilitate infill and compact development. These new tools will be available for local governments to adopt voluntarily. However, the state is providing strong financial incentives for adoption of the rehabilitation code and the model guidelines. Counties that adopt the code without amendments are eligible for the Neighborhood Conservation Program, a fund for streetscape and roadway improvements; rehabilitation code training, circuit rider code inspector and smart growth mortgage programs; and the Rural Legacy Program.<sup>422</sup>

### **17.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)**

Maryland's Models and Guidelines and Building Rehabilitation Code are still in their infancy and cannot be fairly analyzed. However, one year after the adoption of the New Jersey rehabilitation code, rehabilitation work statewide rose eight percent (8%) and in three cities increased dramatically. Spending on rehabilitation rose in Newark from \$68 million to \$110 million; in Jersey City, from \$50 million to \$90 million; and, in Trenton, from \$21 million to \$30 million.<sup>423</sup> In the state's five largest cities, the value of rehabilitation work increased by 60 percent in 1998, compared to only 1.6 percent in 1997, before the code was adopted.<sup>424</sup> In a demonstration project for its rehabilitation standards, HUD found that 15-20% reduction in costs for a single-family home was possible.<sup>425</sup> HUD also concludes that the New Jersey code "has reduced the need for variances from unrealistic regulations, [which] translates into substantial time savings as well as predictability in the planning of rehabilitation ... [and] these provisions promote the continued use not only of single-family dwellings, but also of all types of buildings, helping to preserve the character of the past."<sup>426</sup>

The New Jersey Rehabilitation Subcode won the 1999 Innovations in American Government Award from the Ford Foundation as an original and effective initiative.<sup>427</sup>

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<sup>419</sup> DHCD press release, available at <http://www.state.nj.us/dca/codes/rehab/pressrel.htm>.

<sup>420</sup> Legislation introduced into the Rhode Island House, Bill 00H7793 "Joint Resolution Creating a Special Legislative Commission on Amending the State Building Code by Adopting the New Jersey Rehabilitation Code for Existing Buildings" on Rhode legislature's webpage (<http://www.state.ri.us/bills/00-7793.html>). See also, for Washington, Huck, Janet and Miranda Bryant, "Port Townsend May Change Codes To Spur Rehab Of Historic Buildings' Upper Stories," *Olympic Peninsula Business Journal online* ([www.peninsula-business.com/Articles/ptsmartcodes.html](http://www.peninsula-business.com/Articles/ptsmartcodes.html)).

<sup>421</sup> Maryland Department of Housing and Community Development Smart Codes webpage ([www.DHCD.state.md.us/smart/codes/model.html](http://www.DHCD.state.md.us/smart/codes/model.html)).

<sup>422</sup> *Id.*

<sup>423</sup> "Smart Codes" on the Sierra Club webpage ([www.sc.org/chapters/md/2000-codes.html](http://www.sc.org/chapters/md/2000-codes.html)).

<sup>424</sup> *Id.*

<sup>425</sup> "Innovative Rehabilitation Provisions: A Demonstration of the Nationally Applicable Recommended Rehabilitation Provisions," at HUD website: <http://www.huduser.org/publications/pdf/innrehab.pdf>.

<sup>426</sup> *Id.*

<sup>427</sup> New Jersey Dept. of Community Affairs, Division of Codes and Standards 1999 Press Release "New Jersey Wins National Award for Rehabilitation Subcode" <http://www.state.nj.us/dca/codes/rehab/pressrel.htm>.

### **17.03 IMPACT ON PROPERTY VALUES**

If the Building Rehabilitation Code Program is properly implemented, the value of existing buildings that would otherwise not be rehabilitated could increase. The same can be said for property values in neighborhoods containing a substantial amount of rehabilitation activity.

### **17.04 IMPACT ON DEVELOPMENT COSTS**

The HUD demonstration project cited above indicates that a rehabilitation code can decrease the costs of rehabilitating existing buildings. Examples of cost savings achieved in New Jersey are: \$400,000 in the conversion of an abandoned Jersey City building into a day care center and senior citizen apartments and a 20 percent savings in the conversion of a vacant Trenton office building to a charter school.<sup>428</sup> The cost for new construction, on the other hand, would likely remain the same because the code has no provisions relevant to new development.

### **17.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

The New Jersey experience suggests that Smart Codes are effective in encouraging rehabilitation of existing structures, including deteriorating buildings in the larger cities. These codes create an express preference for the rehabilitation of existing buildings over the construction of new buildings, which must adhere to new construction codes, and seem to be effective in slowing the pattern of abandoned and deteriorating buildings in urban cities.

### **17.06 IMPACT ON HOUSING AFFORDABILITY**

To the extent that rehabilitation cost savings are passed on to consumers, the implementation of the Rehabilitation Code would help to make housing more affordable. In fact, making rehabilitation cost-effective is a HUD affordable housing research initiative.<sup>429</sup> The Smart Code also can have the effect of increasing the stock of suitable housing, by encouraging the rehabilitation of buildings that might otherwise be abandoned. Such supply increases should also help to check the rise in housing costs.

### **17.07 SUMMARY OF PROS AND CONS**

#### **PROS:**

- Rehabilitation Codes will arguably allow rehabilitation projects involving existing buildings to proceed that would otherwise have been postponed or abandoned due to the high cost of achieving compliance with a full set of new construction codes.

#### **CONS:**

- Rehabilitation Codes have limited applicability in areas without a supply of older buildings, in which greenfield development is the norm.

### **17.08 INCENTIVE-BASED ALTERNATIVES**

Rehabilitation Codes are, in fact, an incentive-based alternative used to encourage investment in existing building stock in mature areas rather than new greenfield development of outlying districts.

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<sup>428</sup> *Id.*

<sup>429</sup> HUD Affordable Housing Research & Technology Division (<http://www.huduser.org/research/tech.html>).

# APPENDIX A

## GLOSSARY OF KEY TERMS

(**Bolded** Page Number Indicates Page Where Term is Defined)

- Adequate Public Facilities (APF): *Sec. 4: 15*
- Affirmative Easement: *Sec. 13: 69*
- Affordable Housing: *Sec. 15: 81*
- Afforestation: *Sec. 14: 74*
- Agricultural Preservation Restrictions (APR): *Sec. 9: 44*
- Agricultural Protection Zoning (APZ): *Sec. 9: 43*
- Appearance Review: *Sec. 11: 58*
- Architectural Review: *Sec. 11: 58*
- Benefit Assessment Districts: *Sec. 6: 26*
- Canopy: *Sec. 14: 74*
- Cluster Development: *Sec. 7: 31, 32, 34*
- Cluster Zoning: *Sec. 10: 52*
- Clustering: *Sec. 10: 52*
- Concurrency Management: *Sec. 4: 15*
- Conservation Easement: *Sec. 8: 36 Sec. 9: 44; Sec. 13: 69*
- Contextualism: *Sec. 12: 63*
- Covenant: *Sec. 8: 36; Sec. 9: 44*
- Dbh: *Sec. 14: 74*
- Density Zoning: *Sec. 10: 53*
- Design Review: *Sec. 12: 63*
- Development Design Review: *Sec. 11: 58*
- Development Impact Fee: *Sec. 5: 20*
- Development Rights: *Sec. 8: 36*
- Downtown and Corridor Plans: *Sec. 12: 63*
- Downzoning: *Sec. 7: 32, Sec. 12: 63*
- Dripline: *Sec. 14: 74*
- Easement: *Sec. 8: 36 Sec. 13: 69*
- Exaction: *Sec. 5: 20; Sec. 7: 32*
- Exclusive Use: *Sec. 9: 43*
- Farmland Preservation Techniques: *Sec. 9: 43*
- Fee Simple Absolute: *Sec. 8: 36*
- Fees in Lieu: *Sec. 7: 32*
- Growth Phasing: *Sec. 3: 9, 10; 12, 13; Sec. 4: 15*
- Housing Linkage: *Sec. 15: 80; Sec. 16: 93*
- Incentive Zoning: *Sec. 15: 82 Sec. 16: 96*
- Inclusionary Zoning: *Sec. 15: 82, Sec. 16: 93*
- Interim Zoning Control: *Sec. 3: 10*
- Level of Service (LOS): *Sec. 4: 15*
- Local Improvement Districts: *Sec. 6: 26*
- Mitigation Ordinances and Policies: *Sec. 9: 45, 48*
- Moderate, Low and Very Low Income: *Sec. 15: 82*
- Moratorium: *Sec. 3: 10, 13*
- Negative Easement: *Sec. 13: 69*
- Neighborhood Conservation Districts: *Sec. 12: 62*
- New Urbanism: *Sec. 11: 59*
- Open Space: *Sec. 10: 52*
- Overlay District: *Sec. 12: 63*
- Planned Unit Development (PUD): *Sec. 10: 52*
- Purchase of Agricultural Conservation Easement (PACE): *Sec. 9: 44*
- Purchase of Development Rights (PDR): *Sec. 7: 31, 32; Sec. 9: 44, 47; Sec. 10: 57*
- Rate-of-Growth systems: *Sec. 3: 9, 13, 15*
- Right to Farm Legislation: *Sec. 9: 45, 49*
- Scenic Districts: *Sec. 13: 69*
- Smart Codes: *Sec. 17: 97*
- Special Assessment District (SAD): *Sec. 3: 14; Sec. 6: 26*
- Special Benefit Districts: *Sec. 6: 26*
- Special Zoning/Design Districts: *Sec. 12: 64*
- Specimen Tree: *Sec. 14: 74*
- Transfer of Development Rights (TDR): *Sec. 7: 32, 33; Sec. 8: 44, 57; Sec. 14: 72*
- Tree Preservation Ordinance: *Sec. 14: 73*
- Urban Design Review: *Sec. 11: 58*
- Urban Growth Area: *Sec. 2: 3*

# APPENDIX A

## GLOSSARY OF KEY TERMS

(**Bolded** Page Number Indicates Page Where Term is Defined)

Urban Growth Boundary (UGB): *Sec. 3: 9*

Urban Reserve: *Sec. 2: 4*

Urban Service Area (USA): *Sec. 2: 4*

Viewshed Protection Ordinance: *Sec. 13:  
70*

## APPENDIX B

<b>GROWTH MANAGEMENT TECHNIQUES</b> <i>SUMMARY CHART</i>				
<b>TECHNIQUE</b>	<b>How Effective in Achieving Stated Purpose(s)</b>	<b>Impact on Property Values</b>	<b>Impact on Development Costs</b>	<b>Impact on Housing Affordability</b>
<b>Urban Growth Boundaries (UGBs)</b>	Moderately effective except in areas of diffuse population	Increase values for properties within UGB compared to those outside	May be reduced if densities inside UGB increase	Increase housing prices
<b>Growth Phasing</b>	Generally effective when tied to CIP	Increase values for properties in areas slated for growth	Costs reduced if public facilities available at time of development	Increases housing prices unless preference given to affordable housing projects
<b>Rate of Growth Controls</b>	Effective in limiting actual growth rate but can cause development to “leap frog”	Growth controls limit land supply, driving up prices	May increase costs to extent not tied to availability of public services	Increase housing prices unless preference given to affordable housing projects
<b>Moratorium</b>	Generally effective in halting development	Generally has the effect of downzoning property	No direct effect	Increase housing prices if purpose is to halt residential development
<b>Adequate Public Facilities (APF) and Concurrency</b>	Moderately effective but may divert growth to outlying areas	Increase in areas where public facilities made available	Complexity of permitting and timing delays likely to increase costs	Increase housing prices if APF does not allow supply to keep up with demand
<b>Impact Fees</b>	Generally effective in apportioning infrastructure costs of development to those benefiting from development	May decrease price developer otherwise willing to pay for land, in effect, shifting cost to landowner; land not subject to impact fees may be more attractive and hence more valuable	May reduce costs to extent costs are fairer and more predictable	Increase the price of new and existing homes
<b>Special Assessment Districts (SADS)</b>	Generally effective because can be tailored to need	May increase values to extent makes land developable	No direct impact	SAD assessment may reduce housing demand and lower housing prices
<b>Open Space Preservation Techniques</b>	Clustering/TDR generally effective if market support; fees in-lieu less effective	Can negatively impact values of properties restricted under TDR or by buffer standards	Clustering can produce cost economies, but uncertainty created by process	Reduced supply of land can cause higher prices unless offset by transfer of density elsewhere

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<b>GROWTH MANAGEMENT TECHNIQUES</b>				
<i>SUMMARY CHART</i>				
<b>TECHNIQUE</b>	<b>How Effective in Achieving Stated Purpose(s)</b>	<b>Impact on Property Values</b>	<b>Impact on Development Costs</b>	<b>Impact on Housing Affordability</b>
<b>Transferable Development Rights (TDR)</b>	Effective in certain jurisdictions but generally has had mixed results	TDR reduces value where downzoning is part of establishing TDR program	Can increase costs where TDR program is based on discretionary review process	Depends how TDR program structured, e.g., allowing density bonuses for affordable housing
<b>Agricultural Protection Zoning (APZ)</b>	Generally effective in preventing conversion of farmland	Can have significant negative impact on property values	Mitigation requirements increase costs	Can constrain supply of land relative to demand, creating upward pressure on housing prices, unless adequate amount of land zoned for residential
<b>Purchase of Agricultural Conservation Easement (PACE)</b>	Generally effective and popular with farmers	No net effect if price paid is fair market value	NA	Can constrain supply of land relative to demand, creating upward pressure on housing prices, unless adequate amount of land zoned for residential
<b>Cluster and Planned Unit Development</b>	Generally effective	Some evidence of higher appreciation rate than conventional subdivision, if open space protected as part of development	Lower costs because of reduction in costs of infrastructure	Design flexibility allows mix of housing types, including affordable
<b>Development Design Review</b>	Depends upon extent to which based on careful study and clear standards	Generally positive effect	Generally add to development costs	Increases cost of housing, unless affordable housing exempted from design review or included as part of community design
<b>Neighborhood Conservation Districts</b>	Generally effective	Generally positive effect	Can increase costs through review requirements	May help to conserve older housing stock
<b>Scenic Districts and Conservation Easements</b>	Generally effective	Can be burdensome to individual property owners	Increase costs to extent design review adds uncertainty and complexity	No direct affect, tho by preserving amenities, they contribute to price stability or appreciation

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<b>GROWTH MANAGEMENT TECHNIQUES SUMMARY CHART</b>				
<b>TECHNIQUE</b>	<b>How Effective in Achieving Stated Purpose(s)</b>	<b>Impact on Property Values</b>	<b>Impact on Development Costs</b>	<b>Impact on Housing Affordability</b>
<b>Tree Preservation</b>	Mixed results	May enhance property values to a certain extent, but may also infringe upon traditional property rights	Prohibitions and limitations on tree clearing and best management practices, add to costs	Generally adds to development costs which, if passed on to purchasers, will increase housing prices
<b>Inclusionary Zoning/Housing</b>	Effective when can be made mandatory; if voluntary, underlying density must be lower than bonus allowed	No evidence that affordable housing projects reduce property values	Increases development costs primarily as result of additional regulations implementing affordable housing program	Provides affordable housing
<b>Housing Linkage</b>	Effectiveness depends upon strength and duration of market	Lowers values of properties subject to linkage, as compared to those not subject to linkage	Increase costs by requiring direct expenditures by developer	Has been successful in generating funds for affordable housing
<b>Smart Codes</b>	Too early to make assessment	Should increase property values of those properties rehabilitated as a result of the code	Can decrease the cost of rehabilitating existing buildings	Rehabilitation of existing buildings can increase housing stock, helping to keep down the rise in housing prices