Time Controls on Land Use Prophylactic Law for Planners

Thomas C. O'Keefe

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TIME CONTROLS ON LAND USE:
PROPHYLACTIC LAW FOR PLANNERS

Editor's Note: While this Note was in publication, the New York Court of Appeals decided Golden v. Planning Board.* The court upheld the Ramapo scheme of controlled growth, stating, "[W]here it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for 'phased growth' ..."** Judicial sanction of this mode of controlling the rate of community growth will have a significant impact on future suburban planning and on the delicate balance of competing interests discussed in this Note.

The sprawling megalopolis of the eastern seaboard felt the impact of exclusionary zoning first; other metropolitan areas will experience it as their protective time-lag dissolves. Judicial and social reaction to this issue promises to alter dramatically and perhaps indirectly to consume traditional zoning practices.

Caught between the pressures of increasingly successful attacks on zoning schemes which create barriers to migration and the burdens that massive urban exodus has placed upon municipal public services,

** Id. at 18.

1 This term has come to signify the general problem created by local zoning ordinances that render suburban housing costs so prohibitively high that low- and moderate-income families cannot afford to buy.

It has been clear for some time that the principal direct public controls over land use (zoning, subdivision control, etc.) are often employed to exclude large groups of people from access to good residential areas, on racial and/or on economic grounds.


2 See notes 27-37 and accompanying text infra.
suburban planning boards must revise traditional attitudes and techniques. One solution that accommodates both the traditional interests of planning boards and the demands of outsiders for suburban access features a time controlled, sequential development of the community.

I

THE DILEMMA

A. Halcyon Days of Old: The Reign of the Planning Board

Planning boards have largely had their way in the courts since the 1926 case of Village of Euclid v. Ambler Realty Co.3 firmly established the constitutionality of comprehensive zoning.4 At the time it was decided Euclid was an important boost for the embryonic community planning movement, and it continues to be the lodestar guiding both planners and courts.

Since 19285 the Supreme Court has refused to hear any zoning cases, preferring to leave the task of judicial scrutiny to the states. By heavily embellishing the zoning scheme sanctioned in Euclid with a variety of other devices, many having an exclusionary effect,6 planning boards have evidently interpreted the Court's reluctance to review zoning cases as tacit approval of their practices.7 Generally, the judi-

3 272 U.S. 365 (1926). Euclid has been called “the ‘open sesame’ of land-use planning in this country.” Roberts, The Demise of Property Law, 57 CORNELL L. REV. 1, 11 (1971) [hereinafter cited as Roberts].
4 See R. Anderson, ZONING LAW AND PRACTICE IN NEW YORK STATE § 2.05 (1963); C. Crawford, Strategy and Tactics in Municipal Zoning 63-64 (1969):
The field of zoning is one in which the experts have become very powerful. In most communities the legislative body will not make changes in the zoning ordinance or map without first consulting the planning commission. . . . [T]he planners have [also] gained a considerable amount of judicial respect, and zoning actions . . . have often been upheld with little more than the observation that they were in accordance with professional planning advice.
5 Nectow v. City of Cambridge, 277 U.S. 183 (1928), was the second and the last zoning case decided by the Supreme Court.
6 For a catalog of major exclusionary zoning devices, see Williams & Norman 481-84.
7 Supreme Court decisions subsequent to Euclid on topics related to zoning seem to confirm the Court's policy of allowing considerable local discretion in land-use planning. See, e.g., James v. Valtierra, 402 U.S. 137 (1971) (upholding provision of state constitution requiring local voters to approve site of low-income housing); Berman v. Parker, 348 U.S. 26 (1954) (recognizing condemnation power for aesthetic reasons). One commentator reviling at Valtierra felt that the Court might be a bit rusty at handling zoning law. He found “a Supreme Court remarkably unsophisticated in the devious jungle of local government, a Court that had barely brushed against a building code or zoning ordinance since the 1920’s and had little familiarity with this entire sphere of law.” Bosselman, Commentary on James v. Valtierra, 23 ZONING DIGEST 117, 118 (1971).
ciary has been favorable to these innovations.\(^8\) Citizens for the most part have been equally receptive to planner intervention, their communities having suffered long enough from the effects of chaotic growth produced by laissez-faire land use.\(^9\)

Planners developed an arsenal of zoning weapons to use in the battle against haphazard growth and in pursuit of the time-honored rubric of "orderly community development." Following the lead of *Euclid*,\(^10\) courts relied heavily on the presumption of validity to sustain zoning devices.\(^11\) General welfare for zoning purposes, however, was equated with individual municipality welfare;\(^12\) little consideration was directed beyond the town limits.

One by one the principal exclusionary zoning techniques\(^13\) were

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\(^9\) A. Rathkopf, *The Law of Zoning and Planning* § 1, at 1-3 (3d ed. 1969). In American Smelting & Ref. Co. v. Chicago, 347 Ill. App. 32, 105 N.E.2d 803 (1952), the court explained why early zoning efforts were so well received:

> Zoning was one of the most radical departures from the traditional concepts of private property in our time. . . . The need for it was nevertheless so great that all, conservative, liberal, and progressive alike, have accepted it and it has not been subjected to the vehement attack made on other measures deemed "liberal" or "progressive."

*Id.* at 38, 105 N.E.2d at 805.

\(^10\) "If the validity of the legislative classification for zoning purposes be *fairly debatable*, the legislative judgment must be allowed to control." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (emphasis added).


\(^12\) See, e.g., *Bilbar Constr. Co. v. Easttown Township Bd. of Adjustment*, 393 Pa. 62, 68, 141 A.2d 851, 854-55 (1958): "It is plain enough that zoning restrictions in one township cannot be permitted to control or impinge upon the zoning regulations which a contiguous township may see fit to adopt."

\(^13\) The primary motivation behind exclusionary zoning devices is financial. Many communities desire to "keep out the lower income groups . . . which require significant public expenditures" and which contribute little to municipal revenues. "Looking at the matter in pocketbook terms, [local citizens commonly] support fiscal zoning. Usually nobody bothers to ask where the families who are being excluded should live." *National Comm'n on Urban Problems, Building the American City* 19 (1969). However, as "increasing numbers of jobs are being located in the suburbs, where they are less accessible to central city residents" (*id.* at 47), exclusionary zoning devices may have an adverse economic impact on some communities.
upheld under the permissive Euclid rationale: minimum lot size requirements were sanctioned almost universally; minimum floor space requirements enjoyed judicial endorsement; and the direct or indirect exclusion of multiple dwellings became an integral part of the planners' panoply of tools.

B. The Bubble Bursts: A Clamor To "Open up the Suburbs"

With the recent and phenomenal out-migration from American cities, acute housing shortages have developed and suburban land

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16 E.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (ordinance excluding apartment houses held constitutional); Miller v. Board of Pub. Works, 195 Cal. 477, 254 P. 381 (1925) (upholding ordinance prohibiting buildings housing more than two families); Minkus v. Pond, 296 Ill. 467, 158 N.E. 121 (1927) (upholding refusal to allow apartments in a single family residence area); Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925) (upholding ordinance excluding large apartment houses from residential districts); see Valley View Village, Inc. v. Proffett, 221 F.2d 412 (6th Cir. 1955) (single family use restrictions upheld). Limiting residential development to single family houses has its most direct impact on low- and moderate-income groups.

Multifamily housing units generally provide the best opportunities for housing persons of low and moderate incomes. The rental nature of such housing, and the savings produced by spreading land costs over a great number of units, place such housing within the means of many who could not afford new single-family houses. Furthermore, many of the publicly assisted housing programs are multifamily programs and depend on the existence of zoning for multifamily structures.

17 In 1950, 52 million persons lived in the central cities . . . , constituting 59 percent of the SMSA [Standard Metropolitan Statistical Area] population. . . [T]he 58 million central city residents of 1960 central cities constituted only 51 percent of the total metropolitan population. . . .

Between 1960 and 1985, the projections indicate that while SMSA populations in the nation as a whole would increase by about 58 percent, the population in central cities would increase by only 13 percent whereas that in suburbia, the ring, would more than double. The population in nonmetropolitan areas would grow at almost the same level as that in central cities, some 12 percent.

18 The tight housing market is basically a product of two interrelated phenomena. First, the rate by which construction exceeds removals is declining:
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has become the subject of a tug-of-war. An unlikely alliance of private developers and outsiders has emerged to challenge exclusionary zoning devices as erecting unreasonable obstacles to the solution of housing problems. This alliance seeks to change the face of suburbia by constructing high-density, high-profit apartment houses and small lot subdivisions.

Outsider groups and concerned observers charge that parochial private property interests, not the interests of the general public, are being protected in the name of the police power and that zoning controls have been employed to achieve racial and economic segregation. They demand an end to practices that render suburban living an exclusive privilege of monied classes; the goal is to make the

The net increase of 10.4 million units in the housing inventory in the decade of the sixties was less than in the fifties, primarily due to an increased pace of removals of units from the supply. The number of removals is expected to be even greater during the seventies.

SUBCOMM. ON HOUSING PANELS OF HOUSE COMM. ON BANKING & CURRENCY, 92d CONG., 1st Sess., HOUSING PRODUCTION, HOUSING DEMAND, AND DEVELOPING A SUITABLE LIVING ENVIRONMENT, pt. 1, at 2 (Comm. Print 1971). Secondly, production of new single family housing is also declining. Id. at 40. Only production of multi-family rental units has remained relatively stable, apparently because of the availability of financing: "Many lenders have favored rental housing mortgage financing over single-family home financing during the tight money period because they have been able to obtain an equity interest in the property as a condition of making the mortgage loan." Id. at 42.

The net result of this squeeze is that vacancy rates have diminished nearly to the vanishing point in some metropolitan areas (id. at 23) and the housing that is available is very expensive (id. at 2). According to Babcock and Bosselman, the migration of many American industries to suburban areas encourages a similar migration by their employees who, unable to afford expensive housing, "will look for suburban multiple-family housing."

Babcock & Bosselman, supra note 1, at 1058.

See, e.g., N.Y. Times, Aug. 17, 1971, at 1, col. 2: Land is the coin and the treasure of the suburbs around New York City and that land—some of which has risen in value in 20 years from $700 to $90,000 an acre—is the prize in a continuing battle for control of the 775 municipalities that make up the world's largest suburban area.

See Roberts 22.

See Comment, supra note 8, at 508.

An area of reasonable size (say less than half of a town) can be zoned for one acre (or for that matter for three or five acres) without having a serious impact on the cost of housing for people in the rest of the town. It does of course have a serious impact on the profits of developers and landowners; and it is for this reason that the home builders are leading a campaign against large-lot zoning as the exclusionary device. Their motivation is obvious; if required lot sizes can be sharply reduced, they can often sell the smaller lots for almost as much as larger lots, and thus receive a fine windfall—but with no benefit to those seeking inexpensive housing. Whether public-spirited liberals should join in this campaign is another question.

Williams & Norman 497 (emphasis in original) (footnote omitted).


See Williams & Norman 475; notes 40 & 47 infra.

"Of greatest urgency is ending the use of the police power through zoning to achieve economic and racial segregation." Davidoff & Davidoff, supra note 23, at 522.
suburban environment "open and available for citizens of all incomes and races."

C. Judicial Response: The Outsiders Get a Foot in the Door

Among the first cases to deal directly with the problem of exclusionary zoning devices was *Board of County Supervisors v. Carper*, decided in 1959. In that case the Virginia Supreme Court of Appeals struck down a two-acre minimum lot size requirement as arbitrary, unreasonable, and unrelated to the general welfare of the community. The ordinance failed because of its tendency to channel low-income groups away from the community. The court overcame the ordinance's presumption of validity with these remarks:

The practical effect of the [ordinance] is to prevent people in the low income bracket from living in the western area and forcing them into the eastern area, thereby reserving the western area for those who could afford to build houses on two acres or more. This would serve private rather than public interests. Such an intentional and exclusionary purpose would bear no relation to the health, safety, morals, prosperity and general welfare.

In *National Land & Investment Co. v. Easttown Township Bd. of Adjustment*, the Pennsylvania Supreme Court expanded the *Carper* rationale and invalidated a four-acre minimum lot requirement. The court recognized that the township involved was suffering from the effects of rapid development of the Philadelphia metropolitan area, but stated that zoning could not be used "to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring." *National Land* was the first case unambiguously to acknowledge that parochial zoning had an unacceptable impact on outsider access to the suburbs.

Pennsylvania clarified the thrust of *National Land* in 1970 by two decisions which purport to prohibit entirely use of the police power to

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26 Id. at 509.
28 Id. at 661, 107 S.E.2d at 396.
30 Id. at 528, 215 A.2d at 610 (footnote omitted). The court stated further that the interest of current residents in maintaining the status quo was "purely a matter of private desire which zoning regulation may not be employed to effectuate." *Id.* at 531, 215 A.2d at 611. A zoning ordinance could not be used "to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise." *Id.* at 532, 215 A.2d at 612.
31 *Carper* considered only the exclusionary effect of the ordinance on those already residing within Fairfax County, Virginia. *Board of County Supervisors v. Carper*, 200 Va. 653, 662, 107 S.E.2d 390, 396 (1952).
zone out certain income groups or uses. In *Concord Township Appeal* a two- and three-acre minimum lot size requirement was invalidated. The township argued that lots of less than two acres would burden existing sewage facilities. The court felt that the real issue was exclusionary zoning and dismissed the sewage argument as "irrelevant":

We once again reaffirm our past authority and refuse to allow the township to do precisely what we have never permitted—keep out people, rather than make community improvements.

The implication of our decision in *National Land* is that communities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area.

In a related case, *Girsh Appeal*, the court held unconstitutional a township's failure to provide for apartments as part of its zoning scheme, thus rejecting the traditional view that apartments need not be provided for in a comprehensive zoning scheme.

Of course the problem of exclusionary zoning is most pressing in the urban corridor of the northeastern United States. Even among the northeastern states, however, only Pennsylvania and New Jersey.

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32 439 Pa. 466, 268 A.2d 765 (1970). This case is frequently called *Appeal of Kit-Mar Builders, Inc.*

33 Id. at 471-72, 268 A.2d at 767. Municipalities have sometimes responded to the new burden-on-facilities problem by requiring as a condition of subdivision approval that the subdivider supply the necessary public facilities. See generally *Lake Intervale Homes, Inc. v. Township of Parsippany-Troy Hills*, 28 N.J. 423, 147 A.2d 28 (1958); *Reid Dev. Corp. v. Township of Parsippany-Troy Hills*, 31 N.J. Super. 459, 107 A.2d 20 (App. Div. 1954). This approach, however, may have the exclusionary impact of raising the price of admission to the subdivision. See note 65 infra.

34 439 Pa. at 472, 268 A.2d at 767.

35 Id. at 474, 268 A.2d at 768-69 (footnote omitted).


37 See note 16 and accompanying text supra.

7The development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; ... in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering ... with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes .... Under these circumstances, apartment houses ... come very near to being nuisances.


courts appear to have taken a strict anti-exclusionary position. But as outsider groups elsewhere gather forces they will undoubtedly look to the Pennsylvania and New Jersey decisions for support.

At this point the vanguard cases stand for at least three key principles. First, courts and planners must evaluate local zoning policy in terms of its effect on access to adequate suburban housing by low- and moderate-income groups. Second, communities cannot shirk their responsibilities to outsiders. Third, the overall solution to the problem of exclusionary zoning may be greater regional planning. The Pennsylvania court's endorsement of regional planning may well be the most enduring aspect of its Concord and Girsh opinions.

In addition to the expanded general welfare and due process notions utilized by the Pennsylvania courts, equal protection arguments have been advanced in the law reviews and have made a respectable

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39 Some states, however, have attacked the problem of exclusionary zoning through legislation. In New York, the Urban Development Corporation (UDC) is empowered to buy and sell land, to give financial assistance to projects aimed at alleviating the inadequate supply of low- and moderate-income housing, and to override local laws, including zoning ordinances, should the UDC find an appropriate site for housing. N.Y. UNCONSOL. LAWS §§ 6255, 6266(3) (McKinney Supp. 1971). There is currently a bill pending in the New York State legislature which would vitiate the UDC's pivotal power. (1972) Sen. Int. No. 9987 (Comm. on Rules), (1971) Assy. Int. No. 650 (Mr. Suchin) (UDC shall not initiate any project unless and until it complies with local zoning regulations).

In Massachusetts municipalities have been directed by statute to provide a minimum amount of vacant land to limited-profit developers for construction of low-income housing. MASS. ANN. LAWS ch. 40B, § 20 (Supp. 1970). The effect of such legislation has been minimal:

[T]he Massachusetts legislation in effect legitimizes exclusionary zoning of more than ninety-nine percent of a local community, and the UDC in New York has never exercised its power to enter a community against the will of the local government.

Roberts 37 (footnotes omitted).

40 Industry is moving into the county and region from the central cities. Population continues to expand rapidly. New housing is in short supply. Congestion is worsening under deplorable living conditions in the central cities . . . . The ghetto population to an increasing extent is trapped, unable to find or afford adequate housing in the suburbs because of restrictive zoning.


41 Concord Township Appeal, 439 Pa. 466, 476, 263 A.2d 765, 769 (1970). In a footnote to Girsh Appeal, Justice Roberts elaborated:

Perhaps in an ideal world, planning and zoning would be done on a regional basis, so that a given community would have apartments, while an adjoining community would not. But as long as we allow zoning to be done community by community, it is intolerable to allow one municipality (or many municipalities) to close its doors at the expense of surrounding communities and the central city.


42 Cf. E. ROBERTS, LAND-USE PLANNING: CASES AND MATERIALS 4-151 n.3 (1971).

43 E.g., Sager, supra note 1; Note, supra note 40; Note, Exclusionary Zoning and
showing in the courts. Equal protection is certainly a more intellectually appealing basis than the due process clause for attacking exclusionary zoning, since outsider interests would be expressly considered; due process contests usually involve only a municipality and a landowner seeking to protect his property interests. But there are serious shortcomings in the exclusive use of equal protection arguments. Exclusionary zoning only indirectly discriminates on the basis of race; its primary discrimination is economic. Although discrimination on the basis of wealth has often been held to violate equal protection, wealth classifications have not yet uniformly been subjected to the rigid judicial scrutiny that classifications based on race have received. Indeed, in *James v. Valtierra* the Supreme Court indicated that unless direct racial discrimination is intended, exclusionary community land-use procedures and patterns give rise to no equal protection issues. Similarly, although racial discrimination in housing violates equal protection, housing itself has never unequivocally been held to constitute a fundamental interest.


44 See, e.g., Kennedy Park Homes Ass'n v. Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970). In these cases local building or zoning codes were found to have a motive of racial discrimination.

45 Sager, supra note 1, at 784-85.


47 Within the context of the new suburban city... the poor are no longer black; they are rather every man not a member of the upper middle class...

The real contradiction in American society is that its white, blue collar classes are being excluded from the new city developing in suburbia. It is not the minority which is being discriminated against but the majority.

Roberts 39.


50 In *Valtierra* the Court reviewed article 34 of the California Constitution, which provided that before any low-income housing project could be constructed, the people in the affected area must approve the project by referendum. Since the referendum requirement did not rest upon "distinctions based on race," it did not constitute racial discrimination in violation of the equal protection clause. "[O]f course a law-making procedure that 'disadvantages' a particular group does not always deny equal protection." Id. at 142.


52 But see Reitman v. Mulkey, 387 U.S. 369 (1966): "If we were in a domain exclusively private, we would have different problems. But urban housing is in the public domain... Urban housing is clearly marked with the public interest." Id. at 385 (concurring opinion). See also Note, supra note 40, at 364.
D. The Outsider Movement: A Party in Search of a Candidate

Despite the absence of a unifying rationale, the attack on exclusionary zoning continues on all fronts. Public interest groups have sprouted up to help outsiders plan and litigate. The *New York Times* devoted a series of articles to the effects of exclusionary zoning on jobs and housing opportunities. Settled practices are being rechallenged; for example, suit has been filed in Bedminster, New Jersey, challenging a five-acre minimum lot size requirement that had been upheld in 1952. Environmentalists have brought a federal action alleging that zoning practices of Suffolk County, New York prevent construction of suburban housing for low-income families. A New Jersey superior court has struck down the entire zoning scheme of a municipality on the ground that it ignored the "desperate housing needs" of urban New Jersey. A Westchester County planning department study warns planners that restrictive laws are becoming increasingly vulnerable to

An argument derived from Shapiro v. Thompson, 394 U.S. 618 (1969)—that exclusionary zoning violates the fundamental right to travel by making it impossible for members of certain income groups to move to the community of their choice—has also been advanced. Note, *The Responsibility of Local Zoning Authorities to Nonresident Indigents*, 23 STAN. L. REV. 774, 792 n.112 (1971). This argument seems somewhat unpromising in light of (1) the undeveloped state of the right to travel doctrine (see Freilich & Bass, *Exclusionary Zoning: Suggested Litigation Approaches*, 3 URBAN LAW, 344, 361 (1971)); (2) the question whether the right extends to intrastate travel at all (see Shapiro v. Thompson, *supra* at 630); and (3) the possibility that the "general welfare" purpose of zoning might constitute a "compelling state interest" sufficient to maintain its constitutionality (id. at 634).

53 For example, the Suburban Action Institute, the National Urban Coalition, and the National Committee Against Discrimination in Housing. See Freilich & Bass, *supra* note 52, at 345. See also Bosselman, *supra* note 7, at 117.

Suburban Action Institute and Mack Construction Corporation, a commercial developer, recently proposed construction of a limited profit, racially and economically mixed community on a tract owned by the developer in rural Readington, New Jersey. The Institute's director explained the rationale for the project: "If Readington is prepared to accept industries, it must be prepared to accept the people who will work in them." *N.Y. Times*, Apr. 2, 1972, at 48, col. 7. The proposal is expected to generate litigation. *Id.*, col. 6.

54 *N.Y. Times*, Aug. 18, 1971, at 1, col. 1; *id.*, Aug. 17, 1971, at 1, col. 2; *id.*, Aug. 16, 1971, at 1, col. 2.


56 Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952). The ordinance was upheld as protective of the unspoiled, rustic countryside of Bedminster. See Roberts 14 n.67.

57 Suffolk County Defenders of the Environment, Inc. v. County of Suffolk, No. 70-C-1278 (E.D.N.Y., filed Oct. 9, 1970).

court challenges. In short, the clamor over exclusionary zoning is reaching a fever pitch which no planning board can safely ignore.

Before it is legislatively or judicially imposed on them as an affirmative duty, suburban planners would be well advised to devise a zoning system which makes some provision for all income groups. Some mix of disparate housing types and densities, in addition to the standard single-family residence scheme, should be achieved. At the very least planners will need to demonstrate that their plans neither discourage nor prohibit the development of low- and moderate-income housing. To achieve this housing mix without forfeiting the character and quality of their community is the challenge facing planners in the 1970’s.

II
A Solution

A. Time Controls in the Abstract: Raison d’être

Many zoning tools control population density and in that way indirectly accomplish both economic segregation and geographic population control. The cost of complying with minimum lot size or floor space requirements is high and often results in low density neighborhoods.


It is doubtful that local zoning, without regard to the needs and pressures of the larger metropolitan community, can protect a municipality from destructive change. The solution must be found in regulations which not only protect local interests but advance the interest of the larger community.

Id. at 62.

60 See, e.g., note 39 supra.

61 See Davidoff & Davidoff, supra note 23, at 531-32 n.54; Feller, Metropolitanization and Land-Use Parochialism—Toward a Judicial Attitude, 60 Mich. L. Rev. 655 (1971); Note, 23 STAN. L. Rev., supra note 52, at 798.

62 "[T]he emerging truth is that no community's land-use plan is valid unless it programs pluralistic development and unless it includes a government-sponsored program to produce housing at the lower reaches of the spectrum should market forces prove unresponsive." Roberts 29 (footnote omitted).

63 "In short, the mixture of housing becomes a constitutional question." Freilich & Bass, supra note 52, at 365.


65 See, e.g., Johnston, Developments in Land Use Control, 45 NOTRE DAME LAW. 399, 408 (1970):
Time controls work a much more equitable result. Rather than creating "tight little islands" they emphasize controlling both population and community growth until the municipality is able to provide adequate facilities and services. The time control concept contemplates coordination between the pace of development and its sequence. Growth is not only phased; ideally, it is encouraged adjacent to built-up areas before more remote areas are opened for development. Time controls are an attempt to assure habitable surroundings and efficient land use to whoever ultimately occupies the area. Although they do not inherently ignore either the color of a man's skin or the size of his pocketbook, time controls can be shaped to operate with a high degree of neutrality. If a community embraces a bona fide commitment to sequential development, the capacity for even-handed treatment of all income groups is readily apparent.

Equitably fashioned time controls neutralize or eliminate entirely the need for and abuses resulting from exclusionary devices, without abandoning the legitimate interest of planners and current residents in preserving the character and quality of their community. They restore an equitable aspect to the planning process, respond to the pressures of outsider groups, and possibly stave off harsh judicial intervention. They constitute an eminently sensible approach to the problem of metropolitan growth, reflecting pragmatism and a rough sense of justice to all parties. If not the ultimate solution, controlled growth may at least be a needed transitional approach for bridging the period between current fragmented, parochial zoning practices and the inevitable regional approach of the future.

66 Sager, supra note 1.


68 Although exclusionary zoning is largely motivated by fiscal considerations (see note 15 supra), the concept of time controls implicitly recognizes that the way to provide for pluralistic community growth is not to act as if fiscal considerations are unimportant, but to render them appropriate respect within the regulatory scheme. When fiscal considerations are made explicit in a scheme of controlled growth, judicial review is facilitated. See note 95 infra. Even if a court finds that a particular scheme does not meet constitutional muster, rather than void the entire plan it can merely order it accelerated. Fiscal considerations expressed in a system of time controls are simply another aspect of reviewable regulation, rather than a justification for preserving an otherwise exclusionary scheme. See text accompanying notes 92-95 infra.

69 Fragmentation of the zoning power has resulted in many of the exclusionary features of regulation . . . . Individual units of government were relatively free to employ the zoning power in the provincial interest of the zoning munici-
B. Time Controls in the Real World: Semantics on the Bench

Use of time controls or a controlled growth concept as the foundation of an overall zoning scheme has been pioneered by the Town of Ramapo, a suburb located thirty miles from New York City. The approach of the Ramapo scheme is to regulate the sequence and timing of residential growth in phase with the availability of municipal services and support facilities.

Judicial response to the plan has been mixed to date. The Rockland County, New York supreme court found "that on all the grounds of challenge the ordinance passes muster as a valid exercise of the Town Board's zoning regulation powers." The petitioner's main arguments were that the town board had exceeded its delegated zoning power and had confiscated private property without due process or compensation.

Each unit of local government, large or small, was empowered to restrict the use of land within its borders to achieve objectives which were within the reach of the police power, with little or no regard for the needs of the broader community.


As a theoretical concept, controlled growth had its birth in the mid-1950's. See, e.g., Fagin, Regulating the Timing of Urban Development, 20 LAW & CONTEMP. PROB. 298 (1955); Clinic: Development Timing, supra note 67, at 81 (P. Green, Jr., Univ. of North Carolina). In the days of judicial passivity on zoning matters (see notes 11-16 and accompanying text supra) planners had little use for the time control device. Locking a community into a capital budget and schedule of improvements (see note 105 infra) probably seemed unnecessarily rigid to them.

Ramapo's plan of controlled growth provides that developers must obtain a special permit to build for residential purposes and that issuance of a permit depends on the subdivision area achieving at least 15 "development points." These points are computed in accordance with the proximity of the proposed subdivision to the essential municipal services and facilities. The public improvements are to be extended sequentially by the municipality to all areas of the community over an 18-year period. A developer might advance the date of permit issuance by providing the improvements himself. Brief for Appellant at 5-8, Golden v. Planning Bd., appeal docketed, No. 475, N.Y. Ct. App., Nov. 17, 1971. For details of the plan as implemented see note 105 infra.


Id. at 29.

The action was brought by the record owner of a parcel of undeveloped land known as Golden Estates and by Ramapo Improvement Corp., the owner's contract vendee.

For the varied judicial responses to such a position, see text accompanying notes 79 & 82-83 infra.

The ultra vires challenge was that the enabling statutes\textsuperscript{78} authorized efforts to control population density but did not specifically provide for the Ramapo goal, namely, controlling the rate of population growth. Justice Galloway found this apparent disparity a horse soon curried:

In our judgment the power to so regulate and restrict [density of population] contains within its grant, not only implicitly but expressly, the power to control growth, i.e. the control of population growth. Obviously the power to regulate the height and bulk of buildings, the percentage of lot area occupancy, and the density of population in logic and reasonable construction includes the power to regulate growth of population . . . .\textsuperscript{79}

Justice Galloway also found in the plan neither confiscation without compensation nor a due process violation.\textsuperscript{80}

In the appellate division, a sharply divided bench reversed

\textsuperscript{78} N.Y. TOWN LAW §§ 261, 263 (McKinney 1965). The New York enabling statutes are virtually exact enactments of the Standard State Zoning Enabling Act, the model act for delegation of zoning authority to municipalities. U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926) [hereinafter cited as SZEA]. Two sections are especially relevant to this discussion:

Section 1. Grant of Power.—For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

\textsuperscript{79} No. 525-1970, at 18 (Sup. Ct. Rockland County) (emphasis in original).

\textsuperscript{80} There was no due process violation since the duration of the land-use restriction was not permanent or unreasonable. Id. at 26. The maximum potential restraint was 18 years, and most areas would be developed sooner. The plan had provisions to ensure that deferral of beneficial uses would correspond strictly to the preplanned completion dates for public improvements. Id. at 9. Should the town lag behind schedule, the developer would be credited with development points and the land qualified for a permit, just as if the improvements existed. See note 72 supra. Another relief feature was that a developer could obtain a reduction in the assessed valuation of his land for property tax purposes to the extent that such valuation could be shown to be affected by temporary use restrictions. Id. at 27.
squarely on the ultra vires grounds. Justice Martuscello, speaking for the majority, contended that Ramapo had "usurped power by regulating its population growth in a manner which has not been delegated to it." A town could use its delegated powers to control population density through minimum lot size requirements, but such a practice was "clearly distinguishable" from regulating population growth. The court also found that the discrimination among developers inherent in allowing some "to build earlier than others" could not be relieved by the tax abatement feature of the Ramapo plan.

The judicial timidity of the appellate division reflects a wooden view of zoning statutes. Such a view may freeze experimentation with land-use controls at a time when the insider-outsider struggle urgently needs a resolution that accommodates both suburban community interests and metropolitan growth.

81 The appellate division had before it two cases involving the validity of the Ramapo scheme. Golden v. Planning Bd., 37 App. Div. 2d 236, 324 N.Y.S.2d 178 (2d Dep't 1971); Rockland County Builders Ass'n v. McAlevey, 37 App. Div. 2d 738, 324 N.Y.S.2d 190 (2d Dep't 1971), appeal docketed, No. 476, Ct. App., Nov. 17, 1971. Two benches of five justices each heard the two cases, but because of overlapping assignments only eight individual justices made up the two benches. A headcount reveals that of the eight, only four actually voted to reverse Justice Galloway. The appellate division decided Golden by a three to two majority.

82 Id. at 243, 324 N.Y.S.2d at 186.
83 Id. at 241, 324 N.Y.S.2d at 183.
84 Id. at 243, 324 N.Y.S.2d at 185.
85 See note 80 supra. Justice Hopkins, concurring, felt that the statutory authority for decreasing the assessment of land (N.Y. GEN. MUNIC. LAW § 247 (McKinney Supp. 1971)) did not contemplate purposes such as Ramapo's. 37 App. Div. 2d at 245, 324 N.Y.S.2d at 188. The purpose of the authorizing statute is expressly to preserve "open space," defined in part as areas "whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development." N.Y. GEN. MUNIC. LAW § 247(1) (McKinney Supp. 1971).

Justice Benjamin, dissenting in Rockland County Builders Ass'n v. McAlevey, 37 App. Div. 2d 738, 324 N.Y.S.2d 190 (2d Dep't 1971), found the tax abatement feature a salutary aspect of the plan: "I see no merit in the contention that it constitutes an illegal partial tax exemption. In my view, such reduction of assessment is not a tax exemption at all, but merely a pragmatic and valid recognition of the fact that the temporary restriction on the land has reduced its value during the period of restriction . . . .

Id. at 741, 324 N.Y.S.2d at 195.

86 Even the appellate division majority seemed to sense this: "I am aware of the positions of many legal commentators who have suggested that perhaps new types of controls may be needed to prevent urban sprawl and the problems associated with it." Id. at 243, 324 N.Y.S.2d at 186. Nevertheless, the majority exercised judicial restraint: "[W]hether there should be such delegation of [the power to zone for controlled growth] is a political decision to be made by the Legislature." Id. at 244, 324 N.Y.S.2d at 186. For the argument that ample statutory authority already exists under the relevant SZEAA sections, see text accompanying note 79 supra & notes 87-90 infra.
C. Time Controls: Legitimate Child of Statutory Interstices

The zoning scheme embodied in the Standard Zoning Enabling Act, on which New York's enabling legislation is based, sets forth a number of permissible objectives of zoning regulation. Section one generally authorizes the municipality to regulate land use for the general welfare. Specifically, section one allows the regulation of population density, a grant of authority that to Justice Galloway encompassed the controlled growth concept of the Ramapo plan. Section three is a statement of the purposes of a zoning scheme; it should "prevent the overcrowding of land . . . avoid undue concentration of population . . . [and] facilitate the adequate provision of transportation, water, sewerage, . . . and other public requirements." Time controls accomplish these purposes by design, and perhaps with greater efficacy than common zoning devices already authorized under this enabling legislation.

The appellate division's restrictive reading of New York's enabling legislation was founded in part on its vague fear that to permit a municipality to delay growth might deny outsider access to the urban fringe as effectively as more traditional exclusionary schemes. This concern is not only misplaced; as a matter of statutory interpretation it is beside the point. Time controls undeniably are subject to exclu-

88 Quoted in note 78 supra.
89 See text accompanying note 79 supra. Neither the supreme court nor the appellate division cited direct authority in support of their opposing interpretations of the New York enabling statutes. Justice Galloway relied on logic: if control of population density was allowed, control of population growth must have been contemplated. Golden v. Planning Bd., No. 525-1970, at 18 (Sup. Ct. Rockland County, Nov. 19, 1970). Justice Martuscello in the appellate division took a formalistic approach: the statutory language provided for controlling population density but not controlled population growth. 37 App. Div. 2d at 240-41, 324 N.Y.S.2d at 185-84.
90 N.Y. TOWN LAW § 263 (McKinney 1965).
91 [T]here are at least four legitimate planning bases for controlling the timing of development and . . . these afford both the impetus and the legal justification for some method of regulation. These . . . are: (1) to economize on the costs of providing municipal facilities and services and to maintain them at a high quality level; (2) to retain municipal control over the eventual character of development by preventing premature and sporadic building in unripe places; (3) to maintain a desirable degree of balance among various uses of land; and (4) to achieve greater detail and specificity in development regulation. Clinic: Development Timing, supra note 67, at 95 (H. Fagin).
92 37 App. Div. 2d at 242, 324 N.Y.S.2d at 185:
   It is not difficult to envision the tremendous hardship and chaotic conditions which may result if many of our up-State municipalities decide to delay the exodus of city residents desirous of leaving their crowded environs and moving into such up-State rural regions.
93 See notes 96 & 97 and accompanying text infra.
sionary abuse, just as are many clearly authorized zoning devices. But judicial review should operate to restrict such abuse, not to interpret restrictively the initial legislative grant of power.

The radical ring of the words “controlling population growth” should be of ephemeral shock value once it is realized that not ultimate population but only the immediate rate of population growth is the subject of time control regulation. In fact, at the end of the control period, it is possible that the population of an area regulated by time controls may be higher than that otherwise resulting from the usual low-density zoning devices still judicially authorized. Time controlled development may also better conserve the environment since the incidence of speculative, premature development and other indicia of urban sprawl may be minimized or eliminated.

94 See note 65 supra; note 95 and accompanying text infra.
95 Judicial review would still be available to correct any abuses in the operation of a time control scheme. In fact, time controls have internal features that assist judicial review.

First, a time control scheme involves budgetary commitments and a schedule of capital improvements. Failure to pursue projects planned on paper (a failure, for example, to allocate sufficient funds) would be a very visible display of malafide on the part of community officials. To remain above suspicion, any time control plan must continuously demonstrate consistency with its schedule of sequential growth.

A second feature that facilitates judicial scrutiny is that in initially mapping a schedule of growth, the planning board must adopt reasonable time and space limits; it cannot restrict the development of land for too long a period. See Westwood Forest Estates, Inc. v. Village of South Nyack, 23 N.Y.2d 424, 244 N.E.2d 700, 29 N.Y.S.2d 129 (1969) (rezoning land to bar multiple dwellings for unlimited period of time held taking of property without just compensation).

Controlled growth also serves as a safety valve. By installing at his own expense the necessary public services, a developer may accelerate the date when his land will qualify for a use permit. See note 72 supra. This feature, perhaps more than the others, indicates the bona fides of the time controls approach. The concern is only that the land have adequate public improvements before development, not that development never occur.

96 [R]egulating and stunting growth is neither the ultimate objective or effect of the amendment. The population of the Town at the end of the period of controls and during it will exceed greatly the population which would exist if permanent low-density controls were utilized as is permitted under existing zoning law. The purpose and effect is to increase permanent population, but in sound well planned stages.


97 For the built-in growth retarding features of traditional zoning devices, see note 65 and accompanying text supra.

98 Immediate development, uncoordinated with the surroundings and unmindful of the future carries hidden costs and disruptive second and third order consequences. . . .

Requiring that a minimum level of essential facilities be available before construction encourages the highest and most appropriate use. Such a requirement allows the town to plan for future growth rather than merely reacting to present problems . . . .
Under the Standard Zoning Enabling Act an ultra vires attack would be even more misguided, since sections one and three are broadly phrased general delegations of power.\textsuperscript{9} Zoning statutes, moreover, were originally designed to vest in the municipality the ability to respond to changing concepts of "general welfare." The Supreme Court recognized this in \textit{Euclid}.

Building zone laws are of modern origin. . . . Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require . . . additional restrictions in respect of the use and occupation of private lands in urban communities. . . . Such regulations are sustained, under the complex conditions of our day . . . . And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.\textsuperscript{100}

A zoning scheme should leave some room for imagination and flexibility; the appellate division's invalidation of the Ramapo scheme may have a chilling effect on advances in land-use planning.

Time controls also meet the standard requirement that zoning ordinances encourage the most "appropriate use of the land."\textsuperscript{101} Unless "appropriate" use and "immediate" use are equated,\textsuperscript{102} requiring a minimum level of essential services before development may proceed encourages the most appropriate use of the land. Deferring development may not please speculative developers but it avoids the ecological

\textsuperscript{9} See note 78 \textit{supra}.

\textsuperscript{10} Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926).

\textsuperscript{101} SZEA § 3.

\textsuperscript{102} "One of [the] considerations [in enacting zoning ordinances is] the encouragement of 'the most appropriate use of land throughout such municipality.' At bar, however, the Town of Ramapo prevents the immediate use of land . . . ." Golden v. Planning Bd., 37 App. Div. 2d 256, 242, 324 N.Y.S.2d 178, 184-85 (2d Dep't 1971), \textit{quoting N.Y. TOWN LAW} § 263 (McKinney 1965). \textit{But see Nattin Realty, Inc. v. Ludewig}, 67 Misc. 2d 828, 324 N.Y.S.2d 668 (Sup. Ct. 1971) (probable inadequacy of water and sewage systems for multiple dwellings may warrant municipal postponement or elimination of some land uses):

The definition of "public health, safety and welfare" surely must now be broadened to include and to provide for these belatedly recognized threats and hazards to the public weal. The town's decision . . . would appear to constitute a recognition that it as well as an owner must subordinate immediate to long-term interests.

\textit{Id.} at 832, 324 N.Y.S.2d at 672.
blight and wasteful duplication of municipal facilities which have accompanied unplanned growth in the past.\textsuperscript{103}

A final aspect of time controls which lends them legal respectability is their close conceptual and practical link with the traditional requirement that any scheme of land use be based upon a "comprehensive plan" for community development.\textsuperscript{104} Ramapo clearly made an effort to anchor its plan to this requirement.\textsuperscript{105} Relying on Ramapo's thorough planning and bona fide municipal commitment,\textsuperscript{106} Justice Gal- loway found time controls to be fully consonant with the comprehensive plan standard.\textsuperscript{107} The appellate division at least did not dispute the genuineness of Ramapo's commitment to controlled growth.

D. Time Controls and Exclusionary Attacks

Obviously the ability of time controls to withstand statutory attack does not alone make them a valid zoning device; under modern deci-

\textsuperscript{103} See Comment, supra note 8, at 532.

\textsuperscript{104} A comprehensive plan for community land use is a condition precedent to the validity of any zoning ordinance.

The thought behind the [comprehensive plan] requirement is that consideration must be given to the needs of the community as a whole. . . . Local authorities must act for the benefit of the community as a whole following a calm and de-
liberate consideration of the alternatives. . . . It is not a mere technicality which serves only as an obstacle course for public officials to overcome . . . . Rather, the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served and that zoning does not become nothing more than just a Gallup poll.


\textsuperscript{105} Major features of the Ramapo plan were (1) a two-year study of the area in co-
operation with federal, state, and county agencies before adopting a master plan; (2) a comprehensive zoning ordinance to implement the master plan; (3) a capital budget which, in tandem with a scheduled scheme of capital improvements, committed the town to bring municipal facilities to all nearby areas within 18 years; (4) preparation of a drainage plan after a study of the maximum surface water density of the area, and creation of a sewer district to carry out scheduled construction of sewers to all areas; and (5) creation of a public housing authority to coordinate construction of federally subsidized housing with the Department of Housing and Urban Development. Brief for Appellant at 5-8, Golden v. Planning Bd., appeal docketed, No. 475, Ct. App., Nov. 17, 1971.

\textsuperscript{106} Although it had been argued in the supreme court that there was no assurance that Ramapo would follow through and appropriate funds beyond the statutorily author-
ized six-year period, the court found no merit to this contention. No. 525-1970, at 20-21 (Sup. Ct. Rockland County).

\textsuperscript{107} [The time plan's] obvious purpose is to prevent premature subdivision and urban development in the absence of a minimum level of adequate municipal and public improvement and facilities to properly service such residential subdivisions. Its clear purpose is also [to] . . . assure[s] that the restraints imposed be limited to a reasonably foreseeable period of time . . . .

. . . [T]he ordinance does not contravene the Town's comprehensive plan. Id. at 16-17.
sions they must also be shown not to have an exclusionary effect. An initial significant distinction between time controls and other zoning devices that have been voided on exclusionary grounds is that when the time control device is linked with a bona fide comprehensive plan and a formula for gradually including low- and moderate-income housing, the whole scheme takes on an equitable, quasi-regional, and judicially palatable character. Time controls evidence a spirit of bona fide regulation, not outright exclusion. The Pennsylvania decisions railed against attempts to "keep out people" and exhorted municipalities to be sensitive to the impact of zoning on outsiders. Time controls comply to the letter. They regulate but do not freeze growth; and they are flexible enough to accommodate a variety of densities and housing types.

A second distinguishing feature is that time controls accord with the requirement expressed by the Pennsylvania court that "communities must deal with the problems of population growth." Time controls do not seek to avoid problems of population expansion. They are prospective and based on projections of future community needs.

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108 See Freilich & Bass, supra note 52, at 367. Rather than aiming exclusively at the preservation of property values or other local interests, controlled growth seeks to respond to regional population pressures. Of course, no single community by itself can solve problems of regional magnitude. But an accumulation of judicially or legislatively endorsed time control schemes responding in an ad hoc way to particular regional growth patterns might well be the best hope in a time when real regional land-use planning is still confined to textbooks. See text accompanying note 123 infra.


111 Time controls would also facilitate implementation of flexible zoning techniques such as "cluster" zoning and "floating" zones. These devices can aid a community in meeting the pressures of change without sacrificing the overall goals of habitability and diversity. Cluster zoning promotes the development of closely grouped, self-contained communities and the preservation of open space between them. The cost of services is reduced, architectural diversity is encouraged, and recreational use of open space made possible. See E. Roberts, supra note 42, at 6-136 n.4.

Under the floating zone concept a particular use is confined to specifically limited proportions of community land (e.g., apartment houses on not more than 15% of town land), but no specific land on which the use will be permitted is identified. When a developer applies to the planning board to use his land in a particular way, the decision is made whether, where, and to what extent to exhaust the percentage use limitation. See Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951).


113 Despite the appellate division's holding in Golden, the star of long range planning seems to be on the rise in New York. See, e.g., Salamar Builders Corp. v. Tuttle, 29 N.Y.2d 221, 275 N.E.2d 585, 325 N.Y.S.2d 933 (1971) (prospect of future water pollution unless ample space left between septic tanks in rocky and lily terrain held to justify upzoning); Nattin Realty, Inc. v. Ludewig, 67 Misc. 2d 828, 324 N.Y.S.2d 668 (Sup. Ct. 1971) (re zoning
By their very nature time controls involve background planning and a long term commitment of capital resources. Controlled growth is a bona fide attempt to cope with metropolitan overspill, not to zone it out.

E. Time Controls: A Bridge over Troubled Waters

Time controls used as described render more than lip service to the needs of those caught up in the centrifugal forces of urban escape. But the controlled growth approach takes a fundamental policy posi-

upheld based on court's "ecological notice" of projected inadequacy of water supply and sewage disposal systems for anticipated population of multiple dwellings).


115 Timed development was indirectly suggested by language in Westwood Forest Estates, Inc. v. Village of South Nyack, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969), quoted with approval in Concord. In Westwood the New York Court of Appeals had some free legal advice for planners:

This is not to say that the village may not . . . impose other restrictions or conditions on the granting of a building permit to plaintiff, such as a general assessment for reconstruction of the sewage system, granting of building permits for the planned garden apartment complex in stages, or perhaps even a moratorium on the issuance of any building permits, reasonably limited as to time.

23 N.Y.2d at 428-29, 244 N.E.2d at 702-03, 297 N.Y.S.2d at 133 (emphasis added). The moratorium device alluded to is essentially similar to time controls.

The National Committee on Urban Growth Policy elaborates on this theme: Vacant land is the basic national resource for dealing with growth; urbanization is the filling of land with all of the facilities needed for the people who make up the population projections. The influencing of growth means influencing what happens to vacant land in the places where these people will live. It also means, in some cases, holding land from development as open space or for future use; and preventing the waste of land through development that is haphazard and unplanned.

NATIONAL COMMITTEE ON URBAN GROWTH POLICY, THE NEW CITY 115 (D. Canty ed. 1969). The use of such techniques as large lot zoning as a timing device has all too often resulted in scattered development on large lots, prematurely establishing the character of much later development—the very effect sought to be avoided. New types of controls are needed if the basic metropolitan scale problems are to be solved.

NATIONAL COMMITTEE ON URBAN PROBLEMS, supra note 13, at 245.

116 Quaere whether or not this "escape" might not be of the frying pan-into-the-fire variety. "The brightness of the [suburban] dream has been shadowed by new variants of old city torments. Residents troubled by traffic, race, crime, drugs, even pollution, have found it is not so easy to escape the old America." Rosenthal, Columbia, Md.—A Tale of One City, N.Y. Times, Dec. 26, 1971, § 6 (Magazine), at 16. Professor Roberts also questions the quality of suburban existence:

[Should the suburbanite escape both drought and disease, he must participate in the daily ritual of the trip into center-city to work. The notion that every workday sees the migration of 1,600,000 persons onto [sic] Manhattan . . . stagers the imagination. This spectacle of the madding crowd seems more reminiscent of a teeming and frantic Asian city than of the television stereotype of the well-adjusted and self-contained hamlets inhabited by the likes of Patty Duke.

tion that the stake of present residents in the community will not be abandoned. Time controls are designed to supply both a measure of protection for land values and stability in land uses. By phasing growth and the provision of quality municipal services, community residents are instituting a kind of built-in community "quality control" system. This judicious and efficient use of the land redounds to the benefit of outsiders and insiders alike. The community may be less likely to succumb to the "backsliding" phenomenon and outsiders correspondingly will not be robbed of the advantages of suburbia after fighting tooth and nail to get there.

To be sure, the controlled growth approach does not solve all the pressing problems of suburban growth clamoring for community attention and dollars. Nor is there a guarantee that gearing development to the capacity of the land to support it will successfully avoid all of the unpredictable housing problems that lie ahead. The great strength of time controls is that they deal with the future as it appears now, while retaining enough flexibility to adjust to a different world view.

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117 Such goals are in part embodied in all zoning schemes:
It seems reasonable to conclude that classic Euclidian zoning, in concert with subdivision controls and other restrictions, may have minimized the hazards of unrestricted development. Such regulation may have muted the impact of incompatible use, and it may have had some tendency to protect the quality of residential neighborhoods. Zoning may have enjoyed some success in promoting the more efficient use of commercial districts and preserving prime land for industrial sites; and it may also have made some aesthetic contribution to the development of urban communities.


*See also* E. Roberts, *supra* note 42, at 3-51 to 3-52, where the author identifies one very specific beneficial effect of zoning:

Lest anyone decide that zoning was a total disaster, let him pause to reflect upon the real world. Was it not the best reform of laissez-faire dog-eat-dog that was possible all things considered in light of the times? In addition, did not zoning improve the chances for housing of innumerable lower-middle class people who would not otherwise have had the chance to own their own home? . . . Put another way, zoning serves as an insurance device to assure lenders against "environmental depreciation" which might undercut their security syndrome.

118 "Placing housing projects in the suburbs might even have the disastrous effect of creating suburban ghettos. Property immediately surrounding the project would then decline in value, thereby starting the slow trend to blight." *Note, supra* note 1, at 181-82.

119 There are obstacles to a decent home for all Americans that have nothing to do with exclusionary zoning. *See, e.g.,* Williams & Norman 475 n.2:

Costs have been rising for all three major factors in housing construction—the cost of labor and materials, the cost of borrowing money, and the cost of land. Under these circumstances, a successful program for low- and moderate-income housing of course requires much more than making land available.

*See also* Bentley & Macbeth, *Mortgage Lenders and the Housing Supply, 57 Cornell L. Rev. 149 n.3 (1972): "Increases in cost of materials and labor may . . . price the final product beyond the reach of many Americans . . . ."
should the need arise.\textsuperscript{120} Any plan of controlled growth can be altered or accelerated as legal or practical conditions dictate. The most remote Ramapo time horizon was eighteen years, a horizon subject to acceleration by private developers if they chose to invest heavily in the growth of the community.\textsuperscript{121} A controlled growth plan might take on added respectability, however, and unequivocally demonstrate the bona fides of the town planners, if it provided for self-acceleration in the case of unforeseen population pressure, an increase in financial resources, or advances in the technology of housing construction. Acceleration of time horizons, either by private initiative or planner response to unforeseen circumstances, is only one example of the flexibility of time controls.

**CONCLUSION**

Much of the flexibility that commends a scheme of controlled growth could of course also be achieved by regional planning. Although there is general agreement that regional planning is an idea whose time has come,\textsuperscript{122} its midwife unfortunately is metropolitan intergovernmental cooperation.\textsuperscript{123} Until regional planning becomes more than an academician’s fiction, time controls offer a beneficial interim method to harness the complex forces behind community growth and to promote land use at rational levels of density.

*Thomas C. O’Keefe*

\textsuperscript{120} Because controlled growth development is subject to time and space parameters, policy changes on the basis of new perceptions or subsequent experimentation can be successfully integrated into the overall framework of growth. With standard zoning devices, these same adjustments would more likely be piecemeal and haphazard.

\textsuperscript{121} The Ramapo plan allows the developer, by installing services and facilities at his own expense, to qualify his land for development earlier than scheduled. See note 72 supra. If town planners desire plan acceleration, municipal subsidies might be used to induce development, for example by providing leases of municipal equipment, supplying municipal personnel, or granting property tax credits for municipal improvements made by the developer.

\textsuperscript{122} In pursuing the valid zoning purpose of a balanced community, a municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet the housing needs of its own population and of the region. Housing needs are encompassed within the general welfare. The general welfare does not stop at each municipal boundary.