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TULSA LAW JOURNAL

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NO, MR. BOSSELMAN, THE TOWN OF RAMAPO CANNOT PASS A LAW TO BIND THE RIGHTS OF THE WHOLE WORLD: A REPLY (PART I)

Georgina B. Landman*

Methodological Note

The traditional law journal article begins with the author presenting a legal concept, tracing it from its earliest beginnings, discussing what is new about it in present day, and then, of course, offering some insightful comments on its future implications.

This law journal article is of a little different type. If you will allow me, I choose to build on the materials presented in the fine article, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*[1] by Fred Bosselman. In his article, Mr. Bosselman discusses the case of *Golden v. Ramapo*,[2] disapproving the holding of the court, and showing a general concern for the use of timing and sequential growth controls.

Mr. Bosselman is a distinguished scholar well known in the field of land use. Mr. Bosselman (together with his colleague, David Callies) is perhaps best known for his famous major work, *The Quiet Rev-*

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1. 1 FLA. STATE L. REV. 234 (1973).

2. 30 N.Y.2d 359, 285 N.E.2d 29, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972) [hereinafter cited as *Ramapo*].

olution in Land Use Control.[3] The revolution in land use has been anything but quiet since the publication of this book.

Mr. Bosselman, Mr. Callies and John Banta have recently written *The Taking Issue.*[4] In this text, they present *A Study of the Constitutional Limits of Government Authority to Regulate the Use of Privately-Owned Land Without Paying Compensation to the Owners.* In addition, Mr. Bosselman is and has been, since 1969, the Associate Reporter for the *American Law Institute, Model Land Development* Code.[5]

The reply to Mr. Bosselman's article is being published in two parts. Part I deals with testing Mr. Bosselman's basic hypothesis concerning the *Ramapo* case. Part II will examine the alternative flexible zoning techniques[6] in addition to "timing and sequential controls."

I. INTRODUCTION

In *Construction Industry Association v. The City of Petaluma,*[7] the court agrees with Mr. Bosselman, siding against the *Ramapo* decisions:

> We believe that it is appropriate, against the background of the present case, for the court to comment upon not only what has been held but also what has not been held. The issue here has not been whether or not local government may engage in any number of traditional zoning efforts which have been common throughout our history, such as providing for a certain density of population in a given neighborhood, or standards for the type and quality of construction, etc. *The only issue presented here, for the first time, is whether or not a municipality may claim the specific right to keep others away.* Therefore, the defendants' assertion that the result of this case will destroy or harmfully restrict the zoning and land-use planning power of municipalities is neither pertinent nor correct. No "traditional" powers to zone are affected by the holding in the case. (emphasis added).
>
> As contended by plaintiffs on pages 7 and 8 of their Trial Brief,

3. F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971).

4. F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973). This book, prepared for the Council on Environmental Quality, is an analysis of the constitutional limits of land use control.

5. ALI MODEL LAND DEVELOPMENT CODE (Proposed Official Draft No. 1, 1974).

6. The flexible zoning techniques that will be examined will include: site plans, contract zoning, impact zoning, planned unit development zoning, new town zoning, cluster zoning, vertical zoning, to name only a few.

7. 375 F. Supp. 574 (N.D. Cal. 1974) [hereinafter cited as *Petaluma*].

> This case is a study in anti-planning, the refusal of a city to come to grips with the fact that it has joined a metropolitan complex and is no longer the sleepy small town that it once was. In a world in which nothing is as unchanging as change, Petaluma wants to stay the same. The means to that end is to draw up the bridge over the moat and turn people away. This is not the use of police power, but the abdication of that power. . . .
>
> In a large sense this case sets up the constitutional protections against a single small city's passing laws to keep people away, to maintain 'small town character' at the expense of depriving people of mobility, their right to travel, and of decent housing or perhaps any housing at all. . . .
>
> In a narrower sense, this case [holds] . . . that local police power may [not] be used to shift the burden of providing housing to other cities in a metropolitan region which have their own police power and their own problems. This issue . . . [questions] the jurisdiction of one town to visit its problems on another.
>
> The prospective resident turned away at Petaluma does not disappear into the hinterland, but presents himself in some other suburb of the same metroplex, perhaps in some town with as many problems or more than Petaluma. . . . By this means, Petaluma legislates it problems into problems for Napa, Vallejo or Walnut Creek. May Petaluma pass a law to bind the whole world? See, Bosselman, 'Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?' 1 Fla. State L. Rev. 234 (1973). . . .[8]

As of today, Judge Burke's ruling in *Petaluma* stands. Without so much as a cite to the *Ramapo* case, only the utilization of Mr. Bosselman's article, the United States District Court for the Northern District of California answers, *No, The Town of Ramapo Can Not Pass A Law to Bind the Rights of the Whole World.*[9]

With these words of introduction by Judge Burke in the *Petaluma* case, we can now place in context Mr. Bosselman's hypothesis that will be examined in this reply article:

[Following the *Ramapo* case,] each town can be ex-

8. *Id.* at 587.
9. Bosselman, *supra* note 1.

> pected to exercise this [developmental timing] and similar techniques as if it were an island independent of other towns;[10] that the resulting impact on metropolitan growth patterns will have serious social and environmental consequences; and that the results will force the legislatures and courts to realize that the laws of individual towns and cities, such as Ramapo, must not be allowed to bind the whole world without adequate state supervision.[11]

The research materials presented in this article demonstrate that although the Ramapo ordinance has been in existence since 1969, there is little if any resulting impact on metropolitan growth patterns throughout the nation following the Ramapo plan. In addition, the few results thus far indicate, as we have seen by Judge Burke, that the courts realize the laws of individual towns and cities, such as Ramapo, must not be allowed to bind the whole world without adequate state supervison.

II. GROWTH CONTROL AS A LOCAL CONCERN

Mr. Bosselman traces the development of growth control in the United States and concludes "that unlike virtually every other modern nation we seem to have adopted the position that the control of growth is primarily of concern to local rather than state or federal govern-

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10. Mr. Bosselman was not alone in his conclusion regarding the effect of the *Ramapo* case. The following articles strongly support the court's opinion in *Ramapo* and hail this case in effect, as the most important zoning decision since *Euclid.* ABA LOCAL GOVERNMENT LAW SECTION, COMMITTEE REPORTS 497 (1972); Babcock & Santa, *New Techniques for Inner-City Areas,* in AMERICAN SOCIETY OF PLANNING OFFICIALS REPORTS No. 297 at 20 (1973); Cahn, *Where Do We Grow From Here?,* ARCHITECTURAL FORUM 23-41 (December, 1973) (Mr. Cahn is the Pulitzer Prize winning Environment Editor of the Christian Science Monitor, where this article first appeared.); Elliott & Marcus, *From Euclid to Ramapo: New Directions in Land Development Controls,* 1 HOFSTRA L. REV. 56 (1973); Freilich, *Editor's Comments* in *Golden v. Town of Ramapo: Establishing a New Dimension in American Planning Law,* 4 URBAN LAWYER at ix (1972); LaFontaine, *The Limits of Permissible Exclusion in Fiscal Zoning,* 53 BOSTON U. L. REV. 453 (1973); O'Keefe, *Time Controls on Land Use: Prophylactic Law for Planners,* 57 CORNELL L. REV. 827 (1972); Urbanczyk, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development,* 26 STANFORD L. REV. 585 (1974); Note, *Golden v. Planning Board: Time Phased Development Control Through Zoning Standards,* 38 ALBANY L. REV. 142 (1973); Note, *Time Control, Sequential Zoning: The Ramapo Case,* 25 BAYLOR L. REV. 318 (1973); Note, *Zoning Law—Growth Restrictions—Town Ordinance Conditioning Approval of Residential Subdivision Plan on the Availability of Necessary Municipal Services Held Valid,* 1 FORDHAM URBAN L.J. 516 (1973); *A Zoning Program for Phased Growth: Ramapo Township's Time Controls on Residential Development,* 47 N.Y.U.L. REV. 723 (1972).

11. Bosselman, *supra* note 1, at 234-35. Comprehensive state planning has been discussed by the author previously. *See* Landman, *Land Use Planning in Oklahoma: A Tool for the Protection of the Environment,* 10 TULSA L.J. 63 (1974).

ment."[12] Mr. Bosselman finds that with this local control there has not been, until recently, much stopping of growth. But he perceives: "There is a new mood evident in the public attitude toward urban growth, and its message is 'stop'."[13] Regardless of how we arrived at this "stop growth" movement, we are indeed in the midst of a national policy debate by cities throughout the nation attempting to limit growth.[14]

Limitations on growth, ranging from population ceilings to moratoriums on building permits, are appearing from coast-to-coast day-by-day. Each city has its own reasons for the controlled growth ordinance. These reasons range from a limited water supply and sewage treatment facilities to taxes and claims by cities of their inability to meet the new capital investments necessary to provide community services for increased populations.[15]

Regardless of the reasons for the local growth control movement, the legal profession is now forced to face the following issues:

1. About fifty million people are going to increase the nation's population in the next twenty-five years. If growth-limitation

12. Bosselman, *supra* note 1, at 235.

13. *Id.* at 238.

14. The following sources are by no means conclusive. They do indicate however, the mood of the country's interest and concern over the limited growth programs for the future. D. MEADOWS *et al.*, THE LIMITS OF GROWTH (1972). This is an excellent source to review. It is the first attempt by scientists to make a computer model of the world and actually test future world conditions regarding food, housing, pollution, etc., without controls on growth. *See generally* R. ANDREWS, URBAN GROWTH AND DEVELOPMENT—A PROBLEM APPROACH (1962); CHAPIN *et al.*, URBAN GROWTH DYNAMICS IN A REGIONAL CLUSTER OF CITIES (1962); D. FRASER, THE PEOPLE PROBLEM (1971); H. GEISERT, POPULATION GROWTH AND INTERNATIONAL MIGRATION (1962); H. SHRYOCK, POPULATION MOBILITY WITHIN THE UNITED STATES (1964); B. SPOONER, POPULATION GROWTH: ANTHROPOLOGICAL IMPLICATIONS (1972); A. WEBER, THE GROWTH OF CITIES IN THE NINETEENTH CENTURY—A STUDY IN STATISTICS (1967).

Other distinguished legal scholars are also concerned with the growth movement. Professor Ved P. Nanda's first article on "a Global Population Policy" appeared in 1970. Nanda, *Need for a Global Population Policy*, DENVER L.J. 17 (Special edition 1970). His most recent work is now the definitive statement in the field and is used as an official source by the United Nations. Nanda, *The Role of International Institutions Toward Developing a Global Plan of Action on Population*, 3 DENVER J. INT'L LAW & POLICY 1 (1973). The United Nations Conference on Population is being held during the summer of 1974. The International Labor Organization is using Professor Nanda's article as its working paper for the conference.

15. *See* Klein, *The Trouble with a Zero-Growth World*, The New York Times Magazine, June 2, 1974 at 14. Mr. Klein's article explains how a rising Gross National Product has meant rising living standards for millions of Americans. "But," he continues, "if it goes on rising indefinitely, many fear, it could bring catastrophe in the form of a polluted, over-crowded planet depleted of its resources. On the other hand, a policy of nongrowth might lead to a struggle between the have-nots and the haves." He submits, "We may also be damned if we don't."

by local communities becomes general, where are these people going to live?

2. Does a community have a right to say "no growth" and thus turn future population elsewhere?
3. Granting that many communities have real growth problems, who is to decide which ones should be allowed to adopt limits?
4. If states undertook to apportion growth equitably among communities, who would then decide on equitable apportionment of population among the states?
6. How can a community's limited growth control measures be reconciled with a citizen's constitutionally protected right to travel freely and settle where he pleases?[16]

In the context of these policy considerations, as well as for the reasons stated by Mr. Bosselman, the New York courts considered the new regulatory system adopted by the town of Ramapo.[17]

III. THE RAMAPO ORDINANCE REVIEWED

The town of Ramapo, New York, is one of five towns comprising Rockland County, a suburban and rural area about twenty-five miles north of midtown Manhattan. From 1960 to 1970, Ramapo's population more than doubled.[18]

As early as 1966, Ramapo adopted a master plan detailing the pattern of the town's ultimate growth and development. A comprehensive zoning ordinance was enacted shortly after the unveiling of the master plan. The ordinance is described as follows:

> The ordinance amounted to a customary Euclidean use districting approach, with in excess of nine-tenths of the town's unincorporated area being zoned residential. To further implement the plan, the town enacted a six-year capital budget providing for the installation of certain municipal facilities, e.g., streets, parks, sewers, specified in the plan. In addition, a capital program was drafted which provided for the location and sequence of capital improvements for the follow-

16. These issues have not been faced by the legal profession in earlier writings in this area. LINOWES & ALLENSWORTH, THE POLITICS OF LAND USE (1973); Bell, *Controlling Residential Development on the Urban Fringe*, 48 J. URBAN L. 409 (1971); Cutler, *Controlling Community Growth*, 1961 WIS. L. REV. 370 (1961); Fagin, *Regulating the Timing of Urban Development*, 20 LAW & CONTEMP. PROB. 298 (1955); Yearwood, *Subdivision Law: Timing and Location Control*, 44 J. URBAN L. 585 (1967).

17. Bosselman, *supra* note 1, at 238.

18. Authorities cited note 10 *supra*.

ing twelve years. At the expiration of the eighteen-year period covered by the two capital development agenda, the town expected to be fully developed in accordance with the master plan. At the heart of the town's attempt to insure the success of its master plan, however, are the more recent and ingenious provisions for controlled growth contained in the Amendments to Town of Ramapo Building Zone Amended Ordinance of 1969 (the Zoning Ordinance).[19]

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19. RAMAPO, N.Y., ZONING ORDINANCE § 46-13.1 (1966 as amended). The Amendments to the Town of Ramapo's Building Zone Amended Ordinance of 1969 follow.

Proposed Amendments to Town of Ramapo Building Zone Amended Ordinance of 1969

1. Amend § 46-3, Definitions, by adding after "Day Camp" and before "Dog Kennel" the following:

Development Use, Residential

The erection or construction of dwellings on any vacant plots, lots, or parcels of land. It shall not include the alteration, repair, demolition, or maintenance of existing dwellings or construction or erection of structures accessory to dwellings.

Any person acting in such manner as to come within the definition of development use, residential, shall be deemed to be engaged in residential development which shall be a separate use classification under this ordinance and subject to the requirement of obtaining a special permit from the Town Board.

Developer, Residential

Any person (a) who, having an interest in land, causes it directly or indirectly to be used for residential development, or (b) who directly or indirectly sells, leases, or develops or offers to sell, lease, or develop, or advertises for sale, lease, or development any lot, plot, parcel, site, unit, or interest for a residential development use, or (c) who engages directly or indirectly or through an agent in the business or occupation of selling, leasing, developing, or offering for sale, lease, or development, a residential development use or any lot, plot, parcel, site unit, or interest for a residential development use, and (d) who is directly or indirectly controlled by, or under direction or indirect common control with, any of the foregoing shall be deemed to be engaged in development use, residential.

Development, Agent

Any person who represents, or acts for or on behalf of a residential developer, in selling, leasing, or developing, or offering to sell, lease, or develop any interest, lot, plot, parcel, site, or unit for residential development use, except an attorney at law whose representation of another person consists solely of rendering legal services.

2. Amend § 46-3, Definitions, by adding after "Camp" and before "Cellar" the following:

Capital Budget

The capital improvement program adopted by the Town Board pursuant to § 99-g of the General Municipal Law for a six year period of effectiveness for the development of the unincorporated area of the town in accord with the master plan and official map, establishing the order of priority for all capital projects as shown on the official map and master plan in order to provide for maximum orderly, adequate, and economical provision of transportation, water, sewerage, drainage, parks and recreation, schools, municipal facilities and structures, and other public requirements.

Capital Plan

The capital improvement program adopted by resolution of the Town Board for the seventh through eighteenth year period of effectiveness, for the development of the unincorporated area of the Town in accord with the master plan and official map, which shall establish two general orders of priority, the seventh through twelfth year, and the thirteenth through eighteenth year, for all capital projects as shown on the official map

and master plan in order to provide for maximum orderly, adequate, and economical provision of transportation, water, sewerage, drainage, parks and recreation, schools, municipal facilities and structures, and other public requirements.

3. Delete from § 46-9A, Table of General Use Regulations, RR-80 Col. 2 "Uses Permitted By Right," Nos. 1 and 12 thereof as follows:

"1. One-family detached residences with not more than one principal building on a plot," and

"12. Residences subject to § 281 Town Law pursuant to provisions of density zoning resolution adopted by Town Board."

And change Nos. 2 through 11 respectively to Nos. 1 through 10 respectively.

4. Delete from § 46-9A, Table of General Use Regulations, R-15 Col. 2 "Uses Permitted by Right," No. 1 thereof as follows:

"1. Same as RR-80 Nos. 1, 4, 5, 6, 7, 8, 9, and 12" and

Add to § 46-9A, Table of General Use Regulations, PO Col. 2 "Uses Permitted by Right," No. 1, as follows:

"1. Same as RR-80 Nos. 3, 4, 5, 6, 7, and 8."

6. Add to § 46-9A, Table of General Use Regulations, RR-80, Col. 2A "Uses by Special Permit of the Town Board" the following:

"3. One-family detached residences with not more than one principal building on a plot. (subject to § 46-13.1)

4. Residences subject to § 281 Town Law pursuant to the provisions of the density zoning resolution adopted by the Town Board. (subject to § 46-13.1)"

7. Add to § 46-9A, Table of General Use Regulations, R-15 and HO, Col. 2A "Uses by Special Permit of the Town Board" the following:

The number "1" before the words "Same as RR-80"; and "2. Two-family residences. (subject to § 46-13.1)"

8. Add a new § 46-13.1 to read as follows:

§ 46-13.1. Special Permit Uses—Town Board Residential Development Use.

A. General Considerations

The Town of Ramapo has been experiencing unprecedented and rapid growth with respect to population, housing, economy, land development, and utilization of resources for the past decade. Transportation, water, sewerage, schools, parks and recreation, drainage, and other public facilities and requirements have been and are being constructed to meet the needs of the Town's growing population, but the Town has been unable to provide these services and facilities at a pace which will keep abreast of the ever-growing public need.

Faced with the physical, social, and fiscal problems caused by the rapid and unprecedented growth, the Town of Ramapo has adopted a comprehensive master plan to guide its future development and has adopted an official map and a capital program so as to provide for the maximum orderly, adequate, and economical development of its future residential, commercial, industrial, and public land uses and community facilities including transportation, water, sewerage, schools, parks and recreation, drainage, and other public facilities.

In order to insure that these comprehensive and coordinated plans are not frustrated by disorganized, unplanned, and uncoordinated development which would create an undue burden and hardship on the ability of the community to translate these plans into reality, the following objectives are established as policy determinations of zoning and planning for the Town of Ramapo:

1. To economize on the costs of municipal facilities and services to carefully phase residential development and efficient provision of public improvements;

2. To establish and maintain municipal control over the eventual character of development;

3. To establish and maintain a desirable degree of balance among the various uses of the land;

4. To establish and maintain essential quality of community services and facilities.

The Town, through its master plan, official map, zoning ordinance, subdivision regulations, capital program, and complementary planning programs, ordinances, laws, and

regulations has mandated a program of continuing improvements which is designed to insure complete availability of public facilities and services so that all land in the Town is capable of development in accord with proper planning. The haphazard and uncoordinated development of land without the adequate provision of public services and facilities available will destroy the continuing implementation and successful adoption of the program. Residential development will be carefully phased so as to insure that all developable land will be accorded a present vested right to develop at such time as services and facilities are available. Residential land which has the necessary available municipal facilities and services will be granted approval. Residential land which lacks the available facilities and services will be granted approval for development at such time as the facilities and services have been made available by the ongoing public improvement program or in which the residential developer agrees to furnish such facility or improvement in advance of the scheduled program for improvement of the public sector.

These regulations are adopted pursuant to the authority of the Constitution of the State of New York, the Statute of Local Government, the Town Law, and the Municipal Home Rule Law of the State of New York by providing for comprehensive planning and zoning for the government, protection, order, conduct, safety, health, and well being of the persons and property in the Town and consistent with the purposes set forth in Article 16 of the Town Law in facilitating the adequate provision of transportation, water, sewerage, schools, parks, drainage, municipal facilities and structures, and other public requirements in order to encourage the most appropriate use of land throughout the Town as provided in the master plan, official map, capital program, laws, ordinances and regulations, and other comprehensive planning performed by the Town.

B. Special Permit Required for Residential Development Use

(1) Prior to the issuance of any building permit, special permit of the Board of Appeals, subdivision approval, or site plan approval of the Planning Board for residential development use, a residential developer or development agent shall be required to obtain a special permit from the Town Board.

(2) The provisions of this section shall not be applicable to subdivisions finally approved by the Planning Board and filed in the Rockland County Clerk's Office prior to the effective date of this section.

C. Procedure for Special Permit

(1) The residential developer or development agent shall be required to submit an application to the Administrative Assistant to the Boards and Commissions in such detail as shall be set forth in regulations established by the Town Board of the Town of Ramapo, including a map showing the location of all land holdings of the applicant in the same ownership in the immediate vicinity and the extent of the land proposed for development. Said Administrative Assistant shall review the application with respect to all of the standards set forth in § 46-13.1D as to the availability of municipal services and facilities and projected improvements scheduled in the capital budget and capital plan of the Town. The Administrative Assistant may request reports from appropriate town, county, or municipal agencies, boards, or officials as may be required. Within forty-five (45) days of the submission of the application, the Administrative Assistant shall report his findings in writing to the Town Board and Town Clerk shall proceed to notice the application for public hearing at the first regular meeting of the Town Board not less than two weeks after the submission of the written report.

(2) The Town Board shall within thirty (30) days after conclusion of the public hearing render its decision. In the event of approval of the application without conditions the Town Board shall also render its determination as to the number of residential dwellings that shall be permitted to be built pursuant to the requirements of § 46-13.1E.

D. Standards for Issuance of Special Permit

No special permit shall be issued by the Town Board unless the residential development has available fifteen (15) development points on the following scale of values:

(1) Sewers

(a) Public sewers available in RR-50, R-40, R-35, R-25, R-15, and R-15S districts ..... 5 points

(b) Package Sewer Plants ..... 3 points

(c) County approved septic system in an RR-80 district ..... 3 points
(d) All others ..... 0 points

(2) Drainage

Percentage of Required Drainage Capacity Available

(a) 100% or more ..... 5 points
(b) 90% to 99.9% ..... 4 points
(c) 80% to 89.9% ..... 3 points
(d) 65% to 79.9% ..... 2 points
(e) 50% to 64.9% ..... 1 point
(f) Less than 50% ..... 0 points

(3) Improved Public Park or Recreation Facility Including Public School Site

(a) Within 1/4 mile ..... 5 points
(b) Within 1/2 mile ..... 3 points
(c) Within 1 mile ..... 1 point
(d) Further than 1 mile ..... 0 points

(4) State, County, or Town Major, Secondary, or Collector Road(s) Improved with Curbs and Sidewalks

(a) Direct Access ..... 5 points
(b) Within 1/2 mile ..... 3 points
(c) Within 1 mile ..... 1 point
(d) Further than 1 mile ..... 0 points

(5) Fire House

(a) Within 1 mile ..... 3 points
(b) Within 2 miles ..... 1 point
(c) Further than 2 miles ..... 0 points

All distances shall be computed from the proposed location of each separate lot or plot capable of being improved with a residential dwelling and not from the boundaries of the entire parcel. The Town Board shall issue the special permit specifying the number of dwelling units that meet the standards set forth herein.

E. Vested Approvals and Relief

(1) Vested Approval of Special Permit

(a) The Town Board shall issue an approval of the application for special permit vesting a present right for the residential developer to proceed with residential development use of the land for such year as the proposed development meets the required points as indicated in the scheduled completion dates of the capital budget and capital plan as amended or failing to meet such points then for the final year of the capital plan as amended. An improvement scheduled in the capital budget for completion within one year from the date of application for the special permit shall be credited as though in existence on the date of application. Any improvement scheduled in the capital budget or capital plan more than one year from date of application shall be credited as though in existence as of the date of the scheduled completion.

(b) A developer may advance the date of authorization by agreeing to provide such improvements as will bring the development within the required number of points for earlier or immediate development. Such agreement shall be secured by either a cash deposit or surety bond sufficient to cover the cost of the proposed improvement, the form, sufficiency, and amount of which bond shall be determined by the Town Board.

(c) All approved special permits vesting a present right to future development shall be fully assignable without restriction.

(d) Nothing herein contained shall prevent such land from being immediately used for all other uses other than residential development use, as is authorized by the zoning ordinance.

(2) Relief

Any residential developer or development agent who has applied for a special permit from the Town Board pursuant to § 46-13.1, shall be entitled as of right, to appeal within one year from the Town Board's determination granting the vested approval to the Development Easement Acquisition Commission, pursuant to Chapter 11 of the Code of the Town of Ramapo, for a determination pursuant to § 11-4(b) of the Devel-

It is the Amendments to the Zoning Ordinance that set up the "residential developmental use permit."

> When considering the eligibility of each residential project, the board is instructed to adhere to a specifically enumerated standard, one based upon the "availability" to the proposed development of five essential public improvements and services: (1) sewers or an approved substitute; (2) drainage facilities; (3) parks or recreational facilities, including public school sites; (4) state, county or town roads improved with curbs and sidewalks; and (5) firehouses. The degree of "availability" of each facility to the site is measured and scored on a scale from zero to five, and no permit may be issued unless a minimum of fifteen points are obtained.
>
> Thus, the zoning law relates residential land use to the presence of certain municipal improvements, the purpose being to coordinate residential development with the town's ability to provide the designated facilities and services. The

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opment Easement Acquisition Law as to the extent to which the temporary restriction on residential development use of the land shall affect the assessed valuation placed on such land for purposes of real estate taxation and such assessed valuation on such land shall be reduced as provided in the Development Easement Acquisition Law as compensation for the temporary restriction placed on the land.

F. Variances

(1) The Town Board shall have the power to vary or modify the application of any provision of § 46-13.1 of this ordinance upon its determination in its legislative discretion, that such variance or modification is consistent with comprehensive planning for proper land use including the master plan, official map, capital budget, and capital plan upon which the ordinance is based and with the health, safety, and general welfare of the Town and its inhabitants.

(2) Upon receiving any application for such variance or modification, such application shall be referred to the Planning Board of the Town of Ramapo for a report and recommendation of said Planning Board with respect to the effect of the proposed variance or modification upon the comprehensive planning of the Town including the master plan, official map, capital budget and plan, existing ordinances, laws, and regulations and the health, safety, and general welfare of the Town and its inhabitants.

(3) All applications for variance or modification shall be filed with the Administrative Assistant to the Boards and Commissions who shall forward same within two weeks after receipt to the Planning Board for its report. Such report shall be made in writing and shall be returned by the Planning Board to the said Administrative Assistant within 30 days of such reference. The said Administrative Assistant shall forward said report to the Town Board and the Town Clerk shall proceed to notice the application for public hearing at the first regular meeting of the Town Board not less than two weeks after submission of the written report by the Planning Board. The Town Board shall render its determination within thirty (30) days after conclusion of the public hearing.

G. Fees

(1) The fee for each special permit application pursuant to § 46-13.1(C) to the Town Board shall be Twenty-five Dollars ($25.00) plus Ten Dollars ($10.00) for each proposed dwelling unit, payable at the time of said application and are not refundable.

(2) The fee for each application for a variance pursuant to § 46-13.1(F) to the Town Board shall be Twenty-five ($25.00) Dollars plus Ten Dollars ($10.00) for each proposed dwelling unit payable at the time of the application and are not refundable.

> timing factor is tied into the system by the budget and capital programs, which delineate the location and sequence of the installation of necessary capital improvements. By referring to the programs and the degree to which improvements have already been made, a developer can gauge approximately when the necessary fifteen points will be accumulated and his land will be available for subdivision. The ordinance further provides that the landowner can advance the date on which he may first develop his property either by adding the necessary amenities at his own expense or by obtaining a variance. However, until either a variance is granted or the land attains the necessary number of points the property may only be used for the nonresidential purposes listed in the Zoning Ordinance.[20]

No less than fourteen law suits[21] followed the passage of the Ramapo ordinance. As Mr. Bosselman explains:

> A coalition of landowners and homebuilders brought suit in the New York state courts challenging the validity of the ordinance on the grounds that it was ultra vires and void because the power to control growth through sequential development limitations had not been delegated to the town; that it was unconstitutional as an invasion of property rights because it operated to destroy the value and marketability of the property for residential use; and that it unconstitutionally excluded new residents from the community in a manner that violated the equal protection of the laws.
>
> On May 3, 1972, the court of appeals upheld the validity of the ordinance. Judge Scileppi's majority opinion received the concurrence of four other members of the court. Judge Breitel wrote a dissenting opinion in which Judge Jasen concurred.
>
> The majority stated that [t]he undisputed effect of these integrated efforts in land use planning and development is to provide an over-all program of orderly growth and adequate facilities through a sequential development policy commensurate with the progressing availability and capacity of public facilities. It found the ordinance a legitimate exercise of the zoning power for the purposes of avoiding undue concentrations of population and of facilitating adequate provision for transportation, water, sewerage, schools, parks and other municipal facilities.
>
> The court conceded that insularity of many communities results in distortions of metropolitan growth patterns and the

20. *A Zoning Program for Phased Growth: Ramapo Township's Time Controls on Residential Development*, 47 N.Y.U.L. REV. 723, 727-28 (1972).

21. Authorities cited note 10 *supra*.

crippling of regional and state-wide efforts to solve the problems of pollution, decent housing and public transportation. Although it recognized the need for regional planning, the court held that the authority to phase growth as envisioned in the Ramapo ordinance was within the ambit of the state's enabling legislation.

Although stating that it would not countenance exclusionary zoning, the court found that sequential development and timed growth were not exclusionary but were attempts to "provide a balanced cohesive community dedicated to the efficient utilization of land. The restrictions conform to the community's considered land use policies as expressed in its comprehensive plan and represent a bona fide effort to maximize population density consistent with orderly growth."

With respect to the taking of property issue, the court held that since the restrictions were only temporary in nature they could not be considered, on their face, as an unconstitutional taking of the landowner's property. The court pointed out that the landowner's loss is also mitigated by the ordinance's provision for a reduction in tax assessment and for voluntary construction of the necessary facilities by the developer.

Judge Breitel, in a dissenting opinion, found Ramapo's sequential development ordinance to be beyond the scope of powers either delegated or implied in the state's enabling legislation. He suggested that the ordinance was exclusionary in effect, even if not exclusionary in motive, and that it caused the landowner to suffer substantial economic loss without compensation. An attempt by a single community to deal in isolation with economic, social and political problems of regional significance, without the benefit of regional institutions or understanding, could be justified only if specifically authorized by state legislation. "Legally, politically, economically and sociologically, the base for determination must be larger than that provided by the town fathers."[22]

IV. Reactions to the Ramapo Ordinance and Case

"This case may well be a landmark case in zoning, one of the most important doctrinal advances since *Euclid v. Amber*." "The landmark feature of this case is the fact that acceptance of the concept of restricting development in metropolitan areas, based upon the ability of a community to provide municipal facilities through comprehensive planning has never been upheld in the courts of the United States as an ex-

22. Bosselman, *supra* note 1, at 240-42 (footnotes omitted).

ercise of the police power (zoning power) without compensation." These were views expressed by the local Government Law Section of the American Bar Association.[23]

Comments varied throughout the professions. Mr. Sy J. Schulman[24] notes:

> A key factor in the Ramapo situation was that the town had "clean hands" in that it had a successful policy of providing for subsidized housing. Yet this reporter can cite numerous local reactions to the Ramapo case via editorials and letters which were ignorant of that fact and which hailed the case as judicial concurrence in the right of municipalities to restrict development by, in effect, withholding the provision of needed facilities. This conclusion is justified by a comparative reading of the majority and minority opinions:
>
> The case is clearly not the last word, in New York or elsewhere, and in this reporter's opinion should not be viewed as a new kind of suburban zoning hunting license. Nevertheless, Ramapo and its officials—legislators, planners, attorneys—are to be congratulated for the quality of their case, for their well-documented efforts to use timing controls meaningfully in relation to capital improvements planning, as well as to their concurrent success in supplying subsidized housing. It is doubtful that there are very many other suburban communities who could make such a case.[25]

Mr. Randall W. Scott, Director of the Urban Governmental Affairs Department of the National Association of Home Builders replies:[26]

> The two suits decided by this opinion stem from a unique zoning amendment adopted on October 13, 1969, by the township of Ramapo. Based on several years of planning studies, Ramapo developed a comprehensive master plan, adopted an 18-year capital program, schedule of municipal improvements, and passed a zoning amendment the purpose of which was to slow expected population growth.
>
> The ordinance places an additional layer onto the residential plat approval process by requiring persons who directly or indirectly cause land to be used for residential purposes to secure a "special permit" before they can apply for

23. ABA LOCAL GOVERNMENT LAW SECTION, COMMITTEE REPORTS 497 (1972).

24. Mr. Schulman is Zoning Digest's reporter for the New York area. *See* 24 ZONING DIGEST (1972), *reprinted in* RABIN, MODERN REAL PROPERTY LAW 772 (1974).

25. *Id.* at 772.

26. These comments were written by Mr. Scott specifically for publication in 24 ZONING DIGEST (1972), *reprinted in* RABIN, MODERN REAL PROPERTY LAW 777-82 (1974) (footnotes omitted).

site plan or subdivision approval, or for a building permit. An applicant, in order to receive a special permit, must achieve a minimum of 15 development points out of a possible 23 points. Points are "awarded" on a sliding scale, based on the relative availability of five municipal services to each proposed house on the plat. These services include: sewers or approved substitutes, drainage facilities, roads, firehouses, and parks or recreation facilities including school sites.

If a developer is unable to meet the eligibility requirements for the special permit, he is prevented from applying for further approval. The ordinance seems to have the effect in many instances of prohibiting small landowners-builders who cannot secure the special permit from developing their parcels for nearly a generation. As part of its comprehensive planning, the township has developed a schedule for the provision of some of these five services to the land in the township over an 18-year period. The landowner-builder can either wait for the town to qualify his property for the special permit according to its priority for publicly-provided improvements as per the 18-year capital plan; or he has the option of providing "15 points worth" of public services at his own expense. (In many cases, this latter option is not economically feasible). While objections might be raised on the grounds that these complex permit procedures are not properly an exercise of zoning but rather other state-delegated police powers, the major issues discussed in this comment center on the substance and the adverse effects of Ramapo's zoning ordinance amendments.[27]

The ordinance may superficially appear to be good planning, for few would fault the idea that municipal improvements, such as sewers and roads, should be coordinated with housing production. But the Ramapo ordinance is a technique which, when carefully examined as to its standards and overall effects, could prove to be highly disadvantageous to the general welfare of citizens of the region and of the state, other than those residing in the locality using the technique. This case offers unfortunate precedent which could encourage the adoption of unilateral local policies—in pursuance of seemingly valid planning ideals—which in combined effect could severely and adversely affect the quantity, quality, cost, location, and equitable opportunities for decent housing in this country.[28]

Municipalities are cautioned about copying the Ramapo ordinance, without sufficient and comprehensive planning to substantiate the

27. *Supra* note 19.
28. Scott, *supra* note 26.

phased growth approach. However, Mr. Scott cautions that the Ramapo type ordinance is actually unconstitutional on grounds that it is adverse to the general welfare. Mr. Scott continues:

> The major policy and legal issues raised in relation to a zoning scheme such as Ramapo's include:
>
> (1) The ordinance imposes a host of formal requirements on an across-the-board basis, without reasonable regard to the location of land parcels (such as in outlaying areas) or to size (small builders being constrained by severe cost limitations).
>
> (2) The point system and the five criteria are artificial, arbitrary, unreasonable, and arguably not a valid exercise of the police power.
>
> (3) Because a Ramapo-type ordinance imposes burdensome regulations against private property without a clear showing of overwhelming public need, it becomes an unconstitutional taking of private property (which includes the use and development of property) without just compensation.
>
> (4) The ordinance (with respect to those criteria which are clearly unreasonable and arbitrary) discriminates against landowners who are not now near or in the path of such "planned improvements," versus those who are in proximity to existing or prospective services. Since both such classes of property owners are nevertheless in a common and equally-zoned residential district, and since several of the point-standards of the criteria bear no reasonable relation to public need, the ordinance violates constitutional guarantees of equal protection and due process.
>
> (5) The ordinance imposes an unconstitutional and special burden on landowners who, in order to exercise their now-conditional rights, are forced to provide public services at private expense on land which they are not developing or which they do not own. Such public improvements are actually the common and mandated obligation of the entire community.
>
> (6) As a method of avoiding population pressures, of escaping responsibility to provide public services, and of ignoring the duty to absorb a fair share of regional housing needs, the ordinance is an invalid exercise of the police power. The very reason for the creation and continued existence of local municipal government is negated by such slow-growth policies embodied in the Ramapo ordinance.[29]

At the Appellate Division level (where Ramapo's ordi-

29. *Supra* note 19.

nance was viewed as being clearly unconstitutional), Justice Martuscello perceived that ". . . the consequences of allowing municipalities to place time controls on their expansion, geared to when the municipalities can provide certain necessary facilities and services, are far-reaching in their ramifications." Unfortunately, the Court of Appeals, which reversed the Appellate Division's determination, does not appear to have taken into consideration the full scope or impact of the situation: the six points given previously, or the following:

(7) The Ramapo ordinance, while superficially appearing to be a form of zoning, is in fact a misuse of the police power and outside of the scope of most zoning enabling legislation.

(8) By restricting housing production and the provision of decent homes, the ordinance runs counter to the purpose expressed in the federal housing acts—and may be in violation of the Supremacy Clause of the United States Constitution.

(9) The ordinance may be deemed exclusionary, in that it unilaterally slows or prohibits residential development, restricts natural population growth, fails to absorb a fair share of housing needs, reduces regional housing opportunities, and operates to price the cost of new privately built housing beyond the reach of many low- and moderate-income families in the region.

(10) In operation and in total effect, the ordinance is detrimental to the public interest because it adversely affects the general welfare of the region over an extended period of time—in contravention of the state and federal constitutional mandates.

In summary, it is contended that the New York Court of Appeals decision was narrow as to the issues involved, and incorrect as to the results. The particular slow-growth scheme that the New York court approved is an abuse of governmental authority, and the case offers poor precedent when viewed in the regional perspective.

Mr. Scott is particularly concerned with the decision-making process that went into passing the Ramapo ordinance.

The Ramapo ordinance represents a unilateral determination by local officials of the pace and amount of growth the township will accommodate over an 18-year period. There is no regard given to the region's overall housing needs, nor is there any coordination with regional or state planning. On the contrary, the township has independently chosen a scheme of unilaterally designed slow growth which

its own comprehensive master plan would justify as "appropriate" and "reasonable."

The New York State Court of Appeals should have utilized a line of thinking similar to that developed in *Oakwood at Madison, Inc. v. Township of Madison.*[30] In that New Jersey case, Judge Furman did not merely review the problems and then step aside to view the issue as a local legislative question. Instead, he pronounced the idea that zoning must be exercised in pursuance of the general welfare: that where local zoning has the effect (regardless of intent) of frustrating the general welfare by excluding persons from housing in the area, such regulations must be scrutinized by the judiciary. The judiciary must not be satisfied by a mere finding of whether or not local regulations are "within the ambit of existing [state] enabling legislation." The examination must go further to determine whether such local regulations are effectually acting to contravene the general welfare. While Judge Furman noted that ". . . the general welfare must not be circumvented or flouted in municipal zoning," he also indicated that "[r]egional needs are a proper consideration in local zoning."

After finding that "the exclusionary approach in the ordinance under attack coincides in time with desperate housing needs in the country and region and expanding programs, federal and state, for subsidized housing for low-income families," the New Jersey trial court succinctly stated the doctrine as follows:

> 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 . . . . The ordinance under attack must be held invalid because it fails to promote reasonably a balanced community in accordance with the general welfare. . . .[31]

The New Jersey court's position certainly is not without precedent. Had the Ramapo case been litigated in Pennsylvania, the outcome may well have been different. In *National Land and Investment Co. v. Kohn,*[32] Pennsylvania's highest court stated:

30. 283 A.2d 353 (N.J. 1971).
31. *Id.* at 358.
32. 419 Pa. 504, 215 A.2d 597 (1965).

> The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid.[33]

Mr. Scott agrees with Mr. Bosselman. Both express concern that a community now has a license to pass a plan for the development of its entire jurisdiction—and it can preclude development inconsistent with that plan in outlying areas.

> The built-in dilemma of the Ramapo scheme is that the ordinance may withstand a cursory examination, and thus at first glance could appeal to planners. Thus those who defend the Ramapo ordinance are likely to cast the argument in terms of a "proper exercise of zoning," or as a "realistic and reasonable application of planning" to the problems associated with rapid urbanization. Such proponents would argue that the town has neither zoned-out growth, nor sought to avoid future financial (public service) burdens, nor refused to accept its fair share of population growth. They would maintain that, on the contrary, the town has provided for phased growth; that it has committed itself to a schedule of public service improvements; and that it intends to absorb over time a share of housing needs-provision. This, the Ramapo defenders would assert, is not a situation which even remotely resembles exclusionary zoning tactics.
>
> The questions raised in this article require resolution of the following issue: is it not true that a community has an affirmative duty to exercise the police power in pursuance of the general welfare, and therefore to share the common responsibility with all areas of the state for absorption of growth and accommodation of decent housing for the region's citizens?
>
> The New York State Court of Appeals did not touch on whether such an affirmative duty exists. Rather, we unfortunately are led to believe that even were there an affirmative duty, it is strictly within the province of the local community to determine the rate at which it will assume its general welfare responsibilities.
>
> Such a position is untenable and inadvisable. The

33. *Id.* at 519, 215 A.2d at 612.

courts should clearly state an affirmative duty doctrine; when a community pursues slow growth without major countervailing health, safety, or welfare reasons, then such policies must be found to be unconstitutional. Zoning is properly a method of establishing patterns of land use; it is not a valid method of controlling population growth-absorption, nor is it a constitutional method for prohibiting the provision of housing on a local unilateral basis without regard to the regional and state repercussions.

Phased growth is acceptable only where: (a) there is clear state enabling legislation; (b) there is regional and state planning, including extensive consideration of overall housing needs; (c) local planning and policies are first found to be in accord with state and regional planning; (d) there is no denial of housing opportunities on an economic or racial basis, by intent or by effect, which would otherwise contravene safeguards for the general welfare of the citizens of the region and of the state.[34]

In another comment on the *Ramapo* decision, Mr. Richard May, Jr.[35] concludes:

Golden v. Planning Board of Town of Ramapo is most certainly a landmark decision in that finally the principle of development timing has been established. Yet, this decision is so long overdue, it can almost be viewed as an anachronism in that the issue of control of unplanned suburban growth in the 1950s and 1960s has been overridden by the current issues of regional considerations and open-housing policies. In fact, a close perusal of development trends and the zoning ordinance and map itself in Ramapo gives rise to questions as to whether the Ramapo ordinance satisfies these newer and overriding criteria. Yet, the decision is significant in that both the majority and the dissenting opinion voice the urgent need for state enabling act reform to meet the needs of current urban development problems.

In 1955, I had the opportunity as planning director of Rockland County to prepare zoning ordinances for most of the towns in the country and to incorporate in these ordinances many ideas developed with Norman Williams, Jr., in the earlier two-year study which produced the Plan for Rezoning New York City. The three most significant and lasting ideas were the wider use of the special permit principle for problem uses, the concept of performance standards which

34. Scott, *supra* note 26.

35. Mr. May is a planner with Planners Incorporated of Washington, D.C. His remarks were written especially for 24 ZONING DIGEST (1974), *reprinted in* RABIN, MODERN REAL PROPERTY LAW 782-84 (1974).

were first incorporated in the industrial district regulations for Stony Point, and the development timing provisions in the Clarkstown ordinance. The latter were upheld in 1956 by New York Supreme Court Justice Eager in *Josephs v. Town Board of Clarkstown.* These early experimental efforts were significantly different than their current manifestation in Ramapo.

The Clarkstown regulations combined the concept of development timing with automatic reductions in lot size if the planning board found that the various public facility requirements for a special permit had been met. Such lot size reductions were from one acre to one-third acre in most cases, and also from one-third acre to 7,500 square foot lots or garden apartments in areas directly adjacent to existing urban centers. The important distinction between Clarkstown in 1955 and Ramapo in 1969 is that the Clarkstown ordinance was designed to create urban development clusters to permit the housing of a broad socio-economic spectrum, while Ramapo's merely proposes a better organized and phased pattern of suburban sprawl. In Clarkstown, substantial areas were either zoned for smaller lots or apartments, or where designated for development at such higher densities under the development timing provisions. The Ramapo ordinance, many may be surprised to hear, has no multifamily districts whatsoever and the vast majority of the unincorporated area of the township is zoned for single family lots ranging in size from 25,000 to 80,000 square feet. To my knowledge, no vacant land is zoned for lots of less than 25,000 square feet. Unfortunately, this reality was either overlooked or ignored by both the majority and dissenting justices in *Golden v. Ramapo.* Timing the development of $50,000 to $60,000 single family houses is hardly an approach to the solution of regional housing problems.

It is not clear whether the minority opinion's main motivation was to protect property rights or to prevent exclusionary zoning, since both are strenuously voiced. What emerges most strongly is the position that 'the conflict requires solution at a regional or state level . . . and not by compounding the conflict with idiosyncratic municipal action . . . .' The Ramapo ordinance, the opinion notes, 'may end indefinitely the possibility of commanding better legislation for land planning just because such legislation requires some diminution in the local control now exercised under the zoning acts.'

The minority as well as the majority seem to support the need for controlling the timing of development. The minority is sufficiently suspicious of municipal motives to prefer that such devices be instituted within the framework of state

> and regional authorization and review, while the majority is willing to take a chance with municipal action until the state legislature decides to act. Meanwhile, the effect of the upholding of the development timing principle as embodied in the Ramapo ordinance will help the suburbs meet their development problems, but will do little to open up housing opportunities for middle- and lower-income families in suburban areas.[36]

In Mr. Bosselman's latest work, *The Taking Issue*,[37] he too adds another dimension to the *Ramapo* case.

> The town of Ramapo . . . successfully defended a growth control ordinance before New York's highest court with success due in no small part to a thorough presentation of their case. In their defense they had to rebut contentions based on a number of recent cases exhibiting hostility and sharp judicial criticism of similar controls in other communities.
>
> The town was able to present a vast array of planning data in their defense. In its statement of the facts in *Golden v. Planning Board of the Town of Ramapo*, the Court of Appeals pointed to the Town Master Plan, whose 'preparation included a four volume study of the existing land uses, public facilities, transportation, industry and commerce housing needs, and projected population trends. * * * Additional sewage district and drainage studies were undertaken which culminated in the adoption of a Capital Budget. . . .' Thus, not only could the town rely upon a large number of formal municipal actions, adoption of a Master Plan, a Capital Budget, zoning and subdivision ordinances and the like, but they could also document each with thorough and detailed planning studies.
>
> This impressive detail allowed the Court to open its consideration of legal issues on the premises that:
>
> > The undisputed effect of these integrated efforts in land use planning and development is to provide an overall program of orderly growth and adequate facilities through a sequential development policy commensurate with progressing availability and capacity of public facilities.
>
> Thus the Court could at the outset of its discussion of the taking issue, term the program reasonable 'both in its inception and its implementation.'
>
> . . . .
>
> Ramapo had extensively documented its position on both

36. *Id.*
37. BOSSELMAN *et al.*, *supra* note 4.

issues from the outset of its growth control program, a fact which was not lost before the Court of Appeals.[38]

38. *Id.* at 290-92. As Mr. Bosselman, *et. al.* discuss in their text, "An examination of the taking cases involving local land use regulations shows no particular change from the trend of decisions in the 1960's." *Id.* at 230-32.

1970 *Goodwin v. Board of Selectment of Hopkinton*, 358 Mass. 164, 261 N.E.2d 60 (1970). (Upheld soil removal ordinance).

1970 *MacGibbon v. Board of Appeals of Duxbury*, 356 Mass. 696, 255 N.E. 2d 347 (1970). (Struck down wetlands zone).

1970 *Golden v. Board of Selectmen of Falmouth*, 265 N.E.2d 573 (Mass. 1970). (Upheld wetland zoning).

1970 *Aunt Hack Ridge Estates, Inc. v. Planning Commission of the City of Danbury*, 160 Conn. 109, 273 A.2d 880 (1970). (Upheld mandatory dedication).

1970 *Maher v. City of New Orleans*, 235 So. 2d 403 (La. 1970). (Upheld historic preservation).

1970 *McNeely v. Board of Appeal of Boston*, 358 Mass. 94, 261 N.E.2d 336 (1970). (Upheld historic preservation).

1970 *National Advertising Company v. County of Monterey*, 1 Cal. 3d 875, 464 P.2d 33, 83 Cal. Rptr. 577 (1970). (Upheld sign amortization).

1971 *Lyon Sand & Gravel Co., v. Township of Oakland*, 33 Mich. App. 614, 190 N.W.2d 354 (1971). (Struck down prohibition of gravel mining in rural area).

1971 *Sturdy Homes, Inc. v. Township of Redford*, 30 Mich. App. 53, 186 N.W.2d 43 (1971). (Struck down flood plain zoning).

1971 *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (1971). (Upheld mandatory dedication).

1971 *Kavanewsky v. Zoning Board of Appeal of Town of Warren*, 160 Conn. 397, 279 A.2d 567 (1971). (Struck down large lot requirements).

1971 *Salamar Builders v. Tuttle*, 29 N.Y.2d 221, 325 N.Y.S.2d 933, 275 N.E.2d 585 (1971). (Upheld large lot requirements).

1972 *Turner v. County of Del Norte*, 24 Cal. App. 2d 311, 101 Cal. Rptr. 93 (1972). (Upheld flood plain zoning).

1972 *People v. Goodman*, 31 N.Y.2d 262, 290 N.E.2d 139 (1972). (Upheld sign regulations).

1972 *Pittsburgh Coal Company v. Sanitary Water Board*, 4 Pa. Cmwlth. 407, 286 A.2d 459 (1972). (Struck industrial waste treatment requirement).

1972 *Chicago Allis Mfg. Corp. v. Metropolitan Sanitary District*, 52 Ill. 2d 320, 288 N.E.2d 436 (1972). (Upheld industrial waste treatment surcharge).

1972 *Turnpike Realty Co. v. Town of Dedham*, 284 N.E.2d 891 (Mass. 1972). (Upheld wetlands protection regulations).

1972 *Selby Realty Co. v. City of San Buenaventura*, 104 Cal. Rptr. 866 (Cal. App. 1972). (Struck down mandatory dedication requirement).

1972 *Steel Hill Development, Inc. v. Town of Sanbornton*, 469 F.2d 956 (1st Cir. 1972). (Upheld forest conservation zone).

1972 *Golden v. Planning Board of Town of Ramapo*, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 359 (1972). (upheld development timing).

1973 *City of Escondido v. Desert Outdoor Advertising, Inc.*, 106 Cal. Rptr. 172 (1973). (Upheld sign regulations).

1973 *County of Orange v. Heim*, 106 Cal. Rptr. 825 (1973). (Upheld wetlands regulation).

1973 *Deyo v. Hagen*, 341 N.Y.S.2d 328 (A.D. 1973). (Upheld non-conforming use amortization).

1973 *Walters v. County of Olmsted*, 204 N.W.2d 215 (Minn. 1973). (Upheld county zoning).

1973 *Bohannan v. City of San Diego*, 106 Cal. Rptr. 333 (App. 1973). (Upheld historic districts).

V. RAMAPO TODAY

The controversial Ramapo, New York timed growth program is indeed meeting its primary objective—limiting growth. The Ramapo program has lowered the number of residential units built per year from 943 in 1965 to an average of between 200 and 250 in each of the past four years.[39]

Despite the defeat of court challenges, Ramapo is still criticized for using its program for excluding minorities, reports Dave Fish, deputy administrator in the planning office.

Mr. Fish also comments that several other aspects of the Ramapo plan are found to be unworkable. The fifteen-point system for facilities wherein the developer can acquire these points by putting in the public facilities himself "is not a widespread practice, although three or four major developers have tried."[40]

In addition, part of the Ramapo plan was the public housing program that Ramapo boasted about. The public housing program can be described as having "mixed results".

Thus far 200 units have been built in the unincorporated parts of town, which comprise three-quarters of Ramapo's acreage and five-eights of its population. (The five incorporated villages in Ramapo do not come under the residential control program, but do have their own public housing programs.) Eighty percent of 200 units in the unincorporated areas have been set aside for senior citizens—with the result that all the occupants are white. The other forty units do have some black families, Fish said.[41] The relatively low number of units available to minorities is part of what critics charge constitutes minority exclusion.

Another group theoretically damaged by Ramapo's program are those property owners whose holdings do not qualify for development under the 18-year capital plans. A local program of development easements has been set up to reduce their property taxes.[42]

VI. THE PETALUMA RULING

The city of Petaluma, California, did exactly what Mr. Bossel-

39. LAND USE PLANNING REPORTS (December 3, 1973).
40. *Id.*
41. *Id.*
42. *Id.*

man predicted: following the *Ramapo* case, it passed an ordinance[43]

43. The Resolution No. 6113 N.C.S. passed by the city of Petaluma adopting a residential development system for the city follows.

Resolution No. 6113 N.C.S.

RESOLUTION ADOPTING A RESIDENTIAL DEVELOPMENT SYSTEM FOR THE CITY OF PETALUMA

INTRODUCED BY COUNCILMAN ROBERT E. DALY AND SECONDED BY COUNCILMAN RICHARD W. CLECAK at a regular meeting of the City Council of the City of Petaluma on the 21st day of AUGUST 1972, at the City Hall, Petaluma, California.

WHEREAS, a Residential Development Control System for the City of Petaluma has been reviewed by this Council and the Planning Commission has recommended its adoption in the form as attached hereto; and this council finds that said System should be adopted;

NOW, THEREFORE, BE IT RESOLVED that the City of Petaluma adopt a Residential Control System for the City in the form as attached hereto and made a part hereof.

RESIDENTIAL DEVELOPMENT CONTROL SYSTEM OF THE CITY OF PETALUMA

It is the adopted policy of the City of Petaluma to establish control over the quality, distribution, and rate of growth of the City in the interest of:

Preserving the quality of the community;

Protecting the green open-space frame of the City;

Insuring the adequacy of City facilities and services within acceptable allocation of City and school tax funds;

Insuring a balance of housing types and values in the City which will accommodate a variety of families including families of moderate income and older families on limited, fixed incomes; and

Insuring the balanced development of the City east, north, and west of the central core.

These policies are more completely set forth in the Official Statement of Development Policy for the City of Petaluma, adopted by the City Council, Resolution No. 5760 N.C.S., June 7, 1971.

The policies of the City are given increasingly specific form in three documents:

1. The Petaluma General Plan adopted March 5, 1962, and as subsequently amended from time to time.
2. The Petaluma Environmental Design Plans adopted March 27, 1972.
3. The Housing Element of the General Plan adopted ——.

The General Plan establishes long-range general development policy. The Environmental Design Plan establishes medium-range and more specific and detailed development policy directed to the development period 1973-1977. The Housing Element of the General Plan defines the housing policy goals of the City and establishes a proposed Residential Development Program 1973-1977 as set forth on Page 24 of the Housing Element.

It is the purpose of this Residential Development Control System to implement the policies of the City of Petaluma as recorded in the Development Policy Resolution and the three official documents referred to above. In order to accomplish this purpose, the City must be able to control the rate, distribution, quality and economic level of proposed development on a year-to-year basis. To this end the City Council hereby establishes the following Residential Development Control System for the City of Petaluma which system shall be in effect from and after its adoption by resolution of the City Council until modified or terminated by resolution of the Council.

I. APPLICABILITY OF THE DEVELOPMENT CONTROL SYSTEM

The provisions of the Residential Development Control System shall apply to all residential development in the City of Petaluma including single and multi-family housing and mobile homes, with the exception of projects not defined as subdivisions under

the provisions of the Subdivision Map Act (i.e., four or less lots), fourplexes or lesser numbered multiple dwellings on a single existing lot, single family residential units on a single existing lot.

II. ESTABLISHMENT OF RESIDENTIAL DEVELOPMENT EVALUATION BOARD

In order to administer the system set forth herein, and especially to make the evaluations set forth in Section V below, a Residential Development Evaluation Board (hereafter called the Board) is hereby established, the membership of which shall be appointed by the City Council as follows:

2 members from the City Council
2 members from the Planning Commission
3 citizens from either a business or profession E/W/Central
4 members from each of the local school boards:
  1 from the Petaluma Elementary School District
  1 from the Old Adobe Union School District
  1 from the Cinnabar School District
  1 from the St. Vincent School System
6 citizens at large E/W/Central
17 Total Members

The Board members will be appointed for 60 days, and then the Board will disband unless a time extension is deemed necessary and required by the City Council. This will give them time for the rating and allocation of projects and any reevaluations that are necessary. The Board will make its recommendations to the City Council and will have no relationship with other boards or committees, with the exception of the membership guidelines as put forth above. It will not be concerned with policy, but will act only in an advisory capacity.

(NOTE: The italic print throughout this policy resolution is for the purpose of explanation and interpretation of various sections of the policy statement).

III. ESTABLISHMENT OF ANNUAL RESIDENTIAL DEVELOPMENT QUOTAS

The numbers of dwelling units hereinafter to be constructed each year in the City of Petaluma (except for dwelling units exempted in accordance with the provisions of Section I above) shall be established by action of the City Council as follows:

1. The quantitative quotas shall be based on the numbers of single family and multi-family units set forth in the Residential Development Program, Page 24 of the Housing Element of the Petaluma General Plan.
2. The distribution of the quotas in east, central and west Petaluma shall be based on the Residential Development Program of the Housing Element of the Petaluma General Plan.

The annual quota for any housing type and for any section of the City as set forth in the Housing Element may be modified by the Council to an amount not greater than 10 percent more or less, than the respective figure for any given year as set forth in the Residential Development Program, provided that the annual quota for the next succeeding year shall be set higher or lower, as the case may be, in order to redress any excess or deficiency and maintain in-so-far-as-possible the balance set forth in the Residential Development Program.

Refer to the Residential Development Program on Page 24 of the Housing Element for an example. The table shows a proposed total of 50 units of single family, medium density housing in East Petaluma for year 2 of the Program. According to the above limitations, a minimum of 45 and a maximum of 55 units may be allocated for that year. If possible, the under- or over-allocation in the category should be offset by an under- or over-allocation in another category in the same year to bring the total to as near 500 units as possible. However, it is acceptable for the yearly total to vary by 10% (or 50 units) providing that no one category exceeds its 10% variance limitation. The variances must be redressed as much as possible in the following year of development in order to attain the desired quotas.

In addition to the annual quotas for quantity and distribution of housing, the Council may require that between eight (8) percent and twelve (12) percent of each year's

total quota shall be low to moderate income housing as set forth on Page 27 of the Housing Element.

Not less than three months prior to the submittal date for the ensuing year, the City Council shall, by resolution, establish allocation quotas of the various types of dwelling units, shall direct the Board to adhere to said quotas for the ensuing year and shall publish them in appropriate ways.

(NOTE: This will not apply for the 1973-1974 building year.)

The City Council should establish these quotas on or about May 1, in order to allow approximately four months for developers to submit proposals. Proposals will be accepted prior to this date, but they may later be rejected if they exceed the quotas established by the Council.

IV. DEVELOPMENT ALLOTMENT APPLICATION

Before a developer may submit any residential development application as defined in Section I herein for approval or may be issued a building permit (except for an individual one or two family unit as specified in I above) he shall apply for and be granted a Development Allotment as set forth herein:

A. Application for an allotment shall be made by the developer on a form provided by the City.

B. The application shall be accompanied by the following documents, or so many of them as are applicable:

1. Site Utilization Map including:
   a. Vicinity Map to show relationship to:
      Adjacent development,
      Surrounding area, and
      The City.
   b. Site use layout map to show amount of areas and intensity of use:
      Industrial,
      Commercial,
      Residential categories, and
      Open Space.
      The site use layout map is of major importance; the vicinity map may be shown as a smaller inset map.
2. Site Development Plan
   Lot layout to preliminary subdivision map standards,
   Topography,
   Lot Sizes,
   Street alignments, showing coordination with City street system, and
   Existing and proposed buildings, trees, landscaped areas.
3. Preliminary Architectural Plans
   Typical architectural elevations, types and numbers of dwelling units.
4. Preliminary Landscape Plans
   General indications of planting.
5. Housing Marketability and Price Distribution.
   Expected ranges of rental amounts or sales prices.

C. The application shall be submitted by the close of business on September 1 in order to be considered for development during the ensuing year commencing May 1.

D. Each application shall be accompanied by a fee in the amount of $25.00 plus $2.00 per dwelling unit included in the application up to a maximum of $100.00. Such fee shall not be returnable in the event that no Development Allocation is awarded.

It is expected that this fee should reflect the costs incurred by the Planning Staff and the Board in processing the applications. A minimum fee is necessary because all proposed developments, no matter how small, will require a certain amount of study. The incremental portion of the fee should reflect the additional time needed to study larger developments.

V. DEVELOPMENT ALLOCATION EVALUATION

The Board shall consider all applications properly submitted and shall make recommendations to the City Council based on the criteria set forth below:

A. Conformity with Plans
   1. The Board shall examine each application for a Development Allotment for its conformity with the provisions of the Petaluma General Plan.
   2. Each application shall also conform to the provisions of the Petaluma Environmental Design Plan.

   The Board shall not recommend that a Development Allotment be awarded for any proposed development which it determined not to be in conformity with said plans.

B. Availability of Public Facilities and Services

   The board shall examine each application for its relations to, or impact upon local public facilities and services, and shall rate each development by the assignment of from zero to five points (zero indicating "very poor", five indicating "excellent") on each of the following attributes:
   1. The capacity of the water system to provide for the needs of the proposed development without system extensions beyond those normally installed by the developer.
   2. The capacity of the sanitary sewers to dispose of the wastes of the proposed development without system extensions beyond those normally installed by the developer.
   3. The capacity of the drainage facilities to adequately dispose of the surface runoff of the proposed development without system extensions beyond those normally installed by the developer.
   4. The ability of the Fire Department of the City of Petaluma to provide fire protection according to the established response standards of the City without the necessity of establishing a new station or requiring addition of major equipment to an existing station.
   5. The capacity of the appropriate school to absorb the children expected to inhabit a proposed development without necessitating or adding to double sessions or other unusual scheduling or classroom overcrowding.
   6. The capacity of major street linkage to provide for the needs of the proposed development without substantially altering existing traffic patterns or overloading the existing street system, and the availability of other public facilities (such as parks, playgrounds, etc.) to meet the additional demands for vital public services without extension of services beyond those provided by the developer.

   Since it will be difficult for any developer to only partially comply with the above criteria, it is expected that the Board will assign either 0 or 5 points on each.

   The Supplemental Material Coordinating the Housing Element and the Residential Development Control System located in the back of the Housing Element has been prepared to facilitate the Board in its evaluation of proposed projects. It may be of particular help in the evaluation of items 1, 2, 5 and 6 in this section.

C. Quality of Design and Contribution of Public Welfare and Amenity

   The Board shall examine each application which has not been withdrawn by the applicant for failure to meet criteria A and B, and shall rate each development by the assignment of from zero to ten points on each of the following attributes:
   1. Site and architectural design quality which may be indicated by the harmony of the proposed buildings in terms of size, height, color and location with existing neighboring development.
   2. Site and architectural design quality which may be indicated by the amount and character of landscaping and screening.

3. Site and architectural design quality which may be indicated by the arrangement of the site for efficiency of circulation, on and off site traffic safety, privacy, etc.
4. The provision of public and/or private usable open space and/or pathways along the Petaluma River or any creek.
5. Contributions to and extensions of existing systems of foot or bicycle paths, equestrian trails, and the greenbelt provided for in the environmental Design Plan.
6. The provision of needed public facilities such as critical linkages in the major street system, school rooms, or other vital public facilities.
7. The extent to which the proposed development accomplishes an orderly and contiguous extension of existing development as against "leap frog" development.
*8. The provision of units to meet the City's policy goal of eight percent to twelve percent low and moderate income dwelling units annually.

*Not applicable to 1973-74 year.

D. After having studied each application in accordance with parts A and B, in regard to each of these criteria, or so many of them as may be applicable, and having assigned evaluation points on a scale of zero to ten in accordance with their finding as to the value of the contribution to the quality of architecture and site design and the several contributions to the public welfare of amenity made by each proposed development, the Board shall arrange the developments in order by housing type and by section of the City, from that receiving the greatest total number of evaluation points to that receiving the least number. This makes a maximum of 30 possible points for any one development in Part B (5 points possible for each of 6 criteria) and 80 possible points in Part C (10 points possible for each of 8 criteria). These two point totals shall be listed separately for each development. It is conceivable that a development may be accepted even if it has fewer points than one that is rejected, if they are of two different housing types or sections of the City, and the one with the lower point total still ranks at the top of its category.

E. Having evaluated each development in accordance with the foregoing criteria, the Board shall publish in appropriate ways the rating given to each development on each of those criteria. The Board shall then schedule a public hearing to be held within 15 days of classification of any point assignments made by the Board.

1. Any applicant may request the Board to reevaluate the point assignment made on any or all of the criteria.
2. Any applicant who is dissatisfied with the Board's reevaluation may submit written notification of such dissent, which will be furnished to the City Council prior to the awarding of Development Allotments.

As previously stated, all applicants [*sic*] must be submitted by September 1. From September 1 to September 30 the Planning Department will study the applications and will present its findings to the Board on or about October 1. The Board will meet as often as necessary during the month of October to evaluate all of the applications, and will publish their ratings on or about November 1. The Board will hold their public session within 15 days thereafter, and will present the point rankings to the City Council on the third Monday in November. (See attached Schedule for Development.)

VI. DEVELOPMENT ALLOTMENT AWARDS

A. Having received the recommendations and rankings of the proposed developments from the Board along with any action taken by the Board concerning appealed decisions as specified in Section V, the City Council shall, by resolution, award Development Allotments as applied for, starting with those projects receiving the most evaluation points in each housing type category and proceeding in order down the list provided:

It is the intent of the Council to listen to only those applicants who have requested reevaluation by the Board and are still dissatisfied with the Board's decision. The Board will have passed all pertinent information concerning these appeals on to the City Council who will then be prepared to dispose of said appeals in an efficient manner, and award the Development Allotments at their meeting on the third Monday in November or at a subsequent or special meeting of the City Council held before Dec. 15 of each year.

1. Development Program Quota
   The number of dwelling units for each housing type and for each section of the City for which Development Allotments shall be issued shall not exceed the quotas established by the City Council in accordance with Section III herein.
2. Allocation Limitation
   NO SINGLE DEVELOPER SHALL IN ANY ONE YEAR, BE ISSUED A DEVELOPMENT ALLOTMENT FOR DWELLING UNITS IN EXCESS OF A NUMBER TO BE ESTABLISHED BY RESOLUTION OF CITY COUNCIL. The City Council shall set this limitation at the same time it establishes quotas for housing types, on or about May 1.
   When a developer has applied for a Development Allotment in excess of either the above limitation or the quotas established for each housing type, but has received a high evaluation point rating, the Council may, at its discretion, award the maximum Development Allotment allowable to the developer with the stipulation that the excess units shall be constructed during the following year of the program. This will, of course, limit the number of additional units that may be approved for that particular housing type in the ensuing year.
3. Minimum Point Requirements
   The City Council shall eliminate from consideration any development which has not been assigned a minimum of 25 points under Section V-B herein, or a minimum of 50 points under Section V-C.
   A development must meet both point requirements in order to qualify for consideration for a Development Allotment. Since a development must receive 25 out of 30 possible points under Section V-B, it must meet at least 5 of the 6 criteria in that section. However, in awarding the Development Allotments the Council should favor those applicants who have met all 6 of those criteria (a score of 30 points) even if they have ranked slightly lower on the criteria in Section V-C. If the highest ranking development for any housing type and section of the City does not meet or exceed one or both of the minimum point requirements, the City Council shall make no Development Allotment for that particular category. The number of units allowable for that category may then be added to the quota for the ensuing year.

B. Should a developer fail to initiate construction within six months of the issuance of a building permit pursuant to a Development Allotment, the City Council, after a hearing, may by majority vote, rescind all or part of the Development Allotment and may award the Allotment to the next satisfactory applicant on the rank award list whose proposal is of the same type and in the same sector as the withdrawn allotment; or the City Council may hold the unused Allotment for addition to the ensuing year's quota.
The City Council will make the Development Allotments on the third Monday in November or at a subsequent or special meeting of the City Council held before December 15 of each year. The developer will have ninety days from that date in which to prepare and submit a tentative map of the development. The developer will then have until May 1 to firmly establish his program of development, at which time a building permit shall be issued. The developer then must initiate construction prior to November 1 in order to meet the above limitations. (See attached Schedule for Development.)

almost identical with Ramapo's limiting growth "*as if it were an island independent of other towns.*" [emphasis supplied].[44]

The population of Petaluma, California, a 100 year-old farming center located about forty miles from San Francisco, never exceeded 10,000 until very recently. Then in 1956 United States Highway 101

C. Should a developer fail to carry out fully the development, as detailed in his application, any unused portion of his Development Allotment may be rescinded in the manner set forth in B above, unless the developer has shown good faith and has developed at least 25% of his allotment, or in the case of Subdivisions, has added public improvements (water, sewer, streets, etc.) and amenities which equal at least 25% of the total development costs, and can show that he will conclude development within one year.

D. An application may be amended upon application made in the same manner as for the original application. In addition, the application for an amendment shall set forth the reasons for requesting amendment.
   1. The City Council shall review such an amendment application in the same manner as an original application and may grant the amendment as requested, modify the amendment, or deny the amendment.
   2. An amendment or modified amendment may be granted only if:
      a. The proposed development meets the requirements of Section V-A and B and does not exceed the quota as specified in VI-A; and
      b. The City Council after reviewing the proposed development in relation to the criteria set forth in Section V-B and C shall find that the modified development has earned as many or more evaluation points than the original development for which the Development Allotment was issued.

   The amendment procedure should not be confused with the reevaluation process outlined in Section V-E. An application may be amended either before or after the Development Allotment is awarded. Prior to the application submission deadline (September 1) any amendment shall be automatically accepted. After the submission deadline but before the Board makes their recommendations to the City Council, amendment applications shall be considered by the Planning Department and passed on to the Board. After the Board has made its recommendations, but before the City Council has made the awards, no amendment applications will be received. After the City Council has awarded the Development Allotments, a developer who has received such award may file an amendment application which will be reviewed by the City Council.

VII. ADDITIONAL REGULATIONS

A. Amendment of Environmental Design Plans, General Plan, and Zoning Ordinance.
   Should any applicant wish to apply for an amendment to the General Plan, the Environmental Design Plan or the Zoning Ordinance in order to provide for a proposed development, such amendments will be applied for in the usual manner and all processing will be completed prior to the date for submitting applications for Development Allotments.

B. Should the arrangement of projects as provided in Section V-D produce the situation in which two projects have equal evaluation point scores, but only one project can be permitted within the quota, the City Council may offer those applicants a pro rata share of the number of units available within the quota, or may dispose of such a tie in any other manner deemed equitable by the City Council.

C. The Board may, by majority vote, make rules and regulations for the conduct of its business not in conflict with the provisions of this resolution.

44. Bosselman, *supra* note 1 at 234.

running along the eastern edge of the town was widened to a freeway. This, along with suburbanization in the San Francisco Bay area, began a process of explosive growth—14,000 people in 1960; 25,000 by mid-1970; and 30,000 by the end of 1971.[45]

Most of the development was tract housing east of the freeway, with only two freeway crossovers linking the new area with the "old town." A 1962 "master plan" of development produced by outside consultants had projected an ultimate growth to 77,000 by 1985.

However, even before the 1970 census tally of 25,000 the city public works department warned that the sewage system could handle only one more year of growth at the current rate. Meanwhile, the city approached the limit of its water supply, schools went on double sessions and there was a prospective scarcity of open park land east of the freeway.[46]

All these factors impelled citizens in June, 1973, to approve by four to one an ordinance[47] instituted in August, 1972, "rationing" growth for the ensuing five years to 500 dwelling units a year.[48]

The Petaluma ordinance, adopted in 1972, was challenged when the city rejected construction applications in 1973, for more than 1,600 housing units. The Construction Industry Association of Sonoma County (plaintiffs) claimed that the Petaluma Plan was intended "to preserve the city's small town character and surrounding open space by controlling the city's future rate and distribution of growth."[49]

On April 26, 1974, Judge Lloyd H. Burke of the United States District Court for the Northern District of California issued a written decision confirming his oral decision issued in January, 1974, finding unconstitutional the Petaluma Plan which is intended to limit growth. Judge Burke held the Plan violative of what he describes as the constitutionally protected "fundamental right" to travel.[50]

Judge Burke enjoined Petaluma from implementing any policy "which may have the effect, the intent, directly or indirectly, of placing

45. Hill, *Nation's Cities Fighting to Stem Growth*, The N.Y. Times, July 28, 1974, § 1, at 1, col. 2. (First in a series of articles on community growth controls.)
46. *Id.* at 30, col. 3.
47. *Supra* note 43.
48. Hill, *supra* note 45.
49. Plaintiff's briefs, written by Arata, Misuraca, Clement & Haley and Mr. Joseph Henderson, of Santa Rosa, California, are reproduced in RABIN, MODERN REAL PROPERTY LAW 735-49 (1974).
50. Judge Burke's oral opinion is discussed in LAND USE PLANNING REPORTS 7-8 (January 28, 1974).

any numerical limitation, whether definite or approximate, upon the number of persons permitted to enter the city of Petaluma in order to establish residence."[51]

Judge Burke based his opinion on the "freedom to travel," stating,

> The Supreme Court has made it clear that the freedom to travel, which includes the right to enter and live in any State or municipality in the Union, has long been recognized as a basic right under the Constitution, or a 'fundamental right.'[52]

No where in the entire opinion does Judge Burke so much as mention the *Ramapo* case. Judge Burke cites with approval the *National Land and Investment Co. v. Kohn*[53] case, noted at length in *Ramapo.* Judge Burke, however, cites *Kohn* to support his conclusion of law that communities can not arbitrarily shunt population off elsewhere.

Judge Burke states:

> The municipality asserted many compelling state interests which resemble those discussed earlier, such as its desire to deal with sewage problems and to avoid heavy traffic loads on its road system. The Supreme Court pointed out that under Pennsylvania law municipalities have the power to deal with sewage problems and they should deal with them rather than accept them as they are. With respect to highway traffic the Court made a comment which we consider particularly apropos of the case at bar.
>
> > It can be seen that the restriction to four acre lots, so far as traffic is concerned, is based upon possible future conditions. Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and can not be used by those officials as an instrument by which they may shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future. The evidence on the record indicates that for the present and the immediate future the road system of Easttown Township is adequate to handle the traffic load. It is also quite convincing that the roads will become increasingly inadequate as time goes by and that improvements will eventually have to be made. Zoning provi-

51. *Petaluma* at 588.
52. *Petaluma* at 581 (citations omitted).
53. 419 Pa. 504, 215 A.2d 597 (1966).

> sions may not be used, however, to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring. 419 Pa. 527, 215 A.2d at 609-610.[54]

In the body of the opinion, Judge Burke further articulates in very persuasive language the issue before the court. "The only issue presented here, for the first time, is whether or not a municipality may claim the specific right to keep others away."[55] In addition, the court employed a seldom used,[56] but not unusual move by issuing an order to appoint a "special master" to hear further controversies arising out of the case between the parties involved.[57] This move was apparently in response to the city's subsequent actions to cease issuing building permits in what plaintiffs allege was an effort to subvert the intent of the decision.[58]

To fully comprehend the meaning of the *Petaluma* opinion it is necessary to compare the Ramapo and Petaluma plans for controlled growth. The Petaluma Plan does not contain the "capital budgeting" requirement of the Ramapo Plan. However, in almost every other area of comparison,[59] the Ramapo Plan and the Petaluma Plan are exceedingly similar. The town of Ramapo calls its special permit a "residential developmental use permit"; Petaluma calls its special permit a

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54. *Petaluma* at 584-85.
55. *Petaluma* at 587.
56. Nectow v. Cambridge, 277 U.S. 183 (1928).
57. *Petaluma* at 588.
58. LAND USE PLANNING REPORTS 3-4 (July 22, 1974).
59. Professor Freilich was quite concerned over the comparison of the Ramapo ordinance with Petaluma's. He stated in LAND USE PLANNING REPORTS 8 (January 28, 1974):

> The Petaluma case used a numerical quota of 500 annual housing starts which had been held invalid in New York in *Albrecht v. Town of New Castle*, 167 N.Y.S.2d 843 (1957) and bore no relationship to an ongoing community comprehensive plan and capital budget program. In Ramapo the concept utilized timing and sequential controls based upon an 18 year program of capital improvements which led to a community of planned density rather than restrictive lot controls or quotas. There were no numerical restrictions upon growth and growth could proceed. The New York Court of Appeals held:
>
> > They seek not to freeze population at present levels *but to maximize growth by the efficient use of land*, and in so doing testify to this community's continuing role in population assimilation. (334 N.Y.S.2d 138, 152)
>
> The Court of Appeals in reviewing Ramapo's efforts to deal with explosive growth, uncontrolled sprawl and ecological imbalance directly rejected the arguments of exclusion and found:
>
> > It is, however, a first practical step toward controlled growth *achieved without forsaking broader social purposes.* 334 N.Y.S.2d 138, 150. . . . *but far from being exclusionary*, the present amendments merely seek, by the implementation of sequential development and timed growth to provide a balanced cohesive community dedicated to the efficient utilization of land.

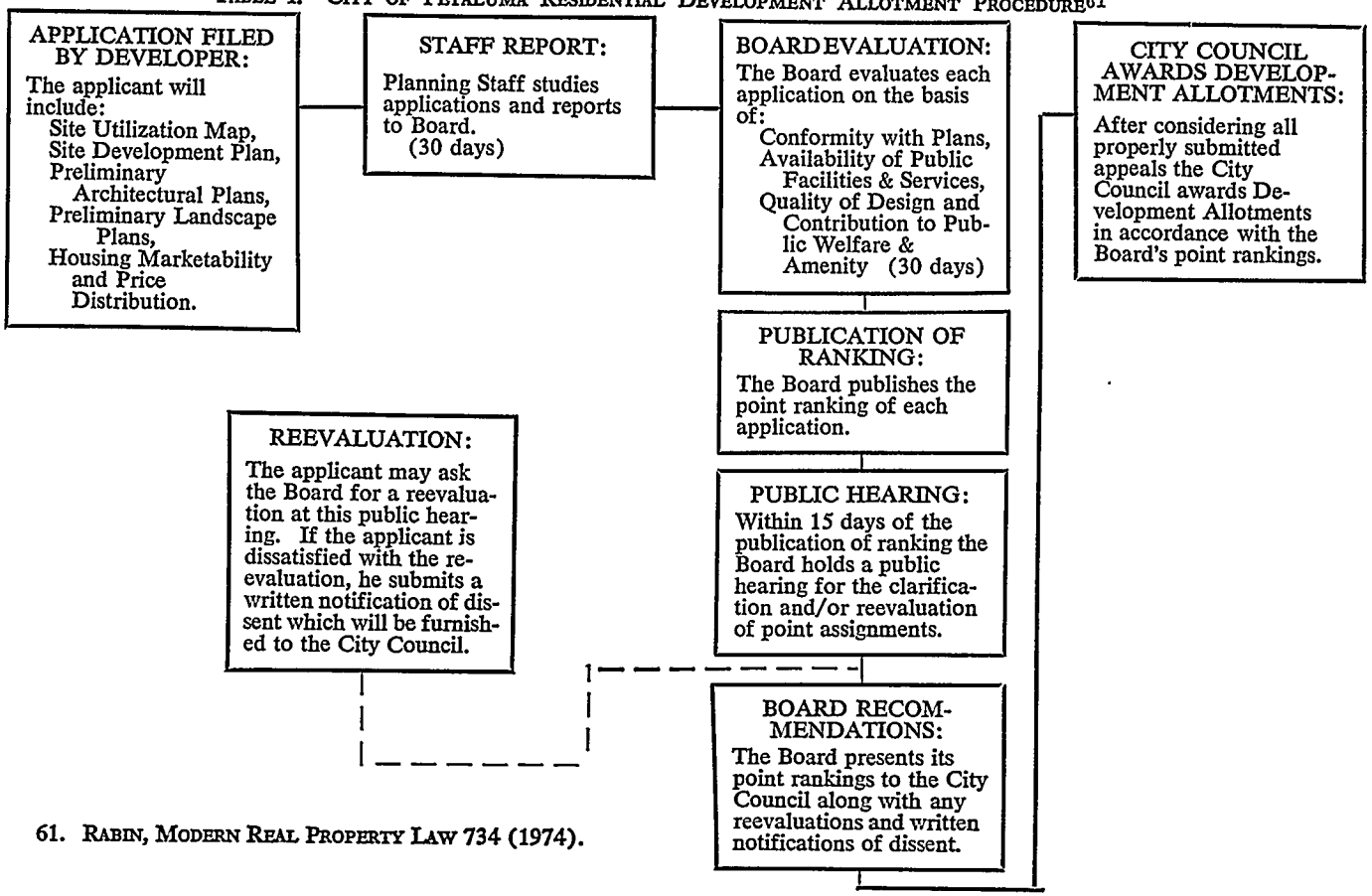
"residential developmental allotment". Both plans are based on a point system which includes points awarded for water and sewers, storm drainage, fire protection, environmental protection, schools, etc. Both plans were wanted by the citizens of the respective communities, and both plans were designed to preserve the "small town character" of the community.[60] A comparison of the two plans follows:

	RAMAPO PLAN [*Residential Dev. Use Permit*]	*PETALUMA PLAN* [*Residential Dev. Allotment Proc.*]
Capital Budget	Yes	No
Point system for:		
Water & sewers	Yes	Yes
Storm drainage	Yes	Yes
Surface drainage	Yes	Yes
Fire protection	Yes	Yes
School impact	Yes	Yes
Street linkages	Yes	Yes
Environmental protection	Yes	Yes
Open space	Yes	Yes
Preserve "small town character"	Yes	Yes
Wanted by citizens	Yes	Yes

The procedure used in the Petaluma Plan is illustrated in Table I.

60. Conclusion of author.

TABLE I. CITY OF PETALUMA RESIDENTIAL DEVELOPMENT ALLOTMENT PROCEDURE[61]



61. RABIN, MODERN REAL PROPERTY LAW 734 (1974).

As illustrated above, except for the capital budget program the Ramapo Plan and the Petaluma Plan in theory are very similar. However, it is important to note, Judge Burke in his opinion emphatically holds that the city officials (of Petaluma) "are prohibited from taking any action of any nature, formal or informal, that preserves, duplicates, replaces, reinstates in another form, or otherwise furthers any of the ordinances resolutions, municipal actions, planning, administration of specific land use proposals, or other actions or omissions held by this court to violate the United States Constitution."[62]

This strong language precludes the city of Petaluma from returning with a detailed "capital budget" program of the Ramapo type. It is likely that even if Petaluma were to return with a "capital budget", Judge Burke would not reach a Ramapo result.[63]

In July, 1974, just following distribution of Judge Burke's written opinion, Associate Supreme Court Justice William O. Douglas issued a stay[64] of Judge Burke's decision. The attorneys for the city of Petaluma had requested the stay on July 11, until the Supreme Court hears the appeal. Petaluma has filed an intent to file an appeal.

Mr. Justice Douglas granted the stay pending receipt of the plaintiff's response to the request for the stay. Mr. Justice Douglas will decide whether to continue the stay until an appeal is heard, when the response is received.[65]

VII. A REVIEW OF EXISTING AND PROPOSED CONTROLLED GROWTH ORDINANCES

Mr. Bosselman, in examining your hypothesis that following the Ramapo case, "each town can be expected to exercise this [developmental timing] and similar techniques,"[66] the researcher submits that only the twin cities, St. Paul, and Minneapolis, Minnesota, are at this time even considering adopting a Ramapo-type ordinance.

The following section reviews the existing and proposed controlled growth ordinances presently found throughout the United States.[67] In-

62. *Petaluma* at 588.
63. Conclusion of author.
64. Application number A 1298. Order delivered July 12, 1974, by Mr. Justice Douglas. (This is an oral order and no written opinion was filed.) The oral order by Mr. Justice Douglas is noted in LAND USE PLANNING REPORTS 3-4 (July 22, 1974).
65. *Id.*
66. Bosselman, *supra* note 1 at 234.
67. All possible sources of information were used to produce the following results.

cluded, for research purposes, is the ordinance of Toronto, Canada.[68]

Aspen, Colorado

Aspen,[69] the skiing "paradise", is having growth pains. Local officials downzoned the entire county to the land's current use. Developers have filed a dozen lawsuits seeking more than $32 million in compensation. Pitkin County, which includes Aspen, has a present population of 12,000 and, at the present growth rate, will have 129,000 by 1990.

Aurora, Colorado

Aurora, Colorado,[70] a suburb southeast of Denver, committed itself to a massive water bond issue some years ago and actively sought development in order to pay for those bonds, until very recently. Too, many slow growth groups have sprung up. A March 1973 report on growth by Aurora's planning department is fraught with warnings of the problems rapid growth has caused and will cause Aurora. Nonetheless, this community which has jumped from 11,550 in 1950, 73,000 in 1969, to 129,000 now has enough water to support an eventual population of 500,000 and is expected to continue as the center of Denver's urban sprawl.

Boca Raton, Florida

To curb growth, the city of Boca Raton, Florida[71] adopted a zoning plan with a limit of 40,000 residential units.

Boulder, Colorado

Boulder,[72] like Denver, is the hub of a county with the same name.

Three major agencies active in this area, Suburban Action Institute, White Plains, New York, The National Committee Against Discrimination in Housing, Washington, D.C., and The National Association of Home Builders, Washington, D.C., were particularly helpful.

68. Materials supplied to researcher by the Toronto Construction Association, The Toronto Building and Construction Trades Council, the Urban Development Institute and the Toronto Real Estate Board.

69. LAND USE PLANNING REPORTS 7 (July 5, 1974). Major Stacy Stanley, 29, was elected to office on a platform to "stop all tourist development." New York Times, July 4, 1974.

70. LAND USE PLANNING REPORTS (July 5, 1974).

71. Boca Villas v. Boca Raton, 73-106. (Judge Tom Sholts' court.) This ordinance is still in litigation.

72. *Supra* note 70.

Unlike Denver, Boulder has grown rapidly. A Boulder Area Growth Study Commission recently issued a report on future growth alternatives for the college town (University of Colorado) of 70,000. Although the county did reject a growth cap of 100,000 in 1972, it has set a building height ordinance, established a locally financed program to purchase open space around the community and set up a "blue line" beyond which Boulder will not provide water for development.

Colorado Springs, Colorado

Colorado Springs,[73] home of the Air Force Academy and 60 miles southwest of Denver, is wary of growth. The town has a surplus of upper-middle income housing but a shortage of low to moderate priced housing. Still, a recent ordinance inspired by the energy crisis bans any new gas or electricity taps, effectively slowing growth.

Dade County, Florida

The Dade County[74] Planning Advisory Board rejected a population ceiling May 26 in the county's master plan. The board opted instead for a policy of carefully controlled growth. The master plan—Dade County Comprehensive Land-Use Master Plan—now goes to the Metro Commission for final approval. Dade County in South Florida is faced with some of the strongest growth pressures in the country.

Denver, Colorado

The metropolitan Denver[75] area has not yet been overwhelmed by growth despite a population jump of 500,000 since 1960 to the present 1.4 million. Nevertheless, Denver and surrounding communities are beginning to make efforts to manage growth with varying degrees of urgency.

In a key move, the Denver Council of Governments (COG) last month adopted an areawide land use plan predicated on a slow growth rate. The land use plan is interdependent with a rapid transit plan and a highway development plan that were approved last fall by local communities.

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73. *Id.*
74. Cahn, *supra* note 10.
75. *Supra* note 70.

Fairfax County, Virginia

Fairfax County, Virginia[76] encompasses about 400 square miles just south of Washington, D.C. Fairfax County is one of the fastest growing large counties in the nation. To curb the growth of this D.C. suburb of almost a million people, the county imposed an emergency 18-month moratorium on practically all new construction.[77]

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76. Fairfax County, Virginia in all probability will be the third major case litigated concerning controlled growth. Some major litigation has already begun. *See* Board of Supervisors v. DeGroff Enterprises, Inc., 214 Va. 235, 198 S.E.2d 600 (1973).

77. The eighteen-month emergency moratorium adopted by Fairfax, Virginia follows.

At a regular meeting of the Board of Supervisors of Fairfax County, Virginia, held in the Board Room in the Massey Building at Fairfax, Virginia, on Monday, January 7, 1974, at which meeting a quorum was present and voting, the following resolution was adopted:

The provisions which follow establish the rationale for the action proposed to the Board of Supervisors. Such provisions are closely interrelated to a significant extent and should be considered in their entirety.

NOW THEREFORE BE IT RESOLVED that the following emergency conditions exist in Fairfax County, Virginia:

A. Background

The County of Fairfax in the State of Virginia being a suburb of the Washington, D.C. metropolitan region, has been experiencing unprecedented and rapid growth with respect to population, housing economy, land development and utilization of natural resources. Schools, roads, public services and facilities have been and are being constructed to meet the needs of the County's growing population but these services and facilities have been and are being constructed to meet the needs of the County's growing population but these services and facilities have been unable to keep pace with the ever growing public need. The extreme and unprecedented rapid growth has: (1) been a principal factor in the creation of a serious sewerage pollution problem affecting the public health and welfare of the County and necessitating a sewerage moratoria on issuance of building permits, pursuant to regulations of Federal, State and regional environmental protection agencies, until the construction and completion of adequate sewerage disposal treatment plants and facilities; (2) caused residential development in outlying non-urbanized areas of the county (by reason of septic tank construction to avoid sewerage moratoria), which areas lack adequate sewerage, drainage, improved roads, firehouses, schools, parks and recreational facilities and other urban functions and facilities, disabling the County from assisting in shaping the character, direction and timing of community development; (3) caused environmental degradation of flood plains, wetlands, slopes, hillsides, stream valleys and other critical environmental areas of the county; (4) caused severe shortages of fuel, electricity and natural resources because of inefficient and costly urban sprawl which has unnecessarily extended roads, sewers and urban systems, resulting in waste of fuel for police and fire vehicles, commuter and automobile traffic; commercial delivery, school busing, and other public functions, as well as general community hardship and health hazard by reason of inadequate fuel and energy for heating of homes, schools and place of public assembly; (5) caused an imbalance of growth between types of uses (commercial, industrial and residential) effecting environmental pollution problems, nuisance, lack of low and moderate income housing for workers near industrial and commercial sites and a loss of open space, agricultural, horticultural and forest uses; (6) caused an inability to provide public services and facilities adequate to match and service private development; (7) caused soaring tax rates on property due to the inefficient, non-sequential provision of public services and the shift in the burden of capital investment to the public sector beyond its capacity to provide same; (8)

caused poor quality of services provided and an inability to implement proper planning, due to lack of time to develop solutions, and inadequate administrative and legal mechanisms. Faced with these social, physical, environmental and fiscal problems caused by this rapid and unprecedented growth and concerned with the overall quality, density and character of land development within the community, the County of Fairfax is now undertaking the preparation of a new comprehensive plan to guide and accomplish the coordinated, adjusted and harmonious development of the County which will, in accordance with present and probably future needs and resources best promote the health, safety, morals, order, convenience, prosperity and general welfare of its inhabitants.

The comprehensive planning program, begun on February 5, 1973 by Resolution of the Board of Supervisors establishing the Task Force on Comprehensive Land Use Control, is being accomplished by the Planning Commission with close liaison maintained with the Board of Supervisors and all County agencies and officials.

The comprehensive planning program includes study and analysis of the County's physical and environmental resources, population trends and characteristics, economic and business activity, existing land use and fiscal trends and available financial resources.

As a result of the study a comprehensive plan pursuant to Va. Code 15.1-446 is scheduled for adoption no later than May, 1975 for all of the County and between May, 1974 and June, 1975 for each of the County Planning Districts. In addition the County Comprehensive Planning program will result in the preparation and adoption of:

(1) A new County zoning ordinance scheduled for adoption in May, 1974;

(2) A new County official zoning map, consisting of individual section sheets, which shall indicate the designation, location and boundaries of all zoning districts, which official zoning map shall be adopted in stages, each stage representing adoption of individual section sheets for individual county planning districts resulting in the rezoning of all land within said planning district commencing June, 1974 and concluding with adoption of the completed official zoning map of the entire county, no later than June, 1975, corresponding to the same schedule for adoption of the comprehensive plan for each of the County planning districts, as set forth above;

(3) Revisions in the County subdivision regulations ordinance;

(4) A capital outlay program and capital outlay plan and establishment of a County Official Map; and

(5) Other ordinances adopting appropriate controls for implementation of the objective comprehensive plan.

B. Legislative Findings of Fact

The Board of Supervisors does hereby find that pending the necessary preliminaries and hearings incident to proper decisions upon the adoption and terms of the new County of Fairfax Zoning Ordinance, and Official Zoning Map thereof, in accordance with the comprehensive plan being prepared by the County, that a state of emergency exists and unless reasonable measures are taken for a reasonable interim period to protect the public interest by preserving the integrity of the comprehensive plan and of the new County Zoning Ordinance, and Official Zoning Map and any stages or sections thereof are adopted and become effective, that any significant development in the County, beyond that for which the owners or developers have made substantial commitment, and which the County has formally reviewed and approved will destroy the integrity of the comprehensive plan and its basic purposes and comprehensive aspects, significantly and deleteriously affect the new Zoning Ordinance and Official Zoning Map thereof and will lead to furthering and worsening the severity of the problems set forth in § A of this Resolution.

C. Legislative Intent

It is the intention of the Board of Supervisors to protect the comprehensive plan and the new Zoning Ordinance and Official Zoning Map thereof and to insure their implementation by hereby adopting, pursuant to the authority vested in the Board of Supervisors, reasonable interim legislation for a reasonable time during consideration of the aforesaid proposed comprehensive plan, zoning ordinance and official zoning map thereof, to protect the public interest and welfare and prevent a race of diligence between

property owners and the County during consideration of the proposed comprehensive plan, zoning ordinance and official zoning map thereof, which would in many instances result in the establishment of a pattern of land use and development which would be inconsistent with the comprehensive plan and violate its basic intent and purpose and fail to protect the community and its general welfare.

It is the purpose and scope of this ordinance to prevent any further increase in the problems of sewerage pollution, septic tank construction, urban sprawl and premature development, environmental pollution, severe energy shortage, imbalance of growth, inadequate and poor quality of public facilities and services and severe financial and tax strain as set forth in A (1) through (8) of this Resolution, which are certain to come about as the result of a race to vest development rights prior to adoption of the new plan and zoning map.

The Board of Supervisors deems the adoption of the following Article as essential to the preservation of proper planning and zoning in the County and in the best interests of the community and its health, safety, morals and general welfare.

ADOPTION OF EMERGENCY AMENDMENTS TO CHAPTER 30 (ZONING ORDINANCE) OF THE 1961 CODE OF THE COUNTY OF FAIRFAX, VIRGINIA, AS AMENDED

At a regular meeting of the Board of Supervisors of Fairfax County, Virginia, held in the Board Room of the Massey Building at Fairfax, Virginia, on Monday, January 7, 1974, the Board adopted certain emergency amendments to Chapter 30 (Zoning Ordinance) of the 1961 Code of the County of Fairfax, Virginia, as amended, said amendments so adopted being in the words and figures following, to wit:

BE IT ORDAINED BY THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY:

Amend Chapter 30, Zoning Ordinance, Code of the County of Fairfax, by amending § 30-6.6.2 to read as follows:

No variance shall be authorized with respect to any of the provisions of sections 30-3.10 and 30-3.11, which relate to the required amount of off-street parking space, sections 30-4.1 and 30-4.2, which relate to nonconforming uses, nor to any of the provisions of Article XVI which relate to signs, except as specified by the provisions of section 30-16.8.3, *nor to any of the provisions of Article XIX.*

Amend Chapter 30, the Zoning Ordinance, Code of the County of Fairfax, by adding:

§ 30-19 Interim Development Ordinance

30-19.1 This Article shall be in full force and effect from the date of its enactment until June 30, 1975, the date established for the adoption of the complete official zoning map of the entire county.

30-19.2 During the period while this Article is in full force and effect for all real property in Fairfax County:

(A) No application shall be accepted for, nor any approval granted for, a special permit, a special exception, a site plan under the Fairfax County Zoning Ordinance of 1959 as amended and revised, or a preliminary subdivision plat, except as provided in Section (C) of this Article.

(B) Nothing contained in this Article shall be deemed to abrogate or annul any prior approval lawfully issued and in effect as of the date of enactment of this Article with respect to a special permit, a special exception, a site plan or a preliminary subdivision plat; provided that if within one hundred eighty (180) days after the effective date of adoption of this Article no building permit has been obtained and no substantial construction, or substantial operation for non-structural uses, has been undertaken on the structure or foundation, or conducted for the non-structural use, the special permit, special exception, or site plan shall be invalid, null and void, and deemed revoked by operation of law. If any existing legal restrictions in effect on the date of or within one hundred eighty (180) days after the date of adoption of this Article, prevent the issuance of a building permit for a lawfully approved special permit, special exception, or site plan, then the one hundred eighty (180) day period shall not begin to run with respect to the obtaining of such building permit and com-

Under its emergency powers the county board of supervisors voted 8-1 for the ban on January 7, 1974. The measure went into effect immediately and will last until June 30, 1975.

The Fairfax moratorium applies to all subdivisions, townhouses, apartments and industrial complexes not already approved by the board of supervisors. More than 200 pending zoning cases and many building permit applications will be held up, officials said.[78]

The only projects to be allowed under the moratorium are public facilities and single family houses on properly zoned lots already having sewers or septic tank systems and not requiring special permits or exceptions.

Board members said they imposed the moratorium because the county was growing too fast and this had created problems of sewage pollution, fuel shortage, inability to provide public services, soaring tax rates and poor services to residents. The county's population grew from 518,350 in 1972 to 547,000 in 1973. From June 30, 1972, to June 30, 1973, 12,497 building permits were issued.[79]

A county planner said that during the moratorium Fairfax plans to: (1) revise the county-wide policy on growth; (2) use that growth plan as a guide in detailing growth plans for each county district; (3)

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mencement of substantial construction and/or operation until the said legal restriction has terminated and is of no force and effect with respect to the subject real property.

(C) 1. When an application for a special permit, a special exception, a site plan, a preliminary subdivision plat or a development plan submitted under Article XV of this Chapter has been approved prior to the effective date of this Article, then the applicant, his agents or assigns, may take such steps as are necessary subject to any restrictions contained in Section (B) above and under the existing Fairfax County Code, to allow him to begin construction on the subject property.

2. No proposal for a public facility shall be subject to the provisions of Section (B) above.

(D) No application for an amendment to the Zoning Ordinance of 1959 as amended and revised on the date of adoption of this Article shall be accepted or considered by the Planning Commission or the Board of Supervisors during the period while this Article is in effect.

This provision shall not preclude the Board on its own motion, from consideration or adoption of an amendment to the zoning map, where:

(1) A court of competent jurisdiction has determined that the existing classification on any particular parcel or tract of land is not reasonable; or

(2) An applicant for an amendment barred by this section has complied with the procedural requirements of the Board, and on the Board's request has postponed the hearing of such application to the harm or detriment of such applicant, his agents, or assigns.

An emergency existing, these amendments shall be effective immediately.

78. Official news release, by Edmund L. Castillo, Director of Public Affairs, Fairfax County Government, Fairfax, Virginia, January 7, 1974, No. 2/74.

79. Nicol & Whitaker, *Fairfax Building Ban Set—Emergency Law to Stop Most Projects*, Washington Post, January 8, 1974.

develop a new zoning ordinance; (4) develop a land banking process; (5) set up a system of five-year capital improvement programs to dovetail with growth projections; and (6) develop a requirement for environmental impact statements on major public and private construction.[80]

Meanwhile, the Metropolitan Washington Council of Governments is pleading with Fairfax and other localities to loosen construction and sewer connection moratoriums enough to permit some low-cost housing construction to proceed.

Fairfax County, one-third of the way through its 18-month building moratorium on July 8, 1974, adopted a policy to rezone the county and bar residential construction until capital facilities are available to serve them. Under this zoning, the county will be divided into three basic categories: residential, undeveloped, and conflict (congested). Rezoning applications would be based on the availability of water, sewers, schools, highways, etc. A dissenting board member, Audrey Moore, said the action does not consider impact on land value. The action, approved by the county board 6-3, is a major step in Fairfax' efforts to establish a Planning and Land Use System (PLUS).[81]

Hamptons, L.I., New York

The Hamptons,[82] resort towns on Long Island, will lose their character if the growth rate there is not kept to two percent a year, according to a 150-page study published by the Regional Science Research Institute of Philadelphia. In addition to destroying the towns' character, the report says, the present four percent growth rate contributes to a high seasonal unemployment rate, will overwhelm the area water supply, and eliminate much of the remaining farmland.

Honolulu, Hawaii

Hawaii's[83] executive and legislative branches have begun a study that may lead to 10-year controls limiting growth to an annual rate of less than two percent. Under a resolution adopted by the state legislature last month, executive agencies and a joint interim legislative

80. *Supra* note 78.
81. LAND USE PLANNING REPORTS 6 (July 8, 1974).
82. LAND USE PLANNING REPORTS 7 (July 22, 1974).
83. Hawaii is one of the first states to pass a comprehensive state planning act. Hawaii is still faced with problems of controlling growth, and control growth laws are being considered for the entire state. BOSSELMAN, *supra* note 3; *see* Cahn, *supra* note 10.

committee are analyzing a Department of Planning and Economic Development Report that offers four growth policies for the next 10 years.

The report being studied, *State of Hawaii Growth Policies Plan: 1974-1984*, recommends a slow growth policy in preference to accelerated growth, the present rate of growth, or no growth. The legislature's resolution specifically directs the development of "action programs to implement the slowed growth alternative." The resolution directs that recommendations be submitted to the 1975 legislature.

Lake Tahoe, California

The California Tahoe Regional Planning Agency[84] is considering a six-month plan that would ban public or private projects of three or more acres or of three or more apartment units if they are "growth inducing." The proposed interim ordinance in other respects would follow the regional plan of the bi-state Tahoe Regional Planning Agency.

Los Angeles, California

The city of Los Angeles begins limiting its future population this year with an ordinance prohibiting construction of multi-family apartments in commercial areas. The measure is expected to reduce the city's future population by 2.2 million.[85]

The ordinance came from a Density Adjustment Study by the city's Planning Commission last year which proposed several other downzonings. Together, the proposed ordinances would reduce Los Angeles' planned population from 10 million to a little over 4 million. The present city population is 3.8 million, although the metropolitan area population is at least twice that.

As expected, zoning rollbacks are meeting opposition. Developers argue that the rollbacks will hurt them economically. In June 1971 Mayor Sam Yorty forced the retraction of a planning department recommendation of future population of 3.4 million people. An attempt to cut density in some residential areas by one-third to one-half was voted down by the Los Angeles Planning Commission earlier this year.

Los Angeles' new Mayor Tom Bradley, who went into office July 1, was elected on a strong limited-growth platform. Thus, developers may be persuaded to accept the argument that because Los Angeles

84. Materials in possession of researcher.
85. LAND USE PLANNING REPORTS 7-8 (September 10, 1973).

has such a limited land area the value of land is not going to vary greatly because of downzoning.[86]

Loudoun County, Virginia

In July, 1974, Loudoun County, Virginia,[87] a Washington suburban area, refused to approve a $112-million, 4,200-unit "new town" even though the developer promised to reimburse the county for installing the necessary public services.

Marin County, California

Marin County, California[88] adopted growth controls on the ground that its water supply could not serve many more people.

Martha's Vineyard, Massachusetts

Massachusetts Governor Francis Sargent signed a bill July 24 designed to regulate development on Martha's Vineyard Island.[89] The bill, H 6573, established a Martha's Vineyard Commission to work with local and state governments to regulate development of regional impact.

As a first step, H 6573 directs a one-year moratorium on almost all building on the island to begin concurrently with the establishment of the commission after the November elections.

The key to the state-passed Martha's Vineyard program is a 21-member commission, consisting of elected and appointed officials, and state officers. The commission will write the standards for identifying critical planning areas and then write standards for controlling land use. The state has approval authority over the standards, but does not have a direct vote. Once the standards are approved the state's role is ended.[90]

Miami, Florida

The Miami[91] Chamber of Commerce decided March 31, 1974 to mount a counter-attack against what it calls "no-growth" elements in Dade County, Florida. The county is currently considering population

86. Hill, *supra* note 45.
87. Materials in possession of researcher.
88. Materials in possession of researcher.
89. LAND USE PLANNING REPORTS 3-4 (August 5, 1974).
90. *Id.*
91. Cahn, *supra* note 10.

growth ceilings for the proposed Dade County Comprehensive Plan. Chamber leaders say Miami needs to attract new people who are more productive than the wealthy retired Miami presently attracts.

Ocean County, New Jersey

The Environmental Protection Agency's (EPA) New York Regional Office plans to release a final environmental impact statement recommending that Ocean County, N.J., limit its population growth to maintain national air quality standards.

The final statement was not released at the time of this writing, but Paul H. Arbesman, head of the regional office environmental impact statement section, said no change in the basic thrust of the draft statement would be made. The draft statement, filed in April, recommends that expansion of a sewage treatment facility be limited to support a population of 250,000. An air quality diffusion model study commissioned by EPA showed that, with existing technology, a large population would make it impossible for the county to maintain air quality standards.[92]

Orange County, California

Orange County,[93] with 1,500,000 people, has cut back its population ceiling for the year 2020 from four million to 2.9 million.

Palo Alto, California

Palo Alto,[94] zoned ten square miles of undeveloped land into ten-acre parcels to prevent any further building.

Phoenix, Arizona

Phoenix,[95] may be the next American city to be "Los Angelized" —an unplanned, pollution-sprawl of a city. Phoenix has grown from 861,000 population in 1964 to 1.2 million in 1974. Development has leap-frogged open space into the desert where sixteen new, planned communities are springing up. Land use experts say they would like to see more development within the city limits, which is only fifty percent developed.

92. Materials in possession of researcher.
93. Materials in possession of researcher.
94. Cahn, *supra* note 10.
95. LAND USE PLANNING REPORTS 6 (July 1, 1974).

Sanbornton, New Hampshire

As an antigrowth measure, the small town of Sanbornton, N.H.[96] (population 1,000), adopted six-acre minimum zoning for the remote sections of the town. This new zoning effectively blocked the plans of a developer who expected to put about 500 family units on his 510 acres, mostly "second homes" for people from nearby metropolitan areas.

In the resulting lawsuit[97] by the developer, U.S. Court of Appeals Judge Albert W. Coffin upheld the zoning as being reasonable to protect the general welfare. He held that the town could consider that hundreds of new homes would have an irreversible effect on the area's ecological balance. They would destroy scenic values, decrease open space, significantly change the rural character of this small town, pose substantial financial burdens for services, and open the way for tides of weekend "visitors" who would own second homes. If the federal government, Judge Coffin said, can require environmental concerns to be considered in its actions, he did not see why Sanbornton could not consider such values in its zoning ordinance.

But Judge Coffin warned in his decision that the town had accomplished its zoning in a most crude manner. He noted that no professional or scientific study was made showing why six-acre zoning rather than four, or eight, is the right way to protect the values cherished by the town. And, although the ordinance may be a legitimate stopgap measure, "Where there is natural population growth, it has to go somewhere, unwelcome as it may be, and in that case we do not think it should be channeled by the happenstance of what town gets its veto in first," said Judge Coffin.[98]

San Jose, California

San Jose, California[99] last year voted a two-year freeze on any new residential zoning that would reduce pupil-space in schools.

Southhampton, Long Island

Southhampton, Long Island,[100] with a population of 39,000 adopted a zoning plan with an ultimate limit of 127,000.

96. Cahn, *supra* note 10.
97. Steel Hill Development, Inc. v. Sanbornton, 469 F.2d 956 (1st Cir. 1972).
98. *Id.*
99. Cahn, *supra* note 10.
100. Materials in possession of researcher.

St. George, Vermont

St. George[101] is perhaps the only community in the nation to adopt TDR (transfer of development rights) as a development control. At the present time, only one TDR transaction is being actively considered under the plan adopted by the town in 1970. It involves the transfer of land as well as of development rights.

The town worked out a "maximum population forever" of 3,000. This was the maximum population with attendant commercial development that a soils inventory indicated could be accommodated within the town's boundaries. Also entering the decision was a check of what ratio of development to open land the people wanted, how much consumer population a commercial center needed to survive, and how large a Vermont community could become before people stopped identifying with it.

The 3,000 limit determined how many development rights would be distributed. To accommodate commercial and industrial interests, the town bought forty-eight acres of land on which to build a town center. Commercial, public, residential, and industrial development will be concentrated in this area.

St. George takes the standard approach to TDR: Development rights are assigned to each parcel of land. If a developer seeks to build in the commercial center, he has to buy a certain number of development rights from outside the center.

To prevent erosion of real estate tax revenues, a portion of the realty tax is assigned to the development rights and a portion to the land. After the transfer of development rights, the remaining open space is taxed at its intrinsic value and the transferred development rights are taxed separately.[102]

St. Paul-Minneapolis, Minnesota

The Twin Cities Metropolitan Council[103] is developing an area growth policy, some aspects of which may be patterned after the Ramapo, N.Y., timing and sequential growth control plan.[104] The coun-

101. LAND USE PLANNING REPORTS 5 (July 25, 1974).
102. For a discussion of transfer of development rights see J. COSTONIS, SPACE ADRIFT (1974).
103. Materials in possession of researcher. *See also* LAND USE PLANNING REPORTS 5 (June 5, 1974).
104. Professor Freilich is the land use planning consultant for the Twin Cities.

cil is a regional group with considerable authority over local and other regional agencies.

St. Petersburg, Florida

On March 21, 1974, the city of St. Petersburg[105] adopted an ordinance requiring the last 25,000 people who had settled there to move out. The ordinance was rescinded only two weeks later as "manifestly unconstitutional and impractical."[106]

The ordinance would have forced residents who had arrived in the city since January 1, 1973, to register with the city. The first 10,000 such registrants would be classified as "permanent residents," and others would be classified as "temporary residents." Temporary residents would have to leave the city within six months unless the city accepted an application for permanent residence. Serious constitutional questions were raised by the ordinance.

Bruce Hahl, St. Petersburg Director of Planning, said increased strain in the past year on city services, especially water and sewer facilities, has made growth a public issue. The city planning commission, at the request of the city council, is preparing a growth policy which will be ready in the latter part of 1974.[107]

Tulsa, Oklahoma

The policy of "Balanced Growth" advocated in Tulsa is in no way a Ramapo type ordinance.[108] Balanced Growth is a policy of the city to encourage building and development in North Tulsa. There are no negative restrictions or sanctions that accompany this type of plan. At the present time, this is not in the ordinance stage.

Toronto, Canada

Toronto, Canada, has imposed a moratorium on construction of buildings over 45-feet tall in the 400-square block downtown area. The moratorium will last two years. The downtown area has been the focus of Canada's most intensive urban development boom, including the world's tallest freestanding structure, the 1,805-foot tall Canadian

105. *Supra* note 45.
106. LAND USE PLANNING REPORTS 6 (April 1, 1974).
107. *Id.*
108. TULSA METROPOLITAN AREA PLANNING COMMISSION, VISION 2000: PHASE TWO SUMMARY (January 1974).

National Railway Tower, now under construction. Toronto Mayor David Crombie said the moratorium would give the city more control over how the city changes.[109]

Table II, illustrates the status of existing and proposed controlled growth ordinances found in the United States.[110] Included for research purposes, is the ordinance found in Toronto, Canada.

For attorneys dealing with controlled growth ordinances, one major legal probelm is evident. The fact persists that no two communities' problems, or proposed remedies for them, are ever identical, and rarely come before the same court. Thus, unlike other areas of law where precedents become guidelines, community planning rulings often do not apply beyond the original cases.[111]

TABLE OF EXISTING AND PROPOSED CONTROLLED GROWTH ORDINANCES

City (or County)	*Enacted*	*Proposed*	*Recommended*	*Under Consideration*	*Rejected*	*In Litigation*
Adirondacks Parks, N.Y.	X					
Aspen, Colo.	X					X
Aurora, Colo.			X			
Belle Terre, L.I.N.Y.	X					
Boca Raton, Fla.	X					X
Boulder, Colo.					X	
Broken Arrow, Okla.				X		
Burlington, Vt.	X					
Collier County, Fla.	X					
Colorado Springs, Colo.	X					
Concord Township, Pa.				X		
Craig, Colo.			X			
Dade County, Fla.				X		
Denver, Colo.				X		
East Brunswick, N.J.						X
Eugene, Ore.	X					
Fairfax County, Va.	X					X
Franklin Lakes, N.J.						X
Gilette, Wyo.			X			
Granada Hills, Calif.	X					
Great Salt Meadow, Conn.	X					
Half Moon Bay, Calif.	X					
Hamptons, L.I.N.Y.		X				

109. *Supra* note 68.
110. Prepared by author.
111. Hill, *supra* note 45, July 29, 1974, col. 1-6.

TABLE OF EXISTING AND PROPOSED CONTROLLED GROWTH ORDINANCES

City (or County)	Enacted	Proposed	Recommended	Under Consideration	Rejected	In Litigation
Hanna, Wyo.			X			
Holmdel, N.J.						X
Honolulu, Hawaii				X		
Irvine, Calif.	X					
Key Biscayne, Fla.					X	
Lake Tahoe, Calif.						X
Livermore, Calif.	X					
Livingston, N.J.						X
Los Angeles, Calif.	X					
Loudoun County, Va.	X					
Marin County, Calif.	X					
Martha's Vineyard, Mass.	X					
Martin Counties, Fla.	X					
Miami, Fla.					X	
Minneapolis, Minn.				*X		
Monterey County, Calif.	X					
Montgomery County, Md.	X					
Nantucket Sound Island, Mass.				X		
New Castle, N.Y.					X	
Ocean County, N.J.			X			
Orange County, Calif.	X					
Orion, Mich.	X					
Palm Beach, Fla.	X					
Palo Alto, Calif.	X					
Passaic Basin, N.J.	X					
Petaluma, Calif.	X					
Phoenix, Ariz.		**X				
Pleasanton, Calif.	X					
Portland, Ore.	X					
Prince Georges County, Md.	X					
Ramapo, N.Y.	X					
Rifle, Colo.			X			
Rock Springs, Wyo.				X		
Sanbornton, N.H.	X					
San Diego, Calif.	X					
San Francisco, Calif.	X					
San Jose, Calif.	X					
Southhampton, L.I.N.Y.	X					
St. George, Vt.	***X					
St. Paul, Minn.				****X		
St. Petersburg, Fla.		X				
Tampa, Fla.	X					
Tulsa, Okla.				*****X		
Wayne, N.J.						X
Toronto, Canada	X					

KEY:

Explanation of the column headings and entries:

Enacted: The city (or county) has actually enacted a controlled growth ordinance.
Proposed: Scheduled for introduction in 1974.
Recommended: Following either a private or governmental research study, recommended to the local governing body.
Under Consideration: Under consideration by the local governing body at this time.
Rejected: Actually considered by the local governing body and rejected.
In Litigation: Actually adopted a controlled growth ordinance and at this time the case is in court.

*: Minneapolis, Minn. The local governing body is considering a "Ramapo" type ordinance.

**: This controlled growth ordinance in Phoenix, Arizona, is to be used to increase growth within the city limits.

***: St. George Vt.: This is the first and only city thus far to pass an ordinance authorizing "Transfer of Developmental Rights." To date, however, the ordinance has not been used.

****: St. Paul, Minn. The local governing body is considering a "Ramapo" type ordinance.

*****: Tulsa, Okla. Under consideration in the city of Tulsa is a "Balanced Growth" policy. This plan would not control growth in the legal language of "Ramapo." Balanced growth carries incentives to build and develop North Tulsa.

VIII. CONCLUSION

Mr. Herbert M. Franklin, a Washington lawyer and a consultant on land use and community planning suggests the following factors be considered by a community attempting to regulate growth.

1. The plan should include some commitment for public investment to assimilate growth.
2. A zoning scheme far sighted enough to obviate drastic future alterations should be considered.
3. The community must recognize present and expectable requirements of regional housing and employment.
4. A controlled growth plan should include commercial and industrial development as well as residential development.
5. A controlled growth plan should be built on the premise of local "tax effort" (ratio of total tax payment to household income) in line with that of surrounding communities.[112]

Finally, it is possible to draw the following tentative inferences on the legality of community plans:

1. A community that adopts growth controls simply to preserve the status quo, with no demonstrable social or economic pressures, may well have difficulties in court.
2. A growth control plan that is patently exclusionary of lower-income groups is legally vulnerable.

112. *Id.*

3. Temporary growth controls, such as moratoriums on building permits and sewerage construction, if their need can be demonstrated, have a good chance of standing up in court.
4. A well-thought-out, long-range, phased-growth plan has at least an even chance of being sustained.[113]

Well, Mr. Bosselman, as yet we do not have a proliferation of Ramapo type ordinances enacted throughout the United States.[114] That we do have communities working on some form of "no growth," "stop growth," or "controlled growth" legislation is axiomatic.[115]

Until the current ruling in *Petaluma, Ramapo* stood alone as a guide for control-minded communities. The outcome of *Petaluma* is still uncertain. In the meantime, Mr. Bosselman, you deserve to be complimented. Judge Burke chose not even to acknowledge the *Ramapo* case,[116] but addressed himself instead to the theme of your article, in essence, "that the town of Ramapo can not pass an ordinance to bind the whole world."[117]

POSTSCRIPT

Following submission of this article for publication, the Fairfax County, Virginia, ordinance, discussed supra, was struck down in August, 1974, by the Fairfax County Circuit Court. The cases—M.S. Horne v. Board of Supervisors, No. 31309; Howard v. Board of Supervisors, No. 31343; Stuart Mill Limited Partnership v. Board of Supervisors, No. 31344; Howard, Trustee v. Board of Supervisors, No. 31345; Eakin Properties v. Board of Supervisors, No. 31489; Schlegel v. Board of Supervisors, No. 31516; Simms v. Board of Supervisors, No. 31661; Wills & Plank v. Board of Supervisors, No. 42657; The Richard Group of Washington v. Board of Supervisors, No. 42659; Berger-Berman Builders v. Board of Supervisors, No. 42662; P. Reed Wills, II v. Board of Supervisors, No. 42817; Maywood Building Corporation v. Board of Supervisors, No. 42879; and Berger Corporation v. Board of Supervisors, No. 43088—were consolidated and tried under the name, M.S. Horne, et. al. v. The Board of Supervisors of Fairfax County, At Law No. 31309 and consolidated cases. A de-

113. *Id.*
114. Conclusion of author.
115. Conclusion of author.
116. At the very least, Lord Ellenborough acknowledged, though he refused to recognize, the Tobago court's judgment. Bosselman, *supra* note 1, at 234.
117. Bosselman, *supra* note 1.

tailed discussion of Judge William G. Plummer's opinion, ruling that the emergency ordinance passed in Fairfax County, January 7, 1974, is invalid and void as violative of state law, will follow in Part II of this article.