

Deep Freeze: Thawing Rate of Development Growth Quotas After *Zuckerman v. Town of Hadley*

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I. INTRODUCTION

Upon the half decayed veranda of a small frame house that stood near the edge of a ravine near the town of Winesburg, Ohio, a fat little old man walked nervously up and down. Across a long field that had been seeded for clover but that had produced only a dense crop of yellow mustard weeds, he could see the public highway along which went a wagon filled with berry pickers returning from the fields.¹

Bulldozers would one day raze the small frame house and the hollow din of traffic would overwhelm the fields of mustard weeds.²

Towns like Sherwood Anderson's Winesburg dot the American landscape. Although Anderson never mentioned the urbanization of his quaint hometown in his collection of short stories, urbanization is inevitable.³ Some communities, cognizant of the price of

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1. SHERWOOD ANDERSON, *WINESBURG, OHIO* 7 (1919).

2. The *Boston Globe* described a similar history in the town of Hadley:

Two hundred years ago, the rich earth that nourished an unusual kind of grain transformed this rural town into the broom-making capital of the nation. Last century, Hadley was once heralded as the asparagus capital of the world.

But in more recent years, the town has also nourished Pizza Hut, Wal-Mart, and Target along a busy strip of Route 9. . . .

. . . [B]uilding permits increased fivefold during the 1980s. . . .

Kathleen Burge, *Hadley Law on Building Goes to SJC: Measures to Temper Development at Issue*, *BOSTON GLOBE*, Feb. 29, 2004, at B1.

3. "Urbanize: to cause (as a rural area) to take on urban characteristics." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2520 (Philip Babcock Gove ed., Merriam-Webster Inc. 1993) (1961).

urbanization, combat expansion by enacting controls referred to collectively as growth management.⁴ For nearly thirty years, the Ninth Circuit's decision in *Construction Industry Ass'n v. City of Petaluma*⁵ stood for the proposition that growth management in the form of rate of development quotas passes constitutional muster.⁶ But, on August 24, 2004, a new case emerged. In *Zuckerman v. Town of Hadley*,⁷ the Supreme Judicial Court of Massachusetts held the town of Hadley's growth management quota unconstitutional as a violation of substantive due process.⁸ Although factual distinctions help explain these divergent decisions,⁹ the *Zuckerman* opinion is useful in illuminating the differences between state and federal courts' approaches to substantive due process in land use decisions.

A. Growth Management

From a heritage of colonization, America has grown to be a nation of property owners.¹⁰ Centuries ago, settlers swarmed the countryside, divided land, formed communities, and planted the seeds of urban development.¹¹ After generations of germination, the

4. Growth management is "a dynamic process in which governments anticipate and seek to accommodate community development in ways that balance competing land use goals and coordinate local with regional interests." DOUGLAS R. PORTER, *MANAGING GROWTH IN AMERICA'S COMMUNITIES* 10 (1997).

When growth is slow, many communities adopt regulations aimed at encouraging development. Douglas R. Porter, *Reinventing Growth Management for the 21st Century*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 705, 705 (1999). Public actions increase infrastructure and promote real estate development. *Id.* A community typically enacts restrictive growth controls only after it has been threatened by impending overcrowding and insufficient public services. *Id.* A sudden aversion to new residents or any unwanted element in a community is related to the "Not in My Back Yard" (NIMBY) phenomenon. See DENIS J. BRION, *ESSENTIAL INDUSTRY AND THE NIMBY PHENOMENON* (1991).

5. 522 F.2d 897 (9th Cir. 1975).

6. See DANIEL R. MANDELKER, *LAND USE LAW* § 10.04, at 426 (4th ed. 1997).

7. 813 N.E.2d 843 (Mass. 2004).

8. *Id.* at 849.

9. See *infra* note 165 and accompanying text.

10. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 53 (1985). "The idea that land ownership was a mark of status, as well as a kind of sublime insurance against ill fortune, was brought to the New World as part of the cultural baggage of the European settlers." *Id.*

11. *Id.* at 54. "The American dream was in large part land." *Id.*

product of these seeds is now fast overrunning rural America. With dreams of property ownership, Americans are hungry for land.¹²

The costs of urbanization, however, temper the benefits of property ownership. Such costs are varied and substantial.¹³ Rapid urban expansion increases pressure on local governments to provide public facilities, such as water and sewer service,¹⁴ leads to overcrowding in schools, and eliminates the “rural” character of communities.¹⁵ Moreover, urbanization has far-reaching ecological effects.¹⁶ The solution to these problems, many argue, is growth management.

12.

[N]o amount of urban gentrification or rural revival can obscure the fact that suburbanization has been the outstanding residential characteristic of American life. The process may slow in the next half-century as rising energy costs encourage higher population densities and less sprawl, and as “urban” problems of crime and obsolescence become typical of the inevitably aging suburbs. But the national cultural preference for privacy, for the detached home on its own plot, will not easily be eroded.

Id. at 304.

13. Costs of urbanization include: “traffic congestion, the sacrifice of community character, loss of farmland and open space, polluted water and air, deferred costs for building and maintaining highways, schools, and public utilities, increases in local property taxes, and disputes among the state, counties, and municipalities on land use decisions.” SAMUEL M. HAMILL, JR. ET AL., *THE GROWTH MANAGEMENT HANDBOOK: A PRIMER FOR CITIZEN AND GOVERNMENT PLANNERS* 4 (1989).

14. For an overview of growth regulation dependent on water infrastructure, see Adam Strachan, Note, *Concurrency Laws: Water as a Land-Use Regulation*, 21 J. LAND RESOURCES & ENVTL. L. 435 (2001).

15. See, e.g., *Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956, 961–62 (1st Cir. 1972) (upholding a minimum lot size of six acres to maintain town’s rural character); TIMOTHY BEATLEY & KRISTY MANNING, *THE ECOLOGY OF PLACE: PLANNING FOR ENVIRONMENT, ECONOMY AND COMMUNITY* 10 (1997) (noting that expansive development encourages expensive construction of basic community infrastructure, such as roads and schools).

16. Ecologists argue:

Urbanization, in the traditional view, destroys natural phenomena and processes, demanding inputs . . . drawn from elsewhere to replace and augment local resources. The inadequate and impaired “carrying capacity” of the urbanized region is offset by the plundering of nonurban hinterlands. . . . [The ecological impacts of urbanization] extend to surrounding agricultural lands, to distant rivers and their watersheds, to lands that provide timber, crops, grazing, water, and recreation, to sources of minerals, to the oceans where wastes are dumped, and to the atmosphere, which is increasingly altered by greenhouse gases and chlorofluorocarbons (CFCS) that emanate from urban sources

Growth management arose from a disconnect between zoning and planning.¹⁷ Although efforts have been made to synchronize zoning with the purposes enunciated in land use plans, perfect coordination is impossible.¹⁸ This disjunction may be attributed in part to the institutional organization of local government. While planning is a governmental function performed by experts, zoning is left to citizen zoning boards, with final authority usually vested in elected officials.¹⁹ Further, whereas planning professionals project years into the future, zoning boards, perhaps pressured by politics, are often shorter-sighted.²⁰ As a result, zoning boards often designate land selected by planners for a particular use in the future for a different use today.²¹

In addition, private development and the zoning process occur at different rates.²² While zoning decisions are based on the land's physical attributes, property ownership is an integral element of the timing of development.²³ Because land values will naturally ripen at different times, development often occurs in a scattered fashion.²⁴ Planners and zoning boards cannot anticipate patterns of private development, and therefore, cannot control for them.²⁵ These

THE ECOLOGICAL CITY: PRESERVING AND RESTORING URBAN BIODIVERSITY 11 (Rutherford H. Platt et al. eds., 1994).

17. JAMES A. CLAPP, GROWTH MANAGEMENT PRACTICES AND ISSUES: A REPORT PREPARED FOR THE ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT 13 (1975). Zoning is "the division of land into districts having different regulations." EDWARD M. BASSET, ZONING: THE LAWS, ADMINISTRATION, AND COURT DECISIONS DURING THE FIRST TWENTY YEARS 9 (1940), *quoted in* DANIEL R. MANDELKER ET AL., PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 193 (4th ed. 1995). The act of planning is active problem solving intended to dictate private land use decisions, focusing primarily on future land use. MANDELKER, *supra*, at 19–20.

18. MANDELKER, *supra* note 6, § 10.01, at 421.

19. CLAPP, *supra* note 17, at 13.

20. *Id.* at 14.

21. *Id.* New York's revitalization of industrial districts serves as an example. *See* Michael Kwartler, *Regulating the Good You Can't Think of*, 3 URB. DESIGN INT'L 13 (1998). Market forces shifted the planned use to reflect the property's highest value use. But in the early 1980s, New York's SoHo district was re-zoned from industrial to residential after citizens petitioned for the change. *Id.*

22. CLAPP, *supra* note 17, at 16–17.

23. *Id.* at 16.

24. *Id.* at 17.

25. *Id.*

inefficiencies make traditional zoning an ineffective tool for growth management.²⁶

Growth management programs remedy these problems by guiding the rate of growth in a community.²⁷ Growth management is a “conscious government program intended to influence the rate, amount, type, location, and/or quality of future development within a local jurisdiction.”²⁸ There are many forms of growth management. For example, a community may match zoning with a comprehensive plan for growth, control the timing and sequencing of development by conditioning building on the provision of public services,²⁹ or adopt annual quotas for development.³⁰ Growth management provisions can also be enacted locally or regionally. Eleven states have enacted state growth management policies that instruct local governments to plan with an eye toward the state’s comprehensive plan.³¹ Ultimately, these techniques, local or statewide, have all faced legal challenge.

26. MANDELKER, *supra* note 6, § 10.01, at 421.

27. *Id.*

28. DAVID R. GODSCHALK ET AL., CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT 8 (1977).

29. *See, e.g.,* Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291 (N.Y. 1972), *appeal dismissed*, 409 U.S. 1003 (1972) (upholding a system requiring a designated number of points based on availability of public services to issue building permit).

30. MANDELKER, *supra* note 6, § 10.01, at 422.

31. Porter, *Reinventing Growth Management*, *supra* note 4, at 719–20 n.83. The states are: Delaware, Florida, Georgia, Maine, Maryland, New Jersey, Oregon, Rhode Island, Tennessee, Vermont, and Washington. *Id.*

A discussion of growth management is incomplete without mention of state-wide growth controls. At times more effective in theory than practice, state-wide growth management targets urban sprawl at a macro-level. *Id.* at 720–21. Since inception in the early 1970s, comprehensive state plans have been difficult to implement and execute due to a failure of communication and cooperation between local governments and state planners. *Id.* Further, local politics often obscure a municipality’s well-intentioned adherence to state planning mandates. *Id.* at 722. Local communities must be dedicated to and invested in the success of the state-wide plan. *Id.* at 721.

Florida offers an example of a state plagued by a number of setbacks in state-wide growth management. “[M]ost of Florida’s future growth will be accommodated through sprawling, low density development on raw land, with jobs and housing moving away from existing urban centers, unless decisive action is taken . . . to reverse this trend.” *Id.* (quoting THE GOVERNOR’S TASK FORCE ON URBAN GROWTH PATTERNS, FINAL REPORT 3 (1989)). For more information on Florida’s state-wide growth management plan, see Mary Dawson, *The Best Laid Plans: The Rise and Fall of Growth Management in Florida*, 11 J. LAND USE & ENVTL. L. 325 (1996).

Growth management gives rise to a number of possible aggrieved parties.³² Local residents, whose personal rights might be affected by growth management, are typical plaintiffs.³³ In addition, developers might oppose growth management because construction limits not only make construction opportunities rare, but also create an artificial scarcity of land.³⁴ Low income citizens, or groups that protect their interests, might object to a potential decrease in housing construction, increase in housing costs, and subsequent exclusion of the poor from communities.³⁵ Finally, neighboring towns, though directly uninvolved in growth management, might nevertheless feel its effect. Towns adjacent to a growth management community are often forced to absorb the excess population and construction created by restricted nearby development.³⁶

Aggrieved parties often challenge growth controls as unconstitutional. A plaintiff may claim that a local community's growth management provision violates his or her substantive due process right under the United States Constitution. This right is protected against federal intrusion by the Fifth Amendment, and is protected against state intrusion by the Fourteenth Amendment.³⁷ The Fourteenth Amendment's Due Process Clause reads, "nor shall any State deprive any person of life, liberty, or property, without due process of law."³⁸ A substantive due process violation exists "if a statute or ordinance regulates something beyond the delegated powers, is arbitrary or capricious, or is lacking in ascertainable

32. GODSCHALK, *supra* note 28, at 14.

33. *Id.*

34. *Id.* at 13–14. The town of Hadley has seen a marked increase in property values since enacting a growth management scheme. This result is often a double-edged sword. While controlling expansion in Hadley, growth management schemes have inflated the price of single-family homes from a median of \$177,000 in 2002, to a median of \$230,000 in 2004. Burge, *supra* note 2, at B1.

35. GODSCHALK, *supra* note 28, at 14; *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443–44 (1968) (holding that private persons are forbidden by the Thirteenth Amendment from racially discriminating in the sale of houses); United States v. City of Black Jack, 508 F.2d 1179, 1188 (8th Cir. 1974) (invalidating the prohibition of multi-family housing under Title VIII of the 1968 Civil Rights Act); S. Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 734 (N.J. 1975) (*Mount Laurel I*) (invalidating zoning that excluded low and moderate income families), *aff'd* 456 A.2d 390, 410 (N.J. 1983) (*Mount Laurel II*).

36. GODSCHALK, *supra* note 28, at 14.

37. *Id.* at 43.

38. U.S. CONST. amend. XIV, § 1.

standards or a statement of reasons.”³⁹ Because most state constitutions mirror the U.S. Constitution’s Due Process Clause, violations of state due process rights follow similar precepts.⁴⁰ This Note focuses on such challenges to annual growth management development quotas in the context of *Zuckerman v. Town of Hadley*.⁴¹ In examining the differences between *Zuckerman* and the seminal case of *Petaluma*, this Note aims to illuminate how the considerations of a state court differ from those of a federal court in a substantive due process challenge.

Part II of this Note first outlines the classic judicial analysis used to review land-use regulations adopted under the police power. Next, it offers an example of how courts apply this analysis in growth management litigation generally, and in growth management quota litigation from *Petaluma* to *Zuckerman* more specifically. Part III provides an overview of the considerations impacting the *Zuckerman* court, and how the *Zuckerman* opinion might affect future courts and local communities. Part IV offers closing remarks.

II. HISTORY

A. Euclid Analysis

Municipalities can regulate land use under the state’s police power, as provided by state enabling legislation, or under state home rule provisions.⁴² The Supreme Court announced the standard for judicial review of regulations based on the state’s police power in *Village of Euclid v. Ambler Realty Co.*⁴³ In deciding *Euclid*, the Supreme Court indicated its reluctance to review the local community’s use of the police power in land use actions.⁴⁴ The task of ruling on local use of the police power has therefore fallen on

39. GODSCHALK, *supra* note 28, at 43–44.

40. *Id.* at 43.

41. 813 N.E.2d 843 (Mass. 2004).

42. GODSCHALK, *supra* note 28, at 45.

43. *Euclid*, 272 U.S. 365, 397 (1926); GODSCHALK, *supra* note 28, at 45.

44. *Euclid*, 272 U.S. at 397.

lower federal courts or state courts.⁴⁵ Nevertheless, *Euclid* provides the classic analysis to be applied by future courts.

In *Euclid*, a landowner challenged an ordinance enacted to establish zoning districts, claiming deprivation of liberty and property without due process of law.⁴⁶ The Court indicated a general presumption in favor of validity; an ordinance is assumed to be within the police power unless rebutted by the plaintiff.⁴⁷ Moreover, the Court exhibited deference to the legislature, noting that questions of legislative policy are beyond its purview.⁴⁸

To overcome the presumption of a regulation's validity, a plaintiff must surmount a high threshold. It is not enough for a plaintiff to prove that another regulation would be more reasonable; instead, a plaintiff must prove that the regulation is clearly arbitrary or unreasonable.⁴⁹ Courts, however, vary in their definitions of what qualifies as clearly arbitrary or unreasonable.⁵⁰

45. GODSCHALK, *supra* note 28, at 45. In addition, in *Graham v. Connor*, 490 U.S. 386, 395 (1989), the Supreme Court suggested that a plaintiff should not argue a substantive due process claim if another constitutional claim is available. This limit has barred many suits in federal courts in circuits adopting this rule for land use conflicts. DANIEL R. MANDELKER, LAND USE LAW § 2.39, at 2–46 (5th ed. 2003). For a general overview of circuits adopting this rule, see *id.* § 2.40, at 2–47 n.3 (citing *S. County Sand & Gravel Co. v. Town of South Kingstown*, 160 F.3d 834, 838 (1st Cir. 1998); *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997); *Villas of Lake Jackson v. Leon County*, 121 F.3d 610, 615 (11th Cir. 1997); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 407 (9th Cir. 1996); *Bickerstaff Clay Prods. Co. v. Harris County*, 89 F.3d 1481, 1490 (11th Cir. 1996) (finding that the substantive due process police power limitation is subsumed within the takings clause); *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991) (non-zoning case)).

46. *Euclid*, 272 U.S. at 384.

47. GODSCHALK, *supra* note 28, at 45.

48. *Euclid*, 272 U.S. at 388. “If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.” *Id.* (citing *Radice v. New York*, 264 U.S. 292, 294 (1924)). The Court further commented that if a legislative body deemed a community to have set forth “a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances.” *Id.* at 393 (quoting *State ex rel. Civello v. City of New Orleans*, 97 So. 440, 444 (La. 1923)).

49. GODSCHALK, *supra* note 28, at 46. “This burden of proof might be met if, for example, it could be shown that the regulation applied only to one parcel of land, had an exclusionary purpose, or put exceedingly heavy demands on landowners.” *Id.*

50. *Id.* Some federal courts require an arbitrary or unreasonable regulation to “‘shock[] the conscience’ of the court.” MANDELKER, *supra* note 45, § 2.39, at 2–46. For an overview of the standards used by the circuits see generally *id.* § 2.39, 2–46 n.5 (citing *Natale v. Town of Ridgefield*, 170 F.3d 258, 259 (2d Cir. 1999) (“outrageously arbitrary so as to constitute a gross abuse of governmental authority”); *Richardson v. City & County of Honolulu*, 124 F.3d 1150

Once a plaintiff proves that a municipal regulation is unreasonable, the court applies a low threshold rational basis test.⁵¹ This test reflects the court's continued deference for legislative determinations. A rational basis may be demonstrated by proving: that the purpose of the regulation is "a legitimate objective of the police power," that the means of the regulation are necessary to accomplish the regulation's end, and that "the means are not unduly oppressive upon the individual."⁵²

A legitimate end is classically one that relates to the health, safety or general welfare of a community.⁵³ The regulation's means are valid if they are tailored to fit the regulation's end, and exhibit a reasonable relation.⁵⁴ However, even if a court finds that a regulation's means and ends are valid, it may nevertheless deem a regulation unconstitutional if it is unduly oppressive to the individual.⁵⁵ In *Euclid*, the Court held that zoning practices separating commercial and residential districts reasonably serve the goals of furthering the public health and safety of a community, and are, therefore, constitutional.⁵⁶

B. Euclid Analysis Applied

*Golden v. Planning Board of Ramapo*⁵⁷ a leading case upholding growth management, represents an application of the *Euclid* analysis

(9th Cir. 1997) (arbitrary and irrational); *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592 (3d Cir. 1995); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992) (something more than arbitrary and capricious); *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992) (reviewing standards applied in the federal circuits); *Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989) (pretextual, arbitrary and capricious, and without rational basis)).

51. GODSCHALK, *supra* note 28, at 46.

52. *Id.*

53. *Id.* at 46–47.

54. *Id.* at 47; *see, e.g., Nebbia v. New York*, 291 U.S. 502, 525 (1934). The court will not impose its own judgment; "wisdom and propriety" are matters left to legislative bodies. *S.C. State Highway Dep't. v. Barnwell Bros., Inc.*, 303 U.S. 177, 190–91 (1938).

55. GODSCHALK, *supra* note 28, at 48. This is a rare occurrence reserved for particularly egregious local actions. *Id.*

56. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 396–97 (1926). "[S]egregation of industries, commercial pursuits and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety and general welfare of the community." *Id.* at 392 (quoting *City of Aurora v. Burns*, 149 N.E.2d 784, 788 (Ill. 1925)).

57. 285 N.E.2d 291 (N.Y. 1972), *appeal dismissed*, 409 U.S. 1003 (1972).

in growth control litigation. The town of Ramapo is located in Rockland County near the Hudson River in New York.⁵⁸ Originally one of many rural communities dotting the New York countryside, Ramapo is now a twenty-five minute commute from New York City, thanks to the construction of the Tappan Zee bridge in 1955.⁵⁹ During the early 1950s and 60s, the town's population grew considerably.⁶⁰

Because it struggled to provide increased municipal services to its growing population, Ramapo developed a master plan.⁶¹ In doing so, it conducted a study of "existing land uses, public facilities, transportation, industry and commerce, housing needs and projected population trends."⁶² Following the adoption of a comprehensive plan, Ramapo adopted two capital improvement plans that forecasted the location and sequence of capital improvements for a total period of eighteen years.⁶³ Ramapo later adopted a series of zoning amendments intended to prevent premature subdivision and urban sprawl.⁶⁴ The court noted that "[r]esidential development is to proceed according to the provision of adequate municipal facilities and services, with the assurance that any concomitant restraint upon property use is to be of a 'temporary' nature and that other private uses, including the construction of individual housing, are authorized."⁶⁵

Ramapo's zoning amendment created a new zoning category designated for "Residential Development Use."⁶⁶ However, a developer had to acquire a special permit before he or she could build

58. CLAPP, *supra* note 17, at 37.

59. *Id.*

60. *Ramapo*, 285 N.E.2d at 294 n.1. Ramapo's population ballooned a towering 130.8% in unincorporated areas. *Id.*

61. *Id.* at 294.

62. *Id.*

63. *Id.* at 295. "The two plans, covering a period of 18 years, detail the capital improvements projected for maximum development and conform to the specifications set forth in the master plan . . ." *Id.*

64. *Id.* "The 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 progressing availability and capacity of public facilities." *Id.* at 296.

65. *Id.* at 295.

66. *Id.* The concept of "'Residential Development Use' is defined as 'The erection or construction of dwellings or any vacant plots, lots or parcels of land.'" *Id.*

for such a use.⁶⁷ Permit allocation depended on the presence of “five essential facilities or services: . . . (1) public sanitary sewers or approved substitutes; (2) drainage facilities; (3) improved public parks or recreation facilities, including public schools; (4) State, county or town roads—major, secondary or collector; and, (5) firehouses.”⁶⁸ Ramapo awarded permits only to proposed developments scoring high enough on each of these factors to attain a total score of fifteen points or more.⁶⁹ Thus, permit award depended on the availability of municipal improvements for a prospective plat.⁷⁰

The zoning amendment further outlined remedial provisions under which the board could issue “special permits vesting a present right to proceed with residential development in such year as the development meets the required point minimum, but in no event later than the final year of the 18-year capital plan.”⁷¹ In addition, a developer could expedite permit approval by supplying his or her own capital improvements to raise the development points of the plat to the required number.⁷²

Golden, who sought plat approval but was denied because he failed to apply for the requisite special permit, brought suit challenging the facial validity of Ramapo’s zoning amendment.⁷³ The court recognized that while Ramapo’s goals were praiseworthy, there were questions regarding the suitability of the means used to achieve the desired end.⁷⁴

The *Ramapo* court considered whether the town possessed the legislative delegation to enact its zoning amendment, and, citing *Euclid*, held that it did.⁷⁵ “[T]he matrix of land use restrictions, common to each of the enumerated powers and sanctioned goals, [is]

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 296.

72. *Id.*

73. *Id.* at 294.

74. *Id.* at 296.

75. *Id.* at 297 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389–90 (1926)).

a necessary concomitant to the municipalities' recognized authority to determine the lines along which local development shall proceed, though it may divert it from its natural course"⁷⁶ Further, the court followed *Euclid* by stating that the distinction between a permissible and impermissible restriction depends upon the restriction's purpose and its impact on the community and the public interest.⁷⁷ In its analysis, the court also noted its deference to the legislature.⁷⁸

Ultimately, the *Ramapo* court held that there was a rational basis for Ramapo's zoning amendment.⁷⁹ The purpose of Ramapo's zoning amendment was not exclusion, but rather timed growth through which a balanced community using land efficiently could thrive.⁸⁰ Moreover, the court acknowledged that Ramapo's zoning amendment was reasonably intended to prevent the transformation of a successful community into a blighted ghetto.⁸¹ Because Ramapo's existing resources were inadequate to furnish essential services and facilities, as required by Ramapo's substantial population increase, the court held that there was a rational basis for Ramapo's zoning amendment.⁸²

76. *Id.*

77. *Id.* at 302.

78. *Id.* at 301. "Implicit in such a philosophy of judicial self-restraint is the growing awareness that matters of land use and development are peculiarly within the expertise of students of city and suburban planning, and thus well within the legislative prerogative"
Id.

79. *Id.* at 304–05.

[W]here it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, there is a rational basis for 'phased growth' and hence, the challenged ordinance is not violative of the Federal and State Constitutions.

Id.

80. *Id.* at 302. "[T]he 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." *Id.*

81. *Id.*

82. *Id.* at 304–05. It is important to note that an integral factor of the *Ramapo* decision was Ramapo's extensive planning prior to adopting its zoning amendment; this enabled the court to easily find a rational basis. *Id.* at 303.

C. Euclid Analysis in Quota Litigation

While *Ramapo* is a leading case upholding the constitutionality of growth management generally, *Construction Industry Ass'n of Sonoma County v. City of Petaluma*⁸³ is a leading case upholding the constitutionality of quotas specifically as a tool for growth management. The city of Petaluma is located in Sonoma County, California, forty miles north of San Francisco.⁸⁴ Over time, the Bay area housing market expanded to include Petaluma as drivers became more willing to commute longer distances.⁸⁵ Once it became part of the Bay area, Petaluma experienced growth estimated at almost twenty-five percent over two years and a sizeable increase in housing construction.⁸⁶

In response, Petaluma temporarily froze development in 1971 to give the City Council and planners an opportunity to evaluate the situation and develop appropriate short- and long-term strategies.⁸⁷ The city subsequently enacted the "Petaluma Plan" to remedy the effects of population growth.⁸⁸ The Petaluma Plan applied only to housing units that were located in developments of five or more units.⁸⁹ The plan called for an annual development quota of 500 dwelling units per year, and purported to last five years.⁹⁰ Further, a

83. 522 F.2d 897 (9th Cir. 1975).

84. *Id.* at 900.

85. *Id.*

86. *Id.* From 1964 to 1971, the number of completed housing units were: 1964—270; 1965—440; 1966—321; 1967—234; 1968—379; 1969—358; 1970—581; and 1971—891. *Id.*

87. *Id.* The Council made the following findings:

[F]rom 1960–1970 housing had been in almost unvarying 6000 square-foot lots laid out in regular grid patterns; . . . there was a density of approximately 4.5 housing units per acre in the single-family home areas; . . . during 1960–1970, 88 per cent of housing permits issued were for single-family detached homes; . . . in 1970, 83 per cent of Petaluma's housing was single-family dwellings; . . . the bulk of recent development (largely single-family homes) occurred in the eastern portion of the City, causing a large deficiency in moderately priced multi-family and apartment units on the east side.

Id.

88. *Id.* at 901.

89. *Id.* The plan did not affect single-family residential homes.

90. *Id.*

“greenbelt” was placed around Petaluma, constricting urban growth to within the designated area.⁹¹

In addition, the Petaluma Plan contained a point system similar to the *Ramapo* system.⁹² The Residential Development Control System provided criteria for the award of the 500 total yearly permits.⁹³ As in *Ramapo*, point allocation was complex. Builders could obtain points by complying with Petaluma’s comprehensive and environmental plans, by exhibiting good architecture, and by providing low income housing.⁹⁴ Also, permits were to be divided between the eastern and western portions of the city, with a percentage of the annual quota designated for low- and moderate-income housing.⁹⁵

Petaluma’s goal in enacting its growth management plan was to ensure its rural nature.⁹⁶ At trial, the district court evaluated the anticipated effect of the plan. Experts testified that if the plan were adopted, there would be a substantial impact on the housing market.⁹⁷ Under the plan, the region surrounding Petaluma would likely experience a housing shortage, an effect that would be felt most acutely by low-income families requiring multi-family dwellings.⁹⁸ However, with regard only to Petaluma, there was no evidence that adoption of the plan would deteriorate the quality or choice of housing for low-income families.⁹⁹

Two landowners and the Construction Industry Association of Sonoma County filed suit claiming that the Petaluma Plan was unconstitutional because it was arbitrary and therefore a violation of their substantive due process rights.¹⁰⁰ In reviewing the plan, the *Petaluma* court noted that even though a lower court had found that

91. *Id.* But, in a footnote, the court commented that the district court had found that Petaluma made official attempts to continue the plan past the five year mark. *Id.* n.1.

92. 285 N.E.2d 291 (N.Y. 1972), *appeal dismissed*, 409 U.S. 1003 (1972).

93. *Petaluma*, 522 F.2d at 901.

94. *Id.*

95. *Id.*

96. *Id.* at 901–02. The stated purpose of the Petaluma plan was to “protect [Petaluma’s] small town character and surrounding open space” and to ensure that development occurred in an orderly fashion. *Id.*

97. *Id.* at 902.

98. *Id.* “For the decade 1970 to 1980, the shortfall in needed housing in the region would be about 105,000 units (or 25 per cent of the units needed).” *Id.*

99. *Id.*

100. *Id.* at 905.

the plan had an exclusionary purpose, this was not the end of the examination.¹⁰¹ The court announced that it needed to go further by engaging in rational basis analysis.¹⁰²

First, the court evaluated whether the purpose of the Petaluma Plan fell within the police power.¹⁰³ Recognizing the inclusive nature of the police power, the court noted that it should be interpreted broadly.¹⁰⁴ In determining whether Petaluma's interest in preserving its town character and avoiding growth fell within the definition of public welfare, the court examined *Village of Belle Terre v. Boraas*¹⁰⁵ and *Ybarra v. City of Los Altos Hills*,¹⁰⁶ two earlier cases in which the court upheld more restrictive zoning regulations.

At issue in *Village of Belle Terre v. Boraas* was a zoning ordinance limiting the occupancy of single family dwellings to traditional families or groups of not more than two unrelated persons.¹⁰⁷ Further, Belle Terre's ordinance prohibited the construction or conversion of any structure for any use other than a single family home, thereby slowing growth.¹⁰⁸ The owners of a boarding house occupied by six unrelated college students, who had been cited for violating the ordinance, brought suit asserting that the ordinance was unconstitutional.¹⁰⁹ The Supreme Court, following *Euclid*, held the ordinance valid, commenting that the expansive police power can be used to promote quiet enjoyment, as well as to prevent public harm.¹¹⁰ Even the dissent recognized the breadth of the local government's police power.¹¹¹

101. *Id.* at 906.

102. *Id.* “[I]n reviewing the reasonableness of a zoning ordinance, our inquiry does not terminate with a finding that it is for an exclusionary purpose. We must determine further whether the *exclusion* bears any rational relationship to a *legitimate state interest*.” *Id.* (footnote omitted).

103. *Id.*

104. *Id.* The police power should not be limited to the “regulation of noxious activities or dangerous structures.” *Id.*

105. 416 U.S. 1 (1974).

106. 503 F.2d 250 (9th Cir. 1974).

107. *Belle Terre*, 416 U.S. at 2. The ordinance defined a family as one or more persons related by blood, adoption or marriage living as a single unit. *Id.* Two people living together, though not related by blood, were also deemed a family. *Id.*

108. *Id.*

109. *Id.* at 2–3.

110. *Id.* at 8–9. The police power is “ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”

At issue in *Ybarra v. City of Los Altos Hills*¹¹² was a zoning ordinance establishing a minimum residential lot size of one acre and a maximum occupancy of one dwelling unit per lot, effectively controlling population and preventing low-income individuals from living within the city.¹¹³ An unincorporated association of Mexican-Americans challenged the constitutionality of this ordinance, alleging a violation of equal protection.¹¹⁴ Following the Supreme Court's decision in *Belle Terre*, the Ninth Circuit held that the *Ybarra* ordinance bore a rational relationship to a legitimate governmental interest of maintaining the community's pastoral character.¹¹⁵

Relying on *Belle Terre* and *Ybarra*, the *Petaluma* court held that the Petaluma Plan was not arbitrary or unreasonable.¹¹⁶ The fact that the Petaluma Plan functioned to Petaluma's advantage did not remove it from the police power.¹¹⁷ Further, the definition of public welfare, announced in *Belle Terre* and *Ybarra*, was sufficiently broad to encompass Petaluma's desire to protect its rural character, limit population density, and ensure slow, orderly growth.¹¹⁸

In addition, the court gave deference to the legislature.¹¹⁹ Because the Petaluma Plan was not unconstitutional, the court stressed that the forum by which residents should seek recourse was the legislature.¹²⁰ As the legislature represents the public, it is in the legislature's

Id. at 9.

111. In his dissent, Justice Marshall identified the expansive nature of the police power, noting that "[t]he police power which provides the justification for zoning is not narrowly confined. And, it is appropriate that we afford zoning authorities considerable latitude in choosing the means by which to implement such purposes." *Id.* at 13-14 (Marshall, J., dissenting) (citation omitted).

112. 503 F.2d 250 (9th Cir. 1974).

113. *Id.* at 252.

114. *Id.*

115. *Id.* at 254 (holding the regulation "rationally related to preserving the town's rural environment," a legitimate goal within the police power); see also *Steel Hill Dev., Inc. v. Town of Sanbornton*, 392 F. Supp. 1144, 1152 (D.N.H. 1974) (considering all factors regarding the reasonableness of an ordinance).

116. 522 F.2d 897, 908 (9th Cir. 1975).

117. *Id.* "[T]he *due process* rights of builders and landowners are [not necessarily] violated merely because a local entity exercises in its own self-interest the police power lawfully delegated to it by the state." *Id.*

118. *Id.* at 908-09.

119. *Id.* at 908.

120. *Id.*

domain to adjust a system to best serve the general welfare of a region.¹²¹

Once the court held that the Petaluma Plan's objective was within the police power, the court further determined that a rational relationship existed between the means employed and Petaluma's desired end of rural preservation.¹²² The Petaluma Plan was, therefore, constitutional.

D. The Rise of Zuckerman

Federal courts and the Supreme court have given great deference to legislative determinations in deciding whether a land use regulation is constitutional. A federal court's distance from the controversy and from the decision-making itself underscores the need for such deference. State courts, less removed, often understandably give less deference to legislatures. *Zuckerman v. Town of Hadley*,¹²³ a recent decision of the Supreme Judicial Court of Massachusetts, demonstrates this phenomenon.

Idyllic in nature, pastoral and quaint, Hadley, Massachusetts, typifies small-town America.¹²⁴ In 1988, experiencing a sudden influx of population, the town enacted a rate of development amendment to its zoning bylaws to control future growth.¹²⁵ The avowed purpose of this amendment was twofold: to maintain

121. *Id.* "[T]he federal court is not a super zoning board and should not be called on to mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests." *Id.*

122. *Id.*

123. 813 N.E.2d 843 (Mass. 2004).

124. The town of Hadley is characterized by "countless relics of the past, from colonial houses and cemeteries to museums containing artifacts from days gone by." Town of Hadley, Massachusetts, <http://www.hadleyma.org/> (last visited Apr. 9, 2006). Urbanization is transforming the town.

Hadley, with about 4,700 residents, is a town with two faces. The busy stretch along Route 9, from Interstate 91 to the Amherst border, is packed with retail and restaurant chains. But another section of town, resting beneath the ragged Holyoke Range, is a world away, sparsely populated and rural.

Burge, *supra* note 2, at B1. Hadley's rapid growth in the 1980s created this split personality. For example, in 1980, the town issued an average of ten building permits annually. *Id.* In 1987, the town issued fifty permits. *Id.* Further, in 1987, a developer unveiled plans for a residential subdivision of 255 homes, the largest development ever proposed in Hadley. *Id.*

125. *Zuckerman*, 813 N.E.2d at 845.

Hadley's small-town character and to enable the organized provision of public services in the future.¹²⁶ The town of Hadley was "dedicated to keep[ing its] distinction as the most agricultural community in the Commonwealth."¹²⁷

Hadley's rate of growth amendment restricted the number of building permits to be issued each year for the development of lots held in common ownership.¹²⁸ The amendment required development to be spread over a period of up to ten years, in effect instituting a quota system.¹²⁹ Though controversial, the bylaw amendment represented only the last step in a lengthy process in Hadley of dealing with growth.¹³⁰ Prior to adopting its zoning amendment, Hadley had engaged in a number of studies to determine how best to enact growth management in the future.¹³¹ However, with no shortage of research and recommendations, Hadley repeatedly failed to adopt many of the solutions suggested by prior studies, opting instead for its bylaw amendment.¹³²

126. *Id.* Hadley described the purpose of its rate of growth bylaw as "preserving the town's agricultural land and character, and providing for a 'phasing-in' of population growth, thereby allowing time for the town to plan and to expand its public services." *Id.*

127. *Id.* at 846 n.3.

128. *Id.* at 845.

129. *Id.*

The relevant portions of the rate of development amendment . . . provide:

"15.0.1. Building permits for the construction of dwellings on lots held in common ownership on the effective date of this provision shall not be granted at a rate per annum greater than as permitted by the following schedule

"15.1.1. For such lots containing a total area of land sufficient to provide more than ten dwellings at the maximum density permitted for the District in which such lots are located: one tenth of the number of dwellings permitted to be constructed or placed on said area of land based on said maximum permitted density.

"15.2.1. For such lots containing a total area of land insufficient to provide more than ten dwellings at the maximum density permitted under these Bylaws for the District in which such lots are located: one dwelling."

Id. at 845 n.2.

130. *Id.* at 846.

131. *Id.* These studies recommended adopting a comprehensive plan, reorganizing the town's planning process, modifying waterfront zoning, enhancing flood protection, providing incentives for protecting farmland, and limiting water and sewer expansion, among other recommendations. *Id.* at 846 n.7.

132. *Id.* at 846-47. "[Hadley] has not prepared or adopted a comprehensive land use plan or a community open space bylaw . . . ; it has not effected a major overhaul of its zoning bylaws . . . ; it has not adopted a cluster development bylaw . . . , increased minimum lot sizes in

Martha Zuckerman, a thoroughbred horse farm owner with an approximately sixty-six acre parcel of land in Hadley, claimed that the rate of development amendment was unconstitutional.¹³³ Reaching the age of retirement and no longer able to care for her farm, Zuckerman wished to sell her property so that it could be subdivided for development.¹³⁴ However, as a result of the town's bylaw amendment, Zuckerman's property, which could accommodate a subdivision of forty single-family homes, could not be developed at once.¹³⁵ Instead, it could only be developed at a rate of four units per year over ten years, making it an unattractive investment for developers.¹³⁶ The lower court, relying on an earlier holding in *Sturges v. Town of Chilmark*,¹³⁷ held the amendment unconstitutional.¹³⁸

At issue in *Sturges v. Town of Chilmark* was Chilmark's growth control ordinance, which was similar to that of Hadley in that it controlled residential rate of development by restricting yearly construction.¹³⁹ Articulating the *Euclid* analysis, the court evaluated the purpose of Chilmark's growth controls.¹⁴⁰ Chilmark, a town in Martha's Vineyard, asserted that its growth control was justified by government studies relating to soil limitations for septic tank

agricultural districts . . . , or hired a full-time planner" *Id.* at 847.

133. *Id.*

134. *Id.*; see also *Massachusetts Supreme Judicial Court Strikes down "Rate of Development" Bylaw*, LAND USE & REAL ESTATE LAW CLIENT ALERT (Davis Malm & D'Agostine P.C., Boston, Mass.), Sept. 2004, at 1, available at <http://www.davismalm.com/DavisMalm/publications/RealEstateClientAlertSeptember2004.pdf> [hereinafter "*Rate of Development*" Bylaw].

135. *Zuckerman*, 813 N.E.2d at 847.

136. *Id.* at 847 n.10.

Zuckerman stated that three developers informed her that, as a result of the bylaw, it was "not economically feasible" to develop the property, largely because the bylaw reduces the developers' flexibility and makes unavailable the economic advantages of large-scale development, thereby increasing the cost of development and reducing the marketability of the land.

Id.

137. 402 N.E.2d 1346 (Mass. 1980).

138. *Zuckerman*, 813 N.E.2d at 847.

139. *Chilmark*, 402 N.E.2d at 1349. The Chilmark bylaw limited "the issuance of building permits for residential construction to one tenth of the lots in a 'subdivision' in the year the lots are subdivided and a further one tenth of those lots in each of the subsequent nine years." *Id.*

140. *Id.* at 1352-53.

sewerage disposal and potential water contamination.¹⁴¹ Noting the safety concerns at issue and the special nature of Martha's Vineyard as a region,¹⁴² the *Sturges* court held that for a growth control to be constitutional, it must be a temporary measure intended to slow growth during the implementation of a comprehensive plan.¹⁴³

In a footnote, the court noted that Chilmark had actively taken steps to alleviate the need for growth control, stating that “[a] very different case would be presented if it were determined that the town was not proceeding with the necessary studies which are said to be the basis for the enactment of the rate of development by-law.”¹⁴⁴ *Zuckerman* is this different case. In *Zuckerman*, the lower court found not only that Hadley's zoning amendment was not temporary, but also that the town failed to develop a working comprehensive plan, or even to implement the recommendations of its numerous development studies.¹⁴⁵ The town of Hadley appealed the lower court's ruling to the Supreme Judicial Court of Massachusetts.¹⁴⁶

The Supreme Judicial Court of Massachusetts evaluated the case under *Euclid*, considering whether the zoning bylaw violated due process because it was arbitrary and unreasonable with no substantial

141. *Id.* at 1353.

142. *Id.* at 1352.

143. *Id.* at 1350. “We hold that a municipality may impose reasonable time limitations on development, at least where those restrictions are temporary and adopted to provide controlled development while the municipality engages in comprehensive planning studies.” *Id.*

144. *Id.* at 1354 n.16.

145. 813 N.E.2d 843, 847 (Mass. 2004). The town of Hadley argued that its growth management amendment should stand so long as the potential dangers of growth remained. *Id.* at 848–49. The *Zuckerman* court succinctly summarized Hadley's position:

[T]he town argues that the pressures of growth justifying the ROD [rate of development] amendment in Hadley are indefinite in duration and substantial in their potential effect on the town's finances and character, and that the unlimited duration of the ROD amendment is therefore consistent with the purposes that motivated it. In essence, the town contends that, so long as the ROD amendment continues to limit growth over time, creating the buffer that the town considers necessary to absorb an increasing population while continuing to preserve those characteristics and to provide those public facilities that make Hadley a desirable place to live, the amendment is in the public interest and advances legitimate zoning purposes, and thus passes constitutional muster.

Id. The court then rejected this argument. *Id.* at 849.

146. *Id.* at 847.

relation to general welfare.¹⁴⁷ In this determination, the court focused on Hadley's inaction. Although its growth management amendment had been in place for fifteen years,¹⁴⁸ the town had taken little, if any, action to remedy potential difficulties in the provision of public services caused by increased population.¹⁴⁹ The court held that unlimited growth controls adopted for a reason other than to assist in the execution of a comprehensive plan are inherently opposite to the public welfare.¹⁵⁰ Further, the court indicated that this sort of growth management not only harms the town itself, but also the neighboring communities because it shifts population from Hadley to other towns.¹⁵¹ The *Hadley* court ultimately held that unless growth must be inhibited temporarily to foster resource and infrastructure development, as determined on a case-by-case basis, ordinances such as Hadley's do not serve a public purpose, and are consequently unconstitutional.¹⁵²

III. ANALYSIS AND PROPOSAL

The Supreme Judicial Court of Massachusetts' holding in *Zuckerman v. Town of Hadley*¹⁵³ represents a change for the better in growth management quota litigation. *Zuckerman* represents the far end of a spectrum built over years of litigation. In *Village of Euclid v. Ambler Realty Co.*,¹⁵⁴ the Supreme Court provided the analytical structure by which courts evaluate constitutional challenges to land

147. *Id.* at 848 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

148. *Id.* at 846.

149. *Id.* at 848–49.

150. *Id.* at 849. Such restrained “rate of growth for a period of unlimited duration, and not for the purpose of conducting studies or planning for future growth, is inherently and unavoidably detrimental to the public welfare, and therefore not a legitimate zoning purpose.” *Id.* *But see* *Home Builders Ass’n of Cape Cod, Inc. v. Cape Cod Comm’n*, 808 N.E.2d 315, 325 (Mass. 2004) (upholding a *permanent* building cap because the town adopted the cap to protect a sole source aquifer).

151. *Zuckerman*, 813 N.E.2d at 850; *see also* *Simon v. Town of Needham*, 42 N.E.2d 516, 519 (Mass. 1942) (describing how a restrictive bylaw encourages movement in nearby towns).

152. *Zuckerman*, 813 N.E.2d at 851. “Our holding . . . should make clear that bylaws restraining growth pass constitutional muster only where they specifically contain time limitations or where it is abundantly clear that they are *temporary*, because they are enacted to assist a *particular planning process*.” *Id.* at 849 n.16 (emphasis added).

153. 813 N.E.2d 843.

154. 272 U.S. 365 (1926).

use actions. Next, as American cities quickly bled into suburban and rural areas and towns increasingly used growth management to combat urbanization, *Golden v. Planning Board of Ramapo*¹⁵⁵ emerged. There, the Court of Appeals of New York condoned local permit requirements that fostered timed development.¹⁵⁶ Both the Supreme Court in *Euclid* and New York's high court in *Ramapo* hesitated to tread on legislative territory,¹⁵⁷ recognizing that matters of land use are within the legislature's prerogative.

Later, in *Construction Industry Ass'n of Sonoma County v. City of Petaluma*,¹⁵⁸ the Ninth Circuit applied *Euclid* to circumstances similar to those in *Ramapo*, with the addition of a growth quota. Again exhibiting deference for the legislature, the Ninth Circuit echoed courts before it by holding that the police power is expansive.¹⁵⁹ In so doing, the *Petaluma* court compared the facts of *Petaluma* to those of *Ybarra v. City of Los Altos Hills*¹⁶⁰ and *Village of Belle Terre v. Boraas*,¹⁶¹ in which courts upheld more restrictive growth controls. For nearly thirty years, *Petaluma* has guided courts in construing the police power broadly and in deciding growth management quota litigation in favor of local communities. *Zuckerman* alters this paradigm.

The town of Hadley possessed an admirable purpose when it enacted its growth management scheme. Witnessing urban life encroaching on a calm, bucolic setting, the town acted to protect its rural nature, its distinguishing feature, by limiting not the use of land, but the time that use occurred.¹⁶² However, it did so in a way that was unreasoned, unguided and ultimately unconstitutional.

155. 285 N.E.2d 291 (N.Y. 1972), *appeal dismissed*, 409 U.S. 1003 (1972).

156. *Id.* at 304.

157. *See supra* notes 48, 78 and accompanying text.

158. 522 F.2d 897 (9th Cir. 1975).

159. *Id.* at 906.

160. 503 F.2d 250 (9th Cir. 1974).

161. 416 U.S. 1 (1974).

162. As the *Hadley* court articulated:

Rate of development bylaws such as the one at issue here are restrictions not on how land ultimately may be used, but on when certain classes of property owners may use their land. Where classic zoning bylaws keep the pig out of the parlor, rate of development bylaws tell the farmer how many new pigs may be in the barnyard each year.

There are a number of intertwined policy considerations implicated by growth management disputes. Legislative deference is a theme running throughout the decisions in *Euclid*, *Ramapo*, *Petaluma*, *Ybarra*, *Village of Belle Terre* and *Sturges*. Each of these courts voiced reluctance to challenge legislative determinations that the zoning or growth management ordinances at issue were constitutional. Instead, each court interpreted the police power broadly so as to easily encompass temporary growth controls intended to ensure peaceful enjoyment for residents of suburban communities. In addition, the costs of urbanization bolstered each court's deference to the legislature and its ultimate holding of constitutionality. In each of these cases, legislative deference, a feature of substantive due process review by federal courts, and the expenses of urban expansion outweighed any individual inconvenience. These factors motivated the courts to declare questionable growth management to be in the interest of the public.¹⁶³

A corollary to legislative deference is a court's willingness to review the fit between the means and ends of a particular growth control. In line with the pre-*Zuckerman* courts' preferences for judicial deference, each court also chose not to meticulously examine the relationship between the ordinance or zoning action and its intended goal. It is certainly possible that the *Zuckerman* court exhibited less deference for the legislature and more closely examined the means-ends relationship because the ordinance at issue, a permanent measure to stave off growth, was an egregious use of growth management. It is also possible that the *Zuckerman* court's status as a state court influenced its decision to delve deeper into the propriety of the rationale behind Hadley's rate of development amendment. Regardless of the motivation, the *Zuckerman* court ultimately privileged an inquiry into an individual's property rights over an established trend of deference.¹⁶⁴

813 N.E.2d 843, 850 (Mass. 2004) (citation omitted).

163. "Interpretive flexibility allows for the evolution of constitutional guarantees to address new controversies in light of changing societal values and convictions." GODSCHALK, *supra* note 28, at 163. For this reason, federal courts, with stronger precedent than state courts, shy away from declaring distant local acts unconstitutional. *Id.*

164. Analysts predicted this movement in land use litigation. Land use litigation has traveled a historical progression from judicial "faith in local autonomy," characterized by

A further consideration implicated by growth management quotas generally, and that of *Zuckerman* specifically, is the importance of comprehensive plans in supporting local growth management. A feature distinguishing *Zuckerman* from the pre-*Zuckerman* line of cases is Hadley's failure to take any measures other than its rate of development amendment to remedy insufficiencies created by urban growth. Petaluma enacted its plan for the express purpose of easing growing pains while the town executed its comprehensive plan; the town of Chilmark instituted its quota to conduct scientific analysis of the town's water and sewage disposal. However, the town of Hadley repeatedly ignored recommendations to institute a comprehensive plan or other tools to plan for development.¹⁶⁵

Comprehensive plans often account for not only local, but also regional well-being. The *Zuckerman* court hinted that future courts might evaluate the regional impact of growth management quotas to determine whether they serve the general welfare.¹⁶⁶ In *Zuckerman*,

"strong presumptions of validity for local actions with no suspicion of motives," to an emerging "sophisticated judicial review" marked by greater concentration between means and ends, "a clearer definition of neighbor's rights," and greater reliance on the requirement that zoning be carried out following a comprehensive plan. *Id.* at 197; *see also* Bd. of Supervisors v. Williams, 216 S.E.2d 33 (Va. 1975) (measuring specific planning decisions against the plans and policies they are purported to serve).

165.

The chairman of the Hadley planning board testified at his deposition that the town "should" develop and implement a comprehensive land use plan, "should" increase minimum lot sizes in agricultural districts to 80,000 square feet, and "should" adopt a community open space bylaw. He admitted, however, that fifteen years after the adoption of the ROD amendment, *none of these had been effectuated*.

Zuckerman, 813 N.E.2d at 847 n.9 (emphasis added); *see also* Beck v. Town of Raymond, 394 A.2d 847, 852 (N.H. 1978) (holding that growth controls adopted by cities and towns "should be the product of careful study and should be reexamined *constantly* with a view toward *relaxing or ending* them") (emphasis added). The town of Hadley's disregard for the importance of timely improvements can be contrasted with other Massachusetts communities that enact growth management for defined lengths: five or, at most, ten years. Jonathan Saltzman, *SJC Overturns Hadley Zoning Bylaw: Placed Strict Curb on Development*, BOSTON GLOBE, Aug. 25, 2004, at B3 (quoting Joel B. Bard, attorney for the town of Hadley).

166. "[R]ate of development bylaws reallocate population growth from one town to another, and impose on other communities the increased burdens that one community seeks to avoid." *Zuckerman*, 813 N.E.2d at 850. Further, "[d]espite the perceived benefits that enforced isolation may bring to a town facing a new wave of permanent home seekers, it does not serve the general welfare of the Commonwealth to permit one particular town to deflect that wave onto its neighbors." *Id.*

Hadley's rate of development amendment had the effect of pushing potential Hadley residents into neighboring communities, exacerbating the pressures of population growth for the entire region.¹⁶⁷ However, an evaluation of regional well-being might actually justify growth management.¹⁶⁸ This regional approach is a rising and controversial trend.¹⁶⁹

The Supreme Judicial Court of Massachusetts has clarified the law of growth management quotas at the state level. In Massachusetts, *Zuckerman*'s impact is substantial. Since 1980, when the Supreme Judicial Court held a temporary rate of development restriction valid in *Sturges*, as many as fifty municipalities enacted bylaws similar to that at issue in *Sturges*, which is nearly identical to the bylaw struck down in *Zuckerman*.¹⁷⁰ Many of these bylaws may now be unconstitutional, or at least challengeable, under *Zuckerman*.¹⁷¹

In the wake of *Zuckerman* Massachusetts has a lens through which to examine growth management quotas. At one end of the spectrum is *Sturges*, dictating that a bylaw that contains specific time limitations or is clearly temporary and enacted in conjunction with a planning scheme will likely be held constitutional.¹⁷² At the other end is *Zuckerman*, instructing that permanent bylaws enacted without a comprehensive plan solely to maintain a town's rural character will likely be held unconstitutional.¹⁷³ Future courts are left to determine the circumstances falling between these poles. In addition, the

167. "Every time a community passes one of these rate-of-growth bylaws, it pulls up the drawbridges around that community and artificially forces neighboring communities to bear the brunt of the population explosion." Saltzman, *supra* note 165, at B3 (quoting Diane C. Tillotson, attorney for Martha Zuckerman); see also John D. Landis, *Do Growth Controls Work? A New Assessment*, 58 J. AM. PLAN. ASS'N 489, 498 (1992) (offering a comparative evaluation of California cities with and without growth controls, and suggesting that "spillover" opportunities in neighboring communities allow housing prices in municipalities with growth controls to remain constant).

168. See, e.g., *Home Builders Ass'n of Cape Cod, Inc. v. Cape Cod Comm'n*, 808 N.E.2d 315, 325 (Mass. 2004) (upholding a permanent building cap because of its necessity to protect a sole source aquifer, the integrity of which was of regional importance).

169. See, e.g., Katharine J. Jackson, *The Need for Regional Management of Growth: Boulder, Colorado, as a Case Study*, 37 URB. LAW. 316-20 (2005).

170. "Rate of Development" Bylaw, *supra* note 134, at 1.

171. *Id.* at 2.

172. *Id.*

173. *Id.*

Zuckerman decision is likely to affect decisions in other states, and may even inform future federal decisions.

Future courts following *Zuckerman* should exercise less deference for the legislature, scrutinize the propriety of suspect quotas, insist on the enactment of comprehensive plans or other planning processes in conjunction with quotas, and analyze the regional impact of a quota system dictating rate of growth. In addition, local governments should respond to the *Zuckerman* decision. Local boards should not enact permanent, unreasoned growth controls, but should instead justify quota decisions and prescribe definite termination dates. These precautions will improve the local development process by forcing local governments to review the propriety of their own acts, and may ultimately alert interested parties prior to litigation.

IV. CONCLUSION

Urban growth is inevitable. The American desire for property ownership is age-old and unrelenting. As residents of urban areas tire of the noise and commotion of city life, they often migrate to more rural communities. This movement, however, can increase pressure on suburban and rural towns to provide public services, and can even destroy local character. To forestall expansion, some communities have turned to growth management, a tool by which the legislature restricts expansion with ordinances targeting development.

Litigation has arisen over the use of rate of development growth controls in the form of growth management quotas. Using the Supreme Court's analysis in *Euclid*, federal and state courts alike have held temporary growth controls valid, paying special attention to the steps that each local community took to further comprehensive plans. *Zuckerman* changed this landscape.

Massachusetts courts, other state courts, and even federal courts may glean wisdom from *Zuckerman*. After *Zuckerman*, courts should exhibit less deference for legislatures, insist that communities develop comprehensive plans in conjunction with temporary rate of development controls, and investigate the regional impact of growth management quotas. In addition, local governments should increase research and planning resources devoted to growth management programs. Further, communities should begin to document local and

regional findings to justify their growth management actions in the event of litigation. By virtue of devoting more resources to the analysis of growth management before enactment, local communities will be forced to evaluate the implications of growth management prior to litigation. Ideally, such analysis will prevent litigation entirely.

It appears after *Zuckerman* that Sherwood Anderson's hometown might be safe. "After the wagon containing the berry pickers had passed, he went across the field through the tall mustard weeds and climbing a rail fence peered anxiously along the road to the town."¹⁷⁴ He saw a moving truck in the distance. Although urbanization may not be staved off permanently, it can be controlled when done so constitutionally.

174. ANDERSON, *supra* note 1, at 8.