

RESTRICTION OF BUILDING PERMITS AS A MEANS FOR CONTROLLING THE RATE OF COMMUNITY DEVELOPMENT

More than ever before, municipalities on the urban fringe are challenged by the problems of their own growth. Along with the accompanying demand of the suburban population for public services, over-rapid growth threatens to overcome the community tax base. Many communities are attempting to control the suburban explosion by the enactment of timing regulations designed to slow expansion down to a reasonable rate. Other communities may desire timing controls for other reasons which are not so legitimate. While it is true that a reasonable control on the rate of growth may assist in the proper expansion of schools and other facilities, it is also true that suburbs may use timing controls to keep out large-scale builders because their developments place a heavy demand on local services, because they attract a lower economic class, or because of a variety of other reasons that are suspect. Whether their purposes are benign or otherwise, a growing number of municipalities are seeking effective legal means to delay or obstruct large-scale residential development. So far, a variety of techniques has been tried. Some of these have gained judicial acceptance, others have not; and a great many are so new that their legality remains unproven.¹ It is the purpose of this comment to examine the judicial reaction to one of these timing techniques—restrictions on the issuance of building permits.²

Following a local election which focused on the problem of rapid growth, the New Jersey township of Marlboro passed an amendment to the Township Building Code designed to slow down new residential development. The ordinance limited the number of building permits made available to a developer during certain stages of construction. A developer was allowed a maximum of ten initial permits. A second ten could only be issued upon the completion of the first ten building

1. Cutler, *Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe*, 1961 WIS. L. REV. 370 (1961).

2. This comment is limited to methods of restricting building permits by a quantitative quota and does not include restrictions which impose a large fee for building permits or restrictions which impose a temporary moratorium on the issuance of building permits. See Cutler, *supra* note 1, at 393-94.

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foundations. Ten more permits could be issued only when the first ten houses were framed and the second ten building foundations were completed, through a four-step construction cycle covering forty dwellings at a time. In *U.S. Home and Development Corp. v. LaMura*,³ the Superior Court of New Jersey, Appellate Division, held this regulation to be arbitrary, unreasonable, and void as beyond the statutory power of the municipality.

Prior to the decision in *LaMura*, the leading decision on building permit regulation as a timing device was *Albrecht Realty Co. v. Town of New Castle*.⁴ In *Albrecht*, the town of New Castle, New York, adopted an ordinance providing that no more than 112 residential permits a year were to be issued for any land that the town board declared to be within a special residence district authorized by the ordinance. Thereafter, the town board issued a declaration placing practically all the residential land in the town in such a special residence district. As in *LaMura*, the ordinance was said to be not only unreasonable, but outside the municipality's authority:

There is nothing in . . . [the enabling act] that gives the defendant town power to regulate the rate of its own growth [sic] and the Zoning Ordinance Article under attack here is a direct regulation and nothing more.⁵

If this strong language of the New York trial court is to be taken as a flat denunciation of all attempts of New York municipalities to control the rate of their own growth, it has been repudiated by judicial approval of at least one other New York timing technique. In the case of *Josephs v. Town Board*,⁶ the town of Clarkstown, New York, linked timing controls to the gradual rezoning of designated areas from low density use to higher density use. A residential district was zoned for 40,000 square foot lots, making it undesirable for large-scale development. The ordinance further provided that exceptions might be permitted for 22,500 square foot lots provided the town board found, after a study, that the existing or proposed plans for schools and other community facilities were adequate for the needs of the future residents of a proposed development. A New York trial court, apparently willing to assume the validity of the one-acre zone on which the regulation was based, held that the town board did not act arbi-

3. 89 N.J. Super. 254, 214 A.2d 538 (App. Div. 1965).

4. 8 Misc. 2d 255, 167 N.Y.S.2d 843 (Sup. Ct. 1957).

5. *Id.* at 256, 167 N.Y.S.2d at 844.

6. 24 Misc. 2d 366, 198 N.Y.S.2d 695 (Sup. Ct. 1960).

trarily or capriciously in denying the plaintiff developer a special permit for smaller lot size requirements. The board had examined school facilities and found that they were inadequate to provide for the needs of future residents in the proposed development.

At the time of *LaMura* there was no express authority in the New Jersey statutes for slowing down the rate of residential construction.⁷ However, an expansive view of the New Jersey Zoning Act⁸ would appear to encompass the building permit regulation. The power to regulate the rate of residential construction could be implied from the municipal power to "regulate . . . buildings and structures according to their construction"⁹ or to "regulate . . . the density of population."¹⁰ Furthermore, it would seem that the restriction on building permits would implement the purposes of avoiding an "undue concentration of population"¹¹ and, perhaps, of preventing the "overcrowding of . . . buildings,"¹² if it is possible to take into account the effect an unrestricted influx of new residents would have on school buildings. The New Jersey court's failure to draw such implications from the statute suggests the necessity of drafting timing controls so that they are tied more directly into the stated objectives of zoning in the enabling law.

The New York zoning laws¹³ applicable to the *Albrecht* and *Josephs* cases are similar to those of New Jersey, with the significant addition of a provision which directs municipalities to "facilitate the adequate provision of . . . schools."¹⁴ This provision would appear to be a likely statutory basis for a timing control, in that the control could regulate school absorption capacity. The school facilitation provision was mentioned in both the *Albrecht* and the *Josephs* opinions. In *Albrecht*, after declaring that the building permit restriction was without statutory authority, the court continued:

If [the zoning act] vested that power in the defendant town, it would still be required . . . to make that regulation "in accordance

7. In 1967 New Jersey enacted the Municipal Planned Unit Development Act, N.J. STAT. ANN. §§ 40:55-54 to -67 (1967), which sets forth a method for timing the sequence of residential and non-residential uses.

8. *Id.* at §§ 40:55-30 to -53.

9. *Id.* at § 40:55-30.

10. *Id.*

11. *Id.* at § 40:55-32.

12. *Id.*

13. N.Y. TOWN LAW §§ 261-84 (McKinney 1965).

14. *Id.* at § 263.

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with a comprehensive plan . . . to facilitate the adequate provision . . . of schools," and there is nothing in the record to suggest that the article was drawn in accordance with any plan to facilitate the adequate provision of schools, much less any comprehensive plan.¹⁵

In separating the school provision from the statutory authority question the court suggests that school facilitation is a secondary statutory requirement and, as such, could not be a sufficient basis for a timing regulation in itself. Courts may well be reluctant to face the school facilitation provision directly. If a municipality is permitted to regulate development in accordance with the capacity of its schools, there is the danger that the municipality might slow down its school construction rate in order to give the planning board leverage over builders. It would be very difficult for a court to supervise or determine what is a "fair" school construction program if asked to do so directly. The New York court in *Josephs* avoided the issue, but perhaps it was aided there by the fact that the issue was the change in minimum lot size and crowding was only a standard for determining when the changes were to be made.

The fact that the timing control in *Josephs* was couched in terms of such traditional zoning restrictions as density and lot size requirements is critical. As timing controls are new to the courts, they will most likely be reluctant to approve methods like those in *LaMura* and *Albrecht* which are obviously *direct* controls on business production. Business production is curtailed in *Josephs* also, but it is done *indirectly* as the restrictions are primarily directed toward the land involved and not the developers. The court in *Josephs* was apparently willing to assume the validity of these controls:

No one would now seriously doubt the right of the Town Board to regulate the density of population in special districts by provisions as are contained in the ordinance here restricting the property in the particular District to detached single-family residences and limiting the lot area for each residence.¹⁶

Thus, the *Josephs* decision indicates that because density requirements and minimum lot sizes have long been approved methods of exercising municipal zoning power, courts may be willing to uphold ordinances in which they are employed even if the ultimate intent of such measures is recognized to be developmental timing.

15. 8 Misc. 2d at 256, 167 N.Y.S.2d at 844-45.

16. 24 Misc. 2d at 368, 198 N.Y.S.2d at 698-99.

The courts in *LaMura* and *Albrecht* were highly critical of the economic effect the ordinances would have on the developers. In *LaMura* the court said that "the ten units at a time" restriction was a "drastic . . . impingement on the right of a developer to build homes in accordance with his economic capacity and business exigencies."¹⁷ In *Albrecht* the annual limitation on building permits was attacked in this way:

Were [the ordinance] within the terms of the power granted to the defendant town . . . it would still be unreasonable because to whatever extent it was effective it would deprive the plaintiffs here of all beneficial use of their land and would make it impossible for them to make a reasonable return on their investment.¹⁸

This argument has been criticized in that the regulation in *Albrecht*, as in *LaMura*, does not permanently preclude the use of property from "all beneficial uses," but merely delays its development for certain purposes.¹⁹ Furthermore, it has long been the rule that a mere lessening of a developer's profits or even economic loss does not necessarily render a zoning ordinance unreasonable.²⁰ However, if the developer's economic loss is to play any role in timing cases, it should apply to the method used in *Josephs* as well as to the building permit ordinances. Density controls also have the effect of slowing down construction because low density, more expensive housing moves more slowly into the market than high density, less expensive housing.²¹ The fact that density controls have been widely accepted by the courts should further indicate that deferred profits do not alone make a timing control unconstitutional.

The unreasonableness of the *LaMura* ordinance went beyond profit deferment. It would have fostered economic waste. The court points out that:

The whole concept of large scale development contemplates the incidence of mass development of residential areas where builders may well be commencing construction of more than ten units at a time and where it may be necessary to do so as a matter of efficiency.²²

17. 89 N.J. Super. at 264, 214 A.2d at 543.

18. 8 Misc. 2d at 256, 167 N.Y.S.2d at 845.

19. Note, *The Legal Significance of Cost Considerations in the Regulation of Apartments by Suburbs*, 59 Nw. U.L. REV. 413, 431 & n.100 (1964).

20. See *Wulfsohn v. Burden*, 241 N.Y. 288, 150 N.E. 120 (1925).

21. See *Christine Building Co. v. City of Troy*, 367 Mich. 508, 116 N.W.2d 816 (1962).

22. 89 N.J. Super. at 264, 214 A.2d at 543.

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It is apparent that normal construction practice would be disrupted as delays and extra costs would unavoidably result from such a scheme. Even though the *Albrecht* ordinance did allow the permitted construction to proceed at a normal rate, it is not an attractive alternative. Unlike *LaMura*, it put an absolute limit on the number of permits available in any one year. Perhaps the *Albrecht* ordinance is more objectionable because it offered no guidelines for determining which developers should receive the limited number of building permits. A discretionary system such as this obviously opens the way to abuses.

The ordinance in *Josephs* is undoubtedly more sophisticated than either of the building permit ordinances. Standards are provided by basing the density change on school capacity, a procedure which may still be self-serving. Yet there is a further problem with the *Josephs* ordinance, which is perhaps unique to it. The shift of a low density area to a higher density might well create discordances in development because the density change is related to school capacity and not to development patterns.

In conclusion, it is clear that if a building permit restriction is ever to gain judicial approval, it will have to be designed with a good deal more attention to the zoning statutes and the reasonableness of its operation in relation to the public need for a timing control than was the case in *LaMura* or *Albrecht*. In fact, legislative amendment of the zoning act may well be necessary in order to assure validity. However, there is some doubt whether the *Josephs* ordinance should entirely escape invalidity, especially in light of its potentiality for misuse. Yet as long as zoning remains the prerogative of autonomous, suburban municipal governments, the potentiality for abuse in timing controls over new development will always exist.

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