GROWTH MANAGEMENT AND CONSTITUTIONAL RIGHTS—

PART I: THE BLESSINGS OF QUIET SECLUSION

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Movement of people from one part of the country to another has traditionally been encouraged by all levels of government. Now that policy is being questioned by those who believe that unlimited growth is not necessarily in the best interest of their community. Consequently, local governments throughout the country are experimenting with new methods of managing growth. From a national perspective, the growth being managed is not real population growth but simply the internal movement of the present population; growth management is the control of that movement. This Article will focus primarily upon the constitutional ramifications of such controls. Part I considers the problems of growth management in light of present judicial standards of review as well as problems of judicial relief. Part II will evaluate possible affirmative governmental action that would enable growth management to be undertaken in a manner consistent with the constitutional "right to travel."

INTRODUCTION—PART I

Federal courts have traditionally permitted local governments great latitude when enacting police power regulations designed to preserve a valued life style. They have, however, viewed skeptically restric-

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tions on the right to move freely about the country—the constitutional "right to travel." A community's desire to protect its life style by restricting growth and development may, on occasion, come into conflict with the constitutional right to travel. A consideration of case law to date may aid in predicting how federal courts will react to the "new mood" regarding growth. It seems certain, however, that judicial attempts to mediate between the desire to control growth and the right to travel can only minimize but cannot solve the conflict.

I. Problems of "Growth"

Growth has only recently become a topic of widespread controversy. Ecologists warn that a world-wide scarcity of resources may establish an ultimate limit to the amount of growth that can take place without relinquishing an acceptable standard of living. The Club of Rome's study team concluded:

> If the present growth trends in world population, industrialization, pollution, food production, and resource depletion continue unchanged, the limits to growth on this planet will be reached sometime within the next 100 years. The most probable result will be a rather sudden and uncontrollable decline in both population and industrial capacity.[1]

Of more immediate concern is the recognition that urbanization is responsible for many major environmental problems, and this recognition has in turn heightened community concern about unrestricted growth. Until recently, air and water pollution were commonly thought of as the result of industrial development. Manufacturing plants belching smoke and pouring refuse into the rivers were viewed as the primary villains. We now realize that the pattern of urbanization itself is the primary cause of pollution. Russell Train, EPA Administrator, correctly points out that "the energy and environmental ills that afflict us . . . are in large measure the result . . . of the character and composition and quality of growth."[2]

Public recognition that urbanization is an environmental problem comes at a time when our metropolitan areas are expanding more rapidly than ever before. In recent years "the territory of metropoli-

1. D. Meadows *et. al.*, Limits to Growth 23 (1972). *See* G. Hardin, Exploring New Ethics for Survival ch. 20 (1972); W. Oltmans, On Growth (1974).

2. Train, *The Quality of Growth,* 184 Science 1050, 1052 (1974).

tan America has expanded even faster than its population,"[3] overflowing the traditional boundaries arbitrarily used to designate metropolitan areas. Between 1970 and 1973 there was a net migration *out* of the metropolitan areas into the surrounding exurban fringes.[4] Planners such as John Friedmann forecast low density urbanization of vast, sprawling "urban fields" connecting many existing metropolitan areas.[5] Life in these areas is increasingly dependent upon an efficient highway network. Yet scientists inform us that to obtain acceptable air quality in these urban fields will require a drastic reduction in the number of automobile-miles traveled.[6] It seems unlikely that drastic transportation control measures will ever be employed in existing metropolitan areas,[7] but the controversy surrounding such measures has made people in urbanizing areas highly conscious of the relationship between automobile traffic and air quality degradation. Problems of noise and solid waste disposal also increase as an area becomes urbanized.

Similar concerns are evident in regard to water pollution. Industrial discharges, while admittedly serious, are less difficult to control than the massive pollution caused by vast quantities of sewage emanating from urban areas. Rapid urbanization frequently overburdens existing treatment plants without providing a source of revenue to expand plant capacity. Many communities have responded by imposing sewer moratoria.[8]

Students of the rapidly emerging field of environmental psychology hypothesize a close relationship between environmental conditions and

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3. COMM'N ON POPULATION GROWTH AND THE AMERICAN FUTURE, POPULATION AND THE AMERICAN FUTURE 31 (1972).

4. *See* U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS (Nov. 1973); Holland, *National Growth Policy: Notes on the Federal Role*, 1973 URBAN L. ANN. 59, 69-70.

5. Friedmann, *The Future of the Urban Habitat*, in ENVIRONMENT: A NEW FOCUS FOR LAND USE PLANNING 57 (D. McAllister ed. 1973).

6. *See generally* J. SENECA & M. TAUSSIG, ENVIRONMENTAL ECONOMICS 314-16 (1974).

7. The EPA Administrator has announced that the Agency is withdrawing for reconsideration proposed transportation control plans in response to strong congressional pressure. 38 Fed. Reg. 1848 (1974).

8. Rivkin, *Growth Control via Sewer Moratoria*, 33 URBAN LAND, No. 3, at 10 (Mar. 1974).

social problems.[9] The poor, who are subject to the most acute social disadvantages, ordinarily inhabit those areas where the environmental effects of urbanization are most severe since they can not afford to pay the premium required to live in more desirable areas. The poor and social decay are therefore associated in the minds of many with the environmental problems resulting from uncontrolled growth.

This association of urbanization with environmental and social decay has led the average American to assume that a further concentration of population will necessarily augment these problems. Concern about such a result has produced a "new mood" at the grass-roots level. This new mood rejects the old thesis that growth is inherently beneficial or desirable. Voters in areas experiencing rapid growth, angered by traffic congestion, pollution, crowded schools, and other irritations common to expanding suburbs, are ousting local business interests from control of local governments and then imposing moratoria, down-zonings, phased growth plans, and a wide variety of other techniques designed to slow or stop new housing construction. "Growth" has become a controversial issue in all areas of the country experiencing significant pressures for new development.[10]

II. Growth Management as a Planning Theory

The correlation in the public's mind between uncontrolled growth and social/environmental problems has precipitated a movement towards new growth management techniques. These techniques typically take the form of local ordinances that either establish a maximum growth rate for the community or set some limit on ultimate growth. These ordinances differ from traditional land use con-

9. Common urban complaints—air pollution, overcrowded buses, bad housing—also belong in a new context of the *human* degradation—not, as the phrase has it, environmental degradation. When the environmental resources people require do not exist at all, or exist unreliably, then society is saying "your purposes are unimportant"—when those purposes may be to get a job outside of the ghetto, to go to school regularly, to keep up friendships. For Americans, housepride is another way of expressing self-esteem: society is saying "self-esteem is unimportant" when it fails to build housing, to clean streets, to plant trees, and to modernize garbage disposal methods.

C. Perin, With Man in Mind: An Interdisciplinary Prospectus for Environmental Design 147 (1970).

10. *See generally* The Use of Land: A Citizen's Guide to Urban Growth ch. 1 (W. Reilly ed. 1973) (report to the Task Force on Land Use and Urban Growth, Citizens' Advisory Comm. on Environmental Quality) [hereinafter cited as The Use of Land]. The author's opportunity to serve as a consultant to this task force led to the development of many of the ideas contained in this Article.

trol by *treating the quantity of urbanization as a subject to be consciously controlled by regulation rather than by market conditions.*

The variety of possible growth management techniques is endless, yet each is based upon the same philosophy regarding the purpose of land use regulation. Growth management techniques rely upon the adoption of an ultimate plan that completely delineates the future configuration and determines the total population of a community. To understand the radical nature of this proposition, it is necessary to review what has happened to planning concepts that underlie land use controls that became widespread in the 1920's.

A. *The Evolution of Process-Oriented Planning*

An early zoning theoretician, Edward Bassett, viewed planning and zoning as simple means to achieve commonly agreed upon goals for the ultimate future of a community. Bassett concluded:

> The regulations . . . must be reasonable . . . and must have a substantial relation to the health, safety, comfort, and convenience of the community. . . . Land similarly situated must be zoned alike. These requirements are so simple and self-evident that one wonders why comprehensive zoning did not begin in this country earlier.[11]

Bassett believed courts would insist that zoning be based on a comprehensive plan: "Zoning has been upheld by the courts because it is comprehensive and not piece-meal."[12] Zoning was to be based on a plan that would determine in advance the uses permissible on all land within the community's jurisdiction.[13] The plan would determine the boundary of each zone and changes in these boundaries would be discouraged. This philosophy has been described as the "static end-state concept of land use control."[14]

In areas that were not yet urbanized, however, the zoning process did not work as Bassett assumed it would. Courts viewed zoning primarily as a means to insure that all uses in a given neighborhood

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11. E. BASSETT, ZONING 9 (2d ed. 1940).

12. *Id.* at 12.

13. *See* Haar, *In Accordance with a Comprehensive Plan,* 68 HARV. L. REV. 1154 (1955).

14. Krasnowiecki, *Basic System of Land Use Control: Legislative Pre-regulation v. Administrative Discretion,* in THE NEW ZONING 3, 4 (N. Marcus & M. Groves eds. 1970).

would be similar—keeping the pig out of the parlor.[15] Where land was still predominantly vacant the courts frequently overturned regulations that sought to determine a new character for a neighborhood prior to its development.[16] As a result, zoning worked well only as a means of regulating infill or redevelopment of areas where the basic character was already established. In newly-urbanizing areas, where the vast majority of development had taken place, pre-planned zoning districts were rarely successful.

Many communities responded with the "wait-and-see" approach to zoning. A community would establish restrictive standards (such as large minimum lot sizes) as a starting point for bargaining with developers and would then relax these standards by granting rezonings in response to specific development proposals.[17] As a consequence of the wait-and-see approach, "the community's real land use policy comes to be expressed in the zoning amendment."[18] As Daniel Mandelker points out, "all familiar with zoning administration know the tail wags the dog."[19]

Given judicial attitudes and community practices, regulation of the urbanization process has most often taken the form of a series of ad hoc rezoning decisions by local legislative bodies in response to specific proposals by developers. These rezonings have generally been treated

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15. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

16. The leading case is Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938). *See* R. ANDERSON, AMERICAN LAW OF ZONING § 2.28 (1968).

17. *See* THE USE OF LAND 183-92:

> So you probably decide, following the example of countless other communities, to employ the rule "when in doubt, prohibit." You put the more attractive industrial sites and the undeveloped dairy farms in a very low-density agricultural or residential zone, thereby prohibiting virtually all construction. Anyone who wants to build or develop there will have to ask for a change in the zoning map. You then have the chance to evaluate his project and to hear what the other townspeople think at a public hearing.
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> In brief, this approach lets you deal with development problems when they arise. You have the opportunity to look over plans in detail and make suggestions. If proposed new residential development on the dairy farms would drive up school taxes too much, you could wonder out loud about having more one-bedroom apartments than three-bedroom ones, and you might indicate that the donation of a grade school building by the developer would be a welcome good-will offering to a town about to receive a lot of newcomers. If the applicant says no, then you can decline to amend the map, and the prohibition will remain in effect.

Id. at 189-90.

18. Krasnowiecki, *supra* note 14, at 6.

19. D. MANDELKER, THE ZONING DILEMMA 65 (1971).

by courts as "legislative" actions that are subject to only minimal judicial review. Thus, courts have not required individual rezoning to conform to any standards or even to the community's own general plan.[20] Communities that have followed their general plan have done so voluntarily rather than under judicial compulsion.

The growth management "movement" is a reaction against this process. A lack of plans or standards has greatly undermined public confidence in planning and zoning. As the Rockefeller Task Force recently noted:

> In the best of circumstances, this kind of [wait-and-see] decision-making is not likely to work without well prepared plans, alternative proposals, and a forum in which all points of view may be presented to qualified decision-makers. An understaffed (or non-existent) planning department, an impecunious applicant, and some threatened neighbors, all presenting views to public officials who probably must squeeze their unpaid service into their spare time, do not add up to a decision-making process that inspires confidence. And added to that are the common accusations of incompetence, conflict of interest, and even corruption among the decision-makers.
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> For these reasons, many citizens who look to land-use controls for protection against unwanted development are dead set against dependence on ad hoc procedures and discretionary reviewing. They want rigid protective rules and safeguards against changing them. They point to "fast-talking" developers who mislead officials and neighbors into thinking development will be nicer than it proves to be. They point to the decades of experience with zoning variances (the grandfather of all development review mechanisms), which, despite legislation and repeated judicial decisions restricting variances to "hardship" cases, have been used in some communities as a free-ranging device to "punch holes" in the zoning. Discretionary review, these people conclude, does not produce quality.[21]

Meanwhile, most professional planners have backed away from the precise, tangible, master planning favored in the 1920's. Current popular planning theory backs a "process-oriented" approach featuring sophisticated data collection and an analytical process for reviewing land use proposals to weigh their impact.

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20. *See* Comment, *Zoning Amendments, The Product of Judicial or Quasi-Judicial Action,* 33 OHIO ST. L.J. 130 (1972). *But see* Fasano v. Board of County Comm'rs, 507 P.2d 23 (Ore. 1973). *See also* A MODEL LAND DEV. CODE, § 2-312 (Proposed Official Draft No. 1, 1974) (American Law Institute).

21. THE USE OF LAND 191-92.

In part, at least, planners switched to concentrating on "process" because of the public outcry that greeted the master plans for urban renewal, city freeways, and other projects of the 50's and early 60's. As the late Dennis O'Harrow lamented in 1965: "We say that urban development without plan brings chaos, and the public immediately votes for chaos."[22] At about the same time Charles Haar suggested that "the desire for flexibility . . . may stem from a loss of confidence or from feelings of modesty with respect to the potential of planning."[23]

Now it is beginning to appear, however, that the public wasn't objecting to the plan as much as to what the plan said. Anthony Catanese describes his recent experience in Hawaii where the professional planners recommended the adoption of "process-oriented" planning legislation. The planners were surprised to find citizen groups objecting strongly to the lack of a master plan:

> As the testimony of civic and environmental groups continued through the hearings, the pattern was clearly established. These groups did not believe that a process of planning at the state level would be adequate to insure that their interests would receive proper attention. They certainly did not trust professional planners. One group argued, for example, that population control would be ignored unless it was a mandatory provision of the master plan. Another group argued that limits on tourism could be invoked only if the legislature made them a required element of the master plan. Clearly these groups were arguing that the legislature must insist upon a document with a specific list of essential components because the professional planners would not tackle the controversial issues unless they were forced into it.[24]

Although both professional theory and practice in recent years have operated on the assumption that the "end-state" plan is obsolete, no one bothered to inform the public, as Catanese discovered:

> The issue is whether professional planners are going to be given a broad and flexible mandate to develop a process for guiding decisions or whether they are to use the master plan concept as the key tool for effecting decisions. In reading the literature on the subject, one would be misled into thinking that the process approach is universally accepted. This is not the case. Activist community and environmental groups have shown that they are

22. O'Harrow, *Plans and Anti-Plans,* 31 ASPO NEWSLETTER 1 (Dec. 1965).

23. Haar, *The Social Control of Urban Space,* in CITIES AND SPACE: THE FUTURE USE OF URBAN LAND 175, 186 (L. Wingo, Jr. ed. 1963).

24. Catanese, *Plan or Process,* 40 PLANNING 14, 16 (June 1974).

> suspicious of planners and the planning process and that they want their legislatures to give planners more restrictive and specific mandates. Much depends upon the trust and confidence these groups have, or do not have, in planners.[25]

Growth management is the embodiment of this new distrust of the planning process; a search for the immutable master plan. But what type of planning is involved and what is its effect? To obtain an idea consider three of the best-known models for managing growth.

B. *Three Growth Management Models*

The growth management techniques of Ramapo, New York, Boca Raton, Florida, and Petaluma, California all reflect the decline of public confidence in the ability of local officials to administer development regulations on a wait-and-see basis. The new growth management systems impose specific standards with which individual decisions must comply, and these standards point toward an overall concept of the future—an end-state to which the community aspires. Thus, growth management systems might be described as a return to a concept of land use regulation closely resembling that of early zoning philosophy—comprehensive end-state planning.

1. Ramapo

The city of Ramapo, New York, fearing that projected growth would overwhelm the capacity of municipal services, adopted a "phased growth" plan that staggered, over an 18-year period, the extension of sewer, water and other municipal services to particular sections of the town. The town then announced that land could be developed only at such time as service facilities were ready to be built. An ordinance was passed containing standards by which a landowner could determine at what future date the development of his property would be permitted.[26]

2. Boca Raton

Boca Raton is a rapidly growing community on Florida's gold coast. Its citizens, concerned with the unabated construction of new housing,

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25. *Id.*

26. The Ramapo system was upheld by a sharply divided New York Court of Appeals in Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972). The author's views on this case are set out at length in Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 FLA. ST. L. REV. 234 (1973).

voted to approve a "population cap." The voters adopted as a municipal policy an ultimate population level for the community and directed city officials to revise zoning and other pertinent regulations to contain growth within these limits. The city council responded by substantially reducing permitted densities on most of the city's land previously zoned for multiple-family use.[27]

3. Petaluma

The city of Petaluma, California, is located in a pleasant valley in Marin County on the fringe of the San Francisco metropolitan area. For years Petaluma maintained its small town character and semi-rural atmosphere. Residents, concerned that increasing expansion of the San Francisco area would cause dramatic and unpleasant changes in the town's character, adopted a plan limiting the number of building permits for new housing to a fixed quota of 500 units per year in order to establish a slow, yet steady growth rate.[28]

C. *The Planning Behind Growth Management*

These widely-publicized growth control prototypes are only three examples of the wide variety of new growth management techniques local governments are experimenting with throughout the country. While the details of these techniques differ widely, all are based upon a common principle—to treat urbanization as a process that must be regulated in terms of rate or volume according to a conscious plan.

But planning deserves to be called comprehensive only when it takes into consideration all of the important factors necessary to an evaluation of future land use decisions.[29] Whether growth management systems are in fact based on an overall comprehensive plan of the type originally conceived by zoning's founders may prove to be the crucial question in regard to the desirability of growth management techniques.

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27. Extensive litigation is currently underway regarding the Boca Raton approach in both the state and federal courts. *See* Boca Raton News, May 15, 1974, § 1, at 1, col. 3. Since the referendum was adopted, the immediate reaction to the "cap" is a rush to obtain building permits worth 82 million dollars. *See* URBAN LAND INSTITUTE, 7 LAND USE DIGEST, No. 5 (May 1974).

28. The Petaluma plan is also in litigation and was held invalid by a federal district court. Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974); *see* Bangs, *Petaluma Controlled-growth Law is Voided by Federal District Court*, 40 PLANNING 7 (Mar. 1974). The district court decision, however, has been stayed pending appeal. *See* note 55 *infra*.

29. *See, e.g.*, A MODEL LAND DEV. CODE, *supra* note 20, at § 3-103.

The techniques of growth management used by Ramapo, Boca Raton, and Petaluma—development timing, population cap, and annual quota—are primarily designed to regulate the construction of new housing. Yet housing is only one aspect of growth and frequently a derivative one. Except in recreation and second home areas, the homebuilder is not creating growth but following it. He provides housing for people whose jobs require them to live in a particular area. Many growth management techniques do not attempt to deal with the factors that attract population to an area.[30] All too frequently, the public welcomes the office park that creates jobs and then focuses its antipathy on the homebuilder who follows. If growth management fails to include comprehensive planning for employment sources as well as residential needs, the risk of judicial disapproval increases.[31]

Even if a community carefully considers all of its *own* needs in adopting a comprehensive plan for growth, since that plan has only been adopted by one small part of the nation's population, the effect of the plan will be to restrict the remainder of the nation's people in their choice of new housing opportunities. While what is being managed may appear to be "growth" from the local perspective, it is "movement" from the perspective of the potential new resident.

To the outsider, growth management merely involves local governments fighting among themselves to determine which of them must take the unwanted people. "Each jurisdiction pushes and pulls against the other, [a]nd the citizens of each watch helplessly as their region assumes shapes and directions that are determined by forces they do not understand and cannot influence."[32] Thus, as presently practiced, growth management does not involve attempts to change the total number of people in the country but merely to control where in the country they may live. When viewed from this perspective, growth management raises an important constitutional issue—freedom of mobility.

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30. *See* R. BABCOCK, THE ZONING GAME 144-50 (1966). Nor, of course, do management techniques even pretend to concern themselves with the number of people that are born or that immigrate into the country. Real growth is determined by the increase in the total number of people who are present in the country at any given time, which is controlled by birth, death and immigration. The pressures for new housing are coming from the children born in the United States in the 1940's and 50's now reaching the age to seek jobs and homes. THE USE OF LAND 79.

31. *See* note 12 and accompanying text *supra.*

32. Train, *supra* note 2, at 1053.

III. Mobility as a Constitutional Right

The United States Supreme Court has recently begun to impose certain limitations on the extent to which state and local governments may restrict the movement of people into their jurisdictions. Although these cases are generally described as the "right to travel" cases, it must be understood that the "travel" given constitutional protection has usually meant migration and settlement rather than mere tourism. Because the right to travel has only recently become the subject of substantial judicial attention, and because it finds its source in general constitutional principles rather than a specific constitutional clause, it is necessary to review the history of the "right to travel" before discussing its current application.

A. *Historical Development of the Right to Travel*

The ability to move freely about the country has always been an important attribute of an American's liberty. Blackstone, whose thinking strongly influenced American colonials, defined "personal liberty" as "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law."[33] In the Articles of Confederation the thirteen colonies pledged to "secure and perpetuate mutual friendship and intercourse among people of the different states,"[34] but retained their basic sovereignty while delegating limited powers to the federal government. The Articles of Confederation, however, expressly gave each citizen of the United States a right to travel freely throughout the country:

> The people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively. . . .[35]

The Constitution delegates the responsibility for "commerce with foreign nations, and among the several states"[36] to the federal government, but it does not contain an express provision granting the right of ingress and regress to and from the states. Zechariah Chafee concluded that this language was not included because the right of "free

33. 1 Blackstone Commentaries 134.
34. Arts. of Confederation art. 4, cl. 1.
35. *Id.* cl. 2.
36. U.S. Const. art. 1, § 8.

ingress and regress" was so obviously inherent in the concept of the federal union envisioned by its draftsmen that they saw no need to specify such a right.[37]

The United States Supreme Court first suggested that the privilege of interstate travel was a constitutionally protected right in the *Passenger Cases*,[38] which dealt with the right of the states to tax immigrants from foreign countries. Chief Justice Taney, in well-known dicta, noted that the states obviously could not levy such a tax on United States citizens: "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."[39]

During the late 19th Century the Supreme Court's attention was frequently devoted to the protection of the national system of trade and commerce from undue state regulation. An attempt to restrict interstate travel of persons rather than goods first came before the Supreme Court in 1867.[40] Nevada imposed a tax on persons traveling between states, and the Court held it invalid, quoting Chief Justice Taney's opinion in the *Passenger Cases*. Although the movement of goods rather than the movement of people attracted most judicial attention, the result—businesses operating on a national scale—tended to encourage internal population movement as well. Large corpora-

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37. Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 163-66 (1956). This reasoning was followed in United States v. Guest, 383 U.S. 745 (1966), in which the Court set forth its currently prevailing interpretation of the historical basis of the constitutional doctrine of mobility:

> Although the Articles of Confederation provided that "the people of each State shall have free ingress and regress to and from any other State," that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution. . . .
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> Although there have been recurring differences in emphasis within the Court as to the source of the Constitutional right of interstate travel, there is no need here to canvass those differences further. Its explicit recognition as one of the federal rights . . . goes back at least as far as 1904. . . . We reaffirm it now.

Id. at 758-59.

38. Passenger Cases, 48 U.S. (7 How.) 283 (1849).

39. *Id.* at 492.

40. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

tions opened and closed new plants, transferred personnel freely, and challenged new markets with new products.[41]

National interests prevailed in the long battle over the Interstate Commerce Clause and in one sense this represented a victory for uncontrolled growth over attempts to manage development in terms that would favor local interests. Battle lines were drawn over issues such as taxation and rate regulation that seem far removed from those issues that currently occupy the attention of those concerned about growth management. Nevertheless, the interplay between national and local interests played an important, albeit indirect, role in our national growth policy.[42]

B. *Challenges to Direct Restrictions on Growth*

Direct restrictions on growth raised few legal issues until the 20th Century when a major constitutional attack was aimed at the then new growth management technique—comprehensive zoning.[43]

In Euclid, Ohio, a developer challenged a restriction limiting his property to residential uses. The trial court viewed zoning with disfavor, calling it a system "to classify the population and segregate

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41. As the Supreme Court stated in Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870), the Constitution entitles "a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business without molestation." *Id.* at 430.

42. Changes in property law concepts also encouraged economic development by national interests at the expense of existing local interests:

> At the beginning of the century, property law tended to encourage higher risk investments through a doctrine of priority, which conferred exclusive property rights on the first developer. By the middle of the century, however, the law had shifted to a reasonable use or balancing test which allowed newer interests to compete while destroying the claims that existing property owners had acquired under older legal doctrines. In the process of responding to the changing and often unstable utilitarian standard of efficiency, the American conception of property was harnessed to the paramount goal of economic development.

Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860,* 40 U. CHI. L. REV. 248, 290 (1973).

43. Language from some of the early state court decisions holding zoning unconstitutional could easily be reproduced in the briefs of the civil rights groups now attacking exclusionary zoning. *See* Babcock & Bosselman, *Suburban Zoning and the Apartment Boom,* 111 U. PA. L. REV. 1040, 1046-48 (1963). An interesting history of early zoning ordinances demonstrates that the first comprehensive zoning ordinance—that of New York City—was basically designed to keep the garment workers out of the expensive retail and residential areas. S. TOLL, ZONED AMERICAN 107-16 (1969).

them."[44] Although the Village's arguments to the Supreme Court centered around the ordinance's effect on property values, rather than on the right to travel, the notion that Euclid's ordinance intended to divert industry away from the Village underlay the developer's argument:

> The recent industrial development of the City of Cleveland . . . has already reached the Village. . . . In its obvious course, this industrial expansion will soon absorb the area in the Village for industrial enterprises. It is in restaint of this prospect that the ordinance seeks to operate. In effect it erects a dam to hold back the flood of industrial development and thus preserve a rural character in portions of the Village [contrary to] natural economic laws. . . .[45]

Yet, the Supreme Court upheld the validity of zoning, rejecting the assertion that is was not within the scope of a municipality's police powers to "divert this natural development elsewhere" in order to protect the health and safety of the community.[46]

While zoning was designed to control growth, it usually has not been used for this purpose except in areas where substantial development already exists. Most communities have sought to encourage the development of vacant land, although discrimination against those uses that attract poor people has been common.[47] Until recently, however, plans to limit growth were quite rare. Daniel Mandelker suggested: "Indeed, it can be argued that an unspoken premise of American planning policy is that no barriers should be placed in the way of indefinite urban expansion."[48] Therefore, cases challenging the effect of zoning on the right to travel appeared only within the last few years.[49]

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44. Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

45. Brief for Appellee, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 371 (1926).

46. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 389-90 (1926).

47. *See* R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING 7-17 (1973).

48. MANDELKER, *supra* note 19, at 41.

49. During the Depression, California passed a statute requiring persons entering the state to prove that they were employed. The Supreme Court in Edwards v. California, 314 U.S. 160 (1941), held the statute unconstitutional by a plurality that nonetheless could not agree whether the statute violated the privileges and immunities clause or constituted an undue interference with Congress' power to control interstate commerce.

In the 1960's the concern of many states over the in-migration of poor people was focused on spiralling increases in welfare payments. Some states imposed residency requirements limiting eligibility for welfare benefits to persons who had resided in the state for a year or more. The Supreme Court held these residency requirements unconstitutional:

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.[50]

The Supreme Court of Pennsylvania has expressed a similar concern that increasingly restrictive local controls on land use may conflict with "the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live."[51] In a series of widely read and influential opinions by Justice Samuel Roberts,[52] the court has invalidated local land use controls that fail to take account of the impact of these controls on the growth of a larger area:

> It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area. If Concord Township is successful in unnaturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live there will

50. Shapiro v. Thompson, 394 U.S. 618, 629 (1968). *See also* Memorial Hosp. v. Maricopa County, 94 S. Ct. 1076 (1974); Dunn v. Blumstein, 405 U.S. 330, 338-42 (1972); Graham v. Richardson, 403 U.S. 365, 375 (1971); Griffin v. Breckenridge, 403 U.S. 88, 105-06 (1971); Oregon v. Mitchell, 400 U.S. 112, 236-39, 285-86 (1970); Demiragh v. DeVos, 476 F.2d 403 (2d Cir. 1973); King v. New Rochelle Municipal Housing Authority, 314 F. Supp. 427 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 646 (2d Cir.), *cert. deined*, 404 U.S. 863 (1971). The *Shapiro* opinion would appear to classify "the poor" as a category deserving special protection, but such an interpretation is questionable in light of James v. Valtierra, 402 U.S. 137 (1971). *See* Lefcoe, *The Public Housing Referendum Case, Zoning and the Supreme Court*, 59 CALIF. L. REV. 1384 (1971); Note, *The Equal Protection Clause & Exclusionary Zoning After* Valtierra *and* Dandridge, 81 YALE L.J. 61 (1971).

51. National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 532, 215 A.2d 597, 612 (1965).

52. *See* Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970); *In re* Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965).

> inevitably have to live in another community, and the requirement that they do so is not a decision that Concord Township should alone be able to make.[53]

It can be argued that no explicit growth management system is consistent with the right to travel and that the underlying motive for regulating the rate or quantity of growth is unconstitutional. A federal district court relied heavily on an absolute right to travel to invalidate Petaluma's quota system.[54] The court did not view the challenge to Petaluma's plan as an attack on traditional zoning powers.[55] Any explicitly quantified controls on growth were, in the court's view invalid: "[The issue is] may a municipality capable of supporting a natural population expansion limit growth simply because it does not prefer to grow at the rate which would be dictated by prevailing market demand. It is our opinion that it may not."[56]

The right to travel represents an important factor in judicial review of local legislative determinations regarding land use regulation. The full extent of its effect on growth management techniques in particular has not been clarified by case law to date.

IV. The Exclusionary Zoning Cases

Lest too much weight be placed on the right to travel, it is important to examine other recent cases upholding local land use regulations against a variey of constitutional challenges. These challenges have often centered on alleged equal protection violations of the rights

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53. Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 474-75, 268 A.2d 765, 768-69 (1970). For a discussion of the relationship of these cases to the United States Supreme Court's decisions on the "right to travel" see Comment, *The Right to Travel and its Application to Restrictive Housing Laws,* 66 Nw. U.L. Rev. 635 (1971).

54. *See* note 28 and accompanying text *supra.* Another opportunity for the federal courts to adopt the right to travel doctrine in a growth management context arises in the pending appeal of Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, No. 74-1326 (7th Cir., June 1, 1974). In their brief plaintiff-appellants alleged that defendant's rejection of low- and moderate-income housing in this suburban community impinged upon the individual plaintiff's right to travel. Brief for Appellants at 49-55, *id. See* text at note 71 *infra.*

55. Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574, 587 (N.D. Cal. 1974). This order has been stayed pending appeal. 5 Environmental Rptr., No. 14, at 429 (1974) (Douglas, J., Circuit Justice).

56. 375 F. Supp. at 583.

of disadvantaged or minority groups and are known as the exclusionary zoning cases.[57]

A. *The Blessings of Quiet Seclusion*

Advocates of growth management can take heart from the fact that the majority of federal court decisions support local land use regulations against various constitutional attacks. Courts have approved many types of local discrimination among different land uses unless the discrimination could be shown to have a racial or ethnic basis.[58]

The United States Supreme Court has considered only one exclusionary zoning case—*Village of Belle Terre v. Boraas*.[59] Although *Belle Terre* involved a somewhat esoteric issue that distinguishes it from typical exclusionary zoning cases, the Court's decision lends considerable support to local governments. Plaintiffs, five unrelated students, charged that the Village's zoning ordinance discriminated against them by prohibiting them from living together in a "single-family" house because unrelated persons were not a "family" as defined by a Village ordinance.[60]

Plaintiffs relied on a number of constitutional arguments but all were rejected. The right to travel argument was summarily dismissed:

> The present ordinance is challenged on several grounds: that it interferes with a person's right to travel; that it interferes with the right to migrate to and settle within a State. . . .

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57. It currently appears that equal protection for the poor and minorities will not be a successful ground for challenging growth management techniques merely on the basis of a statistical predominance of those groups among the persons adversely affected. *See* note 50 *supra*.

58. For cases in which a racial motive was found to exist see Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla.), *aff'd*, 425 F.2d 1037 (10th Cir. 1970). *See also* United States v. City of Black Jack, 372 F. Supp. 319 (E.D. Mo. 1974); Lawrence v. Oakes, 361 F. Supp. 432 (D. Vt. 1973). *See generally* Aloi & Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?*, 1971 URBAN L. ANN. 9.

59. Village of Belle Terre v. Boraas, 94 S. Ct. 1536 (1974).

60. The issue in *Belle Terre* did not involve racial or ethnic discrimination nor did it involve a land-use restriction that operated in an exclusionary manner.

> We find none of these reasons in the record before us. It is not aimed at transients. Cf. *Shapiro v. Thompson,* 394 U.S. 618.[61]

The Court went on to extol the "blessings of quiet seclusion" that the community was trying to protect:

> The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.
>
> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It 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.[62]

The fact that only two justices dissented in *Belle Terre* leaves little hope that the Court will sympathize with future attacks on local regulations unless racial discrimination can be shown.

Belle Terre indicates that the Court will permit very substantial limitations on the use of property based wholly on the desire to maintain community character or neighborhood uniformity,[63] confirming Daniel Mandelker's earlier evaluation of the Court's position:

> *Euclid* merely held, as we translate it, that land use incompatibilities based on taste could be the organizing concept on which [criteria for allocating land use] could be formulated.[64]

Given the Court's willingness to allow local governments to control growth based on very vague standards of "taste," it will be difficult to establish a standard to determine when these regulations infringe on the right to travel and in what circumstances the line of reasonable regulation has been crossed.

B. *Availability of Alternative Sites as a Limiting Factor*

Recent decisions indicate an apparent reluctance on the part of lower federal courts to strike down local regulations designed to re-

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61. *Id.* at 1540; 8 URBAN L. ANN. 194 (1974).

62. 94 S. Ct. at 1541.

63. *See* Nopro Co. v. Town of Cherry Hills Village, 504 P.2d 344, 349 (Colo. 1972). *See generally* N. WILLIAMS, JR., THE STRUCTURE OF URBAN ZONING 60-72 (1966).

64. MANDELKER, *supra* note 19, at 38-39.

tain existing community character or neighborhood conformity *unless the developer can show that no alternative sites are available.* Four recent opinions illustrate this common attitude.

Steel Hill Development, Inc. v. Town of Sanbornton[65] involved a small town in central New Hampshire with a permanent population of approximately 1,000 residents, 400 seasonal homes, and a regular influx of about 1,000 summer residents. Steel Hill Development proposed to build 500 dwelling units on 410 acres of land and began negotiations for zoning text and map amendments that would permit the first stage of the development. Substantial public opposition to the development resulted in a rezoning that placed approximately 70% of the company's land in an agricultural district with a six-acre minimum lot size.

The First Circuit upheld the rezoning against constitutional attack. The court said that while in more urbanized areas a community might be required to accommodate growth, the exclusion of a particular use from a "non-metropolitan community . . . is not likely to conflict with a regional need for local space for that use."[66]

A California district court reached a similar result in *Ybarra v. Town of Los Altos Hills.*[67] The exclusive San Francisco suburb of Los Altos Hills refused to permit any multi-family dwellings and particularly a section 236 housing project[68] proposed by plaintiffs. The court conceded that "for all practical purposes" Los Altos Hills excluded low-income persons from residence in that community.[69] Nevertheless the court held that

> [such exclusion did] not substantially impair any important interest of the poor [because it did not] . . . deny them the opportunity for low-cost housing in convenient and decent locations nearby. Since Los Altos Hills itself has virtually no low-income residents, it is not neglecting any housing responsibility to its own. The city has no industry, has an insubstantial amount of commercial business and thus offers little or no employment

65. 469 F.2d 956 (1st Cir. 1972).

66. *Id.* at 961, *quoting* 57 IOWA L. REV. 126, 140 (1971).

67. 370 F. Supp. 742 (N.D. Cal. 1973).

68. 12 U.S.C. § 1715z-1 (1970), *as amended,* 12 U.S.C. § 1715z-1(n) (Supp. II, 1972).

69. 370 F. Supp. at 750.

> opportunity to low-income persons. Therefore, it need not zone to insure the availability of low-income housing for resident low-income workers.[70]

A federal district court in Illinois reached a similar conclusion in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*.[71] The court upheld the Village's refusal to rezone vacant land to accommodate a proposed section 236 multiple-family housing project,[72] in part because other vacant tracts available to plaintiffs were already zoned for apartments. The court further justified its holding by pointing out that although low-rent housing was lacking in the Village, an adequate supply was available in the surrounding area:

> [S]ome blacks and other minorities do live in Arlington Heights, and an 11% vacancy rate exists for rental property in the Village. What is lacking is low rent property, but even this is available . . . just north of Arlington Heights and nearer to the principal employer of minorities than is the property on which the plaintiff now seeks to build new housing.[73]

In *Acivido v. Nassau County*[74] a district court in New York considered the proposed development of a tract of land in the metropolitan New York City area. The land had been acquired by Nassau County and the General Services Administration. The county refused to consider the construction of any multi-family housing, other than senior citizen housing, on the 685 acres. The tract was located in the part of the county that had the highest population density, the greatest proportion of poor and racial minorities, but the least amount of available land for housing construction. Despite the recognized need for low- and moderate-income housing to meet the pressures of

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70. *Id.* The court went on to point out that the wealthy could not sleep under bridges either:

> Finally, it must be observed that the Los Altos Hills ordinance prevents luxurious high rise or other such development requiring multi-unit housing just as much as it prevents low-cost multi-unit housing. The wealthy individual desiring, for example, the conveniences of an apartment with freedom from the upkeep of a house, freedom from maintenance of grounds and freedom from other like aspects of caring for single family dwellings—that wealthy individual, no less than the poor, is denied multi-unit housing in Los Altos Hills. This saliently distinguishes the ordinance from those forbidden legislative enactments which deny rights and privileges solely for the poor.

Id. at 751.

71. Civil No. 72-C-1453 (N.D. Ill., Feb. 22, 1974).

72. *See* note 68 *supra.*

73. Civil No. 72-C-1453, at 5.

74. 369 F. Supp. 1384 (E.D.N.Y. 1974).

population growth and increased urbanization, local sentiment opposed multi-family housing in order to maintain the overall affluent suburban character of the county. Upholding the county's refusal to build apartments, the district court reasoned:

> [C]onsidering the availability of land throughout Nassau County that could be used to construct multi-family housing and the suburban character of the communities within the county, there is no basis to support a finding that the construction of high-rise apartments at Mitchel Field is essential to the existence of low-income family housing in Nassau County.[75]

In *Steel Hill, Ybarra, Arlington Heights,* and *Acivido* the court looked beyond the boundaries of the local government whose restrictions were challenged and concluded that other potential development sites were available in other jurisdictions. Courts seem to be measuring the reasonableness of a locality's regulations against the impact of those regulations on a broader region. As applied to the right to travel, this position seems at least superficially logical: the purpose of migration is to obtain the benefits of residence in a general geographic area and only in rare instances would such benefits be available in but one local governmental jurisdiction. Thus the impact of local regulations on the right to travel can be measured only by evaluating the impact of all regulations in the area on potential in-migrants and not by measuring the impact of any single regulation on any single parcel of land. Therefore, if local governments can show that the growth they reject can be sufficiently absorbed by surrounding areas that are equally desirable, these decisions suggest that the potential migrant's constitutional rights have not been violated—including the right to travel.[76]

To meet the burden of proof under this standard plaintiff must apparently show that the site he has selected is the only available site

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75. *Id.* at 1390.

76. Consider the allegation that a municipality's restrictive zoning ordinance prevents the construction of multi-family housing within its jurisdiction. Plaintiff then alleges violation of his right to equal treatment. The court, however, determines that his constitutional right is intact since he can build on another site or find housing outside the municipality. The court can use the same standard to uphold the ordinance against plaintiff's claim that his right to travel has been infringed. If he can find an equally desirable home in the vicinity surrounding the municipality, then his right to travel is not jeopardized.

for development in a given region.[77] If a local government can defend its restrictive policies by pointing to opportunities that exist beyond its borders, plaintiff then has the impossible burden of challenging the zoning and land use policies of an entire state or region.[78] The process of data collection alone involved in determining the current zoning regulations applicable to land within the jurisdiction of dozens or hundreds of local governments may prove so expensive as to foreclose this type of litigation except for a few test cases.[79] Moreover, since many communities use the "wait-and-see" process described earlier,[80] there may be no practical way of determining what sites would be available in other jurisdictions without applying for the rezoning of specific sites. Where communities have frequently granted

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77. An analogy may be found in the litigation under NEPA on the issue of whether an environmental impact statement need analyze the potential alternative proposals that are not within the power of the agency to implement. *See, e.g.*, Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 350 (8th Cir. 1972); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972); Montgomery v. Ellis, 364 F. Supp. 517, 525 (N.D. Ala. 1973); Environmental Defense Fund v. Corps of Engineers, 348 F. Supp. 916 (N.D. Miss. 1972), *aff'd*, 492 F.2d 1123, 1135 (5th Cir. 1974); *see* F. ANDERSON, NEPA IN THE COURTS 219-21 (1973). *See also* Fasano v. Board of County Comm'rs, 507 P.2d 23, 29 (Ore. 1973) (standard for granting zoning change is whether site in question is the best available for the proposed development within the city's jurisdiction).

78. For a discussion of the problems involved in defining the scope of a region see Rubinowitz, *Exclusionary Zoning: A Wrong in Search of a Remedy*, 6 U. MICH. J.L. REF. 625 (1973).

79. *Cf.* Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291 (9th Cir.), *relitigated*, 357 F. Supp. 1188 (N.D. Cal. 1970), in which the circuit court stated that plaintiff would prevail if it could show that the City's overall plan failed to accommodate the needs of its existing low-income families and that no environmental and social values precluded building low-income housing on the site in question. *See also* Town of Los Altos Hills v. Adobe Creek Properties, Inc., 32 Cal. App. 3d 488, 108 Cal. Rptr. 271 (1973), in which the state court upheld the exclusion of commercial recreational facilities from the zoning ordinance since plaintiff failed to

> show that the county or regional situation is such that no recreational areas will be available . . . . There is no showing as to whether the customers . . . are poor or affluent, or whether there are other locations outside of the city . . . [to] operate a similar enterprise, and its customers may obtain similar amusement.

Id. at 508, 108 Cal. Rptr. at 286. *Cf.* Williams & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971). *See generally* Fasano v. Board of County Comm'rs, 507 P.2d 23, 30-31 (Ore. 1973) (Bryson, J., specially concurring).

80. *See* note 17 and accompanying text *supra*.

such rezonings no practical method may exist to factually determine whether other sites are available.[81]

When and where the courts will draw the line in upholding the validity of restrictive ordinances is speculative and contingent upon a community's character and setting. The problems involved in identifying the best site for development within a particular region are compounded by procedural and evidentiary difficulties.

V. The Problem of Inadequate Remedies

Even should a substantive standard be adequately defined, the problem of remedies would remain. Attempts to bring litigation challenging the zoning practices of an entire region have floundered on the standing issue.[82] Yet, unless all local governments in which alternative sites are available are subject to the jurisdiction of the court, plaintiff has no assurance that the alternatives are real rather than mythical. Will plaintiffs such as Steel Hill Development, Inc., and Ybarra find other doors closing to them when they apply?

Courts might avoid these problems by holding that a unit of government that limits growth must find some other location within its own boundaries for that growth. A number of state courts, adopting a somewhat similar rule, have established that local zoning must provide space somewhere in the community for at least one of every type of land use.[83] The Pennsylvania supreme court has upheld this doctrine in a line of cases, the most recent of which applied the doctrine to apartment buildings.[84] Other courts have also applied the doctrine somewhat intermittently to a wide variety of uses.[85]

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81. *See* A Model Land Dev. Code, *supra* note 20, at 230-31; *cf.* Southern Alameda Spanish Speaking Organization v. City of Union City, 314 F. Supp. 967 (N.D. Cal.), *aff'd*, 424 F.2d 291 (9th Cir.), *relitigated*, 357 F. Supp. 1188 (N.D. Cal. 1970).

82. Commonwealth v. Bucks County, 8 Pa. Commw. 295, 302 A.2d 897 (1973); *cf.* Warth v. Seldin, 495 F.2d 1187 (2d Cir. 1974); Evans v. Lynn, 73 Civ. 3475 (M.P.) (S.D.N.Y., May 22, 1974) (limits standing to "potential residents" for challenging restrictive zoning).

83. *E.g.*, Suburban Ready-Mix Corp. v. Village of Wheeling, 25 Ill. 2d 548, 185 N.E.2d 655 (1962); Appeal of Girsch, 437 Pa. 237, 263 A.2d 395 (1970).

84. Appeal of Girsch, 437 Pa. 237, 263 A.2d 395 (1970). For a critical comment on that case see Williams & Norman, *supra* note 79, at 498-99. Earlier cases applied the doctrine to quarries, Exton Quarries, Inc. v. Zoning Bd. of Adjustment, 425 Pa. 43, 228 A.2d 169 (1967), and signs, Ammon R. Smith Auto Co. Appeal, 423 Pa. 493, 223 A.2d 683 (1966); Norate Corp. v. Zoning Bd. of Adjustment, 417 Pa. 397, 207 A.2d 890 (1965).

85. *See, e.g.*, Suburban Ready-Mix Corp. v. Village of Wheeling, 25 Ill. 2d 548, 185 N.E.2d 665 (1962).

The principle of these decisions could be expanded to require that a local government seeking to manage growth must provide some place for that growth to go, just as the community must provide some place for the ready-mix plant, the apartment building, and the flashing neon sign. Admittedly, planning based on a requirement that each local government must provide space for a "little bit of everything" in not a very sensible system of planning. In many communities it is illogical to require that land be provided for one of everything, or, for that matter, that any growth at all take place.

From the developer's standpoint a simple, though arbitrary, judicial remedy may be better than one so complex and expensive as to be useless.[86] To any developer time is money, and the delay of litigation

86. Simple judicial remedies, however, seem inadequate to deal with growth control problems at the regional level. Typically, a developer who successfully challenges the actions of a local government against his proposed development is granted injunctive relief. This remedy, however, is limited in scope by merely allowing unhindered construction of housing at a particular site or the provision of municipal facilities for a specific development. *See, e.g.*, United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Hawkins v. Town of Shaw, 437 F.2d 1286 (1971), *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1972); Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Dailey v. City of Lawton, 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970).

Another approach that courts have taken in land use control cases is "per se invalidation" of a restrictive ordinance. *See* L. Sager, "Exclusionary Zoning:" Constitutional Limitations on the Power of Municipalities to Restrict the Use of Land (paper prepared for the American Civil Liberties Union Biennial Conference in Boulder, Colorado, June 8-11, 1972). A court may determine that a regulation is invalid on its face because it is inherently exclusionary or highly suggestive of an exclusionary purpose. Invalidation of the restrictive provision alone does not, however, guarantee that a municipality will not discover other means to close itself off from development and population growth. While courts may develop laudable standards for invalidating zoning ordinances, the need still exists for effective and broad affirmative relief. Excellent illustrations are provided by Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970), and National Land Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965), in which the courts struck down minimum lot size requirements in undeveloped areas as invalid zoning having no reasonable relation to the general welfare.

It is interesting to note:

> Kit-Mar Builders . . . are still negotiating for subdivision approval . . . . Finally, even after the Supreme Court invalidated the four-acre zoning involved in *National Land and Investment Co. v. Easttown Township Board of Adjustment* . . . , Easttown Township then threatened to impose three-acre zoning. National Land finally abandoned its effort to build on one-acre lots, and the case was settled at two-acre minimum lots.

Brief for Appellants at 45-47, Commonwealth v. Bucks County, 22 Bucks Co.

often outweighs its benefits. Any remedy, to be helpful to developers on broad scale, must be quick, inexpensive and painless, and must allow him to build immediately on land he already owns.[87]

If, on the other hand, a court is satisfied that better alternative sites exist outside the boundaries of a given local government and finds a means to exercise jurisdiction over the governmental units that control these sites, can an appropriate remedy be fashioned that will allow the developer to build on these sites? Obviously, any remedy, to be adequate, must insure that those sites that the challenged community alleges to exist continue to remain available for development. This will present many subtle fact questions because local governments can impose a wide variety of legitimate land use regulations, such as height, bulk and density controls, that may or may not have the practical effect of making development economically infeasible. A readily available test of such issues would require courts to maintain some continuing jurisdiction over a broad geographical area.

The district court opinion in *Petaluma* represents one court-adopted approach to the exercise of continuing jurisdiction. After invalidating the essence of the Petaluma zoning ordinance as an unconstitutional infringement on the right to travel, the district court did not absolve itself of further responsibility. Instead, it decided to retain jurisdiction over the matter until the zoning and land use policies of the city could be settled *by the city*.[88] Other than some general guidelines as to what would not be acceptable growth management regulations, however, the court did not choose to interfere with the development of a new ordinance.[89]

L. Rep. 179 (1972), *aff'd*, 8 Pa. Commw. 295, 302 A.2d 897 (1973).

See Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 320 A.2d 223 (L. Div. 1974) (invalidation of ordinance for failing to promote a balanced and well-ordered plan for an entire municipality); Molino v. Mayor & Council, 116 N.J. Super. 195, 281 A.2d 401 (L. Div. 1971) (invalidation of ordinance provisions pertaining to number of bedrooms and certain mandatory amenities required for multi-family housing); Township of Willistown v. Chesterdale Farms, Inc., 7 Pa. Commw. 500, 300 A.2d 107 (1973) (invalidation of ordinance scheme relating to apartments); Board of County Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959) (invalidation of large minimum-lot size).

87. Test cases are of little value in regard to land use regulations. Each parcel of land has unique characteristics that require each case be decided on its own particular facts.

88. Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574, 586-88 (N.D. Cal. 1974).

89. *Id.* at 588.

In *Pascack Association v. Township of Washington*[90] a New Jersey court adopted a novel course of action. An owner who was denied a variance to construct garden apartments on his land challenged the validity of the Township's zoning ordinance. The court held the ordinance invalid insofar as it imposed a two-acre minimum lot size restriction and failed to make any provisions for multi-family or rental housing within the municipality's borders. The municipality was ordered to amend its ordinance accordingly. The court, however, did not consider the Township's subsequent modification to be in good faith.[91] Upon plaintiff's motion to have a judgment entered providing judicial relief, the court came upon a solution more typical in school desegregation cases than land use litigation[92]—it retained planning consultants to recommend the form of zoning relief appropriate under the circumstances of a public need for multi-family housing in the Township. After receiving the planners' report, the court issued its final order granting plaintiff a building permit for the construction of housing in keeping with the recommendations of the planning consultants.[93]

Both *Petaluma* and *Pascack* involved only one local government. State and federal courts have also been experimenting with these more complex remedies in cases concerning the availability and location of low-income public housing in an entire metropolitan area.[94] The remedies take the form of orders mandating municipalities to compile data and submit reports and plans to the court detailing future policies and corrective, affirmative activities. The courts,

90. Nos. A-3790-72, A-139-73 (N.J. Super. Ct. L. Div. 1974).

91. The amendment allowed multi-family developments but not on sites owned by plaintiff. Most of the land rezoned for multi-family and nonprofit uses was owned by the Township, the Young Men's Hebrew Association, and a fraternal order. The court concluded that the amendment was not made in good faith because, in addition, the ordinance contained numerous cost-raising restrictions and requirements such as bedroom limitations and floor space requirements.

92. *See generally* Rubinowitz, *supra* note 78.

93. For a fuller discussion of *Pascack* by the court-appointed planners see Levin & Rose, *The Suburban Land Use War: Skirmish in Washington Township, New Jersey*, 5 URBAN LAND 14 (1974).

94. *See, e.g.*, Gautreaux v. Chicago Housing Authority, Nos. 74-1048, 74-1049 (7th Cir. Aug. 26, 1974); Garrett v. City of Hamtramck, 335 F. Supp. 16 (E.D. Mich. 1971); Urban League v. Mayor & Council, Doc. No. C-41122-73 (N.J. Super. L. Div. 1974); Southern Burlington County NAACP v. Township of Mt. Laurel, 119 N.J. Super. 164, 190 A.2d 465 (L. Div. 1972). *But see* Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F. Supp. 1245 (three-judge court), *on remand*, 355 F. Supp. 1257 (N.D. Ohio 1973), *rev'd*, No. 73-1407 (6th Cir. July 9, 1974).

recognizing the regional impact of public housing decisions, do not limit their considerations to a specific locality. As part of this approach, the courts retain jurisdiction and supervise the proceedings to insure compliance with their orders.

In *Crow v. Brown*[95] the court viewed as inadequate injunctive relief pertaining only to the issuance of building permits and the prevention of interference with the construction of two housing projects proposed for Fulton County, Georgia.[96] No low-income housing was located in the county outside of the city of Atlanta. Recognizing the national policy of balanced and dispersed public housing, the court further ordered the county and the city to form a joint committee to select appropriate sites for public housing in both the city and the county, thus requiring the two separate governing bodies to work together to solve the problems of inadequate housing on a regional basis.[97]

In *Gautreaux v. Chicago Housing Authority*[98] a district court found that the housing authority had been operating a segregated system of public housing. As a remedy, it issued a complex decree requiring, among other things, that the Housing Authority plan and develop low-rent public housing so that three housing units would

95. 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam,* 457 F.2d 788 (5th Cir. 1972).

96. 332 F. Supp. at 395-96.

97. Note that plaintiffs only asked for injunctive relief to aid the construction of the two projects in question. The order for the establishment of the joint committee came as a result of intervenors. Telephone Interviews with Mr. Moriton Rolliston, Jr., Counsel for Plaintiffs Crow and Susman, June 20, 1974.

The committee was in effect for approximately eighteen months and submitted numerous site recommendations; however, none were chosen for actual construction. Those few projects finalized subsequent to the litigation were "already in the mill at AHA [Atlanta Housing Authority]." One project was built on the north side of Altanta but in a predominantly white, middle-income, apartment and commercial area two blocks from the wealthiest, white residential section in Atlanta. *Id.*

The lack of any substantial construction of low-income housing in Fulton County was due in part to the clamp placed on housing funds by the federal government for two years following *Crow.* The main reason was, and still is, that land is so expensive that HUD turned down prospective projects. One proposed site HUD refused to approve was near a shopping center in the county where land was selling for $100,000 an acre. *Id.*

The *Crow* remedy was not considered to be especially effective given the competence of the committee, the absence of cooperation by local governments, and economic practicalities. Yet, the litigation and committee activites are matters of court record and serve as an example for other jurisdictions. *Id.*

98. 296 F. Supp. 907, *enforced,* 304 F. Supp. 736 (N.D. Ill. 1969), *aff'd as modified,* 436 F.2d 306 (7th Cir. 1970), *cert. denied,* 402 U.S. 922 (1971).

be built in white neighborhoods for each unit in black neighborhoods.[99] The *Gautreaux* court dealt with relatively simple issues: only two classes of people (black and white) and only one category of housing (public low-rent housing). Thousands of hours of time and considerable expense have been spent on this case since 1967,[100] and it is still by no means certain whether public housing will actually be built in white neighborhoods in Chicago.[101]

Are judicial remedies the most desirable approach to problems of growth and management? Do courts have the expertise to make the kinds of practical decisions necessary to develop viable systems of land use regulations? The complexities of a decree involving the rights of the whole nation and the entire host of complex land use policies made the limitations of government by judicial decree become all too apparent.

Conclusion—Part I

Popular support for methods of growth management has grown considerably since the public awakening to the fact that uncontrolled growth can not exist concurrently with a policy of preserving environmental quality. Local governments have responded with various methods to control development. Growth management with its concomitant benefit of aiding the maintenance of a quality environment also conflicts with the traditional American freedom of mobility—a tradition that must not be sacrificed.

The parameters of the right to travel have not yet been fully defined and the limitations that this right may place on methods of growth management are not yet known. A great amount of litigation would be necessary in order to afford the courts an opportunity to develop

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99. Gautreaux v. Chicago Housing Authority, 304 F. Supp. 736 (N.D. Ill. 1969), *aff'd as modified,* 436 F.2d 306 (7th Cir. 1970), *cert. denied,* 402 U.S. 922 (1971).

100. Gautreaux v. Chicago Housing Authority, 265 F. Supp. 582 (N.D. Ill. 1967).

101. Some of the problems in implementing the 1969 order are considered in Gautreaux v. Romney, 363 F. Supp. 690 (N.D. Ill. 1973), *rev'd sub nom.* Gautreaux v. Chicago Housing Authority, Nos. 74-1048, 74-1049 (7th Cir. Aug. 26, 1974); Gautreaux v. Chicago Housing Authority, 342 F. Supp. 827 (N.D. Ill. 1972), *aff'd sub nom.* Gautreaux v. City of Chicago, 480 F.2d 210 (7th Cir. 1973), *cert. denied,* 414 U.S. 1144 (1974). For a discussion of the latter two cases and a brief history of the Gautreaux cases see 8 Urban L. Ann. 265 (1974).

criteria that are workable and consistent with constitutional principles. And even if such criteria are developed, their implementation will be hampered by the limited efficiency and adequacy of judicially fashioned remedies. Although litigation may be useful in providing support for the best examples of growth management or invalidating its worst abuses, it offers little hope for a sensible and workable standard to demarcate the limits beyond which growth management may not go without infringing on freedom of mobility.

A legislative solution seems to be clearly desirable. But the standards are not easy to define, even through legislation. Part II of this Article will discuss some possible legislative techniques for dealing with growth management.