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Risk Management for Land Use Regulations: A Proposed Model

Kenneth G. Silliman

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RISK MANAGEMENT FOR LAND USE REGULATIONS:
A PROPOSED MODEL

KENNETH G. SILLIMAN¹

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Indeed, land-use planning commentators have suggested that the threat of financial liability for unconstitutional police power regulations would help to produce a more rational basis for decisionmaking . . . Such liability might also encourage municipalities to err on the constitutional side of police power regulations, and to *develop internal rules and operating procedures to minimize overzealous regulatory attempts*. . . . After all, if a policeman must know the constitution, then why not a planner?²

Justice Brennan's above-quoted warning was issued over twenty years ago in his dissent in the U.S. Supreme Court case of *San Diego Gas and Electric Company v. City of San Diego*. With its foreshadowing of monetary liability for "negligent planning," the *San Diego* case generated uncertainty and anxiety in the planning profession. These concerns lessened over time as a series of subsequent U.S. Supreme Court land use decisions seemed to avoid the direct question raised by Justice Brennan.³

The 1999 decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*⁴ ended the debate: for the first time the U.S. Supreme Court affirmed an award of damages (\$1.45 million) to a landowner on a "takings" case. The Court also held that the property owners were entitled to a jury trial on key factual questions (e.g., reasonableness of the city's actions, whether the owners were deprived of an economically viable use, and the ultimate question of liability).⁵ As a result, one commentator predicted "there will be a chilling effect on [cities'] willingness to deny

²*San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting) (emphasis added).

³*See* *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (asserting in dicta that the landowner can recover monetary damages for a "temporary taking," but reversing and remanding the case for further state court proceedings); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (invalidating regulation of California Coastal Commission that would have required landowner to convey a public access easement, but declaring no monetary damages); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (declaring that a regulation prohibiting development within certain distance of shore constituted a taking, but remanding for further state court proceedings that included opportunity for landowner to obtain a permit to construct his proposed homes); and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (invalidating city's requirements that store owner dedicate a floodplain area and a bikeway on the grounds that such exactions were not "roughly proportionate" to the impact of the owner's expansion project, but declaring no monetary damages).

⁴526 U.S. 687 (1999).

⁵*Id.* at 720-21.

development proposals on grounds that are not broadly understood by the general public...”⁶

In the interest of mitigating this chilling effect, this article proposes a model of “*internal rules and operating procedures*” that planning offices can use to minimize the threat of liability for negligent planning. The Article identifies a device familiar to most planners—the five-year policies plan—as an integral component of the model. However, I propose a new format of the plan that achieves a closer tie between the purposes motivating planners to regulate and the legal tests employed by courts in their review of these regulations.

The model is admittedly a simplification of complex processes: the simplification consists of a synthesis of land use case law into a practical guide for a planning office. This Article constructs a conservative legal framework to guide planners in conventional planning activities. It further proposes that planners should apply the model to these conventional activities, but work closely with the municipal attorney before adopting more innovative and controversial planning devices.

This Article proceeds in four major sections. Section I commences, with historical reviews: major changes in land use planning within the last 50 years, the land development problems associated with those changes, and judicial responses to these same problems. Comparisons are frequently made between cases from a rustbelt Midwestern state (Ohio) and cases from a faster growing sunbelt state (North Carolina). Section I concludes by assessing the case law’s effectiveness (as both a check on the abuse of planning powers and a guide for planning offices) and by previewing a responsive planning model.

The remainder of the Article develops the office procedures model. The office procedures are grouped under three major headings: Section II discusses long range planning procedures, Section III discusses implementation of planning policies through ordinance drafting and mapping, and Section IV discusses the day-to-day administration of planning regulations.

The model’s focus on case law proscriptions imposes several limitations. First, the model does not incorporate requirements imposed by planning enabling legislation. For purposes of this Article, I assume that local planners can choose the form of their land use plan. However, in some states—most notably California and Florida⁷—planning enabling legislation has been revised to mandate local planning and specify particular plan elements. The regulation of the form of the plan through such enabling legislation may render many of the model’s elements inapplicable to local planning in these states.

Second, many states have enacted administrative procedure acts that may apply to the administration of local land use regulations.⁸ Consequently, the recommendations offered in Section IV should be considered only after the municipal attorney has outlined the procedural framework required by such acts. Finally, the enactment of environmental impact legislation in some states requires

⁶TERRY D. MORGAN, LITIGATING THE LAND USE CASE: MUNICIPAL DEFENSES, INST. ON PLAN. ZONING & EMINENT DOMAIN § 9.01(3) (1999).

⁷CAL. GOV’T. CODE §§ 65350- 65362 (West 1997 & Supp. 2002); FLA. STAT. ANN. §§ 163.3161-.3245 (West 2000 & Supp. 2002).

⁸See OHIO REV. CODE ANN. §§ 119.01-.13 (West 1994); N.C. GEN STAT. §§ 150B-1 to-52 (1999).

planners in these jurisdictions to assess impacts of each significant development proposal. While this Article proposes environmental planning through advance designation of land suitability rather than a case-by-case review,⁹ planning offices subject to environmental impact legislation must continue to employ the case-by-case review procedures contemplated by such acts.

I. PLANNING POWERS AND JUDICIAL CONTROLS: A BRIEF HISTORY

Public land use planning is a relatively new discipline, and authorities will agree that the public regulation of land use is primarily a 20th century development. New York's 1916 zoning ordinance is generally regarded as the first enactment of comprehensive land use regulations in this country.¹⁰ This ordinance, and most ordinances following it during the next thirty years, were primarily a response to urban problems: congestion, overpopulation, and the haphazard location of uses. With limited exceptions,¹¹ zoning was a tool used exclusively by incorporated municipalities.

After the U.S. Supreme Court upheld the use of zoning in the 1926 *Village of Euclid, Ohio v. Ambler Realty Company*¹² decision and set general parameters on the use of the tool in a subsequent decision,¹³ the Court proceeded to abandon the field for more than forty years. Consequently, state courts faced the task of developing the more specific rules applicable to zoning regulation. These courts responded by developing, in effect, a "common law" of zoning. Although the rules developed in the state court decisions were roundly criticized,¹⁴ prior to 1950, the limited geographic application and the limited objectives under the zoning function combined to effectively constrict the range of obstacles placed before private land developers.

A. Major Changes In Land Use Planning: 1950-2000

The unprecedented suburbanization that began in America in the late 1940's opened up a new array of land use problems, and planners gradually added corresponding elements to their respective work programs as a result. Most of these new powers were sorely needed to give planners effective control over frequently haphazard suburban development. However, increased land regulation brought with

⁹For an article supporting advance designation of environmental areas rather than case-by-case review, see Donald Hagman, *NEPA's Progeny Inhabit the States - Were the Genes Defective?*, 7 URB. L. ANN. 3, 46-47 (1974).

¹⁰1 KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 3.07 (4th ed. 1995). See generally Raphael Fischler, *The Metropolitan Dimension of Early Zoning: Revisiting the 1916 New York City Ordinance*, 64 J. AMER. INST. PLANNERS 170 (1998).

¹¹The state of Wisconsin, which is generally considered a leader in the regulation of land use, authorized rural zoning in 1929. Erling D. Solberg, *Rural Zoning in the United States*, AGRIC. INFO. BULLETIN. 59, U.S.D.A. (1952), cited in JACOB H. BEUSCHER & ROBERT R. WRIGHT, *CASES AND MATERIALS ON LAND USE* 324 (1969).

¹²272 U.S. 365 (1926).

¹³*Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

¹⁴See, e.g., Norman Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROBS. 317, 318-19 (1955).

it undesirable byproducts: fewer housing choices and higher housing costs. The new planning elements and the problems associated with their use are separately discussed below.

1. The Expanding Scope of Land Use Planning

At least four major additions to the scope of planning practice can be identified: comprehensive land coverage, additional objectives, greater emphasis on implementation of plans, and increasing use of discretionary review practices.

a. Comprehensive land coverage—Outside of Wisconsin,¹⁵ countywide zoning was exceedingly rare prior to 1960. The planners' main arenas were developed urban areas and those select suburbs that used zoning to protect community property values. As long as land developers had the option of building in unregulated rural areas, they avoided any harshness present in the municipal zoning ordinance by simply "leapfrogging" outside the city limits. Yet as area-wide zoning gained increasing acceptance, developers' choices contracted and excessive zoning requirements began directly impacting land developers and their housing and commercial customers.

b. Additional objectives—From the original health and safety-based regulations, supplemented with zoning ordinances regulating the relationship of urban land uses, the scope of planning controls widened to embrace a whole new set of suburban and rurally-oriented objectives: environmental quality, growth management, fiscal and energy efficiency, preservation of open space, preservation of prime farm and forest land, and preservation of a quiet, rural lifestyle.¹⁶

c. Increased emphasis on plan implementation—While traditional land use planning viewed the preparation of an idealized future land use map as its key function, current practice considers "plan implementation" as an equally important function.

Since mid-century, the nature of the plan has evolved from an elitist, inspirational, long range vision that was based on fiscally innocent implementation advice, to a framework for community consensus on future growth that is supported by fiscally grounded actions to manage change. Subject matter has expanded to include the natural as well as the built environment. Format has shifted from simple policy statements and a single large-scale map of future land use... to a more complex combination of text, data, maps and time tables.¹⁷

The original isolation of land use planning from the specific, short-range battles over property rights had caused many planners in the 1950s and 1960s to question the effectiveness of the profession.¹⁸ However, by the late 1960s a notable shift had

¹⁵See BEUSCHER & WRIGHT, *supra* note 11.

¹⁶See 1 YOUNG, *supra* note 10, § 2.03.

¹⁷Edward J. Kaiser & David R. Godschalk, *Twentieth Century Land Use Planning: A Stalwart Family Tree*, 61 J. AM. PLAN. ASS'N. 365, 368 (1995).

¹⁸See, e.g., Martin Meyerson, *Building the Middle Range Bridge for Comprehensive Planning*, 22 J. AM. PLAN. ASS'N. 58 (1956); Constance Perin, *A Noiseless Secession From the Comprehensive Plan*, 33 J. AM. PLAN. ASS'N. 336 (1967).

taken place: more and more planners were concentrating their efforts on short-range implementation measures.¹⁹

One aspect of this new emphasis on effectiveness was planners' assertion of greater control over the traditional regulatory devices—zoning and subdivision regulations. Additionally, planners began exerting control over the timing and location of capital improvements. Although the manipulation of capital improvements to produce desired land development patterns was discussed as early as 1955,²⁰ the concept was not widely employed until after the Town of Ramapo's sophisticated capital improvements program was upheld in a landmark 1972 New York case.²¹ Since that time, a variety of measures—sewer moratoria, facility sizing, service area policies, detailed staging policies—have been effectively applied by an increasing number of communities.²²

d. Increased use of discretionary review—One of the most significant recent trends in planning is the increased exercise of discretion in decisionmaking.²³ This is a marked departure from the purpose of zoning as conceived in the 1924 Standard Zoning Enabling Act.²⁴ At the commencement of this trend in the early 1970's, Professor Michael Brough commented as follows:

The theory held that most development would occur in the manner prescribed by the regulations applicable to the various districts, and deviations from the preset rules (through use of variances, special exceptions or zoning amendments) would occur only in exceptional cases. But as the system evolved, use of these three devices, and their more

¹⁹The following passage is illustrative:

The current economic situation facing cities, both growing and mature, is bringing a new fiscal orientation to planning. Traditional physically oriented planning is being transformed into budget-oriented planning. Where once planners concentrated on the future design of the city, now they are concerned about bringing some order into day-to-day decisions. Planning is becoming more modest and less visionary, shorter range and more political.

American Planning Association, *Local Capital Improvements and Development Management* 47 (1980).

²⁰Henry Fagin, *Regulating the Timing of Urban Development*, 20 LAW & CONTEMP. PROBS. 298 (1955).

²¹*Golden v. Planning Bd.*, 285 N.E.2d 291 (N.Y. 1972), *appeal dismissed*, 409 U.S. 1003 (1972).

²²*See generally* AMERICAN PLANNING ASSOCIATION, *supra* note 19; R. TABORS, et. al., LAND USE AND THE PIPE 109-31 (1976); John S. Herbrand, Annotation, *Validity of Municipality's Ban on Construction Until Public Facilities Comply With Specific Standards*, 92 A.L.R. 3d 1073 (1980); David J. Oliveiri, Annotation, *Validity of Zoning Ordinance Deferring Residential Development Until Establishment of Public Services in Area*, 63 A.L.R. 3d 1184 (1975); Barbara A. Ramsey, Note, *Control of the Timing and Location of Government and Utility Extensions*, 26 STAN. L. REV. 945 (1974); Robert H. Freilich & John W. Ragsdale, *Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009 (1974).

²³AMERICAN PLANNING ASSOCIATION, *STREAMLINING LAND USE REGULATION* 5 (1980).

²⁴U.S. DEPARTMENT OF COMMERCE, *A STANDARD STATE ZONING ENABLING ACT* (1924).

sophisticated progeny-planned unit developments, floating zones, contract and conditional zoning, etc.—became so widespread that . . . a system originally conceived to permit development by legal right in accordance with specified criteria has now evolved into a system requiring specific development permission in most instances.²⁵

2. Land Development Costs Associated with Planning Trends

Land use planners made considerable strides in the last half of the 20th century. Planners expanded the geographic scope of their activities, incorporated a wider array of environmentally and fiscally related objectives, achieved greater effectiveness through an expanding mix of growth management techniques, and subjected individual development proposals to more intense scrutiny.

Unfortunately (as Professor Brough envisioned in the early 1970s), governmental bodies given new powers also acquired “new opportunities to interfere arbitrarily or maliciously with legitimate private prerogatives.”²⁶ The expanded planning developments discussed above are at least partly responsible for significant increases in land development costs during the past thirty years. The most obvious causes of these cost increases are additional substantive requirements, time delays, less developable land, and less predictability in land use review procedures.

a. Additional substantive requirements—The most direct cost impacts are those in which the government requires developers to install improvements that would not be constructed in the absence of regulations.²⁷ Common requirements include sidewalks, underground utilities, underground storm drainage, curbs and gutters. More sophisticated requirements include land reservations for future highway, parks and other community facilities.²⁸

b. Time delays—Studies in Sacramento in 1990,²⁹ and in Houston in 1980,³⁰ have demonstrated that longer development review times, coupled with more complex procedures and uncertain outcomes, can significantly increase housing costs.

c. Restricting the supply of developable land—When planning areas institute “growth controls” (e.g., population caps, urban service areas, large lot zoning) in a manner which substantially restricts the supply of prime developable land, the

²⁵Michael Brough, *Flexibility Without Arbitrariness in the Zoning System: Observations on North Carolina's Special Exception and Zoning Amendment Cases*, 53 N.C. L. REV. 925, 925-26 (1975). See also, Craig A. Peterson, *Flexibility in Rezoning and Related Government Land Use Decisions*, 36 OHIO ST. L.J. 499 (1975).

²⁶Brough, *supra* note 25, at 926.

²⁷A thorough economic discussion of these requirements appears in Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L. J. 385 (1977).

²⁸*Infra* note 120.

²⁹IRA B. LOWRY & BRUCE W. FERGUSON, DEVELOPMENT REGULATION AND HOUSING AFFORDABILITY 143-48 (1992).

³⁰RICE CENTER FOR COMMUNITY DESIGN AND RESEARCH, TECHNICAL REPORT: THE DELAY COSTS OF GOVERNMENT REGULATION IN THE HOUSTON HOUSING MARKET (1980).

impact on real estate prices can be significant.³¹ A 1992 study of Sacramento County estimated that development regulations added \$26,000 to the cost of a typical new home (or about one-fifth the cost of the \$131,000 median sales price.)³²

d. Lack of predictability—Prior to the 1970's, few discussions of development cost impact of land use regulations cited “predictability of public review” as a major factor. While corporate lawyers stress the importance of preventive law in the conduct of businesses' day-to-day activities,³³ the elements of “predictability” and “preventive law” are frequently missing in the land development business. This is particularly problematic in communities where most public decisions are made through case-by-case project reviews. As Lake County, Illinois Planning Director Lane Kendig noted in 1980, “ad hoc procedures make the role of planning unclear at best and futile at worst . . . the results have been inconsistent, highly subjective and too often politically motivated.”³⁴

B. Legal Tests Applied to Land Use Regulations

In the mid 1970's, many state and federal courts undertook a more active review of land use regulations. In part, this legal development was a judicial response to the land development cost factors discussed above. In his five-volume series, *AMERICAN LAND PLANNING LAW*, Professor Norman Williams observed that prevailing attitudes toward land use regulations have gone through five stages. The third stage—faith in local autonomy—was then (and arguably is still today) the majority rule.

During this period, the courts have given great respect to decisions on zoning by various local agencies . . . The change in attitude has been expressed in various ways- a genuine presumption of validity which controls unless a strong case is made to the contrary, the rule that zoning is valid when the case is fairly debatable, etc.³⁵

Nevertheless, by 1988, Williams had detected the emergence of a fourth stage (sophisticated judicial review by state courts) and a possible fifth stage (re-assertion of federal oversight of land use).³⁶ The respective state and federal courts developed tighter review standards during the 1970's and 1980's as they attempted to arbitrate disputes clustered under the label of “exclusionary zoning.” The legal tests included: the “comprehensive plan requirement,” substantive due process, equal protection, procedural due process, and antitrust.

³¹See Ellickson, *supra* note 27, at 434 n.131, partly attributes the astounding increase (101% between 1968 and 1975) in Washington, D.C. area housing prices to the “simultaneous takeover of Fairfax, Montgomery and Prince Georges counties by anti-development politicians in the early 1970s,” citing Donald P. Baker, *D.C. Area is Most Expensive Place in U.S. to Buy a House*, WASH. POST, August 3, 1975, at A1.

³²LOWRY & FERGUSON, *supra* note 29, at 4.

³³See, e.g., Hodge O'Neal, *Preventive Law: Tailoring the Corporate Form of Business to Ensure Fair Treatment of All*, 49 MISS. L. J. 529 (1978).

³⁴LANE KENDIG, *PERFORMANCE ZONING* 281 (1980).

³⁵1 NORMAN WILLIAMS, *AMERICAN LAND PLANNING LAW* § 5.04 (2d ed. 1988).

³⁶*Id.* at §§ 5.05-.07 (fourth stage) and § 5.08 (fifth stage).

1. Revival of Interest in the Planning Base of Zoning

By the 1970's, academic commentators had energetically tackled the question of the relationship between comprehensive planning and zoning controls.³⁷ Many state zoning enabling laws included requirements that zoning be "in accordance with a comprehensive plan."³⁸ Two policy questions lie at the root of these statutory expressions: what are the community's planning objectives, and what means have the community's planners chosen to accomplish these objectives?³⁹

After over fifty years (1925-1980) of benign neglect by politicians and courts, the original statutory requirements acquired new vitality in two respects. First, since 1980 there has been a significant increase in the number of states requiring that zoning be in accordance with a real and distinct comprehensive plan.⁴⁰ Second, judicial review of these requirements evolved from early mechanical tests toward more searching tests scrutinizing the suitability of the communities' planning backgrounds.⁴¹

2. Increased Substantive Due Process Scrutiny

The basic examination under a substantive due process challenge to a legislative scheme consists of a two pronged test: (1) does the legislative enactment address permissible state police power objectives, and (2) is the specific enactment reasonably related to these legitimate objectives?⁴² As New Jersey Supreme Court

³⁷See Daniel Mandelkar, *The Role of the Local Comprehensive Plan in Land Use Regulations*, 74 MICH. L. REV. 899 (1976); A. Dan Tarlock, *Kentucky Planning and Land Use Control Enabling Legislation: An Analysis of the 1966 Revision of K.R.S. Chapter 100*, 56 KY. L. J. 556 (1968); Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353 (1955); and Charles M. Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955). For analyses of the requirement in Ohio and North Carolina, see Robert F. Benintendi, Note, *The Role of the Comprehensive Plan in Ohio: Moving Away From the Traditional View*, 17 U. DAYTON L. REV. 207 (1991); Kenneth G. Silliman, *A Practical Interpretation of North Carolina's Comprehensive Plan Requirement*, 7 CAMPBELL L. REV. 1 (1984).

³⁸See, e.g., N.C. GEN. STAT. § 160A-383 (cities), *id.* § 153A-341 (counties) (1999); OHIO REV. CODE ANN. § 713.07 (cities), *id.* § 303.05 (counties), and *id.* § 519.02 (townships) (West 1994).

³⁹See Haar, *In Accordance With a Comprehensive Plan*, *supra* note 37, at 1155.

⁴⁰As of 1993, 24 states had enacted some form of mandatory planning legislation. Ann Strong, et al., *Property Rights and Takings*, 62 J. AMER. INST. PLANNERS 5, 9 (1996).

⁴¹See 1 WILLIAMS, *supra* note 35, § 23.03 (mechanical tests) and *id.* § 23.04 (real substance). North Carolina and Ohio have required scant planning foundations for zoning decisions. See *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444 (N.C. 1979) and *Columbia Oldsmobile, Inc. v. Montgomery*, 564 N.E.2d 455 (Ohio 1990), *cert. denied*, 501 U.S. 1231 (1991).

⁴²*San Antonio Indep. School District v. Rodriguez*, 411 U.S. 1, 40 (1973); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1223 (6th Cir. 1992); *Curto v. City of Harper Woods*, 954 F.2d 1237, 1242 (6th Cir. 1992); *Fred P. French Investing Co., Inc. v. City of New York*, 350 N.E.2d 381, 386 (N.Y. 1976), *appeal dismissed*, 429 U.S. 990 (1976); *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444, 448-49 (N.C. 1979); *State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345, 350-52 (Ohio 2002); *Goldberg Cos., Inc. v. Richmond Hts. City*

Justice Hall stated in his classic dissent in the 1962 case of *Vickers v. Township Committee of Gloucester Township*,⁴³ these questions were often buried under presumptions of validity of municipal action and judicial reluctance to inquire into the actual setting of a zoning case. However by 1980, some courts had begun to return to a more realistic and searching analysis of the range of permissible objectives and the relationship between specific land use controls and these objectives.⁴⁴

3. Equal Protection Analysis

Analyses of ordinances under the Equal Protection Clause of the United States Constitution,⁴⁵ and similar clauses in most state constitutions, traditionally proceed on a two-tier basis. The strict scrutiny test, used to test the reasonableness of classifications involving fundamental rights⁴⁶ and suspect classifications,⁴⁷ embodies a searching inquiry into legislative purposes. By contrast, the rational basis test, usually applied to land use classifications, will uphold the classification if there is any reasonable basis for the difference in regulatory treatment.⁴⁸ Traditionally, application of this test has yielded results similar to those obtained under the deferential due process analysis discussed above, and land use ordinances are rarely invalidated.

However, the rational basis test also began changing in the early 1980's.⁴⁹ By the turn of the century, there were indications that future planners may have to

Council, 690 N.E.2d 510, 512, 514-15 (Ohio 1998). *Presbytery of Seattle v. King County*, 787 P.2d 907, 913 (Wash. 1990), *cert. denied*, 498 U.S. 911 (1990).

⁴³181 A.2d 129, *cert. denied*, *appeal dismissed*, 371 U. S. 233 (1962).

⁴⁴*See generally* MacGibbon v. Bd. of Appeals of Duxbury, 340 N.E.2d 487, 489-92 (Mass. 1976); *See also* 1 WILLIAMS, *supra* note 35, at § 5.05-.06.

⁴⁵U.S. CONST. amend. XIV.

⁴⁶For a summary of cases involving fundamental interests, *see* Gerald Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-9, 12-20 (1972).

⁴⁷For a summary of cases involving suspect classifications, *see id.* at 9-10, 12-20.

⁴⁸*Agins v. City of Tiburon*, 447 U. S. 255, 262 (1980); *Young v. American Mini Theaters, Inc.*, 427 U. S. 50, 71 (1976); *Vill. of Belle Terre v. Boraas*, 416 U. S. 1, 8 (1973).

⁴⁹In 1972, Professor Gerald Gunther observed that the U. S. Supreme Court appeared to be recognizing a middle ground between the strict scrutiny and rational basis tests. He described the characteristics of this new test as follows:

Stated most simply, it would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends . . . Extreme deference to imaginable supporting facts and conceivable legislative purposes was characteristic of the "hands off" attitude of the old equal protection. Putting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by exercising its imagination. It would have the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture. Moreover, it would have the Justices gauge the reasonableness of questionable means on the basis of materials that are offered to the Court, rather than resorting to rationalization created by perfunctory judicial hypothesizing.

specifically document the existence of a problem and the need for the particular legislative classification offered as a solution.⁵⁰

4. Procedural Due Process Challenges

Procedural attacks upon land use ordinances, based on the Due Process Clause of the federal⁵¹ and most state constitutions, have greatly increased in the last twenty years. Due Process requires that an individual be given adequate notice and an opportunity for a hearing before she is deprived of a significant property interest.⁵² The ordinance must give individuals sufficient warning to allow them to conduct themselves in a manner so as to avoid illegal actions.⁵³ Further, the content of the

Gunther, *supra* note 46, at 20-21. Gunther's new test was enthusiastically embraced by the U.S. Court of Appeals for the Second Circuit in *Boraas v. Vill. of Belle Terre*, 476 F.2d 806, 815 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974); however, the subsequent reversal of this decision by the U.S. Supreme Court, *Village, supra* note 48, appeared at the time to foreclose the application of the Gunther test in federal equal protection land use decisions. But see cases cited at note 50 *infra*. Nevertheless, in the mid-1970s several state courts began applying more rigorous standards in their review of land use classifications under their own equal protection clauses. See *Sands Point Harbor, Inc. v. Sullivan*, 346 A.2d 612, 614 (N.J. Super. Ct. App. Div. 1975) (upholding the classification only after court review of testimony and specific legislative findings); *Toms River Affiliates v. Dep't of Env'tl. Prot.*, 355 A.2d 679, 686 (N.J. Super. Ct. App. Div. 1976) (upholding, again, the classification only after searching review of testimony and findings); *Kmiec v. Town of Spider Lake*, 211 N.W.2d 471, 475-77 (Wis. 1973) (scrutinizing the methods by which an agricultural classification was devised and holding that no rational basis existed for the classification).

⁵⁰*See, e.g.*, *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 526 U.S. 687, 698-707 (1999); *Alvarez v. Chavez*, 886 P.2d 461, 466-67 (N.M. Ct. App. 1994) (applying a heightened scrutiny test).

⁵¹U. S. CONST. amend. XIV.

⁵²*Goldberg v. Kelly*, 397 U.S. 254, 267-69 (1970); *Jordan v. DeGeorge*, 341 U.S. 223, 230 (1950). *Cf. Fruman v. City of Detroit*, 1 F. Supp. 2d 665 (6th Cir. 1998) (entering summary judgment for owner of demolished building on procedural due process claim and de facto taking and inverse condemnation claims) *with Harris v. City of Akron*, 20 F.3d 1396 (6th Cir. 1994) (denying building owner's wrongful demolition claim after the owner had alleged inadequate notice and hearing provisions), *reh. denied, cert. denied*, 513 U.S. 1001 (1994).

⁵³*Yater v. Hancock County Planning Comm'n.*, 614 N.E.2d 568, 573 (Ind. Ct. App. 1993), *reh. denied, transfer denied, cert. denied* 511 U. S. 1019 (1993); *Lebanon v. Wergowske*, 590 N.E.2d 902, 904 (Ohio Ct. App. 1991). These general due process principles have been interpreted as follows in the context of land use regulations:

The reason for that rule, the court noted, was the necessity for notice to those affected by the operation and effect of the ordinance. . . . *The restriction on property rights must be declared as a rule of law in the ordinance* and not left to the uncertainty of proof by extrinsic evidence.

James D. Lawlor, Annotation, *Validity, Construction and Effect of Agreement to Rezone, or Amendment to Zoning Ordinance, Creating Special Restrictions or Conditions Not Applicable to Other Property Similarly Situated*, 70 A.L.R. 3^d 125, 182 (1976), *citing Harnett v. Austin*, 93 So. 2d 86 (Fla. 1956) (emphasis added).

hearing is important; the decision-maker must be an impartial one and she must reach her decision according to articulable standards.⁵⁴

Prior to 1980, procedural due process attacks on land use controls were rare. Their prominence today is a specific response to communities' increasing use of discretionary review techniques. Developers now assert due process claims to attack procedures for review of special use permits (and their more sophisticated environmental counterparts). Although there are differences, and some confusion associated with the various discretionary review devices, the basic components are similar.

In a typical special use permit (sometimes known as a "conditional use permit") ordinance, the legislature requires administrative review (usually with preset conditions) prior to final approval of a proposed development. When all these preset conditions can be addressed in objective fashion (e.g., size of parcel, distance from public utilities) there is little need for procedural protections.⁵⁵ Most ordinances, however, establish conditions that are extremely subjective (e.g., whether the use threatens public health and safety). Additionally, many of the ordinances delegate permit decisions to planning boards or boards of adjustment. In these latter situations, courts have established a set of procedural safeguards that usually include a right to sworn testimony, a right of cross-examination, and findings and conclusions based on the evidence adduced at the hearing.⁵⁶

5. Federal and State Antitrust Laws

In the late 1970's, developer land use lawsuits began raising both federal and state antitrust challenges. These attacks were in part enabled by U.S. Supreme Court decisions that narrowed the scope of municipal immunity under federal antitrust laws.⁵⁷ Although Congress' passage of the Local Government Antitrust Act of 1984⁵⁸ partially stemmed this tide of litigation, some developers' attorneys continue to allege anti-competitive city activities in their lawsuits. While successful attacks

⁵⁴Rose v. Village of Peninsula, 875 F. Supp. 442 (N.D. Ohio 1995); see Note, *Developments in the Law- Zoning*, 91 HARV. L. REV. 1427, 1525 (1978).

⁵⁵Brough, *supra* note 25, at 929.

⁵⁶Zylka v. City of Crystal, 167 N.W.2d 45, 50-51 (Minn. 1969); Humble Oil and Refining Co. v. Bd. of Aldermen, 202 S.E.2d 129, 137 (N.C. 1974); *In re Rocky Point Plaza Corp.*, 621 N.E.2d 566, 572 (Ohio Ct. App. 1993).

⁵⁷At the federal level, *cf.* Cmty. Communications Co. v. City of Boulder, 455 U.S. 40 (1982) and *City of Lafayette v. La. Power & Light Co.*, 435 U. S. 389 (1978) with *Parker v. Brown*, 317 U.S. 341 (1943). At the state "unfair trade practices" level, see *Wal-Mart Stores v. Am. Drugs, Inc.*, 891 S.W.2d 30 (Ark. 1995) (finding Wal-Mart not liable of unlawful predatory pricing).

⁵⁸The Local Government Antitrust Act of 1984 protects local governments, and officials and employees thereof acting in an official capacity, against liability for damages, costs and attorney fees for antitrust violations. 15 U.S.C. §§ 34-36 (1994). The Act *does not bar* injunction actions, *nor does it bar* claims against officials or employees not acting in an official capacity. *Id.*

are exceedingly rare in the land use area, careful municipal attorneys should acquaint themselves with the available immunity defenses.⁵⁹

C. Effectiveness of the Legal Tests

1. In Addressing Housing Cost and Housing Choice Problems

Generally, when applied, the legal tests have adequately addressed the more blatant governmental attempts to exclude low-cost housing from a particular jurisdiction.⁶⁰ However, to date, the legal tests have rarely addressed the general cost impacts and the restricted housing choices engendered by overly restrictive ordinances.⁶¹

⁵⁹Antitrust actions will fail if the land use restriction falls within the “state action” exemption announced in *Parker*. 317 U.S. at 341. There is a two step test: “First, the state legislature must have authorized the action under challenge. Second, the legislature must have intended to displace competition with regulation.” *Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d 1111, 1120 (10th Cir. 1991). With respect to the first requirement, the Ohio Revised Code does contain numerous specific authorizations for land use regulation, *see, e.g.*, OHIO REV. CODE ANN. § 711.001-.040; *id.* § 713.01-.34 (West 1994); whether any of these sections can be viewed as satisfying the second requirement of the “state action” exemption (i.e., whether the legislation intends “to displace competition with regulation”) will depend upon the particular facts of the case. However, even if a court should determine that a “state action” exemption is unavailable, other antitrust defenses may still save the ordinance. For example, a city could argue that the restriction complies with the “rule of reason” in that it is no more restrictive of competition than required to achieve the city’s public objectives. *See Susman & White, The Perspective of a Plaintiff’s Lawyer*, in J. SIENA, ANTITRUST & LOCAL GOVERNMENT 28-30 (1982).

⁶⁰*See, e.g.*, cases cited *infra* note 135.

⁶¹The following two practical observations are illustrative:

Many attorneys feel that even if developers win in court, they still “lose” if the result of litigation is a remand to the local governing body with instructions to act in conformance with the court’s decision. Such action does not guarantee that the developer will achieve what was wanted.

FRANK SCHNIDMAN, et al., HANDLING THE LAND USE CASE § 5.3.3 (1984).

Actually, dozens of conditions of doubtful validity imposed on developers are as a practical fact accepted by them and not contested in court. The developer is after all a businessman anxiously awaiting the day when he can begin realizing on his substantial investment by selling lots or lots and houses. A court review may delay that day for a long time. In addition, he may be quite anxious not to arouse the antagonism of the very local officials before whom he may again be shortly appearing and asking approval for another subdivision. Finally, he may be able to pass the additional cost of the imposed condition on to his customer.

BEUSCHER & WRIGHT, *supra* note 11, at 286.

The root causes of the cost increases – time delays,⁶² lack of predictability,⁶³ and restricted supply of developable land,⁶⁴ are only now being challenged in the courts. If more developers object to these tactics in their future land use lawsuits, the constitutional doctrines may sometimes offer solutions. The real question is whether a significant number of developers will start to challenge these more subtle impacts on housing costs and housing choices. A significant, recent Ohio decision may open the floodgates—in that state and other states—to developers’ monetary delay claims.⁶⁵

2. In Setting Guidelines for Planning Activities

There are elements in the legal tests that can be translated into guidelines suitable for use in a planning office. Unfortunately, there have been few attempts to gather the various rules into a package that makes sense to most planners. The result—except in departments actively counseled by planning law experts—is that the legal principles guiding most planners’ work consist of bits and pieces of important case holdings as summarized in various trade journals. The planning staff rarely assembles the separate case holdings into a coherent set of principles. Such an endeavor requires legal training; it is seemingly a task for the municipal attorney, not the planner.

Unfortunately, many municipal attorneys are reluctant to prepare a “cookbook of legal principles” for the planning office. These attorneys will assert that case

⁶²See *State ex rel. Kmart Corp. v. Westlake Planning Comm’n*, 624 N.E.2d 714 (Ohio 1994) (rejecting planning commission’s contention that all of the information was not yet submitted, and determining that a 60-day period for the commission to approve or reject plans began to run at the end of an extension period). *But cf.* *River Park Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994) (finding that time delay does not violate due process or equal protection clauses); *Licari v. Ferruzi*, 22 F.3d 344 (1st Cir. 1994) (finding time delay not a violation); *Orange Lake Assoc., Inc. v. Kirkpatrick*, 21 F.3d 1214 (2d Cir. 1994) (finding time delay not a violation); and *PFZ Properties v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991) (upholding district court’s dismissal of a developer’s procedural due process, substantive due process and equal protection challenges to a review process extending over at least four years and culminating in an eventual refusal to process plans), *cert. dismissed*, 503 U.S. 256 (1992).

⁶³There are threads of this contention in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 526 U.S. 687, 698-707 (1999) (upholding \$1.45 million jury verdict in which the record included city’s separate suggestions to the developer that densities of 264 units, *then* 224 units, *then* 190 units would be acceptable. Yet, city still denied each proposal after the developer had *in each instance* prepared plans in reliance on the city’s statements). As stated in an old English case, “(A) law which a man cannot obey, nor act according to it, is void and no law: and it is impossible to obey contradictions, or act according to them.” Vaughn, C.J., in *Thomas v. Sorrell* (1677), *cited in* FULLER, *THE MORALITY OF LAW* 33, 63-65 (1969); cases and Lawlor, *supra* note 53.

⁶⁴*Cont’l Bldg. Co. Inc. v. Town of N. Salem*, 625 N.Y.S.2d 700, 211 A.D.2d 88 (N.Y. 1995) (striking down ordinance that devoted less than 1% of town’s residentially-zoned land to “as of right” multi-family development).

⁶⁵*State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345 (Ohio 2002) (finding a temporary taking *extending over an eight-year time period* due to city’s restrictive zoning regulation); upon rehearing, the eight-year period was shortened to six years. *State ex rel. Shemo v. City of Mayfield Heights*, 775 N.E.2d 493, 498 (Ohio 2002).

holdings contain subtle distinctions incapable of being summarized in “black-letter rules.” Further, municipal attorneys who are unfamiliar with planning methods and processes will encounter difficulty devising legal principles tailored to the daily functions of the planning office.

Yet, the fundamental planning principles learned by planners during their education or in practice are not vastly different from some of the tests employed by the courts in their review of planning activities. An effective legal guide for a planning office must build on these similarities. Specifically, the Substantive Due Process test discussed above can form the core of a reorganized planning process.

First, consider the objectives of planning. The comprehensive planning process begins with the specification of goals and objectives. Similarly, the first prong of the Substantive Due Process test asks whether an ordinance is motivated by a permissible police power objective. Traditionally, planning objectives are categorized under physical development headings—residential, commercial, industrial, open space—while the police power “nouns” used by lawyers include public health, public safety, and public welfare (as defined in particular decisions). To the extent that planners can re-phrase their objectives so that they more generally track the police power nouns,⁶⁶ their various planning studies, which document the need for action on a planning objective, will also serve as useful evidence in future court actions.

Second, consider the implementation of plans. Under traditional planning theory, the implementation phase of planning consists of the search for “a course of action which best achieves the stated objectives.”⁶⁷ The authors of a standard text on urban land use planning, who refer to a collection of implementation measures as a “guidance system,” offered the following standards:

1. Guidance system approaches should be formulated which employ the least costly tools and interject the least interference with the land market, consistent with achieving a degree of control necessary to serve the intended purpose . . .
2. Regulations should not be more restrictive of uses than is necessary to achieve the public purpose being sought.
3. A guidance system should cause as few “windfalls” and “wipeouts” as possible, regardless of their legality,
4. Costs should, as much as possible, be distributed to those receiving the benefits (except for those strategies pursuing income redistribution).
5. Facilities and guidance tools efficiently serving multiple purposes are preferable to single-purpose facilities and tools.⁶⁸

All these statements are consistent with, and actually enhance, the second admonition of the Substantive Due Process test: that a legislative scheme be

⁶⁶For examples of the use of police power objectives in planning texts, see F. STUART CHAPIN, JR. & EDWARD KAISER, *URBAN LAND USE PLANNING* 48-58 (3^d ed. 1979); EDWARD KAISER, et al., *URBAN LAND USE PLANNING* 266-68 (4th ed. 1995).

⁶⁷R. J. Burby III, *Planning and Politics: Toward a Model of Planning-Related Policy Outputs in American Local Government* (1968) (Unpublished paper: University of North Carolina Environmental Policies and Urban Development Thesis Series No. 12).

⁶⁸See CHAPIN & KAISER, *supra* note 66, at 107.

rationally related to permissible police power objectives. Realizing, therefore, that legal guidelines for planners can be formulated by recasting the vocabulary but not the core theory of land use planning practice, the remainder of this Article constructs a model for long-range and current planning activities.

II. OFFICE GUIDELINES FOR LONG-RANGE PLANNING

As noted above, traditional land use planning regarded the production and periodic amendment of the long-range (i.e., 20-25 years) comprehensive plan as its essential activity. Further, the essence of the comprehensive plan (as it was then defined) consisted of a map indicating detailed future land uses.⁶⁹ Critics of this process have argued for a planning procedure that instead regards a short-term (i.e., five years) policies plan as the key element. Although maps may be prepared in conjunction with such policies plans, they usually consist of general land classifications rather than specifications of detailed land uses.⁷⁰

This Article's model is based on the short-term policies plan approach. The long-range planning division of the typical planning office will undertake its policy planning in four major phases: planning base studies, the four major elements of the plan, goals and objectives of the plan, and a land classification map and short-term public action program for the plan.

A. *The Information Base for the Five-Year Policies Plan*

One of the early steps in the planning process is a survey of basic data relating to the community's physical, economic and social conditions. Traditionally, these basic technical studies are gathered under a few major groupings:

We can think of phenomena involved in planning analyses in terms of major systems, of which there are at least five: economic, population, activity, land development, and environmental. In developing the information base for these systems, some general guidelines for recording, storing, processing and retrieving data are required. These general requirements . . . precede studies of the five systems so that information collected in these basic studies can be organized on the basis of certain common characteristics.⁷¹

A 1995 urban land use planning textbook provides a good summary of these "tooling-up studies."⁷² Upon completion of these studies, the planning staff should

⁶⁹KAISER & GODSCHALK, *supra* note 17. As courts have begun to take seriously the requirement of conformity with master plans, some serious difficulties have arisen when the detailed future land use map is regarded as the essence of the plan. *See, e.g.*, *Green v. Hayward*, 552 P.2d 815, 817-19 (Ore. 1967).

⁷⁰*See* text associated with note 157. German land use planning and zoning (which preceded American activities by 30 years) used a land classification system. The inner city was divided from the outer city; and the outer city was divided into: "an inner, an outer, and a rural zone, in which the permissible height of new buildings and percentage of the lot that they may cover progressively decrease." Williams, *Public Control of Private Real Estate*, in *CITY PLANNING* 48, 70-73 (J. Nolen ed. 1928).

⁷¹*See* CHAPIN & KAISER, *supra* note 66, at 107.

⁷²*See* KAISER, et al., *supra* note 66, at 85-248.

prepare an executive summary of the technical data. Over time, the planning staff should periodically (e.g., every six months) supply the municipal attorney with a brief written summary of additional technical studies being conducted by the department. The executive summary and the periodic updates will enable the attorney to suggest modifications that will provide a stronger technical base for regulatory actions.

One of the major functions of the technical studies is to establish an informational base out of which the policy plan “findings” grow. As stated in Section II (B) *infra*, findings and policies will be extremely dependent on public comment within the community.

B. The Plan’s Four Elements: Goals, Police Power Objectives, Findings and Policies

The planning studies discussed in Section II (A) above are designed to provide both a snapshot of the community as it now exists and a projection of the community as it is most likely to develop. Once these studies are completed, the planning office will have a technical foundation to support the four major elements of the five-year policies plan.

As noted above, the traditional comprehensive plan consists of a set of physical development goals and objectives with detailed policies or principles listed under each objective.⁷³ By contrast, I propose a policies plan consisting of goals, police power objectives, findings and policies. The goals are ends toward which planning efforts are directed: they constitute the most general statements of the police power. The police power objectives are the more specific methods by which land use planning contributes to the goals. Findings are short statements summarizing existing and future conditions as expressed and predicted in the planning base studies. Policies are guides for future action: they are the recommended methods for achieving the objectives, given the current situation as disclosed by the findings.

Although the goals and police power objectives will generally remain constant over time, the findings and policies are dynamic and largely dependent on public input. The long-range planning division should continually monitor (and revise) these latter two elements to insure that they always reflect the current state of the community.

The model proposes the following major goal headings: (1) health and safety; (2) protection of natural resources; (3) economic efficiency/energy conservation; (4) aesthetics (amenity); (5) economic development; and (6) community development.⁷⁴ Section II(C) *infra*, separately addresses these six major goals: within each goal category, I will cite specific police power objectives associated with the goal. I will

⁷³*Id.* at 342-43.

⁷⁴These goal headings are derived (with some modifications) from the discussion of “Elements of the Public Interest” in CHAPIN & KAISER, *supra* note 66, at 48-58. In summary:

The public interest is frequently used in law to refer to what the courts will sanction as a public purpose. . . . For example, health, welfare, morals and safety have become generally recognized tests of the public interest in American jurisprudence.... [however], for planning purposes, a more advanced concept of the public interest is warranted, one which builds on the legal tests but seeks forward-looking guideposts.

Id. at 48.

also give some indication of the extent to which the courts have accepted the separate objectives as proper exercises of the police power.

Since findings and policies will depend on the community's unique characteristics, I will not discuss the specifics of these elements in this article. However, when planners attempt to develop regulations based on some of the less-accepted objectives described below, the drafting of the findings and policies are critical steps that should be conducted with the assistance of the municipal attorney.⁷⁵

Public participation is essential during planning staff's development of both findings and policies. I recommend two rounds of extensive public participation. The first round would commence immediately after the completion of the base studies and would solicit the community's involvement in the identification of, and drafting of, the findings based on the technical studies. Staff members would prepare draft policies after its incorporation of public comments into the findings. The draft policies would touch off round two of public participation: at that time, the staff would solicit public comment (including proposed amendments) on the draft policies.⁷⁶

C. *The Goals and Police Power Objectives in the Plan*

1. Protecting the Public Health and Safety

The protection of the public health and safety is the most basic and most accepted exercise of the police power. Health and safety based controls on land use were enacted and enforced in American urban areas prior to the Revolutionary War.⁷⁷ Apart from the historical acceptance of such regulations, the very statement "health and safety" conveys the urgency of a problem; like the general public, courts are quick to respond to such problems. Accordingly, planning objectives that are related to legitimate health and safety concerns should be explicitly categorized as such.

a. *Exclusion of nuisances from residential areas*—The prohibition of nuisances (e.g., heavy industries, livery stables) from residential areas is a clearly established objective that predates formal zoning.⁷⁸

b. *Regulating intense development*—Overcrowding, lack of adequate light and air, and inadequate open space were all familiar problems to city residents in the late 19th and 20th centuries. Bulk regulations designed to curb these problems have long been regarded as proper exercises of the police power; more recently, requirements

⁷⁵A North Carolina appellate court upheld denial of a permit due to conflict with a county land use policy. *Everhart & Assoc., Inc. v. Dep't of Env'tl Health & Natural Res.*, 493 S.E.2d 66 (N.C. Ct. App. 1997), *cert. denied*, 502 S.E.2d 590 (N.C. 1998).

⁷⁶The Cleveland City Planning Commission used a roughly analogous public participation process in its preparation of a 2000 update to the city's downtown plan.

⁷⁷See generally John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996).

⁷⁸Professor Daniel Mandelkar has stated:
 Courts recognize the land use hierarchy implicit in nuisance cases by granting relief to plaintiffs who sue to prohibit noxious nonresidential uses in residential neighborhoods. Nuisance suits against industrial uses seldom present difficulties.
 DANIEL MANDELKAR, *LAND USE LAW* § 4.05 (4th ed. 1997). See also Hart, *supra* note 77, at 1289-99; Williams, *supra* note 14, at 331.

that dense development be served by urban services (i.e., public water, sewer and drainage) have been upheld.⁷⁹

c. Minimizing traffic hazards and traffic congestion—The safety threat posed by increased traffic attributed to a proposed multi-family use was a significant factor in the U.S. Supreme Court’s validation of zoning in the 1926 *Village of Euclid* case.⁸⁰ Since that time, regulations responding to problems of traffic safety have enjoyed favorable treatment by the courts,⁸¹ however, Ohio courts have been reluctant to embrace this as a “stand-alone” objective.⁸²

d. Regulating development in natural hazard areas—The regulation of natural hazard areas is a fairly recent development; examples prior to 1970 are rare. In contrast to the objectives above (that deal with relationships between and intensity of particular uses), natural hazard area regulations focus on particular geographic areas. These areas—including floodplains, ocean beaches and dunes, areas of seismic activity and steep slope areas—have particular limitations for development due to their natural characteristics.

Floodplain regulations are increasingly accepted as valid safety measures.⁸³ Successful attacks on these ordinances have generally focused on applications to particular sites rather than the validity of the planning objective.⁸⁴ The restriction of development on ocean beaches and dunes is also receiving favorable treatment from the courts.⁸⁵ Threats posed by erosion and hurricanes supply the public safety

⁷⁹See Williams, *supra* note 14, at 332; BEUSCHER & WRIGHT, *supra* note 11, at 522-23.

⁸⁰272 U.S. 365, 394-95 (1926).

⁸¹See *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 109 (1949); Williams, *supra* note 14, at 332; Allen Fonoroff, *The Relationship of Zoning to Traffic Generators*, 20 LAW & CONTEMP. PROBS. 238 (1955).

⁸²While many states have recognized “relative traffic congestion” as an appropriate zoning consideration, the State of Ohio has “gone both ways” on this point. 1 WILLIAMS, *supra* note 35, § 10.05. Cf. *Columbia Oldsmobile*, 564 N.E.2d 455, 461 (Ohio 1990) (stating that, while traffic safety may be insufficient standing alone as an objective, traffic safety can be one factor in a comprehensive analysis) with *State ex. rel. Killeen Realty Co. v. City of East Cleveland*, 160 N.E.2d 1, 8 (Ohio 1959) (stating that traffic regulation must remain a “byproduct” of zoning activities).

⁸³*Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (dicta); *Turner v. County of Del Norte*, 101 Cal. Rptr. 93 (Cal. Ct. App. 1972); *Turnpike Realty Co. v. Town of Dedham*, 284 N.E.2d 891 (Mass. 1972), *cert. denied*, 409 U.S. 1108 (1973); *Responsible Citizens v. City of Asheville*, 302 S.E.2d 204 (N.C. 1983). Professor Mandelkar has stated: “Although the Supreme Court’s Lucas decision changes taking law as it applies to floodplain regulations, it is not likely to change the favorable view most courts had adopted toward floodplain regulation under the taking clause.” MANDELKAR, *supra* note 78, § 12.06. See generally Alan Weinstein, *Revisiting the National Flood Insurance Program*, 48 LAND USE LAW & ZONING DIGEST (No. 10) 3 (1996); Rebecca S. Thiem, Note, *Various Aspects of Flood Plain Zoning*, 55 N.D. L. REV. 429, 438 (1979); Zygmund J. B. Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 TEX. L. REV. 201, 218 (1974).

⁸⁴See *infra* notes 177-202, and accompanying text.

⁸⁵*McNulty v. Town of Indiatlantic*, 727 F. Supp. 604 (M.D. Fla. 1989); *Adams v. N.C. Dep’t of Natural Res. and Cmty. Dev.*, 249 S.E.2d 402 (N.C. 1980) (upholding North Carolina’s Coastal Area Management Act, which provides special protection for ocean hazard

rationale for these regulations. Steep slope areas and areas of high seismic activity are now receiving attention, particularly in California. The objective of discouraging development in such areas should be valid;⁸⁶ regulatory problems here usually stem from the difficulty of delineating precise boundaries.⁸⁷

e. Regulating man-made hazards—A number of facilities (e.g., airports, refineries, nuclear power plants) present particular risks that demand individualized regulatory treatment. Major state and regional legislative enactments have addressed this problem in recent years.⁸⁸ There is little doubt that the protection against threats posed by such facilities is a valid objective.⁸⁹

f. Emergency measures—Occasionally, regulations that would be unlawful as permanent measures are upheld as permissible short term (i.e., one-two years) emergency measures. Crises such as overburdened sewer lines, contamination of water supplies, droughts, and landfill closings all fall within this category.⁹⁰

2. Protecting Natural Resource Areas

General regulations applicable to natural resource areas have been accepted for some time,⁹¹ however, the protection of natural resource areas as a separate objective for land use controls is a comparatively recent development. Nevertheless, many state courts now recognize natural resource protection as a permissible objective, particularly when clear ties to a community's economic base can be established.⁹²

The most commonly accepted resource objectives are discussed below. Generally, the validity of the objective is no longer the major legal question

areas—and other “areas of environmental concern—against several forms of constitutional challenges). Ocean hazard areas (e.g., beaches, dunes and inlets) are directly exposed to wave, wind, and current action. During storms, these forces are intensified and can cause significant changes in the bordering landforms and to structures located on them. *See* tit. 15A N.C. ADMIN. CODE 7H § .0302 (2002).

⁸⁶*See, e.g., In re Kiesel*, 772 A.2d 135, 139 (Vt. 2000); *Girton v. City of Seattle*, 983 P.2d 1135 (Wash. Ct. App. 1999). *See generally*, Robert B. Olshansky, *Planning for Hillside Development*, AM. PLAN. ASS'N. No. 466 PLAN. ADVISORY SERV. (1996). The total financial loss due to slope failures is probably greater than that for such geologic hazards as floods, hurricanes, tornadoes and earthquakes. Fleming, et al., *Landslide Hazards and Their Reduction*, 45 J. AM. PLAN. ASS'N. 428 (1979).

⁸⁷*See infra* notes 177-88, and accompanying text.

⁸⁸Regarding power plant siting, *see, e.g.*, MINN. STAT. ANN. § 116C.51-.69 (1997) (2002 Cum. Annual pocket part); N.Y. PUB. SERV. L. §§ 120-130 (2000); VT. STAT. ANN. TIT. 30, §§ 2901-2925 (2000). Regarding coastal facilities, *see, e.g.*, N.J. STAT. ANN. §§ 13:19-1 through 13:19-21 (1991 & Supp. 2001 cum. Annual pocket part). Regarding heavy industry in coastal zone, *see, e.g.*, DEL. CODE ANN. TIT. 7 §§ 7701-7717 (2001).

⁸⁹*See, e.g., Kahl v. Consol. Gas & Elec. Light & Power Co.*, 60 A.2d 754 (Md. 1948), *cited in* 1 YOUNG *supra* note 10, §§ 7.10, 15.04.

⁹⁰*See* James A. Kushner, *Growth Management and the City*, 12 YALE L. & POL'Y REV. 68, 71 (1994).

⁹¹An extensive list of early statutes is cited in a 1936 opinion issued by the Solicitor to the U. S. Department of Agriculture, reprinted in BEUSCHER & WRIGHT, *supra* note 11, at 612-15.

⁹²*See infra* notes 97 and 100 for cases cited.

associated with protection of these areas; instead, the more troubling question involves the definition of fair and precise boundaries for the resource areas.⁹³

a. Wetlands, shorelands and estuarine waters—Wetlands are transitional areas between land and open water characterized by low topography, poor drainage and standing water. Boundaries of wetlands are usually determined by reference to predominate water depth, vegetation and salinity of water.⁹⁴ Shorelines are less precisely defined; they are areas, including wetlands, which are adjacent to water bodies.⁹⁵ Estuarine waters are waters found in the mouth of a river or sound where the tide flows in. The natural functions of these areas are closely related. Wetlands protect offshore water resources from pollution, stabilize the water table, and provide breeding, nesting, resting and feeding grounds for fish and wildlife.⁹⁶ Biologists and economists have documented the economic contributions of this latter function.⁹⁷

Although shoreline areas outside wetland boundaries perform less significant natural functions, they have deservedly received protection based on the impact that development in these areas can have on wetlands. Specifically, development in upland areas can destroy a wetlands' filtering function by overloading it with nutrient and sediment inflow.⁹⁸

Estuaries serve as breeding areas for many commercially important species of fish.⁹⁹ Many states now regard the preservation of these natural resources as a valid purpose under the police power.¹⁰⁰ However, the definition of reasonable boundaries for these areas (particularly shorelands) remains a problem.¹⁰¹

⁹³See *infra* notes 177-88, and accompanying text.

⁹⁴CHARLES THUROW, et al., PERFORMANCE CONTROLS FOR SENSITIVE LANDS: A PRACTICAL GUIDE FOR LOCAL ADMINISTRATORS 38 (1975).

⁹⁵DANIEL MANDELKAR & ROGER CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 1107 (1979).

⁹⁶THUROW, et al., *supra* note 94, at 38; JOHN R. CLARK, COASTAL ECOSYSTEMS 68 (1974).

⁹⁷Potomac Sand and Gravel Co. v. Governor of Md., 293 A.2d 241, 249, *cert. denied*, 408 U.S. 1040 (1972); Tihansky & Meade, *Economic Contribution of Commercial Fisheries in Valuing U. S. Estuaries*, 2 COASTAL ZONE MGMT. J. 411 (1976). Although the decision in *Lucas*, 505 U.S. at 1003, has cast a shadow over wetlands regulation, Professor Mandelkar remains optimistic:

Since *Lucas*, state courts have upheld a designation of a wetlands and the denial of development permits against taking claims. They have been able to find economic uses of the land that avoids the application of the *Lucas* per se taking rule, even though those uses were wetlands and recreation uses.

MANDELKAR, *supra* note 78, § 12.04.

⁹⁸THUROW, *supra* note 94, at 40; see CLARK, *supra* note 95, at 96.

⁹⁹Tihansky & Meade, *supra* note 97.

¹⁰⁰Candlestick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm'n., 89 Cal. Rptr. 897, 906 (Cal. Ct. App. 1970); Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1383 (Fla. 1981), *cert. denied*, 454 U.S. 1083 (1981); *Potomac Sand and Gravel Co.*, 293 A.2d at 241; Lopes v. City of Peabody, 629 N.E.2d 1312, 1316 (Mass. 1994); FIC Homes of Blackstone, Inc. v. Conservation Comm'n., 673 N.E.2d 61, 68 (Mass. App. Ct. 1996); Sibson v. State, 282 A.2d 664, 666 (N.H. 1971); *Gazza v. New York State Dept. of Envtl. Conservation*, 679 N.E.2d 1035, 1040 (N.Y. 1997), *cert. denied*, 522 U.S. 813 (1997); Mills,

b. Primary aquifer recharge areas—Primary aquifer recharge areas consist of those land surfaces that serve to recharge an underground water supply. When recharge areas are densely developed, the attendant increase in impervious surface area reduces the amount of rainwater seeping into, and recharging, the aquifer. The legal protection of land areas performing this recharge function has been upheld in several states.¹⁰² Again, the problem seems to lie less with the objective than with the accurate definition and delineation of a particular recharge area.

c. Agricultural and forest land – Prior to 1980, the preservation of prime agricultural land was rarely a generally accepted “stand-alone” objective under the police power.¹⁰³ The sparse case law at that time usually focused on non-exclusive agricultural zoning (carried out through requirements of large lots which also allow for residential uses). In the past twenty years, however, many state courts have specifically accepted this police power objective and have endorsed significant protections based on the objective.¹⁰⁴

By contrast, the preservation of prime forestland remains a rarely endorsed objective, and case law is sparse on this topic.¹⁰⁵ Given the uncertain treatment of the forest preservation objective, I advise the planning staff to proceed very cautiously. The staff should base its regulatory programs on thorough technical studies, carefully drafted findings, and extensive consultation with the municipal attorney.

d. Air and water quality—In the 1970’s, the federal government directly undertook the protection of air and water quality through enactment of the Clean Air Act,¹⁰⁶ and the Federal Water Pollution Control Act.¹⁰⁷

Inc. v. Murphy, 352 A.2d 661, 669 (R.I. 1976); *Just v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972).

¹⁰¹See notes 177-88, and accompanying text.

¹⁰²*Moviematic Indus. Corp. v. Bd. of County Comm’r*, 349 So. 2d 667, 669-71 (Fla. Dist. Ct. App. 1977), *New Jersey Builders Ass’n. v. Dep’t of Env’tl. Prot.*, 404 A.2d 320, 330-31 (Sup. Ct. App. Div. 1979); *Ketchel v. Bainbridge Township*, 557 N.E.2d 779, 782-83 (Ohio 1990), *cert. denied*, 498 U. S. 1120 (1991).

¹⁰³Rare instances of pre-1980 cases upholding agricultural zoning were in California, *Consol. Rock Prod. Co. v. City of Los Angeles*, 370 P.2d 342 (Cal. 1962), *appeal dismissed*, 371 U.S. 36 (1962) and Oregon, *Joyce v. City of Portland*, 546 P.2d 1100 (Or. 1976) (upholding against a taking challenge the rezoning of 842 acres from “low density residential” to “farm and forest”). The case law as of 1980 was summarized in John C. Keene, *Agricultural Land Preservation: Legal and Constitutional Issues*, 15 GONZ. L. REV. 621 (1980).

¹⁰⁴See *Von Kerssenbrock-Praschma v. Saunders*, 121 F.3d 373, 378 (8th Cir. 1997); *Harvard State v. County of McHenry*, 620 N.E.2d 1360, 1364-68 (Ill. App. Ct. 1993); *Wilson v. County of McHenry*, 416 N.E.2d 426, 428-30 (Ill. App. Ct. 1981) (upholding 160 acre minimum lot sizes); *Smythe v. Butler Township*, 620 N.E.2d 901, 905 (Ohio Ct. App. 1993), *appeal dismissed*, 619 N.E.2d 419 (Ohio 1993). See generally M. W. Cordes, *Takings, Fairness and Farmland Preservation*, 60 OHIO ST. L.J. 1033 (1999).

¹⁰⁵See *Dodd v. Hood River County*, 136 F.3d 1219, 1229-30 (9th Cir. 1998).

¹⁰⁶42 U.S.C. §§ 7401-7515 (1994).

¹⁰⁷33 U.S.C. §§ 1251-1387 (1994).

Both the air and water quality programs have as their main statutory objective the attainment of statutory air and water quality standards . . . There are two sets of standards; primary standards are established to protect the public health while secondary standards are established to protect the public welfare.¹⁰⁸

Were it not for the protection afforded by these federal statutes, these objectives would certainly fall under the health and safety goal of the local policies plan.¹⁰⁹ To the extent that federal protection is eroded by poor implementation or relaxation of standards, local governments may find themselves more actively involved in this area.

3. Economic Efficiency/Energy Conservation

Most planners would include the objectives discussed in this section under the heading of growth management. However, growth can be managed for a number of reasons, some of them permissible and some exclusionary and illegal (e.g., exclusion of lower-income persons).¹¹⁰ By avoiding the use of the “growth management” phrase and focusing instead on the legitimate reasons for its application, the ensuing discussion can better demonstrate the proper limits of growth management strategies.

Some definitions are required:

(Economic) efficiency is associated with public cost implications whether in terms of municipal expenditures or cost to the urban dwellers in general . . . (Energy conservation) is a special case of cost efficiency in which scarcity of energy supply rather than a whole mix of considerations becomes the basis of figuring costs.¹¹¹

Although few of the cases reference it specifically, a review of the objectives discussed in this section will reveal that “economic efficiency” is the core goal involved in these cases. Energy conservation is a newer concern, and this writer is

¹⁰⁸MANDELKAR & CUNNINGHAM, *supra* note 95, at 1154.

¹⁰⁹Localities contemplating regulation of air and water quality must first overcome a significant federal preemption hurdle:

With the advent of increasingly sophisticated federal and state environmental regulations and enforcement mechanisms the idea of costly local enforcement of local performance standards seems a needless redundancy for both the local government and the industrial community. Legally, such local efforts are, in any event, frequently pre-empted by federal and state laws and regulations.

ROBERT BABCOCK & CLIFFORD WEAVER, *CITY ZONING: THE ONCE AND FUTURE FRONTIER* 83 (1979).

¹¹⁰Consider the warning issued by Professor Norman Williams in 1955:

There is a difference, sometimes rather subtle but none the less real, between those communities which want to grow by admitting only “the right kind of people,” and others which do not want to grow at all. The latter type of community simply does not want *anybody* to move in, because it prefers to maintain its status as a small semi-rural or rural village, untouched by “development.”

Williams, *supra* note 14, at 348. *See also* Kushner, *supra* note 90, for a thorough review of permissible growth management objectives.

¹¹¹CHAPIN & KAISER, *supra* note 66, at 52.

aware of no cases validating it as an independent end of regulation. However, the economic impact of energy waste is documented,¹¹² and eventual acceptance by the courts is possible.

a. Staging growth—Can a municipality stage or “time” growth so as to prevent unreasonable increases in land areas for which urban services (e.g., public water, sewer, drainage) must be provided? The courts approving such measures do so with qualifications. The qualifications usually include the presence of a capital improvements program, a provision for eventual service (even if 10-20 years in the future) of all areas, and a provision allowing developers to advance the approval date by installing urban services at their expense.¹¹³ Further, the notable growth timing schemes upheld by the courts have been adopted in communities experiencing rapid population growth. Accordingly, findings associated with this objective should document: (1) the existence of rapid growth in the community; and (2) the fiscal impact of this growth on the community.

b. Encouraging an efficient pattern of land development—In contrast to the timing objective discussed above, this objective seeks to achieve a permanent pattern of land development that is more efficient than that which would develop in the absence of controls. Governments pursuing this objective frequently concentrate financial resources by “providing services and utilities to limited, prespecified areas.”¹¹⁴

This objective has not received general acceptance by the courts; planners attempting to implement water and sewer extension policies by denying services to uneconomic areas, have found their schemes struck down by several state courts.¹¹⁵

¹¹²See ROBERT STOBAUGH & DANIEL YERGIN, *ENERGY FUTURE* 55-64 (1979).

¹¹³In upholding Hudson, Ohio’s growth management scheme against a number of constitutional challenges, a federal appellate court stated:

The City of Hudson wishes to control growth of residential areas until such time as its infrastructure is able to meet current and future needs. . . . Slowing the rate of growth will allow the City to improve its infrastructure to meet existing and future needs without straining resources.

Schenck v. City of Hudson, 114 F.3d 590, 594-95 (6th Cir. 1998). *Accord* *Golden v. Planning Bd.*, 285 N.E.2d 291 (N.Y. 1972). However, several state courts have struck down growth control measures that were not properly linked to these permissible objectives. See, e.g., *City of Boca Raton v. Bocas Villas Corp.*, 371 So. 2d 154 (Fla. 1974) (voiding city charter amendment that set a cap of 40,000 dwelling units); *Stoney Brook Dev. Corp. v. Town of Fremont*, 474 A.2d 561 (N.H. 1984) (finding no careful study of community’s needs and no means to insure relaxation of growth controls); *Beck v. Town of Raymond*, 394 A.2d 847 (N.H. 1978) (voiding annual ceiling on each landowner’s available building permits—but allowing to survive as an interim measure); *Toll Brothers, Inc. v. West Windsor Township*, 712 A.2d 266 (N.J. Super. Ct. App. Div. 1998) (voiding complex permit allocation formula that took too long to ripen); *Continental Bldg. Co., Inc. v. Town of North Salem*, 211 A.D.2d 88 (N.Y. App. Div. 1995) (finding the community set too small of a percentage—1%—of community’s residentially-zoned land available for multi-family development “as of right”).

¹¹⁴KAISER, et al., *supra* note 66, at 290; CHAPIN & KAISER, *supra* note 66, at 52.

¹¹⁵See, e.g., *Robinson v. City of Boulder*, 547 P.2d 228 (Colo. 1976), *overruled on other grounds in* *Bd. of City Com’rs v. Denver Bd. of Water Com’rs*, 718 P.2d 246 (Colo. 1986); *United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974). See generally Carol R. Stone, *The Prevention of Urban Sprawl through Utility Extension Control*, 14 URB. LAW. 357, 366-69; 375-77 (1982).

Further, the planning profession itself has never agreed on what constitutes an economically efficient pattern of land development.¹¹⁶

Accordingly, until better planning information is available, I advise the planning staff to avoid regulatory schemes based solely on this objective. When that planning information becomes available, the staff should then seek the active involvement of the municipal attorney in drafting land use controls based on this objective.

c. Encouraging economic and energy-efficient site design—The previous subsection considered the objective of promoting efficient development patterns for the community as a whole. By contrast, this subsection addresses the more localized objective of encouraging and requiring economic and energy-efficient site planning. A study of thirteen communities enacting ordinances based on this latter objective has identified four major areas of energy use regulation: (1) reducing heating and cooling needs; (2) reducing the dependence on automobile transportation; (3) reducing the consumption of energy in construction material and processes; and (4) promoting the use of alternate energy.¹¹⁷

Regulations based on these objectives are very new, and few have been litigated in the courts. Note, however, that regulatory actions in this area have concentrated on encouraging (and removing regulatory barriers to) energy conserving practices,¹¹⁸ yet few localities have actually required such practices.¹¹⁹

d. Requiring new development to pay a larger percent of public costs of land development—Local governments have traditionally required developers to install certain types of improvements—streets, utility house connections and laterals, onsite drainage—as a condition of subdivision approval. However, many rapidly growing communities have sought to ease municipal finance burdens by requiring developers to install, or pay for, other improvements that have traditionally been paid for out of general revenues.¹²⁰

¹¹⁶*Cf.* Peter Gordon and Harry W. Richardson, *Are Compact Cities a Desirable Planning Goal*, 63 J. AMER. INST. PLANNERS 95 (1997) with Reid Ewing, *Is Los Angeles-Style Sprawl Desirable?*, 63 J. AMER. INST. PLANNERS 107 (1997).

¹¹⁷Duncan Erley & David Mosen, *Energy Conserving Development Regulations: Current Practice*, AM. PLANNING ASSOC. #352 PLANNING ADVISORY SERVICE REPORT 1 (1980).

¹¹⁸*Id.* at 33.

¹¹⁹*Id.*

¹²⁰Street lights, parks, school sites, firehouses, off-site sewerage facilities (all of which were once financed from general funds) are now often exacted from developers, and bicycle paths and traffic control devices are on the horizon. *Ellickson, supra* note 27, at 465. *See, e.g.*, OHIO REV. CODE ANN. § 711.101 (Baldwin's 1994) (authorizing cities to require new subdivisions to include streets, curbs, gutters, sidewalks, sanitary sewers and storm sewers). For a recent summary of state law cases on subdivision exactions (followed by a new "rough proportionality" test) *see Dolan v. City of Tigard*, 512 U.S. 374, 389-91 (1994). North Carolina will probably use the mid-level "rational nexus" test. *See Batch v. Town of Chapel Hill*, 376 S.E.2d 22, 31 (1989), *rev'd. on other grounds*, 387 S.E.2d 655 (N.C. 1990). *Cf. River Birch Associates v. City of Raleigh*, 388 S. E. 2d 538 (N.C. 1990) (upholding a three acre park dedication when the subdivider creates "the specific need" for the park) with *Buckland v. Town of How River*, 541 S.E.2d 497 (N.C. 2000) (striking down town's attempt to require construction of adjacent street). Ohio used to follow the conservative rule that exactions must be "specifically and uniquely attributable" to the project's impact, *see McKain v. Toledo City Plan Comm'n.*, 270 N.E.2d 370, 374 (Ohio Ct. App. 1971), but in *Home*

The early cases from the 1960's authorized dedications of land for road widening,¹²¹ recreation areas,¹²² and school sites.¹²³ By the end of that decade, some state courts were upholding regulations authorizing governments to accept cash payments in lieu of land allocations.¹²⁴ In the past thirty years, governments have employed progressively extreme measures such as requiring dedications or payments for thoroughfares, water and sewerage treatment plants and trunk lines, and major offsite drainage improvements. Although cases upholding each of these requirements can be found,¹²⁵ communities that have traditionally financed such services with general tax revenues will encounter serious difficulties in the courts.¹²⁶

Accordingly, the planning staff should proceed with extreme caution in this area. Regarding parks and school sites, the community should ask the developer to pay only that portion of the cost bearing "a rational nexus to the needs created by and benefits conferred upon, the subdivision."¹²⁷ Through careful drafting of findings and policies, staff should develop criteria to aid in this evaluation.

Builders Ass'n. v. City of Beaver Creek, 729 N.E.2d 349, 356 (Ohio 2000) the Ohio Supreme Court endorsed a "middle level of scrutiny" in upholding an impact fee for off-site road improvements. See also Connie B. Cooper, *Transportation Impact Fees and Excise Taxes*, AMERICAN PLANNING ASSOCIATION, #493 PLANNING ADVISORY SERVICE 1 (2000).

¹²¹Ayres v. City Council, 207 P. 2d 1 (Cal. 1962); 181 Inc. v. Salem County Planning Bd., 336 A.2d 501 (N.J. Super. 1975).

¹²²Jordan v. Vill. of Menomonee Falls, 137 N. W. 2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966). *But cf.* Pioneer Trust & Savings Bank v. Vill. of Mount Prospect, 176 N.E. 2d 799 (Ill. 1961) (finding the need for facilities not adequately established in the record).

¹²³Morris Cmty. High School Dist. No. 101 v. Morris Dev. Co., 320 N.E. 3d 37 (Ill. Ct. App. 1974). See also Ellickson, *supra* note 27, at 486-87.

¹²⁴Associated Homebuilders, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal. 1970); Jenad, Inc. v. Vill. of Scarsdale, 218 N.E.2d 673, (N.Y. 1966); Jordan, *supra* note 122. *But cf.* Ellickson, *supra* note 27, at 483, who noted that local governments lost eight of the twelve park exaction cases reported in the decade between 1966-1976.

¹²⁵See Associated Homebuilders, Inc. v. City of Livermore, 366 P.2d 448 (Cal. 1961) (upholding off-site utility charges); Wald Corp. v. Metro Dade County, 338 So.2d 863 (Fla. Dist. Ct. App. 1976) (upholding dedication for canal); Krieger v. Planning Comm., 167 A.2d 885 (Md. 1961) (upholding dedication for road widening); Ridgefield Land Co. v. City of Detroit, 217 N.W. 58 (Mich. 1928) (upholding dedication for road widening); Divan Builders, Inc. v. Planning Bd., 334 A.2d 30 (N.J. 1975) (upholding requirement for off-site drainage).

¹²⁶McKain v. Toledo City Plan Comm'n., 270 N.E.2d 370 (Ohio Ct. App. 1971) (invalidating a subdivision requirement to widen a thoroughfare 700 feet distant from developer's project); R. G. Dunbar, Inc. v. Comm'n., 367 N.E.2d 1193 (Ohio Ct. App. 1976) (stating that city planning commission cannot "freeze" construction based on an uncertain street concept for a future highway). See also Ellickson, *supra* note 27, at 486.

¹²⁷Longridge Builders, Inc. v. Planning Bd., 245 A.2d 336, 337 (N.J. 1967)(*per curiam*), discussed in Ellickson, *supra* note 27, at 482. Accord the "rough proportionality" test announced by the U. S. Supreme Court in *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). For an example of an ordinance designed to meet the *Longridge* test, see the discussion of the City of Naperville's ordinance contained in *Krughoff v. City of Naperville*, 354 N.E.2d 489 (Ill. Ct. App. 1976) (reviewing and upholding an ordinance providing for land dedications or fee exactions under standards based on the estimated final population of the proposed subdivision). See also Wald, 338 So.2d at 863; *Collis v. City of Bloomington*, 246 N.W.2d 11

In considering dedication requirements or impact fees for other traditionally “public” improvements, the planning staff should first confirm the existence of state enabling legislation. Second, the staff should prepare a five-year capital improvement program (including projections of federal and state funding at current levels) with allowance for facility dedications or impact fees to compensate for shortfalls. Third, the staff should seek governmental adoption of the five-year program.

Upon completion of these initial actions, the staff can then work with the municipal attorney to draft an impact fee ordinance. The ordinance should apply to all significant development projects and should specify all needed community service facilities. The ordinance should require construction of off-site facilities (or payment of a fee for same) only after the community’s planning commission finds that: (1) the development will generate a need for the facility; and (2) the required construction or charge is reasonably related to the need generated by the project.

When the community assesses a specific fee, it should deposit that fee in a special account established for the given facility. The community should spend the fee within a reasonable (no more than five years) time period. Finally, planning staff should develop standard formulas to calculate fees and should insure that expenditures are confined to pre-designated benefit zones.

e. Encouraging development/redevelopment in areas already served by urban services—To the extent that future urban development can be encouraged to locate in areas already served by urban services (i.e. public water, sewer, drainage, police and fire protection), a community minimizes the expenses of utility construction and expansion. Policies directed toward this objective normally speak in terms of “promoting infill development.”¹²⁸ The objective itself is usually acceptable as a valid economic measure.¹²⁹ Additionally, it is usually supplemented with aesthetic objectives relating to the revitalization of cities. The difficulty comes in implementing the objective through valid yet effective measures.¹³⁰

(Minn. 1976); *River Birch Associates v. City of Raleigh*, 388 S.E.2d 538 (N.C. 1990) (upholding required dedication of three acres—out of a 19.6 acre townhouse development—for a private homeowners association’s recreational use). Ellickson would probably further qualify the *Longridge* test by insisting that the exaction also be consistent with the manner in which the community has traditionally financed the specific services. Ellickson, *supra* note 27, at 483.

¹²⁸As early as 1635, a Massachusetts court ordered that court permission was required prior to building a dwelling more than one-half mile from the meeting house in any town. Hart, *supra* note 77, at 1273. See generally J. Terrance Farris, *The Barriers to Using Urban Growth Infill Development to Achieve Smart Growth*, 12 HOUSING POLICY DEBATE 1 (2001). Portland, Oregon and Minneapolis–St. Paul are generally regarded as national leaders in the promotion of infill development. Portland has focused on regional growth management regulatory tools to discourage exurban development, while Minneapolis–St. Paul has focused on both regulations and regional tax sharing. Cf. Carl Abbott, *The Portland Region: Where City and Suburbs Talk to Each Other—and Often Agree*, 8 HOUSING POLICY DEBATE 11 (1997), with Freilich & Ragsdale, *supra* note 22.

¹²⁹*Berman v. Parker*, 348 U. S. 26, 33 (1954).

¹³⁰For a discussion of this “infill” objective and the problem of structuring programs to achieve it, see AMERICAN PLANNING ASSOCIATION, *supra* note 19, at 201-202; BABCOCK & WEAVER, *supra* note 109, at 281-294. See generally Peter A. Buchsbaum, *Old Wine in New Bottles: Redevelopment Tales of a City, a Suburb and a State*, 30 URB. LAW. 745 (1998).

4. Aesthetics

Although conservative concepts of zoning authority have always regarded “aesthetics” or “amenity” as insufficient bases for police power regulations, these factors often lie at the core of significant zoning classifications. Some commentators see a trend toward judicial acceptance of aesthetics matters as proper objectives; others see only a more open discussion of these factors (in place of prior judicial manipulations which based decisions on tenuous health and safety grounds).¹³¹ While there are differences in the degree to which state courts will accept aesthetics ends as independent bases for regulations, it does seem clear that courts will readily uphold ordinances that also promote economic ends.¹³²

a. Protecting the stability of residential neighborhoods—Few purposes of land use control have received more consistent judicial support than the promotion of peace and stability in detached residential neighborhoods. The following dictum from the *Village of Euclid v. Ambler Realty* opinion set the stage:

With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses . . . Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come near to being nuisances.¹³³

The state courts have readily accepted single-family zoning as a proper pursuit of this objective; moreover, in 1973, the Supreme Court itself supplied additional encouragement.¹³⁴ Accordingly, virtually no court will question a community’s right

¹³¹Consider the following quotation from a 1913 Missouri case sustaining billboard regulations:

The evidence also shows that behind the obstructions the lowest form of prostitution and other acts of immorality are frequently carried on, almost under public gaze; they offer shelter and concealment for the criminal while lying in wait for victim; and last, but not least, they obstruct the light, sunshine and air, which are so conducive to health and comfort.

St. Louis Gunning Adver. Co. v. City of St. Louis, 137 S.W. 929, 942 (Mo. 1913). For a classic discussion of the reasoning in the early aesthetics zoning cases, see J. J. Dukeminier, Jr., *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955).

¹³²In the 1980s, both North Carolina and Ohio rendered favorable decisions on “aesthetics zoning.” *State v. Jones*, 290 S.E.2d 675 (N.C. 1982); *Franchise Developers, Inc. v. City of Cincinnati*, 505 N.E.2d 966 (Ohio 1987); *Vill. of Hudson v. Albrecht, Inc.*, 458 N.E.2d 852 (Ohio 1984), *cert. denied* 467 U. S. 1237 (1984). In a survey undertaken prior to these decisions, a commentator observed that sixteen states accepted aesthetics as a legitimate police power objective and nine states did not. Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. REV. 125, 127 (1980).

¹³³*Vill. of Euclid*, 272 U.S. 365, 394-95 (1926).

¹³⁴In *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1973), the U. S. Supreme Court upheld a village’s establishment of an exclusive single-family zone against numerous constitutional challenges. The court issued the following dictum:

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 ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clear air make the area a sanctuary for people.

to set aside protected detached residential areas; difficulties will only arise when attempts are made to classify all, or nearly all, of a jurisdiction's residential lands for such use.¹³⁵

b. Historic and scenic areas—The regulation of unique historic and scenic areas to preserve the aesthetic features of such areas is a valid police power objective in some states.¹³⁶ Such regulations are supported by the so-called “aesthetic-economic rationale,” which holds that scenic or historic areas that attract large numbers of tourists are deserving of protection due to economic as well as aesthetic reasons.¹³⁷ Additionally, as high technology employers increasingly target “amenity” as a key location factor, unique historic areas can be protected under a “job attraction” economic rationale.¹³⁸

c. General design and appearance—Regulation of the design and appearance of buildings in typical (although usually expensive) residential and commercial areas

Id. at 9.

¹³⁵See *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, *appeal dismissed, cert. denied*, 423 U. S. 808 (1975); *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975).

¹³⁶North Carolina embraced the “historic preservation” objective in *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444 (N.C. 1979). To date, Ohio courts have sidestepped the question of whether historic preservation, standing alone, constitutes an acceptable police power objective. See, e.g., *State ex. rel. BSW Dev. v. Dayton*, 699 N.E.2d 1271 (Ohio 1999), *cert. denied*, 526 U. S. 1067 (1999). See generally R. Netherton, *The Due Process Issues in Zoning for Historic Preservation*, 19 URB. LAW. 77 (1987).

¹³⁷See, e.g., *Bohannon v. City of San Diego*, 106 Cal. Rptr. 333 (Cal. Ct. App. 1973); *Sunad, Inc. v. City of Sarasota*, 122 So. 2d 611 (Fla. 1960); *City of New Orleans v. Pergament*, 5 So. 2d 129 (La. 1941); *Opinion of the Justices to the Senate*, 128 N.E.2d 563 (Mass. 1955); *City of Santa Fe v. Gamble-Skogmo*, 389 P.2d 13 (N.M. 1964); *Hayes v. Smith*, 167 A.2d 546 (R.I. 1961). See generally MODEL LAND DEV. CODE § 2-209 (1976) and accompanying note.

¹³⁸In a recent economic analysis, three University of North Carolina professors stated: Studies of the locational preferences of high-technology firms in the Southeast have found that the livability and education factors were the most important criteria, followed by local transportation and infrastructure availability (Malizia, 1985). Raleigh-Durham is consistently rated by business magazines as one of the best places in the United States to live and work. The concentration of research universities and research-based industries in Research Triangle Park has drawn a significant number of achievement-oriented people, reflected in the fact that the area contains the highest per capita concentration of Ph. D.'s in the United States. Dennis A. Randinelli, et al., James, *The Changing Focus of Urban Economic Development: Globalization and City Competitiveness in the 21st Century*, 3 CITYSCAPE: A JOURNAL OF POLICY DEVELOPMENT AND RESEARCH 89 (No. 3) (1998), citing Emil Malizia, *The Locational Attractiveness of the Southeast to High Technology Manufacturers*, in HIGH HOPES FOR HIGH TECHNOLOGY (Dale Whittington, ed. 1985). In a recent discussion of the relationship between “amenity” and economics, Partners for Livable Communities stated: “We urged cities to incorporate cultural facilities, parks and open space, natural and scenic resources, architecturally distinct buildings, and preserved or restored historic areas in their planning for economic development.” PARTNERS FOR LIVABLE COMMUNITIES, *THE LIVABLE CITY: REVITALIZING URBAN COMMUNITIES* 9 (2000). See generally R. McNulty, et al., *THE ECONOMICS OF AMENITY: COMMUNITY FUTURES AND QUALITY OF LIFE* (1985).

may represent the most extreme intrusion of government into the amorphous area of “beauty.” Nevertheless, courts occasionally uphold such regulations, particularly when strong ties between design and neighborhood property values can be established.¹³⁹ Naturally, technical planning foundations and legal precision are again crucial factors in the defensibility of such programs.

d. Maintaining a rural residential lifestyle—The first aesthetics objective discussed above was “preserving the stability of residential neighborhoods.” A closely related yet separate objective is “maintaining a rural residential lifestyle.” The difference between the objectives lies in the latter’s “rural” emphasis that speaks to the dominant visual impression of open space rather than structures.¹⁴⁰ A number of state courts have approvingly cited this objective while upholding large lot zoning schemes.¹⁴¹ However, the presence of other permissible objectives for large lot zoning in most of these cases makes it difficult to assess the independent standing of the specific aesthetic purpose.¹⁴²

A carefully crafted and geographically limited regulatory scheme based on this objective will probably succeed in most courts. However, staff should expect serious problems when it seeks to devote all of its residential areas to low-density living.¹⁴³ Relatively few rural communities—those with virtually no commercial or industrial development, no public service or facilities, and no low-income residents—can hope to succeed in allocating most of their lands to rural residential use.¹⁴⁴

5. Economic Development

Prior to the 1970’s, most planning offices gave little attention to the goal of economic development. However, as the local economies in many major cities continued to deteriorate, more planners instituted local economic development planning.

¹³⁹*People v. Stover*, 191 N.E.2d 272 (N.Y. 1963) (upholding ordinance prohibiting the stringing of clotheslines in front yards), *appeal dismissed*, 375 U. S. 42 (1963); *Reid v. Architectural Bd. of Review*, 192 N.E.2d 74 (Ohio Ct. App. 1963) (upholding architectural board of review’s denial of permit for home clashing with general neighborhood design in a fashionable (but not historically unique) suburb).

¹⁴⁰MANDELKAR & CUNNINGHAM, *supra* note 95, at 430. An Ohio appellate court recognized the validity of protecting a small town environment in *Loretto Dev. Co, Inc. v. Vill. of Chardon*, 695 N.E.2d 1151 (Ohio 1996). *Accord B.P. Am., Inc. v. Avon City Council*, 753 N.E.2d 947 (Ohio Ct. App. 2001).

¹⁴¹*Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Ybarra v. City of Town of Los Altos Hills*, 370 F. Supp. 742 (N.D. Cal. 1973), *aff’d*, 503 F.2d 250 (9th Cir. 1974); *Senior v. Zoning Comm’n*, 153 A.2d 415 (Conn. 1959), *appeal dismissed*, 363 U.S. 143 (1960); *Norbeck Vill. Joint Venture v. Montgomery County Council*, 254 A.2d 700 (Md. App. 1969); *Simon v. Needham*, 42 N.E.2d 516 (Mass. 1943).

¹⁴²For lists of objectives frequently used to support large lot zoning, see BEUSCHER & WRIGHT, *supra* note 11, at 485-86 and MANDELKAR & CUNNINGHAM, *supra* note 95, at 430-31.

¹⁴³*See* cases cited at *supra* notes 113 and 135.

¹⁴⁴*See* *Ybarra*, 370 F. Supp. at 746, 750-51.

Local economic development planning is a central feature of the planning process today, just as the segregation of land uses was for an earlier era. The new goal of economic development planning—to increase the number and variety of job opportunities available to local residents—requires that local governments and community groups use local resources to design and develop the local economy.¹⁴⁵

In short, the economic development goal reflects the public interest in a healthy and diversified local economy. Because planners have only recently promoted this goal, few courts have ruled on its validity. Further, the nature of the goal is such that regulatory responses are frequently inappropriate; deregulation and public spending programs are often better strategies in ailing urban areas.¹⁴⁶

a. Protecting the local economic base—The objective of protecting the local economic base often arises as a side issue in cases involving wetlands protection and the protection of scenic or historic areas.¹⁴⁷ In these cases, discussion of the need to protect the local economy occurs often. Questions remain as to the validity of regulatory measures designed solely to protect an area's economy, but this is an area where planning background studies can convince the courts of the legitimacy of the objective.

b. Preserving/improving the central business district—Regulations based on the need to protect and enhance a community's central business district have occasionally received favorable judicial treatment.¹⁴⁸ Commenting on a New Jersey borough's refusal to rezone outlying areas for shopping center use, a New Jersey court concluded that the intention to preserve the central business district was the only possible objective behind the ordinance; nevertheless, the court upheld the borough's action.¹⁴⁹ Other courts are now beginning to accept this reasoning.¹⁵⁰

c. Encouraging new industrial development—Apart from the objective of protecting the existing economic base, a community can actively seek to attract new industrial development. This is seldom discussed as a police power objective, primarily because police power responses to the problem are rarely appropriate. Instead, deregulation and technical assistance strategies are usually employed.

¹⁴⁵EDWARD J. BLAKELY, ECONOMIC DEVELOPMENT, in INTERNATIONAL CITY MANAGEMENT ASSOCIATION, THE PRACTICE OF LOCAL GOVERNMENT PLANNING 286 (2000).

¹⁴⁶See BABCOCK & WEAVER, *supra* note 109 at 81-82 (maintaining industrial economic base) and 295-298 (supporting some deregulation in central business districts). Baltimore followed this approach in the early 1970s. See AMERICAN PLANNING ASSOCIATION, *supra* note 23, at 20, 63-64.

¹⁴⁷See cases cited *supra* notes 97 and 137.

¹⁴⁸*Forte v. Borough of Tenafly*, 255 A.2d 804 (N.J. Sup. Ct. Law Div. 1969).

¹⁴⁹*Id.* at 806-07.

¹⁵⁰*Jacobs Visconsi & Jacobs v. City of Lawrence*, 927 F.2d 1111, 1120 (10th Cir. 1991); *Oberndorf v. Denver*, 900 F.2d 1434, 1441 (10th Cir. 1990), *cert. denied*, 498 U. S. 845 (1990); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 892 (9th Cir. 1988), *cert. denied*, 488 U. S. 965 (1988). *But cf.* *Westborough Mall Inc. v. Cape Girardeau*, 693 F.2d 733 (8th Cir. 1982), *cert. denied*, 461 U. S. 945 (1983). See generally Clifford L. Weaver and Christopher J. Duerkson, *Central District Planning and the Control of Outlying Shopping Centers*, 14 URBAN LAW ANNUAL 57 (1977).

6. Community Development

If asked to define a “community development” goal, many communities would simply equate it to the programs funded under the federal community development block grant program. Under a different heading (“Equity”), the authors of an urban planning text identified a much broader goal: it involves “fundamental human rights” and includes both social equity and social choice objectives.¹⁵¹

a. Achieving social equity—Social equity encompasses the civil rights of the community’s populace, particularly insofar as those rights intersect (or should intersect) with the local government’s land use and public improvement programs:

Social equity includes not only equal access to education, recreation, and other services provided by tax funds for the general welfare, but also equal opportunity to be employed, to lease or acquire property, and to be served in the businesses (restaurants, hotels, theaters, etc.) without regard to race, religion, or social status, including the right to travel or to move into a community.¹⁵²

b. Increasing choices for those constituents who have the fewest choices— This goal has its roots in the “advocacy planning” concept articulated by planners Paul Davidoff and Thomas Reiner in a 1962 article.¹⁵³ The advocacy planning approach was implemented by Professor Norman Krumholz during his tenure as Cleveland planning director in 1969-1979. As articulated by Professor Krumholz:

Our approach, we decided, would be based on one overriding goal: that, in a context of limited resources, we must place first priority on the task of promoting more choices for those Cleveland residents who had few, if any, choices. We were not aiming at more choices for all, but more choices for those who had few.¹⁵⁴

In practice, the proponents of these objectives have used the city spending and taxation powers (as opposed to regulatory powers) as their primary tools.

c. Enhancing constituents’ self-determination—Some may contend that the pursuit of self-determinism is a means to an end, rather than an independent objective. However, in many cities, decision-making at the block and neighborhood level is an independent—and a strongly accepted—local objective.¹⁵⁵ Again, this

¹⁵¹CHAPIN & KAISER, *supra* note 66, at 54-55.

¹⁵²*Id.* at 55.

¹⁵³Paul Davidoff & Thomas A. Reiner, *A Choice Theory of Planning*, 28 J. AM. INST. PLANNERS 103 (1962).

¹⁵⁴NORMAN KRUMHOLZ, *Government, Equity, Redistribution, and the Practice of Urban Planning*, CLEVELAND: A METROPOLITAN READER 312 (W. Dennis Keating, et al eds., 1995). The U.S. Supreme Court has arguably endorsed this objective in a *unanimous* decision upholding Hawaii’s use of eminent domain to disperse land ownership and create fee estates for former tenants. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

¹⁵⁵*See generally* Judith A. Martin & Paula R. Pentel, *What the Neighbors Want: The Neighborhood Revitalization Program’s First Decade*, 68 J. AM. PLAN. ASS’N 435 (2002).

objective is usually implemented through spending powers rather than regulatory powers.¹⁵⁶

*D. Land Classification Map and Short Term Public Action Program
for the Policies Plan*

The public goals and police power objectives described in Section II(C) above comprise the raw materials for the community's five-year policies plan. The planning staff must then incorporate these goals and objectives into two operational documents: a land classification map and a short-term public action program.

1. Land Classification Map

The purpose of the land classification map is to graphically represent the consequences of the goals, police power objectives, findings and policies. The map should divide the community's total land area into four major categories of land use: "developed," "transition," "rural," and "conservation."¹⁵⁷

The "developed" category should coincide with the existing pattern of intense urban development. The "transition" category should indicate the areas where intense urban development (or redevelopment) is anticipated—and is appropriate—during the next five years.

The "rural" category may represent either of two distinct concepts. A "pure rural" category indicates those portions of the community where preservation of a low-density, rural environment is desirable for a long-term (20-25 year) period. By contrast, a "rural holding area" indicates areas where intense urban development is not expected within five years, but may occur soon thereafter.

The "conservation" category encompasses those environmentally sensitive areas (or neighborhoods) where additional development activity of almost any kind will destroy significant natural or historic resources.

2. Short-Term Public Action Program

This short-term public action program is gradually becoming an accepted element in the comprehensive planning process.¹⁵⁸ Its functions are detailed in the American Law Institute's [hereinafter "ALI"] Model Land Development Code:

First, it demands that planners devote major attention to accomplishment of desired objectives rather than simply to formulating them. Second, it gives meaning to the objectives by detailing their costs and consequences. Third, it makes the plan more realistic because the programming time is

¹⁵⁶*Id.*

¹⁵⁷This four-part classification is based on the standards required to be adopted by the North Carolina Land Policy Act, N.C. GEN. STAT. § 113A-156 (West's 1999).

¹⁵⁸The American Law Institute's Model Land Development Code requires the local planning office to prepare a short-term program of specific public actions to be undertaken. MODEL LAND DEV. CODE § 3-105 (1975). In North Carolina, coastal counties preparing mandated land use plans under that state's Coastal Area Management Act must incorporate into their plans a list of "implementation actions." N.C. ADMIN. CODE TIT. 15A, § 7B-.0214 (July, 2001).

short enough to be comprehended and action is more likely to flow from the plan's adoption by the governing body.¹⁵⁹

A recent planning textbook adds the following:

Regardless of how well plans are related to goals, the land planning program and the community will fail to achieve their potentials unless regulations and public investments follow plans. It is important to attend to each function of the planning program and to each link in the planning chain, from goals and problems right through to the administration and enforcement of regulations.¹⁶⁰

Accordingly, in the short-term public action program, the long-range planning staff pursues the general coordination of a range of action instruments. By contrast, the "current planning" staff will perform the specific administrative actions and ordinance drafting. Additionally, both sections of the planning staff should consider alternate implementation schedules; methods for evaluating the consequences of different programs are available.¹⁶¹

E. Summary: The Functions of Long-Range Planning

The major function of the long-range planning division is to produce, and continually update and revise, a five-year policies plan (including a land classification map and a short-term public action program.) These functions reflect the new emphasis on planning as a continuing process, rather than one that ends with the preparation of a future land use map.

The staff should follow the American Law Institute's approach to the planning "process;" the Institute requires that staff submit to the local governing body periodic "Land Development Reports."¹⁶² The reports should indicate the extent to which plan objectives have been achieved by the previous short-term public action program, and indicate the extent to which there have been significant changes in the Plan's technical base. The reports should also recommend changes in objectives and policies, and propose periodic revisions in the short-term public action program.¹⁶³

III. IMPLEMENTING THE PLAN: ORDINANCES AND MAPS

This section discusses two major planning activities: a) devising specific ordinances and investment practices to achieve the directives of the policies plan;

¹⁵⁹MODEL LAND DEV. CODE, *supra* note 158.

¹⁶⁰KAISER, et al., *supra* note 66, at 82.

¹⁶¹Chapin and Kaiser recommend that guidance system designs be continuously tested against both land use objectives and the real-life development market. CHAPIN & KAISER, *supra* note 66, at 484, 486. They discuss a number of land use models suitable for performing these evaluations. *Id.* at 512-601. For a procedure to monitor the impact of regulations on land costs for housing, see David E. Dowall, *Reducing the Cost Effects of Local Land Use controls*, 47 J. AM. INST. PLANNERS 145 (1981).

¹⁶²MODEL LAND DEV. CODE, *supra* note 158, at § 3-107.

¹⁶³*Id.*

and b) applying these regulations and investment practices to particular parcels through mapping.

These activities lie at the heart of the planning process; they form a bridge between the empirical, normative long-range planning function and the hard realities and political choices encountered by the current planning section. Consequently, it is essential that the long range and current planning sections of the planning office jointly discuss and decide on the implementation actions discussed here.

A. *Enacting Specific Action Instruments*

Ordinances, Investments, and Technical Assistance Programs. The planning staff has many available action instruments to implement its plan: these include zoning ordinances, subdivision regulations, five-year capital improvements programs, and impact fee ordinances. This section recommends specific office procedures to be followed whenever the planning staff considers a particular action instrument affecting private land development rights.

As previously noted, the implementation phase of planning and the second prong of the Substantive Due Process test focus on the same general inquiry: whether a particular land use control is reasonably related to a permissible planning objective. However, this Article's model sets a more selective approach than that applied by most courts. In each case, the model proposes that planning staff search for the least restrictive regulatory alternative—the control that is no more restrictive of uses than is necessary to achieve the relevant objectives.¹⁶⁴

The procedure for analyzing a proposed action consists of four steps: list relevant objectives, assess the strength of the relevant objective(s), insure that the action is the least restrictive alternative, and make the “decision.”¹⁶⁵

¹⁶⁴This “least restrictive regulatory alternative” test, while applied in several non-zoning subject areas (*cf.* the fourth prong of the four-part First Amendment test stated in *Cen. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U. S. 557, 563-566 (1980), and the antitrust “rule of reason” summarized in *SUSMAN & WHITE*, *supra* note 59) is a more severe standard than most courts would use in their review of land use regulations. *See supra* notes 35-50, and accompanying text. However, at least in the area of subdivision exactions, the U.S. Supreme Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), arguably achieves a more intense scrutiny of development exactions: “No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” *Id.* at 391. Additionally, consider the following advice from a Dallas land use attorney:

Municipalities traditionally have had the advantage as the defendants in land use cases . . . over the years, however, these advantages are diminishing. For instance, in recent years, state legislative action has contracted or restricted the scope of municipal police powers. In addition, substantive theories of relief in land use cases have expanded. At the same time, defenses available to municipalities have been limited or restricted. Consequently, the result is an increased exposure to substantial damages awards arising from implementation of land use regulations.

MORGAN, *supra* note 6, § 9.01[1]. Finally, by choosing an admittedly tight standard of ordinance review *prior to adoption*, this article is endorsing a risk-management approach that should effectively serve the community in the future.

¹⁶⁵The American Law Institute established a roughly analogous process entitled “Statements of Trends, Objectives, Beliefs, Policies and Standards.” *See* MODEL LAND DEV. CODE, *supra* note 158, at § 3-104.

1. List Relevant Objectives

The planning staff should review permissible governmental objectives categorized in the policies plan; then it should identify each objective which would be served by the adoption of the proposed action. The advantage of organizing policies under categories of objectives approved by the courts becomes apparent at this stage, for the planning staff following this procedure is anticipating the approach to be taken by a reviewing court.

2. Assess the Strength of the Relevant Objectives

After it has identified the objectives served by the proposed action, the planning staff must next gauge the strength of the objective or combined objectives. As I discussed each objective in Section II(C) above, I offered a general assessment of its relative strength. Based on those assessments, the planning staff must then determine whether the objective (or combination of objectives) supplies sufficient support for the considered action. If the staff doubts the strength of the supporting objectives, the staff should consider whether further studies might sufficiently strengthen the foundation of the action. The municipal attorney's advice and counsel becomes critical at this stage.

3. Insure that the Action is the Least Restrictive Alternative

Assuming there is a reasonable relationship between a proposed action and one or more acceptable police power objectives, the planning staff should next ask: Is there a less restrictive means of accomplishing the objective(s)? The planning staff can simplify this difficult question by classifying possible actions according to the degree to which they appear to interfere with the private land market.

This subsection identifies seven categories of actions listed in ascending degrees of interference with the private market. The staff will answer the "least restrictive question" by first classifying the proposed action into one of these seven categories, and then examining less severe categories of actions to determine whether they might instead be employed to achieve the underlying objectives.

a. Marketing, technical assistance and deregulation—These proactive actions have the least negative impact on market conditions because they assist, rather than regulate developers and redevelopers. These actions form the core of redevelopment strategies for older Rustbelt cities and their inner ring suburbs.¹⁶⁶ These urban areas

¹⁶⁶The inner ring suburbs in Cleveland, Ohio have formed an effective coalition. See John C. Bruening, *Withering Heights: As suburban expansion explodes beyond the county borders, the inner ring fights back*, CLEVELAND FREE TIMES, June 23-29, 1999, at 16; Thomas Ott, *First Suburbs Hope to Unite Development Efforts in Council*, THE PLAIN DEALER, December 18, 2001, at 3-J. Cooperative efforts such as this stand out in northeast Ohio, which often engages in intramural sparring. After travelling to North Carolina's Research Triangle Park, the Chancellor of the Ohio Board of Regents observed:

Unlike North Carolina, Ohio doesn't work together. Our many Ohios, our jealously independent city-states, don't cooperate with one another. Our colleges and universities don't work together. Our elected leaders don't work together. . . . The colleges and universities have defined competition as competition among themselves, in an Ohio environment, in a small league.

Roderick Chu, *We Have Met the Enemy and They Is Us*, CLEVELAND'S PATH TO REGIONAL ADVANTAGE 15 (Case Western Reserve University, ed. 1999).

do have marketable attributes: “strategic location, local market demand, integration with regional clusters, and human resources.”¹⁶⁷ An effective marketing program can convey these attributes to both businesses and potential homebuyers. These communities can also attract developers through technical assistance and deregulation (e.g., simplifying development regulations, replacing discretionary review with predetermined standards, encouraging pre-application conferences, and using technology to make city hall more accessible).

b. Selective spending and taxation (targeting)—Assuming a given level of public expenditures and income, a governing body may nevertheless be able to achieve certain objectives by targeting its expenditures or tax assessments to selected neighborhoods or regions. By definition, a targeting strategy restricts the class of beneficiaries of a spending program. Rather than spreading public capital improvements equally throughout a planning region, the government concentrates its spending in certain priority areas.¹⁶⁸ Similarly, preferential tax assessment confers tax benefits upon a restricted group.¹⁶⁹ Obviously, the planning staff must carefully craft any targeting strategies. The staff should select priority areas through use of criteria designed to yield clear benefits to the public at large; otherwise, the scheme can be attacked as an inequitable distribution of governmental services.¹⁷⁰

¹⁶⁷Michael E. Porter, *The Competitive Advantages of the Inner City*, HARV. BUS. REV., May-June 1995, at 55.

¹⁶⁸See *Duckworth v. City of Kansas City*, 758 P.2d 201 (Kan. 1988) (finding no denial of equal protection to competing developers when city loaned to developer at 8% interest with deferrals); *accord* *Maready v. City of Winston-Salem*, 467 S.E.2d 615, 626 n.1 (N.C. 1996); *Stark County v. Ferguson*, 440 N.E.2d 816 (Ohio Ct. App. 1981). *But see generally* Rachel Weber, *Why Local Economic Development Incentives Don't Create Jobs: The Role of Corporate Governance*, 32 URB. LAW. 97 (2000).

¹⁶⁹See, e.g., *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997) (upholding, against an equal protection challenge, an Ohio tax approach that exempted local distribution companies from sales and use taxes on sales of natural gas); *Deseno, Inc. v. City of Akron*, 706 N.E.2d 323 (Ohio 1999) (upholding Ohio statute authorizing joint economic development districts); *McCormack v. Attorney General of Texas*, 822 S.W.2d 814 (Tex. App. 1992) (upholding open space exemption provision in tax code providing reduced appraisal for land devoted principally to agricultural use for five of preceding seven years). *See generally* Peter D. Enrich, *Saving the States From Themselves: Commerce Clause Constraints On State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996); Thomas A. Gihring, *Incentive Property Taxation: A Potential Tool for Urban Growth Management*, 65 J. AM. INST. PLANNERS 62 (1999).

¹⁷⁰See *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (invalidating village's demand for a 33-foot easement—from property owner who had previously successfully sued the city—when record showed that city had only asked for 15-foot easements from other property owners). *Cf. Mlikotin v. City of Los Angeles*, 643 F.2d 652 (9th Cir. 1981) (rejecting an equal protection challenge to city's provision of municipal services) *with* *Franklin v. City of Marks*, 439 F.2d 665 (5th Cir. 1971) (finding denial of equal protection when city provided inadequate services to residents on “other side of tracks”); *Dowdell v. City of Apopka*, 511 F. Supp. 1375 (M.D. Fla. 1981) (finding denial of equal protection due to deficiencies in city's provision of paving, street maintenance, storm water drainage, and water distribution) *modified*, 698 F.2d 1181 (11th Cir. 1983); *Johnson v. City of Arcadia*, 450 F. Supp. 1363 (M.D. Fla. 1978) (finding deficiencies in city's provision of street paving, parks, recreation and water supply).

c. *Pricing policies*—The governing body can adopt various pricing policies that impose extra costs on land developers. These extra costs may consist of improvement requirements¹⁷¹ or connection fees to public utilities that use marginal cost pricing to encourage efficient development.¹⁷²

d. *Traditional zoning*—The typical zoning ordinance classifies land. Invariably, the classification of a parcel excludes some form of potential development; frequently, the property's "highest and best use" in the market sense cannot be attained. Nevertheless, the property owner is usually left with permitted development options that allow for a reasonable economic return.

e. *Prohibiting most development options for a specified time period*—Moratoria and staged growth ordinances are examples of actions that focus on the timing of development. Using such measures, a community will seek to ban most or all development options for a parcel for a stated time period.¹⁷³

f. *Prohibiting nearly all development options*—Regulatory programs that attempt to restrict development in general (rather than prohibit particular types of development) are primarily responses to the need to protect critical environmental areas. The police power objectives required to support such programs must be exceedingly strong.¹⁷⁴

g. *Public land acquisition*—The public acquisition of land over a property owner's objections under the power of eminent domain represents the most drastic interference with private property rights.¹⁷⁵ Additionally, it is the most costly

"In general, a utility must provide service without discrimination to all customers within its service area." AMERICAN PLANNING ASSOCIATION, *supra* note 19 at 56.

¹⁷¹See *supra* notes 120-27, and accompanying text.

¹⁷²See TABORS, *supra* note 22, at 126-127; Downing, *Sewer and Water Pricing and Investment Policies to Implement Urban Growth Policy*, 11 WATER RESOURCES BULLETIN 345 (1975).

¹⁷³The U.S. Supreme Court recently affirmed the 9th Circuit's approval of a 32-month moratorium to allow time for lake basin planning. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465 (2002). Meanwhile, staged growth ordinances have received mixed results. See cases cited *supra* note 113.

¹⁷⁴See *Lucas v. S.C. Carol. Coastal Council*, 505 U.S. 1003, 1014-15 (1992). In the 6th Circuit, see *Stupak-Thrall v. Glickman*, 988 F. Supp. 1055, 1064-65 (W.D. Mich. 1997) (finding a motorboat restriction applicable to plaintiff's lake property constituted a taking); *Tandy Corp. v. City of Livonia*, 81 F. Supp. 2d 800 (E.D. Mich. 1999) (finding that city's downzoning of property from commercial to professional use violated substantive due process but did not constitute a taking). In Ohio, see *State ex. rel. RTG, Inc. v. State of Ohio*, 2002 Ohio LEXIS 3064 (Ohio 2002) (upholding lower court finding of a taking of *subsurface rights* when regulations prohibited mining in areas near village wells, and then finding an additional taking of *surface rights*).

¹⁷⁵"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most or not all cases there must be an exercise of eminent domain and compensation to sustain the act." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922).

implementation action for the municipality.¹⁷⁶ Consequently, a city should only take this action when no other remedy exists for a problem.

4. Decision and Preparation of Legislative Findings

The planning staff's procession through the first three steps will result in a decision concerning the particular spending, taxing, or regulatory action proposed. If the proposed action requires legislative authorization, the staff should work with the municipal attorney to prepare legislative findings based on the above-described analyses.

B. Mapping: Application of Regulations to Specific Parcels

Land use regulations, capital improvements programs and taxation policies establish the ground rules for a community's future development. Although the rules themselves may occasionally spark controversy, the "acid test" for a regulatory program does not take place until the rules are applied to specific parcels of property. Concepts that seem remote and esoteric when discussed in the abstract seem to acquire a particular vitality when established as mapped zones.

There is nothing new in the warning that an ordinance valid on its face may nonetheless be held to be confiscatory as applied to a specific parcel.¹⁷⁷ In fact, experienced zoning attorneys will usually concentrate their attacks on the application of the ordinance, rather than its underlying constitutional soundness.¹⁷⁸ Accordingly, there is no more certain invitation to continuous (and often successful) land use litigation against a community than a poorly conceived mapping strategy. Although the task of carefully fitting mapped zones to the text of ordinances is often more art than science, this section reviews the major contentions usually contained in an attack upon an ordinance as applied.

1. Mapping of Specific Parcels Must Be Reasonably Related to Valid Police Power Objectives

Substantive Due Process challenges to zoning ordinances are quite common; probably because there are at least two ways a community can err in attempting to achieve an admittedly valid objective. First, as discussed in Section III (A) above, the regulatory measure itself may not be reasonably related to a valid objective.¹⁷⁹ Second, the application of the measure as expressed in the zoning of a specific parcel may be found to be arbitrary.¹⁸⁰

¹⁷⁶*Id.*

¹⁷⁷*Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928).

¹⁷⁸Corwin W. Johnson, *Constitutional Law and Community Planning*, 20 LAW & CONTEMP. PROBS. 199, 206, 215 (1955).

¹⁷⁹*See cases cited supra* note 42.

¹⁸⁰*Tuggle v. Manning*, 159 S.E.2d 703 (Ga. 1968) (holding that single family zoning prohibited only use for which property was reasonably suited); *Bd. of Zoning Appeals v. Koehler*, 194 N.E.2d 49 (Ind. 1963) (finding city's prohibition of shopping center not based on reality, since property was located in large and growing commercial sector); *Kozenick v. Township of New Jersey*, 131 A.2d 1 (N.J. 1959) (declaring industrial zoning invalid as applied to a small parcel that could not be used in that fashion); *Rose v. Guilford County*, 298 S.E.2d 200 (N.C. Ct. App. 1982) (finding rezoning to be illegal due to county's reliance on

Generally, mapping decisions will run afoul of this second requirement when specific properties are zoned for uses that they cannot physically accommodate.¹⁸¹ Ideally, planning staff would consider the suitability of the zoning for each parcel before the ordinance is enacted; practically, this is usually impossible. Instead, planning staff should consistently refer to the policies plan while mapping decisions are made. Moreover, the community can usually rely on individual property owners to point out the worst mapping mistakes by requesting zone changes. In the context of its decisions on zone changes, the community has the opportunity to correct its earlier mapping errors.¹⁸²

2. General Mapping Classifications Must Be Reasonably Related to Valid Objectives

The Equal Protection Clause requires that classifications of areas be reasonably related to proper police power objectives. This potential challenge must be considered when establishing boundary lines between districts. While all boundaries are arbitrary to some extent, the planner can minimize problems by following some general rules.

a. Boundaries between urban zones—Planning law authority Philip Green recommended two principles for setting boundaries of urban zones. First, the boundaries of a district should be generally run through a block (along rear lot lines) rather than down the center of a street.¹⁸³ Second, when a district line runs parallel to side lot lines, the boundary should follow the lot line rather than splitting the lots.¹⁸⁴

b. Boundaries of environmental areas—Environmental classifications should be tied as closely as possible to the underlying natural characteristics that serve as the basis for regulations. Accordingly, the mapping of environmental zones is highly dependent on the environmental technical studies conducted prior to the preparation of the policies plan.¹⁸⁵ The planning staff must convey the “equal protection” mandates at the mapping stage to those persons responsible for technical studies. The technical studies must supply sufficient criteria to enable the mapper to logically

neighbors’ complaints rather than property’s suitability for the particular zoning category); *Shemo v. Mayfield Heights*, 722 N.E.2d 1018 (Ohio 2000), *reconsideration denied*, 727 N.E.2d 596 (Ohio 2000) (holding a cluster single-family zoning unconstitutional as applied to an undeveloped parcel where asserted objective of mixed uses/reduction of traffic congestion were inapplicable to an area that already demonstrated mixed use); *W.O. Brisben v. City of Montgomery*, 637 N.E.2d 347 (Ohio Ct. 1994) (invalidating a residential zoning classification that rendered the development of a property economically infeasible); *Zeltig Land Dev. Corp. v. Bainbridge Twp.*, 599 N.E.2d 383 (Ohio Ct. App. 1991) (invalidating 5-acre minimum lot size after finding that lot size made public sewer uneconomic, and property’s location on shallow bedrock precluded septic tanks).

¹⁸¹*Kozenick*, 131 A.2d 16.

¹⁸²Pennsylvania has established a procedure in which a landowner may couple a challenge to an ordinance with a request for a so-called “curative amendment.” 53 PA. CONS. STAT. ANN. §10609.01 (West 1997).

¹⁸³PHILIP GREEN, *A ZONING PRIMER FOR LOCAL GOVERNMENT ADMINISTRATORS* 8 (1978)

¹⁸⁴*Id.*

¹⁸⁵*See, e.g.*, D. GODSCHALK, F. PARKER & T. KNOCH, *CARRYING CAPACITY: A BASIS FOR COASTAL PLANNING?* (1974).

distinguish zones; to the extent that the mapper must engage in guesswork, the technical studies have failed in one of their major purposes.

3. Boundaries of Zones Must be Sufficiently Precise

The Procedural Due Process requirements of notice and an opportunity to be heard have been discussed above. At the mapping stage of the planning process, these requirements tell the planning staff to describe or draw the boundaries of zones so as to give landowners adequate notice of the restrictions placed on their properties.¹⁸⁶

The mapper must, therefore, navigate a narrow course between the Equal Protection and Due Process Clauses. Classifications establishing separate zones must be rational; yet, the boundary lines separating these zones must be reasonably precise. The balancing of these factors is particularly problematic in the zoning of critical environmental areas (which by their nature are usually difficult to define).¹⁸⁷

Nevertheless, the Due Process Clause is not so strict as to require surveyed boundaries. Word definitions and delineations on aerial photographs and tax maps are an acceptable and preferable means of establishing boundaries of environmental zones.¹⁸⁸

4. The Takings Issue

The Fifth Amendment of the U.S. Constitution provides that “nor shall private property be taken for public use, without just compensation.”¹⁸⁹ While the so-called “takings clause” operates most directly as a check on a community’s exercise of its eminent domain power, its more indirect impact as a limit on the scope of police

¹⁸⁶Vill. of Westlake v. Elrick, 83 N.E.2d 646 (Ohio Ct. App. 1948) (invalidating a zoning ordinance that failed to define with certainty the location, boundaries and areas of districts); Tirpack v. Maro, 222 N.E.2d 830 (Ohio Ct. App. 1967) (invalidating zoning ordinance that defined boundaries of districts with reference to an unpublished map). See also cases cited at *supra* notes 52; Annot., *Validity of zoning regulations with respect to uncertainty and identification of boundary lines*, 39 A.L.R. 2d 766 (1955); Thomas Schoenbaum & Kenneth Silliman, *Coastal Planning: The Designation and Management of Areas of Critical Environmental Concern*, 13 URB. LAW ANNUAL 15, 35 (1977).

¹⁸⁷Consider the following discussion regarding the definition of buffer boundaries for streams and creeks:

There are two principal ways of defining the buffer boundary. The boundary may be a fixed distance from the banks or high water point of the stream. Or the boundary may float or be adjusted according to the character of the adjacent lands.... The main advantage of the fixed-point buffer is the ease with which it is administered. It is relatively simple to determine whether a projected development will fall within the buffer or not. The key weakness is found in the rigidity of fixed boundaries.... (which) may exclude consideration of... related sensitive areas.

THUROW, *supra* note 94, at 13.

¹⁸⁸Schoenbaum & Silliman, *supra* note 186, at 13.

¹⁸⁹U.S. CONST. amend. V. This takings prohibition is applicable to the states under the 14th amendment. *Chicago B&Q R.R. v. City of Chicago*, 166 U. S. 226, 235-241 (1897).

power regulations has probably received more attention from courts and commentators.¹⁹⁰

An informed planning staff will pay close attention to the U.S. Supreme Court's continuing expansion of the remedies available following a determination of a "regulatory taking." Of course, courts have always stated that just compensation must be paid when a taking occurs.¹⁹¹ The key question is when this obligation is triggered? The traditional view held that (following a court's declaration of a taking coupled with its invalidation of the offending regulation) the municipality would only have to pay for the right to restrict the landowner's property in the future: interpreters assumed that the municipality still had the option of abandoning its public purpose without paying damages for prior impacts of the invalidated regulations.¹⁹²

By contrast, the more recent theory (usually advanced under the heading of "inverse condemnation") requires the government to pay compensation for damages suffered prior to the court's determination of a taking.¹⁹³ This apparent strengthening of the remedy lends some additional urgency to the takings issue. The relevant inquiry here is properly limited to a consideration of only those additional precautions, not previously discussed, that a community must take in its application of regulations to specific parcels.

This question can be answered by first listing those elements which often compel courts to find a taking, and then considering only those elements not addressed under another constitutional test. Generally, courts are inclined to find a taking of property when: (1) a use restriction is not reasonably necessary to effectuate a substantial public purpose;¹⁹⁴ or (2) government has physically invaded the land;¹⁹⁵ or (3) the regulations cause an excessive diminution in the value of a parcel.¹⁹⁶ The first element is essentially covered under the Substantive Due Process test,¹⁹⁷

¹⁹⁰Recent articles include Melvin R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464 (2000); Hart, *supra* note 77; Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Commission*, 45 STAN. L. REV. 1433 (1993).

¹⁹¹*See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014-19.

¹⁹²*Fred P. French Investing Co., Inc. v. City of New York*, 350 N.E.2d 381, 384-386 (N.Y. 1976); *Presbytery of Seattle v. King County*, 787 P.2d 907, 914-15 (Wash. 1990).

¹⁹³*Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 526 U.S. 687, 704 (1999); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-22 (1987).

¹⁹⁴*Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 127 (1977); *State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345, 350 (Ohio 2002).

¹⁹⁵*United States v. Causby*, 328 U.S. 256, 264 (1946).

¹⁹⁶*Lucas*, 505 U.S. at 1014-19; *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922); *State ex rel. Shemo*, 765 N.E.2d at 345.

¹⁹⁷*See* text associated with *supra* note 42. At least one state court seems to use the substantive due process grounds for cases in which it chooses to simply invalidate regulations, while reserving the taking grounds for rare cases in which compensation seems appropriate. *Presbytery*, 787 P.2d at 14-15. *Cf.* *Fred P. French*, *supra* note 192 (suggesting that a government's exercise of its regulatory police powers can never effect a regulatory taking).

recommendations for satisfying this requirement are given in Section III (A) above. Accordingly, the discussion below will focus on the last two elements.

a. Avoiding governmental physical invasions of land—Damages to property values caused by physical interference by government are often held to be takings. Examples include cases involving direct flights over a claimant's land¹⁹⁸ and repeated flooding caused by a public water project.¹⁹⁹ Related to these cases, and more significant for land use planners, are those instances in which government institutes restrictive regulatory measures on a land area as a prelude to public acquisition. Such governmental conduct, always closely scrutinized in the past, is even more suspect today.²⁰⁰ Consequently, the planning staff should clearly distinguish between lands to be regulated and lands to be purchased, and should not use regulation as a tool to facilitate later purchases.

b. Avoiding excessive diminution in land values—While only excessive diminution in land values caused by regulations amount to a taking, the court decisions do not offer a uniform definition of "excessive."²⁰¹ Consequently, the protection against a takings challenge calls for considerable exercise of judgment and opinion. During the mapping phase of regulatory action, the planner should first use her best judgment to identify those areas where regulations are likely to cause the most severe impact on land values. Second, she should list practical permitted uses for these general areas.²⁰² Third, she should incorporate the list into the legislative

¹⁹⁸*Causby*, 328 U.S. at 256; *Griggs v. Allegheny County*, 369 U.S. 84 (1962).

¹⁹⁹*United States v. Cress*, 243 U.S. 316 (1917); *Jacobs v. United States*, 290 U.S. 13 (1933); *United States v. Dickinson*, 331 U.S. 745 (1947).

²⁰⁰Cities apparently had used regulations as preludes to public acquisition in both *San Diego Gas & Elec. v. City of San Diego*, 450 U.S. 621 (1981), and *Agins v. City of Tiburon*, 447 U.S. 255 (1980); however, in neither case did the U.S. Supreme Court's disposition turn on these facts. For a thorough listing of cases holding pre-condemnation downzonings to constitute "takings" violations, see Alan E. Brownstein, *Illicit Legislative Motive In the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 68-78 (1988). On the more specific subject of "planner's blight" (i.e., property owner's allegation that property values have been "taken" due to inclusion of property in mapped urban renewal areas), cf. *Sayre v. City of Cleveland*, 493 F.2d 64 (6th Cir. 1974) (rejecting claim); *Woodland Market Realty Co. v. City of Cleveland*, 426 F.2d 955 (6th Cir. 1970) (rejecting claim); *Cook v. Cleveland State Univ.*, 104 F. Supp. 2d 752 (N.D. Ohio 2000) (rejecting claim), with *Henn v. City of Highland Heights*, 69 F. Supp. 2d 908 (E.D. Ky. 1999) (finding inadequate basis for city's designation of a blighted neighborhood), *vacated*, 248 F.3d 1148 (6th Cir. 2001).

²⁰¹See *supra* note 191.

²⁰²See *Schoenbaum & Silliman, supra* note 186, at 46. See also *Turnpike Realty v. Town of Dedham*, 284 N.E.2d 891, 899-900 (Mass. 1972); *Just v. Marinette County*, 201 N.W.2d 761, 765 (Wis. 1972). In North Carolina, see *Helms v. City of Charlotte*, 122 S.E.2d 817 (N.C. 1961) (remanding to determine whether city's rezoning of a 5,000 square-foot lot from "industrial" to "residential" caused the lot to retain any practical value, given that new zoning required 7,500 square-foot minimum lot size). In Ohio, cf. *Shreiner v. Russell Township Bd. of Trustees*, 573 N.E.2d 1230 (Ohio Ct. App. 1990) (striking down regulations rendering property "valueless") with *Columbia Oldsmobile, Inc. v. Montgomery*, 564 N.E.2d 455 (Ohio 1990) (upholding residential zoning where property left with value between \$664,000 and \$1,025,000) and *Goldberg COS v. Council of City of Richmond Heights*, 690 N.E.2d 510 (Ohio 1998) (remanding to lower court to determine whether denial of variance to reduce required retail parking spaces from 554 spaces to 372 spaces was constitutional).

findings prepared for the ordinance; the municipal attorney can then use the list in a future defense of the regulation.

IV. OFFICE GUIDELINES FOR "CURRENT PLANNING"

The "current planning" division of the planning office is primarily concerned with the administration of a community's land development laws. The current planner's task is to draw upon previously established policies and rules to render correct and consistent decisions on individual cases.

These individual cases can be grouped into major categories. Rezoning decisions constitute one important function. Although requests for rezoning frequently issued from individual property owners concerned with the use of a single parcel, rezoning is necessarily a legislative or rulemaking function: one which lays down general policies without regard to the attributes of a specific piece of property.²⁰³

Rezoning can be contrasted with a second major function of current planning: discretionary review of specific development proposals. Since discretionary review procedures are adjudicatory in nature, these case proceedings must satisfy procedural due process requirements.²⁰⁴

Site plan review is the third major function of current planning. Prior to the 1960's, subdivision plats were the only development site plans reviewed by most planners. However, the advent of floating zones, planned unit development, clustering, and other devices, has greatly expanded the types of development subjected to site plan review.

The reader will detect a common thread running through the separate discussions of the three current planning functions: the contention that a considerable amount of discretion can, and should, be removed from the review process.²⁰⁵ This issue of discretion, and the related issue of time delays in review, are so significant to the land developer that planning reforms in these areas are likely to decrease the volume of litigation faced by a community.

There are at least six steps a planning office can take to minimize delay and uncertainty in its review procedures: pre-application conferences, mandatory time

²⁰³Rezoning is regarded as a legislative function in North Carolina, *Kerik v. Davidson County*, 551 S.E.2d 186 (N.C. Ct. App. 2001); *Brown v. Town of Davidson*, 439 S.E.2d 206 (N.C. Ct. App. 1994), and in Ohio, *BP Am., Inc. v. Avon City Council*, 753 N.E.2d 947, 949 (Ohio Ct. App. 2001); *In re Rocky Point Plaza Corp.*, 621 N.E.2d 566, 569 (Ohio Ct. App. 1993).

²⁰⁴Adjudicatory proceedings (also known as "quasi-judicial" proceedings) have been explained as follows:

Quasi-judicial proceedings have been likened to "contested cases" before administrative agencies acting under federal or state administrative procedure acts. In contrast to legislative proceedings, quasi-judicial proceedings must afford procedural due process to the participants.

SHNIDMAN, et al., *supra* note 61, at 98. Most land use discretionary devices (e.g., variances, special use permits, site plan reviews) encompass individualized review involving specific parties and specific applications. In these cases, the reviewing board is determining "adjudicative facts," a term first used by Professor K. C. Davis in 1942. See Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-16 (1942).

²⁰⁵*Accord* 1 WILLIAMS, *supra* note 35, § 163.50-163.84.

frames for review, revised application forms, specification of vested rights in the ordinances, setting standards in advance, and fast-tracking minor permits.²⁰⁶ A detailed discussion of these methods lies outside the scope of this paper, and the procedures are amply detailed elsewhere.²⁰⁷ Nevertheless, these general reforms will facilitate the planner's performance of each of the three current planning functions discussed below.

A. Rezoning Cases (Rulemaking)

Rezoning decisions can take a variety of forms and can be initiated by either individual property owners or the municipality. The typical amendment proposed by an individual property owner is the single tract-rezoning request, usually sought to permit the applicant to use the property for a particular planned use. By contrast, municipally-initiated rezonings are frequently based on more general community concerns: for example, comprehensive rezoning usually takes place after a land use plan is prepared or updated.

Most courts apply the same legislative review standard to landowner and city-initiated rezonings: in deciding either type of rezoning case, a municipality is usually cloaked with a presumption of legislative validity.²⁰⁸ Those decisions that were successfully overturned were done so under the catchphrase of "spot zoning," which was usually defined as the use of a zoning amendment to single out a small parcel of land and permit the owner to use it in a manner inconsistent with other uses in the area.²⁰⁹

Within the past quarter century, however, the single tract rezoning request initiated by an individual property owner has begun to receive special treatment by courts in some states, most notably Colorado, Kansas and Oregon.²¹⁰ These courts believe that case-by-case decisions on individual land uses are more appropriately characterized as administrative (or quasi-judicial), rather than legislative decisions. This characterization institutes a stricter standard of review for these cases that may,

²⁰⁶See AMERICAN PLANNING ASS'N, *supra* note 23, at 8-9, 17-23, 44.

²⁰⁷*Id.*

²⁰⁸Edward Kancler, *Litigating the Zoning Case in Ohio: Suggestions to Fill the Textbook Void*, 24 CLEV. ST. L. REV. 33, 58 (1975).

²⁰⁹Consider the following explanation of spot zoning:

"Spot zoning" is essentially an epithet, not a doctrine, and covers essentially the same issues as those involved in interpretation of the comprehensive plan requirement. Three tests have been suggested in the case law to determine the presence of spot zoning, but none of these hold up as criteria under serious analysis: (1) Whether the use permitted is very different from the prevailing use in the surrounding area; (2) Whether the area is small or large; (3) The intent behind the change—whether this is for the benefit of the community as a whole or merely as a favor to a specific individual or group.

1 WILLIAMS, *supra* note 35, § 27. For cases applying this "epithet," see *Blades v. City of Raleigh*, 187 S.E.2d 35 (N.C. 1972); *Zopfi v. City of Wilmington*, 160 S.E.2d 325 (N.C. 1968); *Allred v. City of Raleigh*, 173 S.E.2d 533 (N.C. Ct. App. 1970), *revd. on other grounds*, 178 S.E.2d 432 (N.C. 1971).

²¹⁰*Snyder v. City of Lakewood*, 542 P.2d 371 (Colo. 1975); *Golden v. City of Overland Park*, 584 P.2d 130 (Kan. 1978); *Fasano v. Bd. of County Comm'r*, 507 P.2d 23 (Or. 1973).

as in Oregon, range all the way to requiring hearings with such trial-type features as the opportunity to present and rebut evidence, cross-examination, and a record with adequate findings.²¹¹

Considering this divergence of views among courts as to the appropriate standard of review for rezoning decisions, the procedures recommended here represent a compromise between practices acceptable under the traditional approach to rezonings and those required under the recent searching inquiries conducted on single-tract zoning decisions. Consequently, the reader is advised that these recommended practices would probably be insufficient in at least Colorado, Kansas and Oregon.

1. Guiding Principles

Given that the methods set forth in this section reflect a compromise, I will start by listing the major principles dictating the establishment of these procedures. First, this model regards all rezoning decisions as rulemaking functions;²¹² it makes no distinction between so-called “comprehensive rezoning” and single parcel zone changes. Second, planning staff should base all future zoning amendments upon the application of officially adopted policies to the particular request: the staff should phrase its rationale for the decision in terms of these policies. Third, particular characteristics of the individual landowner or her parcel of land are irrelevant (except insofar as they clearly relate to existing policies).

2. Office Procedures on Zoning Applications

a. Accepting the application—The rezoning application should perform a dual function: in addition to supplying the planning staff with the information it needs to consider the application, it should also educate as to the proper factors upon which staff will base its final decision. The application form should encourage the applicant to give some attention to these matters by including policy-related questions (i.e., how is the request consistent with land use policies? How was the original zoning inconsistent? How would the change impact the neighborhood?).

b. Notification of meeting—State enabling legislation will usually establish notification requirements for rezoning meetings. A typical provision might require publication in a newspaper of general circulation two weeks in advance of the

²¹¹*Fasano*, 507 P.2d at 30.

²¹²In this writer’s view, the courts and commentators who classify rezoning decisions as adjudicatory in nature are less concerned with the need to afford participants trial-type features (e.g., cross-examination, sworn testimony) than they are with replacing a lenient standard of *substantive* review with a closer analysis of the relevant planning background. *See, e.g., Golden*, 584 P.2d at 135-37 (reaffirming that the standard of review is “reasonableness,” but requiring the governing body to include minutes summarizing the factors it considered in making its decision); *Brough*, *supra* note 25, at 944-45; *see also* Note, *Developments in the Law-Zoning*, *supra* note 54, at 1546-47. Accordingly, this article’s recommended rezoning procedures are designed to withstand an intense standard of *substantive review*: rezoning decisions must explicitly reference applicable land use policies and must be based on a sound application of these policies. However, this article’s model does not endorse the quasi-judicial *procedures* (sworn testimony, cross examination) required by the courts in Colorado, Kansas and Oregon.

meeting date. Additionally, staff should mail individual notices to the applicant and to all immediately adjacent landowners.

c. Staff decision on the request—Staff should analyze the request in terms of its consistency with the policies enumerated in the adopted five-year policies plan. The final staff decision should be reduced to writing. The writing should contain a brief description of the request (but not a description of the applicant's proposed use of the property.) The writing should also cite relevant policies and their applicability to the particular request. As noted earlier, staff should disregard as irrelevant any particular attributes of the applicant or her property (except insofar as they directly relate to the application of the policies.)

Many planning staffs have customarily mailed copies of their recommendations to planning boards or governing bodies in advance of the meeting date. When this practice is followed, the staff should also mail a copy to the applicant. This decision should contain two disclaimers: (1) recommendations are subject to change if additional information is acquired prior to the meeting date; and (2) staff will not comment on recommendations prior to the meeting date.

Although I do not recommend individual mailing of staff decisions to adjacent property owners, the original notification of the meeting date should advise these persons that copies of staff recommendations will be available a certain number of days in advance of the meeting date.

d. Conduct of the public meeting—The governing body and the planning board should each adopt and publish general ground rules for the hearing of rezoning requests. A typical format would allocate time for the applicant's proposal, staff recommendations, and public comment, with rough time limits set for each phase of the meetings. Sworn testimony, cross-examination, rebuttal and other rights commonly associated with a due process hearing are unnecessary and should not be provided.²¹³

e. The decision—The decisions, which can and should be announced at the same meeting where the comments are received, should inform the applicant and the public of the policy reasons for the decision; however, particularly in those states where rezoning decisions still enjoy a healthy presumption of validity, the decision should also explicitly reference more general legislative powers. A typical provision might read as follows:

Following a public hearing held on (date), the municipality of (city) decided to (grant/deny) your rezoning request. This decision was based on general considerations of public health, safety, and general welfare. Additionally, the following policies contained in (city's) five-year policies plan support the decision:

Staff should deliver a written copy of the decision to the applicant.

3. Redefining the Role of the Planning Commission

Planning commissions often decide on a wide variety of land development cases, including rezonings, special use permits, and subdivision and other site plan reviews. The quality of the Commission's decisions on rezoning cases can be improved by removing the other matters from planning commission review.

²¹³See *supra* note 212, and accompanying text.

The redefined planning commission would thus, concentrate on long-range planning recommendations (with its attendant zoning policy decisions), rather than the adjudication of particular development proposals. Hearing officials can more properly and fairly perform the latter function.

By concentrating the planning commission's efforts on continuous planning as embodied in the adoption and revision of the policies plan, rezoning decisions are more likely to be infused with an appreciation of policy determinants rather than the particular needs of the individual applicant.

B. Site Plan Review

The history of site plan review by planners closely tracks the general developments in the planning field discussed in Section I (A) above. That is, an original scheme for examining a narrow range of developments with reference to preset standards has been expanded to encompass a case-by-case review of a broad range of development proposals.

Governmental site plan review can first be seen in the land platting legislation enacted in the late 19th century. Concern about surveying inaccuracies and discrepancies was the motivating force behind these acts, which required developers wishing to record maps or plats to meet certain surveying requirements.²¹⁴ By the 1920s, a plethora of poorly designed new subdivisions served by inadequate facilities spurred the adoption of subdivision control provisions within the Standard City Planning Enabling Act.²¹⁵

Prior to the 1950s, most courts strictly limited the approving body to the standards or conditions specified in the enabling legislation.²¹⁶ Subdivision regulations at that time typically consisted of objective standards based on enabling legislation; once the applicant had complied with these stated conditions, the approval of the plat by the governing body was regarded as a ministerial duty.²¹⁷

Beginning with a 1949 California decision, in which a court upheld the Los Angeles City Council's imposition of conditions of approval not expressly provided for in the state legislation or the local ordinance,²¹⁸ the review of subdivision plats has gradually evolved into a process characterized as "[requiring] a high degree of . . . discretion."²¹⁹ Discretionary standards have been built into many ordinances;

²¹⁴MANDELKAR & CUNNINGHAM, *supra* note 95, at 783.

²¹⁵U.S. DEPARTMENT OF COMMERCE, STANDARD CITY PLANNING ENABLING ACT §§ 13-14 (1928).

²¹⁶State *ex. rel.* Jackson and Morris, Inc. v. Smuczynski, 102 N.E.2d 168 (Ill. App. Ct. 1951); State *ex. rel.* Strother v. Chase, 42 Mo. App. 343 (Mo. Ct. App. 1890). In Ohio, *cf.* State *ex. rel.* Pelham Dev. Corp. v. Cerny, 228 N.E.2d 309 (Ohio 1967) (finding that a mandamus remedy will issue to compel action on subdivision plat within 30 days as required by OHIO REV. CODE ANN. § 711.09) with State *ex. rel.* Square v. Planning Comm'n, 413 N.E.2d 825 (Ohio 1980) (finding that a mandamus remedy will not issue to compel action on subdivision plat within 30 days, since developer had a plain and adequate remedy in the form of a declaratory judgment action .

²¹⁷*Id.*

²¹⁸Ayres v. City Council of Los Angeles, 207 P.2d 1 (Cal. 1949).

these standards encourage the developer to negotiate a site plan with the planning staff. Further, they allow for greater control by the staff over subdivision design.²²⁰

Moreover, site plan review is now used in a considerably wider range of development types. Site plan requirements are often included in zoning ordinance provisions authorizing special use permits, floating zone amendments, townhouse and condominium projects, and planned unit developments.²²¹ In summarizing site plan review, Professor Norman Williams stated:

Many modern zoning ordinances contain provisions for site plan review, and this is among the most useful techniques in modern zoning. In many communities, especially large built-up ones, most new development takes place by the assembly of several lots and their redevelopment by private investment, usually without public assistance. In regulating such redevelopment, site plan review performs a function analogous to subdivision control (on vacant land) and urban renewal (for worn out areas). Like most administrative arrangements, such processes may be misconceived or misused, to deal with matters far beyond their appropriate function. *Properly conceived, such regulations are concerned primarily with (a) the layout of buildings and other spaces, including parking areas, and (b) the provision for access to and from the public street system.*²²²

The public review of site plans for a wider range of projects is a welcome development. Among the benefits are improved design of individual projects, better coordination of projects with each other, and careful analyses of necessary improvements. More serious questions can be raised concerning the increased discretion granted to planning staffs and governing bodies in their review of these site plans. This section will address two questions related to this issue; the answers will in turn suggest appropriate office procedures for the current planning division in its review of site plans.

²¹⁹C & D P'ship v. Gahanna, 474 N.E.2d 303, 306 (Ohio 1984); Emerald Lakes, Inc. v. South Russell Planning Comm., 598 N.E.2d 60, 62 (Ohio Ct. App. 1992). In North Carolina, see *River Birch Assoc. v. City of Raleigh*, 388 S.E.2d 538 (N.C. 1990), in which the North Carolina Supreme Court upheld the City of Raleigh's requirement for dedication to a homeowners association of three acres open space within a 19.6 acre town home project.

²²⁰See, e.g., *River Birch*, 388 S.E.2d at 546-51 (holding that city can reject a "final plat" based on its noncompliance with a "preliminary plan;" this decision contains a thorough explanation of the differences among the terms "sketch plan," "preliminary plan," and "final plat" as the terms are used in subdivision control); *Emerald Lake*, 598 N.E.2d at 62 (holding village had authority to enact a provision—requiring developer to supply evidence of water availability for each lot when a governmental water supply is not available—not specifically mentioned or authorized by enabling statute; also holding village had authority to reject developer's plat due to nonconformance with such provision).

²²¹Site plan review authority in Ohio was approved in *Lakewood Homes, Inc. v. Bd. of Adjustment*, 258 N.E.2d 470 (Ohio Misc. 1970) *modified*, 267 N.E.2d 595 (Ohio Ct. App. 1971).

²²²1 WILLIAMS, *supra* note 35, § 152.01 (emphasis added).

1. Should Discretion be Removed from Site Plan Review?

Although discretionary site plan review affords a number of advantages to a planning staff, probably none is more frequently extolled than design review. The case-by-case analysis of a developer's site plans is a procedure tailor-made for the department gifted with well-trained design professionals. Design modifications that could not be required under a ministerial review procedure can be easily exacted when each case is treated separately. In fact, this individual review of projects is compatible with recent trends in environmental design, which regard the development of each tract as a unique problem of adjusting the proposed use to the environmental constraints of the site.

Further, unlike the use of discretion in other areas discussed *infra*,²²³ the use of discretionary site plan review standards does not appear to lead to an increase in land use litigation. The opportunities for compromise, the relatively minimal costs of most imposed conditions, and the quasi-judicial protections mandated by the courts, all combine to make developers grudgingly accept conditions or requirements of doubtful validity. Finally, many states regard subdivision review, the most widely-used form of site plan review, as adjudicatory in nature; this insures a full range of procedural protections.²²⁴

There are some arguments against discretionary site plan review. Although the method may work well in communities which have able design professionals to conduct the review, this situation is the exception rather than the rule. Many communities lack the resources to employ full-time design professionals; those communities that do have trained staff sometimes experience that staff modifying projects to meet their personal tastes.

Additionally, the results of case-by-case reviews of site plans are difficult to predict and frequently involve longer and more uncertain time periods for approval. The significant impact of these latter factors on housing costs calls for an examination of more predictable alternatives to discretionary site plan review.

2. Are There Sufficient Guidelines to Establish Advance Conditions?

One of the major advantages of individual site plan review is the opportunity it affords staffs to respond to unique development problems. Consequently, many planners would warn that the replacement of this review with uniform advance standards would handcuff the staff when unique problems arise.

Experience in the review of site plans is the best safeguard against this problem. Thus, it comes as no surprise that those departments with considerable experience in site plan review are confidently incorporating their heritages of design and planning principles into advance guidelines.²²⁵

²²³See *infra* note 228, and accompanying text.

²²⁴The review of subdivision plats is classified as adjudicatory (quasi-judicial) in both North Carolina, see *Batch v. Town of Chapel Hill*, 387 S.E.2d 635 (N.C. 1990), *cert. denied*, 496 U.S. 931 (1990); *Springdale Estates Assoc. v. Wake County*, 267 S. E. 2d 415 (N.C. Ct. App. 1980), and in Ohio, see *C & D P'ship*, 474 N.E.2d 303; *Emerald Lakes*, 598 N.E.2d at 62.

²²⁵The American Planning Association described Sacramento County's approach: Sacramento County, California has been successful in setting guidelines for PUD projects in advance of concrete proposals rather than in conjunction with them. Instead of drafting a single PUD ordinance that applies to any potential PUD in the

Moreover, Lane Kendig's performance zoning textbook culminated his exhaustive efforts to shift the practice of zoning from an ad-hoc administrative process to a legislative act: Kendig argued that his performance standards were designed to anticipate and correct nearly all problems raised by the development of a particular site.²²⁶

On balance, planning staffs that lack design professionals should practice site plan review as the ministerial process it once was.²²⁷ Only sophisticated planning staffs should perform extensive discretionary site plan review, and even those staffs should gradually attempt to convert some of their practices into advance standards.

C. Discretionary Review Procedures

I have previously argued that adjudicatory land use decision-making (with its attendant due process hearing requirements) should be limited to the narrowest possible range of planning activities. Specifically, the planning staff should confine discretionary, case-by-case reviews to four types of decisions: (1) traditional special use permits; (2) variances; (3) predefined environmental critical areas; and (4) discretionary site plan review by select professionals (see Section IV (B)).

I have already discussed one benefit of more limited discretionary review: that is the gain in predictability, leading, in turn, to lower land development cost impacts. However, the removal of some categories of decisions from "special use" review can also minimize future litigation against a community. Whenever a community changes a permitted use to a special use, or classifies a new use (e.g., townhouses and condominiums) as special, it often removes a significant protective cover from its future decisions—the presumption that legislative actions are valid.²²⁸

jurisdiction, the county has written a set of individually tailored performance standards that govern specific undeveloped parcels in the county. In this way, criteria can be less vague; the applicant knows ahead of time any particular requirements that are attached to a parcel.

American Planning Association, *supra* note 23, at 44.

²²⁶See generally KENDIG, *supra* note 34, at 281-88.

²²⁷Accord Jack L. Nasar & Peg Grannis, *Design Review Reviewed: Administrative versus Discretionary Methods*, 65 J. AMER. INST. PLANNERS 424 (1999) (asserting that, based on a study of projects in a Columbus neighborhood, discretionary design review is not demonstrably better than measurable standards). In ruling that a planning board acting in its design review capacity exceeded its authority by prohibiting an otherwise permitted use (a convenience market), a New Jersey court stated:

the role of the planning board, with respect to permitted or in commercial or industrial uses, is the grant or denial of site plan approval....Although site plan review affords a planning board wide discretion to insure compliance with the objectives and requirements of the site plan ordinance.... *it was never intended to include the legislative or quasi-judicial power to prohibit a permitted use...*

PRB Enter., Inc. v. S. Brunswick Planning Bd., 518 A.2d 1099 (N.J. 1987) (citations omitted) (emphasis added). For New York decisions strictly construing site plan review, see *Apache Assocs. v. Planning Bd.*, 517 N.Y.S.2d 29 (N.Y. 1987); *Moriarty v. Planning Bd.*, 506 N.Y.S.2d 184 (N.Y. 1986), *all cited in* 1 WILLIAMS, *supra* note 35, § 152.01.

²²⁸This point is expressed in *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994):

in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272

Consider the common request for a planning staff to address a new or controversial use of land. Instead of intensively researching the problem and adopting appropriate standards for such uses, many departments postpone these decisions by simply classifying the use as “special.” This delaying tactic frequently backfires when a specific use is adjudicated. At the very time the governing body is hurriedly deciding and documenting its case, the quasi-judicial nature of the proceedings is generating considerable publicity (and controversy). Once the decision is made, municipal opponents can confidently enter the courts knowing that both the administrative procedures and the substantive decision will be closely scrutinized.

1. Appropriate Categories For Adjudicatory Procedures

a. Traditional special use permits—As originally conceived, the special use permit was designed primarily to permit certain admittedly desirable but potentially problematic uses to locate within a zone, provided that certain conditions were set. The “traditional” types of special uses were described by New Jersey Supreme Court Justice Hall: “the uses so treated are generally those serving considerable numbers of people, such as private schools, clubs, hospitals and even churches as distinguished from governmental structure or activities on the one hand . . . or businesses on the other.”²²⁹

A fairly narrow definition of special uses should be maintained; the community should resist the urge to use the special use category as a dumping ground for postponed decisions on new and controversial uses.²³⁰

b. Variances—Statutory criteria for the grant of zoning variances are fundamentally adjudicatory in nature: they focus on the attributes of a special parcel. Although local governments will often craft the specific standards for the granting of variances, the courts will usually require that variance hearings include sworn testimony, cross examination and other procedural protections.²³¹

U.S. 365 (1926). Here, by contrast, the city made an *adjudicative* decision to condition petitioner’s application for a building permit on an individual parcel. *In this situation, the burden properly rests on the city.* . . .

Id. at 391 n.8 (citations omitted) (emphasis added). *Accord* SCHNIDMAN, et al., *supra* note 61, § 3.1.2(b).

²²⁹Tullo v. Township of Millburn, 149 A.2d 620, 625 (N.J. Super. Ct. App. Div. 1959).

²³⁰People v. Perez, 29 Cal. Rptr. 781, 783 (Cal. Ct. App. 1963). For a lengthy explanation of “special exceptions” in North Carolina, see Jackson v. Guilford County Bd. of Adjustment, 163 S.E.2d 265 (N.C. Ct. App. 1968), *affd.*, 166 S.E.2d 78 (N.C. 1969) (upholding zoning board of adjustment’s issuance of special exception against neighbors’ attack; confirming that procedure is quasi-judicial). Special use permit hearings in Ohio are clearly quasi-judicial. *Cf.* Cmty. Concerned Citizens, Inc. v. Union Twp., 613 N.E.2d 580 (Ohio 1993) (upholding the township’s review procedures) *with* Adelman Real Estate Co. v. Gabanic, 672 N.E.2d 1087 (Ohio Ct. App. 1996) (finding procedures deficient). See also State ex. rel. Synod of Ohio of United Lutheran Church in America v. Joseph, 39 N.E.2d 515 (Ohio 1942) (upholding hearing of such cases by the governing body itself); Blue Stone Sand & Gravel v. Montana Tp. Zoning Bd. of Appeals, 127 Ohio App. 3d 27, 711 N.E.2d 749 (1998) (upholding city’s use of a “beyond a reasonable doubt” standard).

²³¹See, e.g., Crist v. City of Jacksonville, 507 S.E.2d 899, 900 (N.C. Ct. App. 1998); Willoughby Hills v. C.C. Bar’s Sahara, 591 N.E.2d 1203, 1208 (Ohio 1992).

c. Development in critical environmental areas—Only within the last quarter of the 20th century has environmental planning been incorporated into the general land use planning process. Relying largely on the guidance of the ALI Model Land Development Code, most governments which have defined critical environmental areas (e.g., natural hazard areas, resource areas) have established a permitting system to control development. Given the unique natural attributes of these environmental areas, the retention of discretionary review procedures for development in such areas is warranted.

2. Guidelines for Administrative Review

Given that administrative review is appropriate for a particular type of development, what specific procedures should be established? First, before the hearing even commences, the hearing official(s) must be careful to avoid any contact with the parties or their attorneys. In some states, formal ethical rules may prohibit such contacts.²³² Even in states with no formal prohibitions, the hearing official still must function as an impartial arbiter.²³³ Pre-hearing conversations with one or more parties can severely compromise this status. With respect to the hearing itself, the “Administrative Hearings” section of the ALI Model Land Development Code offers a useful list of procedures.²³⁴

a. Notice and publication—The Code requires: (1) notice of a hearing at least two weeks in advance of the hearing date; (2) publication in a newspaper of general circulation; and (3) individual notice to the developer and nearby landowners.²³⁵ State enabling legislation may alter these requirements.

b. The hearing process—The governing body is authorized to designate a hearing official to conduct the hearing.²³⁶ All testimony at this hearing is under oath.²³⁷ The hearing official(s) must allow the parties to present evidence, make arguments, and examine and cross-examine witnesses (subject to reasonable limits on the number of witnesses and the nature and length of their testimony).²³⁸ Meaningful cross-examination can only occur when the witnesses state facts rather than opinions or general public comment.²³⁹ The governing body must make a full record of the hearing that shall be transcribed upon request.²⁴⁰

²³²See generally R. Lisle Baker, *Ethical Limits on Attorney Contact with Represented and Unrepresented Officials: The Example of Municipal Zoning Boards Making Site-Specific Land Use Decisions*, 31 SUFFOLK U. L. REV. 349 (1997).

²³³See *supra* note 54.

²³⁴MODEL LAND DEV. CODE § 2-304 (1976).

²³⁵*Id.* at § 2-304(2).

²³⁶*Id.* at § 2-304(4).

²³⁷*Id.* at § 2-304(6).

²³⁸*Id.* at § 2-304(7).

²³⁹In *Alderman Real Estate Co. v. Gabanic*, 672 N.E.2d 1087, 1090 (Ohio Ct. App. 1996) (citations omitted), an Ohio appellate court reversed a trial court’s affirmation of a conditional use permit denial; in relevant part, the appellate court reiterated:

A public hearing is one where members of the general public may speak and express their views on the question of governmental, political and policy considerations as to whether certain legislation should be adopted. Adjudication hearings, however, are

c. Written findings of fact and conclusions of law—The final decision should be in writing, based on the record, and include findings of fact and conclusions together with the reasons therefor.²⁴¹ A conclusory board determination unsupported by factual findings will most likely be reversed and remanded by a reviewing court.²⁴²

V. CONCLUSION

Despite their often conflicting interests, today's real estate developers and urban planners share common frustrations: each group must practice its trade in a political maze that can yield wrong turns, dead ends, and fruitless journeys; and each group now faces the risk of significant monetary liability when it fails to correctly predict the timing and results of its trips through the maze.

Conflicting messages sent by the courts and legislatures impede planners' and politicians' efforts to develop fair and predictable land use controls. When these public officials respond with highly discretionary and—in many cases—arbitrary land use controls, developers in turn respond by either: (1) increasing prices to consumers (and thereby recovering the developer's increased costs due to delay); or (2) withdrawing from the market altogether.

This Article attempts to lessen the public officials' uncertainties through the use of a model designed to anticipate the legal outcomes of future land use disputes. In older Rustbelt cities that are attempting to attract developers, the public officials will concentrate their actions on incentives (e.g., marketing, low-interest loans, tax incentives) lying at the lower end of the "least restrictive alternative" analysis. For those regulations that remain necessary, the principal challenge will be to simplify the process and reduce the time a developer or redeveloper spends in navigating the process.

The strategy will be different for communities at the opposite end of the growth spectrum. Consider a rural village threatened by overzealous developers. The village may wish to repel most developers. In doing so, the village will probably use strong regulatory actions (e.g., temporary moratoria, outright prohibitions) at the higher end of the "least restrictive alternative" analysis. If the village focuses on its goals and police power objectives, then tailors its regulatory actions to the objectives, it will reduce its legal uncertainties while strengthening its defenses to the unwanted development.

The different "languages" of lawyers and planners convey more differences—and more confusion—than exist in real life. The two professions are actually trained to analyze land use issues in very similar fashion. If planners rephrase their terminology to include lawyers' police power objectives, they can reduce confusion and achieve a more surgical approach to land use regulation. In the process, they can begin to meet the challenge issued twenty years ago by Justice Brennan in his *San Diego* dissent.

not subject to such public comment but, instead, involve the determination of rights of specific persons and whether such rights should be granted based upon *evidence (not public opinion)* presented at the hearing.

Id.

²⁴⁰MODEL LAND DEV. CODE § 2-304 (10)-(12) (1976).

²⁴¹*Id.* at § 2-304 (12).

²⁴²*See supra* note 54.