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Moratoriums and Growth Management

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Moratoriums and Growth Management

I. An Overview Of Growth Management And Moratoriums 1

With the explosion of suburban growth and urban sprawl accompanying the post-World War II years in America, local government management of both urban or suburban growth came in vogue in the 1970s and 1980s for the primary purpose of regulating the pace and extent of growth. The issues of how much growth should occur and when it should occur became as important as the traditional height, bulk and use aspects of Euclidean zoning's preoccupation with where development would be permitted.

The decision of various communities around the United States to manage growth was prompted by a variety of factors—the environment, crowding of public facilities, the economic and social effects of the energy crisis of the 1970s and the steady decrease of non-renewable energy sources, the decrease of federal dollars to local and state governments for a wide variety of land use and public facilities programs, the high unemployment rate of the late 1970s and early 1980s, and an acceleration of the growth of the Sunbelt. Juergensmeyer & Roberts, *Land Use Planning and Control Law*, § 9.1 (West 1998).

Always controversial, growth management programs around the nation have taken four basic approaches to the issue: (1) timed or phased growth; (2) population caps; (3) urban growth boundaries; and (4) adequate public facilities requirement. *Id.*, § 9.2.

“Timed” or “phased” growth programs generally limit the number of residential and/or commercial units which can be built in a specified period of time. These programs are generally tied to the availability of public services and capital improvements. Sometimes a point system is established according to which a developer or the parcel of land sought to be developed must have a certain number of points before development is allowed. Points are earned or awarded on the basis of availability of public services and/or design criteria.

Under the population cap approach, a local government sets the maximum number of dwelling units which will be allowed to be built in the jurisdiction.

The third form of growth management delineates the area or areas for staged future urban growth, outside of which urban development is restricted, deferred or prohibited. The provision of municipal services usually occurs only within the boundaries of the growth areas. This technique establishes geographic limits for “urbanizable” land, which can promote efficient development patterns and prevent or delay development of agricultural or wetland resources. Growth boundaries often are set beyond the projected

extension of urban services. By defining geographic points beyond which urban-density development will not be permitted, the urban growth boundary can discourage “leap-frog” development patterns and deter development of agricultural and wetland resources. Once a boundary is established, administration is dependent upon development approval decisions that respect geographic and service limitations. 2 Ziegler, *Rathkopf's The Law of Zoning and Planning*, § 13.08[4].

The last approach (often called the “concurrency requirement” or “adequate public facilities requirement”) is to forego the establishment of ultimate or periodic numbers but to avoid, deter or overcome many problems associated with growth by conditioning the issuance of building permits or plat approval on the existence of public improvements and capital facilities or requiring that developers pay fees which will be used by the government to provide the roads, schools, parks, sewers, water facilities and/or police protection which will be needed as a consequence of the new development. Juergensmeyer & Roberts, *supra*, § 9.2.

Moratoriums, on the other hand, are legally authorized periods for the delay or abeyance of some activity. *Id.*, § 9.5. The adoption of a building permit or development approval moratorium is an increasingly frequently used approach by local governments to halt or slow growth until new growth management programs, new comprehensive plans and/or new zoning ordinances can be adopted and implemented. *Id.* In spite of much litigation, the best summary of the requirements for a valid moratorium can be found in the Minnesota Supreme Court decision in *Almquist v. Town of Marshan*, 245 N.W.2d 819 (Minn. 1976), in which the Court wrote that a moratorium on building permits is valid if:

- (1) It is adopted by the local government in good faith;
 - (2) It is not discriminatory;
 - (3) It is of limited duration;
 - (4) It is for the purpose of the development of a comprehensive zoning plan;
- and
- (5) The local government acts promptly to adopt such a plan.

Moratoriums and other interim controls play an important role in protecting the planning process by limiting the ability of developers to acquire vested rights to pursue development that may conflict with planning goals. *Id.*

II. How Growth Management Plans Work

A. The First Approach—Timed or Phased Growth

The first major decision concerning timed or phased growth management was *Golden v. Planning Board of the Town of Ramapo*, 285 N.E.2d 291 (N.Y. 1972), *appeal dismissed*, 409 U.S. 1003 (1972). The plan challenged involved the issuance of a special development permit based on the availability of essential services and facilities such as: (1) public sanitary sewers or approved substitutes; (2) drainage facilities; (3) improved public parks, recreation facilities and schools; (4) state, county or town roads—major, secondary or collector; and firehouses. By agreeing to provide these essential services that would earn development “points,” a development could be approved more quickly.

These growth management programs generally limit the number of residential and/or commercial units which can be built in a specific time period. These programs are tied to the availability of public services and capital improvements. Sometimes a “point” system is established to determine which development plan will be approved. Points are awarded on the basis of the availability of public services or design criteria.

In *Schenck v. Hudson Village*, 937 F. Supp. 679 (N.D. Ohio 1996), the federal district court found that growth control ordinances are permissible only if they are limited in duration and tied to a specific and prompt plan for whatever corrective action is needed to lift growth control measures. Hudson Village was an upscale bedroom community for commuters working in the Akron and Cleveland areas. The average cost of a new home was \$320,000. The population of the city grew by more than 50% in the 1970s and 35% in the 1980s. The growth plan was adopted in response to the explosive and continued growth in the population of the city. Central to the plan was the premise that “the current pace of development is straining the community’s ability to provide adequate public services and the amenities that are representative of the quality of Hudson life.” *Schenck*, 937 F.Supp. at 682. The plan noted significant shortcomings in the infrastructure of the city such as water, sanitary sewers, storm sewers and transportation. The plan also addressed the City’s desire to maintain its “unique quality,” in particular its historic town, and noted the threats that increased development posed to those interests. The plan suggested that the city moderate its growth by limited issuance of zoning certificates required to obtain a building permit. The plan awarded permits on the basis of a point system tied to infrastructure availability, adequate public facilities, protection of wetlands and stream banks, storm water management, tree conservation, provision of public amenities, finalization of subdivision build-outs, and improvement of jobs to housing balance.

The plan prohibits the issuance of a zoning certificate for residential housing

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unless the applicant possesses an “allotment” granted by the city. The city issues a limited number of allotments each year, determined annually by the council upon the recommendation of the city manager and the municipal planning commission. The ordinance calls for the city to issue the allotments on semi-annual allocation dates in equal amounts. In 1997, the city issued 100 allotments. Eighty percent of the allotments are to be placed in a “priority pool” and are to be distributed to the following applicants: (1) those seeking to build “affordable housing,” as defined in the ordinance; (2) those seeking to build housing for the elderly or disabled; (3) those seeking to build on lots already having direct access to public streets, or in subdivisions with preliminary or final plat approval prior to the enactment of the ordinance; and (4) those seeking to build on lots of five acres or more with access to public streets and water.

The plan also stated that no single development could receive more than 30 allotments in a single year unless there were no competing applicants. Applicants could apply for multi-year allotment “reservations,” however, which would count against the total amount of allotments to be distributed in upcoming years. The plan also provided for two mechanisms outside the normal allotment process in cases of hardship or merit.

The district court sustained a home builders association challenge to the plan because the plan contained no “sunset” provisions. At the time, there were few growth control cases on point, but the cases did support the proposition that growth control ordinances are permissible only if they are (1) limited in duration and (2) tied to a specific and prompt plan for whatever corrective action is needed to lift the control on growth. *Schenck*, 937 F. Supp. at 691. *See also Almquist v. Town of Marshan*, 245 N.W.2d 819 (Minn. 1976) (six-month moratorium on building permissible in part because of limited duration and town’s prompt action to adopt comprehensive zoning plan); *Golden v. Planning Board of Town of Ramapo*, 285 N.E.2d 291 (N.Y. 1972), *appeal dismissed*, 409 U.S. 1003 (1972) (ordinance tying issuance of permits to capital improvements held valid); *Conway v. Town of Stratham*, 414 A.2d 539 (N.H. 1980) (“slow growth” ordinance permissible but could not extend beyond one year without a master plan). The district court also rejected the plan in

part because it was neither tied to infrastructure improvements nor to comprehensive, long-term growth control measures. *See Construction Industry Association of Sonoma County v. Petaluma*, 375 F.Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) (San Francisco suburb grew 25 percent in two years and established five year plan for moderating the pace of growth). The Sixth Circuit Court of Appeals in *Schenck*, however, reversed the district court's findings and remanded for a new trial. *Schenck v. City of Hudson*, 114 F.3d 590 (6th Cir. 1997). The Sixth Circuit dissolved the preliminary injunction because it found that it was very unlikely that the plaintiffs would succeed on the merits in the district court. The Sixth Circuit, after noting that the legislative body need not select the best or the least restrictive method of attaining its goals so long as the means selected were rationally related to those goals, held that "[t]he City of Hudson wishes to control growth of residential areas until such time as its infrastructure is able to meet current and future needs. A cap on the number of homes built in the City unquestionably bears a rational relationship to this concern." *Id.* at 594.

1. Adequate Public Facilities Standards (APF)

Adequate public facilities standards require that, in addition to meeting applicable zoning and subdivision standards, new development demonstrate that facilities and services will be available to serve the project at the time the development comes on line. A community adopts a level-of-service standard for each type of facility, and applications are denied if the service demands of a project cannot be accommodated at the adopted service level by existing or planned facilities.

2. Growth Phasing

Growth phasing systems are an attempt to address the shortcomings of performance-based adequate facilities systems. Unlike APF requirements that are administered on a project-by-project basis, growth phasing systems limit the amount of new development that can be approved over a certain period of time, typically one year. Performance-based controls on public facilities work well with facilities such as arterial roadways, interceptor wastewater lines, and schools that serve particular regions and for which capacity must be measured in relationship to proximate demand. Using such facilities as the basis for computation, some communities adopt growth phasing systems to spread remaining capacity over the time period between the present and the probable date of facility expansion.

Westminster, Colorado's Growth Management Program. In 1977, Westminster, a suburb of Denver, adopted a long-term growth management program that limits the number of units for which building permits may be

obtained to the number of service commitments held by the developer (a service commitment represents the immediate availability of water and wastewater service for one single-family dwelling unit). The number of new service commitments issued annually varies widely, depending on the availability of water and wastewater capacity. In times of capacity shortages, the system gives priority to the orderly completion of projects already underway, but allows for the initiation of projects each year. The growth phasing system primarily addresses capacity constraints in water and wastewater systems in the community.

Livermore, California's Growth Management Plan. Livermore is a rapidly growing suburb of San Francisco as a bedroom community for workers in the Bay Area. Until 1987, the foundation of Livermore's growth management was a 2 percent annual growth rate cap. The previous plan was a cumbersome points-based, competitive allocation system. Livermore's current plan involves three year cycles of analysis and implementation.

The first step is to prepare background reports containing historical and technical data concerning factors such as water, wastewater, air quality, traffic, parks and open space, schools and emergency services. This first step takes about six months and involves community input into policy issues through a citizen committee, the planning and zoning commission, and the city council. The growth rate policy of the program is its most important aspect. The city's general plan is to target growth somewhere between 1.5 and 3.5 percent annually. Small developments (less than four units) are exempt from the plan, so the target is generally 2.5 percent annually.

The Housing Implementation Plan (HIP) evaluates residential projects based on the criteria set up in the initial phase. The criteria are used as a method of evaluating and ranking projects on the basis of site planning and design principles. Once a project's individual criteria are ranked, an overall ranking is assigned. Since project excellence is the goal, the process consists of evaluating the overall quality of a particular project rather than simply adding up points or rankings in various areas. This big picture approach means that a project that is extraordinary in a few areas could be ranked higher than a project that has good, but not extraordinary, performance in more categories.

The following project-specific criteria are used:

- Siting (natural/unique features, grading, safety, compatibility)
- Street/lot layout (pattern, integration, pathways, layout, sensitivity)
- Open Space (quantity, quality, access, facilities, integration, linkage)
- Landscaping (quantity, compatibility, integration, drought-tolerance)

- Architectural Design (distinction, variety, scale, sensitivity, conformance)
- Solar access/energy efficiency (beyond state requirements, site design)
- Facility contributions (pedestrian, equestrian or bicycle trails, infrastructure)
- Innovation (distinguishing and unique design solutions)
- Location (infill, adequate facilities, environmental compatibility)

Although the system lacks objective criteria, the “know-it-when-we-see-it” approach to design and project quality review has been praised by site planners, designers and local public officials as being more flexible than systems that award points for specific project features.

3. Rate of Growth

Rate of growth systems typically have annual development caps similar to growth phasing systems, but are less closely linked to public facility constraints. Most systems are developed to establish a locally controlled rate of growth rather than to establish a link to available public facilities. These programs are more aptly called growth control rather than growth management. Growth management seeks to accommodate growth while directing the location and pattern of new development: growth control programs typically impose quantitative limits or quotas on residential and/or non-residential development. Growth control systems can be adopted by communities with very little planning groundwork, while growth management systems almost always rest on solid foundations of land use planning and policy guidance by local governments. Growth controls are usually applied where developmental pressures are so great that without controlling growth, congestion of public facilities is imminent and costs of accommodating development in terms of facilities or pollution control are extraordinarily high. For example, in **Boulder, Colorado’s** growth control plan, the city calculates the base number of dwelling units each year and multiplies it by 2 percent. This number becomes the yearly cap on growth for dwelling units. **Aspen, Colorado** and **Petaluma, California** fix the annual number of residential units by local ordinance.

Boca Raton, Florida took an innovative approach to controlling growth by placing an ultimate cap of 40,000 residential units in the city. The plan essentially reduced the number of multi-family units because single-family units were exempt from the ultimate limitation. In other words, Boca Raton

limited the number of multi-family dwelling units that could ever be developed in the city to 40,000. A Florida Appeals Court, however, overturned the “Alice In Wonderland” limit because the cap was not based on a rational study of the residential growth patterns in the area. *City of Boca Raton v. Boca Villas*, 371 So.2d 154 (Fla. Dist. Ct. App. 1979).

B. The Second Approach—Population Caps

Under this approach to growth management, the city sets the maximum number of dwelling units that will be allowed to be built in the jurisdiction. In *City of Boca Raton v. Boca Villas*, *supra*, the city set a limit of 40,000 dwelling units as well as a revised density cap on development in the city which was found to be unconstitutional. In *Construction Industry Association of Sonoma County v. Petaluma*, 375 F.Supp. 574 (N.D. Cal. 1974), *rev 'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976), the city set a five-year cap on the number of dwelling units in the city.

In *Boulder City v. Cinnamon Hills Assocs.*, 871 P.2d 320 (Nev. 1994), a developer brought an action against the city, alleging that the city’s denial of a building permit pursuant to the city’s Growth Control Ordinance was arbitrary and capricious. The Nevada Supreme Court found, however, that the grant of a building permit under the city’s ordinance was a discretionary, legislative act by the city and therefore not unconstitutional. The city’s Growth Control Ordinance limited the number of multi-unit construction projects to 120 units per year with a single developer only able to obtain 30 allotments per year. The ordinance set up an allotment allocation procedure with exceptions for housing for the elderly. The developer wanted to build a 52-unit apartment complex for senior citizens in the city. At a public hearing, concerns were raised that the proposed site for the project was not conducive to a residential development for the elderly due to the isolation of the area from key city centers to which elderly residents would need ready access (hospitals, doctors offices, post offices, etc.) and the steep terrain of the area. The Nevada Supreme Court upheld the City’s denial of the building permit because the growth control plan required all developments, even those for the elderly, to obtain “approval of the city.”

In *Long Beach Equities, Inc. v. Ventura County*, 231 Cal. App.3d 1016 (Cal. Ct. App. 1991), *cert. denied*, 505 U.S. 1219 (1992), a California Appeals Court upheld a county growth plan which placed a cap on the number of dwelling units which could be built in the area of the proposed development. According to the “guidelines for orderly development,” the cap in the area was set at 1,100 units per year in addition to one shopping center. The guidelines set out that the property in question was designated as an “Urban

Reserve overlay,” meaning that the City of Ventura’s open space plan would impact the property. The particular area in question already had been developed to 80% of the cap when Long Beach Equities (LBE) sought approval for building 249 dwelling units on 250 acres in the Urban Reserve overlay area. During this time, the City revised its growth plan and limited development of LBE’s property. The City also adopted a moratorium on growth in the Urban Reserve overlay area, thus eliminating the possibility that LBE could develop the property. LBE challenged the growth plan as an inverse condemnation, but the Appeals Court held that the growth guidelines expressed rational legislative goals and determinations of (1) assuring that land continues to be available for the use of natural resources; (2) discouraging premature and unnecessary conversion of open space land to urban uses and discouraging noncontiguous development patterns; and (3) preserving valuable open space land by adopting strict administrative ordinances to further these goals. The Court held that such legislative goals were well designed to prevent the ill effects of poorly planned urbanization.

C. The Third Approach—Urban Growth Boundaries

This technique of growth management delineates the area or areas for staged future urban growth, outside of which urban development is restricted, deferred or prohibited. The provision of municipal services usually occurs only within the boundaries of the growth areas. Urban “containment” usually has two goals: first, to promote compact and contiguous development patterns that can be efficiently served by public services; and second, to preserve open space, agricultural land and environmentally sensitive open areas that are not currently suitable for urban development. At the most basic level, urban containment involves drawing a perimeter around an urban area, outside of which urban development is discouraged and within which urban development is encouraged. Urban containment boundaries are generally drawn to accommodate projected growth over a period of ten to twenty years.

Generally, however, urban containment programs are based on seven factors:

Demonstrated need to accommodate long-range urban growth requirements consistent with local policies.

Need for housing, employment opportunities and livability.

Orderly and economic provision of public facilities and services.

Maximum efficiency for land uses in or at the fringe of existing urban areas.

Environmental, energy, economic and social consequences.

Retention of farm, forest, open space or other resource land.

Compatibility of the proposed urban uses with other nearby resource areas.

Urban containment plans are often supplemented by urban service area plans, so that cost-effective delivery of public services can be accomplished by controlling the timing of utility extensions and infrastructure improvements. Land within the urban service boundary may be sub-categorized for the phasing of services, depending on development suitability, proximity to existing public facilities, contiguity with existing development, and other factors. Enough land must be included in the urban service area to provide sufficient land to accommodate projected market demand within the prescribed planning period, with additional land available for optional development. If too little land is included, exorbitant increases in the cost of property and housing, legal challenges and political pressure to increase the urban service area may result.

1. Urban Containment Techniques

Urban Service Areas (USA)/Urban Growth Areas (UGA). When used together, several techniques help to achieve urban growth containment. Using a single technique will never be as effective as combining complementary techniques. Generally, USAs are more flexible in expansion because they are drawn mostly consistent with the economics of planned public facilities. UGAs, on the other hand, are based on additional policy concerns other than efficient provision of public services.

In 1976, **San Jose, California** established its Urban Service Boundary beyond which no urban development, even if within city limits, would be permitted. New home construction was effectively banned beyond the boundary. Along with the boundary was established an area in which the city wanted to encourage development. These measures were intended to slow growth, and to redirect new home construction to un-developed “infill” areas.

In **Lexington, Kentucky**, urban growth areas were established in an effort to protect the surrounding countryside well known for its premier horse farms and famed bluegrass. The program was designed to protect agricultural land while encouraging efficient development patterns in urban areas. Currently, land outside of the UGA is limited to one-unit per ten acres. Density bonuses

are granted to encourage redevelopment of older parts of the city.

Urban Development Phasing. Urban Development Phasing involves anticipating future growth patterns and adjusting growth plans and USAs and UGAs in order to accommodate future development. **Minneapolis-St. Paul, Minnesota** anticipates needs for future development by evaluating growth boundaries every five years.

Intermediate Growth Boundaries. These are short-term boundaries within long-term containment boundaries. One example is **Portland, Oregon**, where intermediate growth boundaries limit urban development to certain areas within the long-term UGA. Ideally, this technique is used to prevent development of land at or near the outermost boundary before infrastructure can support development at the fringe of the UGA. Rather, growth is sequential in the UGA by expanding the intermediate growth boundary towards the UGA boundary as time passes.

Urban Development Reserves. **Metro Dade County, Florida** has a long-term UGA that is designed to meet development needs until 2010. The long-term development plan calls for area to be “reserved” until the UGA is nearing complete development by requiring that these areas remain open space. At that point, the urban development reserves will be released to allow for higher density development. The fear is that allowing these reserve spaces to be developed at low density will absorb all the available land in the UGA and limit development. If low density developments encircle the perimeter of the UGA, future expansion of the UGA may be hampered (*i.e.*, extension of public services into the expanding urban service area).

Shadow Platting. Shadow platting essentially allows planners to anticipate the types of growth that might occur in the area immediately outside the UGA. These concept plats show predicted subdivision schemes so that future public facilities and services can grow to match land development.

2. Zoning Approaches

Zoning will continue to play a major role in growth management schemes. Although zoning strategies take many forms, most commonly zoning is designed using one or a combination of the following methods.

Nontransitional Zoning. Many communities employ transitional zoning to buffer land use activities from each other by establishing concentric rings of urban growth areas. This zoning approach is generally not the most compatible with growth management. The typical result is that low- to medium-density residential areas sprawl into rural and resource areas. Instead, growth management techniques tend to employ nontransitional zoning in order to:

- Establish moderate to high density and intensity land use categories throughout the urban area.
- Facilitate nodal development especially along transit lines and major transit intersections that are generally surrounded by medium to high density zoning.
- Greatly reduce the scale of low and very low density areas inside the urban area.
- Eliminate low and very low density development in areas that are predominantly resource lands or environmentally sensitive areas.
- Restrict the size and location of low and very low density development in urban areas that are made up of resource lands or environmentally sensitive areas.

Inclusionary Zoning. Many communities choose to exclude certain classes of residences by using zoning strategies to zone for large lots and large minimum square foot homes. Low income households, for instance, would not be able to afford to enter the housing market in these communities. Many communities now utilize a variety of inclusionary zoning strategies to remove exclusionary boundaries. These communities require developments to have affordable housing opportunities or to contribute linkage fees to a fund to build such housing.

Minimum Density Zoning. Housing densities are often negotiated between developers and communities. Negotiated densities generally defeat the purpose of growth management strategies. These negotiations undermine the economical and efficient provision of public facilities and services. Some communities, in response to these criticisms, have established minimum density goals for urban areas. For instance, consider **Portland, Oregon** and surrounding communities. The Metropolitan Housing Rule specifically sets minimum density requirements for the various communities surrounding Portland.

- For cities with projected populations of less than 8,000, the overall housing density must be at least six units per net developed acre by 2000.
- For the two suburban counties in the Portland Metro Area and cities with projected populations between 8,000 and 50,000, the overall housing density must be at least eight units per net developed acre by 2000.
- For the urban county and cities with projected populations exceeding 50,000, the overall housing density must be not less than ten units per net developed acre by 2000.

These goals can only be met by formal minimum housing densities used in development review processes. Developers have a strong interest in streamlined review procedures that minimum density standards require.

3. Infill and Redevelopment

Infill and community/neighborhood redevelopment programs help channel new development back into urban areas and away from the urban growth boundaries. Communities may view the USA program as necessary to focus development efforts on blighted areas and under-utilized downtown areas. Urban growth boundary programs must encourage infill or face a negative impact on housing costs. An example is **San Jose, California's** urban growth boundary program. Notably absent from San Jose's program was an active infill and redevelopment provision. Without encouraging infill, housing costs skyrocketed as low- and medium-density developments "used up" available raw land in the fringes of the USA. An active infill and redevelopment program, however, would act as an incentive for urban renewal and redevelopment of under-utilized urban areas. Key to infill programs is a steady increase in density requirements for new developments in the USA. Higher density developments often are more cost-effective in terms of providing services, and they also result in lower housing costs, thus offsetting higher land costs incurred by the urban containment program.

The redevelopment of older areas and infill of small urban tracts should be encouraged as part of any urban containment program through the use of waivers of development fees, the use of economic incentives which help offset the higher costs associated with redevelopment of older urban areas or the development of small urban tracts previously unattractive to development. This infill development will become essential as the USA approaches capacity.

D. The Fourth Approach—Conditional Development Approval

The last method of growth management is to forego the establishment of ultimate or periodic numbers, but to avoid, deter or overcome many problems associated with growth by conditioning the issuance of building permits or plat approval on the existence of public improvements or capital facilities or requiring that developers pay fees which will be used by the proper government authority to provide the roads, schools, parks, sewer and water facilities and/or police protection which will be needed because of the new development. These types of plans also match quite well with "adequate public facilities" requirements.

Of the four basic approaches, programs employing adequate public facilities requirements are the most basic, most useful and most defensible. Any determinations of adequacy or inadequacy of the public facilities, however, must be rational, with some quantifiable basis upon which the

determinations are made. This approach allows the city to establish a direct, causal link to the fundamental health, safety and welfare issues related to the provision of additional public services because of the new development.

This approach also demands extensive negotiation between the developer and the regulatory body. This negotiation is often based on practice or on the nature of infrastructure finance requirements or “point” systems approaches that form a part of the jurisdiction’s growth management plan.

III. Attacking The Legality Of Growth Management Plans

While there are a number of potential theories under which a disgruntled landowner conceivably could challenge a local government’s adoption and implementation of a growth management plan (including any moratoriums utilized in such a plan), ranging from the far flung to more conventional attacks, there are several fairly established categories of land use and zoning challenges that may be used as a framework within which to analyze any growth management plan. These general categories are as follows:

Just Compensation Takings Claim. This claim arises when a landowner asserts that the zoning or land use decision applied to his property constitutes a taking of his property without just compensation in contravention of the Fifth and Fourteenth Amendments to the United States Constitution. The remedy usually sought in this type of challenge is just compensation.

Due Process Takings Claim. In this challenge, a landowner claims that the zoning or land use regulation applied to his property goes too far and destroys the value of his property to such an extent that it amounts to a taking by eminent domain without due process of law. The remedy sought in this challenge is typically the invalidation of the zoning or other land use regulation.

Arbitrary and Capricious Substantive Due Process Claim. A landowner may claim that the zoning regulation or other land use decision is arbitrary and capricious in that it does not bear a substantial relation to the public health, safety, morals or general welfare. This type of challenge may be brought under either a facial or “as applied” attack.

Equal Protection. An equal protection challenge may be based upon an assertion that the zoning regulation or other land use decision unfairly impacts upon a suspect class, which would involve a strict scrutiny review, or results in economic discrimination, which would involve a rational basis review.

Procedural Due Process. This last category involves an attack whereby a landowner claims that he has been deprived of procedural due process in the manner in which the zoning or other land use regulation has been enacted.

The foregoing challenges may be brought under both the United States and Texas Constitutions. In analyzing a growth management plan and the implications that might arise from the implementation of a plan, I have included a discussion of certain constitutional theories as they relate to both land use matters in general, a detailed discussion of the Texas Supreme Court's recent decision in *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 119 S.Ct. 2018 (1999), and a more specific analysis regarding the constitutionality of growth management techniques in general.

A. Taking Challenges In General

1. Federal Taking Analysis

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the United States Supreme Court set out the test to determine if a land use regulation amounts to a taking.

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests [citation omitted], or denies an owner economically viable use of his land [citation omitted].

Id. at 260. *See also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987). The Court has also acknowledged, however, that it has developed no "set formula to determine where regulation ends and taking begins." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986).

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the Court applied the taking clause to a land use case when it upheld the designation of Grand Central Station as an historic landmark, and upheld the city's refusal to allow the construction of a high rise building in the air space above the station. The Court enumerated the factors to be considered in applying the taking clause. The first consideration is the economic impact of the regulation on the claimant and the extent to which the regulation interferes with "distinct investment-backed expectations." *Id.* at 124. The Court noted, however, that "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." *Id.* at 130.

The Court further wrote that “government may execute laws that adversely affect recognized economic values,” such as exercises of the taxing power. More important, the Court added, were cases that upheld “land-use regulations that destroyed or adversely affected recognized property interests. . . . Zoning laws are, of course, the classic example. . . .” *Id.* at 125. The *Penn Central* case, and the taking guidelines stated therein, impose a significant burden on landowners who challenge zoning laws and other land use decisions as a taking due to a mere diminution in property value.

In any taking analysis, the initial inquiry is whether the challenged governmental action advances a legitimate public interest. *Agins*, 447 U.S. at 260; *Penn Central*, 438 U.S. at 125. The second step in a taking analysis examines whether the challenged governmental action denies an owner the economically viable use of his land. *Agins*, 447 U.S. at 260. In reviewing this part of the taking analysis, it is important to note that the Fifth Amendment’s prohibition against taking without compensation does not guarantee the most profitable use of property, *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962), and diminution in value, standing alone, does not establish a taking. *See Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (restriction that devalued property by approximately 90%, from \$800,000 to \$60,000, upheld); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (zoning regulation sustained even though the restriction reduced the value of the property by 75%); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir. 1987) (reduction in value from \$495,600 to \$52,000 held not a taking); *Pompa Constr. Corp. v. Saratoga Springs*, 706 F.2d 418, 420 n.2 (2d Cir. 1983) (use restriction which devalued property by approximately 77% was not a taking). *Penn Central*, 438 U.S. at 131. Taking issues must be resolved by focusing not on the uses regulations deny, but rather on the uses that regulations permit. *Id.* As stated in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 674 n.8 (1976) (citations omitted):

By its nature, zoning “interferes” significantly with owners’ uses of property. It is hornbook law that “[m]ere diminution of market value or interference with the property owner’s personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance or entitle him to a variance or rezoning.”

See also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 638 F.Supp. 126, 134 (D. Nev. 1986) (“A zoning regulation is not made invalid merely because of loss of value to the property affected, even if that loss is substantial”).

Under federal law, a land use regulation does not constitute a taking unless it deprives the property owner of all use of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 320 (1987); *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d

1070, 1080-82 (5th Cir. 1989); *Midnight Sessions Ltd. v. City of Philadelphia*, 945 F.2d 667, 677 (3d Cir. 1991); *Pace Resources*, 808 F.2d at 1031.

Although the Supreme Court has yet to define the meaning of the term “economically viable use,” the term appears to have nothing to do with whether a landowner realizes a profit on his investment. *See Agins*, 447 U.S. at 262-63. In *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985), the Supreme Court discussed the “economically viable use” concept with reference to the defendant’s evidence that, because of prior investments in the property, it would not be profitable to develop the land with the 67 dwelling units the Planning Commission was willing to approve. The Supreme Court refused to equate the concept of “economic feasibility” with the concept of “profitability.”

The expected income from the sale of the 67 units apparently was measured against the cost of the 27-hole golf course and the cost of installing water and sewer connections for a large development that would not have had to have been installed for a development of only 67 units. . . . Thus, the evidence appears to indicate that it would not be profitable to develop 67 units because respondent had made various expenditures in the expectation that the development would contain far more units; the evidence does not appear to support the proposition that, aside from those “reliance” expenditures, development of 67 units on the property would not be economically feasible.

Id. at 191 n.12 (emphasis added).

2. State Taking Analysis

In *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex. 1984), the Texas Supreme Court enunciated the test to determine whether an ordinance constitutes a “taking” under the Texas Constitution: a taking occurs if (1) the ordinance is not substantially related to the health, safety or general welfare of the people; or (2) the ordinance is arbitrary.

Most zoning decisions are substantially related to the health, safety or general welfare, thereby satisfying the first prong of the *Turtle Rock* test. This rule was applied in *Turtle Rock* to uphold the park land dedication ordinance in question.

The presumption favors the reasonableness and validity of the ordinance. An “extraordinary burden” rests on one attacking the city ordinance. . . . If reasonable minds may differ as to whether or not a particular zoning ordinance has a substantial relationship to the public health, safety, morals, or general welfare . . . the ordinance must stand as a valid exercise of the city’s

police power.

Turtle Rock, 680 S.W.2d at 805. Most land use decisions, including growth management plans, are at the very least issuable or debatable, and therefore should be upheld as facially and constitutionally sound.

B. Due Process And Equal Protection Challenges In General

Initially, it should be noted that in order for a landowner to maintain a claim for substantive due process, equal protection or taking without just compensation, the landowner must establish that he has been deprived of a property interest. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-04 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1972). Property interests are not created by the United States Constitution; rather, they are created by state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). It is well established in Texas that "property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made." *City of University Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972); *Smith v. Copeland*, 787 S.W.2d 420, 422 (Tex.App.-San Antonio 1990, no writ).

1. Federal Substantive Due Process Analysis

The applicable standard of review for substantive due process claims in land use matters was established in *Shelton v. City of College Station*, 780 F.2d 475, 482 (5th Cir.) (en banc), *cert. denied*, 477 U.S. 905 (1986) ("[W]e hold that the outside limit upon a state's exercise of its police power and zoning decisions is that they must have a rational basis"). In reviewing a landowner's challenge, the appropriate inquiry for a reviewing court is whether there was a conceivable or even hypothesized factual basis for the specific zoning decision made. *Id.* at 480-81. It is not the function of the trial court to determine whether a city council's land use decision necessarily would have been the best course for the community. *Id.* at 480. The United States Supreme Court has admonished courts from intruding into local government zoning decisions absent a clear showing of a violation of constitutional rights.

The zoning function is traditionally a governmental task requiring the “balancing [of] numerous competing considerations,” and courts should properly “refrain from reviewing the merits of [such] decisions, absent a showing of arbitrariness or irrationality.”

Larkin v. Grendel’s Den, Inc., 459 U.S. 116, 121 (1982) (citations omitted).

The range of legitimate governmental interests to support a change in zoning or other land use decision is very broad. In *Euclid*, 272 U.S. at 394, the Supreme Court first sustained the constitutionality of zoning ordinances based upon the “evils of overcrowding people.” The Court further noted the legitimacy of keeping residential areas free of “disturbing noises,” “increased traffic,” the hazards of “moving and parked automobiles” and “depriving children of the privilege of quiet and open spaces. . . .” The ordinance was upheld because the validity of the legislative classification was “fairly debatable” and therefore could not be said to be “wholly arbitrary.” *Id.* at 388. Similarly, in *Berman v. Parker*, 348 U.S. 26 (1954), a landowner challenged a District of Columbia zoning ordinance alleging that such ordinances were unconstitutional because they were passed “merely to develop a better balanced, more attractive community.” *Id.* at 31. In upholding the zoning ordinance, the Supreme Court held:

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. [Citations omitted.] The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Id. at 32-33.

In reviewing the constitutionality of growth management programs, courts would be required to recognize the presumption of validity accorded the adoption of the program. *Goldblatt v. Hempstead*, 369 U.S. 590, 596 (1962); *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938) (exercise of police power will be upheld if any set of facts either known or which could be reasonably assumed affords support for it).

Zoning ordinances are presumed valid. [Citations omitted.] The courts may interfere only if an ordinance is unreasonable and arbitrary. Hence, parties challenging an ordinance bear the “extraordinary burden” of demonstrating that reasonable minds could not differ as to whether the ordinance has a “substantial relationship to the protection of the general health, safety or welfare of the public.” Otherwise, the ordinance will stand. [Citations omitted.] Thus, the Ordinance need only have a possible rational basis; the

court will not inquire into its actual purposes. In other words, the court's review is deferential to the City.

Brewster v. City of Dallas, 703 F.Supp. 1260, 1263-64 (N.D. Tex. 1988) (emphasis in original). Indeed, as one court explains: “[Substantive due process] claims should, however, be limited to the truly irrational—for example, a zoning board’s decision made by flipping a coin. . . .” *Lemke*, 846 F.2d at 472 (Arnold, J., concurring).

2. Federal Equal Protection Analysis

The equal protection clause of the Fourteenth Amendment commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws,” which essentially is a direction that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts themselves have devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). When social or economic legislation is at issue, the equal protection clause allows the states wide latitude, *United States Railroad Retirement Bd.*, 449 U.S. at 174; *Dukes*, 427 U.S. at 303, and the Constitution presumes that even improvident decisions eventually will be rectified by the democratic process. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

The general rule gives way, however, when a statute or ordinance classifies by race, alienage or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to soon be rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. *See Cleburne Living Center*, 473 U.S. at 441, and the cases cited therein.

Strict scrutiny has never been employed in reviewing deferential treatment based upon wealth classifications. *See, e.g., James v. Valtierra*, 402 U.S. 137 (1971); *Harris v. McRae*, 448 U.S. 297, 323 (1980) (poverty, standing alone, is not a suspect classification); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) (Supreme Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis). *See also Maher v. Roe*, 432 U.S. 464, 470-71 (1977). An ordinance or other

legislative enactment that does not burden a suspect class or a fundamental interest should not be overturned “unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [governing body’s] actions were irrational.” *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988) (quoting *Vance*, 440 U.S. at 97).

Absent anything in the enactment or the proposed application of a growth management plan which would invite either strict scrutiny or heightened scrutiny as a suspect or quasi-suspect regulatory scheme, respectively, the appropriate standard of review would be the “rational basis” standard. One issue that does merit further discussion, however, would be a potential equal protection challenge to a growth management plan that makes a distinction between residential versus non-residential growth. While it is my opinion that there is a rational basis to distinguish between residential and nonresidential development, that issue is discussed more fully hereinafter.

3. State Substantive Due Process And Equal Protection Analysis

In Texas, municipal zoning ordinances and other land use legislation are presumed to be valid and the burden is on the party seeking to prevent their enforcement, whether generally or in relation to a specific parcel of property, to prove that the ordinance or other legislative act is arbitrary or unreasonable because it bears no substantial relationship to the health, safety, morals or general welfare of the citizenry. If reasonable minds may differ, no clear abuse of discretion is shown and the ordinance must stand as a valid exercise of the city's police power. *City of Pharr v. Tippitt*, 616 S.W.2d 173, 175-76 (Tex. 1981); *Hunt v. City of San Antonio*, 472 S.W.2d 536, 539 (Tex. 1971). The burden on the party attacking the ordinance or other legislative act is an “extraordinary” one and the challenging party must show that no conclusive or controversial, issuable facts or conditions exist that would authorize the governing body of the municipality to exercise the discretion confided to it. *Hunt*, 472 S.W.2d at 539; *Thompson v. City of Palestine*, 510 S.W.2d 579, 581 (Tex. 1974). The validity of an ordinance or other legislative act clearly is a question of law, not a question of fact. *City of Pharr*, 616 S.W.2d at 175; *Hunt*, 472 S.W.2d at 539.

In determining whether an ordinance or other legislative act violates either the due process of law or equal protection of law provisions of the Texas Constitution (*see* Tex.Const. art. I, § 3), a reviewing court must determine whether to apply the rational relationship or strict scrutiny test. *See, e.g., Littlefield v. Hays*, 609 S.W.2d 627, 629 (Tex.Civ.App.-Amarillo 1980, no writ). In undertaking due process and equal protection analyses, the

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reviewing court must deem the state constitutional provisions coterminous with their federal counterparts; consequently, federal constitutional due process and equal protection violations are equated with the appropriate state constitutional violations. *See, e.g., Alford v. City of Dallas*, 738 S.W.2d 312, 315-28 (Tex.App.-Dallas 1987, no writ) (federal and state constitutional due process and equal protection claims simultaneously considered along with applicable case law and are dispositive of both federal and state constitutional claims); *Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935, 944 (Tex.Civ.App.-Amarillo 1978, writ ref'd n.r.e.), *cert. denied*, 444 U.S. 833 (1979). *See also Houston Chronicle Publishing Co. v. City of Houston*, 620 S.W.2d 833, 836-39 (Tex.Civ.App.-Houston [14th Dist.] 1981, no writ).

C. Procedural Due Process Challenges In General

As long as a city follows state law regarding the process of enacting a growth management program, no property owner should be able to successfully mount a procedural due process challenge against such a plan since landowners are not entitled to any procedural due process rights relating to a city's legislative act of enacting the growth management program.

“It is an established constitutional principle that procedural due process attaches only to administrative or adjudicatory action by the state, and not to legislative action.” *Development in the Law - Zoning*, 91 Harv. L. Rev. 1427, 1508 (1978) (emphasis added). *See also Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 167 (1951) (“[W]hen decisions of administrative officials in execution of legislation turn exclusively on considerations similar to those on which the legislative body could itself have acted summarily, notice and hearing may not be commanded by the Constitution”). Consequently, the procedural protections of due process do not extend to all deprivations of otherwise protected property interests. Deprivations which occur as a result of a legislative act of a municipality are not subject to the procedural requirements of due process. *See Jackson Court Condominiums, supra*, and cases cited therein; *Couf v. DeBlaker*, 652 F.2d 585, 590 (5th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982) (“Our opinions repeatedly characterize local zoning decisions as ‘legislative’ in nature,” therefore “Plaintiffs cannot complain of a denial of procedural due process, for no constitutional limitation on legislative procedure is relevant here”).

As recently noted by the Fifth Circuit in *Calhoun v. St. Bernard Parish*, 937 F.2d 172 (5th Cir. 1991), even spot zoning is considered a legislative act:

Although this court has always viewed zoning as a legislative function, at one point, we distinguished “true” zoning ordinances from spot zoning. . . .

In *Shelton [supra]*, this circuit put [that distinction] to rest. In *Shelton*, we held the denial of a request for a variance from a zoning ordinance was a legislative decision. . . . It followed that the decision at issue was a legislative judgment, an evaluation of legislative facts, even though the legislative decision was not the initial enactment of a zoning code. Rather, the spot zoning remained legislative in character.

Id. at 174.

IV. Overview Of Regulatory Takings Claims Under *Mayhew*

While the above discussion gives a broad overview of the possible avenues of attack against any growth management program under both the Texas and Federal Constitutions, the Texas Supreme Court's recent decision in *Mayhew* is worthy of a closer look, given that it is the Supreme Court's latest and most exhaustive discussion of the constitutional concepts that would, in all likelihood, be applied to an analysis of any Texas growth management program, and because *Mayhew* has added a new wrinkle to the law in terms of "investment-backed expectations."

The Texas Supreme Court in *Mayhew*, relying extensively on federal cases with respect to land-use constitutional claims,² recently provided us with a road map in the manner in which to analyze regulatory takings claims.

In a general rule, the application of a general zoning law to a particular property constitutes a regulatory taking if the ordinance "does not substantially advance legitimate state interests" or it denies an owner "all economically viable use of his land."

Id., 964 S.W.2d at 933.

Mayhew indicated that in any taking analysis, the initial inquiry is whether the challenged governmental action substantially advances a legitimate public interest. The second step in the taking analysis examines whether the challenged governmental action denied the property owner all economically viable use of its land. *Id.*

A. Substantially Advances A Legitimate Interest

The legitimacy prong of a regulatory takings analysis requires a court to identify whether the challenged regulation substantially advances a legitimate governmental interest. The *Mayhew* Court indicated that "a broad range of governmental purposes and regulations" will pass this constitutional muster given the variety of legitimate state interests available to governmental entities, including protecting residents from the "ill-effects of

urbanization,” “enhancing the quality of life,” “precluding the conversion of open-space land to urban uses,” “preserving desirable aesthetic features,” and “controlling both the rate and character of community growth.” *Id.* at 934.

The range of legitimate governmental interests to support a change in zoning or other land use decision is very broad. In *Village of Euclid*, 272 U.S. at 365, the Supreme Court first sustained the constitutionality of zoning ordinances based upon the “evils of overcrowding people.” The Court further noted the legitimacy of keeping residential areas free of “disturbing noises,” “increased traffic,” the hazards of “moving and parked automobiles” and “depriving children of the privilege of quiet and open spaces. . . .” The ordinance was upheld because the validity of the legislative classification was “fairly debatable” and therefore could not be said to be “wholly arbitrary.” *Id.* at 388. Similarly, in *Berman v. Parker*, 348 U.S. 26 (1954), a landowner challenged a District of Columbia zoning ordinance alleging that such ordinances were unconstitutional because they were passed “merely to develop a better balanced, more attractive community.” *Id.* at 31. In upholding the zoning ordinance, as previously noted, the Supreme Court held:

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. [Citations omitted.] The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Id. at 32-33.

B. Just Compensation Taking Claims

The *Mayhew* Court, in reviewing the just compensation prong of the regulatory taking analysis, held that even if a governmental action substantially advances a legitimate state interest, that “[a] compensable regulatory taking can also occur when governmental agencies impose restrictions that either (1) deny landowners of all economically viable use of their property, or (2) unreasonably interfere with landowners’ rights to use and enjoy their property.” *Id.* at 935. In determining whether a restriction denies a landowner all economically viable use of the property, a court must determine whether the restriction renders the property valueless or, in other words, whether any value remains in the property after the governmental action. *Id.*

To determine whether the government has unreasonably interfered with the

landowner's rights to use and enjoy property, the Court noted the importance of two factors: "the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations." *Id.* In analyzing the first factor, the economic impact of the regulation, the Court indicated that it was appropriate to compare "the value that has been taken from the property with the value that remains in the property." *Id.* The Court admonished, however, that "[t]he loss of anticipated gains or potential future profits is not usually considered in analyzing this factor." *Id.* at 936. The *Mayhew* Court's analysis is consistent with federal law in this area.

C. Investment-Backed Expectations

In reviewing the second factor of the economic impact test—the extent to which the regulation interferes with distinct investment-backed expectations—the *Mayhew* Court provided us with little guidance as to the meaning or application of that standard. A review of the cases cited in *Mayhew*, however, provides some clarity as to the meaning of the investment-backed expectations test.

The Supreme Court in *Lucas, supra*, while not defining "distinct investment-backed expectations," made it very clear that such expectations are shaped by the uses permitted by state law and the reasonable regulations that government may place upon the use of the property. The Court reveal the importance of understanding "how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Id.*, 505 U.S. at 1016 n.7. In fact, the Court acknowledged that the property owners' expectations regarding the use of their property should reasonably include the government's power to restrict property uses.

[O]ur "taking" jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power."

Id. at 1027 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

Justice Kennedy, in his concurring opinion, further explain the meaning of

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an “owner’s reasonable, investment-backed expectations.” *Lucas*, 505 U.S. at 1034. Justice Kennedy explained that reasonable, investment-backed expectations must be determined in light of the rights afforded the property owner by state law.

Property is bought and sold, investments are made, subject to the State’s power to regulate. Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.

There is an inherent tendency towards circularity in this synthesis, of course; for if the owner’s reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matters, however, as it is in other spheres. The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.

In my view, reasonable expectations must be understood in light of the whole of our legal tradition.

Id. at 1034-35 (citations omitted).

Consequently, to determine whether a growth management program would violate a landowner’s reasonable distinct, investment-backed expectations, a court must look to the law in Texas regarding whether a landowner acquires any vested rights in the zoning on his property or the right to immediately put the property to a desired use. A review of Texas law establishes that no such rights or reasonable, investment-backed expectations can exist. It is important to remember that in Texas, all property is held subject to the valid exercise of the police power and compensation is generally not required for losses resulting therefrom. *Turtle Rock*, 680 S.W.2d at 804. A property owner acquires no property interest in an existing zoning classification, or even in uses once commenced. *City of University Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972); *See City of Pharr v. Peña*, 853 S.W.2d 56 (Tex.App.-Corpus Christi 1993, writ denied). A particular zoning classification does not become vested even by preparation and preliminary work done in anticipation of development. *Caruthers v. Board of Adjustment*, 290 S.W.2d 340, 350-51 (Tex.Civ.App.-Galveston 1956). *See also Town of Sunnyvale v. Mayhew*, 905 S.W.2d 234, 262 (Tex.App.-Dallas 1994) *af’d*, 964 S.W.2d 922 (1998), *cert. denied*, 119 S.Ct. 2018 (1999) (despite town’s encouragement to apply for zoning approval and developers’ expenditure of over \$500,000 in the application process, developers had no right to have their property rezoned); *Biddle v. Board of Adjustment*, 316 S.W.2d 437, 441 (Tex.Civ.App.-Houston 1958, writ *ref’d n.r.e.*); *Benners*, 485 S.W.2d at 778. Indeed, a city may rezone property even if an application for development approval is pending.

Williamson Pointe Venture v. City of Austin, 912 S.W.2d 340, 343 (Tex.App.-Austin 1995, no writ) (holding that Vested Rights Statute did not prohibit city from amending zoning); *Connor v. City of University Park*, 142 S.W.2d 706, 709 (Tex.Civ.App.-Dallas 1940, writ ref'd). Consequently, no landowner in a city that adopts a growth management program should have a distinct, investment-backed expectation that his property will not be subjected to a temporary moratorium.

D. Profit Expectations Are Noncompensable

Further, a landowner's expectations regarding the profits that he might make from his property are similarly not entitled to constitutional protection. In reviewing whether a particular zoning decision created a "severe economic impact" on a property owner, the Texas Supreme Court in *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1993), stated as follows:

The testimony [the landowner] offered at trial was simply that the land could not be profitably developed when zoned for single-family use. The takings clause, however, does not charge the government with guaranteeing the profitability of every piece of land subject to its authority. Purchasing and developing real estate carries with it certain financial risks, and it is not the government's duty to underwrite this risk as an extension of obligations under the takings clause.

(Emphasis in original). This is consistent with federal precedent in this regard.³

In sum, in light of the existing law regarding a municipality's ability to establish development and growth moratoria, no landowner should possess any reasonable, investment-backed expectations that he would be able to develop his property at any particular time or that he would be entitled to any particular level of profitability on his investment.

V. Legal Analysis Of Moratoriums And Growth Management Programs

The discussion in Section III, *supra*, of taking, due process and equal protection challenges provides a good overview of the law in those areas in regards to zoning and land use challenges generally. Since growth management plans present constitutional issues not typically associated with traditional zoning and land use challenges, a more detailed look at cases that address growth management devices is warranted.

A. Illustrative Growth Management and Moratorium Cases

In *Golden v. Planning Board of the Town of Ramapo*, 285 N.E.2d 291 (N.Y.), *appeal dismissed*, 409 U.S. 1003 (1972), the New York Court of Appeals upheld the timing and sequential control of residential subdivision activity for a period of up to 18 years based upon three six-year capital improvement programs. *Id.* at 304-05. *Ramapo* is considered a landmark decision because it the first reported case to address the validity of linking the timing and sequencing of development with capital improvements, tying the purchase of development easements to reduction in tax assessments, and integrating the development plan, the capital improvement budget and the zoning ordinance. *See* Freilich and Greis, “Timing and Sequencing Development: Controlling Growth” in *Future Land Use, Energy, Environment and Legal Constraints*, 59-106 (Burchell and Listokin, Eds., Rutgers Univ. 1975); *Ramapo*, 285 N.E.2d at 301-04.

In *Ramapo*, the Town adopted its 18 year growth management plan for the purpose of “eliminating premature subdivision and urban sprawl.” *Id.* at 294. The plaintiffs—a builders’ association and a group of landowners affected by the Town’s growth management plan—challenged the constitutionality of the Town’s actions. As a threshold constitutional issue, the court rejected the plaintiffs’ assertion that the Town’s growth management plan was designed as an exclusionary device.

[F]ar from being exclusionary, the present amendments merely seek, by the implementation of sequential development and timed growth, to provide a balanced cohesive community dedicated to the efficient utilization of land. The restrictions conform to the community's considered land use policies as expressed in its comprehensive plan and represent a bona fide effort to maximize population density consistent with orderly growth.

Id. at 301. In upholding the concept of growth management, the court also added that the purpose of the Town’s plan was “to prevent premature subdivision absent essential municipal facilities and to insure continuous development commensurate with the Town’s obligation to provide such facilities.” *Id.* at 302.

After upholding the legitimate purposes behind the Town's growth management plan, the court addressed the plaintiffs' assertion that such plan constituted a taking of their property. While acknowledging that the Town's regulations had a significant impact on the ability of the plaintiffs' property to be developed in the short term, the court held that no taking was established because the regulations were not permanent in character.

Without a doubt restrictions upon the property in the present case are substantial in nature and duration. They are not, however, absolute. The amendments contemplate a definite term, as the development points are designed to operate for a maximum period of 18 years and during that period, the Town is committed to the construction and installation of capital improvements. The net result of the on-going development provision is that individual parcels may be committed to a residential development use prior to the expiration of the maximum period. . . . While even the best of plans may not always be realized, in the absence of proof of the contrary, we must assume that the Town will put its best effort forward in implementing the physical and fiscal timetable outline under the plan.

Id. at 303. In closing, the court noted as follows:

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

Id. at 304.

The vast majority of the courts that have addressed the growth management issues discussed in *Ramapo* have followed *Ramapo*'s lead. For example, in *Boulder City v. Cinnamon Hills Assocs.*, 871 P.2d 320 (Nev. 1994), the Nevada Supreme Court rejected a developer's claim that the City's denial of his application for a building permit, pursuant to the City's growth control ordinance, was unconstitutional. *Id.* at 324-27. In that case, Boulder City had adopted a growth control ordinance to limit commercial and residential growth in its community. The ordinance limited the number of apartment complexes and motels that could be developed in the City during any one year by establishing a limit of 120 living units per year, with a single developer being able to obtain only an allotment of 30 living units per year. *Id.* at 321. A corporate developer who was denied an application for a building permit to construct a senior citizen housing complex challenged the City's growth control ordinance by asserting a claim for a violation of its equal protection and due process rights, and a taking of property without just compensation. *Id.*

The court denied the developer's taking claim on the basis that Boulder City's growth control ordinance only denied the developer the right to build multi-unit projects and not other uses. Accordingly, the court held that the City's restrictions did not destroy all economically viable use of the developer's property. *Id.* at 324-25 ("Even assuming that [the developer] had exercised its option to purchase the development property, denial of a permit to build living quarters for the elderly did not destroy all viable economic value of the prospective development property."). Similarly, the court disposed of the developer's substantive due process claim because the City's growth control ordinance was a valid exercise of the City's police powers and, accordingly, made the grant of a building permit discretionary. Since the City Council had discretion in granting or denying the building permit application pursuant to the terms of the City's growth control ordinance, the court held that the developer had no entitlement and no constitutionally protected interest in the building permit. *Id.* at 324. Finally, the court rejected the developer's claim that the growth control ordinance violated its equal protection rights since there was no suspect classification involved and, under a rational basis standard, the developer failed to prove a violation of equal protection. *Id.* at 326.

In *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258 (Minn. Ct. App. 1993), *cert. denied*, 508 U.S. 960 (1993), the Minnesota Court of Appeals held that a moratorium denying a property owner all economically viable use of his property for two years was not a taking of property. Factually, this case arose when the City of Woodbury adopted an interim moratorium that prohibited all development on certain properties that were being studied by the City for traffic congestion problems. *Id.* at 259. The Minnesota Court of Appeals defined the issue as follows: "Does a two-year moratorium . . . which denies all economically viable use of property to protect a planning process constitute a compensable 'taking' under the Fifth Amendment?" *Id.* at 259. The court held that it did not.

The court determined that although the property owner was denied all use of its property for the two-year period in question, the denial of all economically viable use for two years was different from the denial of all economically viable use as discussed in pertinent taking cases. *Id.* at 261. The court rejected the property owner's attempts to equate its loss of use to a "total" taking by narrowly defining the measurable property interest as a two-year segment, and held that the regulation must be measured by the economic burden against the value of the property as a whole, rather than against discrete segments.

When measured against the value of the property as a whole, rather than against only a two-year time frame, the moratorium did not deny the [property owner] "all economically viable use" of its property. Delaying the sale or development of property during the governmental decision-making process may cause fluctuations in value that, absent extraordinary delay, are incidents of ownership rather than compensable takings.

Id.

Another illustrative case is *Long Beach Equities, Inc. v. County of Ventura*, 231 Cal.App.3d 1016 (Cal. Ct. App. 1991), *cert. denied*, 505 U.S. 1219 (1992), wherein the California Court of Appeals held that a city ordinance limiting the number of building permits to be issued annually was constitutional. Factually, Ventura County adopted certain guidelines to assure the “efficient provision of urban services and sound urban land use planning,” and to avoid “the problems and costs associated with urban sprawl” through coordinated planning with other local governmental entities. The County’s guidelines “provided that urban growth of developing communities in Ventura County should proceed in a compact and logically expanding form which includes satisfactory permanent open space areas within physically developed land.” *Id.* at 1025.

The City of Simi Valley, to facilitate Ventura County’s planning guidelines, passed an “urgency interim ordinance” that imposed a partial moratorium on providing approval for various land use permits until the City could review and revise its comprehensive plan to comport with the County’s development guidelines. *Id.* at 1026-27. Additionally, the City adopted a temporary growth management plan that severely limited the number of building permits to be issued annually. The building permit restrictions, which were implemented in July of 1986, were scheduled to expire on January 1, 1996. *Id.* at 1027.

A developer, who desired to build 249 single-family residences on a 250-acre parcel of land it owned adjacent to the City, contended that the land use regulations of the County and City so greatly delayed its development plans as to render them economically infeasible and a violation of the Constitution. Specifically, the developer sued under theories of inverse condemnation, denial of substantive and procedural due process, denial of equal protection and a deprivation of civil rights under 42 U.S.C. § 1983. *Id.* at 1028-29. The court rejected the developer’s taking claim since it found that the growth control plans substantially advanced legitimate state interests and that such plans did not deprive the developer of all economically viable use of its land. Specifically, in regards to the city’s building permit limitations, the court noted that “[b]y limiting the rate, distribution, quality and type of residential development on an annual basis, with periodic reviews of the ongoing situation, [the City] seeks ‘to improve local air quality, reduce traffic demands . . . and ensure future demands for such essential services as water, sewers and the like are met. . . .’” *Id.* at 1030.

The court also rejected the developer’s claim that the delay in its ability to develop its property constituted a taking.

The instant temporary ordinance [adopted in July of 1986] calls for a reevaluation in 1991 of its restrictions, pursuant to the 1990 census and it automatically expires in 1996. Unless a temporary moratorium is total and is unreasonable in purpose, duration or scope, the restrictions it places on development are not compensable.

Id. at 1035.

Similarly, the court rejected the developer's due process and equal protection challenges since the County's guidelines and the City's ordinance were reasonably related to the public welfare. *Id.* at 1040. Additionally, because there was no constitutional violation, the court also rejected the developer's Section 1983 claims. *Id.* at 1040-41.

Cases from other jurisdictions also support the general proposition articulated in the above-discussed cases—that growth management planning and regulatory implementations such as moratoriums do not deprive properties of all use. The standard for these cases, and the standard required of a regulation in order to avoid a taking claim, is “reasonable use over a reasonable period of time,” as measured by the local government's comprehensive plan or other growth management programs. *See, e.g., McCutchan Estates Corp. v. Evansville-Vanderburgh County Airport Auth. Dist.*, 580 N.E.2d 339, 343 (Ind. Ct. App. 1991) (administrative delay of nine months before granting developers preliminary approval of subdivision, while awaiting determination of whether proposed runway would be developed in area of subdivision, was not so extraordinary as to amount to unconstitutional temporary taking); *Dufau v. United States*, 22 Cl. Ct. 156, 162 (Cl. Ct. 1990) (fact that process leading to issuance of permits for fill of wetlands took almost 16 months did not constitute extraordinary delay so as to constitute a temporary taking of the land); *Tocco v. New Jersey Council on Affordable Hous.*, 576 A.2d 328, 330 (N.J. Super. Ct. App. Div. 1990), *cert. denied*, 499 U.S. 937 (1991) (18-month land development moratorium imposed on municipality in which land was scarce, for purpose of enabling municipality to fulfill its constitutional obligation to provide its fair share of low and moderate income housing, did not result in an unconstitutional taking of affected property because, absent extraordinary delay, any decrease in the value of property during the land development moratorium was a mere incident of ownership); *Zilber v. Town of Moraga*, 692 F.Supp. 1195, 1206-07 (N.D. Cal. 1988) (a one-and-a-half-year development moratorium in order to develop comprehensive scheme for regulation of open space was neither unreasonable nor, standing alone, sufficiently burdensome to require compensation, even though property owner lost lucrative sale as a partial result of the moratorium); *Guinnane v. City and County of San Francisco*, 197 Cal.App.3d 862, 867-69 (Cal. Ct. App. 1987) (city's more than one-year delay in processing real estate developer's building permit application to

study possible environmental impact of development was not so excessive as to constitute compensable temporary taking).

While Texas and Fifth Circuit authority on moratoriums and other growth management techniques is not as plentiful as in other areas of the country, there is authority supporting such techniques in both Texas case law and Fifth Circuit jurisprudence. For example, in *Estate of Scott v. Victoria County*, 778 S.W.2d 585 (Tex.App.-Corpus Christi 1989, no writ), Victoria County's sewer plant became seriously overloaded due to the increase in the number of homes serviced by the sewer system, which resulted in a system shut down that caused enormous amounts of raw sewage to be discharged into a nearby creek. Additionally, the sewer system was operating in violation of the conditions of its operating permit and state and federal regulations. *Id.* at 588. In 1979, the County issued an order prohibiting the issuance of any future permits connecting to the sewer system. The sewer hookup moratorium lasted 7½ years until the County transferred the ownership of the sewer plant to a newly created utility district. *Id.* at 588-89. Owners of undeveloped tracts of land who had sought sewer service during the 7½ year moratorium contended that the moratorium was a taking because "(1) the moratorium was unreasonable or arbitrary because it rendered their property wholly useless for 7½ years; [and] (2) the moratorium was unreasonable in its duration. . . ." *Estate of Scott*, 778 S.W.2d at 589. The court, after noting the taking consideration factors set out in *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978),⁴ held that the record did not establish a taking.

A review of the record reveals that the evidence conclusively establishes the following: (1) the sewer moratorium was adopted for a legitimate purpose substantially related to the health, safety, and general welfare of the public; (2) the government's action in prohibiting additional sewer hookups was not for its own advantage; (3) the regulation was reasonable and not arbitrary; and (4) the sewer moratorium did not render appellants' land wholly useless nor did it totally destroy the land's value.

Estate of Scott, 778 S.W.2d at 591.

There are also two Fifth Circuit cases of note. In *Schafer v. City of New Orleans*, 743 F.2d 1086 (5th Cir. 1984), the City of New Orleans passed an ordinance prohibiting the issuance of building permits for fast-food restaurants in a certain neighborhood until the City completed a study of the area. The moratorium was to last approximately one year. *Id.* at 1088. A landowner who had contracted to sell his property to McDonalds was effected by the moratorium and subsequently lost the McDonalds deal. *Id.* at 1088. The court rejected the landowners' taking challenge and offered some rather broad language supporting moratoriums and other interim development control measures.

The ordinance does not take an inch of the landowners' property. It does

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not deny them the right in the future to use the property for any purpose that it may now be put to. It merely suspends the owners' ability to devote their property to a particular use for 10½ months. . . .

Interim development control such as this moratorium have been found to play an important role in municipal planning. They aid in "bridging the gap between planning and its implementation into legal measures." They may, as here, be used to preserve the status quo while study of the area and its needs are completed. This moratorium on land use serves a significant public purpose.

Study of, and, if study warrants, changes in land use control cannot be completed instantaneously. While these are proceeding, there may be a dramatic increase in the number of potentially adverse uses. Building activity may increase or be expected because of the fear that contemplated uses may be prohibited. Interim zoning or a moratorium may be necessary to prevent a plan's defeat before it is formulated. In determining whether stop-gap ordinances or moratoria are reasonable, their duration is an important consideration. Property owners should not be deprived of the use of their property by an ordinance if its temporary character is but a ruse. Yet municipalities must be allowed a reasonable time within which to plan comprehensive zoning measures.

Id. at 1090.

Similarly, in *Jackson Court Condominiums, Inc., supra*, the court upheld the constitutionality of the City's moratorium on the establishment of time-share condominiums in residential areas. Factually, the case arose when the City of New Orleans, in response to a rapidly growing phenomenon of time-share condominiums in the City, passed an ordinance creating a city-wide moratorium on time-shares within certain zoning classification areas, pending a comprehensive zoning study of time-sharing rentals. *Id.*, 874 F.2d at 1072. The plaintiff, Jackson Court Condominiums, purchased an apartment building with the intent to convert it to luxury time-share condominiums. After the City passed the time-share condominium moratorium, the plaintiff was unable to complete its condominium conversion plans for the property. *Id.* at 1072-73.

In its subsequent suit against the City, the plaintiff claimed that the city-wide moratorium on time-share arrangements violated its right to substantive due process. The court, however, rejected this claim citing the differential legislative standard in *Shelton, supra*, and by holding that the question of whether the moratorium was reasonable was "at least debatable," and therefore would be upheld as a rational decision. *Jackson Court*, 874 F.2d at 1077-78.

Certainly the protection of residential integrity is a legitimate objective of a zoning regulation. [Citations omitted.] The City of New Orleans was concerned that the implementation of time-share arrangements in residential neighborhoods would increase the noise, littering, and vandalism which might be associated with transient users. This was a legitimate concern of the city and was debatable. Therefore, the moratorium reaches the threshold established in *Shelton* for substantive due process.

Id. at 1078. The court also disposed of the plaintiff's equal protection claims, which were based on the argument that the moratorium did not apply to other transient uses, such as boarding houses, by noting that "as long as the classification is rationally related to a legitimate state objective, a legislature is allowed to attack a perceived problem piecemeal." *Id.* at 1079.

The Fifth Circuit also rejected the plaintiff's claims that the moratorium was a taking without just compensation because the moratorium advanced a legitimate government interest and did not deny the plaintiff all economically viable use of its property. *Id.* at 1080-82. The court noted that the plaintiff could still use the apartment complex for apartments and that the plaintiff's particular intended use for the property was not relevant to a determination of whether economically viable use for the property remained.

[The plaintiff] seems to rely upon the business failure while renting the property as apartments as establishing a fact question as to whether there was a taking of constitutional dimension from the viable economic use of its property. The record shows, however, that [the plaintiff] took a knowledgeable risk in purchasing the property and failed. It was the market, rather than the city, which deprived [the plaintiff] of that potential use. There is no evidence to indicate that the city's action was the sole cause of the bankruptcy. This was a typical business failure, perhaps abetted somewhat by zoning, which is not at all uncommon when risky choices are made by the business.

Id. at 1081.

Cases from other jurisdictions are in accord. In *Schiavone Construction Co. v. Hackensack Meadowlands Development Commission*, 486 A.2d 330 (Sup. Ct. N.J. 1985), the Hackensack Meadowlands Development Commission ("HMDC") imposed a moratorium on real estate development for the purpose of completing studies to determine the feasibility of a food distribution center. *Id.* at 330-31. The moratorium covered approximately 550 acres, included approximately 115 acres of undeveloped land owned by plaintiffs. *Id.* While plaintiffs' zoning application requesting a use and bulk variance was pending, the HMDC had applied for a grant to be used for a development design analysis of the food center. *Id.* The HMDC received the grant and thereafter adopted a resolution authorizing a feasibility study of the

food distribution study and directing that all development applications be held in abeyance until the agency's next monthly meeting. Based on this resolution, action on plaintiffs' application was withheld. *Id.* Subsequently, a series of resolutions were adopted, the purpose of which was to enable the HMDC to complete its feasibility study and the net effect of which was to place a freeze on all land development in the covered area. *Id.* Ultimately, the restrictions lasted for 19 months. *Id.* at 332.

Plaintiffs contended that the length of the moratorium constituted a public taking for which they were entitled to be paid just compensation. *Id.* The court noted that

[r]estrictions on land use short of a total appropriation, if sufficiently extensive and prolonged, may constitute a taking. [citations omitted] Whether such restrictions upon the development of land, as opposed to outright appropriation, constitute a compensable taking usually turns on the particular facts of each case.

* * *

When evaluating temporary land use restrictions, courts should consider the reasonableness of the duration of any moratorium on development. In *Deal Gardens v. Loch Arbour*, 48 N.J. 492, 226 A.2d 607 (1967), the Court said:

Although the municipality may adopt a "stop gap" zoning ordinance, which if not temporary might be considered unconstitutional, such power is strictly limited and must be exercised with great caution. One of the more dangerous aspects of this type of legislation arises from the damage which may result if there is no restriction period of time during which a restraint against some land use is permitted to continue. Plainly there must be some terminal point. It is impossible to establish an inflexible rule applicable to every cause. Each situation must be assayed in its own particular factual setting to ascertain whether the elapsed time during which the ordinance has been in effect is reasonable.

Id. at 332-33. One factor that the court considered to be relevant is the relationship that existed between the purpose of the moratorium and the time required to reach and to implement a final decision as to the use of the property. *Id.*

B. Is A Growth Management Program's Distinction Between Residential and Nonresidential Growth Defensible?

There are cases that support the proposition that a growth management plan which distinguishes between residential and nonresidential growth is constitutional, provided that there is a rational basis for the distinction. For example, in *Schenck v. City of Hudson*, 114 F.3d 590 (6th Cir. 1997), the

City of Hudson, Ohio, which covers 25 square miles with an estimated population of 21,000, faced serious growth issues. The population of Hudson had increased more than 50% in the 1970s and more than 35% in the 1980s. To address the unprecedented growth, Hudson adopted a growth management plan (the “Plan”), which contained, among its goals, the need to manage the City’s growth rate so that it did not exceed the capabilities of its infrastructure, to avoid the need for new infrastructure so that the City could meet current needs, to protect the City’s unique character, and to “encourage nonresidential development to decrease the disparity between residential and nonresidential growth.” *Id.* at 592.

To implement the plan, Hudson adopted a slow-growth zoning ordinance, after finding that the City’s sewer facilities were operating beyond capacity, the City’s water treatment and distribution systems were inadequate, the City’s roads were insufficient to meet traffic needs, emergency services were unavailable to meet the City’s current needs, and property taxes collected from new home construction were less than the costs to the City generated by the home’s construction. *Id.* To effectuate the slow growth desired by Hudson, the slow growth ordinance provided a system whereby the City Council would determine how many residential growth allotments would be issued in a given year, based upon the level of residential development for the previous year and the ability of Hudson’s infrastructure to cope with new development. A lottery system, combined with certain hardship allotments, was created by the slow-growth ordinance. *Id.* at 593.

A group of landowners owning land in Hudson brought suit against the City seeking an injunction against the enforcement of the ordinance. While the district court granted the preliminary injunction, the Sixth Circuit, on appeal, dissolved the preliminary injunction because it found that it was very unlikely that the plaintiffs would succeed on the merits in the district court. The Sixth Circuit, after noting that the legislative body need not select the best or the least restrictive method of attaining its goals so long as the means selected were rationally related to those goals, held that “[t]he City of Hudson wishes to control growth of residential areas until such time as its infrastructure is able to meet current and future needs. A cap on the number of homes built in the City unquestionably bears a rational relationship to this concern.” *Id.* at 594.

After the case was returned to the district court, the court, after a full trial on the merits, similarly upheld the constitutionality of the City’s slow-growth zoning ordinance. In upholding the constitutionality of Hudson’s slow growth ordinance, the district court rejected the plaintiff landowners’ attack that the City had “deliberately scuttled public works for political expediency,” and that “any need for limitation resulted because Hudson refused to make necessary road modifications.” *Schenck v. City of Hudson*, 997 F.Supp. 902, 905 (N.D. Ohio 1998). The district court rejected the plaintiffs’ challenge as nothing more than an attack upon the political decisions made by the elective representatives of Hudson.

Under its police power, Defendant City of Hudson has the right to maintain its character and to grow at a slower pace to allow orderly provision of services, including infrastructure service levels. It has the right to ensure that the costs of development do not exceed revenue available from such development. It also has the right to limit the density of population to prevent congestion. While neither the district court nor the Sixth Circuit expressly addressed whether Hudson's slow-growth ordinance, which distinguished between residential and nonresidential development, was susceptible to a challenge based upon that distinction, both courts did uphold Hudson's slow-growth plan.

Other cases, while not directly dealing with growth and development moratoriums, have consistently held that zoning and land use decisions that distinguish between different types of development will withstand constitutional challenge if there is some rational basis for the distinction. *See, e.g., Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1240-41 (9th Cir. 1994) (evidence did not establish that owners' property, which was classified by city as partially single-family residential and partially rural residential and which was subject to temporary water moratorium, was treated differently from similarly situated properties so as to support equal protection claim, notwithstanding owner's contention that requests for amendments to city's general plan were granted for owners of nonagricultural property; moreover, city's proffered reasons for its treatment of owner's property--to permit effective coordination of services, to preserve agricultural land, to limit development and to provide for range of housing types--were rational.); *Scott v. City of Sioux City*, 736 F.2d 1207, 1216-17 (8th Cir. 1984) (City's enactment of zoning ordinances which limited commercial development of outlying areas of city was rationally related to goal of effective inner-city urban renewal, and thus violated neither substantive due process nor equal protection rights of landowners on periphery of city); *McCauley v. City of Jacksonville*, 739 F.Supp. 278, 284 (E.D.N.C. 1989) (developer's equal protection challenge to city's sewer main extension moratorium on the basis that the moratorium applied only to single-family development, and not to multi-family development, held not to violate equal protection since "[t]he undisputed evidence clearly shows that the moratorium policy's distinction between single and multi-family development had a rational basis"); *Jacobs, Visconsi & Jacobs Co., v. City of Lawrence*, 715 F.Supp. 1000, 1006-07 (D. Kansas 1989) (Even assuming that developer seeking to develop suburban mall and developers seeking downtown development were considered to constitute two distinct classes created by the city's action in denying rezoning application for suburban land, equal protection claim of suburban property owners whose application to rezone property from residential to commercial had been denied would fail, as city's decision to encourage downtown development and discourage and prevent suburban retail development was legitimate reason supporting denial of application to rezone residential property as commercial); *Burstyn v. City of Miami Beach*, 663 F.2d 528, 534 (S.D. Fla. 1987) (for purposes of equal protection analysis, protection of retail trade, preservation of

commercial districts, and encouraging tourism, are legitimate governmental goals).

In sum, there are numerous cases that have drawn distinctions between different types of development, whether it be residential versus nonresidential development, single-family versus multi-family development, or development in one part of the community versus another part of the community. In each of those cases, given that there were some rational basis for the distinction, the courts have not invaded the legislative prerogative of the decision makers to substitute their judgments for that of the local government and have upheld those legislative decisions under both equal protection and substantive due process constitutional challenges. Indeed, as discussed *infra*, the Texas Attorney General's Office has upheld the concept of the residential/nonresidential distinction.

C. General Principles Regarding Growth Management Planning and Regulatory Implementations

One commentator has stated that

[g]rowth control measures may be employed for two principal purposes: (1) to prevent development and associated demands on public services from outstripping available resources; and (2) to slow down, if not to stop, adverse changes in community character and "quality of life" which are perceived to result from rapid urban or suburban development.

Robert H. Freilich and Elizabeth A. Garvin, *Takings After Lucas: Growth Management, Planning, and Regulatory Implementation Will Work Better Than Before*, 1993 Inst. on Plan. Zoning & Eminent Domain § 5.04[1].

Growth management, unlike zoning alone, allows a city to control the timing of growth. This concept—regulating the timing of growth—has been consistently upheld since *Ramapo*, *supra*, as long as the regulation provides a reasonable use over a reasonable period of time. The concept of "reasonable use" was first articulated in *Village of Euclid*, *supra*, and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). The reasonable period of time standard was added by *Ram apo*.

Additionally, as the above-referenced cases make clear, there is a distinction between (1) those cases where time is a factor in the determination of whether a taking has occurred, and (2) those cases seeking to determine the time of the taking once a taking has been determined to have occurred. For example, a number of the cases discuss *First English*, *supra*, in addressing various landowner's claims that any denial of use of property, no matter how short, is a "temporary taking" under *First English*. Those cases, however,

have clarified that what *First English* held is that once a taking has been determined, then compensation is due from the effective date of the taking regardless of how short the period of time the taking has been in effect, but in determining whether a taking has occurred in the first place, reasonable timing and sequencing regulations do not effect a taking because the property has not been permanently deprived of all value or use. If the property is provided a reasonable use over a reasonable period of time, no taking has occurred. *See Woodbury Place*, 492 N.W.2d at 261 (“*First English* does not create a new liability standard to determine when a ‘temporary’ taking occurs, but clarifies the appropriate remedy after a taking is recognized”); *Long Beach*, 231 Cal. App. 3d at 1035 (“[The plaintiff] cannot take solace in [*First English*], which stated that damages may be available for temporary total takings”); *McCutchan Estates*, 580 N.E.2d at 342 (citing *First English* for proposition that the “question is whether the administrative delay was ‘extraordinary’”); *Zilber*, 692 F. Supp. at 1206 n. 10 (“*First English* was concerned with the proper measure of compensation once a taking is established, not the proper method of determining if a taking has occurred”); *Guinnane*, 197 Cal.App.3d at 869 (“[T]here is nothing in *First English* which alters the established principle that the interim burden imposed on a landowner during the government’s decision making process, absent unreasonable delay, does not constitute a taking”).

Moreover, the Supreme Court’s 1992 decision in *Lucas, supra*, did not change the basic standard that there is no categorical taking unless there is a permanent deprivation of all value and use. Legitimate growth control regulations do not present *First English* or *Lucas* taking claims since growth control ordinances, by themselves, do not foreclose future use, as did the downzoning presented in *Lucas*, but merely postpone the time when permitted development may occur. This is significant because the land may retain considerable market value despite the regulation.

VI. The Flower Mound, Texas, Experience

A. SMARTGrowth

The Town of Flower Mound (“Town”) is a rapidly growing home-rule municipality located in Denton County and presently has a population of in excess of 52,000. In 1998 alone, for example, 1,665 building permits were issued (one of those building permits was for a multifamily unit that contained in excess of 200 apartments). The Town’s consultants conservatively estimated that without SMARTGrowth, as described below, 1,500 building permits will be issued each year in the future. Based on that assumption, Flower Mound’s population is projected to exceed 60,000 by 2002. In response to the Town’s rapid growth and the problems associated with such growth, on January 11, 1999, the Town Council unanimously adopted its SMARTGrowth (Strategically Managed and Responsible Town Growth) Program. SMARTGrowth is defined as a strategic initiative to manage both the rate and character of residential growth in Flower Mound.

The objectives of the SMARTGrowth Program were as follows:

1. To achieve the objectives of the Town's Comprehensive Master Plan;
2. To prevent increased traffic congestion and further deterioration of traffic safety until transportation system capacity improvements can be completed;
3. To maintain adequate water and wastewater service;
4. To broaden the Town's tax base with quality commercial development;
and
5. To preserve the quality of life and the unique character of Flower Mound while mitigating the ill effects of rapid and intense urbanization.

The adoption of the SMARTGrowth Program was the result of detailed and meticulous study by engineering consultants who previously had been retained by the Town to assist in infrastructure study and review.

Infrastructure study and review consisted of (1) updated population/land use data and projections; (2) updated water consumption data and projections; (3) updated wastewater flow data and projections; and (4) updated data regarding the Town's transportation system and transportation deficiencies.

The Flower Mound Town Council adopted a SMARTGrowth (Strategically Managed and Responsible Town Growth) Program at its January 11, 1999, meeting. To the best of the author's knowledge, this one of the first growth initiatives in the State of Texas. The SMARTGrowth Program contained four major components, as follows:

1. An update of the Town's 1994 Comprehensive Master Plan and a reaffirmation of the community vision embodied in the 1994 Comprehensive Master Plan;
2. A temporary moratorium applicable to residential Master Plan amendments, residential zoning amendments and residential development plans, ensuring future development will be consistent with the community vision expressed in the updated Comprehensive Master Plan;
3. Amendments to the Town's Building Code providing that residential building permits are valid for forty-five (45) days without construction commencing; and
4. Consideration, after the update of the Comprehensive Master Plan and analysis of the Town's water, wastewater and transportation systems, of the

need and feasibility of a plan to manage and equitably apportion residential building permits in a manner that ensures the Town's ability to maintain a defined level of service while accommodating reasonable and sustainable residential and non-residential growth.

To date, there are no lawsuits filed against the Town as a result of the adoption of the SMARTGrowth Program (several lawsuits previously were non-suited by the plaintiffs). Although the residential moratorium initially was to expire one year after adoption, it was extended for an additional sixty (60) days on January 6, 2000; however, the moratorium was repealed on February 17, 2000, upon adoption of the SMARTGrowth Management Plan.

B. SMARTGrowth and Texas Attorney General Opinion No. JC-0142

On November 10, 1999, Texas Attorney General John Cornyn issued an opinion validating growth management strategies by Texas municipalities. The issue was raised by the Homebuilders Association of Greater Dallas ("HBA"), a development group, in response to the foregoing SMARTGrowth initiative adopted by the Town of Flower Mound in January 1999.

The fourth component of SMARTGrowth, the possible adoption of a growth management plan by the Town, is the one aspect of the Program that has caused considerable consternation in the development community, coupled with a concern that other cities around the state could adopt similar plans.

Although no litigation was filed against Flower Mound immediately after the adoption of the SMARTGrowth Program, opposition by the development community has been and continues to be intense. At the urging of the HBA, Representative Bill G. Carter, Chairman, House Committee on Urban Affairs, submitted two questions to the Attorney General:

1. Can a municipality implement a cap of the number of building permits issued when no emergency situation exists to justify the limit?
2. Can a municipality limit the number of residential building permits while placing no limits on the issuance of non-residential permits?

Simply stated, a growth management plan basically is a plan to manage and equitably apportion residential building permits in a manner that ensures a community's ability to maintain a defined level of service while accommodating reasonable and sustainable residential and non-residential growth. In Flower Mound's case, during the update of the Comprehensive Master Plan (which is not yet completed as of late January 2000 but will be completed by April 2000), the Town is assessing the need and feasibility of implementing a growth management plan. This assessment necessarily will involve further analysis of the Town's water, wastewater

and transportation systems. If deemed necessary, it is anticipated that the growth management plan would be effective upon the date of the adoption of the new Comprehensive Plan and would remain in effect until the completion of system capacity improvements or until the next update of the Comprehensive Plan in 2004. Non-residential development would be exempt from the conditions of any growth management plan.

In upholding Flower Mound's actions, Attorney General Cornyn wrote that

a home-rule municipality may, even in the absence of an emergency, limit the number of building permits the municipality will issue in a given period of time. First, a growth-management plan does not appear to be generally inconsistent with constitutional and statutory law. Second, the legislature has not, with "unmistakable clarity," forbidden a home-rule municipality to adopt a growth-management plan in the absence of an emergency.

Although a growth management plan must be adopted in compliance with constitutional due process standards, Attorney General Cornyn wrote that such a plan does not per se facially contravene federal or state constitutional provisions nor does it in the abstract contravene state statutory law. Additionally, the legislature has not "with unmistakable clarity" forbidden a home-rule municipality's adoption of such a plan and, consistent with the broad grant of authority to home-rule municipalities, the Attorney General concluded that "even in the absence of an emergency, a home-rule municipality may adopt a growth-management plan that limits the number of building permits the municipality will issue in a given time period."

The second question submitted by HBA also was answered in the Town's favor. After discussing general legal issues associated with the federal equal protection clause, the Attorney General concluded that "[d]istinguishing between residential and nonresidential building permit applications does not involve a patently suspect class, so a court probably would determine that this distinction need only be 'rationally related to a legitimate state interest.'" Moreover, he wrote that "[a] court may find that the Town's desire to ensure the Town's 'long-term economic health' . . . constitutes a legitimate state interest and that restricting residential development is rationally related to this interest."

In conjunction with the Texas Supreme Court's decision in *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (1998), *cert. denied*, 119 S.Ct. 2018 (1999), the author believes that this attorney general opinion provides strong legal support for the implementation of growth management strategies by communities facing the ill effects of rapid and intense urbanization. Although any such growth management programs must comport with federal and state constitutional mandates, Texas cities now have more solid legal

authority for combating urban sprawl. Indeed, if the developers/homebuilders had been correct that no action limiting growth may be taken by a municipality absent an emergency, then a precious aspect of local self-government would have been taken from the citizens of Texas municipalities and they would have been denied the right to control the character and rate of growth in their cities.

C. The SMARTGrowth Management Plan

On February 17, 2000, the Flower Mound Town Council unanimously adopted the SMARTGrowth Management Plan, the first comprehensive growth management plan adopted in the State of Texas (to the best of the author's knowledge).

The SMARTGrowth Management Plan is a community-based growth management strategy employing a zoning overlay to effectuate the community vision and values embodied in the Flower Mound Comprehensive Plan by translating them into "Threshold Zoning Criteria" to establish the character and quality of development desired within each of the Town's four land use planning districts. Emphasizing the character and quality of development, the SMARTGrowth Management Plan's overarching purpose is to preserve and enhance Flower Mound's community character and its quality of life.

The Flower Mound Town Council determined that the SMARTGrowth Management Plan was necessary to mitigate the ill effects of rapid and intense urbanization caused by explosive population growth. These ill effects include, but are not limited to, the following:

- Overcrowding and congestion.
- Overburdened infrastructure, facilities and services.
- Overcrowded and inadequate educational facilities.
- "Scrape and build" development and resulting environmental degradation.
- Volatile fluctuations in real estate markets associated with boom-bust land development.
- Strip commercial development employing a short-term perspective relative to the quality, character and life cycle of uses and changing market conditions.
- Conflicting interaction or relationships between new and existing development and a resulting diminution of property values.

- Severely imbalanced and unhealthy property tax base resulting in a disproportionate tax burden being placed on homeowners (e.g., based upon the 1999 appraisal roll from the Denton Central Appraisal District, residential development comprises 89.9% of the Town's tax base).
- Destruction of natural landforms and associated natural and ecological resources, including important plant and wildlife habitat.
- Loss of open space, agricultural land and scenic vistas.
- Degradation in the quality of the community's natural and built environments resulting in a loss of community character or sense of place (i.e., "placelessness").

The following facts testify to the rapid and intense urbanization of Flower Mound during the ten-year period from 1990 to 2000.

- The Town's population has grown from 15,527 to 51,300, a total population increase of 35,773 or 230.4%.
- The average number of residential building permits issued annually is 1,170.
- The average annual increase in population is 3,577.
- The average annual growth rate is 12.8%.
- The United States Census Bureau has identified Flower Mound as the nation's tenth fastest growing community within its population category.
- Historical development patterns since 1990 evidence the fact that the development pressures associated with Flower Mound's rapid and intense urbanization will ultimately consume and destroy many of the community's irreplaceable natural and cultural resources, and the community character and quality of life derived therefrom, unless the Town acts to preserve and protect them.

The objectives of the SMARTGrowth Management Plan are to:

- Mitigate the ill effects of rapid and intense urbanization in Flower Mound.
- Protect the open lands, natural landforms, agricultural landscapes and scenic vistas that create and define Flower Mound's unique community character and quality of life.
- Protect the natural, scenic and ecological resources that are essential elements of Flower Mound's community character and which provide

irreplaceable plant and wildlife habitat.

- Ensure that development is respectful of and appropriately integrated with the natural physical geography of the land in Flower Mound by requiring environmentally sensitive development techniques to eliminate “scrape and build” development.
- Promote a vigorous, diversified and regionally competitive economy.
- Foster a balanced tax base to ensure Flower Mound’s long-term financial ability to respond to the service demands of both new and existing development without placing a disproportionate tax burden on homeowners.
- Ensure that new development produces positive fiscal impacts to allow Flower Mound to maintain a tax structure conducive to both home ownership and economic development, while providing the highest level of service to residents and businesses.
- Ensure that adequate facilities exist to provide both existing and future student populations with optimal learning opportunities as an essential element of a quality living environment and a family-friendly community.
- Ensure that the character and quality of Flower Mound’s built environment, relative to commercial development, contribute to desired community character objectives and foster a positive relationship between the taxable value of real property and the corresponding cost of municipal services.
- Ensure that the character and quality of Flower Mound’s built environment, relative to residential development, contribute to desired community character objectives and integrate with surrounding natural landscapes.
- Provide adequate availability and access to park lands and recreational opportunities for residents of all ages to maintain and nurture a quality living environment and a family-friendly community.
- Avoid conflicting interaction and/or relationships between new and existing development and a resulting diminution of property values.
- Protect existing farmland and agricultural operations from conflict with new residential development.
- Provide adequate public infrastructure, facilities and services to serve the demands created by new development without degrading or diminishing

service levels to existing development.

- Establish a development framework for Flower Mound that is respectful of private property rights, while encouraging them to be used responsibly for the benefit of the entire community.
- Implement a long-term strategy of sustainable development that embodies the community's vision and values; achieves both community character and economic development objectives; and considers the social, environmental and fiscal impacts of land development.
- Preserve and enhance Flower Mound's distinctive community character and quality of life by ensuring that its natural and built environments are consistent with the community vision and values embodied in the Flower Mound Comprehensive Plan.

As a growth management plan based upon the community vision and values embodied in the Flower Mound Comprehensive Plan, and utilizing Threshold Zoning Criteria to emphasize the character and quality of development, the SMARTGrowth Management Plan provides an effective and critical nexus not only between the Comprehensive Plan and the Town's Land Development Code, but also the Town's SMARTGrowth Program. This crucial nexus will ensure that the Town's Comprehensive Plan, its Land Development Code and the SMARTGrowth Program operate in concert to preserve and enhance Flower Mound's community character and its quality of life.

As previously noted, the SMARTGrowth Management Plan establishes a crucial nexus between the Town's Comprehensive Plan, its Land Development Code and the SMARTGrowth Program. One of the more significant aspects of this nexus relative to the Town's development process is the linkage that the SMARTGrowth Management Plan forges between the Comprehensive Plan and the Land Development Code. This linkage is significant because it eliminates a major disconnect in the traditional development process that occurs between the analyses required to evaluate Comprehensive Plan amendments and zoning amendments, each of which has a different focus and occurs within differing planning and time contexts.

In relation to zoning amendments, the focus of the traditional zoning analysis is twofold: (1) the specific development proposal's compliance with the use and dimensional regulations of the zoning district in which the proposed project would be located and (2) its projected impact upon adjacent properties. Subsequently, the context of the planning analysis is the neighborhood within which the proposed development project would be located, with the focus of the analysis being limited to site-specific impacts related to the project itself or the immediately surrounding area.

On the other hand, the focus of the analysis required for a Comprehensive Plan amendment is much broader and more complex, addressing such community-wide issues as the adequacy of public infrastructure, facilities and services; impacts upon the community's economic base; environmental quality; and community character and quality of life objectives. Therefore, the planning context for a Comprehensive Plan amendment is the community, not the neighborhood, and, in some instances, may even be the larger regional community of which Flower Mound is a member and its influences and impacts upon the community.

Not only do the analyses traditionally required for the Comprehensive Plan and zoning amendments vastly differ in terms of their planning contexts and foci; they also apply different time contexts to the analysis that is performed. For example, the traditional zoning analysis occurs in conjunction with each proposed development project and, for the most part, applies a present-oriented time context. The analysis associated with the amendment of the Comprehensive Plan, however, applies a future-oriented time context and typically occurs only once every five years (in some communities, every ten years), unless the specific development proposal itself necessitates an amendment of the Comprehensive Plan.

The major disconnect that exists in the traditional development process is attributable not only to the differing foci of the analyses performed for Comprehensive Plan and zoning amendments, and the differing planning and time contexts that are applicable to each type of analysis, but also to the fundamental lack of linkage between the two differing types of analyses in most development processes. It is precisely this lack of linkage that makes it possible for a proposed development project to be analyzed only in the context of neighborhood impacts, while community impacts are all but ignored.

The Threshold Zoning analysis required by the SMARTGrowth Management Plan eliminates this disconnect by ensuring that each proposed development project is also evaluated within the context of its impacts upon the community, with the analysis focusing on issues of community-wide concern identified in the Comprehensive Plan, such as those previously identified. In terms of its integration into the Town's land development process, the SMARTGrowth Management Plan forms a bridge or linkage between the Comprehensive Plan and the site or project-specific zoning regulations in the Land Development Code, essentially creating a project-specific analysis within the context of community impacts.

In relation to its applicability to specific development proposals or applications, the Threshold Zoning analysis required by the SMARTGrowth Management Plan will apply to all applications for zoning amendments, development plans and/or site plans filed after the date of the Plan's adoption by the Town Council. Relative to process, the Threshold Zoning analysis will occur in conjunction with the traditional zoning analysis if the

development proposed necessitates a zoning amendment. If the underlying zoning does not need to be amended, the Threshold Zoning analysis will occur prior to consideration of any applications for residential development plans or non-residential site plans.

Threshold Zoning Criteria effectuate the community vision and values embodied in the Flower Mound Comprehensive Plan by translating them into constitutive zoning criteria to evaluate the community-wide impacts of development applications and projects for the purpose of ensuring that development occurs in a manner that contributes to the accomplishment of community character and quality of life objectives. There are three general types of Threshold Zoning Criteria used in the SMARTGrowth Management Plan:

- Performance-based criteria relative to the adequacy of public service levels.
- Per unit of population criteria relative to the adequacy of public facilities.
- Values-based, qualitative criteria relative to community character and quality of life objectives.

The Threshold Zoning Criteria have also been grouped into seven general categories, as follows: adequate public infrastructure, adequate public facilities, adequate public services, economic development, fiscal impact, environmental quality, and community character. The various Threshold Zoning Criteria are also applied in three different ways to the evaluation of specific development applications and projects. In this regard, the Threshold Zoning Criteria are designated either absolute, relative or incentive in their application, as explained below:

- **Absolute criteria** require complete compliance at the time a development application or project is evaluated, with the failure to comply resulting in the denial of same until such time as complete compliance is or can be attained, as defined in the applicable criterion.
- **Relative criteria** pertain to either complex or values-based, qualitative development impacts for which absolute criteria are inappropriate. While the failure to attain complete compliance with such criteria will result in the denial of a development application or project, mitigation measures may be proposed by the development applicant and may be considered in evaluating whether compliance is or can be attained, provided such mitigation measures are embodied in a development agreement.
- **Incentive criteria** are policy-related, incentive-based criteria (rather than regulatory criteria) that are intended to encourage or incentivize specific types

of development. These criteria will be considered and applied on a project-by-project basis, are discretionary with the Town and will be approved by the Town Council only after community input and public hearing.

In applying the absolute and relative Threshold Zoning Criteria to a specific development application or project, a “pass-fail” evaluation will be utilized to determine compliance not only with each criterion, but also compliance with all of the absolute and relative Threshold Zoning Criteria collectively. In other words, for a development application or project to attain compliance with the SMARTGrowth Management Plan (ensuring that it contributes to community character and quality of life objectives), it must be evaluated as “passing” or complying with each and every absolute and relative Threshold Zoning Criterion. Otherwise, it will “fail” and be denied until such time as compliance is or can be attained. The actual Threshold Zoning Criteria are contained in the attached Appendix.

The SMARTGrowth Management Plan has been well received in the Dallas/Fort Worth Metroplex and national groups have contacted Flower Mound for information about the Plan. Although no applications for new subdivisions or projects have yet been considered by the Town Council, several are “in the pipeline” and presumably will be considered by the Town Council in the near future.

VII. Enacting A Growth Management Plan In Texas

If a city wishes to consider a growth management strategy or adopt a growth management plan, how should a city undertake such a project? While case law and practical guidance are somewhat scarce in Texas, I suggest the following framework in evaluating the feasibility of adopting a growth management plan. Please note that the strategy contains two components: (1) the adoption of a moratorium while the growth management issue is studied; and (2) determining which growth management strategy is appropriate for the city. The steps are as follows:

A. Adoption of a Moratorium

1. Adopt a moratorium while the city determines the necessity for a growth management plan. During this period, determine what needs to be abated for a short period of time during the moratorium (cessation of applications for zoning amendments, for example, pending consideration of a new zoning ordinance, consideration of a comprehensive plan and efforts to limit growth, building permit caps, etc.) and any studies or information supporting the need for a moratorium. Of course, there must be a valid public purpose for the proposed moratorium. Be mindful of Section 212.131 *et seq.* of the Texas Local Government Code! This 2001 legislation

circumscribes the authority of municipalities in adopting moratoriums and requires certain procedural requirements for a city to adopt a moratorium on residential development. This legislation:

- by its express terms, applies only to a moratorium that affects residential property only.
- requires that before a moratorium is adopted, a city must give notice of hearings at least four (4) days in advance of the hearings.
- requires at least two (2) hearings on the question of adopting a moratorium.
- provides that on the fifth business day after a hearing notice is published, a temporary moratorium takes effect.
- requires that within twelve (12) days after the first public hearing, a city must decide whether to impose a moratorium.
- provides that if a moratorium is not imposed, the temporary moratorium ends.
- provides that if a moratorium is adopted, the ordinance must be given at least two (2) readings separated by at least four (4) days.
- provides that a moratorium can be imposed only if there is a need, supported by written findings, to prevent a shortage of essential public services (water, wastewater, drainage facilities, or street improvements) or significant need (one that would endanger public health and safety) for other public facilities, including police and fire services.
- limits a moratorium to 120 days, unless a city extends the moratorium by going through another process of required notices, hearings and adoption of written findings.
- provides that a moratorium is not valid if it does not provide a “waiver” procedure.

2. Consider how Chapter 245 of the Texas Local Government Code (vested rights statute) impacts the proposed moratorium while the city considers growth strategies. Also, a city should review and address any constitutional considerations of any proposed moratorium.

3. To the greatest extent possible, detail factual findings in the moratorium resolution or ordinance. Be certain that the legislative facts are adopted as

the basis for the implementation of the moratorium. The need for consideration of a growth management plan should be addressed as well.

4. Set a time frame or duration for the moratorium and provide a mechanism to renew or extend the moratorium if the city has not yet decided upon a growth strategy.

5. Consider whether you wish to have an appeal mechanism in the moratorium in the event there may be a resulting hardship on a landowner.

6. Post the action item on an agenda at least 72 hours in advance, pursuant to the Texas Open Meetings Act (Chapter 551 of the Texas Government Code). For a residential moratorium, at least 96 hours (four days) notice is necessary, according to Section 212.134 of the Texas Local Government Code. Additionally, that section generally requires a hearing before the Planning and Zoning Commission and the governing body and final action must be taken by the governing body within twelve (12) days of the first public hearing.

7. Have an action strategy prepared (address media concerns, address landowner and developer concerns, assess potential political fallout, etc.).

B. Adoption of a Growth Management Plan

1. Determine the basis for a growth management plan: is it based upon inadequate facilities/infrastructure, depletion of scenic areas, traffic concerns, population growth, etc.?

2. What is the status of the city's comprehensive plan? Does it adequately address growth issues or does it need to be amended? Remember, the city's comprehensive plan may be the key document justifying the need for a growth management plan as well as a key document in adopting a growth management plan since the comprehensive plan articulates (or should articulate) the community's vision of its future. Additionally, the comprehensive plan should contain a chapter or other provisions relating to growth issues.

3. Document the need for the growth management plan. This usually will entail detailed consultant findings and reports, particularly if the adequate public facilities requirement is the basis for the growth management plan. Thereafter, based on the foregoing data, determine which growth strategy is appropriate as a result: (1) timed or phased growth; (2) population caps; (3) urban growth boundaries; or (4) adequate public facilities requirement. If a city wishes to attempt a stop-gap measure to limit the speculative nature of homebuilding, then perhaps the city should consider limiting the duration of residential building permits by amending the city's building code.

4. Once a particular growth management strategy is under consideration, review similar growth management plans that were adopted in other cities or areas of the United States. How were they adopted? What data was presented justifying the need for the growth management plan? How did the growth management plan work? What constitutional or other legal issues were raised about that plan and how did the city respond to those challenges?

5. How does the proposed growth management plan comport with Texas case law or relevant statutory authority (particularly Chapter 245 of the Texas Local Government Code, the vested rights statute)?

6. Again, have an action strategy prepared (address media concerns, address landowner and developer concerns, assess potential political fallout, etc.).

7. Have your lawyers ready for any possible

court action! **VIII. Conclusions**

Based upon a review of the above-discussed cases, and certain commentators' work regarding growth control measures, there are certain fundamental guidelines that can be extrapolated regarding growth management planning and regulatory implementation techniques. Those guidelines are as follows:

1. By working to time and phase growth, local governments can address problems of deteriorating infrastructure, fiscal deficits, degradation of the environment, energy shortfalls and other problems through land use planning. Such land use planning must provide, however, a reasonable use of land over a reasonable period of time.

2. Growth management systems, if properly designed and implemented, can provide a framework to enable local governments to balance and accommodate the goals of landowners and developers with legitimate governmental interests, while ensuring the quality of life expected by the community.

3. The element of time entered the land use/taking equation with the beginning of growth management in the landmark decision of *Ramapo, supra*, where the New York Court of Appeals upheld the timing and sequential control of residential subdivision activity for periods of up to 18 years—the first instance of a state's highest court and the United States Supreme Court upholding the uncompensated restriction of development by means of time and sequential phasing under the due process clause.

4. Fundamentally, all growth management systems involve the control of one or more of the familiar components of land use planning: the rate, location, type, density, amount and/or quality of development. Unlike traditional subdivision and zoning, which are two dimensional (controlling the use of land and the density of permissible development), growth management adds and emphasizes a third dimension—timing.

5. By accepting full population and employment growth through timed and sequenced development, property is afforded an urban use when public facilities become available and, thus, are not deprived of “all” use under the *First English* and *Lucas* decisions.

6. If the regulation is not a permanent prohibition on development, time is used as an element of the taking equation to determine what use is left to that land. It is important to distinguish between time of the taking and time as a factor of a taking.

7. Time as a factor in determining whether a taking has occurred will be an element in ascertaining remaining reasonable use of the land. If the regulation is temporary, all reasonable use has not been denied because there is a future use remaining. Thus, for temporary regulations, the test is whether the regulation left a reasonable use over a reasonable period of time.

While Texas case law is not plentiful relative to moratoriums and growth management plans, if the Texas Supreme Court’s pronouncements in *Mayhew* and Attorney General Opinion JC-0142 (1999) about the authority of local governments to control the rate and character of community growth and to protect residents from the ill effects of rapid and intense urbanization are to have real meaning, then Texas courts should uphold both growth management techniques (assuming, of course, constitutional compliance). The impending battle between developing communities and development interests no doubt will be posited as one of local government police powers versus property rights; however, regardless of the terms employed, what truly is at stake is the right of residents to preserve and maintain the character and uniqueness of their communities.

Manufactured Housing and Mobile Homes

1 Should it be “moratoria” or “moratoriums”? Since I prefer to say “stadiums” rather than “stadia,” I have opted for “moratoriums.”

2 In *Mayhew*, the Court assumed, without deciding, that the state and federal guarantees in respect to land use constitutional claims were coextensive, and the Court analyzed all of the *Mayhew* plaintiffs’ claims under federal

standards. In that case, however, the plaintiffs asserted both state and federal claims and all parties to that litigation agreed that the federal analysis was appropriate to resolve the state constitutional claims. *Id.* at 932.

³ See, e.g., *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (Loss of anticipated gains or future profits is not usually sufficient to constitute a taking); *Agins*, 447 U.S. at 263 n.9 (Fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership and cannot be considered a taking); *Park Ave. Tower Assoc. v. City of New York*, 746 F.2d 135, 139 (2nd Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985) (Loss of profit or reasonable return on investment does not constitute a taking).

⁴ *Teague*, 570 S.W.2d at 393, indicated that the following factors were to be considered in determining whether a taking had occurred: (1) whether the property was rendered wholly useless; (2) whether the governmental burden created a disproportionate diminution in economic value or cause a total destruction in the value; or (3) whether the government's action against an economic interest of an owner was for its own advantage.