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CAN THE TOWN OF RAMAPO PASS A LAW TO BIND THE RIGHTS OF THE WHOLE WORLD?

Fred P. Bosselman*

I. INTRODUCTION

In the famous case of Buchanan v. Rucker the plaintiff sought to collect in the English courts on a default judgment issued by the Island Court of Tobago against the defendant. The defendant claimed that he had never been to Tobago and was not subject to the jurisdiction of the Tobago court. Lord Ellenborough refused to recognize the Tobago court's judgment:

Supposing however that the Act had said in terms, that though a person sued in the island had never been present within the jurisdiction, yet that it should bind him upon proof of nailing up the summons at the Court door; how could that be obligatory upon the subjects of other countries? Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?

One of the most important issues in the United States today is the question of who gets to live where. Our present system of laws lets each individual local government determine who may live within its borders through the use of a wide variety of indirect but very effective regulatory techniques. Like the Island of Tobago these local governments pass laws that affect the “whole world” by limiting the right of outsiders to live in the community.

In 1969 the town of Ramapo, New York, adopted a relatively new legal technique that allows local governments to limit severely the amount of new residential development. This technique, known generally as “development timing,” gives local government an even more powerful tool for determining who will live within its borders than had heretofore been available.

This article expresses the opinion that, based on past experience, each town can be expected to exercise this and similar techniques as if it were an island independent of other towns; that the resulting

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2. Id. at 547 (emphasis added).
impact on metropolitan growth patterns will have serious social and environmental consequences; and that the results will force the legislatures and courts to realize that the laws of individual towns and cities, such as Ramapo, must not be allowed to bind the whole world without adequate state supervision.

II. GROWTH CONTROL AS A LOCAL CONCERN

Unlike virtually every other modern nation we seem to have adopted the position that the control of growth is primarily of concern to local rather than state or federal government. How did we arrive at this position?

The United States began in an historical context that made growth control seem wholly irrelevant. The colonists arrived in a land that seemed to stretch endlessly beyond the western horizon, occupied only by what they viewed as a few tribes of wandering savages. Concern about overpopulation was hardly foremost in their minds. Nevertheless the nation had barely been settled when problems of too rapid growth in the cities were perceived. The concentration of immigrants in the new colonial cities, as contrasted with the sparse population of the countryside, "created a host of problems unknown or little felt in rural communities."3

Concern with fire, crime and sanitation led the cities from the beginning to enforce regulations restricting population growth by attempting to exclude the poor. "Boston established the pattern for the exclusion of poor and undesirable strangers in May, 1636, when the Selectmen forbade any inhabitant to entertain a stranger for more than two weeks without official permission."4 By the end of the seventeenth century almost every sizable town was making some effort to exclude the "indigent or undesirable stranger."5 Nevertheless, by mid-century all of the major colonial cities faced problems of fire, water supply, crime, mob disorder, disease and indigence, much of which was attributed to overcrowding.6

Urban problems were thus as old as colonial settlement itself, but the "antagonism of the country bumpkin toward the city slicker mounted from the late 1750s onward."7 Many in the dominant rural population echoed the sentiments of Thomas Jefferson: "The mobs of great cities add just so much to the support of pure government,

4. C. BRIDENBAUGH, CITIES IN THE WILDERNESS 79 (1938).
5. Id. at 231.
6. Id. at 407.
as sores do to the strength of the human body." De Tocqueville opined that "I look upon the size of certain American cities, and especially the nature of their population, as a real danger." He predicted that democratic government would perish "unless the government succeeds in creating an armed force, which, while it remains under the control of the majority of the nation, will be independent of the town population, and able to repress its excesses."

Throughout the eighteenth century the problems of crime, disease and poverty were associated with the cities, while rural areas were popularly thought to be free of such problems. Most of these ills were attributed to the hordes of indigent people who flocked to the cities to compete for the industrial jobs available there. Although the large cities recognized that exclusion of poor people would increase the cost of labor, there was nevertheless great popular pressure to improve the lot of the poor or remove them from the cities. As a consequence, most of the larger cities made some attempt to control the number of homes built for poor people through fire and building regulations, but not without some ambivalence in these attempts.

No such ambivalence was found in the growing suburbs of the late nineteenth century. Here there were few industrial jobs demanding cheap labor, and the well-to-do could be increasingly restrictive in designing communities to exclude the poor. The very existence of the suburbs as separate local governments was based on the idea of combining the city's conveniences with the rural area's freedom from urban problems. This rapid proliferation of the suburbs coincided with the massive foreign immigration that filled the cities in the latter part of the nineteenth century.

Luther Gulick described the rapid emergence of a wide variety of local legislation restricting the use of urban land as a natural reaction to overcrowding. "The problems arise in acute form because of congestion. The individual cannot protect himself against the dangers or discomforts arising from the free acts of others. Therefore, the community establishes rules of action to maximize welfare by rationing freedom." It was in this context of rapid urban and suburban growth, around the turn of the century, that the city planning movement

began to become popular. The problems with which the city planning movement was trying to cope were the problems associated with the rapid migration of large numbers of people to the urban areas. This increasing congestion, coinciding with the disappearance of the frontier, spawned the city planning movement, with its attendant regulatory legislation.\textsuperscript{13}

Because the problems were perceived as urban, and because the state legislatures were traditionally dominated by rural interests, the state legislatures typically delegated to local governments the power to regulate land. Professor Ernest Freund summarized the attitude prevailing during that period:

> The exercise of the police power for safety and health is of the greatest importance in closely populated districts. This part of the police power has therefore chiefly grown up in cities, and there today finds its most extensive application. This fact is recognized by an ample delegation of powers of local legislation in this field by the state to incorporated municipalities. . . .

> . . . The principle of delegation seems to be to make the municipal police power co-extensive with local dangers arising from the close aggregation and contact of persons and property in a limited space or territory.\textsuperscript{14}

So well accepted became the idea of state delegation to local governments of the power to regulate the use of land, that when Edward Bassett wrote his evaluation of the first twenty years of zoning law he began chapter one by stating that "[m]unicipalities must obtain their power from the state"—it being obvious that only the municipalities were interested in exercising this power.

Until recent years, therefore, our political system assumed without serious question that land development and urban growth problems were local in nature and occurred only in cities—or in communities that threatened to become cities. It seemed natural that such problems should be resolved by voluntary local action of any local government troubled by these problems—thus the enabling act approach to land use controls.

Despite the wide use by local governments of their powers to control the development of land,\textsuperscript{16} the casual observer usually finds little evidence that the exercise of these powers has significantly di-

\textsuperscript{14} E. Freund, The Police Power 150-31 (1904).
\textsuperscript{15} E. Bassett, ZONING 13 (1936).
verted the process of urban growth from the directions it would have taken in the absence of regulation. Developers will build only that which they think the market will support; they cannot be forced to build something else merely because the local regulations desire another type of development—thus the old cliché that land use regulation can stop growth but not create growth.

But until recently there has not been much stopping of growth either. Although local governments have on paper had wide-ranging and autonomous powers to control growth under the zoning and related enabling legislation generated by the city planning movement, in reality the impact of these local regulations has been dampened by two important factors. First, the political process in outlying communities was frequently dominated by real estate and local business interests that perceived increased growth of the community as beneficial to their financial interest.17 Second, court decisions held that local governments had no power to stop development in outlying areas where there were few immediate neighbors to be directly affected.18 As a result, the energies of suburban communities were traditionally devoted not to stopping growth but to controlling its nature, i.e., keeping out developments that might bring in poor people or minority groups.

The political situation is now changing rapidly. The business and real estate interests increasingly find themselves outweighed by other residents who do not perceive increased growth as beneficial. There is a new mood evident in the public attitude toward urban growth, and its message is “stop.” If courts should begin to permit local governments to use their existing regulatory powers to stop the development of outlying areas, these new political forces are likely to assure that those powers are extensively used. It was in this context that the New York courts considered the new regulatory system adopted by the town of Ramapo.19

III. THE RAMAPO ORDINANCE

The town of Ramapo is located a few miles west of the Hudson River, just north of the New Jersey line, in Rockland County, New York. The opening of the Tappan Zee Bridge made the town an “easy 25-mile commute from the heart of New York City,” and brought a rapid increase of development activity.20 The sudden increase

17. R. Wood, supra note 11, at 180-82.
in activity stimulated the adoption by the town of a development plan in 1966. The plan declared the town’s policy to preserve its “rural, semi-rural and suburban character” by keeping the population increase at a moderate level. It projected a total ultimate population for the area within the town’s jurisdiction of 72,000 people living in 20,000 residences.

The plan further expressed the town’s policy that the areas of greatest residential density should be developed in and surrounding the existing urban areas. Under the plan, however, no part of the town’s jurisdiction was deemed suitable for multiple-family dwellings. Although the town’s zoning ordinance had previously provided for apartments at a density of eight to ten units per acre, the 1966 plan’s highest proposed density was four units of single-family housing per acre. In conjunction with the development plan, the town also adopted a capital improvements program, that set up an eighteen-year schedule for sewerage and drainage facilities, parks and recreation areas, school sites, roads and firehouses.

In 1969 Ramapo adopted a new zoning ordinance imposing “sequential development limitations” on residential subdivision development to “eliminate premature subdivision, urban sprawl and development without adequate municipal and public facilities.” The ordinance requires a subdivision developer to obtain a special “residential development use permit” from the Town Board prior to receiving any building permit, special permit from the Board of Appeals, subdivision approval or site plan approval from the Planning Board. The standards for issuance of the special permit are based on the availability of or proximity to (1) public sanitary sewers or an approved substitute, (2) drainage facilities, (3) improved public parks or recreation facilities including public school sites, (4) state, county or town roads, and (5) firehouses. The relationship of each public facility to the proposed development is rated on a sliding point scale: the more immediate the availability or proximity of the facility to the subdivision the greater the number of points allocated, to a maximum of five per facility.

Development is permitted only when a subdivision accumulates fifteen points under this system. The capital improvements program projects sufficient public facilities to provide the needed fifteen points

22. Id. at 24. The incorporated villages located within the boundaries of the town are not within the town’s jurisdiction. References to “the town” in this article refer only to the area within its jurisdiction unless otherwise noted.
23. Id. at 21.
24. Id. at 22. Interview with Manuel Emanuel, Planning Consultant to the Town of Ramapo, N.Y., Aug. 24, 1972.
for all land in the town at some point during the eighteen-year life of the program.\textsuperscript{26} Therefore, if the capital improvements program is followed, the town will never need to deny an application for a development permit, but can merely delay the effective date of the permit until such time as the needed facilities are to be constructed.\textsuperscript{27}

The Planning Board may grant variances from the point requirement in case of hardship.\textsuperscript{28} A procedure is provided by which developers may request the town to acquire a development easement in order to reduce the tax assessment if valuation is affected by the temporary use restriction, although there is apparently no assurance that the request would be granted.\textsuperscript{29}

Finally, a key provision of the ordinance allows the developer to advance the date of authorization by agreeing to provide such improvements as will bring the development within the required number of points for earlier or immediate development.\textsuperscript{30} Thus, if a developer is willing to construct the needed major roads, firehouses, trunk sewers and treatment plants, and provide the park and school sites at his own expense, he can presumably build anywhere in the town immediately.

A coalition of landowners and homebuilders brought suit in the New York state courts challenging the validity of the ordinance on the grounds that it was ultra vires and void because the power to control growth through sequential development limitations had not been delegated to the town; that it was unconstitutional as an invasion of property rights because it operated to destroy the value and marketability of the property for residential use; and that it uncon-

\textsuperscript{26} The ability of the town to insure that its plan will be followed does not seem completely certain. Sewers are provided by a special district although the district's governing board is apparently identical to the Town Board. See \textit{Rockland County Planning Board, Rockland County Water and Sewer Study 60} (1971). Firehouses are also provided by separate fire districts. Most of the roads in the town are under the jurisdiction of the state or county, and schools are constructed by independent school districts. Interview with John Keogh, Administrative Assistant to Town Boards and Commissions, Town of Ramapo, N.Y., Aug. 23, 1972. Moreover, as a practical matter, construction of many of the facilities may depend on referendums or on applications for federal assistance.

\textsuperscript{27} The \textit{Ramapo} majority opinion apparently gave great weight to the fact that the ordinance only permitted the Planning Board to condition, not to deny, applications for permits. 285 N.E.2d at 298-300 & n.7, 334 N.Y.S.2d at 149-50 & n.7.

\textsuperscript{28} \textit{Ramapo, N.Y., Zoning Ordinance} § 46-13.1 (1966). The town has granted occasional variances for developments in the 12-14 point range, especially when the developer is promising to provide the needed public facilities. Interview with Emanuel, supra note 24.

\textsuperscript{29} 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

\textsuperscript{30} Id.
stitutionally excluded new residents from the community in a manner that violated the equal protection of the laws.31

The case was argued for the town by the draftsman of the ordinance, former town attorney Robert Freilich, now a professor at the University of Missouri-Kansas City School of Law, and the editor of The Urban Lawyer.32 On May 3, 1972, the court of appeals upheld the validity of the ordinance. Judge Scileppi's majority opinion received the concurrence of four other members of the court. Judge Breitel wrote a dissenting opinion in which Judge Jasen concurred.

The majority stated that “[t]he undisputed effect of these integrated efforts in land use planning and development is to provide an over-all program of orderly growth and adequate facilities through a sequential development policy commensurate with the progressing availability and capacity of public facilities.”33 It found the ordinance a legitimate exercise of the zoning power for the purposes of avoiding undue concentrations of population and of facilitating adequate provision for transportation, water, sewerage, schools, parks and other municipal facilities.

The court conceded that insularity of many communities results in distortions of metropolitan growth patterns and the crippling of regional and state-wide efforts to solve the problems of pollution, decent housing and public transportation. Although it recognized the need for regional planning, the court held that the authority to phase growth as envisioned in the Ramapo ordinance was within the ambit of the state’s enabling legislation.34

Although stating that it would not countenance exclusionary zoning, the court found that sequential development and timed growth were not exclusionary but were attempts 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.”35


32. Professor Freilich is so confident that the Ramapo ordinance represents the wave of the future that he has asked the National Science Foundation to fund a $450,000 project to replicate it across the country. Hearings Before the Subcomm. on Urban Affairs of the Joint Economic Comm. on Regional Planning Issues, 92d Cong., 1st Sess., pt. 5, at 460-70 (1971). (The proposal is reprinted as an appendix to Professor Freilich's testimony.) Cf. Freilich, Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning, 49 J. Urban Law 65 (1971).

33. 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

34. Id. at 300, 334 N.Y.S.2d at 150.

35. Id. at 302, 334 N.Y.S.2d at 152.
With respect to the taking of property issue, the court held that since the restrictions were only temporary in nature they could not be considered, on their face, as an unconstitutional taking of the landowner's property. The court pointed out that the landowner's loss is also mitigated by the ordinance's provision for a reduction in tax assessment and for voluntary construction of the necessary facilities by the developer.\textsuperscript{36}

Judge Breitel, in a dissenting opinion, found Ramapo's sequential development ordinance to be beyond the scope of powers either delegated or implied in the state's enabling legislation. He suggested that the ordinance was exclusionary in effect, even if not exclusionary in motive, and that it caused the landowner to suffer substantial economic loss without compensation.\textsuperscript{37} An attempt by a single community to deal in isolation with economic, social and political problems of regional significance, without the benefit of regional institutions or understanding, could be justified only if specifically authorized by state legislation. "Legally, politically, economically and sociologically, the base for determination must be larger than that provided by the town fathers."\textsuperscript{38}

The significance of the \textit{Ramapo} decision goes beyond the particular technique of development timing endorsed by the court. An earlier case\textsuperscript{39} held that local governments could not preclude development in outlying areas where there were no neighboring uses to be injured by the development. The court now holds that when a community has a sound plan for the development of its entire jurisdiction—and whether this plan incorporates development timing or not is perhaps irrelevant—it can preclude development inconsistent with that plan in outlying areas. Before examining the importance of this holding, however, it will be helpful to look in more detail at the theoretical basis for the development timing concept embodied in the Ramapo ordinance.

\textbf{IV. THE DEVELOPMENT TIMING CONCEPT}

The concept of "development timing"—controlling the rate at which development occurs according to an established schedule—has been discussed for many years,\textsuperscript{40} but Ramapo is the first town in which

\begin{footnotes}
\item[36.] \textit{Id. at} 308-05, 334 N.Y.S.2d at 154-56. The effectiveness of the tax assessment reduction features of the ordinance were questioned by Justice Hopkins in his concurring opinion in the Appellate Division. 324 N.Y.S.2d 178, 187-88 (App. Div. 1971).
\item[37.] 285 N.E.2d at 310, 334 N.Y.S.2d at 163 (Breitel, J., dissenting).
\item[38.] \textit{Id. at} 311, 334 N.Y.S.2d at 165.
\item[40.] See Cutler, \textit{Legal and Illegal Methods for Controlling Community Growth on
a complex development timing ordinance, based on a master plan for capital improvements, has received the approval of an appellate court. Underlying the idea of development timing is a rather simple planning concept: development is desirable if it is the logical extension of an existing urban area and can be served by incremental expansion of existing public facilities. Development farther removed from existing urban areas is undesirable.

So conceived, city planning is little more than the translation of basic principles of civil engineering into suggested guidelines for development that minimize the cost of public facilities. This type of plan assumes that a continued extension of the status quo is desirable, and projects the method of achieving this extension with the least expenditure of public funds. It partakes of the flavor of the early city planning movement, which saw no need to examine the impact of its plans on different population groups and their ability to find jobs and housing, on the provision of social services, or on the protection of natural resources or environmental quality.

Given the assumption that a continued gradual extension of present patterns of development according to a well-prepared engineering study would be socially desirable, this pattern of development can be regulated neatly through the use of the development timing technique. Sewers and streets can be most economically constructed if the construction takes place in increments, with each increment of urban growth being directed to the next concentric circle beyond the last existing subdivision. This vision of a gradually expanding urban organism duplicating itself with increased beauty and economy with each succeeding expansion brings to mind the famous crustacean of Doctor Holmes’ poem:

Build thee more stately mansions, O my soul,
As the swift seasons roll!
Leave thy low-vaulted past!
Let each new temple, nobler than the last,
Shut thee from heaven with a dome more vast,
Till thou at length are free,
Leaving thine outgrown shell by life's unresting seal


41. For a list of lower court cases involving earlier attempts at development timing, see N. WILLIAMS, THE STRUCTURE OF URBAN ZONING, AND ITS DYNAMICS IN URBAN PLANNING AND DEVELOPMENT 50-51, 153 (1966).


43. O. HOLMES, THE AUTOCRAT OF THE BREAKFAST TABLE 97-98 (1886). Cf. L. MUM-
It seems anomalous today to consider as a goal of planning that the New York metropolitan area and its constituent parts should continue to reproduce, expanding in successive increments by building new chambers each similar to the last but larger, growing gradually through "domes more vast." Considering the environmental degradation and racial segregation that has been fostered by our present patterns of development, almost any alternative would be an improvement over the present pattern.

Of course, the technique of development timing need not necessarily imply merely an incremental expansion of the status quo. In theory the technique could be used to channel development in any intended direction and to encourage specific types of physical development that might be considerably different from the existing pattern. Thus, for example, development timing could be used to shut off all incremental development in favor of the development of large new towns.44

But any sophisticated use of development timing requires enforceable regional planning policies. If development timing is undertaken by individual local governments, each concerned with the engineering economies involved in the construction of its own public facilities, these economies will inevitably point toward an incremental expansion of existing development patterns.

Under control techniques available prior to Ramapo, local governments had a wide range of discretion in determining the character of development that could be constructed but had no power to prevent or delay development entirely.45 Thus developers have typically had the choice of a wide range of vacant land available for sale for development purposes. After the land is purchased the developer uses an ingenious variety of means to provide municipal services, including private utilities, special districts, or gerrymandered annexations.46 Developers will often go beyond the areas of most logical development to isolated locations on the urban fringe where they can find land at reasonable prices.47

These isolated subdivisions or apartment complexes must be served

45. See Babcock & Bosselman, supra note 10.
by water, streets and sewers. Their remote location means that water and sewer lines must be extended over great distances, resulting in higher costs for these services. Existing public schools in the undeveloped area are inadequate to handle the greatly increased population, resulting in overcrowded classrooms and schools located great distances from pupils. New schools must be constructed, resulting in unwanted taxes for existing residents. Unplanned traffic is created as the new scattered populations make their way to the increasingly distant city. The existing roads are inadequate to handle these problems, and become clogged with traffic, forcing the construction of massive new highway projects. Having constructed these new highways and water and sewer facilities, the governmental agencies then encourage more development that can be assessed to help pay for the facilities. This entire “leapfrogging” process creates a pattern around the edges of urban areas that is aptly characterized as urban sprawl.

That urban sprawl is costly and unaesthetic seems certain. That development timing systems will change the existing pattern of sprawl also seems certain. But this does not demonstrate that every alternative to urban sprawl is an improvement.

V. THE OVERALL IMPACT OF LOCAL DEVELOPMENT TIMING

Consider the probable impact of numerous communities in a metropolitan area, each controlling substantial vacant land situated in the path of future development and each permitting housing only on the land located near its existing urban area for which sewers and other facilities are planned for the near future. What will happen to land prices? It has been pointed out that where a narrow urban-limits policy is adopted “the impact on land development will be considerable. Competition among developers for the potential sites will be more intense, as their number is more limited. More competition for fewer sites will inflate prices, increase densities, or both.”

If the density of housing permitted on the land were allowed to increase in a ratio comparable to the increase in land value, the impact on housing costs might be minimal. The capital improvement

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50. Housing costs, however, may still be increased because the effect of the Ramapotype ordinance will be to increase public facilities costs borne by new residents. Public construction of such facilities usually must be preceded by either a bond issue to be voted on by local referendum or by application for a federal grant from an agency which at the present time receives many more applications than it has funds to disburse. The local government’s plan, therefore, is likely to be contingent either on the approval
plans on which the regulations are based, however, will not permit any increased density because the public facilities are sized for the densities currently projected. Since the whole system is designed to fit the proper size of the streets and sewers, if the system is to have any validity the local government must maintain roughly the same density as currently projected.

Although urban planners have been advocating narrow urban-limits policies for many years, few actual examples can be found in this country for studying the effect of such a policy. Perhaps the best example is in Honolulu County, Hawaii, where the combination of a statewide land use law and countywide zoning and planning has succeeded in implementing a policy of narrow urban limits.

The Hawaiian Land Use Law\(^5\) created the State Land Use Commission and authorized it to divide the state into four zoning districts, only one of which—the urban district—permitted intensive development for housing or other purposes. The policy of the Commission has been to keep the urban district boundary restricted to the general outlines of the already urbanized area and to promote the filling in of vacant land within the urban district before permitting rezoning of land outside the existing urbanized area. Furthermore, when rezonings of the voters at a subsequent election or on the receipt of a grant of federal funds. Since the voters are increasingly likely to reject such referendums, and because the amount of money available from federal agencies is quite limited, developers are likely to be told that the timetable shown in the plan would permit development of their land if only someone—like, say, the developer—would build the trunk sewer. Under existing law the prevailing rule allows local governments to force developers to pay for only those costs of public facilities that are directly generated by their proposed development. See D. Hagman, Urban Planning and Land Development Control Law 253-58 (1971); Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 S. Cal. L. Rev. 1, 56-57 (1971). See also Associated Home Builders v. City of Walnut Creek, 484 P.2d 606, 94 Cal. Rptr. 630 (1972). This rule is more of an academic proposition than a realistic assessment of what goes on. In fact, developers are frequently forced to pay additional sums into particular funds or build facilities of greater capacity than those needed for their own projects, but they find the alternative of litigation so expensive and time-consuming that they forbear from enforcing their legal position. Under the Ramapo decision, however, their presently weak legal position will deteriorate even further. The developer will have three choices. First, he can wait until the voters or the federal agency or both take the necessary action to approve the funds. Secondly, he can build the trunk sewer himself, adding the cost into the price of the housing he constructs. Thirdly, he can go to the court and attempt to prove that the town did not, as the majority in the Ramapo decision put it, "put its best effort forward in implementing the physical and fiscal timetable outlined under the plan," a burden of proof that would be quite imposing, given a complex fact situation similar to the one described.

are permitted they are typically restricted to land immediately adjoining the outer boundary of the existing urban area.\textsuperscript{52}

Because Hawaii's insular location creates additional transportation costs for building materials and provides only a tightly constricted labor supply, there seems little doubt that housing costs in Hawaii would be somewhat higher than on the mainland, regardless of any impact caused by the narrow urban-limits policy. This is true even though the Hawaiian climate makes it unnecessary to provide heating or insulation in most housing. But when one looks at the magnitude of the difference between housing costs for Hawaii and those for the nation—the median value of owner-occupied housing in Hawaii in 1970 was $35,100 as compared to the national median of $17,000—one can hardly help but attribute a large share of these increases to the narrow urban-limits policy and the housing shortage that it has produced.\textsuperscript{53}

Outside of Hawaii, however, there is scarcely any single local government having authority to control the use of land whose jurisdiction includes an entire housing market. The metropolitan areas of the country are expanding so rapidly that individual local governments can best be thought of as occupying one small portion of a giant "urban field" that includes most of the northeast United States.\textsuperscript{54} The city "has not just grown bigger than its boundaries—it has outgrown the concept and vocabulary of the city itself."\textsuperscript{55}

The Commission on Population Growth and the American Future recently pointed out that the territory of metropolitan America has expanded even faster than its population, producing ever lower population densities over the total urbanized area.

Roads and communications extend the reach of today's metropolitan areas deep into their hinterland. Villages and towns become part of the city-system, grow, and the metropolis expands . . . the most extensive depopulation in the contemporary United States is occurring in central cities of metropolitan areas . . .

. . . Declining central cities lost more people in the 1960's than were lost by declining rural counties . . . Continuing dispersal and

\textsuperscript{52} See generally F. Bosselman & D. Callies, The Quiet Revolution in Land Use Control 22-24 (1971).

\textsuperscript{53} Id. at 25-28.


\textsuperscript{55} Ylvisaker, The Shape of the Future, in Metropolis: Values in Conflict 63, 68 (Elias, Gillies & Riemer eds. 1964).
expansion means that the density of the central cities and of the great metropolitan areas as a whole is falling slightly as the border gets pushed further and further outward.

The territorial expansion of metropolitan areas has resulted from the movement of business and the more affluent and white population out of the central city, and from a shift in the locus of new growth—residential, industrial, commercial—to the expanding periphery. . . . The suburban resident has a decreasing need to come into the city. Many work at industries along the beltways circling many cities.66

Ramapo and its counterparts will increase this trend. If more and more towns adopt development timing a major increase in housing costs can be expected. This will effectively exclude all but upper income groups from the areas that adopt development timing by restricting the amount of land available for housing and increasing its cost. Development will be forced farther and farther into the rural areas that form the fringe of the urban field.

Ironically, Ramapo defended its ordinance as a means of preventing urban sprawl, and the majority of the court of appeals accepted it on that basis.57 But, by preventing urban sprawl within its own borders, Ramapo is contributing to the far more serious problem of megalopolitan sprawl. This means the loss of usable open space and the need for more major highway construction.

Supporters of local stop-growth movements argue, however, that stopping growth can be justified as the first step in a general rebellion against the present patterns of development. The ideological leadership of the movement is provided by the Sierra Club and other organizations that see the imposition of limits on growth as a general corollary to the zero population growth movement.58 One who witnesses one of these public meetings where grandmother and granddaughter stand shoulder-to-shoulder agreeing perhaps for the first time on one thing—that all their problems are caused by the nasty developer—can hardly avoid a feeling of open-mouthed amazement.

That the imposition of local limitations on growth is a foolish response to a serious problem seems so self-evident that it would be hardly necessary to spend time arguing the point were it not for the tremendous increase within the past year of the popularity of the stop-

57. 285 N.E.2d at 295, 334 N.Y.S.2d at 143.
58. See Luten, Progress Against Growth, Sierra Club Bulletin, June 1972, at 22.
growth movement.\textsuperscript{59} Obviously, the overall growth of the nation depends on the number of people who are born, immigrate, emigrate and die. Stopping the growth of Livermore or Boulder or Palm Beach does not reduce the nation’s population growth; it merely directs it somewhere else. While it may be in the self-interest of the existing residents of a particular municipality to divert the problems caused by growth onto other areas and other people, it is fraudulent to justify this diversion on the grounds of environmental improvement unless some impartial source has evaluated the environmental impact of the various alternatives. The wolf of exclusionary zoning hides under the environmental sheepskin worn by the stop-growth movement.

The majority of the court of appeals were obviously concerned that the elaborate mechanism of the Ramapo ordinance might conceal an exclusionary purpose.\textsuperscript{60} The court was impressed, however, with the town’s argument that it had not only built “biracial low-income family housing,”\textsuperscript{61} but had even defended its proposals for such housing against litigation brought by some of its own residents.\textsuperscript{62}

Interviews with local officials indicate that this housing has now been completed. It consists of approximately 200 units, seventy-five percent of which are designed for and occupied by the elderly, all of whom are white. About fifty units are occupied by low-income families, ten to twenty percent of which are black. No further low-income housing is contemplated.\textsuperscript{63}

Without denying the noble intentions of the town’s officials, evidence such as this hardly justifies the court’s assertions that Ramapo seeks “to provide a balanced cohesive community dedicated to the efficient utilization of land,” that it has made “a bona fide effort to maximize population density consistent with orderly growth” and that it seeks “to maximize growth by the efficient use of land.”\textsuperscript{64} The town permits no multiple-family dwellings at all, and insists on large lot sizes for single-family homes.\textsuperscript{65} The average lot size under the


\textsuperscript{60} 285 N.E.2d at 302, 334 N.Y.S.2d at 152-53.

\textsuperscript{61} Id. at 295 n.2, 334 N.Y.S.2d at 143 n.2. See Brief for Respondents-Appellants, supra note 20, at 7.


\textsuperscript{63} Interview with Keogh, supra note 26.

\textsuperscript{64} 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

\textsuperscript{65} The majority cites recent decisions of the Pennsylvania Supreme Court holding invalid a complete prohibition of multiple family dwellings, Appeal of Girsh, 263 A.2d 395 (Pa. 1970), and minimum lot sizes exceeding one acre, Appeal of Township of Concord, 268 A.2d 765 (Pa. 1970), but distinguishes the Ramapo ordinance because it “does not impose permanent restrictions upon land use.” 285 N.E.2d at 302, 334 N.Y.S.2d
zoning ordinance is 40,000 square feet, or approximately one acre, and many areas are restricted to two-acre lots. In general, the ordinance seems to have succeeded in limiting the number of building permits to the level of 300 to 350 housing units per year as contemplated by the master plan; the prices of these homes start at $40,000 to $45,000.

The court stated that "[w]e only require that communities confront the challenge of population growth with open doors." But a door that is open just a crack will apparently suffice. And if Ramapo can obtain immunity from judicial inspection of the exclusionary effects of its regulation by providing homes for five or ten black families in a town that projects its ultimate population as 72,000, there are few other communities that would be unwilling to make the same "sacrifice." If the court is willing to accept this degree of tokenism, adoption of the Ramapo approach by other towns is not likely to be impeded by a judicial finding of exclusionary intent.

Summarizing at this point, then, ordinances of the Ramapo type, if they become commonplace, will encourage the clustering of new development around the fringes of existing settlements and the excluding of new development from large areas where it now typically takes place. The impact of a proliferation of such ordinances would be to create a series of communities made increasingly exclusive by raised housing costs and to exaggerate the trend toward megalopolitan sprawl. The current mood of the suburban population and the lack of vigilance expressed by the court of appeals is likely to produce a wide proliferation of Ramapos not only in New York but throughout the country.

What can be done? Three approaches seem worth considering, a discussion of which will form the basis for the rest of this article: (1) affirmative intervention in the land market to counteract the effects of exclusionary zoning; (2) additional litigation designed to induce the courts to apply new judge-made standards to local zoning actions; and (3) state legislation that would provide some sort of regional planning review of suburban zoning.

at 152. It is hard to see why an ordinance that allows large lot development over a whole township is more exclusionary than one that gives the developer a choice between large lot development and no development at all.

68. 285 N.E.2d at 302, 334 N.Y.S.2d at 153.
69. The record contained little evidence of this issue since the challenge was directed to the ordinance on its face. This makes it hard to see how the majority could have expressed its conclusions with such certainty.
70. Other alternatives are obviously possible, e.g., voluntary action by suburban
VI. LAND BANKING

One means of counteracting the effect of widespread use of development timing for exclusionary purposes would be an extensive program of land banking that would acquire and make available to potential developers sufficient land to serve as a ceiling on land prices. Such a program might hold down the upward spiral of housing costs likely to be engendered by the Ramapo decision.

Proponents of this type of land banking program frequently cite the experience in Sweden and the Netherlands where for many years the large cities have been in the business of acquiring land for future developments. Stockholm, in particular, is the city that has used the land banking system to the greatest extent. It has purchased large tracts of land in the suburban area and thereby precluded the typical suburban development that characterizes the outlying areas of most cities. Instead, Stockholm has developed a number of new communities, often cited as models of gracious living, linked with a central city by mass transit.

Many students of urban planning who have examined the Swedish system have advocated its use in this country. John Reps is one of the most persuasive advocates for the creation of such a land banking system:

Land at the urban fringe which is to be developed for urban uses should be acquired by a public agency. Acquisition, in fact, should run well ahead of anticipated need and include the purchase or condemnation of idle and agricultural land well beyond the present urban limits. The public agency, therefore, should be given territorial jurisdiction which includes not only the present central city and surrounding suburbs but a wide belt of undeveloped land.

The advantages of a land banking system were excellently summarized in a recent paper prepared for the House Subcommittee


Such a land bank would stabilize the land market in much the same way as the Federal Reserve Bank stabilizes the money market. It would reduce land price fluctuations and improve the functioning of the private land market by releasing land from its inventories according to an overall plan of development. The Douglas Commission recommended that state governments enact legislation enabling the acquisition of land in advance of development for the following purposes: "(a) assuring the continuing availability of sites needed for development; (b) controlling the timing, location, type, and scale of development; (c) preventing urban sprawl; and (d) reserving to the public gains in land values resulting from the action of government in promoting and servicing development."

Is it feasible to consider a land banking program within an urban field the size of that surrounding New York City? In New York State, the vehicle for a land banking program is already theoretically available in the Urban Development Corporation, which has the power to acquire and develop or sell for development land throughout the state. It is questionable however, whether the Urban Development Corporation could realistically expect to find either funds or political support sufficient to undertake the massive land banking effort needed to counteract a severe constriction in the supply of land available for development. The Urban Development Corporation is currently attempting to provide housing sites in Westchester County on a much less extensive scale than would be necessary to provide the market-influencing function said to characterize land banking. The strength of the adverse reaction to these limited efforts leads one to suspect that large-scale land acquisition by the Corporation would be greeted with violent opposition by the residents of the suburban area. Nevertheless, this alternative certainly deserves serious consideration.

76. Id. at 935. See also Reps, supra note 74, at 51-52.
77. NATIONAL COMM’N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 251 (1968). Similar proposals may be found in the reports of other urban policy task forces. See President’s Comm. on Urban Housing, A Decent Home 144-46 (1969); President’s Council on Recreation and Natural Beauty, From Sea to Shining Sea 115-16 (1968); Puerto Rico Planning Bd., Urban Land Policy for the Commonwealth of Puerto Rico 95-106 (1961); New York State Urban Development Corp. and New York State Office of Planning Coordination, New Communities for New York 64-66 (1970).
VII. GREATER JUDICIAL SCRUTINY

Judge Breitel, in his dissent, concluded that the majority's "unsupportable extrapolation from existing enabling acts" to uphold the Ramapo ordinance "without considering the social and economic ramifications for the locality, region, and State . . . is unsound as well as invalid." 80 The majority's refusal to force Ramapo to support its assertion that it sought a balanced community 81 is consistent with the judicial attitudes in most states. The courts have generally given local zoning decisions a presumption of validity. 82 Many courts say they will uphold the local action if it is "fairly debatable" or unless some other extraordinary burden of proof is borne by the plaintiffs. 83

When the plaintiff has the usual complaint that he is being unfairly treated in regard to his neighbors or that his property values are being reduced by an unwarranted amount, the quantum of relevant facts is at least manageable. 84 But a truly herculean burden is encountered when he seeks to demonstrate what Judge Breitel described as the "social and economic ramifications for the locality, region and State." 85

In recent years the advisability of this allocation of the burden has increasingly been questioned. In Vickers v. Township Committee, 86 the majority of the New Jersey Supreme Court, relying in part on the

80. 285 N.E.2d at 309, 334 N.Y.S.2d at 162.
81. "Ramapo, far from excluding the poor, has fought to make available hundreds of units of public housing, which is integrated, and for low and moderate income families." Brief for Respondents-Appellants, supra note 20, at 39.
83. Of course, the extent to which courts will inquire into local decisions varies from state to state and over time. As Norman Williams has pointed out:
   The proper role of the courts . . . is of course a standing controversy; and in the rapid flux of current zoning law, attitudes on this problem have almost reversed themselves. Twenty years ago, the principal problem was to keep the courts from arbitrarily upsetting almost all zoning regulations; and in some states—for example Michigan, and sometimes Illinois—this is still problem no. 1. Yet in other states—notably New Jersey, and sometimes California—the courts have gone almost to the opposite extreme, automatically and uncritically approving any local action on which someone has pinned the label "planning."
   N. Williams, supra note 41, at 55.
84. Plaintiffs do at times succeed in persuading the courts that the local decision is invalid. David Trubek has commented that "One of the most striking things about the area of judicial review of state zoning powers is not how few cases the courts take—which is what one would predict from the existence of the presumption of validity—but rather how many they take, and the number of times that local restrictions are overturned." Trubek, Testimony Before the U.S. Commission on Civil Rights, Exhibit No. 92, at 841 (June 16, 1971).
85. 285 N.E.2d at 309, 334 N.Y.S.2d at 162.
86. 181 A.2d 129 (N.J. 1962).
presumption of validity of municipal action, upheld an ordinance prohibiting trailer camps in certain areas of the town. In his influential dissenting opinion, Justice Hall attacked this reliance. "Judicial scrutiny has become too superficial and one-sided. . . . '[T]he presumption of validity . . . is only a presumption and may be overcome or rebutted not only by clear evidence aliunde, but also by a showing on its face or in the light of facts of which judicial notice can be taken, of transgression of constitutional limitation or the bounds of reason.'"87 Justice Hall suggested that municipalities be given the burden of justifying their actions when there is a possibility that they have gone to a doubtful extreme.88

The Supreme Court of Pennsylvania, Justice Roberts writing for the court in National Land & Investment Co. v. Kohn,89 also recognized that the presumption of validity has a dubious base in logic:

[W]e must also appreciate the fact that zoning involves governmental restrictions upon a landowner's constitutionally guaranteed right to use his property, unfettered, except in very specific instances, by governmental restrictions. The time must never come when, because of frustration with concepts foreign to their legal training, courts abdicate their judicial responsibility to protect the constitutional rights of individual citizens. Thus, the burden of proof imposed upon one who challenges the validity of a zoning regulation must never be made so onerous as to foreclose, for all practical purposes, a landowner's avenue of redress against the infringement of constitutionally protected rights.90

A recent decision of the Michigan Court of Appeals reached a similar result in regard to a refusal to rezone land for a mobile home park.91 In view of the "massive nationwide housing shortage," the court held that mobile home parks occupied a "preferred or favored" status, causing the burden of proof to shift to the municipality whenever it sought to exclude a park.

These courts are correct in removing the presumption of validity and shifting the burden of proof in any case where local regulations are not based on an effective system of regional planning. The constitutional issues inherent in these cases are too important to be allowed to escape effective judicial review.92 It has been argued that

87. Id. at 143-44.
88. Id. at 144.
90. Id. at 607. See also Appeal of Township of Concord, 268 A.2d 765 (Pa. 1970).
92. It would unduly lengthen this article to discuss the nature of the constitutional
detailed review of the factual circumstances of local zoning decisions is a function for which the courts are ill-equipped because of the lack of legislatively-stated policies on which to base decisions, the political implications of the subject and the complexity of the fact and value issues presented.93

[I]t would be unwise for anyone to assume that the state courts will take on the issue except in extreme circumstances, and wrong to establish a policy that would try to make them do this without a major legislative change of the basic land use control system which would create standards and rules that courts might usefully apply.94

It is unquestionably difficult for courts to fashion the type of simple standards usually thought appropriate for interpreting constitutional provisions and to enforce the standards in a manner that will have a beneficial impact on the urban growth process. The land development business has so many complex facets that enforcement of simple "rules of thumb" may produce complex and unexpected results. Consider, for example, the elimination of large minimum lot size requirements. Assume that the court eliminated all density requirements.95 Developers could now put as many dwelling units on an acre of land as they wished. But low-income housing developers must operate on a very strict budget, and the land that has sewer and water utilities sufficient to support such housing may be too expensive for them. The owners of any land that is even remotely susceptible to future high density development can be expected to ask a price beyond the means of the low-income developers; but it will be a price they can reasonably expect to receive because of the great demand for sites for other types of housing.

Observation will reveal that most low-income housing outside central cities is built on land originally zoned for low densities and rezoned at the request of the developer. If that is true, then, in one sense exclusionary zoning is the best ally the low-income housing developer has—the more exclusionary the better. It keeps the price of land down to where he can afford it. The best way for a community issues that are raised by local exclusionary efforts. The subject has received extensive attention in the law reviews. A good general summary of the constitutional arguments is found in Aloi & Goldberg, Racial and Economic Exclusionary Zoning: The Beginning of the End, 1971 URBAN L. ANN. 9. The assumption is made that if the courts seriously examine the factual context of current zoning practices they will find them in violation of one or more constitutional or statutory provisions.

93. See Trubek, supra note 84, at 851.
94. Id. at 853.
to avoid low-income housing might be to zone all its land not for five-acre lots but for quarter-acre lots; then no low-income developer could touch it.

Or consider the standard apparently adopted by the Ninth Circuit in *Southern Alameda Spanish Speaking Organization v. Union City*.

In this case the plaintiff sought to construct low-income housing to serve Mexican-American residents of the community who were being displaced by code enforcement and by freeway projects. The court said:

"Surely, if the environmental benefits of land use planning are to be enjoyed by a city and the quality of life of its residents is accordingly to be improved, the poor cannot be excluded from enjoyment of the benefits. Given the recognized importance of equal opportunities in housing, it may well be, as matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low-income families, who usually—if not always—are members of minority groups."

The court seems to be saying that if a community has existing residents who are poor or members of minority groups, it has an obligation to see that housing is made available for them. While this principle may sound appealing, its converse implications are appalling. It implies that a community that has managed so far to avoid any low-income residents may continue to avoid them in the future, and that low-income residents have a "right" to remain in the communities in which they now reside.

It seems likely that the enunciation by the courts of simple and basic principles that sound appealing on their face may have results far different than originally intended when applied to land development. Consequently fears of judicial incapacity to resolve these problems seem well warranted. But one can agree completely that it is desirable for courts to serve as permanent arbiters of local planning decisions and still believe in the desirability of judicial intervention mainly as a catalyst to secure the ultimately more desirable legislative action. "As in the passionate areas of school segregation and reapportionment, legislative action in the agitated field of private land use will probably be forthcoming only when the bench challenges the current posture of the law." The political resistance to effective regional planning is very powerful. Additional impetus in the form of

96. 424 F.2d 291 (9th Cir. 1970).
97. Id. at 295-96.
98. Babcock & Bosselman, supra note 10, at 1090.
court-imposed sanctions might be extremely helpful in persuading local officials of the desirability of significant regional policies.

VIII. REGIONAL PLANNING MECHANISMS

Both the majority and dissenting opinions in the Ramapo case suggested with unusual frankness that the legislature should pass new laws that would extricate the courts from the dilemma that the instant case presented.99 The majority extolled the virtues of regional planning:

Of course, these problems cannot be solved by Ramapo or any single municipality, but depend upon the accommodation of widely disparate interests for their ultimate resolution. To that end, State-wide or regional control of planning would insure that interests broader than that of the municipality underlie various land use policies.100

But in reality regional planning has been frequently extolled and rarely implemented.

Planning in the United States in the early part of this century was conceived as synonymous with city planning.101 The problems for which planning was seen as a solution were viewed as local problems susceptible to local solutions. Beginning late in the nineteenth century, however, the growth of most central cities by annexations slowed and the creation of separate and independent suburbs increased. People began to think of the central city and its associated suburbs as a single region. Gradually the recognition grew that problems pervaded the entire region, but the mutual antagonism of the central city and its suburbs overcame any desire they might have had to find common solutions.102

Regional planning in the United States began outside of any governmental framework with the growth of citizen-sponsored regional planning societies.103 Gradually most states passed enabling legislation

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100. Id. at 300, 334 N.Y.S.2d at 150.
102. M. SCOTT, supra note 42, at 174-76.
103. B. McKELVEY, THE EMERGENCE OF METROPOLITAN AMERICA, 1915-1966, at 61 (1968). The Regional Plan Association in the New York area began as a voluntary organization made up of "leading citizens" who were interested in the growth of the New York...
for the creation of agencies to undertake regional planning. But these government-authorized regional planning commissions tended to follow a typical pattern: they were advisory bodies made up of leading citizens interested in planning, appointed by the heads of local governments. The commissions were given the function of preparing regional plans, but neither the plans nor the commissions had the powers necessary to make them effective.

When the federal government began to develop the interstate highway program in the late 1950's, it became apparent that the absence of effective regional planning would seriously hamper the highway network. All too often the federal and state highway agencies could find no one who could even predict, much less control, the location where future development would take place. In response, Congress attached to the Federal Aid Highway Act of 1962 a requirement that regional transportation planning be undertaken for metropolitan areas. At about the same time, Senator Edmund S. Muskie's subcommittee instituted a series of studies of metropolitan planning in the United States that found that the existing system of metropolitan planning was largely ineffective. The studies concluded that the power to control major decisions lay with the elected officials of local governments, but that the existing regional planning agencies had little influence on these local governments.

Out of these studies came a federal recommendation that the metropolitan planning agency should be a Council of Governments made up of elected public officials from the local governments in the metropolitan area—a requirement that was designed to squeeze out the typical, metropolitan agency based on the "leading citizen" model.

area. It undertook the preparation of regional planning studies, educated the public in the need for planning and criticized the plans of local governments if they overlooked the regional interest. But RPA's function from the beginning has been purely advisory, and its plans and recommendations have no legal force and effect. See M. Scott, supra note 42.

104. Joint Center Study, supra note 101, at 52.
105. Id. at 62-65.
108. See Joint Center Study, supra note 101, at 88, 121-22.
109. Charles Haar, then Assistant Secretary for Metropolitan Development, explained
The federal impetus for metropolitan planning remained academic and received little attention in the early 1960's because federal law gave metropolitan planning agencies no explicit function. This changed with the creation of the A-95 program (so called because its guidelines are set forth in Budget Bureau Circular No. A-95). Originally established under the Demonstration Cities and Metropolitan Development Act of 1966, the A-95 program requires applicants for grants-in-aid under certain federal programs to submit their applications to the appropriate metropolitan planning agency for review and comment. Typically the applicants are local governments or special districts seeking federal aid to construct public facilities. The comments of the regional planning agency are not binding on the federal agency that awards the grant, but because the federal agency typically has more applicants than funds, an adverse comment from a regional planning agency is often the kiss of death.

Unfortunately, however, this program of regional planning has not proven to be very effective. After reviewing the performance of the regional planning agencies for the Presidential Task Force on Governmental Reorganization, Melvin Mogulof concluded that these Councils of Governments are generally weak and ineffective because the member governments do not want them to emerge as an independent source of regional influence but prefer to view them as coordinators that serve to ensure the continued flow of federal funds. The operation of a regional agency has been described as "backscratching." "I'll vote for whatever you want in your county because I expect you to vote for whatever I want in my county."

The problems to which metropolitan planning is addressed are public problems. Public action is required for their solution . . . . But, where public action is desired, public money is required. And our political credo since the days of the Stuart kings has been that gathering and spending public money is the duty and responsibility of elected officials, and of those nearest the electorate at that . . . . Elected officials have tended to look beyond the fairly circumscribed interests of professional planners. The necessity of returning to their constituency makes officials more responsive to public needs. It makes them more inclined to seek practical means of meeting those needs.

On the whole, I think it is probably valid to assume that councils of governments tend to be more realistic citizen planning agencies. They do not tackle many of the grand issues professional metropolitan units have faced. But they get more done, albeit by sticking to more limited and perhaps more feasible issues.

The weaknesses of the currently popular system of regional planning have caused many commentators to demand more powerful and effective methods. Some areas have taken steps toward creating a strengthened agency for regional planning. The Metropolitan Council of Twin Cities in Minnesota is the leading example of a regional planning agency, the members of which are appointed by the governor with the advice of the legislature. It exerts strong and independent powers to control metropolitan growth in the twin cities area. The Atlanta region also seems to be moving in this direction, but the difficulties encountered by attempts to force strong metropolitan planning have been great.

When a metropolitan area includes parts of more than one state (Ramapo's includes substantial segments of three states—New York, Connecticut and New Jersey), the problems are doubly severe. In 1965, in response to the demands of federal highway legislation, a Tri-State Transportation Commission was created for the New York metropolitan area by interstate compact and implementing legislation from the three states. The Commission's primary function was planning new highway locations for the region. When the A-95 program was instituted, the Commission was the only agency capable of undertaking any regional planning function. To comply with the A-95 requirements, the compact legislation was amended to change the Commission's name to the Tri-State Regional Planning Commission.

At the present time, the Commission still functions primarily as a transportation planning agency. Nevertheless, it has begun tentative steps toward a broader planning approach. A staff-prepared housing plan has been prepared and will be presented to the Commission in 1972-1973. The plan seeks to allocate the annual need for each sub-region by structure type and income class. The staff, however, pro-

119. The Metropolitan Regional Council is a voluntary association of mayors of local governments in the region, but it has never undertaken any regional planning.
121. Of a proposed budget of about $11.5 million for 1972-1973, all but about $1.5 million is for transportation related programs. TRI-STATE REGIONAL PLANNING COMMISSION, CONTINUING COMPREHENSIVE PLANNING PROGRAM AND JOINT REGIONAL PLANNING 150 (1972).
122. Id. at 34. At the present time it is estimated that perhaps eighty percent of
poses no system for enforcing compliance with its plan, and the Commission is prohibited from involving itself in actual land use decisions under the terms of the interstate compact by which it was created.\(^2\)

Insofar as the A-95 program is concerned, the Commission has concluded that its geographical area is too vast to allow review by the Commission or its staff of most applications for federal funds. Consequently, it has delegated to the county planning agencies its authority to review applications except for those projects that its staff classifies as of regional significance.\(^2\) Approximately eighty-five to ninety percent of local applications are approved without any difficulty, and the remaining applications are usually approved after modification.\(^2\)

Meanwhile, the state of New York was working on its own program of regional planning. Governor Rockefeller created the Office of Planning Coordination, an agency that became the most powerful state planning organization in the country. It embarked on a massive project of reorganizing state programs through a planning-programming-budgeting system.\(^2\) As part of its project it created eleven multi-county regional planning districts within the state\(^2\) and proposed legislation that would give these regional agencies power to review new development decisions affecting certain areas of critical state concern.\(^2\) The Office of Planning Coordination wanted county and regional planning agencies to review all "public and private actions which, because of their size or nature, would directly or indirectly affect more than one municipality . . . ."\(^2\) During 1971, however, the legislature abolished the Office of Planning Coordination\(^3\) and its proposed legislation has remained dormant.

The Office of Planning Coordination issued, as one of its last acts, the New York State Development Plan, which projects extensive

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2. \textit{Interview with Deturk, supra} note 118.
4. \textit{Interview with Carroll, supra} note 124.
7. \textit{New York State Office of Planning Coordination, New York State Planning Law Revision Study (Study Document No. 4, February 1970)}.
8. \textit{New York State Office of Planning Coordination, supra} note 127, at 86.
population growth for the area in Rockland County occupied by Ramapo, designating it for population densities in the range of 2,000 to 10,000 persons per square mile. "By virtue of its key location, this sector of the New York urban area will experience great population increase in the coming decades. Development pressures, now so evident in the southern end will move progressively north [to the Ramapo area] as the state gives priority to providing facilities to sustain this growth."  

The state plan, like the various regional plans, has no force and effect. No private developer nor governmental agency has any legal obligation to pay it any attention whatsoever. It seems fair to say, therefore, that the impact of regional planning on Ramapo—or any other town in the region—is minimal. If a town chose to embark on a massive development program, it might be forced to negotiate with the county and regional agencies to obtain the federal funds necessary to finance the development. If, however, its goal is to exclude development, it has the legal power to implement these policies regardless of the opinions or plans of any state, regional or federal agency.

Both the majority and dissenting opinions in Ramapo proclaim the need for regional planning and cite the tentative drafts of the American Law Institute’s Model Land Development Code as an example of a statute that authorizes development timing, but in a context of regional planning. If it is reasonable to assume that the enabling legislation will soon be revised to provide a stronger role for regional planning, then fears of the adverse effects of the Ramapo decision may be unfounded.

Much of the existing enabling legislation for planning, zoning and subdivision control remains based on model statutes that were drafted by the Department of Commerce in the 1920’s. In the mid-1960’s the American Law Institute concluded that it was advisable to begin a project of drafting new model legislation to supplant these forty-year old models. The new legislation was designated a “Model Land Development Code.” Five tentative drafts have appeared to date, covering in all about three-fourths of the total material eventually to be encompassed within the Code.

The draftsmen of the Model Code have tried to weight evenly the

131. New York State Office of Planning Coordination, supra note 127, at 54.
134. Tentative draft number one was published in 1968, number two in 1970, number three in 1971, number four in 1972 and number five in 1973.
need for state or regional participation in land use decisions, the values of participatory democracy that our existing system has done so much to foster, and the risk that any regulatory process can become too costly and time-consuming. They attempted to resolve these conflicting values by defining the major development problems and providing for state or regional participation in only these major decisions, leaving the great majority of cases within the sole jurisdiction of local government. In addition, by providing that the state shall participate only on appeal from an initial decision of any agency of local government, the Code drafts preserve the expertise of local people to solve local problems. The time and expense of state review is conserved by limiting it to major decisions and by providing that the review shall be of the record made at the local hearing, thus eliminating the need for duplicate hearing procedure.

Identifying what constitutes “major” development decisions, which invoke state level review, is obviously a difficult problem. The Code drafts have adopted a threefold definition authorizing state or regional participation in: (1) all development proposals in certain districts declared to be “districts of critical state concern”; (2) all decisions regarding certain types of development alleged by the developer to be “development of state or regional benefit”; and (3) all decisions involving “large scale development” having a state or regional impact.\(^\text{135}\)

The tentative drafts also recommend a substantially increased state participation in planning for land development. The state planning agency would be authorized to prepare state land development plans, which might cover the whole state or any region thereof, or a multi-state region if approved by an interstate compact.\(^\text{136}\) Each plan would be a comprehensive plan rather than a plan concentrating on any single function.\(^\text{137}\) Within this framework, however, most of the planning and regulation would continue to be handled at the local level.\(^\text{138}\)

The tentative drafts of the Model Land Development Code would authorize local governments to tie the issuance of “development permits” (a combined procedure that replaces existing zoning and subdivision control permits) to a land development plan using a system of development timing.\(^\text{139}\) The exercise of these powers by local governments is, however, limited by the authorization for state and re-


\(^{136}\) See generally ALI MODEL LAND DEVELOPMENT CODE art. 8 (Tent. Draft No. 3, 1971).

\(^{137}\) Id. § 8-402.


\(^{139}\) Id. §§ 3-202, -105.
Regional planning and by the supervision of local regulations found in articles seven and eight of the Model Code. Thus, section 8-405 authorizes the state planning agency or any regional agency designated by it to prepare state or regional land development plans for any region of the state. Once a state or regional plan is adopted, any local land development plan that the state agency finds inconsistent with the state or regional plan is not entitled to any weight in support of the validity of any local government action. Thus, once a state or regional plan is adopted, the local government can enforce a development timing mechanism only if its own local land development plan is consistent with the state or regional plan.

Under article seven of the Code, the state may become involved even more directly in certain types of land development decisions. Thus, certain portions of the state can be designated as "districts of critical state concern." Certain types of development may be designated as "development of state or regional benefit," or as "large scale development." If any application for a development permit is within an area so designated or involves development of the type designated, the local decision in regard to the development permit must include a consideration of the overall impact of the development on the surrounding region. Additionally, such decisions are appealable to a state land adjudicatory board, which may review the local government's decision in regard to a regional impact of the development. Under the system proposed by the Code, local governments could be authorized to use systems of development timing with confidence that they would fit into an overall state or regional planning system.

141. Id.
142. See id. § 8-405(2) & note. This section provides that such plans are adopted when they have been submitted to the legislature and no action is taken to disapprove the plan within ninety days. At the annual meeting of the American Law Institute in 1971, however, it was agreed that the next draft of the Code would include two alternative proposals for methods of adopting the plans: the first being a full scale submission to the legislature for approval; the second being an adoption of the plan by gubernatorial action without any legislative approval. Future drafts of the Code will contain these three alternatives.
143. Id. § 8-502 (3).
144. Id. § 7-201.
145. Id. § 7-301.
146. Id. § 7-401.
147. Id. § 7-502.
148. Id. §§ 7-701 to 704.
149. Although the Model Code is still over a year away from publication of a final draft, the state of Florida recently passed the Environmental Land and Water Management Act of 1972, Fla. Stat. ch. 380 (Supp. 1972), which provides for supervision
Federal legislation currently pending in Congress would provide grants-in-aid to the states to work on state and regional planning programs containing similar types of control by state or regional agencies over local decisions. On June 21, 1973, the Senate passed S. 268;150 similar legislation is under consideration by the House Interior Committee and passage is expected in the 1973 session of Congress. The legislation is expected to contain provisions requiring the states to establish some system to ensure that development of state or regional benefit is not excluded through the actions of local governments.

The trends clearly seem to indicate that state legislation will increasingly give state or regional agencies a supervisory role over major land use decisions made by local governments. Whether or not this legislation follows the format of the ALI model, it appears likely that some form of state supervision will be a key element of future legislation.

IX. Conclusion

Local government's assertion of the power to undertake development timing might be at least partly beneficial if any of three conditions existed: an effective system of regional planning, an extensive program of land banking, or detailed judicial scrutiny of the effects of development timing. None of these now exists. Consequently, authorizing local governments to exercise development timing power might be analogized to giving dynamite to a baby. It is a risky business, but at least it induces the parents to watch the child more closely.