Growth Management
Fact Book
Third Edition

PREPARED BY

ROBINSON & COLE LLP
ATTORNEYS AT LAW

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PREFACE

This updated edition of the *Growth Management Fact Book* has been prepared by Robinson & Cole LLP as consultant to NAR. As an updated resource in NAR’s Smart Growth program, the *Fact Book* is intended to help REALTORS® at the state and local level better understand and respond to growth management and sustainability initiatives in their communities.

The *Fact Book* supplements, but does not substitute for, the more focused assistance provided by NAR through its Land Use Initiative Program. Its purpose is to provide NAR’s member associations with a basic framework and reference source for engaging their fellow citizens and local officials in a productive dialogue about how, when and where growth should take place in their communities.

Brian W. Blaesser  
Robinson & Cole LLP  
*December 2011*
SECTION 1: INTRODUCTION

This 2011 edition of the NAR Growth Management Fact Book provides REALTORS® with an update of factual information and analyses concerning modern growth management (aka “Smart Growth”) initiatives and techniques. The publication of this Fact Book reflects NAR’s belief that REALTORS® must be able to engage with citizens, legislators and government officials effectively on regulatory issues of importance to the real estate industry. The Fact Book is designed to keep REALTORS® well informed and help them develop well-reasoned policy positions on growth management-related issues at the national and local levels.

In the Introduction to the 2008 edition of the Fact Book we noted that the Smart Growth movement that began in the 1990s has now converged with two other movements — New Urbanism, and Green Building — and that this convergence has profoundly influenced government land use and development policies, and the minds of the consuming public. Today, “sustainability” has become the overarching principle for the fundamental objectives of these three movements — quality and management of growth, compact urban form and attention to the relationship of buildings and the Public Realm, and sustainable building design, construction and land development. The implementation of these principles through government regulation and private sector initiatives has dramatically affected the marketplace in which REALTORS® work.

Even though the public discourse today on land use and development issues is more often framed in terms of “sustainability,” that discourse, at its core, concerns how best to “manage” and shape the “form” of real estate development to achieve desired outcomes concerning the rate, amount, type, location, character and quality of growth that occurs. For this reason, this 2011 edition of the Fact Book continues the five-part structure which covers the basic objectives that growth management techniques seek to address. These are:

- Location, density and rate of growth
- Public facilities and infrastructure
- Protection of natural resources and environment
- Preservation of community character
- Affordable housing

As in the 2008 edition, each of these broad categories is followed by sections describing specific government regulatory techniques utilized to address the issues involved. This new edition has been expanded to include a new section on Land Banking.

The discussion of each growth management technique focuses on the following key questions and concerns that REALTORS® should have regarding these techniques:

- Purpose and Key Terms
- Effectiveness in Achieving Stated Purpose(s)
- Impact on Property Values
- Impact on Development Costs
- Impact on Amount and Patterns of Land Development
- Impact on Housing Affordability
• Summary of Pros and Cons
• Incentive-Based Alternatives

The discussion under each of these subsections has been updated, as appropriate to provide the most current factual information and theoretical reasoning, to help REALTORS® understand and assess the implications of using specific growth management techniques in their communities.

Key terms pertaining to each growth management technique are defined or explained in the context of the discussion. In order to assist the reader in locating and referencing these terms, they are bolded in the text and also listed in a Glossary of Key Terms in the Appendix to this book. Also in the Appendix, is a Summary Chart that summarizes for each technique the effectiveness of the technique, and its likely impact on property values, development costs, the amount and patterns of land development, and on housing affordability.
PART I: LOCATION, DENSITY AND RATE OF GROWTH

SECTION 2: URBAN GROWTH BOUNDARIES (UGBs)

2.01 PURPOSE AND KEY TERMS

An Urban Growth Boundary (UGB) is a line drawn on a map to contain urban growth and separate it from rural and environmentally sensitive lands. It is the most direct technique for implementing urban containment policies as part of growth management or smart growth. From the planner’s perspective, urban containment has two basic purposes:

1. To promote compact and contiguous development patterns that can be efficiently served by public services; and

2. To preserve open space, agricultural and environmentally sensitive areas that are not currently suitable for urban development.¹

The area within the UGB is referred to as the Urban Growth Area. By definition, it is the area in which urban growth is encouraged. It should be of sufficient size to allow development sufficient to accommodate the urban growth that is projected based upon population forecasts. Within the UGB is also frequently established an Urban Service Area (USA) which is an area within, but not beyond which, urban services (roads, water, sewer, etc.) will be provided. In theory, the USA should be extended in conjunction with planned public facilities set out in a Capital Improvements Program (CIP).²

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² Id. at 75. Because the USA is made up of the combination of services to be made available in accordance with the CIP, its boundary is not necessarily uniform, and may vary depending upon the configuration of the particular.
area outside the USA, but within the UGB, is the **Urban Reserve**. This is an area in which future development, including extension of services, is planned. In summary, the Urban Service Area and the Urban Reserve, taken together, make up the Urban Growth Area within the UGB. *(See Figure above)*

As an “urban containment technique,” the Urban Growth Boundary is, in effect, a strategy to manage space. Spatial management of land has not been part of the American land use planning tradition, although it has been a central element of land management programs in other countries such as Great Britain, where the British Green Belt Program has been in place for almost half a century.³

**2.02 Effectiveness in Achieving Stated Purpose(s)**

When assessing the effectiveness of UGBs, it is important to distinguish between *local* urban growth boundaries and *regional* urban growth boundaries. When an individual local community draws a UGB within its own borders and constrains future development to within that boundary, and establishes rules and regulations within the UGB, the local UGB can result in higher density within the UGB and less expansive new growth within that community than would have occurred if no such UGB were adopted. Hence, viewed solely from the perspective of the local community, the UGB can be an effective tool for slowing and/or stopping growth. However, few communities overtly apply slow growth regulations within the UGB. It is more common for there to be no express growth restrictions within the UGB.

However, considered at the metropolitan level, the effect of local UGBs will be to divert future growth to other communities in the same market area that may not have established UGBs or adopted growth limiting measures. This will result in increased growth pressure on those communities. Also, data show that development within the UGB is more costly and higher costs may tend to redirect buyers to less costly locations, if they are available. If a large number of communities within a region adopt local UGBs, the net result may be to divert future growth to more remote, less costly locations, thereby spreading out development into a pattern of “sprawl,” contrary to the basic purpose of an urban growth boundary.

Where the urban growth boundary is established on a *regional* basis, this usually requires the coordination of state, county and local officials. Typically, such a boundary is drawn through the efforts of a Council of Governments (COG) or similar metropolitan body (such as in Portland, Oregon, where the body is specially elected) or by a body appointed by the state governor (as in the Twin Cities area of Minnesota) or with the oversight of an agency of the state government (as in New Jersey). The extent to which these *regional* UGBs are effective depends upon how stringently growth is restricted outside the UGB. In some places in Florida, for example, developers who are willing to pay for the necessary infrastructure can develop new projects outside the *regional* UGB (if they receive local planning commission approval). In Oregon, most development outside the regional UGB is prohibited, even if developers are willing to pay the costs of the entire additional infrastructure required.

There is an ongoing debate regarding the effectiveness of *regional* UGBs. This debate was focused primarily on the experience of Portland, Oregon. While some have argued that the UGB in Portland has been effective in promoting compact development and preserving open space, agricultural and environmentally sensitive areas, others assert that Portland’s growth patterns are indistinguishable from service (e.g., water, sewer etc.) that is planned to be provided. The Figure is merely an illustration of the relationship of the Urban Service Area to the UGB.

other metropolitan regions and that Portland’s UGB has mostly succeeded only in deflecting some suburban growth into neighboring Washington State.\(^4\)

It is generally agreed that Urban Growth Boundaries or Urban Growth Areas are not very effective in rural areas with a diffuse population and no real urban center. Because of the counterproductive results that can result from local UGBs, the American Planning Association recommends strongly against establishing local UGBs.\(^5\)

### 2.03 Impact on Property Values

The extent to which a UGB will affect property values depends upon how expansively the UGB is drawn. A very expansive UGB would have little or no effect on property values as it would only restrict development in places with little or no market demand for new housing. On the other hand, a UGB that is drawn to include only a small amount of vacant, developable land would be expected to impact property values. In this case, property values within a UGB will increase because the UGB reduces or eliminates the potential for market competition between owners of land inside the UGB and those with property outside the UGB. Property values far outside the UGB would be relatively unaffected as market forces do not support intensive development in such far-flung rural areas. The negative impact of UGBs on property values is felt in the zone between these two extremes where relatively more intensive development would have been economically viable were it not for the UGB.\(^6\) Some studies have suggested that the entire burden of UGBs falls on these in-between areas. In addition, to the extent that a UGB achieves the objective of more dense and better designed development, property values within the UGB will be higher due to perceived higher quality of development.\(^7\)

It should be noted that land immediately adjacent to the UGB may sometimes experience an increase in value where a market develops for large, single family “ranchettes,” “martini farms,” or “hobby farms” on large lot acreages. These lots experience an increase in value because they provide their owners with the amenity of open space that has been created by means of the UGB. Such rural residential development on the fringe of a UGB may act as an impediment to future urbanization of these areas. In Oregon, these so-called rural “exception” lands exist with one- to five-acre home site developments that compete with the urban land supply and create long-term impediments to the expansion of the boundary. These “exception” lands are those that are unsuitable for farming or forestry because of their small size or nearness to existing developments. Residents in this urban fringe area oppose boundary expansion to accommodate new development at higher densities. The result is that the UGB becomes politicized as these residents outside of the UGB voice their objections to any expansion of the UGB.

### 2.04 Impact on Development Costs

While UGBs may increase the price of land per acre, this cost increase may be offset by the higher density of development within the UGB. The increased price of land within the UGB and zoning regulations allowing greater density should lead to an increase in the density of urban development within the UGB. Generally speaking, infrastructure costs are lower per housing unit in higher density


developments. Development costs may be further reduced if the UGB development approval process is streamlined.

2.05 Impact on Amount and Patterns of Land Development

The UGB, if adopted locally by many municipalities within a region, may have the effect of deflecting future growth to further out locations, thereby increasing sprawl and undermining the purpose of a UGB. Data show that development within the UGB is more costly and higher costs passed on to consumers may tend to redirect buyers to less costly locations, if such are available. By contrast, the regional UGB has the potential to minimize this “deflection” effect and reduce the potential for the “leap-frogging” of development to areas where land is cheaper. A truly regional UGB may be hard to achieve, however, as demonstrated in Portland, Oregon where the agency responsible for the UGB does not have jurisdiction to regulate Clark County, Washington. Some suggest that Portland’s neighborhood densities have increased since the 1960s and the adoption of the UGB. Others note that because Clark County lies just across the Columbia River from Oregon, Portland’s UGB may merely divert suburban expansion to this county, which has been rapidly growing for the last 20 years.

2.06 Impact on Housing Affordability

There has been a substantial debate about the impact of UGBs on housing prices. The relatively rapid increase in housing prices in Portland during the 1990s precipitated this debate. While some have concluded that these price increases were the result of the UGB’s supply constraining function, others have interpreted the data as providing scant evidence that UGBs increase housing prices, instead finding that Portland’s housing price increases were caused by strong economic conditions, population growth, and other traditional housing market dynamics. While not denying the potential for UGBs to limit supply, advocates of the latter interpretation point to measures undertaken in Portland to promote higher density and infill housing as having mitigated the land supply constraints imposed by the UGB.

Where housing densities increase within UGBs, the higher land prices that also occur within the UGB will not necessarily result in higher housing prices. In Portland, for example, the state Land Conservation and Development Commission adopted the so-called “Metropolitan Housing Rule” setting specific standards for housing density and housing mix and made the rule applicable to all local jurisdictions in

9 Myung-Jin, supra note 4; see also McConnell & Wiley, at 4.
11 William Fischel, “Comment on Anthony Down’s ‘Have Housing Prices Risen Faster in Portland Than Elsewhere?’” 13 Housing Policy Debate 43 (2002). See also an empirical study designed to measure the effect of the Knoxville, Tennessee UGB and Urban Growth Area (“UGA”) on housing prices, Seong-Hoon Cho, et al., Urban Growth Boundary and Housing Prices: The Case of Knox County, Tennessee, 38 REVIEW OF REGIONAL STUDIES 1, 2008 available at http://policy.rutgers.edu/cuprrs/files/vol38issue1/Cho_RRS_38(1).pdf (hereinafter Cho et al.). The Knoxville UGA was designed to accommodate the City’s growth between 2001 and 2021. The Cho study concludes that, all other factors being equal, the value of housing within the UGA, after the implementation of the UGB, is generally higher than outside of the UGA.
12 See Cho et al. (Interpretations of the empirical evidence are split as to whether the UGB has had any effect on housing prices in Portland, with some researchers concluding that market demand, not the boundary, has been the primary driver of housing prices, and others suggesting that the UGB has created an upward pressure on housing prices in Portland.) (citations omitted).
the Portland Metropolitan Area. Specifically, the rule mandated that each of the Portland region’s 24 cities and 3 counties zone land for 6, 8, or 10 units of housing per acre depending on each jurisdiction’s location. It also required that new construction be mixed 50/50 in each jurisdiction between multifamily or attached single-family units, and single-family detached units. In 1990, the Oregon Homebuilders Association and the 1000 Friends of Oregon analyzed data on housing projects approved in the Portland Metropolitan Area from 1985 through 1989. For each project, actual developed density was compared with the density that theoretically could have been achieved on the site under the local comprehensive plan. Their research indicated that overall, housing projects have achieved 79% of the density required by the Metropolitan Housing Rule, with single family developments averaging 66% of planned densities and multifamily projects reaching 90% of planned densities.\footnote{Charles A. Hales, “Higher Density + Certainty = Affordable Housing for Portland, Oregon” \textit{Urban Land} (September 1991) at 14.}

Finally, because a \textit{regional} UGB increases price pressure on land within the boundary and causes home values in inner city neighborhoods to rise, this can cause lower income households to be displaced as a result of higher rents, property taxes, or housing prices. These households may then be forced to move further away from jobs, public transit, and other urban amenities that are important to lower income households.\footnote{See Robbins, supra note 10.}

### 2.07 SUMMARY OF PROS AND CONS

**PROS:**

- A \textit{local} UGB, from the perspective of the community, allows it to constrain future development within a boundary and thereby control local growth.

- A \textit{local} UGB, from the perspective of the community, can create higher density that results in a more compact community, at least in the short run.

- A \textit{regional} UGB, if accompanied by stringent controls outside the UGB, can prevent developers from creating new subdivisions outside built up areas.

- A \textit{regional} UGB can reduce the total amount of land needed to accommodate a given total regional population while preserving agricultural lands and environmentally sensitive lands around the periphery.

- A \textit{regional} UGB can increase the average density of new development and reduce the average size of individual lots, resulting in lower infrastructure costs necessary to serve the population within the region.

- The increased land prices within the UGB, along with zoning regulations allowing greater density, result in an increase in the density of urban development within the UGB that, in turn, allows for a reduction in overall development costs.

**CONS:**

- A UGB is not effective in rural areas with diffused population and no real urban centers.
A UGB will confer a market advantage on owners of property within the UGB, as opposed to owners of property outside the UGB.

Properties outside a UGB will decrease in value because of the loss or deferral of their potential to be developed. Because those properties are not developable in the near future, the UGB imposes unexpected losses on landowners.16

The potential for a UGB to be expanded can be frustrated by the phenomenon experienced in some jurisdictions of large single family ranchettes, or hobby farms, being developed on the periphery of the UGB. This, in turn, leads to political opposition by the owners of these properties who do not want to see the expansion of the UGB allowing higher densities and thereby threaten their open space amenities.

The increased land prices within the UGB can be expected to raise housing prices and therefore negatively impact housing affordability, except to the extent that the increased density allowed within the UGB may limit the degree to which housing prices rise.

A local UGB will deflect future growth away from the community to other nearby communities. This will increase growth pressures on those nearby communities that do not adopt local urban growth boundaries.

If a large number of communities adopt individual local UGBs within a region, the net result may be to deflect future growth to more remote locations, thereby increasing sprawl and defeating the purpose of an urban growth boundary.

Because a regional UGB increases price pressure on land within the boundary, home values in inner-city neighborhoods will rise, causing poor households to be displaced from such areas because they cannot pay required taxes, and forcing them to move to areas where affordable housing may or may not be available.17

2.08 INCENTIVE-BASED ALTERNATIVES

The most logical incentive-based alternative to the use of urban growth boundaries to preserve agricultural and environmental sensitive lands is transferable development rights (TDR). If studies and proper planning are done to identify and map areas of a community or region that are considered to contain prime farmland and/or environmentally sensitive resources, a TDR program can be effective in preserving such areas by providing landowners with an adequate incentive to retire their development rights in exchange for compensation, at close or equal to fair market value. From the property owner’s perspective a voluntary TDR program is preferable to a mandatory program, since the latter typically involves a downzoning of property in order to encourage owners to transfer their development rights to receiving zones. TDR is addressed in Section 9.

16 National Association of Industrial and Office Properties (NAIOP); National Growth Management Taskforce, Growing to Greatness (1999).
17 Id. at 35.
SECTION 3: GROWTH PHASING, RATE OF GROWTH SYSTEMS AND MORATORIA

3.01 Purpose and Key Terms

The growth management techniques of growth phasing, rate of growth controls and moratoria all have one concern in common: The timing of when growth occurs. Under conventional zoning, so long as a use is permitted and meets code requirements, it can occur at any rate. The technique of growth phasing can be used to phase growth or to sequence the order in which areas of a community will develop. Growth phasing is typically tied to a community’s desire to plan for investment in new public facilities such as sewer and water. The planning concept underlying growth phasing is relatively simple: Development is desirable if it occurs as an extension of an existing urban area accompanied by incremental expansion of existing public facilities. Stated differently, growth phasing is little more than translation of basic civil engineering principles into development controls designed to minimize the cost of public facilities.

The most well-known example of growth phasing is the program that was adopted in 1969 in Ramapo, New York. Under that program, the town adopted a 6-year capital budget for providing municipal facilities such as street, parks and sewers. It also adopted a capital improvements program, (CIP) which set out the location and sequence of capital improvements for the 12 years following the completion of the first 6-year plan. Over this eighteen year period, the town expected to become fully developed in accordance with its master plan. The regulations implementing this eighteen year build-out utilized a special permit concept under which the issuance of a special permit for a subdivision depended upon the developer demonstrating the immediate availability to the proposed subdivision of five essential public improvements and services: (1) public sanitary sewer or approved substitutes; (2) drainage facilities; (3) improved public recreation facilities in schools; (4) roads; and (5) fire houses. No special permit would issue unless the proposed residential development accumulated fifteen development points based upon values assigned to these specific categories of improvements under the ordinance.

This development timing provision was applied in combination with the town’s traditional zoning ordinance based upon use districts, over 90% of which in the unincorporated area were zoned for residential use. The effect of this timing provision in combination with the basic zoning district scheme was to postpone or phase the development of every vacant parcel in the town. This meant that development of a parcel could be delayed, in an extreme case, for 18 years. The ordinance establishing this type of growth phasing was upheld by the New York courts as a valid exercise of local zoning power under the delegated powers and permissible purposes provisions of the New York Town Law.

Rate-of-growth systems, unlike growth phasing, are not always tied to a budget and plan for provision of public facilities. Rather, they tend to be adopted for the purpose of achieving locally desired rates of growth, with the availability of public facilities being a secondary consideration. Rate-of-growth systems come closer to outright growth control, as opposed to growth management, because they attempt to impose quantitative limits or quotas on residential and/or nonresidential development.

One of the earliest rate-of-growth programs is that of the City of Petaluma, California. The so-called “Petaluma Plan” was adopted in 1971. Under the plan, a “green belt” boundary was drawn around the city. All residential growth and the extension of city services were prohibited beyond this line. This

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1 See Amendments to Town of Ramapo Building Zone Amended Ordinance of 1969 described in Landman, “No, Mr. Bosselman, the Town of Ramapo Cannot Pass a Law to Bind the Rights of the Whole World: A Reply (Part I),” 10 Tulsa L.J. 169 (1974).
aspect, by itself, is similar to an urban growth boundary, discussed in Section 2. However, the City of Petaluma combined this boundary with a Residential Development Control System in order to regulate the actual number of building permits issued. In accordance with the Petaluma Plan, the number of building permits was limited to 500 dwelling units per year for a 5 year period beginning in 1972. This figure was applied only to housing units in developments consisting of 5 units or more. The Residential Development Control System used a point system that gave preference to projects that conformed to the city’s general plan and that included low- and moderate-income housing units. The plan also provided that permits should be issued on an essentially equal basis between single-family dwellings and multifamily residential units, and also equally between the west and east sections of the city.

This rate-of-growth regulation was challenged by builders and land owners in federal court on constitutional grounds, namely, that it denied the right to travel to people whose ability to settle in Petaluma would be hindered by the limitations placed on the issuance of building permits, and that the city’s growth control policy violated due process and equal protection because of its alleged exclusionary purpose or effect. The federal court upheld the regulation as reasonable and did not reach the right to travel issue. Rate-of-growth controls have subsequently been adopted in other jurisdictions.

Several entire states, most notably Florida and Washington, follow a Ramapo-type system which they call “concurrency.” This is a requirement that certain items of public infrastructure must be available “concurrent” with the impacts of the development. In the absence of infrastructure adequacy, the development will be postponed until adequacy is achieved, unless the developer “voluntarily” elects to provide the needed infrastructure.

A moratorium is a type of interim zoning control that either prohibits all development, or certain types of development, for a defined period of time. A moratorium is typically adopted by local government ordinance and, if adopted in good faith, is intended to provide a community with the time to conduct and review studies necessary for adopting or revising a land use plan and related regulations. Because such planning activities are time consuming, the moratorium allows for a “planning pause” period during which period land development activity is frozen or limited until permanent regulations implementing the plan can be adopted. If the objectives to be sought and the duration of the moratorium are both “reasonable,” a moratorium is likely to be upheld.

3.02 Effectiveness in Achieving Stated Purpose(s)

Growth Phasing. The Ramapo, New York growth phasing program was not particularly effective in achieving its objectives. One of the problems with the program was that the town did not have control over two components of its public facilities and services program, namely, fire protection services and sanitary sewer. Consequently, when faced with a delay in the completion of the regional sewage collection system, it was forced to decide to award an automatic 5 points to each development for sewer service, with the result that each project received one-third of the points that it needed for approval. The program was ultimately repealed. However, growth phasing is currently being used in various forms in

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4 See discussion of concurrency in Section 4.

5 See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002). Note: The Supreme Court acknowledged that “[i]t may well be true that any moratorium that lasts for more than one year should be viewed with skepticism.” Id.

6 Hammer, Siler, George and Associates, Impact on Ramapo Fiscal and Economic Conditions of the Town’s Growth Control Ordinance (Washington: Hammer, Siler, George and Associates 1977). This study was prepared for the National Association of Homebuilders (NAHB).

7 Id.
other jurisdictions around the country. For example, Montgomery County, Maryland utilizes an annual growth policy (AGP) as a guide for the planning board’s implementation of its adequate public facilities ordinance (APFO). The AGP includes (1) the current level of service conditions for major public facilities; (2) an estimate of the service demands resulting from un-built, but approved, subdivisions; and (3) recommended growth capacity (residential and employment) ceilings for defined policies areas, based on alternative scenarios of future public facility growth. This growth phasing system is part of a larger more complex growth management system that includes agricultural land preservation, functional and area master plans and land development regulations.  

San Jose, California has applied growth phasing controls for specific areas since the early 1970s and currently utilizes a residential development permit allocation system based on transportation capacity for the city’s east side. In 1977, Westminster, Colorado adopted a growth phasing system designed to address capacity constraints in the community’s water and wastewater systems. These systems established the number of water and wastewater service commitments that were to be granted for each year for the next two and a half years before new capacity would be available. Service commitments were awarded competitively and were valid for up to two years. This system was re-adopted in 1980 and the criteria for awarding service commitments were revised to give greater emphasis to the design quality of projects.

Livermore, California enforces a growth phasing system adopted in 1987 known as the Housing Implementation Program (HIP) based on 3-year cycles of analysis and implementation. The factors taken into consideration in the preparing each new HIP are water, wastewater, air quality, traffic, parks and open space, schools and emergency services. Projects having fewer than four units are exempt from the growth phasing program. Project-specific evaluation criteria such as street layout, open space, landscaping, architectural design, solar access, facility contributions, innovation and adequate facilities, are used to determine which projects will be approved.

Monroe County, Florida (the Florida Keys) employs a quota system of allocating building permits. This system applies to all buildings, not just projects with multiple units. This program was implemented as part of the State’s Area of Critical State Concern program designed to protect the fragile ecosystem of the Keys and the surrounding waters.

To the extent that all of these growth phasing programs are effective in achieving their stated objectives, it appears that their success depends in significant part upon the degree of sophistication in their capital improvement programming, the use of growth phasing in the context of other growth management programs, and the avoidance of arbitrary point-award systems for features or facilities, emphasizing instead the specific characteristics of particular projects.

**Rate of Growth Systems.** The effectiveness of the Petaluma Plan, the purpose of which was to restrict growth for aesthetic reasons, is not clear. The rapid growth that occurred between 1970 and 1972 that led to the adoption of the growth phasing program did not continue at that rate. In fact, in the majority of the years since 1972 the actual growth rate has been below the maximum permitted under the growth

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9 Nelson at 102.

10 Id. at 103-104.

11 Id. at 105.

12 *Construction Indus. Ass’n of Sonoma County v. City of Petaluma*, 522F.2d 897, 909 (9th Cir. 1975).
phasing program. The rate of growth program in Boulder, Colorado, which was also established in the 1970s, originally applied a three percent annual growth rate. That growth rate was subsequently reduced to two percent. While it appears that the rate of growth program has been effective in limiting the actual growth rate in Boulder, its effect has been to cause "leap frog" development into surrounding communities. Demographic data and anecdotal evidence also indicate that the program has pushed families with children into nearby communities such as Longmont, Louisville and Lafayette. San Diego, California has also imposed annual limits on building permits through its zoning code. This rate of growth regulation appears to have been effective and also withstood legal challenge because it was consistent with the city’s planning and other regulatory provisions.

Moratoria. By definition, a moratorium, when adopted, achieves its immediate purpose of halting all development or limiting development to certain uses for a specific period of time. However, the true measure of its success depends upon what is accomplished in the planning process during that interim control period. A moratorium can rationally serve its purpose only if it is preceded and supported by a planning process that identifies and evaluates the community’s needs and objectives and uses the time period when the moratorium is in effect to develop permanent regulatory mechanisms to address the desired objectives and policies. The defensibility of a moratorium from the judicial perspective depends on whether the interim controls were adopted in good faith and for a reasonably short period of time and whether the local government proceeded diligently in completing whatever study or analysis was deemed necessary in adopting permanent regulations. It is also important that there be reasonable and beneficial economic uses possible during the period of the moratorium.

3.03 Impact on Property Values

Growth Phasing. The impact of a growth phasing program on property values depends, in large part, on how it is structured. For example, if the program attempts to set priorities for areas that will develop first, it can be expected that those areas will increase in property value by comparison with areas that have not received priority designation. In this manner it would function similar to a short term urban growth boundary. If a growth phasing program seeks to phase growth throughout the entire community, whether or not particular parcels increase in value will depend upon their proximity to available public facilities or to facilities that are planned within a specific capital improvements program timeframe. To the extent that a growth phasing program results in developer assumption of certain infrastructure costs, property values would decline in proportion to the costs assumed.

Rate of Growth Systems. Because rate of growth systems are based less upon analysis of public facility availability, but rather reflect locally desired rates of growth, they become growth control measures that tend to limit the available supply of land, thereby creating a shortage of buildable land and driving up land prices. When changes to a rate of growth system depend upon a political decision by the governing body, the rate of growth percentage or the numerical allocation system tends to become rigid and, similar to an urban growth boundary, can result in a constraint on supply versus demand, thereby leading to an

14 Kelly at 54-59.
overall increase in land prices. Of course, if the limit is higher than what the market demands, a rate of growth system would have no effect on property values.

**Moratoria.** Because moratoria impose bans on all or specific types of development, they virtually always have the effect of temporarily down zoning property. The extent of value diminution would depend on the extent of the moratorium. This diminution of property value raises the issue of a *temporary taking*. The U.S. Supreme Court has ruled that when a regulation is found to have taken property, just compensation must be paid for the period of time which the regulation denied all use, even if the deprivation is temporary. 18 On the other hand, the U.S. Supreme Court has also ruled that the issue of whether a moratorium effectuates a taking should be analyzed using an *ad hoc* balancing test that has generally granted broad latitude to local governments in adopting planning moratoria.19

### 3.04 Impact on Development Costs

If a growth phasing program ensures that capital facilities are available at the time a development is approved, it will likely result in a reduction in the cost of new development compared to comparable development requiring private financing of the same infrastructure. This is the same likely result under an adequate public facilities program or concurrency. Growth phasing may also make the planning of new subdivisions and receipt of approvals to build more predictable because of the linking of infrastructure with development approval. Because rate of growth programs are not necessarily tied to the availability of public facilities, the potential benefits of reduced cost for infrastructure and greater predictability are not present to the same degree. Because a moratorium effectively halts development, it does not have an immediate effect on development cost. However, if a moratorium continues beyond a short period of time, it can be expected that development costs, assuming normal inflation, would be greater at the point that development is ultimately allowed to go forward. When growth phasing results in developer assumption of infrastructure costs, development costs will be increased by the amount of those costs.

### 3.05 Impact on Amount and Patterns of Land Development

To the extent that a growth phasing program prefers development in one part of a community rather than another based on aesthetic reasons or to protect lands containing wetlands, steep slopes or other constraints to development, such a program will alter the potential amount and patterns of development. Because growth phasing is tied closely to the availability of public facilities, the pattern and amounts of development will follow the priorities and locations set out in the capital improvements program (CIP). Capital facilities such as highways and sewer lines have been termed “the growth shapers”. Rate-of-growth systems also alter previous building patterns, although the shape of such patterns is not tied as closely to the availability of public facilities. For example, in Petaluma, the requirement that housing permits be evenly divided between single-family and multifamily units, presumably was in recognition that appropriate sites for these two different kinds of residential units were different. The resulting development patterns would not necessarily be the same as if the market were allowed to determine the location and timing of single family versus multifamily development. Whether a moratorium affects the amount and pattern of land development depends upon the results of any planning and regulatory decisions taken during the period of the moratorium. Because a moratorium typically results in decisions to downzone certain areas, or to change the priority of growth areas, the ultimate effect of the moratorium will be to change the amount and patterns of land development. Growth phasing systems that key on

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adequacy of infrastructure will tend to direct development to areas with adequacy, which may well be in more distant areas or even in adjoining jurisdictions. The unintended consequence would be encouragement of sprawl. Paradoxically, the expectation or fear of development moratoria in a community may actually foster anticipatory development that proceeds more rapidly and at higher or lower densities than would occur without the threat of development moratoria.\footnote{See Geoffrey K. Turnbull, “Development Moratoria,” 13 Journal of Housing Economics 155 (2004).}

3.06 IMPACT ON HOUSING AFFORDABILITY

To the extent that growth phasing programs and rate of growth systems drive up land prices or development costs, they also raise housing costs and negatively impact housing affordability. However, because these kinds of growth timing programs can be coupled with policies giving preference to affordable housing projects, such programs need not necessarily have a negative effect on the cost of housing. Nevertheless, in the case of the Petaluma Plan the effect of the plan has been to significantly reduce the availability of affordable housing.\footnote{See Rohan, Zoning and Land Use Controls §4.04 [1] at 4-45. 17 (Matthew Bender & Company, Inc.: 2001).} Also, it is generally acknowledged that permit allocation systems have a potentially exclusionary effect because such systems tend to encourage developers to build large, expensive houses in order to generate greater profits.\footnote{Arthur C. Nelson and James B. Duncan, Growth Management Principles & Practices (Planners Press: 1995) at 106.} If a moratorium exempts development proposals for residential housing, then, assuming no change in other factors affecting the affordability of housing, the moratorium, would not impact housing affordability because it would not change land supply. If, however, one of the purposes of the moratorium is to halt residential development, then the resulting constraint on land supply would increase land prices and correspondingly increase housing prices.

3.07 SUMMARY OF PROS AND CONS

PROS:

- A growth phasing program enables the timing of development with the availability of capital facilities.
- A growth phasing program allows a community to tie capital facilities to areas of a community considered most suitable for development.
- A rate-of-growth system enables a community to decide upon its locally desired rate-of-growth.
- A moratorium gives a community time to do proper planning and obtain public participation in deciding upon policies and regulations to manage future growth.

CONS:

- A growth phasing program can result in increased land prices and development costs and can have an exclusionary effect.
- A rate-of-growth system can result in increased land prices and have the effect of excluding less wealthy residents from the community.
- *Rate-of-growth* controls adopted by individual communities can induce sprawl by causing “leap frog” development and increasing growth pressures on surrounding communities that have not enacted rate-of-growth controls.

- A *moratorium* typically results in the temporary downzoning of property and can, in certain instances, result in a temporary taking of property.

### 3.08 Incentive-Based Alternatives.

As an alternative to growth phasing programs, a *special assessment district* (SAD) that allows landowners within a district to decide how infrastructure needed for development is to be financed and constructed, has attributes that are less regulatory in nature and allow for cooperative efforts for mutual benefit. Special assessment districts are discussed in more detail in Section 6. To the extent that a community has identified certain land with characteristics such as wetlands or other constraints on development, it can adopt *transferable development rights* (TDR) as a market-based incentive program for owners to “retire” any development rights they may have in those lands and, in exchange for compensation, transfer those rights to lands more desirable for development. The TDR concept is discussed more fully in Section 9.
PART II: PUBLIC FACILITIES AND INFRASTRUCTURE

SECTION 4: ADEQUATE PUBLIC FACILITIES (APF) AND CONCURRENCY

4.01 Purpose and Key Terms

Adequate Public Facilities (APF) systems, also known in some places as concurrency management systems, tie or condition development approvals to the availability and adequacy of public facilities. Public facilities typically made subject to APF requirements based on adopted level of service (LOS) standards are those relating to roads, sewer systems, schools, water supply and distribution systems, and fire protection.¹

The reason a local government adopts an APF ordinance is to ensure that before new development occurs its public facilities will have sufficient available capacity to serve the development at a predetermined acceptable level of service.² This technique is intended to guarantee that public facilities are either in place already or that they will be provided as impacts occur from new development. In that way, a county or municipality can be assured that new development will not place excessive additional loads on existing infrastructure until necessary capacity has been added to that infrastructure.³ Unlike impact fees and in-kind exaction requirements, APF programs do not require that developers pay for public improvements, but only that such improvements be made before or when development occurs. As a practical matter, though, in those instances where public funds are not available, growth may occur only if the developer pays for needed public facility improvements.⁴

APF is related to, but different from, growth phasing and rate-of-growth programs. All three techniques attempt to balance the timing and amount of development with the ability or willingness of a community to accommodate it. Growth phasing systems limit the total amount of new development that can be approved over the course of a year or other definite period of time, in an attempt to address some of the shortcomings of performance-based APF systems. Rate-of-growth systems have annual development caps similar to growth phasing systems, but are less closely linked to public facility constraints, and instead are typically adopted based on locally desired rates of growth rather than on an analysis of facility availability.⁵ Growth phasing and rate-of-growth programs are discussed in Section 3.

APF requirements include two main components: (1) an identification of the types of public facilities and related levels of service that are needed to permit new developments; and, (2) a clear policy about when

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the public facilities must be in place relative to the impact of development. Implementation of these requirements requires an ordinance and a map that together spell out the required existing or planned levels of service; coordination among planning agencies and service providers; a system designed to measure and monitor the levels of public services; and a permit process.

4.02 Effectiveness in Achieving Stated Purpose(s)

While most communities that initially used APF or concurrency were located in Florida, Maryland, California and Washington, the practice has spread in recent years to other states, such as North Carolina and New Mexico. Concurrency management has had the longest tenure in Florida. In January 1999, the Florida Transportation and Land Use Study Committee issued a report in which it identified “major shortcomings” in the state's implementation of this technique because of its focus on transportation capacity. Shortcomings identified were:

- The methods used to establish and measure levels of service were focused on automobile mobility, to the exclusion of other modes of travel;
- When development could not occur due to roadway deficiencies, property owners who could not develop may seek reductions in their tax assessments. As a consequence, the community’s property tax base would be compromised;
- The system can cause uncertainty for local governments in those cases where developers and their financiers become reluctant to undertake projects that would benefit the community but might not enable the community to meet its stated transportation requirements; and
- Transportation concurrency must be based on realistic and financially feasible capital improvement programs, but in some cases these programs do not maintain their feasibility over time.

The Florida report did not draw firm conclusions about the effectiveness of the concurrency program because its investigation was largely based on anecdotal evidence. Rather, it made specific recommendations to the legislature for amendments to the state concurrency program statutes and rules. Legislation in 2005 re-invoked concurrency requirements for transportation and public schools, but with inadequate funding to address the infrastructure backlog.

In 2009, the Florida legislature changed course, passing a bill that significantly changed the concurrency program, removing the requirements for many urban areas of the state (the so-called “transportation concurrency exception areas”). This legislation was based on findings that the existing concurrency

7 Id.
program had the unintended result of discouraging urban infill and redevelopment and that a change was needed to promote transportation alternatives.\textsuperscript{11} Instead of requiring concurrency in these exception areas, the state established new mobility planning requirements, which direct local governments to adopt plans and strategies for funding and supporting alternative modes of transportation.\textsuperscript{12} In addition to these changes, the legislation contains findings that criticize the current system as being too complex and inequitable, and that the current concurrency system is “complex, inequitable, lacks uniformity among jurisdictions, is too focused on roadways to the detriment of desired land use patterns and transportation alternatives, and frequently prevents the attainment of important growth management goals.”\textsuperscript{13} A 2006 study published by the National Center for Smart Growth Research and Education at the University of Maryland looked at the implementation of Adequate Public Facilities Ordinances (APFOs) in Maryland.\textsuperscript{14} The report identified the following significant problems in how these programs had been implemented in twelve Maryland counties:

\begin{itemize}
  \item Many counties had made APFOs the predominant planning tool whereas they are intended to be one of many tools used to manage growth.
  \item APFOs were often poorly linked to capital improvement plans, which resulted in long moratoria on development.
  \item APFOs often had the unintended consequence of directing growth away from areas designated under the state’s Smart Growth policies as appropriate areas for growth and toward areas not intended or appropriate for growth.
\end{itemize}

4.03 Impact on Property Values

Since they control the pace and location of development based on the availability of public facilities, APF regulations could have the effect of increasing property values in those areas where facilities are in place or designed to be in place in the near future.\textsuperscript{15} Conversely, all else being equal, with the adoption of an APF system, one would expect property values to decline in those areas where no facilities are scheduled to be provided in the near future.

4.04 Impact on Development Costs

APF would not be likely to impact “hard” development costs such as material and labor, except to the extent that a developer provides the facilities required under the APF system as a way to accelerate its ability to develop its property. However, because it delays development in areas lacking the necessary public facilities, APF would be expected to increase “soft” development costs, specifically carrying costs in those areas. APF systems tend to be complex and involve additional permitting. Complexity and additional permitting programs will raise the cost of compliance for developers. Additionally, APF or concurrency requirements often result in developers assuming heretofore public infrastructure costs, thereby increasing development costs.

4.05 Impact on Amount and Patterns of Land Development

\begin{itemize}
  \item Id. at 109-110.
  \item Id. at 110.
  \item 2009 Fla. Laws 96, § 13(1)(a).
  \item The National Center for Smart Growth Research and Education at University of Maryland, “Adequate Public Facilities Ordinances in Maryland: Inappropriate Use: Inconsistent Standards and Unintended Consequences,” 20 (2006).
\end{itemize}
Because the purpose of APF is to affect the amount and location of land available for development based on the availability of the necessary infrastructure, it directly impacts the amount and patterns of development. Development will be directed toward those areas with adequate infrastructure regardless of where those areas may be. APF can also affect the allowable density of development. APFOs that are too strict can substantially reduce the number of housing units developed in the community with the APFO, often causing that growth to be redirected into areas even less equipped to deal with growth. In the experience of Florida, some commentators have identified the focus of APFOs on obtaining particular levels of service for automobile traffic as having encouraged “sprawl” and worked against other policies targeted at fostering more compact, walkable communities.

4.06 IMPACT ON HOUSING AFFORDABILITY

Depending on how such a system is implemented, housing costs may be affected by development delays resulting from the APF system. If infrastructure development does not allow housing development to keep pace with demand, housing prices may be driven higher by shortages in the supply of buildable sites. Furthermore, direct costs of the APF system on developers and builders will be either passed on to homebuyers, thereby raising housing costs, or absorbed by builders and developers as lower profits, decreasing the builder’s incentive to build new housing. If APF compliance reduces anticipated profits to less than an acceptable minimum, builders will not build and the result will be growing scarcity in the number of housing units in a community. Such scarcity will tend to increase prices, thus making housing less affordable.

4.07 SUMMARY OF PROS AND CONS

PROS:

- An APF ordinance allows control over the timing of development and clarifies the local government's role in providing public infrastructure.

- An APF ordinance can help direct growth to suitable areas where there is a capacity for growth and thereby contribute to the fiscal stability of the government as well as support the revitalization of urban areas where existing facilities have the ability to absorb growth.

- APF policy can act to prevent leapfrog development patterns and the concomitant costs of infrastructure extensions in this type of pattern.

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CONS:

- APF can be used as a no-growth measure when “acceptable” levels of adequacy are set above current levels, which works to automatically put a brake on future development until the condition is improved.22

- APF can have the unintended effect of promoting land use patterns that are inconsistent with adopted growth plans.

- APF works best with a volume of development that far exceeds the ability of the local government to keep up with the demand for public facilities; otherwise the complexity and administrative costs of enacting and maintaining such a program are not justifiable.23

- An APF system creates a certain amount of bias in favor of larger projects that are more able to marshal resources and control development timing.24

4.08 INCENTIVE-BASED ALTERNATIVES

There are alternatives to an APF system that will allow development to proceed in accordance with market conditions, while addressing the government’s concern that necessary facilities are available for that development. These alternatives are "market based" to the extent that they provide the ability for the developer to determine whether the market warrants private investment in the necessary infrastructure or whether it is preferable to wait for public investment to occur.

For example, if state law enables local government to allow private sector control over infrastructure development, a Special Assessment District (SAD) may be a viable alternative to APF. In a Special Assessment District the landowners within the district decide how infrastructure needed for development is to be financed and constructed. Special Assessment Districts are discussed in Section 6.

Another alternative is for the local government to allow developers to actually construct the needed infrastructure in those cases where the government has not scheduled the public facility improvements needed for development to proceed, and to recover the expenditures that are made in excess of their proportionate share, through a reimbursement or “recapture” agreement with other property owners whose subsequent developments will benefit from the improvements. This is a practical approach only where the return on the investment in the infrastructure makes financial sense for the developer.

Tax Increment Financing (TIF) is a public-private development tool that enables local authorities to finance needed public improvements, including infrastructure improvements, using property tax proceeds from property value appreciation resulting from development within a designated geographic area. The traditional purpose of TIF has been to provide the legal framework for municipalities or counties to channel the increased taxes that flow from improvements within the TIF district to pay for the costs of


23 Maryland Office of Planning.

land assembly and infrastructure improvements such as water and sewer lines, streets, sidewalks and lighting. It is typically used where it is determined by the local government that “but for” the cost of infrastructure improvements needed to support development, the private market would undertake desired development. The local government’s willingness to designate a TIF district and issue bonds to pay for the cost of these improvements and pay off the bonds with the increased tax revenue from the TIF district acts as the incentive for developers to undertake the desired development. TIF is discussed in Section 7.
SECTION 5: IMPACT FEES

5.01 PURPOSE AND KEY TERMS

A development impact fee is a form of exaction that is assessed by local government upon new development in order to cover the capital cost of primarily off-site infrastructure (capital facilities) necessary to serve the new development. Simply put, "exactions" or "developer exactions" are conditions to development approval. Exactions may take the form of mandatory dedications of land for roads, schools, or parks as a condition to plat approval, fees in lieu of mandatory dedication, water or sewer connection fees, and development impact fees.

Impact fees were conceived as a mechanism to offset the cost of growth resulting from the need for large-scale public improvements located off-site of new developments. These fees were also intended to address the developer's need for more predictable development costs as compared to negotiated developer contributions. An impact fee is a type of exaction that is:

1. in the form of a predetermined money payment;
2. imposed as a condition to building permit issuance;
3. pursuant to local government powers to regulate new growth and development and provide for adequate public facilities and services;
4. levied to fund large-scale, off-site public facilities and services necessary to serve new development;
5. in an amount that bears some reasonable proportion to the need for the public facilities generated by new development.\(^1\)

In other words, impact fees are designed to require that each development pay its proportionate share of the cost of providing off-site public services and facilities generated by new development. The purpose of an impact fee is to have those persons who benefit from specific new developments pay their proportionate share of the costs associated with those developments.\(^2\)

The rationale for impact fees is that the proponent of new development should incur the cost of capital improvements needed to serve the new development, rather than having the cost paid by the public at large through taxes, or assumed by the users of the service through user fees. Impact fees also give a local government revenue up front to make necessary public infrastructure improvements for a specific development without having to rely on funds from future tax revenue or debt instruments such as bonds. Impact fees may only be used to pay for the provision of new facilities and the expansion of existing facilities that are made necessary by the development project. These may include roads, schools, parks and recreation facilities, sewer (storm and sanitary) and water utilities, solid waste, fire/EMS, police and library services. Some impact fee systems allow local government to recoup a portion of the capital costs of previously built systems having excess capacity that will be devoted to the new development.\(^3\) But, as a general rule, impact fees may not be used to pay for the maintenance of existing facilities or to cover

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operating expenses. A properly designed impact fee system fairly accounts for the infrastructure costs incurred by the local government to serve a new development, and shifts all or a proportionate amount of those costs to that new development. Payment of impact fees may be required at the time of development approval, at the building permit stage or upon issuance of the certificate of occupancy. The timing of the required payment can have a significant impact on the financial feasibility of a development.

As a result of the U.S. Supreme Court’s decisions in the Nollan and the Dolan cases, there has developed a constitutional test for exactions frequently referred to as the Dual Nexus Test. As illustrated in the diagram on the following page, the Supreme Court said in Nollan that a development condition or impact fee must have an essential nexus to some legitimate governmental purpose in order to satisfy the first prong or first nexus. If that stated purpose is not really a legitimate objective based on a court’s review of the objective as stated, then the Supreme Court has said that lack of a substantial relationship between the exaction and a legitimate state interest may constitute a taking of property.

The second prong, or the second nexus, as illustrated in the diagram, is that there must be a “rough proportionality” between the exaction or impact fee and the impact of, or need created by, the proposed development. As that second prong was articulated in the Supreme Court’s decision in the Dolan case, it means that local government, not the developer, has the burden of substantiating the purpose and the amount of the impact fee. The connection between development impact and fee amount need not be mathematically precise. But a court must be able to determine whether there is a methodology and if that methodology supports the condition imposed upon the development. (See Diagram)

Note that litigation over impact fees generated its own constitutional test long before these two cases shaped American land use and takings jurisprudence. Much of the impact fee litigation was in the state of Florida, and resulted in what is called the Dual Rational Nexus Test. There are two prongs to this test. The first prong requires that there be an identified “nexus” (connection) between the new development and the need for the improvements for which a fee is imposed. In order to satisfy the first prong, the nexus must be substantial, rationally linked and direct between the new development and the identified need for the improvements. The second prong requires that the development that has been assessed the cost (fee) must receive a substantial benefit from the improvements constructed with a fee. This is the constitutional test followed in the majority of the states in which impact fees are legally authorized. Not all states have adopted the federal Nollan/Dolan Dual Nexus Test, and it is important to check the state court decisions regarding the question in each jurisdiction before assuming that it applies to legislatively adopted impact fee programs. However, it can at least be said that the Supreme Court’s decision in the Nollan case reinforced the use of the Dual Rational Nexus Test by state courts in assessing the validity of legislatively adopted impact fee programs.

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4 American Planning Association, “Local Land Development Regulation,” Chapter 8 in Growing Smart™ Legislative Guidebook (APA: March 2, 2000) at 8-132. Note, however, that some municipalities are exploring ways to use impact fees to cover the costs of infrastructure operation and maintenance of existing facilities, such as in Lake Oswego, Oregon, which has adopted a “street maintenance fee.” Nelson, IMPACT FEES at 334-336.

As indicated at the bottom of the diagram, the capital facility improvements funded with the impact fee must substantially benefit the proposed development. This concept has always been embedded in modern impact fee systems and is consistent with impact fee case law as it developed at the state level before Dolan, now called the “rough proportionality” test. In other words, it is not enough to demonstrate some connection between a fee and the kind of need that a development is creating. It is also necessary to show that the fee payer, the developer, will receive the benefit of that improvement. The discipline of making sure that the feepayer actually receives the benefit of the fee is critically important in an impact fee program. This is typically done by establishing zones and requiring that fees paid for development within a zone are spent for improvements in the same zone.6

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6 For further discussion of the constitutional test for legislatively adopted exactions such as impact fees, see Brian W. Blaesser, Discretionary Land Use Controls: Avoiding Invitations to Abuse of Discretion (Thomson-West: 2011) §1:37. See also Michael B. Kent, Jr., Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings 51 Wm. & Mary L. Rev. 1833 (2010).
5.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

As applied in some jurisdictions, impact fees have been seen as a “pro-growth tool because of their ability to defuse rising no-growth sentiments, ensure adequate infrastructure capacity, and facilitate development approval.” Impact fees can add speed and predictability to the development process, be more equitable than a negotiated exaction or “proffer” process, and are considered likely to generate more revenue. Impact fees are seen as more equitable than other means of financing infrastructure improvements, because they impose the financial burden of a particular infrastructure development on those who benefit from it the most. An impact fee system is only efficient, however, when the fees are roughly equal to the public expenses they are supposed to cover. On the other hand, when set too high, impact fees can suppress new development which will cause the cost to rent or purchase existing housing to increase.

Historically, impact fees and other types of exactions were most prevalent in high growth states like California and Florida that are burdened with highly restricted tax systems. Their use has spread considerably, however, with one survey finding that nearly 60% of cities with populations in excess of 25,000 and 39% of metropolitan area counties employ some form of impact fees. In part, this seems to be because they are perceived to be more politically acceptable than other potential revenue sources. In addition, a 2008 study examining impact fees noted that utility-based impact fees have increased at a rate that is nearly twice the rate of inflation, while non-utility-based impact fees increased even more significantly.

5.03 IMPACT ON PROPERTY VALUES

The effect impact fees have on property values will depend on the nature and extent of the local impact fee system and the particular nature of the local market for land. In general, the imposition of impact fees may decrease the price a developer would otherwise be willing to pay for raw land in an area subject to the impact fee, because the impact fee will increase the cost of development. This would have the effect of shifting the impact fee back to the landowner. Conversely, imposing impact fees in some areas may make land in other areas not subject to the fee more attractive for development and hence more valuable. This would have the effect of suppressing development in the impact fee area until prices rise enough in those areas without impact fees to restore relative price and cost equilibrium between impact fee and non-impact fee areas.

5.04 IMPACT ON DEVELOPMENT COSTS

Various studies have examined the effect of impact fees on development and other costs in Illinois, California, Texas, and Colorado. These studies conclude that impact fees increase the cost of

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7 Nelson and Duncan at 123.
8 Id.
11 Id. at 208-9.
12 Rosenberg at 214.
13 Id. at 24.
14 Baden, Bret M., Don L. Coursey, and Jeannine M. Kannegiesser, Effects of Impact Fees on the Suburban Chicago Housing Market, Heartland Institute Policy Study No. 93 (November 19, 1999).
15 Dresch, Maria and Steven M. Sheffrin, Who Pays for Development Fees and Exactions? (Public Policy Institute of America, 1997).
housing, primarily because they result in higher development costs. Developers, in turn, attempt to pass
the higher costs along to the ultimate homebuyer. Based on these studies, one should expect land
development costs to rise in those jurisdictions in which impact fees are imposed, even where they are
imposed fairly and consistently.

Another relevant factor is who ultimately bears the increase in development costs. While the fees are
imposed directly on developers, research suggests that developers bear little of the actual burden in a
competitive housing construction market. While some of these costs may be shifted “backwards” from
the developer to the owners of undeveloped land, new home purchasers likely bear most of the additional
costs through higher housing prices. This dynamic will vary depending upon the particular community.
In jurisdictions that are growing and are desirable places to live, any increase in development costs can be
more easily passed on to consumers. Growth and desirability will tend to introduce a degree of
inelasticity in the demand for housing, especially new construction, and this inelasticity allows costs to be
shifted forward to consumers. If impact fees are imposed in distressed, non-growing or less desirable
areas, however, there is greater risk that builders and developer will not be able to recover their increased
costs and will have to absorb the fees or simply choose not to develop new housing.

To the extent that impact fees are a more predictable and fairer system of imposing infrastructure capital
costs and securing development approvals, costs associated with development uncertainty may be reduced
as compared with alternatives that operate on a project-by-project basis such as proffers or ad hoc
exactions. Additionally, a “one stop” impact fee system can greatly reduce the time involved with
permitting as well as compliance costs. If the alternative is additional reliance on regulatory APF
programs, impact fees will tend to have less effect on costs and prices. If the alternative is broad based
taxation, impact fees will have greater effects on costs and prices.

5.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

Because impact fees increase development costs, they would be expected to have an effect on where and
how land is developed. For example, other things being equal, if impact fees are imposed in one
jurisdiction but not in a neighboring jurisdiction, one would expect the jurisdiction without the fees to
experience more development. All else being equal, developers will tend to favor jurisdictions with lower
fees or no fees. Of course, all else is not always equal, and if the jurisdiction without impact fees instead
imposes other less predictable forms of exactions, or compensates for a lack of sufficient infrastructure by
denying or scaling back development proposals, a developer may view the impact fee as the “lesser evil.”
Some studies have suggested that a system of transparent and well-calibrated impact fees may increase
development by fostering greater certainty in the permitting process and creating a monetary incentive for
local governments to approve new projects. As a practical matter, however, local governments often do
not adopt transparent and equitable impact fees, but rather set them higher to strategically position
themselves in bargaining with developers seeking approvals.

18 Rosenberg at 214.
19 Dresch at 75.
5.06 Impact on Housing Affordability

To the extent that imposing impact fees serves to increase the market price for new construction, prices may also rise for existing development or for new development in areas not subject to the impact fee.\textsuperscript{22} New and existing homes are in competition. When the cost of new construction rises, existing homes become increasingly preferred. As demand shifts away from new to existing homes, the prices of existing homes will be bid up until relative equilibrium is re-established. Results of an empirical study in Illinois show that impact fees increase the price of new and existing homes.\textsuperscript{23} Thus, they have a direct negative effect on housing affordability. At an extreme, impact fees could be set so high that more affordable housing development becomes unprofitable (and thus not built), while more expensive housing developments could still be profitable.\textsuperscript{24} When considering the effect of impact fees, it is important to remember that developers must often finance and carry these costs for long periods of time. Thus, studies have shown that each dollar assessed as an impact fee increases housing prices by between $1.66 and $1.88.\textsuperscript{25}

In addition, recent reports have examined the common practice of calculating flat-fee impact fees on a “dwelling unit” basis.\textsuperscript{26} This practice may have a disproportionate impact on affordable housing, by saddling smaller homes with the same fee as for larger homes.\textsuperscript{27} By contrast, impact fees that are calculated based on the square footage of the dwelling unit, or potentially by the anticipated number of occupants, may be more equitable and consistent with affordable housing goals and policies.\textsuperscript{28} In addition, a number of local governments have been enacting impact fee programs designed to minimize, if not totally eliminate, the disproportionate effect of impact fees on affordable housing by waiving, deferring or paying the impact fee for affordable projects.\textsuperscript{29}

5.07 Summary of Pros and Cons

There are a number of advantages to well-devised impact fee programs and a number of disadvantages, particularly, to those that are not well founded.

**PROS:**

- Impact fees help communities pay for the infrastructure required to support new development projects, without forcing elected officials to levy new taxes on the public as a whole;
- Impact fees create a situation where new development arguably “pays its own way”;

\textsuperscript{23} Baden at 46.
\textsuperscript{24} American Planning Association at 8-133.
\textsuperscript{27} Nelson: HOUSING AFFORDABILITY at 3-4.
\textsuperscript{28} Id. at 4.
\textsuperscript{29} Id.
A well-devised impact fee system can add speed and predictability to the development process, as compared to negotiated exactions.\textsuperscript{30}

Properly created and applied, impact fee systems can attribute specific costs to specific developments in a rational and predictable manner.

CONS:

- An impact fee requirement increases the costs of new development, especially for residential projects and consequently may reduce the number of projects that are economically feasible.

- The increased costs resulting from such impact fees may make it harder for low-and-moderate income households to afford to purchase residential units in new developments. Impact fees can also result in higher prices for existing homes, thus making all homes less affordable.

- Impact fees may be favored by local officials and existing residents who see them as a mechanism for keeping their own taxes low by passing on government expenses to new residents who do not yet have a voice in the community.\textsuperscript{31}

- Impact fees can result in double taxation for buyers of new houses. In many cases, those who are forced to pay impact fees to secure their building permits pay not only for their new public facilities, but also for facilities serving existing residences and businesses. The reason is that, in addition to incurring impact fees as a cost of their new housing, these residents also pay regular taxes at sufficient levels to pay for the same or other facilities used by existing residents that are financed through general revenues.\textsuperscript{32}

- Impact fees are an unstable source of funding since they depend directly on new housing starts.

5.08 INCENTIVE-BASED ALTERNATIVES

Impact fees themselves can be used to create incentives to encourage development to locate in areas with facilities that are less costly to serve. For example, San Diego is a jurisdiction that encourages growth through the use of lower impact fees in areas already well-served with public facilities, and discourages growth through the use of higher impact fees in areas lacking infrastructure.\textsuperscript{33}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{30}] Nelson and Duncan, at 123.
\item[\textsuperscript{31}] \textit{Id.} at 8-133.
\item[\textsuperscript{32}] South Carolina Policy Council, \textit{Assessment of Impact Fees as Means of Financing Government Infrastructure} (1997).
\item[\textsuperscript{33}] Nelson and Duncan at 123.
\end{itemize}
\end{footnotesize}
SECTION 6: SPECIAL ASSESSMENT DISTRICTS (SADS)

6.01 PURPOSE AND KEY TERMS

A Special Assessment District (SAD) is a sub-area of a community designated by ordinance to assess a tax for the construction or installation of public facilities that directly benefit the property owners within that district.¹ Also known in various states as Local Improvement Districts, Special Benefit Districts, or Benefit Assessment Districts, SADs are a means of paying for improvements over a period of time through proportionate assessments on benefiting properties.²

A “special assessment” is a dedicated tax on real property used to defray all or part of the cost of a public improvement. The assessment is apportioned according to the estimated benefit that will accrue to each property. This apportionment based on the projected benefit to the individual property is the distinctive feature of a special assessment. This feature distinguishes SADs from property (or “ad valorem”) taxes levied for the purpose of collecting general revenues that permit the local government to fund a variety of programs and projects throughout the locality.³

An SAD is distinguishable from a Special District. A Special District is a limited-purpose unit of local government created to carry out a specific function, such as the provision of sewer or storm drainage facilities.⁴ A special district is accorded full power to provide the service for which it is created and, as such, is typically authorized to tax, issue bonds, and to enter into contracts for service. An SAD, on the other hand, is generally not independent of the government that creates it. It is a designation for a cluster of properties that are subject to a special assessment for the purpose providing a specific benefit.⁵ It is common to distinguish between the types of districts, with a Special District characterized as “independent,” meaning independent from the local government, and Special Assessment District characterized as being “dependent,” meaning that it is dependent on the local government.

Despite those differences between an SAD and a Special District, the two are similar in effect. They are discussed in this section interchangeably for purposes of evaluating their effectiveness at financing public improvements, since both of these mechanisms provide local governments with a means of separately financing improvements within a limited geographic area. In fact, a 1992 Urban Land Institute (ULI) report on Special Districts noted that independent districts like SADs, “are increasingly important for the provision of infrastructure.”⁶

Finally, an SAD or a Special District, in this context, should not be confused with a “Special Zoning District” which is a name given to districts created by municipalities under the zoning powers to

² Municipal Research and Services Center of Washington, “What is a Local Improvement District?,” Chapter in Local Improvement District Procedural Outline (http://www.mrsc.org/subjects/pubworks/lidoutl.aspx#whatlid).
⁴ Id.
⁵ Id.
implement flexible site-specific development regulations. These types of regulatory districts are variously referred to as “Special Design District,” “Special Area Protection District,” “Special Purpose Development Districts,” “Special Development Review District,” and “Special Mixed Use District.”

6.02 Effectiveness in Achieving Stated Purpose(s)

The principle behind an SAD is straightforward: If a segment of the community desires to have infrastructure beyond that provided by the local government, it should foot the bill. For example, an SAD may be created to provide a centralized water system to replace individual wells. These districts allow local control over spending because the money can only be used for specific projects, so they are generally well-suited to meet their designed purpose. They also are an available source of revenue for tax constrained areas, such as California, after Proposition 13, where communities may be unable to provide basic infrastructure improvements out of general tax revenues.

SADs and Special Districts are authorized in all 50 states, either through enabling legislation or state constitutions, and go by various names, such as Municipal Utility District (Texas), Community Development District (Florida) and the Mello-Roos District (California). The 2007 Census of Governments reports that there were 37,381 independent special districts that were active in the United States, approximately equal to the 39,044 general purpose local governments. The Urban Land Institute also noted that no census was taken of dependent Special Districts, which, it concluded, must number in the tens of thousands and also provide important services.

Although SADs vary in their details, they have several principles in common:

- The use of a Special Assessment enables a group of property owners to pay for a public facility that specially benefits them. Since individuals will not necessarily agree on the value of the project, the process for establishing a district also includes a process for considering objections to its establishment from among those to be charged.

- The assessed cost is distributed among many property owners according to the proportionate benefits to each owner’s land.

- Standards for the public facilities are established by the governmental unit responsible for their future operation and maintenance. Each project is usually part of a larger system that must be functionally adequate for the entire community.

- The facility is built in accordance with a final, permanent standard. Property owners are not easily persuaded that a new special benefit is received from reconstruction of a project that is already in place.

- A developer may be granted the privilege of special assessment financing for facilities that the developer would otherwise pay for directly. Using the lower interest rate on municipal

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9 2007 Census of Governments.
10 Porter at 1.
borrowing reduces the developer’s cost. Some units of government either do not allow, or place limits on, this use of special assessment.

- State enabling legislation typically establishes when, where, how and by whom an SAD can be formed and administered. Generally, the establishment of an SAD is subject to a vote of affected property owners.¹¹

The procedures under which an SAD is established are usually very detailed and must be followed carefully in order for the district to survive challenge. As an example, The Florida Special District Handbook, published by the Florida Department of Community Affairs, describes the process for establishing a Special District in Florida.¹²

In 1981, Burlington, Vermont created a redevelopment district to bolster its downtown, the Church Street Marketplace. Administered by a city agency and funded by a special assessment based on a combination of frontage on Church Street and overall building square footage, the district is considered a success. During its first five years, the assessment basis was considered equitable, but as adjacent areas of downtown rebounded, equity issues surfaced. For example, property on streets perpendicular to Church Street paid no fees, but arguably benefited from spill over success. These and other issues caused the city to periodically reexamine the boundaries and management of the SAD.¹³

A report by the Planning and Conservation League of California credited benefit assessment districts in that state with enhancing that state’s quality of life by providing residents with necessary police, fire, public transportation, roads, flood control, sewer lines, libraries, parks, open space, and economic development efforts. The use of this technique generated $304 million in revenue in 1992-93, up from $28 million only 15 years earlier.¹⁴ However, since the 1996 passage of Proposition 218, an amendment to the California Constitution, California courts have struck down special assessments aimed at open space acquisition and public park improvement and maintenance, finding that the assessments did not confer any special benefit on affected parcels that were different from the general benefits conferred to the public at large.¹⁵

The District of Columbia has received recognition for using an SAD to fund the cost of constructing a new Metrorail station on New York Avenue. A special assessment levied against commercial properties within 2500 feet of the entrances to the new station is expected to generate about $25 million of the $84 million originally budgeted to build the station. An SAD was seen as an equitable tool for financing the station given the increases in property values that would accrue because of proximity to the new Metrorail

¹¹ Bureau of Governmental Research and Service, School of Community Service and Public Affairs, University of Oregon, Financing Local Improvements by Special Assessment, BGRS No. 82-1 at 4 (January 1982).
Bonds backed by future special assessment revenues were issued to fund construction and some landowners even donated land to assist in making this infrastructure development a reality.  

6.03 IMPACT ON PROPERTY VALUES

If the SAD assessment truly reflects the benefit accruing to the property from the infrastructure provided, one would expect there to be little positive or negative impact on property values from the creation and implementation of an SAD. To the extent that the use of an SAD makes it possible to develop property that it would not otherwise be feasible to develop to the same extent, the SAD may increase property values within the district, all else being equal. Shifting costs to new development will tend to decrease property values, but making infrastructure available will tend to increase property values.

6.04 IMPACT ON DEVELOPMENT COSTS

SADs should have no direct impact on development costs, except to the extent that they make possible the provision of necessary infrastructure with the cost shifted to future owners. Such costs would otherwise have to be brought to the site at the developer’s expense.

6.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

SADs can make it possible to provide infrastructure and services to areas that might not otherwise receive public investment, thereby potentially opening up new areas to growth or allowing faster growth in developing areas.

6.06 IMPACT ON HOUSING AFFORDABILITY

The amount of the special assessment will be assumed by homeowners in the district as an increased cost of housing. The effect on housing prices is more difficult to predict. Depending on market factors, the effect of this additional assessment, all else being equal, may be to reduce housing demand and consequently prevent higher housing prices in the affected area. However, in places where SADs are not common, consumers are frequently unaware of the existence of any obligation to pay SAD charges, despite disclosure requirements, and do not show market resistance to such districts. In places where SADs are common, consumers are aware of the districts, and their costs are factored into the prices consumers are willing to pay. This market resistance tends to capitalize future SAD charges as lower prices, which will tend to be borne by owners, builders and developers.

6.07 SUMMARY OF PROS AND CONS

PROS:

- SADs can provide important services in areas where local governments have limited financial and/or administrative capabilities.

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18 Porter at 41.
The creation of SADs offers the government an opportunity to avoid increases in general property taxes, thereby avoiding public controversy or legal constraints on the ability to raise tax levies.

Because of their narrow focus, SADs allow greater control over spending for specific infrastructure projects than general fund revenues.

If the purpose of the assessment is properly described and attainable, and the assessment itself is competently administered, all in the district should proportionately share the burden of the tax and all should proportionately benefit from the eventually-constructed improvement.

CONS:

Where there is a belief that the ability to construct new infrastructure is constrained by a city bureaucracy that wastes tax revenue, SADs, one argument goes, simply enable this dysfunctional system to consume dollars while producing less and less.

To the extent that infrastructure and amenities serving new developments in the district are spread equally among all properties in the district, the system is unfair to existing users in that they are excluded from receipt of new infrastructure or amenities.

When the assessments are limited to new developments, it may take decades for sufficient funds to accumulate and to construct desired amenities.

Where fiscal oversight and control is inadequate, funds generated by the special assessment can be spent elsewhere.

6.08 INCENTIVE–BASED ALTERNATIVES

SADs are an alternative to the customary process of relying on funding from general public revenue sources to provide needed or desired infrastructure improvements. Under an SAD, infrastructure investments may be possible on a timetable that comports with market needs, whereas investment that relies on general revenue sources may not be able to count on those revenues being available at all or on a schedule that is predictable.

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19 Id.
21 Id. Ross describes the example of Carmel Valley, California Community Park FBA funds being spent by the city on a highway.
SECTION 7: TAX INCREMENT FINANCING

7.01 PURPOSE AND KEY TERMS

Tax Increment Financing (TIF) is a development tool that enables local authorities to finance public improvements, including infrastructure improvements, to stimulate redevelopment and in some cases new development, using property tax proceeds from property value appreciation within a specified geographic area. The traditional purpose of TIF was to provide the legal framework for municipalities or counties to channel the increased taxes that flow from improvements to pay for the costs of land assembly and infrastructure improvements such as water and sewer lines, streets, sidewalks, and lighting. As discussed in more detail below, local governments use property tax increases in the TIF district attributable to redevelopment to pay for designated economic development expenses that are initially financed through so-called TIF bonds.

TIF was originally designed and justified as a local method of self-financing the redevelopment of blighted urban areas. Now, the use of TIF to raise project finance monies has expanded into other areas. TIF bond proceeds commonly finance projects in non-blighted as well as blighted areas, and for a variety of purposes associated with redevelopment, development, or related physical infrastructure improvements, such as elementary and secondary educational facilities, roads, bridges, parking facilities, recreational facilities, water and wastewater facilities, and electrical power plants. TIF has also been used to finance a wide variety of successful commercial and industrial projects. In addition, TIF projects have been means through which to create affordable housing, assist in the revitalization of low-income and moderate-income neighborhoods, and to tackle modern, technical redevelopment problems such as the redevelopment of contaminated sites such as brownfields. TIF is also being used to provide infrastructure financing to encourage mixed-use and New Urbanism-style developments in places such as Denver, Colorado and Virginia Beach, Virginia. A study of TIF adoption in Michigan found that cities with growing populations and rising property values are more likely to adopt a TIF plan than “shrinking cities,” largely because TIF provides a tool for financing the infrastructure required by growth. All states except Arizona have enacted legislation authorizing the TIF projects.

TIF programs are implemented through the creation of discrete geographic areas called tax increment districts or TIF districts. TIF districts commonly share boundaries with the enabling government, usually a city, or the TIF district may be a smaller part of a city, such as a section of the downtown area or an industrial park within the city. The boundaries of a TIF district are typically created by the local redevelopment authority.

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2 TAX INCREMENT FINANCING, prepared for the National Association of Realtors® by Robinson & Cole LLP and Craig L. Johnson [hereinafter NAR TAX INCREMENT FINANCING], Part I, 1 (2002); Council for Development Finance Agencies, TIF Across America – 5 Case Studies [hereinafter TIF Across America] (available online at http://www.cdfa.net/cdfa/cdfaweb.nsf/ftaad5956b2928b086256efa005c5f78/09bb875ff7a9b74c862571c3006ac51e/$FILE/The%20Diversity%20of%20TIF.pdf).
5 NAR TAX INCREMENT FINANCING, Part I at 5.
TIF projects are financed through the issuance of debt. The most common source of debt financing for up-front capital expenses comes from the sale of **TIF bonds**, which act like revenue bonds in the sense that principal and interest payments are generally funded with project revenues. The proceeds from the sale of the TIF bonds are used to finance the capital improvements within the TIF district. Unlike traditional **general obligation bonds** (bonds secured by the pledge of the municipality’s full faith, credit, and taxing power), TIF bonds in most states are not subject to municipal debt limits or public referendum requirements. Therefore, local officials have more discretion to sell TIF bonds than they do general obligation bonds, which provides the municipality with more debt capacity to finance infrastructure improvements.\(^6\)

TIF bonds are repaid with the **tax increment** derived from new development within the TIF district. The tax increment is the difference in the **assessed valuation** (AV) of all property parcels in the TIF district at the base year determined at the beginning of a project (**Base AV**) and the taxes derived from the increases in the assessed values of new development within the TIF district (**Incremental AV**). At the time when the TIF district is terminated, the Incremental AV reverts back to the general revenue pool (**New Post-Project AV**).\(^7\) The following chart illustrates AV over the life of a TIF project.

**TIF Assessed Value (AV) Over Project Life**

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\(^6\) *Id.* at 4.

\(^7\) *Id.* at 5.
**Initiation.** A TIF project is typically initiated by the local government, but may also be initiated by a private firm or non-profit agency.

- **Needs Assessment.** Because TIF is authorized by state statute and involves the government’s taxing and spending powers, TIF must be used for a legitimate public purpose. Additionally, the proposed TIF program must meet various statutory requirements. For example, most states require the local government to make a blight finding, which is a determination that the TIF district meets the statutory definition of “blight.” Many statutes also require that the proposed redevelopment project satisfy what is known as the “but for” test. This test is intended to ensure that TIF is only used in cases where the desired redevelopment would not occur in the absence of the governmental assistance. Some state statutes also require a cost-benefit analysis or feasibility study as well as a blight determination and satisfaction of the “but for” test.

- **Redevelopment Plan Formation.** In this stage, a detailed redevelopment plan is created. The plan describes the objectives of the program, formalizes the community purposes for which TIF may be used, creates a timetable, and forms the written basis for communicating these matters to stakeholders. Often, this plan must align with the general plan for the community. During this stage, the boundaries of the TIF district are determined. The relevant state statute may limit the size of a specific TIF district or the total aggregate area of all TIF districts in a particular municipality. Additionally, public-private partnerships are created and development agreements are entered into in order to facilitate the implementation of the redevelopment plan.

- **Plan Adoption.** During this stage, the redevelopment plan is presented to key stakeholders and the public in order to obtain buy-in and any necessary approvals. Most TIF statutes provide procedures allowing the public to review and comment upon proposed TIF district boundaries or redevelopment plan. Typically, notice and public hearings are held. As TIF programs may divert taxes from other overlapping taxing districts such as school and fire districts, some state statutes require that these districts approve the redevelopment plan prior to its implementation.

- **Implementation and Evaluation.** During implementation the government must generally oversee the construction process and manage the finances of the redevelopment authority and TIF district. Additionally, TIF statutes often require local governments to provide annual reports to state actors to keep them informed about the status of TIF projects.

- **Plan Termination.** The final stage is termination of the TIF district. Typically, a TIF enabling statute specifies a distinct period of time within which the objectives of the TIF district must be satisfied. This period is generally twenty to thirty years provided that the debt has been repaid.

In addition to traditional property tax-based TIF programs, some states have authorized TIF programs based on sales tax or income tax increments. Louisiana’s *Sales Tax Increment Financing* (STIF) program, for example, allows municipalities to use the increased or additional sales tax revenue from a STIF district to finance economic development within that district. Indiana and Maine are two states that currently provide for *Income Tax Increment Financing* (ITIF) programs in which the incremental income tax revenues paid by employees employed within the ITIF district are used to pay debt service bonds issued for redevelopment.

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9 NAR TAX INCREMENT FINANCING, PART I AT 7-13, PART III AT 1-5.
10 Lauren Ashley Smith, Alternatives to Property Tax Increment Finance Programs: Sales, Income, and Nonproperty Tax Increment Financing, 41 URBAN LAWYER 705 (Fall 2009).
11 See id.
12 See id.
7.02 Effectiveness in Achieving Stated Purpose(s)

The effectiveness of a TIF program can be measured within the TIF district, and on a community-wide basis. Generally, TIF programs are effective at achieving their purposes within the TIF district. By implementing the redevelopment plan, blighted or underutilized areas within the district are redeveloped and the AV of the TIF district tends to increase. The effectiveness of a TIF program may be limited if the redevelopment is delayed due to unforeseen environmental remediation issues or the developer is unable to complete the redevelopment project. Effectiveness may also be limited if the new development within the TIF district fails to generate sufficient incremental revenue to pay off the bond indebtedness. This shortfall may occur because the projected level of development may not be reached or may be reached with significant delay, assessed property values in the TIF district may decline, or project costs may be significantly higher than anticipated.\(^\text{13}\)

There is considerable debate about TIF’s effectiveness to spur economic development on a community-wide level. TIF proponents argue that the incentives provided through TIF are effective in attracting firms to locate or expand their businesses in a TIF district, resulting in increased economic activities, more jobs, lower unemployment, higher wages, greater property values, more tax revenues, and the revitalization of blighted areas.\(^\text{14}\) Opponents of TIF argue that TIF programs are ineffective and inefficient because the incentives provided by state and local governments only account for a small portion of a firm’s production cost so that TIF programs are unlikely to affect business location choices or expansion decisions.\(^\text{15}\)

Empirical research on TIF programs to promote and stimulate economic development on a community-wide basis has yielded conflicting conclusions on the effectiveness of TIF programs.\(^\text{16}\) For example, a survey of 300 randomly selected municipalities found that cities that use TIF programs experienced an increase in property values both within the TIF district and the surrounding community.\(^\text{17}\) Another study found a correlation between the adoption of TIF programs by cities in Michigan and the growth of property values in those cities.\(^\text{18}\)

In contrast, other studies have concluded that TIF is not effective at achieving its goal of increasing economic growth on a community-wide level. One empirical study of TIF use in the Chicago metropolitan area concluded that the equalized assessed value (EAV), defined as the value of the property upon which the tax rate is calculated after deducting all applicable exceptions, of non-TIF areas of municipalities that use TIF grew more slowly than the EAV of similar municipalities that do use TIF, which suggests that the higher EAV growth rate in the TIF district trades off with lower EAV growth rates elsewhere in the community.\(^\text{19}\) The same study found that establishment of a commercial TIF district reduced both commercial and residential EAV growth in non-TIF areas of the community.\(^\text{20}\)


\(^{15}\) *Id.* at 4.

\(^{16}\) Joyce Y. Man, *Effects of Tax Increment Financing on Economic Development* in *TAX INCREMENT FINANCING* at 106.

\(^{17}\) *Id.* at 103.

\(^{18}\) *Id.*


\(^{20}\) *Id.*
These findings support the conclusion that while TIF stimulates new development and EAV growth within the TIF district, it depresses EAV growth in other areas of the community, thus calling into question the community-wide benefits of TIF. A subsequent study revealed that the overall economy of municipalities that adopt TIF grow more slowly after adoption than those that do not because TIF inefficiently allocates governmental and private resources from non-TIF areas of the community to TIF areas of the community.

TIF may also have negative spillover costs to taxpayers outside the TIF district. Municipal service requirements such as police, fire, sanitation, education and transportation, will most likely rise as development occurs within a TIF district. If regular property taxes paid by persons within the district cannot cover the cost of services provided for the district, taxpayers outside the district must make up the difference. The larger the TIF district, the greater the impact on the surrounding community.

7.03 IMPACT ON PROPERTY VALUES

TIF may have differing impacts on property value depending on whether or not the property in question is located within the TIF district. Logically, it would seem that TIF programs would increase the property values for properties within the TIF district if the TIF results in new development. Empirical studies have found that TIF programs do stimulate property value growth within the TIF district. It is also not unreasonable to expect that TIF programs would have positive spillover effects on property values of property located outside the TIF district. New development within the TIF district could increase the attractiveness of the area surrounding the district and may increase the value of nearby properties as well.

These positive results are dependent upon the overall market in the community as a whole supporting the new development. If the market is weak and does not support development or the development does not generate sufficient tax revenues to cover the costs of the public investments, then it is likely that impact on property values would be small or negligible. Furthermore, while TIF may increase the value of property located within the TIF district, the positive effects may not extend beyond the TIF district boundaries.

Empirical research on TIF’s impact on property values outside of the TIF district has yielded conflicting results and no clear consensus has been reached by economists. Some studies have found that TIF programs increase property values on a community-wide level. These studies have found that communities that adopt TIF programs generally experience greater property values than non-TIF adopting communities. Another study in Indiana found that that Indiana TIF programs have increased the median owner-occupied housing value by 11.4 percent in cities that have utilized TIF relative to what it would have been without the program. This is equivalent to approximately a $4,900 increase in the median value of owner-occupied housing in the entire community. This study went on to conclude that the infrastructure investment and improvements in a targeted area financed through TIF had a substantial positive spillover effect on the host community’s real estate market.

21 Id.
23 Learning from Experience at 4.
25 Man, supra note 16 at 103.
26 Id. at 104.
27 Id.
In contrast, other studies have found that TIF programs do not increase property values outside of the TIF district. One study of TIF programs and property values in the Chicago metro area found that TIF actually reduces assessed property value growth rates in the municipality as a whole, and that municipalities that elect to adopt TIF stimulate the growth of economically declining areas at the expense of non-targeted areas. The study of EAV discussed above also indicates that TIF does not increase property values on a community-wide level.

**7.04 IMPACT ON DEVELOPMENT COSTS**

Generally, TIF programs should be expected to lower development costs in two ways. First, TIF programs enable municipalities to finance the construction or improvement of infrastructure related to TIF developments. These construction costs might otherwise be imposed on a private developer. Second, if authorized by a state’s TIF enabling legislation, a municipality can utilize its power of eminent domain to condemn property in order to assemble land parcels for private development, thereby reducing a developer’s land acquisition costs.

**7.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT**

TIF programs should impact the pattern of land use in a community by encouraging development within the area defined by the TIF district. Thus, it would be expected that a developer would be more likely to develop property within a TIF district than in another area of the community. All else being equal, TIF may affect land use patterns by encouraging development of one area of a city over development in another area of the city.

Additionally, as the purposes for which TIF may be used continue to expand, it has become a tool to advance a community’s land use policy objectives. For example, TIF programs have successfully provided public infrastructure necessary to support a New Urbanism development in the downtown area of Virginia Beach, Virginia, redevelop a brownfield area in Milwaukee, Wisconsin, and facilitate the development of a public light rail system in Houston, Texas.

**7.06 IMPACT ON HOUSING AFFORDABILITY**

Generally, if TIF programs have a positive effect on values of properties within the TIF district, it would be reasonable to expect that TIF programs would negatively affect housing affordability in that district. As the price of land within the district increases, the cost of redevelopment would also increase. These increased costs tend to be passed on to potential buyers and tenants in the form of higher sale prices and rents. Additionally, if the property values increase significantly, the increased values may deter some developers from building in the area. These impacts may affect areas beyond the boundaries of the TIF district if the TIF project increased the value of property located outside the TIF district.

However, TIF programs have also been used to increase the number of affordable homes in a community. A program in Austin, Texas, similar to a TIF program, protects affordable housing in its downtown area, which is quickly gentrifying, by allowing the city to create homestead preservation districts. As occurs in a TIF program, a Base AV is established for the district based on the property tax revenue for that district and any Incremental AV goes toward preserving affordable housing within the

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30 Housing Policy, Using TIF to Preserve Affordable Housing Opportunities in Gentrifying Neighborhoods (available online at http://www.housingpolicy.org/toolbox/strategy/policies/tif.html?tierid=144).
district.\textsuperscript{31} Maine has also adopted a similar program entitled Affordable House Tax Increment Financing (AHTIF).\textsuperscript{32} Under the program, municipalities can designate up to two percent (2\%) of their land as an AHTIF district. A Base AV is established for the district and any Incremental AV is used to construct affordable housing within the district.\textsuperscript{33}

### 7.07 SUMMARY OF PROS AND CONS

**PROS:**

- TIF may effectively increase property values within a TIF district and may have positive spillover effects in areas of a community outside the TIF district.
- TIF provides local governments with a means to intervene in the real estate market and offer tax and other incentives to encourage the redevelopment of areas by private entities which “but for” the use of TIF would not undertake the desired redevelopment.
- TIF debt typically does not count against a municipality’s debt limit, nor is the municipality responsible for repayment from other sources.
- TIF is a self-financing mechanism and does not require direct public investment or an increase in the existing tax burdens on residents because the proceeds of TIF bonds are used to finance the capital improvements and the debt is repaid with the Incremental AV from the TIF district.
- TIF programs are flexible. They can be used in combination with other types of redevelopment programs, can be initiated at any time, and can be used to encourage the redevelopment of an area that meets certain broadly defined standards.
- TIF programs can also be an effective means by which a community’s land use and policy goals may be obtained such as the creation of New Urbanism developments, the redevelopment of brownfields, and the development of public transportation systems.
- TIF may provide a means to protect housing affordability if structured so that any Incremental AV goes toward preserving affordable housing within the district.

**CONS:**

- TIF may not improve economic growth in the community as a whole because development in a TIF district may replace development that would have otherwise occurred elsewhere in the community.
- TIF may have negative spillover costs to taxpayers outside the TIF district because the new development within the TIF may increase the cost of public services beyond the Base AV forcing taxpayers located outside of the TIF district to cover the increased costs.
- TIF programs tend to be complicated and costly to operate.

\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} For further information on Maine’s AHTIF program, see the Maine State Housing Authority’s Affordable Housing Tax Increment Financing webpage at \url{http://www.mainehousing.org/TaxIncrement}.
- TIF programs may not generate sufficient revenue to cover the obligation to repay the bond sold to finance the infrastructure improvements.

- TIF may negatively affect housing affordability within a TIF district if the resulting TIF-related improvements increase land values, making development of affordable housing more costly, and no provision is made within the TIF program for preserving or creating affordable housing.

### 7.08 Incentive-Based Alternatives

TIF is an incentive-based mechanism by which local governments and the private sector can partner together to achieve redevelopment objectives. By issuing TIF bonds to cover the cost of needed capital improvements within a TIF district, local government as the “public partner” provides the incentive in the form of reduced development costs for the private sector to undertake the redevelopment of a targeted area.
PART III: PROTECTION OF NATURAL RESOURCES AND ENVIRONMENT

SECTION 8: OPEN SPACE PRESERVATION TECHNIQUES

8.01 PURPOSE AND KEY TERMS

Open space tracts are valued for their scenic attributes, for recreational purposes, as wildlife habitat and ecological preserves, as a means of protecting the public against risks posed by development in unsafe areas such as steep slopes and floodplains, for the protection of water supplies, and as a way of preserving a rural “character” and creating “buffers” between developed areas. There are a variety of mechanisms by which local governments can attempt to protect open space from development, ranging from market-based techniques such as open space acquisition programs, development rights purchases, and transfer of development rights, to design techniques such as cluster subdivisions, to developer exactions requiring the dedication of parkland or payment into an open space fund, to restrictive regulations such as large lot zoning and riverfront buffer zones.

Many state and local governments have undertaken open space purchase programs by which parcels of land identified as valuable for open space purchases are acquired with public funds. Properties acquired under such programs may be purchased in fee after which the purchasing entity owns the property outright. Fee purchase is commonly used to acquire land for parks, where it is desired that the public entity have both ownership and control over the property.¹

Alternatively, a local or state government may acquire a conservation easement, scenic easement or similar development restriction under a Purchase of Development Rights (PDR) program. Under these programs, ownership, as well as, usually, the responsibility for operating and maintaining the property, remains with the fee owner. The fee owner may make whatever use of the property is not prohibited by the restriction or easement. PDRs are often used in the context of agricultural land, where they are sometimes called Purchase of Agricultural Conservation Easement or “PACE” programs.² Development or other use restrictions may be imposed through a purchase and sale or purchase and leaseback arrangement whereby restrictions are imposed through conditions placed on the disposition of land acquired by a public entity for resale or lease.

Site planning techniques such as cluster development can be used to set aside tracts of open space within a development plan, while consolidating buildings and infrastructure on only a portion of the site. Under such techniques, a property slated for development is evaluated to identify the most desirable areas for preservation, such as wetlands, land bordering a water course, or an area that provides a scenic view to others. The development is then designed to protect the area of interest from development impacts. These techniques can be imposed through subdivision or zoning law as mandatory requirements, or can be offered to landowners as an option under such laws, either with or without density bonuses or other incentives for their use.³

² See discussion in Section 10, Farmland Preservation Techniques.
³ Cluster development is further discussed in Section 11.
Low density or large lot zoning is often used in developing suburban and rural jurisdictions to minimize development densities. This is often done in an attempt to preserve rural character by ensuring that development lots include large open areas. Zoning and non-zoning environmental regulations may establish “no build” buffer areas within which development is prohibited for environmental protection or public safety reasons, such as within floodplains, adjacent to water bodies and riverways, on steep slopes, or in other protected or difficult terrain.

Transfer of Development Rights (TDR) is a technique by which property owners within a “sending” area that the jurisdiction wants to protect from development are allowed to sell development rights to third parties. The development rights can be used to increase permissible development densities on other properties within a “receiving” area. The receiving area is one in which development is encouraged. TDR is discussed in detail in Section 9.

Some jurisdictions use exactions imposed on development approvals as a way of ensuring that open space is set aside. These exactions can take the form of requiring the dedication of land within a development for open space purposes such as parkland. They may also be imposed as fees in lieu by which the jurisdiction collects a financial payment for deposit into a fund dedicated to the purchase of open space elsewhere in the community.

Some states have adopted legislation authorizing local governments to create special assessment districts for the purpose of creating parks or preserving open space. Generally referred to as open space districts, these special assessment districts finance park or open space improvements through a special property tax assessment levied on property owners within the district that directly benefit from the improvements.

**8.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)**

**Purchase of Land in Fee or Purchase of Development Rights**

The effectiveness of programs for the purchase of land or development rights in land depends upon how well the program does at identifying its priority sites for acquisition and focusing its expenditures on those priority sites. Some commentators recommend that communities establish eligibility and scoring criteria for ranking properties. For example, a PDR program aimed at protecting farmland might score properties on the basis of its agricultural activity, development pressure, contribution to the local agricultural industry, and compatibility of adjacent land to long-term agricultural use. PDR programs are sometimes constrained by the limited funding made available for open space purchases, and the need to identify and plan for the most effective use of these financial resources. New Jersey’s Garden State Preservation Trust authorizes the expenditure of funds for the purposes of “acquisition and development of lands,” but funding for the purchase of development rights on farmland is more limited. Acquisition of a tract of land, or the development rights to such land, is generally thought to be the most effective way to ensure that the land is set aside for open space purposes forever. Although it is possible in theory that

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5 See id.


7 Id.

the government entity could resell the property or the easement rights, it would be unlikely to do so except under the most unusual circumstances.\(^9\)

**Cluster Development**

Cluster development can be very effective in preserving contiguous open space within a development site. One example is the 13,522 acre Galisteo Basin Preserve, a conservation development located southeast of Santa Fe, New Mexico.\(^10\) By clustering the planned 1,015 residential units into four conservation neighborhoods plus a mixed use village, 96% of the land in the Galisteo Basin Preserve will be permanently preserved as open space.\(^11\) Another example is the Jackson Meadow conservation community located west of St. Croix, Minnesota, a 145-acre development that in which 60 residential lots are clustered on just 40 acres.\(^12\) However, clustering is not effective at transferring growth away from preservation areas, because it is restricted to redistributing development within a single development site.\(^13\) Cluster development allows the property owner to achieve the economic return from development while preserving the agriculture or open space, at no cost to the public.\(^14\)

**Downzoning and No-Build Buffers**

Restricting development density through the imposition of large lot or low density zoning can be effective in preserving tracts of open space and protecting environmental resources. The judgment of how effective this approach is depends in large part on how agriculture or environmental resources are viewed. Dividing a working farm or ranch into a number of 5 to 10-acre lots may preserve the aura of rural lands, but certainly not the function. Additionally, reserving extensive areas for large lot zoning is often criticized as being one of the principal causes of urban “sprawl” in growing areas.\(^15\) Non-contiguous or “leapfrog” development can result if growth pressures create demand for development beyond the city limits, but density limits prevent that demand from being met in contiguous areas. Likewise, no-build buffers along riverfronts or in areas with other natural features can be very effective in preventing the encroachment of development and its impacts on the resource to be protected, but raise significant property rights concerns.

**Transfer of Development Rights (TDR)**

A TDR program can be an effective means of preserving open space in circumstances where there is a viable market for the development rights created. In the Pinelands area of New Jersey, for example, more than 12,000 acres of agricultural and environmentally sensitive land were preserved from development in the first 14 years of that region’s well-known TDR program.\(^16\) The market for purchase of development rights in that case is created by allowing development rights to be used in the sending area at a 4:1 ratio (four units created for every one unit given up in the sending area) and in part through the use of a publicly funded development rights “bank” to purchase and hold development rights for resale. In theory

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\(^11\) See id.

\(^12\) See id. at 174-183.

\(^13\) Pruetz at 78.


\(^16\) Pruetz at 217-223; See Section 8 for additional discussion of TDR programs.
a TDR program can be effective in setting aside preserved open space in sending areas even if the program is a “voluntary” one in which the transfer of development rights is not coerced by the application of drastic development restrictions, but rather the TDR is offered as an option to sending area property owners who otherwise would be free to develop their property at reasonable densities. However the Pinelands program, like many TDR programs described as being successful, is premised in part on strict growth controls in the sending area that strongly encourage the sale of development rights for use elsewhere. In a survey of twenty publications that listed factors thought to be responsible for making TDR programs successful, the third and fourth most frequently cited factor were: “strict sending-area development regulations” and “few or no alternatives to TDR for achieving additional development.”

Exactions or Fees in Lieu

Fees and dedication requirements are limited in their effectiveness at preserving open space because they are necessarily tied to development approval. They are therefore limited in scope to what is reasonably necessary to offset the impacts of a development and are limited in extent to an amount that is roughly proportional to the development’s impact. Many states have dedication requirements calling for the set-aside of park land within a subdivision, and some jurisdictions have adopted requirements allowing payment of a fee in lieu of such dedication that could be used to purchase recreational land within proximity to the development. By contrast, the Massachusetts subdivision control law prohibits local planning boards from conditioning a subdivision approval on the dedication of land to public use or conveyance to the town, without just compensation.

8.03 Impact on Property Values

It is logical to think that programs for the preservation of open space can lead to higher property values for properties that abut that open space. Data from Amherst and Concord, Massachusetts, show that cluster development properties appreciate faster than residential properties with larger private yards but no protected open space. A study from Boulder, Colorado, showed that proximity to the city’s greenbelt was correlated to residential property prices. Where open space is created through techniques that do not preserve development rights, however, the affected owners will suffer a loss in property value. For example, downzoning will reduce the development value of affected properties, even as it may increase the comparative value of other properties in the market area that have not been downzoned, or where development has already taken place. Properties that are encumbered by “no build” buffers and similar environmental requirements can be significantly diminished in value.

TDR depends on the manipulation of property values in order to encourage the transfer of rights from “sending” to “receiving” areas. Requirements that a developer donate open space or pay into a fund for open space purchases reduces the value of that property from what it would be worth if it could be developed in its entirety or if no payment has to be made. The effect of cluster development requirements on property values will depend on whether the market values such development as highly as more traditional forms of project design, or whether the jurisdiction incorporates an incentive provision that allows higher density, and hence more developer profit, for clustered projects. One can presume that

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if cluster development were the most profitable type of development, developers would provide it. It follows that requiring developers to provide a type of development that is less preferred in the marketplace would lead to lower property values.

8.04 IMPACT ON DEVELOPMENT COSTS

TDR or cluster development programs involving discretionary approvals, and negotiations over open space dedication requirements or fee in lieu payments can increase developer transaction costs, including carrying costs associated with the time it takes to get development approvals and uncertainty over project outcome. TDR transaction costs can include time-consuming negotiations over price and the preparation of development right purchase and sale agreements, and closing costs associated with the TDR purchase.22 On the other hand, cluster development options can result in development cost economies, including reduced infrastructure costs.23 Likewise, increased densities allowed for projects incorporating TDR can potentially reduce the hard costs of development on a per unit basis.

8.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

Each of the techniques discussed in this section is intended to affect the patterns of development by resulting in the reservation of large tracts of undeveloped land. With TDR, development density is transferred from one property to another, and with cluster development, density is transferred from one part of a parcel to another. Downzoning to large lot minimums decreases the potential development density in the downzoned area, which may or may not be compensated for in other parts of the jurisdiction or market area. Low density zoning can be a contributing factor to non-contiguous development, as growth that cannot be accommodated in more urban areas, either for reasons of land supply, cost, or market preference reasons, is forced to “leapfrog” over restricted areas to less restrictive jurisdictions beyond. No-build buffers and similar techniques keep development a specified distance away from the protected resources, and can reduce the total amount of development that takes place in proximity to the resource area. With PDR, land is removed from the development market altogether. Taking property out of the development market through the use of PDR can also interrupt logical growth corridors if planning considerations are not incorporated into the identification of target properties for purchase.

8.06 IMPACT ON HOUSING AFFORDABILITY

Open space preservation strategies may result in upward pressure on housing prices to the extent that growth in the relevant market area cannot be or is not accommodated at other locations, for example, because there is an inadequate supply of land zoned, available and desirable for development. Downzoning and purchase of development rights programs can have the effect of reducing the supply of available, developable land, thereby making the remaining developable land more expensive and existing housing stock more valuable. To the extent that the effect of downzoning or development rights purchases are offset by allowing the reduced density to be transferred elsewhere through a TDR program, increases in allowable density in the receiving area may result in increased housing stock in those areas and consequently more affordable housing prices, all else being equal. Development cost economies and reduced infrastructure costs can translate into more affordable housing in cluster developments, depending on market conditions. The cost of a development exaction or fee-in-lieu will be passed more or less directly to the purchaser of the housing or absorbed by builders and developers.

depending upon the nature of the local housing market.

8.07 SUMMARY OF PROS AND CONS

PROS

- Open space preservation techniques provide a way to protect desirable community assets from the negative impacts of development.
- Proximity to preserved open space can increase the value of developed or developable land.
- Techniques such as voluntary TDR programs and PDR result in the payment of fair market value to property owners for the loss of development rights and are preferable to regulatory programs from a property rights standpoint.

CONS

- Techniques such as downzoning and no-build buffers have significant implications for property rights.
- PDR and low density zoning can lead to “leapfrog” development depending upon how they are implemented.

8.08 INCENTIVE BASED ALTERNATIVES

Voluntary TDR programs, discussed in more detail in Section 9, provide an incentive for the preservation of open space by offering the property owner the ability to sell development rights for a desirable return. Such a program can be designed so that selling the development rights may be even more profitable than developing the property would have been. Mandatory TDR programs, which follow downzoning of the affected property, are not really an incentive-based alternative for preserving open space, because the property owner is left with no other choice after the downzoning but to sell the development rights if the owner wants to realize value from its property.

PDR can also be seen as providing an incentive to preserve open space, because it typically results from an arms-length transaction by which the rights are acquired for fair value, providing the property owner with the ability to obtain an immediate return on investment, rather than await what may be speculative future development.

In some jurisdictions, cluster subdivisions are allowed a “density bonus” by which more units can be built on a parcel of a given size under a cluster configuration that preserves open space, than if the parcel were developed using standard subdivision design.
SECTION 9: TRANSFERABLE DEVELOPMENT RIGHTS

9.01 PURPOSE AND KEY TERMS

Transferable Development Rights or “TDR” is based on the legal concept that ownership of real property, in actuality, is ownership of a combination of rights that pertain to that property. For that reason, ownership of real property is frequently analogized to owning a “bundle of sticks.” Each stick in the bundle represents one of the rights of ownership, such as the right to possess, including the right to minerals below the surface, the right to exclude others from one’s property, and, of course, the right to make productive use of one’s property, usually understood as the right to develop, or development right. Ownership of the entire “bundle” of rights is known as ownership in fee simple absolute. However, because each property “right” is a separate “stick” in the bundle, each such right can be conveyed to another person or entity. One way that a property right may be conveyed separately without conveying the entire fee simple interest in property, is to grant certain rights in the form of an easement. An easement is frequently the instrument used when a property owner grants to an adjacent property owner the right to use a road that runs across his or her property.

TDR is a market-based mechanism intended to discourage development of property within a designated “sending area.” The “sending area” contains attributes that the community wants to protect from development such as valuable environmental resources, wildlife habitat, large tracts of open space, farmland, or historic landmarks. Under a TDR program, a property owner in the “sending area” can agree to restrict development on its property by entering into a conservation easement or similar deed restriction that is noted on the land records and encumbers the property forever. A conservation easement means that the property owner records a covenant against the property that prohibits the disturbance of natural resources areas identified on the property. Typically this grant of conservation right in the form of an easement is granted to a third party such as a not-for-profit organization that is given the right under the terms of the easement to enforce the restrictions against use and disturbance of the natural resource areas. In effect, the conservation easement “extinguishes” the right to develop the natural resource areas of the property, usually in perpetuity. Conservation easements are discussed in Section 15.

In exchange for this restriction, the property owner receives one or more development rights. These “transferable development rights,” as the term suggests, can be transferred (sold) to a property owner in a “receiving area” who wants to build more than would otherwise be allowed by the development regulations applicable in that area. The “receiving area” is a designated district where denser development is appropriate and encouraged. (See figure below) The receiving area should be desirable for development from a market perspective, and the necessary infrastructure should be available.1 Typically the use of TDRs in the receiving area is based on a “density bonus” by which the TDRs can be used to create, for example, up to 20 percent more dwelling units on a particular property than would be allowed under the established base zoning. The premise of such programs is that the purchase price for the TDR compensates the seller for the development rights relinquished. Ensuring that there is a market for the purchase of transferable development rights is one of the most difficult aspects of devising a workable TDR system. This requires careful market analysis for the designation of appropriate receiving areas.

Programs incorporating the TDR concept come in a number of variants. In some programs, the TDR is established in conjunction with new regulations restricting development and is construed as a way to compensate for reductions in the market value of the newly regulated “sending area” property. In these cases, the TDR program offers a way for communities to address questions of equity and fairness that arise when downzoning and other restrictive regulations are imposed to drastically restrict development on private property without accounting for the financial loss to affected landowners. TDR can make it politically possible for a community to impose significant regulatory restrictions on development because it is seen as a compensatory mechanism that offsets the economic impact of the restriction. This is true, even though it is an open legal question whether it is constitutionally permissible to use TDR to provide “just compensation” for a regulatory “taking” of property. Such programs, premised on drastic regulatory restrictions on development of the “sending areas,” are sometimes called “mandatory” TDR programs, because the property owner’s ability to develop its property has been constrained and the only way to recover development value is to sell development rights for use elsewhere.

In other cases, a TDR mechanism is established without accompanying downzoning, using a more purely market-focused incentive for property owners to forego the development of sending areas. Often, in such cases, a TDR will be “worth” more or equate to more development in the receiving area than has been given up in the sending area. For example, a sending area property that could have been developed with ten single family houses, might when voluntarily placed under permanent conservation restriction, be entitled to a TDR that could be used to build twenty additional housing units on a receiving area property. Such a program would be described as having a “transfer ratio” of 2 to 1. Such “voluntary” TDR programs are less vulnerable to challenge under constitutional due process and regulatory takings theories.

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2 See Joseph L. Sax, Land Use Regulation: Time to Think About Fairness, 50 NAT. RESOURCES J. 455, 468 (Spring 2010); see also Rick Pruetz, Saved by Development” (Arje Press 1997) at 48-49.
4 Pruetz at 53-55. Transfer ratios greater than 1:1 can be found in “mandatory” TDR programs, too.
Ideally under a TDR program, all parties end up ahead. The development rights purchaser ends up enhancing the value of its development project by more than the cost of the additional development rights. The seller of the development rights receives fair value for the foregone rights. The community secures the permanent protection of land that has high environmental, heritage or open space value at little or no direct cost, while directing additional development to an area more suited for it. When successful, TDR “offers a way for communities to achieve their land use goals without having to find the money for acquisition.”6 Viewed strictly through a “property rights” lens, however, a TDR program may be viewed more cynically—as confiscating property from “sending area” owners by imposing severe restrictions on development intended to coerce the transfer of development rights, and by exacting from “receiving area” property owners the purchase of these development rights.7

While environmental, farmland or historic protection in some form is the predominant purpose for most TDR programs, the technique is robust enough that it can be applied to a wide variety of purposes. For example, some jurisdictions have used TDR to discourage development of existing lots in antiquated subdivisions that would be difficult to build-out under current standards.8 The ability to sell a development right gives the lot owner some economic value for its property and presumably alleviates the incentive to press ahead with construction on the original lot. TDR is used to mitigate the economic impact of restrictions intended to protect scenic views of Big Sur in Monterey County, California,9 Seattle uses TDR to help protect low-income housing and performing arts centers from redevelopment.10 TDR is also used in some jurisdictions as an incentive to move development away from areas with significant infrastructure limitations.11

9.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

TDR programs have existed in this country since 1968, when New York City adopted its Landmark Preservation Law, which incorporated the concept of allowing development density to be transferred from a lot containing an historic structure to an adjacent parcel.12 A 2005 study observed that more than 130 local governments and 22 states had adopted some form of TDR program.13 The pace of new TDR proposals seems to have accelerated as communities have become increasingly concerned about growth and community character issues. Montgomery County, Maryland, has had a TDR program for twenty years, and its program is often cited as being among the most successful examples of this technique. As of May 2006, Montgomery County had preserved 48,584 acres through the sale of TDRs, which constitutes nearly 75% of all preserved farmland in the county.14

Many local TDR programs were established under home rule authority without the benefit of statewide enabling legislation, or under statewide legislation that offered little specific guidance on program development. Some of these are generally viewed as being successful. However, well-drafted state enabling legislation can increase the likelihood that a local TDR program will be successful. For example, the Long Island Pine Barrens of New York is frequently cited as a TDR program that has been

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6 Pruett at 1.
8 Pruett at 29.
9 Pruett at 29.
10 Frankel at 833.
11 Pruett at 27.
12 Pruett at 9.
relatively successful. The Pine Barrens program is voluntary in that sending area properties were not downzoned. The Long Island Pine Barrens TDR program is authorized in state legislation that is specific to the Pine Barrens. Recognizing the success of this TDR program, the New York legislature enacted similar TDR enabling legislation to more broadly authorize the implementation of TDR programs at the local level by cities, villages, and towns.

The following provisions should be part of state TDR enabling legislation:

1. Comprehensive definition of terms.

2. A requirement that there be specific local program objectives for identifying sending areas.

3. A requirement that there be clear standards for delineating receiving areas and regulating development within receiving areas. Receiving areas must have sufficient demand for new development to absorb TDRs.

4. A requirement that local TDR programs follow steps to guide the initial allocation of TDRs and to measure and establish values. Standards should require a market analysis to ensure a reasonable balance between the supply of TDRs and the demand for them, so that there is an economic incentive for use of TDRs.

5. Standards to guide the administration of local programs so that programs are equitable, simple to administer, and have clearly defined procedures for the acquisition, transfer, and use of TDRs.

6. A requirement that the local government responsible for program implementation have or hire the expertise necessary to design, implement, and monitor the program.

7. If the state enabling legislation authorizes exceptions to standard restrictions placed on property following the sale of TDRs, the legislation should include provisions defining the circumstances under which such exceptions may be permitted.

8. A requirement for variance provisions to ensure the flexibility of local TDR programs and provide a way to address undue hardships.

Not all TDR programs are successful in providing sufficient incentive for a substantial number of development rights transfers to take place. Transfers will only occur where the jurisdiction is successful in creating a market for development rights. A 2007 study noted that for any TDR program to be successful, “there must be a healthy supply of land and demand for development rights, interested parties must be able to meet in the TDR ‘marketplace,’ and trades must be made at some mutually agreed-upon price.”

TDR programs are vulnerable to supply and demand pressures. Program planners must address supply-side issues by ensuring a sufficient supply of sending sites is available to serve as “stockyards for the program.” The number and type of TDRs produced by sending sites must be carefully calculated and matched with the calculated demand created by the receiving sites. To maintain an effective TDR program, local governments should be prepared to continually monitor the TDR marketplace and make

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15 (N.Y. Gen. City Law 20-f); (N.Y. Village Law § 7-701); (N.Y. Town Law, § 261(a)).
16 Pruetz at 50.
17 Walls & McConnell at 124.
19 Aoki, Briscoe & Hovland, 20 J. ENVTL. L. & LITIG. 273 at 315.
adjustments to reflect changing supply and demand factors. TDR programs must also maintain fair prices for TDRs in order to ensure a steady demand for the commodity. Governments considering TDR programs must also consider the impact that their existing land use laws will have on TDR supply and demand. Where zoning regulations are overly permissive, demand for TDR will likely suffer as developers decline to pay for additional density.

The transaction costs often associated with TDR transactions—including time-consuming negotiations over price, preparation of development rights purchase and sale agreements, and closing costs associated with the development rights purchase—may be substantial enough to discourage developers from participating in a TDR program. TDR “banks,” in which a governmental or quasi-governmental agency buys and aggregates development rights from sending area properties and sells them for use on receiving-area properties, can help minimize transaction costs by setting minimum purchase prices to resolve valuation problems. TDR banks can also help to overcome market timing gap issues by providing a ready purchaser for development rights during economic downturns, and a source of development rights available for purchase when the real estate market has recovered. This can help to stabilize the value of TDRs. Local TDR banks, however, can face a range of complex issues, such as funding and appraisal issues, which are outside the realm of expertise of many local government officials and staff. These complexities can be viewed as disadvantages to having a TDR bank as part of a local TDR program.

9.03 IMPACT ON PROPERTY VALUES

TDR programs are variations on cluster development. Both programs begin with the premise that some properties should not be developed and that the community will be better off if development is moved from one site to another. If both sites are within the same parcel, it is “cluster.” If the two sites are in different parcels, it is a transfer of development. Depending upon how they are implemented, TDR programs can have significant impacts on property values in both the sending and receiving areas. Indeed, the entire premise of a viable TDR program is that transfers will take place only if both the sending area property owner and the receiving area property owner will benefit from the transaction. TDR programs “use zoning restrictions to create a contrived market for development rights.” Put another way, the TDR process relies upon the manipulation of land values through regulation as the premise to a workable scheme.

As noted above, in some jurisdictions a TDR program is a component of a downzoning scheme for the “sending area” that would tend to reduce the development value of property and create an incentive to turn to TDR for compensation. Frequently the “downzoning” is achieved by refusing to rezone properties to more intensive uses without the use of TDRs. TDR can enhance both the political prospects and the legal justification for extreme low density zoning such as agricultural preservation and conservation zoning districts. Under the ideal circumstances of a well-conceived and implemented TDR program, with sufficient demand for the development rights created in the “sending area,” payments to property owners for development rights will offset the development value lost through the downzoning. But where a

21 See TDR Siren Song at 429.
22 See TDR Siren Song at 429.
23 See TDR Siren Song at 429.
24 Frankel at 829; see also Pizor at 207.
25 Miller at 471-472.
mandatory TDR program is premised on downzoning and there is not enough demand to purchase all the development rights created, there will be property owners who may suffer an economic loss.

In addition, under nearly all TDR programs, the value of the TDRs are supported by density bonuses that permit additional development at a “receiving area” site. But the effectiveness of these density bonuses is premised on keeping “low baseline density limits in receiving areas, to ensure that these limits can only be exceeded by TDR and to encourage higher density development.” For example, assume, as is commonly the case, that demand for TDR is encouraged by downzoning receiving area properties, or by adopting a policy forbidding upzoning (zoning to higher densities). Analyzed from a post-downzoning viewpoint, the ability to use TDRs presumably makes the property more valuable than it would be under the same regulatory constraints, without the ability to increase density. Indeed, a developer will not purchase development rights unless the price of the rights is less than the value of the additional density that the rights authorize, so that the development is profitable.

But looked at from the perspective of the property owner prior to a TDR accommodating downzoning, the analysis reaches a different result. If a property owner were entitled to build at a density, say, of eight units per acre, its property would presumably be worth more, all else being equal, than if the owner is entitled to build at a density of only four units per acre and had to purchase the right to the additional four units because the property had been downzoned or kept at an artificially low zoning density. In cases where receiving-area property is downzoned as a way to create demand for development rights transfers, the need to use TDR to restore allowable development density seems little different than imposing an exaction on a “receiving area” developer. This exaction is used to pay for development rights ceded by the “sending area” property owner, and the need to pay the exaction to achieve the desired development density makes the receiving area property less valuable than it would be if it were not necessary to purchase development rights. Where receiving area properties will not be upzoned without TDR, the effect on property value would depend on how the land market valued those properties. If the market assumed upzonings, the TDR requirements would reduce market prices for land. Alternatively, if the market did not assume upzonings, then TDR could increase land values.

9.04 IMPACT ON DEVELOPMENT COSTS

The complexity of TDR programs can increase transaction costs associated with development involving TDRs. In particular, those TDR programs that incorporate a discretionary approval process for the use of TDRs in a development, can result in delays, uncertainty of success, and the imposition of costly conditions of approval that might not be imposed on a “by right” project. The flip side of this concern is that programs that are too intricate and time-consuming will be avoided by developers, who will prefer to develop in areas or at densities that do not involve such complications. On the other hand, depending on the nature of the site and the development design, the increased development density allowed in receiving areas with the use of TDRs may result in lower per-unit development costs, as compared with development at base densities.

26 Pruetz at 56.
27 Pizor at 209.
28 Pruetz at 58-59.
29 Pizor at 210.
9.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

TDR is a mechanism intended to alter the patterns of land development by redirecting development from “sending areas” to “receiving areas.” Whether a TDR program affects the amount of overall land development should depend on a variety of factors. These include the nature of local land markets in sending and receiving areas; the design and effectiveness of the TDR program, including the transfer ratio; the permissible density bonus within the receiving area, and the extent to which base densities in the receiving area are set at artificially low levels to encourage development rights transfers. For example, if base densities are reduced in receiving areas as part of a TDR program, and there is not an effective market for transfer of development rights, development in the receiving area may be constrained below what would otherwise have taken place without the downzoning. In contrast to PDR programs, TDRs shift development to different locations within a community without necessarily reducing the total amount of development allowed.30

9.06 IMPACT ON HOUSING AFFORDABILITY

Whether a TDR program has any effect on housing affordability, and what that effect is, will depend on the design of the TDR program and the nature of the relevant housing markets. Depending on market factors, one could foresee a TDR program resulting in localized increases in housing prices within “sending areas” as it discourages development in that area and supply becomes insufficient to meet demand. Similarly, a TDR program, to the extent that it results in greater development density than would otherwise be possible in “receiving” areas, may lead to increased housing stock in those areas and consequently more affordable housing prices. Some TDR programs allow greater density bonuses for projects that include housing units satisfying standards for “affordability,” while others, such as Seattle’s, use TDR expressly to preserve housing for low income residents. Depending on market factors, a developer who is able to reduce per unit development costs by taking advantage of TDR to construct denser projects in receiving areas may be able to sell housing for less than comparable developments at lower density. Conversely, increased administrative costs associated with navigating a complicated TDR process may drive development costs up and create upward pressure on housing costs.

9.07 SUMMARY OF PROS AND CONS

PROS:

- A well-designed TDR program can be a way to help preserve environmental, historic and other resources, while also protecting property rights.
- The ability to transfer development rights for value can offset development value lost through a downzoning or other restriction on sending area properties.

CONS:

- It is difficult to design an effective TDR program; they can be expensive and complex to administer, and not all programs are successful in creating a market for development
- TDR programs may employ downzoning or similar restrictions in “receiving areas” in order to generate demand for the use of development rights.
9.08 INCENTIVE-BASED ALTERNATIVES

A voluntary TDR program provides an incentive for the protection of desirable environmental or built features in the sending area by offering the property owner the ability to sell development rights for a desirable return. Such a program can be designed so that selling the development rights may be even more profitable than developing the property would have been. Similarly, under a TDR program, development in a “receiving area” is allowed at densities that are higher than allowed under otherwise applicable development regulations in order to provide transferable development rights with value and encourage “receiving area” property owners and developers to participate in the program. A variety of jurisdictions using TDR have incorporated additional incentives to make TDRs more attractive for developers. For example, Pacifica, California, exempts projects using TDR from parkland dedication requirements, capital improvement fees and traffic impact mitigation fees. St. Mary’s County, Maryland, allows reductions in the required open space ratio and landscape ratio requirements. Sunderland, Massachusetts, relieves receiving site developments from minimum lot size and frontage requirements. At least in theory, providing incentives for participation by “receiving area” property owners has the effect of creating or enhancing the market for transferable rights, thereby encouraging greater participation by “sending area” property owners and furthering the primary goal of protecting the sending area from development.

It is also possible to provide an additional incentive for “sending area” property owners to place their properties under development restrictions by allowing transfer ratios greater than 1:1. Encouraging the use of TDRs through this type of a “carrot” approach is vastly preferable from a property rights standpoint to the “stick” approach of using drastic development restrictions to force property owners to turn to TDRs as the only practical way to obtain value from their property. Mandatory TDR programs that follow downzoning of the affected property are not really an incentive-based alternative for preserving open space because the property owner is left with no other choice after the downzoning but to sell the development rights if it wants to realize value from its property.

Residential density transfer (RDT) is a variation on the traditional TDR concept. The RDT approach differs from the TDR concept in that no sending areas are created and no development rights are actually transferred. Instead, receiving areas are designated and developers wanting to exceed the base density are required to submit two appraisals for the site’s land value—one that assumes development at the base density, and another that assumes development with RDT bonus density. The increase in value between the two appraisals is attributed to the density bonus and the developer is required to pay a set percentage of that increase. In Gunnison County, Colorado, for example, the RDT fee is 10% of the increase in the receiving-site land value.

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31 Pruetz at 63.
32 Pruetz at 64.
SECTION 10: FARMLAND PROTECTION TECHNIQUES

10.01 PURPOSE AND KEY TERMS

Farmland preservation techniques are intended to slow the conversion of productive agricultural land to residential and commercial uses. The American Farmland Trust (“AFT”), an organization that is influential in encouraging farmland protection efforts nationally, asserts, broadly, that “[e]conomic opportunity, environmental protection, community infrastructure and quality of life are among the most compelling reasons to save farmland.”¹ Saving farmland is perceived as critical to ensuring continued American advantage in world food markets and ensuring “food security” — that is, the ability of America to put food on the table of its citizens at reasonable prices.² From the standpoint of environmental protection, saving farmland is encouraged on the grounds that “well-managed farmland protects soil and water resources and can prevent flooding. It absorbs and filters wastewater and provides groundwater recharge.”³ Proponents also point to the role that privately owned farm and ranch lands have in sustaining wildlife populations, and note that energy crops have the potential to replace reliance on fossil fuels.⁴

With respect to “community infrastructure,” AFT notes that people increasingly “view natural resources, including agricultural land, as vital for the well-being of our communities, rather than as ‘free’ material to be disposed of at will.”⁵ From that perspective, the role played by agriculture in local economies, including secondary markets such as food processing and tourism, provides a reason to defend against farmland conversion. Additionally, AFT cites studies showing that tax revenue from farmland more than pays for the municipal services it requires.⁶ Finally, and probably most compellingly for many people concerned with the loss of agricultural land in their own communities, “farm and ranch land maintains scenic, cultural and historic landscapes” which “create identifiable and unique community character and add to our quality of life.”⁷ Farmland also plays an integral role in our national heritage as an agrarian population.⁸

There are a variety of tools used by state and local governments to protect farmland. Some of the most common are discussed here.

- **Exclusive Use or Agricultural Protection Zoning (APZ)** refers to the designation by a county or municipality of zones in which agriculture is the exclusive or principal allowed use, and in which uses that could be incompatible with farming, including non-farm residential developments, are prohibited.⁹ These zones typically require much larger lot sizes or allow much lower development densities than other zones.¹⁰ APZ ordinances in some jurisdictions place limitations on the ability to subdivide agricultural parcels, often with an exemption for

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² SAF at 5-6.
³ SAF at 7.
⁴ Id.
⁵ Id.
⁶ SAF at 7-8.
⁷ SAF at 8.
⁸ SAF at 9.
⁹ See SAF at 49.
agricultural worker housing or family members of the farmer.\textsuperscript{11} APZ provisions may also make it more difficult than usual to rezone land from the agricultural protection zone to a classification in which development is allowed.\textsuperscript{12} APZ ordinances may include provisions addressing the conflict between farming and non-farming uses, including enhanced setbacks, site design review of non-farming development, required buffers, or mechanisms designed to protect farmers against nuisance claims.\textsuperscript{13} Ideally, the designation of Agricultural Protection Zones is based on consideration of soil quality as well as other factors concerning the location, character and current use of the land.\textsuperscript{14} APZ has a number of purposes, including protecting areas with prime agricultural soils from development, protecting against conflicts between farming and non-farm land uses, and maintaining a “critical mass” of agricultural land in a jurisdiction. APZ is used to forestall land speculation by non-farmers. APZ is also used to “promote orderly growth” and as a means of preserving open space and scenic landscapes.\textsuperscript{15}

- **Purchase of Agricultural Conservation Easement (PACE)**, also known as **Purchase of Development Rights (PDR)** is a program by which a state or local government pays a farmer for the development rights in a parcel of agricultural land.\textsuperscript{16} Under a PACE program, the right to develop or use a specified agricultural property for non-farming purposes is severed from the right to use the land for agriculture. This occurs through the imposition of a **conservation easement** which “runs with the land” either permanently or for a specified period of time. Depending on local real estate laws, in some states the government purchases a **covenant** against development of the burdened parcel.\textsuperscript{17} Such restrictions are sometimes called **Agricultural Preservation Restrictions (APR)**. In terms of the “bundle of sticks” analogy for the rights of a fee simple property owner, the development “sticks” are acquired by the government for compensation, while the farmer retains the remaining property right “sticks.” In addition to the right to reside and continue farming on the property, these retained rights include the right to exclude others, the right to pass the property to descendants or to sell it to another agricultural user, as well as, often, the ability to provide housing for workers or family members. The price paid for the easement is generally, but not always, set by an appraisal.\textsuperscript{18} Funds for the purchase of development rights may come from general appropriations, or from specific revenue sources including property taxes, specialized taxes, such as a tax on real estate transfers, or bonding. PDR is also discussed in Section 8 above pertaining to Open Space Preservation. The several purposes of a PACE or PDR program for acquiring easements on agricultural land include retaining land in farming use, and providing an infusion of capital that can help maintain the economic viability of the farm or ranch.\textsuperscript{19}

- **Transfer of Development Rights (TDR)** programs are another mechanism that is sometimes used to preserve farmland by creating a private market for development rights on agricultural properties. The definition and purpose of TDR is discussed above in Section 9, and will not be further addressed here.

- **Mitigation Ordinances and Policies** require the permanent set-aside of agricultural land as a condition of allowing the conversion of agricultural land to other uses. One example of this

\textsuperscript{11} See SAF at 61. 
\textsuperscript{12} SAF at 65-66. 
\textsuperscript{13} See SAF at 62-63. 
\textsuperscript{14} SAF at 49, 56-57. 
\textsuperscript{15} See SAF at 50. 
\textsuperscript{16} SAF at 83. 
\textsuperscript{17} SAF at 83, note. 
\textsuperscript{18} SAF at 98-99. 
\textsuperscript{19} SAF at 83.
technique is an ordinance that requires developers to permanently protect an acre of farmland through conservation easement or other mechanism for every acre that is converted to other uses. Developers may also pay a fee in lieu of the land set-aside. An alternative approach is to require “no net loss of farmland” on a jurisdictional basis. These types of provisions are less common and of more recent vintage than the other mechanisms discussed above.

- **Right-to-Farm Legislation** is intended to strengthen a farmer’s legal defense against suits by neighbors for private nuisance, and to protect farmers from local regulations that would constrain farming practices. These provisions may be imposed at the state or local levels. There are two broad types of nuisance protection that state statutes provide. About half of the states have codified the “coming to the nuisance” defense so that farmers who have been in operation before an area develops residentially cannot generally be forced to curtail operations because the new neighbors complain about odors, noises or other impacts. The second type of nuisance protection insulates farmers from lawsuits challenging the effects of their operations so long as they are operating using “generally accepted agricultural and management practices” in accordance with applicable regulations.

### 10.02 Effectiveness in Achieving Stated Purpose(s)

Farmland preservation techniques seem to be most effective in achieving their purpose of preventing the conversion of farmland to urban development when used in combination with one another. However some farmers dispute that approaching urban development causes a reduction in farmland. High water and labor costs and low commodity prices also reportedly are major factors in encouraging farmers to sell their land for development rather than continuing in business. Federal farm policy and its effect on profitability is probably more important in determining whether farming in an area survives in the long run than the implementation of farmland preservation measures. Furthermore, there is considerable doubt whether the “loss” of farmland is really the crisis that farm advocates claim it is. A U.S. Department of Agriculture study reports that the amount of land used for growing crops is virtually the same today as it was fifty years ago, and the same agency has said that “losing farmland to urban uses does not threaten total cropland or the level of agricultural production.

**Exclusive Use or Agriculture Protection Zoning (APZ)**

According to the AFT, APZ “is the only farmland protection technique that can prevent development of large tracts at low public cost.” APZ has reportedly been successful in maintaining the agricultural land base in predominantly rural areas of the Midwest and West where farmland preservation measures were enacted before significant development pressures and where land prices therefore reflected the value for farming so that residents did not perceive a significant economic burden from the regulation. AFT reports that farmers in those areas support APZ because “most have no desire to sell land for development, and they see zoning as a means of preventing any of their neighbors from doing so.” A ten year study in one Pennsylvania jurisdiction found that the adoption of APZ shifted the pattern of land sales for development

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20 SAF at 33.
21 SAF at 169, 174-175.
22 SAF at 39.
26 SAF at 71.
27 Id.
from the agricultural district to land outside the agricultural district. The author of the study concluded that “the adoption of agricultural zoning significantly reduced the flow of land in the agricultural district from owners who generally intend to keep it in rural use to owners whose ultimate intention is development.”

28 The same author notes that the would-be developers clearly considered the agricultural zoning in that case to be relatively permanent. 29 A frequent criticism of agricultural zoning as a farmland preservation tool is that zoning can be easy to change, so that APZ is a “temporary fix” and land zoned for agriculture can be rezoned for development given sufficient economic or political pressure. 30

AFT states that in rapidly growing communities, “APZ alone cannot address the economic challenges that farmers face.” 31 It has been more successful in those areas where it is combined with PACE and TDR programs. 32 APZ is used to protect land from development until funds are available for the purchase of development rights. 33 AFT cites a conversion rate of only 3,100 acres of farmland per year during the 1987-1994 time period in the state of Oregon where all 36 counties have enacted APZ as part of the state’s growth management program. 34 In a national survey of farmers and ranchers, APZ was preferred (58%) over the purchase of agricultural conservation easements (PACE) (16%) as a mechanism for avoiding the conflicts between non-farmers and agricultural uses that result when homes are built in agricultural areas. 35 Area- or density-based APZ can be more effective in preserving farmland because it allows development on smaller lots, providing more flexibility in site planning, and potentially allowing dwellings to be placed where they cause the least intrusion on the active farming use, and where soils are the least conducive to agriculture. 36 By contrast, farm advocates caution that residential/agricultural zoning that results in “large lot” requirements of one to five acres does little to protect commercial agriculture and, in fact, often hasten its decline by increasing land consumption for non-farming purposes. 37

One author observes that “[t]he fundamental concern about the effectiveness of agricultural zoning is the inherent impermanence of any system based on political choice.” 38 Loudon County, Virginia, is the classic example of this. The author points out that the effectiveness of APZ is also undermined by the opportunities to change zoning restrictions through variances and rezonings. 39

In urban areas, APZ may result in the creation of non-agricultural “ranchettes” or “estates.” For example, in western Marin County, California, where APZ requires 60-acre zoning, wealthy San Franciscans built country houses on 60-acre lots. 40 Such developments fragment agricultural land, tend to bid up land prices, and defeat one of the principal purposes of farmland protection measures, which is to maintain a viable agricultural community. 41 Oregon’s zoning approach to preserving farmland has also been

28 Coughlin at 190-91.
29 Coughlin at 191.
30 See SAF at 52.
31 Id.
32 Id.
33 SAF at 69.
34 SAF at 52.
36 Coughlin at 184.
37 SAF at 49.
38 Mark W. Cordes, Agricultural Zoning: Impacts and Future Directions, 22 N. Ill. U. L. Rev. 419, 446 (Summer 2002).
39 Cordes, 22 N. Ill. U. L. Rev. at 440.
40 Id.
41 Id.
criticized as leading to the creation of thousands of “hobby farms” on parcels too small to be viable for commercial agriculture, yet competing with commercial farmers for the land base.  

According to the 1997 AFT report, “APZ is most widespread in Pennsylvania, Maryland, parts of the Midwest, and along the Pacific Coast.” In a national survey of all counties and some municipalities, AFT identified 24 states with local jurisdictions that had adopted APZ zoning. In particular, AFT found a concentration of APZ ordinances in Wisconsin and Pennsylvania, accounting at that time for 75 percent of the jurisdictions surveyed having APZ zoning.

### Purchase of Development Rights (PDR) and PACE Programs

Programs such as PDR and PACE, that involve the purchase of development rights are considered to be successful in accomplishing the set aside of farmland, and are thought to be popular with farmers and with the community at large. More than 2,023,000 acres of farmland were protected through state PACE programs as of January 2010. Such programs are also considered to be more advantageous than regulatory measures because they provide a more permanent form of protection for farmland. The principal criticisms of these programs’ effectiveness are their cost and the resulting slow pace of acquisitions. AFT reports that state and local programs had enough funding to purchase from only one out of every seven landowners wanting to sell easements in 1995. Because limited funds are available to acquire land, the ability of these programs to preserve contiguous agricultural area is constrained. It is critical for jurisdictions to target farms for preservation in a strategic manner in order to meet program goals. Some commentators recommend that communities establish eligibility and scoring criteria for ranking properties. For example, a PDR program aimed at protecting farmland might score properties on the basis of its agricultural activity, development pressure, contribution to the local agricultural industry, and compatibility of adjacent land to long-term agricultural use.

Federal funding for the purchase of agricultural easements is available through the Farm and Ranch Lands Protection Program (FRPP). Initially enacted under the Federal Agriculture Improvement and Reform Act of 1996, and later modified by the 2008 Farm Bill, FRPP is a voluntary federal conservation program that provides matching funds to eligible entities to purchase conservation easements on farm and ranch lands. Eligible entities include state and local governments, Indian tribes, and certain non-governmental organizations formed for conservation purposes. According to the AFT, more than $887,971,000 in matching funds has been allocated under the FRPP by the end of 2010.

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42 Daniels at 428.
43 SAF at 52.
44 SAF at 40.
45 SAF at 51.
46 See discussion of transferable development right (TDR) in Section 9.
47 SAF at 107.
48 Fact Sheet - Status of State PACE Programs, American Farmland Trust – Farmland Information Center (June 2010).
49 See PLANNING FOR AGRICULTURE IN NEW YORK: A TOOLKIT FOR TOWNS AND COUNTIES at 50 (American Farmland Trust 2011); see also Fact Sheet - Status of State PACE Programs, American Farmland Trust – Farmland Information Center (June 2010).
50 SAF at 88.
52 Id.
53 Fact Sheet – Farm and Ranch Lands Protection Program, American Farmland Trust – Farmland Information Center (June 2011).
54 See id.
Because PACE programs are voluntary, a low rate of participation can result in protection of land in scattered parcels that is not conducive to protecting farms from non-compatible abutters or preserving a critical mass of farm enterprise.\(^{55}\) Isolated islands of preserved land can actually attract development to abutting parcels because of the proximity of the permanently preserved open space.\(^{56}\) AFT reports that Forsyth County, North Carolina, sold back an agricultural preservation easement on a farm that had become surrounded by housing development, making it impossible for the farmer to lease enough additional land to maintain a viable operation.\(^{57}\) Depending on the terms of the restriction, PACE properties are sometimes also purchased by wealthy individuals who desire an estate property but do not intend to keep it in active agricultural use — the arguable effect is that they have had their land purchase subsidized by public funds.\(^{58}\) At least 88 independently funded local PACE programs in 20 states had acquired funding and/or easements as of January 2010, according to an AFT survey.\(^{59}\) Some states have been very aggressive with their purchase programs. For example, as of January 2010, New Jersey had spent $826,404,430 to preserve 182,953 acres of farmland through the New Jersey Farmland Preservation Program.\(^{60}\) In addition to local and state governments, non-profit organizations also operate PDR programs focused on preserving agricultural property, and very often these non-profit groups partner with governmental entities in acquiring development restrictions on such properties.

**Transferable Development Rights (TDR) Programs**\(^{61}\)

The 1997 AFT Report notes that TDR has failed to live up to its promise as a mechanism for the protection of farmland, with only 55,000 acres protected at that time.\(^{62}\) A number of reasons are given for TDR falling short. They include the reluctance of some jurisdictions to implement such programs because of uncertain legal authority and lack of political support. The major reason given, though, is the difficulty of creating a market for development rights.\(^{63}\) In particular, TDR will not be successful in a “no growth” environment, because the mechanism relies on growth in the “receiving zones” for the success of the program. For example, AFT reports on Calvert County, Maryland, which implemented a growth management program that depressed the market for development rights so that few transfers occurred.\(^{64}\) The other point made by observers of TDR programs is that even those that are successful take a considerable amount of time to get to that point. Montgomery County, Maryland, established an 89,000 acre “agricultural reserve” as a TDR sending area in 1980. Transactions began in 1983 after receiving areas were designated. But it took until 1997 before the supply of development rights in the sending area fell below the county’s capacity to use development rights in the receiving area — the point at which the market for transferable rights theoretically can provide compensation to sending zone landowners for

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\(^{56}\) Daniels at 424.

\(^{57}\) SAF at 106.

\(^{58}\) SAF at 88-89.

\(^{59}\) *Fact Sheet - Status of State PACE Programs*, American Farmland Trust – Farmland Information Center (August 2010); see also *Fact Sheet - Status of Local PACE Programs*, American Farmland Trust – Farmland Information Center (August 2010).

\(^{60}\) *Fact Sheet - Status of State PACE Programs*, American Farmland Trust – Farmland Information Center (June 2010).

\(^{61}\) See discussion of transferable development right (TDR) in Section 9.

\(^{62}\) SAF at 138.


\(^{64}\) SAF at 138-139.
their foregone development potential.\textsuperscript{65} According to an AFT Fact Sheet, a 2007 Farmland Information Center survey identified 99 TDR programs established for the protection of farmland.\textsuperscript{66} The AFT Fact Sheet notes that since 1980, Montgomery County, Maryland, has protected 51,489 acres of farmland using TDR.\textsuperscript{67}

**Mitigation Ordinances and Policies**

AFT reports on two local Mitigation Ordinances and Policies: a Davis, California, ordinance that requires developers to permanently protect one acre of farmland for every acre that is converted to another use; and a “no net loss of farmland” policy in King County, Washington’s comprehensive plan.\textsuperscript{68} Two states, Vermont and California, have adopted comprehensive land-planning procedures that allow for the development of certain agricultural lands in exchange for off-site mitigation through conservation easements or transfer of development rights.\textsuperscript{69} As of November 2002, Vermont’s off-site mitigation program led to the purchase of conservation easements on 22 farms containing a total of 5,183 acres of land.\textsuperscript{70}

**Right-to-Farm**

All fifty states have some form of nuisance protection for farm operations, and a number of counties and municipalities also have adopted local ordinances to supplement state law protections for farmers.\textsuperscript{71} AFT concludes that “right to farm laws often seem to promise more than they deliver” but remain very popular with farmers.\textsuperscript{72} RTF laws are effective when metropolitan areas begin to encroach upon outlying farm communities because they cause urbanites seeking a more rural lifestyle to reconsider their decision where the impacts of farming activity (e.g., animal waste, odors, airborne pollution, and roosters crowing at the crack of dawn) would intrude upon their “rural tranquility.”\textsuperscript{73} However, these laws have come under attack when applied to protect large scale animal feeding operations or corporate agriculture that may be less accountable to the local community.\textsuperscript{74} AFT quotes the former director of the University of Iowa Agricultural Law Center as seeing “Iowa’s right-to-farm laws as a threat to rural ‘neighborliness.’”\textsuperscript{75} Right to farm laws do not protect against the conversion of farmland for development, but do provide support to the agricultural community in the form of protection against nuisance litigation.

**10.03 IMPACT ON PROPERTY VALUES**

Typically land markets treat farmland as a reserve for future development. In most instances, agricultural zoning is considered to be temporary or a “holding zone.” APZ can have a significant negative impact on property values within the agricultural zone, as the ability to develop land is constrained by large

\textsuperscript{65} SAF at 135.
\textsuperscript{67} *Fact Sheet - Status of State PACE Programs*, American Farmland Trust – Farmland Information Center (April 2008).
\textsuperscript{68} SAF at 33.
\textsuperscript{70} Id.
\textsuperscript{71} SAF at 169.
\textsuperscript{72} SAF at 184-85.
\textsuperscript{73} Paster at 299-300.
\textsuperscript{74} SAF at 186.
\textsuperscript{75} Id.
minimum lot sizes and restrictions on use. Farmers may oppose APZ on those grounds, making it difficult to pass such provisions in rural jurisdictions. Depending upon market factors, one would expect the institution of APZ zoning to increase property values in areas not subject to such restrictive zoning, as development is redirected to those areas.

PACE/PDR programs should have no net impact on the values of affected properties, provided that the price paid for the restriction reflects fair market value. However, some critics of PACE programs claim that “grantors may receive ‘double compensation’ for the easement when the easement confers financial rewards and results in an increase in land value.” Some programs use other mechanisms, such as point systems, to determine the price that will be paid for an agricultural easement. One would also not expect an agricultural easement purchase program to have an effect on the value of property not placed in the program, although neighboring properties may increase in value where open space and environmental benefits are realized through a conservation easement placed on adjacent property. However, to the extent that PACE programs are used as a strategic means of placing obstacles to development on other property, they could certainly have a negative effect on some property values. For example, the Montgomery County, Maryland, PACE program reportedly prefers and pays higher prices for farms located within one quarter mile of its urban growth boundary as a means of erecting “a legal and economic barrier to possible water and sewer extensions” to more outlying properties. There is also an indication that if such preserved farms are removed from active agricultural use, the value of land surrounding such “estate” settings may increase.

The extent to which TDR programs will impact property values depends on how they are implemented. Properties that have TDRs attached will sell for the underlying value of the land plus the value for the TDR. Theoretically, TDR compensates property owners for restrictions on their ability to develop land. However if the market for development rights is depressed or non-existent, the TDR does not represent a viable option for recovering any lost development value. The success of a TDR program will depend on the market for the units constructed with the TDRs and that value, in turn, depends on there being meaningful development options in receiving areas.

Right-to-Farm Legislation is considered by some to be an impairment of property rights because it amounts to a limitation on the property rights of non-farmers by constraining their ability to sue for damages caused by the effects of abutting farm operations on their property values. In an Iowa Supreme Court case, the court found that a right-to-farm law making farmers immune from nuisance suits effected an unconstitutional taking of property by effectively giving farmers an easement over the property of others to conduct activity (noise, noxious odors) that would be considered a nuisance in the absence of the legislation. Some farmers, who may be equally as affected as their non-farming neighbors by a noxious agricultural operation nearby, also feel that right-to-farm laws act to take their property rights.

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76 Mark W. Cordes, Fairness and Farmland Preservation: A Response to Professor Richardson, 20 J. LAND USE & ENVTL. L. 371, 374 (Spring 2005); see also Cordes, 22 N. ILL. U. L. REV. at 435.
77 SAF at 50.
78 SAF at 280.
79 SAF at 98-100.
80 Vinson at 281.
81 SAF at 92.
82 SAF at 230.
83 Paster at 307.
85 SAF at 185.
10.04 Impact on Development Costs

Mitigation requirements will increase development costs on lands converted from agriculture by causing the developer of those protected agricultural lands to commit to forego development rights on other land as a condition of development approval. The large lot sizes or low development densities that are typically required under APZ ordinances would be expected to increase the cost of development in those zones, and APZ ordinances may also include extraordinary setbacks and design requirements that could make development more costly. The complexity associated with some TDR programs can increase transaction costs associated with development involving TDRs. The other farmland preservation techniques discussed above would not necessarily be expected to have an impact on development costs. It would be expected that any higher development costs would be shifted back to the property owner through a reduction in the price a developer is willing to pay for the affected land.

10.05 Impact on Amount and Patterns of Land Development

APZ, PACE, and TDR as Farmland protection techniques are specifically designed to limit the amount of development that takes place in land designated for agricultural use. Many urbanizing jurisdictions use these techniques in conjunction with other growth management techniques in implementing urban growth boundaries or directing growth away from farmlands and towards other areas. As discussed above, APZ has been shown to be effective in altering development patterns where the zoning was perceived as being relatively difficult to change. When adopted as part of a broader growth management plan, APZ is likely to direct development pressure towards more compact and dense housing development located closer to existing urban or suburban areas. Evidence also exists that some types of large-lot zoning result in increased sprawl by scattering development further from existing farmland.

10.06 Impact on Housing Affordability

To the extent that APZ or PACE limits the availability of land for residential development to levels below that needed to keep up with the demand for new housing, there is likely to be upward pressure on land costs and consequently housing prices. This may be avoided by the community maintaining an adequate supply of appropriately zoned land for development.

10.07 Summary of Pros and Cons

PROS:

- The farmland protection techniques described above can be successful in protecting agricultural lands from development, particularly when they are used in combination with one another.

- PACE in combination with APZ is thought to be particularly effective at protecting agricultural land from development pressures.

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87 Cordes, 22 N. Ill. U. L. REV. at 440.
88 Cordes, 22 N. Ill. U. L. REV. at 440.
89 Cordes, 22 N. Ill. U. L. REV. at 442.
CONS:

- The effectiveness of farmland protection techniques at protecting farmland can have negative consequences from the standpoint of real estate interests. APZ, in particular, can result in drastic reduction in property values. Farmers themselves sometimes oppose APZ on that ground.\(^\text{90}\)

- Placing permanent development restrictions on land currently used for agriculture through PACE or TDR can have negative consequences for a region’s future development, if protected parcels are selected indiscriminately or, worse, used to block logical growth corridors.

10.08 INCENTIVE-BASED ALTERNATIVES

PACE is an incentive based mechanism for protecting farmland in that it pays a property owner fair market development value to retain its land in agricultural use. Properly designed and implemented, TDR can be an incentive-based mechanism. Other incentive-based mechanisms for the preservation of farmland include differential tax assessment for farmland so that it is taxed at the agricultural value of the land rather than the development value and “circuit-breaker” tax programs by which farmers receive tax credits that are often based on farm income and the state reimburses the local taxing authority for the lost revenue.\(^\text{91}\) Agricultural district laws in many states allow farmers to receive various benefits by voluntarily forming areas within which commercial agriculture is protected and encouraged. Right-to-farm laws protect farmers from lawsuits based on impacts from farming operations as an incentive to remain in the farming business.

\(^{90}\) SAF at 50; Daniels at 421.

\(^{91}\) SAF at 34-39.
SECTION 11: CLUSTER ZONING AND PLANNED UNIT DEVELOPMENT

11.01 PURPOSE AND KEY TERMS

Cluster zoning and planned unit development (PUD) came into use during the 1960s as alternatives to traditional zoning. Traditional zoning treats each parcel of land in a community as a distinct unit, regardless of its size, based on the assumption that a different owner or builder will develop each parcel. That approach has the disadvantage of being too rigid and cumbersome when applied to large pieces of land, and in large-scale development it tends to discourage creativity and flexibility.¹

Cluster zoning applies the concept of concentrating development on smaller lots in order to preserve larger open spaces.² It is defined as:

an innovative land use control device for grouping or “clustering” buildings to increase densities on some portions of the development area in order to open the remaining area to recreational or other purposes.³

It is also called “open space” or “density” zoning.⁴

Cluster zoning is designed to meet the need for community development while providing specific plans for the retention of open spaces and preservation of natural beauty. In residential development, it can make large open tracts of land available for use as either improved or undeveloped open space to replace the small private yard of traditional zoning, while keeping the overall population density of the development at the same level as traditional zoning.⁵ Thus, cluster development groups residences to increase dwelling densities on specific portions of a development and leaves other portions free of dwellings.⁶

Although PUD and cluster development are similar, they are not identical. Cluster development is often an essential element of the broader concept of a PUD.⁷ The simplest form of PUD, which may be termed a cluster zoning or density transfer PUD, maintains the overall density of a development, for example, by allowing an increase in the density of the housing in one part of the PUD in return for setting aside open space elsewhere in the development.⁸

PUDs have several purposes. They allow the flexible development of large parcels of land as a single unit with a mixture of buildings and land uses. They accomplish these purposes by using varying lot sizes and integrating different structures and uses in ways that would be considered incompatible under traditional zoning principles. The ability to mix structures with varying bulks and uses allows the

² 2 Rohan § 12.01[1].
³ 2 Rohan § 12.01[2]; see also Donald G. Hagman & Julian Conrad Juergensmeyer, Urban Planning and Land Development Control Law § 7.15, at 221 (2d ed. 1986) (hereinafter “Hagman & Juergensmeyer”) (defining cluster development as “a device for grouping dwellings to increase dwelling densities on some portions of the development area in order to have other portions free of buildings”).
⁴ 2 Rohan § 12.01[2].
⁵ 2 Rohan § 12.01[2].
⁶ 2 Rohan § 12.02[1].
⁷ 2 Rohan § 12.02[1].
developer to use aesthetics or site conditions, rather than a zoning map, as a basis for arranging areas of common open space and recreational facilities with different building types or land uses.\(^9\)

The PUD combines elements of cluster zoning and subdivision platting,\(^10\) and PUD regulations incorporate elements of zoning and subdivision controls. Like a zoning ordinance, planned unit development regulations regulate land use density and site development. They also may include internal design and thoroughfare requirements, such as those contained in subdivision ordinances.\(^11\)

A PUD has been defined in formal terms as:

an area of land, controlled by a landowner, to be developed as a single entity for a number of dwelling units, and commercial and industrial uses, if any, the plan for which does not correspond in lot size, bulk, or type of dwelling or commercial or industrial use, density, lot coverage and required open space to the regulations established in any one or more districts created, from time to time, under the provisions of a municipal zoning ordinance enacted pursuant to the conventional zoning enabling act of the state.\(^12\)

Another way of expressing this concept is that a PUD is a mixed use development that is approved as an integral unit based on a plan for the overall development rather than through the application of typical use and dimensional regulations to individual parts of the development. One of the basic premises of the PUD is that planning is best done at the “community” or “neighborhood” level, rather than at the level of the individual lot. This results in applying prevailing density regulations to the project and parcel of land as a whole rather than to each lot and component of the project.\(^13\) In other words, a PUD allows “density zoning”:

Density zoning allows lots to be grouped for development, rather than being subjected to the lot-by-lot approach of Euclidean techniques. Individual parcels within the group may be developed more intensely than otherwise allowed by the comprehensive plan as long as the total development of the grouped lots together does not exceed the allowable level. Under this approach, lot size is not the primary regulating factor; when applied to an entire development, density zoning results in the development of a maximum number of units per acre. Consequently, density zoning allows a developer to plan a fixed number of dwelling units on a property to secure the greatest land use.\(^14\)

Without PUD, traditional zoning of a large scale planned development could require two or more zoning districts if the development includes, for example, single-family and multi-family dwellings, or even ancillary commercial or service uses. This would make it impossible to implement a coordinated set of land use controls for the development.\(^15\)

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\(^9\) 5 Rohan § 32.01[2].
\(^10\) Hagman & Juergensmeyer § 7.15, at 220.
\(^13\) 5 Rohan § 32.01[2].
\(^14\) 5 Rohan § 32.02[1].
\(^15\) Mandelker § 9.24, at 9-27.
PUD regulations provide standards for the approval of a PUD plan in an administrative review process. A unit of local government can approve a PUD plan as an integrated set of land use controls that apply to an entire development. Unlike traditionally zoned areas, PUDs are not divided into districts—conditions may vary from parcel to parcel. Because the development is planned and reviewed in its entirety, a developer can achieve better site planning by varying lot sizes, setbacks, and other site development requirements. The preservation of open space and natural areas in one part of the development can offset higher densities in another part. However, providing open space is not necessarily the primary objective, particularly in non-residential PUDs. As an alternative to traditional zoning, a PUD’s primary advantage is its ability to provide for a mixture of uses. Depending upon whether there is a minimum or maximum acreage size for a PUD, it potentially can allow the development of an entire neighborhood or even town based upon a single approved plan.

The PUD represented an early attempt—preceding approaches such as concurrency and adequacy of public facilities—to address the timing dimension of development. Traditional zoning was historically unable to control development to keep pace with the growth of public facilities and services and to restrict development from certain areas until others were built out. The site plan review process of PUD strengthened the control of local government over the pace and sequence of development.

Property within a PUD usually is sold by the developer on either a common ownership basis or to individual owners in fee, subject to restrictive covenants on each owner’s use of the land. These ownership forms are frequently mixed within a PUD. The owners are subsequently required to pay collectively for the maintenance of the PUD’s common areas, such as recreational areas and, potentially, roads. A board of directors, which may delegate managing duties to managing agents, supervises land use within an operating PUD.

11.02 Effectiveness in Achieving Stated Purpose(s)

The stated purpose of cluster development is straightforward. Clustering allows the grouping of buildings at higher densities on some portions of a development in order to keep the other portions clear of buildings. Cluster development results in the setting aside of land in its natural state, open space, or recreational areas wherever it is employed.

Cluster development forms the basis of the related technique known as conservation subdivisions. Conservation subdivisions use cluster development for the primary purpose of environmental protection by explicitly linking the built environment to the carrying capacity of the underlying land. Buildings and roads are placed at the locations on a parcel that are best suited to handle them, so the remaining areas can be preserved in their natural state. An example is this type of development is the 13,522 acre Galisteo Basin Preserve, a conservation development located southeast of Santa Fe, Mexico. By clustering the planned 1,015 residential units into four conservation neighborhoods plus a mixed use village, 96% of the land in the Galisteo Basin Preserve will be permanently preserved as open space.

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16 Hagman & Juergensmeyer § 7.16, at 222-23.
18 2 Rohan § 12.02[1]; 5 Rohan § 32.01[2].
21 5 Rohan § 32.01[4][a].
23 See id.
Another example is the Jackson Meadow conservation community located west of St. Croix, Minnesota, a 145-acre development in which sixty residential lots are clustered on just 40 acres.\(^{24}\)

When conventional cluster regulations limit the number of dwelling units to no more than what would otherwise be permitted in a standard subdivision, as is typical, developers have little incentive to use them. This is particularly the case when houses in cluster subdivisions sell for less than houses in standard subdivisions. Consequently, many developers would prefer to build larger single-family homes in standard subdivisions, limiting the availability of choices in the stock of housing.

In light of those shortcomings and in an effort to increase the diversity of its housing stock, the Town of Lexington, Massachusetts enacted an “impact-incentive” cluster regulation. Essentially a form of performance zoning, Lexington’s regulation relates maximum allowed development to the development’s impacts, rather than its density as measured by dwelling units per unit of area. The total density of the development under the impact-incentive regulation may exceed the density available in a standard subdivision. In Lexington, smaller housing units with fewer bedrooms had lower impacts on traffic generation, occupancy, school-age children, site coverage, and impervious surface than larger single-family houses. Therefore, the regulation permits developers to build more smaller houses in an “impact incentive” development than the number of larger houses that would be allowed in a standard subdivision on the same parcel. Moreover, the regulation includes bonus provisions that permit more development when such development offers significant public benefits, such as historic preservation, provision of extraordinary amounts of open space, rental housing, affordable housing, and housing oriented to age groups that are not adequately served by standard subdivision housing. Lexington’s impact-incentive development is available by special permit with site plan review.\(^{25}\)

11.03 IMPACT ON PROPERTY VALUES

Data from Amherst and Concord, Massachusetts, show a higher appreciation rate for cluster development with open space than for residential properties with larger private yards but no protected open space.\(^{26}\) A 2006 study of real estate transactions in the town of South Kingstown, Rhode Island, found that developed lots in conservation subdivisions carried additional value of 12% to 16% per acre and sold in about half the time compared to lots in conventional subdivisions.\(^{27}\)

The requirement of a fixed amount of open space in every cluster development or PUD may not bring added value to the parcel or to individual lots within the development where such developments are located near existing parks or community centers, or are located on parcels lacking in significant aesthetic or recreational value.\(^{28}\)

\(^{24}\) See id. at 174-183.


\(^{28}\) Fees, Infrastructure Costs, and Density ... Their Impact Upon the Twin Cities Regional Growth Strategy & Life-Cycle Housing Goals, at 16 (Builders Association of the Twin Cities & Center for Energy and Environment, 2000).
11.04 Impact on Development Costs

Both a developer and a community can realize economic savings from the use of clustering. Compared to a conventional subdivision of equivalent property, a clustering plan can yield more open space and requires less infrastructure, including shorter and narrower streets, fewer sidewalks, curbs, and gutters, and less underground piping for water and sewers.\(^{29}\) One model clustering plan yielded five times more open space, reduced the length of necessary streets by 10 percent, and reduced the total length of required sewer lines by 25 percent.\(^{30}\) To illustrate these potential cost savings, the South Kingstown, Rhode Island, study found that lots in conservation subdivisions cost $7,400 less to produce than lots in conventional subdivisions.\(^{31}\) If a PUD ordinance allows developers to build at higher overall densities, development costs can be spread over a larger number of units.\(^{32}\)

Although PUD can make use of clustering, it also can introduce a new element of cost. Because PUDs frequently include commonly owned facilities and space, complicated restrictions and covenants are necessary to manage the facilities and space. Indeed, the elaborate negative and affirmative restrictions, covenants, conditions, and easements are typically so extensive that an association or corporation must be established to administer the provisions.\(^{33}\) Preparing the property interests and establishing the association or corporation add to the initial development costs, and operating the association or corporation creates an ongoing cost for the residents of PUDs.

11.05 Impact on Amount and Patterns of Land Development

Cluster development and PUD do not necessarily alter the total amount of land developed, but rather affect the pattern in which it is developed. As discussed earlier, clustering increases building density in some areas of a development in order to make it possible to keep other areas open. With cluster development, an entire community can be built within a single zone, and density requirements regulate the relationship between residences and open areas to achieve a desirable balance.\(^{34}\)

PUD has a broader range of impact on patterns of land development. It can fulfill the need for well-designed communities by improving population distribution and the range of housing options because it allows greater density in some areas of a development in return for greater open space elsewhere on the parcel.\(^{35}\) The developer of a PUD can improve the land as an integral unit, with considerable flexibility, instead of being forced to build on a lot-by-lot basis with required setback and yard limitations. PUD encourages innovations in land development, such as the integration of recreational, living, working, and commercial facilities wholly within the same community under a preexisting approved plan.\(^{36}\) Design flexibility permits the concentration of buildings on the portions of a site that are most suitable for building, resulting in a more environmentally sensitive development that preserves open space and natural features.\(^{37}\)

\(^{29}\) See CONSERVATION COMMUNITIES at 31; see also John R. Nolon & Jessica Bacher, Zoning and Land Use Planning, 36 REAL ESTATE LAW JOURNAL 73, 85 (Summer 2007).


\(^{31}\) See The Economics of Conservation Subdivisions at 393.


\(^{33}\) Hagman & Juergensmeyer § 7.19, at 232.

\(^{34}\) 2 Rohan § 12.01[3][i].

\(^{35}\) 5 Rohan § 32.02[1].

\(^{36}\) 5 Rohan § 32.02[2].

\(^{37}\) Affordable Housing Techniques, supra.
Other impacts of PUD are more incidental to its basic nature. It can be used to overcome topographical problems. It allows a developer to capitalize on a region’s unique characteristics and to sustain transition zones or uses.\textsuperscript{38} It can offer a “psychological advantage” as a community center similar to the European village concept and serve the social requirements of its residents and neighboring areas.\textsuperscript{39}

11.06 IMPACT ON HOUSING AFFORDABILITY

Developments, including PUDs, that incorporate clustering have available a flexible land use concept for providing low- and moderate-income housing. The concept can combine higher density development with more traditional suburban aesthetics.\textsuperscript{40} The most effective features of cluster development and PUD for encouraging affordable housing are the development cost economies that can be achieved through the clustering of buildings and the related savings in site development costs for items such as streets, sidewalks and utility lines. Reducing the amount of required infrastructure also helps reduce the costs of maintaining it.\textsuperscript{41} Some jurisdictions allow for the provision of one or more affordable housing units, in addition to the number of market rate units allowed by the base zoning density, as an “incentive” for using a cluster rather than standard subdivision design.\textsuperscript{42} The Maine legislature has expressly authorized municipalities to employ cluster zoning and has encouraged them to use cluster zoning in conjunction with the development of affordable housing.\textsuperscript{43}

On the other hand, developments in which land is set aside as open space other than a homeowner’s backyard or a public park or recreational area require the creation of a homeowner’s association to maintain the open space. Requiring entry-level homebuyers to pay a fee for the work of such an association adds a financial burden on those who are least able to pay for it.\textsuperscript{44}

11.07 SUMMARY OF PROS AND CONS

PROS:

- PUDs allow a mixture of land use and building types within a single development.
- Both PUDs and cluster developments afford the flexibility to develop land as an integral unit.
- Both techniques provide a mechanism for preserving open space and natural areas.
- Cluster developments can result in developer savings on infrastructure costs.
- Open space preserved through these techniques can increase the value of adjacent property.

CONS:

- Both techniques may require a homeowners’ association, with creation and maintenance costs, and with responsibility for open space and other common areas.

\textsuperscript{38} 5 Rohan § 32.02[2].
\textsuperscript{39} 5 Rohan § 32.02[1].
\textsuperscript{40} 2 Rohan § 12.01[3][iii].
\textsuperscript{41} Affordable Housing Techniques, note 33, supra.
\textsuperscript{42} Nolon & Bacher, 36 REAL ESTATE LAW JOURNAL at 85.
\textsuperscript{43} Nolon & Bacher, 36 REAL ESTATE LAW JOURNAL at 92-93.
\textsuperscript{44} Fees, Infrastructure Costs, And Density, supra.
Both techniques require greater attention to a development’s planning and design, including discretionary reviews by municipal planning staffs, planning commissions, and legislative bodies, which can increase uncertainty in the development approval process.\(^{45}\)

11.08 **INCENTIVE-BASED ALTERNATIVES**

In situations where cluster development is mandatory, as with conservation subdivisions, for example, a program for the **purchase of development rights (PDR)** or for **transfer of development rights (TDR)** offers an incentive-based alternative to the preservation of open space. Typically, however, PUD is not mandatory under land use regulations. Also, because the PUD has the potential to allow for a comprehensive approach to site plan issues and development impacts, individual incentive-based alternatives do not provide the comprehensiveness of PUD. Performance-based zoning and ordinances that allow for neo-traditional development probably represent the closest alternatives, whether regulatory or incentive-based, to PUD.

\(^{45}\) Affordable Housing Techniques, *supra*. 
SECTION 12: SUSTAINABLE DEVELOPMENT REQUIREMENTS

12.01 PURPOSE AND KEY TERMS

Building design and construction are major factors affecting energy consumption and environmental resources in the United States and globally. According to data collected by the U.S. Green Building Council (“USGBC”), the design, construction, and operation of buildings still represent:

- 39% of U.S. primary energy use (includes fuel input for production);
- 38% of U.S. CO2 emissions;
- 72% of U.S. electricity consumption;
- 13.6% of total potable water use in the U.S.; and
- 40% of global raw materials use.\(^1\)

Defining Sustainability, Sustainable Development, and Green Building

The most widely referenced general definition of “Sustainability” comes from a report of the United Nations World Commission on Environment and Development, which spoke in broad terms of sustainable global economic development as development which

meets the needs of the present without compromising the ability of future generations to meet their own needs.\(^2\)

The United Nations’ 2005 World Summit gave more definition to this broad concept, referring to three components of “Sustainable Development” — economic development, social development, and environmental protection — and declaring them to be “interdependent and mutually reinforcing pillars,” and then stating that

[p]overty eradication, changing unsustainable patterns of production and consumption and protecting and managing the natural resource base of economic and social development are overarching objectives of and essential requirements for sustainable development.\(^3\)

Within this broader context of intersecting economic, social, and environmental considerations, “green building” focuses on environmental protection and a healthy environment for humans. As defined by the Office of the Federal Environmental Executive, “green building” is

the practice of (1) increasing the efficiency with which buildings and their sites use energy, water, and materials, and (2) reducing building impacts on human health and the

environment, through better siting, design, construction, operation, maintenance, and removal—the complete building life cycle.  

As used in this section, “Sustainable Development” includes the construction of buildings that utilize design and construction practices to reduce or eliminate negative impacts on the environment, and real estate development that incorporates such buildings into the surrounding area through the use of smart growth/New Urbanist principles of urban design and connectivity.

The Emergence of Rating Systems

Concern over the environmental impact of conventional methods of building design and construction first began to surface with the global environmental movement in the late 1960s and 1970s. Principally, this was a reaction to multiple worldwide energy shocks and the advent of several interrelated modern building technologies that came online in the post-war period, chief among them air conditioning, low-wattage fluorescent lighting, cheap structural steel, and reflective glass. These new technologies made it possible to construct the iconic International Style “glass box” commercial building along with production housing in the fast-growing U.S. Sunbelt and in other previously difficult to develop areas. The result was development divorced from local climate conditions and traditional building patterns and reliant on cheap energy-based inputs to make it workable, and all at a level of dispersal and scale that was unprecedented. As the environmental impacts of these emerging building construction and development practices became apparent and it became increasingly clear that they were not sustainable over the long term both economically and environmentally, the stage was set for a new approach. In the mid-1980s, Our Common Future promulgated the first widely accepted definition of this new approach called “Sustainable Development.”

Even with more stable energy prices in the 1980s and 1990s, Sustainable Development continued to gather momentum as the scope of environmental worries widened and global climate change attributed to the release and atmospheric retention of greenhouse gases from carbon-based energy sources, became a major concern. Further progress was made at the 1992 United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil. Following on the Rio Summit, rating systems began to appear as the design and construction professions and public sector partners in developed countries in western Europe and the United States sought methods of measuring progress toward the goal of Sustainable Development. Examples of such systems internationally include BREEAM from Great Britain, and BEPAC from British Columbia, Canada. Regional and local variants of note that have appeared in the last decade include the Austin Energy Green Building System, Built Green Colorado, and Green Built North Texas. Four major rating systems available in the U.S. are:

**LEED Rating System**: The Leadership in Energy and Environmental Design or “LEED” system was developed by the U.S. Green Building Council (“USGBC”). USGBC was formed in 1993

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6 Id.
with the express goal of creating a new design and construction sustainability rating system. The system is intended to provide an aggressive but achievable leadership benchmark to encourage building design and construction practices that are more energy-efficient and protective of the environment than industry norms. LEED is currently the most popular of the major rating systems. It is discussed in more detail below.

Green Globes: Developed by the Green Building Initiative (“GBI”) and launched in the U.S. in 2004, the Green Globes system was initially developed in Canada and is based on the British BREEAM system. GBI is a consortium of organizations led by the Building Owners and Managers Association. Green Globes is based on online questionnaires in categories including: project management; policies and practices; site; energy; water; resources, building materials, and solid waste; emissions and effluents; and indoor environment. Assessments must be verified by a third party to receive a Green Globes rating, which range from one to four Globes based on the number of total points achieved. Green Globes has been designated as a standards developer by the American National Standards Institute (“ANSI”). GBI has begun the process of establishing Green Globes as an official ANSI standard for commercial structures.

ENERGY STAR: Developed by the U.S. Environmental Protection Agency and the Department of Energy, this program focuses principally on energy efficiency. Projects that perform in the top 25 percent of U.S. buildings are eligible to earn an ENERGY STAR label. Once construction is completed and the building has operated long enough to accumulate one year of utility data, the owner can go online to ENERGY STAR’s Portfolio Manager, submit the required data and, if the energy performance meets requirements, apply for an ENERGY STAR label. Commissioning and other consulting fees may be incurred. ENERGY STAR for Homes applies to new or renovated existing homes of three-stories or less, focusing on a tight building envelope and efficient mechanical systems, lighting, and appliances. Qualified houses must exceed the 2004 International Residential Code (IRC) requirements for energy efficiency by at least 15 percent, but ENERGY STAR says qualified buildings typically exceed the IRC requirement by 20 to 30 percent. A Home Energy Rating System (“HERS”) inspector must independently verify compliance with ENERGY STAR. HERS raters set their own fees. As can be seen in this section, ENERGY STAR has been adapted to local conditions in a multiplicity of jurisdictions.

NAHB Green Scoring Tool and Green Building Certification: First published in 2005, the National Association of Homebuilders Model Green Home Building Guidelines were written by a group of builders, researchers, environmental experts, and designers to provide guidance for builders engaged or interested in green building products and practices for residential design, development, and construction. The Guidelines were also written to serve as a “baseline” so that NAHB members could easily develop local green building programs. NAHB’s existing Green Scoring Tool and Green Building Certification programs are based on the Guidelines. In 2007, NAHB, in conjunction with the International Code Council (ICC), developed the ICC 700 National Green Building Standard™ for single- and multifamily homes, residential remodeling projects, and site development projects. The rating system received approval from the American National Standards Institute (ANSI). The NAHB Research Center

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14 Industrial and manufacturing buildings need to enter data into a plan “energy performance indictor” as opposed to Portfolio Manager.
provides certification of projects at four threshold levels: Bronze, Silver, Gold, and Emerald.

The LEED Rating System™

LEED® is the most commonly used and referenced rating system for Sustainable Development in the United States. The LEED Green Building System™ for new construction (or “LEED-NC”) appeared in its initial pilot format in 1998. LEED-NC 1.0 – the first “live” version – was released in 2000.

LEED-NC and all of the subsequent LEED products focusing on ratings for construction and renovation of individual buildings follow the same basic pattern. Projects seeking the LEED stamp of approval are registered with USGBC for certification. These projects are then rated by USGBC on a points-based system that covers various categories. For example, under LEED-NC 2009, the seven categories are:

- Sustainable Sites;
- Water Efficiency;
- Energy and Atmosphere;
- Materials and Resources;
- Indoor Environmental Quality;
- Innovation in Design; and
- Regional Priority Credits.

Example design elements or strategies that may be employed to make a building “greener” and earn points under the various LEED-NC categories include:

<table>
<thead>
<tr>
<th>LEED Rating Categories</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sustainable Sites</td>
<td>Erosion, sediment, and stormwater runoff control</td>
</tr>
<tr>
<td></td>
<td>Access to public transportation</td>
</tr>
<tr>
<td></td>
<td>Reduced parking or preferred parking for low emission vehicles and/or car pools</td>
</tr>
<tr>
<td>Water Efficiency</td>
<td>Water-efficient landscaping</td>
</tr>
<tr>
<td></td>
<td>Water-efficient (low-flow) fixtures</td>
</tr>
<tr>
<td>Energy and Atmosphere</td>
<td>Passive or active solar heating and cooling</td>
</tr>
<tr>
<td></td>
<td>Solar energy, wind power, hydropower, or other renewable energy</td>
</tr>
<tr>
<td>Materials and Resources</td>
<td>Recycled-content building materials</td>
</tr>
<tr>
<td></td>
<td>Reduced construction waste</td>
</tr>
<tr>
<td>Indoor Environmental Quality</td>
<td>Daylighting</td>
</tr>
<tr>
<td></td>
<td>Low-emitting paints, carpets, sealants, or other materials</td>
</tr>
</tbody>
</table>

The LEED rating systems are point-based systems. Each category contains a specific number of credits and each credit carries one or more possible points. In addition, each category contains one or more prerequisites, which must be met in order to achieve any level of certification. The LEED-NC rating

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system, and the majority of other rating systems in the LEED “suite,” are based on a 100-point system for
the major categories, with 10 additional points being available for Innovation in Design and Regional
Priority Credits. A project that earns enough points (40) can become “LEED Certified,” and projects that
go further can achieve ratings of Silver (at 50 points), Gold (at 60 points), and Platinum (at 80 or more
points).

The growth in the LEED program and the spread of the Sustainable Development concept in the years
since the LEED-NC pilot program debuted has been remarkable. There are now nine different LEED
products focused on design and construction or renovation, or operation and maintenance, of buildings
and neighborhoods:

- LEED for New Construction (LEED-NC);
- LEED for Existing Buildings: Operation & Maintenance (LEED-EB: O&M);
- LEED for Commercial Interiors (LEED-CI);
- LEED for Core & Shell (LEED-CS);
- LEED for Schools (LEED-SCH);
- LEED for Retail (LEED-R);
- LEED for Healthcare (LEED-HC);
- LEED for Homes (LEED-H);
- LEED for Neighborhood Development (LEED-ND).¹⁷

Sustainable Development Market Penetration

By September 2003, 948 projects representing nearly 140 million square feet of new commercial space
had registered for certification under the LEED-NC rating system.¹⁸ By July 2011, USGBC reported that
those figures had risen substantially for the full suite of LEED products:¹⁹

<table>
<thead>
<tr>
<th>LEED -</th>
<th>NC</th>
<th>EB</th>
<th>CI</th>
<th>CS</th>
<th>SCH</th>
<th>R</th>
<th>HC</th>
<th>H</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registered</td>
<td>17,194</td>
<td>5,922</td>
<td>3,359</td>
<td>3,207</td>
<td>1,326</td>
<td>329</td>
<td>1,211</td>
<td>57,342</td>
<td>89,890</td>
</tr>
<tr>
<td>Certified</td>
<td>4,945</td>
<td>1,218</td>
<td>1,912</td>
<td>792</td>
<td>170</td>
<td>307</td>
<td>250</td>
<td>12,261</td>
<td>21,855</td>
</tr>
<tr>
<td>TOTAL</td>
<td>22,139</td>
<td>7,140</td>
<td>5,271</td>
<td>3,999</td>
<td>1,496</td>
<td>636</td>
<td>1,461</td>
<td>69,603</td>
<td>111,745</td>
</tr>
</tbody>
</table>

As of September, 2011, the LEED-Certified commercial projects accounted for a total of over 1.5 billion
square feet.²⁰ The green market grew from 2% of non-residential construction in 2005 to be 28-35% in
2010, and it is anticipated to grow further to 40-48% by 2015.²¹

¹⁷ USGBC, LEED Rating System Selection Guidance, Version 4 (Updated September, 2011), available at
¹⁹ USGBC Press Kit, The LEED Green Building Program at a Glance, available at:
Development projects as USGBC reports only the number of certified projects (104) and not the number of
registered projects in this report. Last visited September 9, 2011.
²¹ USGBC, Green Building Facts at 1.
USGBC reports that there are several factors driving the dramatic green building market growth, including mandates and policies and even the recent economic recession, which resulted in green construction increasing in both absolute dollars and as a percentage of overall construction activity.

The demand for sustainable, green design and building features appears to be substantial and poised for even greater growth. A review of five different studies of homebuyer preferences from 1998 provided by BuildSmart found that fifty percent (50%) of respondents would pay two percent (2%) more and twenty percent (20%) would pay five percent (5%) more for the “sustainable” or “green” features they value. Similarly, home builders appear attuned to this demand. A 2006 article from the online newspaper of the National Association of Home Builders (NAHB) found that 88% of home builders surveyed at the time indicated they were “going green” by adopting Sustainable Development practices and project components because of “consumer demand,” second only in popularity to “increases in energy costs.” A discussion of the improvement in sustainable materials over the last several years is beyond the scope of this Fact Book.

General Benefits of Sustainable Development

Looking strictly at energy/environmental impacts, the *Sustainability White Paper* estimated that LEED-certified buildings provided substantial benefits over conventional construction:

<table>
<thead>
<tr>
<th>LEED rating</th>
<th>Anticipated Energy/Environmental Impact (Energy, Water, Land Improvements, etc.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Certified</td>
<td>30% improvement</td>
</tr>
<tr>
<td>Silver</td>
<td>40% improvement</td>
</tr>
<tr>
<td>Gold</td>
<td>50% improvement</td>
</tr>
<tr>
<td>Platinum</td>
<td>70% + improvement</td>
</tr>
</tbody>
</table>

At a broader level, the U.S. Environmental Protection Agency (“USEPA”) touts the following benefits of sustainable or “green” building design and construction:

- Enhances and protects biodiversity and ecosystems
- Improves air and water quality
- Reduces waste streams
- Conserves and restores natural resources

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22 BuildSmart, *Presentation: Consumer demand for green features in residential buildings*, available at: http://www.builditgreen.org/webfm_send/112, last visited April 22, 2008. This review of several surveys found that the most popular green building features were durability of materials, indoor air quality, and energy efficiency.


24 *Sustainability White Paper* at 8.

Economic Benefits

- Reduces operating costs
- Creates, expands, and shapes markets for green products and services
- Improves occupant productivity
- Optimizes life-cycle economic performance

Social Benefits

- Enhances occupant comfort and health
- Heightens aesthetic qualities
- Minimizes strain on local infrastructure
- Improves overall quality of life

These benefits have been proven through various studies, including several economic and environmental performance studies.\(^{26}\)

**12.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)**

With the advent of the full suite of LEED rating system products and their incorporation into discussions of “best practices” in the design and construction industry, local governments have begun to tie development approvals to buildings achieving certification based on one or more of these products or on the concept of Sustainable Development or “Green Building” generally.\(^{27}\) Over the last two years, there has been a significant rise in local regulations – generally in the form of building code requirements — using LEED or an alternative Sustainable Development rating system. This rise in popularity as a regulatory tool is all the more dramatic when one recalls that LEED was intended as an aspirational leadership standard, and not as a mandated baseline for all projects. This subsection reviews the stated purposes, operative provisions, and effectiveness of the reported mandatory sustainable development programs currently adopted in the U.S.:

**Babylon, New York:** Babylon, a township of over 200,000 residents on New York’s Long Island, adopted both residential and commercial building Sustainable Development requirements in 2006:

**Residential Buildings:**

*Purposes:* The ordinance states that it is intended to protect the general health, safety, and welfare of town residents by requiring compliance of single family dwellings with ENERGY STAR program guidelines, “thus ensuring that the dwellings will use considerably less energy than if built to prevailing building standards.”\(^{28}\)

*Provisions:* Starting on April 1, 2008, parties seeking to build a new single-family dwelling in the town will be required to certify that it will either qualify for the Builder Option Package under the Long Island Power Authority New York ENERGY STAR program or score an 84 or higher on the Home Energy Rating System scoring system adopted by the State of New York.

\(^{26}\) See USGBC, *Green Building Facts.*


\(^{28}\) Babylon (New York) Town Code, Chapter 89, Section 79.
Commercial Buildings:

*Purposes:* The ordinance states that it is intended to provide owners and occupants of covered buildings with “the economic benefits of energy and water savings, good indoor quality, and healthy, pleasant and productive surroundings.” A further intent is described as benefiting “the community by having buildings constructed that are resource-efficient and conserve energy.”

*Provisions:* Effective in December 2007, LEED certification is required for any new construction of commercial buildings, office buildings, industrial buildings, and multi-family residences (unrestricted or senior citizen) of 4,000 or more square feet. The regulation, adopted as part of the Town’s Building Construction Code, expressly adopts LEED-NC, Version 2.2, and “further, automatically adopts any future versions promulgated by the USGBC.” However, a project proponent subject to the requirement can submit “the local variant of a green building project checklist acceptable to the [Town] Commissioner of Planning and Development or his/her designee.” A fee of $0.03 per square foot of the project (up to a maximum of $15,000) is required for the Town’s Green Building Fund. Upon achieving LEED-certified status, the proponent is refunded the amount of this fee.

*Effectiveness:* No information was publicly available on the number of projects proposed or constructed since the adoption of the ordinance. However, the USGBC’s project database indicates that there is only one LEED certified project in the Town, with three other projects having registered for certification. Given the low number of projects in the certification queue, it is possible that developers are avoiding projects that would be subject to the Ordinance’s requirements or are utilizing the local variant to avoid certification. It is notable that, subsequent to the adoption of the ordinance, the Town, with the assistance of ICLEI, performed an assessment of greenhouse gas emissions and determined that the existing buildings in the town were the largest source of emissions. The Town subsequently created a retrofit financing program to target the reduction of greenhouse gas from existing buildings, including single family homes.

Boston, Massachusetts: Boston adopted its “Green Buildings” standards as part of its zoning ordinance in January 2007.

*Purposes:* The first section of the article declares that its purposes are “to ensure that major building projects are planned, designed, constructed, and managed to minimize adverse environmental impacts; to conserve natural resources; to promote sustainable development; and to enhance the quality of life in Boston.”

*Provisions:* Starting in January 2007, new developments or major renovation projects subject to Large Project Review under Article 80B of the Boston Zoning Code – generally, projects newly constructing or adding 50,000 square feet or more of gross floor area or rehabilitating/renovating 100,000 s.f. or more of

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29 Babylon (New York) Town Code, Chapter 89, Section 83.
30 Id. at Sections 84-87.
31 Id. at Section 84(A).
32 Id. at Section 86(A).
33 Id. at Section 86(B).
34 USGBC’s searchable LEED project database is available at: [http://www.usgbc.org/LEED/Project/CertifiedProjectList.aspx](http://www.usgbc.org/LEED/Project/CertifiedProjectList.aspx).
36 Id. See also the website for the Long Island Green Homes program at: [http://ligreenhomes.com](http://ligreenhomes.com).
gross floor area – are required to demonstrate green building compliance.\textsuperscript{37} Compliance is based on a project’s being “LEED Certifiable” (i.e., reaching at least the “LEED Certified” level) under “the LEED building rating system most appropriate” for the proposed project.\textsuperscript{38} Up to four of the required credits may be obtained by fulfilling specially designated Boston Green Building Credits in four categories:

- **Modern Grid**: Use of distributed generation/combined heat and power in areas determined to have power capacity distribution load constraints.
- **Historic Preservation**: Historic renovation of an existing structure.
- **Groundwater Recharge**: Proposed projects in areas subject to the City’s existing Groundwater Conservation Overlay District can earn this credit by providing 50% more recharge than required by the provisions of that district. Proposed projects in areas outside of the overlay district can earn this credit by capturing not less than one inch of rainwater across the entire site area covered by the proposed project.
- **Modern Mobility**: Principally, implementation of transportation demand management (TDM) measures including such actions as transit system pass subsidies, reduced parking ratios or parking cash out programs, on-site bicycle storage and showers, preferential parking for carpools and alternative fuel/low emission vehicles, and on-site car rental services. These measures are presented as menu options depending on the uses of the proposed project (residential, educational/medical institutions, office/retail, hotels, and mixed-use projects).\textsuperscript{39}

**Effectiveness**: During the initial roll out of the program, the City’s review agency, the Boston Redevelopment Authority (the “BRA”), found it necessary to conduct significant staff training to allow for adequate processing of the applications. Since then, however, the program has been generally well integrated into the City’s project review. Applicants submit documentation during the review on how projects will meet the standards.

**Dallas, Texas**: Dallas’ green building requirements were adopted in April, 2008.

**Purpose**: The purposes of the city’s green building program are defined as “to reduce the use of natural resources, create healthier and more sustainable living environments, and minimize the negative environmental impacts of development in Dallas and the North Texas region.”\textsuperscript{40}

**Provisions**: Citywide Green Building Program will apply to both residential and commercial construction in the City in two phases:

- In Phase 1, effective October 1, 2009:
  - All new residential construction must demonstrate energy conservation performance that is at least 15% better than the 2006 International Energy Conservation Code (IECC) as shown by an IC3 –Energy Systems Lab, Inc. certificate, an HERS index of 85, or compliance with ENERGY STAR, Green Built North Texas, LEED-H, or an approved equivalent standard. In addition, new residences must include at least 4 of a 6-item menu of water conservation measures, mitigation measures for relatively flat roofs, and a

\textsuperscript{37} Boston Zoning Code, Article 37.
\textsuperscript{38} Id. at Sections 37-2.4 and 37-4.
\textsuperscript{39} Id. at Appendix A.
\textsuperscript{40} Dallas Municipal Code, Chapter 52, Section 1001.1.
checklist showing compliance with Green Point, Green Communities, Green Built North Texas, LEED-H, or an approved equivalent standard.\textsuperscript{41}

- All \textit{new commercial construction:} (a) Under 50,000 square feet in building area must demonstrate energy conservation performance 15\% better than the 2006 IECC, employ water fixtures 20\% better than the current Dallas Plumbing Code standard, provide mitigation measures for relatively flat roofs, and comply with outdoor lighting restrictions. Compliance could be demonstrated by energy modeling or by submittal of a checklist under ENERGY STAR or LEED-NC, LEED-CS, or approved equivalent; (b) 50,000 square feet and larger must be 85\% of LEED certified in the appropriate LEED rating system or an approved equivalent, with required points under water efficiency (20\% reduction over 2006 IECC) and energy use (14\% better than ASHRAE 90.1-2004). Commercial building owners will also be required to release annual energy consumption data to the City of Dallas.\textsuperscript{42}

- In Phase 2, effective October 1, 2011:

  - All \textit{new residential construction} must be certifiable under LEED-H, Green Built North Texas, or an equivalent approved green building standard, and show at least a 17.5\% improvement over IECC 2006. In addition, at least: (a) one point must come from the indoor water use credit under LEED-H or similar; and (b) four points must come from the optimize energy performance credit under LEED-H or similar.\textsuperscript{43}

  - All \textit{new commercial construction} must be certifiable under the applicable LEED standard, Green Built North Texas, or an equivalent approved green building standard. In addition, at least: (a) one point must come from the water use reduction credit under LEED or similar; and (b) three points must come from the optimize energy performance credit under LEED-H or similar.\textsuperscript{44}

\textbf{Effectiveness}: This program is in the early stages of implementation. The City has continued to prepare itself for implementation, most recently by announcing that, as of September 1, 2011, the City will begin to accept third party plan review and inspection results for the program.\textsuperscript{45} The use of a third party certifier is one way in which a local government can ensure that a proper review is provided without relying on additional staff. However, this approach results in additional costs for property owners, and can lead to issues of uniformity in assessments.

\textbf{Montgomery County, Maryland}: Montgomery County adopted its Green Building Law in 2006.

\textit{Purpose}: The county’s Green Building Law is “intended to protect the public health and welfare by requiring an integrated approach to planning, design, construction, and operation of a covered building and its surrounding landscape that helps mitigate the energy and environmental impacts of the building so that it is energy efficient, sustainable, secure, safe, cost-effective, accessible, functional, and productive.”\textsuperscript{46}

\textsuperscript{41} Dallas Municipal Code, Chapter 57, Section 362.2.1.
\textsuperscript{42} \textit{Id.} at Chapter 53, Section 4301.
\textsuperscript{43} \textit{Id.} at Chapter 57, Section 326.2.2.
\textsuperscript{44} \textit{Id.} at Chapter 53, Section 4304.
\textsuperscript{46} Montgomery County Code, Sections 8-47.
Provisions: Effective not later than September 1, 2008, the provisions of the Montgomery County Green Building Law became mandatory. All new or substantially modified County-funded buildings must either achieve a certification of Silver or greater under the applicable LEED rating system, be certifiable at that level under the applicable system as determined by the County Planning Director, or meet alternative energy and environmental design standards that the director identifies as equivalent. New construction or additions to private non-residential or multi-family residential (taller than 4 stories) buildings of 10,000 square feet or more in gross floor area must be at least certifiable under the applicable LEED rating system, an equivalent standard approved by the County Planning Director, or alternative energy and environmental design standards identified by the director as equivalent.

Effectiveness: In the County’s proposed 2012 budget, the Department of Permitting Services reports that all projects subject to the Green Building Law have registered with LEED and will be monitored for compliance.


Purpose: After recognizing that “building construction, maintenance, and operations consume resources which have a direct impact on the public welfare and the natural environment,” the ordinance describes its purposes as follows:

A. Enhance the public welfare and assure that civic and private sector development is consistent with the city’s desire to create a more sustainable community by incorporating green building measures into the design, construction, and maintenance of buildings;

B. Improve the health of residents, visitors, and workers by counteracting negative environmental impacts associated with building construction and occupation; [and]

C. Promote development that fosters sustainable sites, improves energy and resource efficiency, decreases waste and pollution generation, and improves the health and productivity of a building’s occupants over the life of the building.

Provisions: Effective April 15, 2006, Pasadena has required certain new building construction, expansion, and renovation projects must register for the applicable LEED rating system and attain at least the level of certified. Covered projects include:

- Municipal buildings of 5,000 or more square feet;
- Non-residential buildings of 25,000 or more square feet in new construction;
- Tenant improvements of 25,000 or more square feet requiring a building permit;
- Multi-family residential buildings of 4 or more stories;

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47 Codified at Montgomery County Code, Chapter 8 (Buildings), Article VII (Energy Efficiency and Environmental Design), Sections 8-46 through 8-52.
48 Montgomery County Code at Section 8-49(a).
49 Id. at Section 8-49(b).
50 Presumably, this statement should indicate that the projects are registered with the Green Building Certification Institute, the affiliate of USGBC who manages the actually certification process, under the applicable LEED rating system. This mistake in reporting raises a concern that those officials responsible for implementing the Green Building Law may be insufficiently versed in the LEED certification process to effectively administer the program.
51 Montgomery County, Maryland, Community Development and Housing, FY12 Operating Budget and Public Services Program, FY12-17, available at: http://www.montgomerycountymd.gov/content/omb/FY12/psprec/pdf/dps.pdf.
52 Pasadena Municipal Code, Section 14.090.020.
53 Id. at Section 14.090.050.
- Mixed-use buildings of 4 or more stories; and
- Mixed-use projects and multi-family residential projects that include a residential building of 4 or more stories.\textsuperscript{54}

**Effectiveness:** Since the adoption of the ordinance, the City has modified the requirements, increasing the scope of municipal projects subject to the ordinance, and requiring that all commercial projects of 50,000 square feet or more meet the intent of LEED Silver. The City has also adopted new building code requirements, effective as of January 1, 2011, which significantly increase the minimum standards for baseline energy efficiency.\textsuperscript{55}

**Washington, D.C.:** The D.C. Council’s Green Building Act of 2006 commits the city to a gradual phase-in of green building requirements over a five year period.

**Purpose:** The preamble to the Act states an intent to “establish high-performance building standards that require the planning, design, construction, operation and maintenance of building projects which help to mitigate the environmental, economic and social impacts of built structures in the District.”\textsuperscript{56}

**Provisions:** In the initial period, from October 1, 2007, only publicly-owned and -financed buildings and tenant improvements (both residential and non-residential) in excess of 10,000 square feet were required to meet either ENERGY STAR, LEED (at the silver level), or Green Communities 2006 standards.\textsuperscript{57} Starting on January 1, 2009, all new construction or substantial improvements for non-residential privately owned projects of 50,000 or more square feet in gross floor area were required to submit a green building checklist, and be required to meet LEED-NC 2.2 or LEED-CS 2.0 certification standards within two years of issuance of a certificate of occupancy.\textsuperscript{58} Finally, starting on January 1, 2012, all such structures are required to meet the minimum LEED standards upon building permit application submittal.\textsuperscript{59} The statute is fairly unique in its requirement, in effect as of January 1, 2012, that performance bonds be submitted by all covered projects in order to secure the certification requirement. The amount of the bonds will be based on a percentage of project cost – 2% of total cost for projects up to 150,000 square feet of gross floor area, 3% for projects from 150,001 to 250,000 square feet of gross floor area, and 4% for projects of greater than 250,000 square feet of gross floor area, up to a maximum bond amount of $3 million. If the project covered by the bond fails to meet its certification requirements, the bond is forfeited to the District and paid into a new Green Building Fund to be used to provide incentives for new green buildings.\textsuperscript{60}

**Effectiveness:** While the most significant aspect of the Act did not go into effect until January 1, 2012, one commenter has raised concerns that the LEED mandate contains too many deficiencies to be implemented properly.\textsuperscript{61} The primary concern is that the Act’s requirements are better suited for implementation through building code adoption, as opposed to a LEED mandate.\textsuperscript{62}

\textsuperscript{54} Id. at Section 14.090.040.
\textsuperscript{56} District of Columbia Green Building Act of 2006, Preamble.
\textsuperscript{57} Id. at Section 3.
\textsuperscript{58} Id. at Section 4(a).
\textsuperscript{59} Id. at Section 4(b)(2).
\textsuperscript{60} Id. at Section 6.
\textsuperscript{62} Id.
**West Hollywood, California:** West Hollywood’s Green Building Program ordinance was adopted in July 2007.

**Purpose:** The ordinance’s purpose is to “conserve natural resources, increase energy efficiency, and improve indoor air quality.”

**Provisions:** All new commercial projects and all new residential projects with three or more units are required to comply with the “West Hollywood Green Building Program” by obtaining at least 60 points on the West Hollywood Green Building Point System Table. Projects achieving certification from LEED are exempt from the point requirement. Incentives allowing additional residential units, permitting required open space to be provided on a vegetated green roof, letting side yards be counted toward common and/or private open space requirements, additional floor area, reduced parking ratios, and expedited permitting are provided to those “high-achieving” projects obtaining 90 points or more on the city’s own point system. The West Hollywood Green Building Point System Table is administered and updated by the city’s Community Development Department.

**Effectiveness:** The City has published a detailed Green Building Manual to help applicants understand the requirements of the program, which contains specific information on the application process, and review and verification of installation and operation.

**Challenges to Sustainable Development Requirements**

There have been at least two cases in which industry groups have challenged a government’s imposition of sustainable development requirements. Both of these cases involved challenges to the extent of a local government’s authority to regulate energy efficiency in the face of federally mandated efficiency standards established by the Energy Policy and Conservation Act of 1975 (EPCA) for furnaces, water heaters and other building systems. While the two decisions are trial court decisions, the results have been split, with one decision finding that an ordinance was partially preempted while the second decision did not find any issue with preemption.

12.03 IMPACT ON PROPERTY VALUES

It is reasonable to expect that the impact of mandatory sustainable design and construction standards on property values will be determined in large part by the impact that these new standards have on development costs. In general, if satisfaction of green building standards significantly increases development costs, property values may be affected at least in the short run. However, if development costs are not appreciably increased as a result of compliance with the new standards, then the impact on property values would likely be negligible. In the long run, when buildings begin to realize energy savings, the impact on property values may be more long-term.

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64 Id. at Section 19.060(B).
65 Id. at 19.060(C).
66 Id. at Section 10.060(B).
68 Air Conditioning, Heating, and Refrigeration Inst. v. City of Albuquerque, 2008 U.S. Dist. LEXIS 106706 (D.N.M. 2008), finding that certain requirements in the City of Albuquerque’s ordinance were preempted by the federal law; Bldg. Indus. Ass’n of Wash. v. Wash. State Bldg. Code Council, 2011 U.S. Dist. LEXIS 12316 (W.D. Wash. 2011), finding that Washington state’s requirements were not preempted. See also Shapiro, Sheri, Code Green: Is ‘Greening’ the Building Code the Best Approach to Create a Sustainable Built Environment? Planning & Environmental Law, 63.6 (2011).
savings, the impact should even be positive if commercial and residential end users place a premium on sustainable sites and buildings. This is discussed in more detail in the next subsection.

12.04 IMPACT ON DEVELOPMENT COSTS

The question of the impact of sustainable design and construction practices and inputs on development costs has been at the heart of the debate over Sustainable Development since its inception. Increased development costs resulting from sustainable design and construction standards typically stem from four sources:

- Sustainable or green project elements such as renewable energy sources, sustainable building materials, and water conserving fixtures;
- Certification fees paid to the project rating system’s administrators and documentation costs related to the submittals required to obtain certification;
- Costs of “commissioning” the sustainable building in order to “shake the building out” and demonstrate compliance with the applicable rating system’s performance measures; and
- “Learning curve” costs that may be expressed as premiums or cost overruns by contractors and other consultants unfamiliar with Sustainable Development techniques and practices.

If “green” features and transactional costs are viewed as a costly up-front add-on with no bottom-line benefits or bottom-line benefits that accrue only after several years of operation, the path to acceptance becomes that much harder, regardless of the environmental benefits. On the other hand, if there is little additional up-front cost and green features can be included for little or no premium, acceptance is likely to be faster and wider. In 2004, USGBC retained the construction consulting firm of Davis Langdon to provide analysis of available data on this subject. Both the initial Davis Langdon report, entitled “Examining the Cost of Green,” and the follow-on study entitled “Cost of Green Revisited: Reexamining the Feasibility and Cost Impact of Sustainable Design in Light of the Increased Market Adoption” concluded that the bottom-line additional development cost of “green” features for a building seeking LEED certification was negligible. As described in Cost of Green Revisited:

[t]here is no significant difference in average costs for green buildings as compared to non-green buildings. Many project teams are building green buildings with little or no added cost, and with budgets well within the cost range of non-green buildings with similar programs.

With regard to “learning curve” costs, the study went on to note that it had found “that, in many areas of the country, the contracting community has embraced sustainable design, and no longer sees sustainable design requirements as additional burdens to be priced in their bids.”

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69 Such “commissioning” is a required part of all of the LEED certification programs. See Peter C. D’Antonio, Costs and Benefits of Commissioning LEED-NC Buildings (National Conference on Building Commissioning: May 2007) (hereinafter LEED-NC Commissioning Study) at 11.
70 GREEN BUILDING A TO Z at 49, 54-56.
72 Davis Langdon, Cost of Green Revisited: Reexamining the Feasibility and Cost Impact of Sustainable Design in the Light of Increased Market Adoption (July 2007) (hereinafter Reexamining Cost of Green).
73 Id. at 3.
74 Id.
However, the LEED-NC Commissioning Study, which reviewed data from LEED-certified projects in Colorado, found that the overall cost premium for LEED-NC certification ranged from 1% to 6% of construction costs. Within that total cost premium, the study also found that soft costs, including LEED registration and certification, documentation, and commissioning, average about 0.8% of construction costs, or approximately $1.00 per square foot. These findings are in line with the costs reported by Yudelson in Green Building A to Z. Both the LEED-NC Commissioning Study and Green Building A to Z observe that these costs are actually relatively minor compared to the benefits that result from the additional information and focus on efficient performance that results from commissioning: Yudelson reports an energy savings increase of 10% to 15% from commissioning, and D’Antonio references studies that have found the median recovery for commissioning costs to be less than five years. Alternative rating systems such as Green Globes and proponents of LEED alternatives tout the lower certification fees and documentation costs of their systems, but they appear not to account for the efficiency benefits that commissioning is reported to provide.

12.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

By themselves, mandatory Sustainable Development standards should have relatively little impact on the amount and patterns of land development, except to the extent that additional land-use regulations generally add costs to the development process and may cause developers to seek development sites in jurisdictions that do not impose such restrictions. This could result in more dispersal of development depending on the location of the jurisdiction imposing the new requirement and the availability of developable land in the region that is not subject to such requirements.

12.06 IMPACT ON HOUSING AFFORDABILITY

Considering the mixed data available on increased development costs resulting from Sustainable Development requirements and transaction costs, mandatory sustainable development standards may or may not have a significant impact on housing affordability. If development costs are increased on a particular residential project, the additional costs could substantially impact the level of affordability that can be offered for residential units. However, in light of the recent rapid escalation of energy costs, the greater operating efficiencies of more sustainable housing units may make such units more affordable over the long run by reducing costs of ownership or building operations, in the case of rental projects. This could lead to a greater capacity to finance acquisition costs among homebuyers and bring more homes within reach of more buyers.

12.07 SUMMARY OF PROS AND CONS

PROS:

- Sustainable Development and green building standards provide the means for the design, construction, and development industries to address global climate change.

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75 LEED-NC Commissioning Study at 4.
76 Id.
77 GREEN BUILDING A TO Z at 49.
78 Id.; LEED-NC Commissioning Study at 5.
• Life cycle analysis of the costs of building ownership and operation over the long term shows that more sustainable, greener, more energy-efficient buildings are less expensive to own and operate than conventional buildings, particularly as energy costs continue to escalate.

• Sustainable Development encourages fulfillment of market demand for sustainable and green living environments, which are desired by an increasing segment of the home-buying population.

CONS:

• Incorporation of Sustainable Development elements and compliance with certification requirements can increase up-front development costs.

• Development consultants and contractors may require a premium to address unfamiliar green building requirements and inexperienced project team members may experience a relatively steep learning curve.

• Green building standards that are imposed by local governments through discretionary review processes can add to development costs unless local governments provide expedited permitting processes for Sustainable Development projects.

12.08 INCENTIVE-BASED ALTERNATIVES

Governmental actors at the federal, state, and local levels have been trying for several years to promote Sustainable Development through a wide range of incentives, including grants, development bonuses, expedited permitting, permit and impact fee waivers and reimbursements, and tax credits and abatements.

The Federal Role in Sustainable Development

The federal government encourages Sustainable Development policies in the management of existing buildings and facilities and the construction of new buildings and facilities by various federal departments, agencies, and offices. In addition to this early-adopter role, the Department of Energy and the Environmental Protection Agency have also collaborated on the creation and expansion of the ENERGY STAR rating system for new commercial and residential buildings and building products, which is one of the more widely used Sustainable Development rating systems in the U.S. As described elsewhere in this section, ENERGY STAR has also spawned widespread local adaptations. The federal Energy Policy Act of 2005 allocated $1.3 Billion for a wide range of tax code-related incentives for Sustainable Development in the following areas:

• Energy efficient commercial buildings deduction;

• Credit for construction of new energy efficient homes;

• Credit for certain non-business energy property;

• Credit for energy efficient appliances;

• Credit for residential energy efficient property;

• Credit for business installation of qualified fuel cells and stationary microturbine power plants; and

81 Federal Green Building Report at Section V.

82 See www.energystar.gov for a full description of the range of rating products available under the ENERGY Star label.

- Business solar investment tax credit.  

**State and Local Incentives for Sustainable Development**

State and local incentives for Sustainable Development include the full range of possible incentives described above.  

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**States**

*Nevada* (Property Tax Abatement and Sales Tax Exemption): State law authorizes property tax abatements of up to fifty percent (50%) for up to 10 years for newly constructed buildings that are LEED Silver certified. The law also exempts from the sales tax products and materials used in the construction of a LEED Silver building.

*New Mexico* (Tax credit): The Sustainable Building Tax Credit applies to projects achieving Silver or higher on LEED-NC, LEED-EB, LEED-CS, or LEED-CI. The credit increases commensurate with the level of LEED certification achieved. Residential projects may be eligible for the credit by attaining a HERS rating of 60 or lower, or by designing to meet LEED-H or a specific New Mexico standard. Total credits statewide are capped at $5 million with respect to commercial buildings and $5 million with respect to residential buildings.

*North Carolina* (Fee reduction/waiver): Cities and counties in the state are granted authority to encourage green building practices by reducing or partially rebating permit fees.

*Oregon* (Tax credit): LEED Business Energy Tax Credit, administered by the state Office of Energy, is tied to the level of LEED certification achieved. LEED-NC, LEED-CS, or LEED-CI projects achieving a minimum Silver certification, and achieving certain specifically identified credits, are eligible.

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Virginia (Tax credit): Energy efficient buildings can be treated as a separate class of taxation from other real property. Localities can levy equal or lesser taxes on energy efficient buildings, defined as meeting the performance standards of LEED, ENERGY STAR, Green Globes or EarthCraft.

Counties and Municipalities

Arlington County, Virginia (Density bonus): The Arlington County Green Building Incentive Program provides a density bonus for commercial projects and private developments earning LEED Silver or better.

Chicago, Illinois (Expedited permitting): LEED-Certified projects accepted into the city’s Green Permit Program can receive their permits in as few as 30 business days depending on the complexity of the project. If a project goes for a higher level of LEED certification, waiver of plan review fees is also possible.

El Paso, Texas (Grants): The El Paso Green Building Grant Program awards grants for commercial and multi-family, multi-story residential projects earning LEED certification. The maximum grant allowance is $200,000 for platinum under LEED-NC and $400,000 for projects achieving LEED platinum for a multi-story existing building that includes mixed uses and reuses a structure that has been 50% vacant for 5 years.

Howard County, Maryland (Property tax credits): The County offers tax credits to offset County property taxes for certain buildings. Credits are available for up to five years for projects achieving at least silver LEED certification, with the credit level increasing based on the level of certification: 25% for silver, 50% for gold, and 75% for platinum. Similar credits are provided for LEED-EB for a period of three years.

San Diego County, California (Expedited permitting): The County of San Diego has a Green Building Incentive Program that offers incentives of reduced plan check turnaround time, saving approximately 7-10 days on a project timeline, and a 7.5% reduction in plan check and building permit fees. Projects must comply with one of four measures pertaining to water conservation, energy conservation, and natural resource conservation.

San Francisco, California (Expedited permitting): Projects achieving a LEED Gold rating are given priority in scheduling the assignment of an application to a project planner at the San Francisco Planning Department under the city’s LEED Gold Priority Permitting Program.

Seattle, Washington (Density Bonus): A project must achieve at least LEED Silver to be eligible for the greater FAR and density bonus offered by the city. However, if the applicant for this bonus fails to deliver a timely report specified by the city, a $500/day penalty is assessed.

12.09 SUSTAINABLE DEVELOPMENT STANDARDS AT THE NEIGHBORHOOD OR DISTRICT LEVEL

The growth in the popularity of LEED-NC and its related family of site-based rating systems over the last decade, has not come without a certain amount of criticism from various quarters. While some critics have focused on the effort and expense of obtaining LEED certification and others observed that LEED suffers from the same drawback as all rating systems and can be gamed into achieving building ratings higher than might be considered appropriate, one of the more resonant critiques came from the Smart Growth/New Urbanist movements in real estate development and urban planning. To these critics, LEED addresses only half the problem by focusing on buildings and sites in isolation and not considering their
context. Smart Growth/New Urbanist critics of LEED also take the system to task for failing to meaningfully incorporate the urban design and connectivity elements that make densely developed neighborhoods and work places, which have been found to have inherent energy use-reduction as well as public health benefits, more successful. To these critics, relating a green building to its context, especially other buildings and public spaces such as streets, is a critical piece of the puzzle.

USGBC’s LEED for Neighborhood Development rating system was created in response to this criticism. According to the USGBC’s website, “LEED for Neighborhood Development integrates the principles of smart growth, new urbanism and green building into the first national standard for neighborhood design.” Included on the Core Committee were representatives from USGBC as well as the National Resources Defense Council and the Congress for the New Urbanism. Following the evaluation of the rating system in a pilot program, the LEED ND rating system was published in 2009 and project registration began in early 2010.

The LEED-ND prerequisites and credits are organized into 3 broad categories: Smart Location & Linkage, Neighborhood Pattern & Design, and Green Infrastructure & Building, with additional categories for Innovation and Design Process and Regional Priority Credits. Like LEED-NC, LEED-ND has a potential 100 credit points among the main categories, with 10 additional points being available for the Innovation and Design Process and Regional Priority Credits.

LEED-ND is heavily biased toward infill development and redevelopment, where transit and other infrastructure are already available, and where there are few environmentally-based site constraints, such as important habitat, wetlands, or floodplain. Unlike other rating systems, LEED-ND allows for three stages of certification: Stage 1 – Conditional Approval; Stage 2 – Pre-Certified; and Stage 3 – Certified.

As of 2011, it appears that LEED-ND is not being integrated into local land use regulatory systems in the same way that the other LEED and alternative site and building rating systems have been. Two factors may explain this circumstance. First, unlike LEED’s mature rating systems, LEED-ND is still in the early stage as a rating system. Second, the intent of the LEED-ND system is to have a bias in favor of infill and redevelopment, as expressed most clearly in the Smart Location & Linkage prerequisites. This means that it will not be possible for many locations (such as greenfields or other environmentally sensitive or remote sites) to achieve LEED-ND certification. This policy bias creates a barrier to broad application of the LEED-ND certification requirement. As a result, it may be that LEED-ND criteria will be used, at least at first, only as a factor in determinations such as whether a project will warrant public funding, as a tool for the evaluation of local plans or zoning, or as the requirement for granting density bonuses or other incentives such as expedited permitting and fee waivers to new development proposals.

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87 See Nate Berg, "LEED-ND: Creating a More Complete Vision of Neighborhood Sustainability" (Planetizen: 19 November 2007), available at: http://www.planetizen.com/node/28493. In connection with the location-related prerequisites of LEED-ND, Jennifer Henry, then the director for LEED-ND at USGBC, is quoted as stating that "[i]t's really important to the Smart Growth constituency that not every bad location is able to be certified, because if it is, it's not much of a rating system for smart growth."
PART IV: PRESERVATION OF COMMUNITY CHARACTER

SECTION 13: DEVELOPMENT DESIGN REVIEW

13.01 PURPOSE AND KEY TERMS

In their efforts to implement smart growth initiatives directed at the location and quality of development and the preservation of “community character,” communities utilize concepts and techniques that involve a high degree of discretionary decision-making. One prevalent discretionary review procedure is development design review.

Development design review processes usually take three forms: (1) urban design review, (2) appearance review, and (3) architectural review. Urban design review is a review process and term more typically employed in the large built environment of cities, where the focus is the urban fabric—light, air, view protection, open space, and spatial and functional relationships within a city.

In a survey published on design review practice, the following definition of design review was used:

Design Review refers to the process by which private and public development proposals receive independent scrutiny under the sponsorship of the local government unit, whether through informal or formalized processes. It is distinguished from traditional (Euclidean) zoning and subdivision controls, in that it deals with urban design, architecture, or visual impacts.¹

Of the three terms used in this definition of design review—urban design, architecture, and visual impacts—the term "urban design" is perhaps least understood. One explanation that is helpful describes urban design as:

. . . the composition of architectural form and open space in a community context. The elements of a city's architecture are its buildings, urban landscape, and service infrastructure just as form, structure, and internal space are elements of a building. . . . Like architecture, urban design reflects considerations of function, economics, and efficiency as well as aesthetic and cultural qualities.²

Stated differently, from a city planning policy perspective, urban design is "designing cities without designing buildings."³

By contrast, “appearance review,” primarily a suburban and small town phenomenon, is more directed at preserving and enhancing a perceived community identity or "character" and emphasizes compatibility with existing architectural styles and visual harmony throughout the community through review of site plans, landscape plans and signage. Architectural design, of course, is an important component of these community appearance review programs. The third form of

discretionary design review—“architectural review” — is the result of communities focusing primarily upon architectural design. To do this they establish architectural review boards. The architectural design review conducted by these boards can have varying missions. For example, in some communities, the board’s mission is to disapprove excessive similarity to any other existing or approved structure within a certain distance. A mission of other such boards is to avoid excessive differences between structures. There are also architectural review boards whose mission is to prevent inappropriate design.

13.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

As a general principle, the effectiveness of design review depends upon the extent to which a community has taken the time to think through and clearly articulate the goals that it wishes to further through the combination of zoning and design standards or guidelines of the review process. This includes setting forth the basic characteristics of its community form and organization that should inform the development design review process. If this context of community form and organization is defined, the effectiveness of development design review to inform the development approval process so that new individual buildings or combinations of buildings further the community’s design goals, depends upon using standards and/or guidelines that give meaningful guidance to the developers and their designers. This means avoiding the use of terms that are vague or meaningless when defining design elements essential to the community’s built environment.

Common failings in this regard that undermine the effectiveness of design review are (1) the use of words that are not sufficiently "technical" so as to be understood by design professionals and (2) the use of words that do not have any settled meaning based on usage and custom. These two demands occasionally may be contradictory, that is, a word that is sufficiently technical may be considered too professionally-oriented and thereby have no settled meaning for public review purposes. For example, in one case in Washington in which the court found the city’s building design criteria too vague, the criteria stated that evaluation of a proposed building project would be based on the "quality of its design and relationship to the natural setting of the valley and surrounding mountains." The criteria further stated that a project’s windows, doors, eaves and parapets should be of "appropriate proportions" and seldom "bright" or "brilliant"; its mechanical equipment should be screened from public view; its exterior lighting should be "harmonious" with the building design and "monotony should be avoided." The city’s building design criteria also stated that a project should be "interesting," and that buildings and structures should be made "compatible" with adjacent buildings having "conflicting architectural styles" by use of "screens and site breaks, or other suitable methods and materials. "Harmony in texture, lines and masses [is] encouraged."n5

Although design review criteria are mostly focused upon the totality of a project,6 the imposition of design requirements on development proposals through design review can impact constitutional rights. Hence the design review process must employ language that is sufficiently precise for an

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4Anderson v. City of Issaquah, 851 P.2d 744 (Div. 1 1993), citing City of Issaquah Municipal Code (IMC) 16.16.060 (D) (1)-(6).
5Anderson v. City of Issaquah, 851 P.2d 744 (Div. 1 1993), citing Issaquah Municipal Code (IMC) 16.16.060 (B) (1)-(3).
applicant to ascertain what is being requested and to help the decision-maker arrive at fair, consistent decisions. This is a difficult task. For example, the following architectural review board criteria for signs in the Borough of Stone Harbor, New Jersey ordinance were challenged on vagueness grounds. The court highlighted the offending terms:

Signs that demand public attention rather than invite attention should be discouraged. Color should be selected to harmonize with the overall building color scheme to create a mood and reinforce symbolically the sign's primary communication message. . . . Care must be taken not introduce too many colors into a sign. A restricted use of color will maintain a communication function of the sign and create a visually pleasing element as an integral part of the texture of the street. (Court's emphasis)\(^7\)

The court found these criteria too vague, encouraging the imposition of subjective standards upon the applicant.\(^8\)

Finally, to be effective in giving direction to developers and their designers, development design review must also employ language that has practical application. Even when language appears to have a commonly understood meaning, it may be inadequate when applied to specific circumstances. For example, in one case in New Jersey, a design standard required that the building design be "early American." When a court examined that standard in light of the actual physical development in the surrounding area, it observed that there was no consistent character. Consequently, "early American" design could mean anything from log cabin or tepee to a Cape Cod or Dutch colonial style.\(^9\)

**13.03 Impact on Property Values**

Design standards—whether imposed through a development design review process, or as part of an overall community design plan, can generally be expected to increase property values, particularly if the requirements for site layout and building design are viewed by local residents and consumers as being consistent with and enhancing the perceived character of a neighborhood.\(^10\) The “character” of an area typically is expressed through a design plan guidelines, or through design standards and guidelines derived from a “neighborhood” or “area” character study.

**13.04 Impact on Development Costs**

Design requirements placed upon development proposals through a design review process typically add to the cost of development, particularly when such conditions are imposed through vague standards or guidelines and could not have been anticipated by the developer. This result is especially true in the case of requirements pertaining to individual building designs.

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\(^8\) Id. at 680.


\(^10\) IMPLEMENTATION MANUAL: DESIGN REVIEW (Vermont Land Use Education & Training Collaborative, 2007) (available online at http://www.vpic.info/pubs/implementation/pdfs/6-Design.pdf).
IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

Development design review to achieve or preserve community character does not in and of itself affect the amount and patterns of land development. Only when design considerations are imposed through a particular approach such as Traditional Neighborhood Development (TND), which changes the typical pattern of low density, single-family subdivisions, does the result impact the typical patterns of land development.11

13.05 IMPACT ON HOUSING AFFORDABILITY

Development design review can have an exclusionary effect when it requires more costly processes and methods of design and construction. As one commentator has noted:

Because of the open-endedness of design review, it could be used as an easy subterfuge to block unwanted housing for low- and moderate-income people. . . . Furthermore, design review is a way to increase development cost just in order to insure that all new housing in a community must bear “snob appeal” price tags. If such abuses were tolerated, they would undermine the legal basis for design review and discredit the entire concept.12

But to the extent that design requirements require or allow for a mixture of housing types and a mixture of uses, it may be possible to create affordable housing. For example, TND may provide for the construction of residential apartments above retail shops. To the extent that land and infrastructure costs are financed in whole or large part by such retail shops, the housing can be provided at a much lower costs than housing-only development, thereby, enhancing affordability.

One way a community can avoid the potential exclusionary effect of its design review process is to simply exempt affordable housing developments from design review. While a community may not wish to exempt mixed income or low-income housing development from design review, its regulations should provide that design considerations alone cannot be used as a basis to deny the approval of an affordable housing development proposal.

13.06 SUMMARY OF PROS AND CONS

PROS:

- Development design review, if applied to implement planning and design policies derived from careful study of a particular area, can enhance property values.

- Community design solutions such as Traditional Neighborhood Development (TND) can provide an alternative housing solution in the marketplace that can also be cost effective because land uses, open spaces, and transportation options are integrated with services and infrastructure.

11 See Section 18.
CONS:

- Development design review, if based upon vague standards or guidelines, can result in arbitrary decisions that increase development costs without enhancing community character.

- Development design review can impose a costly process and require methods of design and construction that increase development costs.

- Development design review can have an exclusionary effect when used as a means of blocking affordable housing solutions that may not comply with “community design” principles.

13.07 INCENTIVE-BASED ALTERNATIVES

The most obvious incentive-based alternative to design review is the marketplace itself, where developers and designers, driven by competition for their products and by examples of good design, will propose design solutions consistent with community character and adopted standards that do not require the scrutiny of a design review body. Most developers and their designers believe that the solutions they propose are grounded in principles of good design and in the practical realities of the marketplace and consumer preferences, and that discretionary design review is unwarranted.
SECTION 14: NEIGHBORHOOD CONSERVATION DISTRICTS

14.01 PURPOSE AND KEY TERMS

Two solutions for sprawl—infill development and development within existing urban areas—often create unintended and unwanted impacts on the character of existing neighborhoods. Increased densities and bulk, incompatible uses, and the introduction of contextually inappropriate architecture can contribute to a decline in neighborhood character, loss of a “sense of place,” as well as the loss of historic structures. In an effort to preserve those qualities, local governments across the country have enacted neighborhood conservation districts.¹

The neighborhood conservation zoning district is a technique that has been in use since the mid-1970s, when Boston established a Landmarks Commission.² It became prominent in the late 1980s in response to the economic boom and the National Historic Preservation Act prompted by the expansion of local government preservation activities. Its purpose is primarily to preserve neighborhood character, as defined by the neighborhood’s historic, architectural or aesthetic features, or by the nature of its use (e.g., residential); and sometimes to act as a catalyst for rehabilitation.³

The broadest definition of this technique, offered in 1993 by Robert E. Stipe, Professor Emeritus of Design at North Carolina State University, encompasses the effect on neighborhood identity of all aspects of the built environment, not just the architecture:

A conservation area possesses form, character, and visual qualities derived from arrangements or combinations of topography, vegetation, space, scenic vistas, architecture, appurtenant features, or places of natural or cultural significance, that create an image of stability, comfort, local identity, and livable atmosphere.⁴

The City of Indianapolis Historic Preservation Commission describes the difference between a neighborhood conservation district and a historic district as follows:

Conservation districts are areas that may have experienced significant change over time or might be ineligible for the National Register [of Historic Places], but still represent a key component of local history. The purpose of a conservation district is to preserve and protect the historic character of the neighborhood. . . . In conservation districts, fewer things are subject to design review, and the design guidelines are less restrictive than in local historic districts.⁵

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² Dennison at 1.
³ Morris at 13.
Professor Stipe argued for a non-regulatory approach. But this technique, as typically practiced, is regulatory, following either a “historic preservation” or a “neighborhood planning” model. The neighborhood conservation district that follows the “historic preservation” model is most often used as a means to protect and rehabilitate older buildings and neighborhoods. This approach may involve some level of design review for new construction in the neighborhood. The neighborhood conservation district based on a “neighborhood planning” model utilizes neighborhood-level planning that includes such concerns as transportation, public safety and public services, as well as preservation. This approach typically does not include design review, relying instead on zoning dimensional regulations such as lot size and setbacks, consistent with a neighborhood’s built form.

Where the focus is historic preservation, the overlap between a “conservation” and a “historic” district can be confusing and the distinctions are often blurred. Indeed, some argue that “[t]he distinctions between preservation-based and planning-based conservation districts are becoming less apparent as communities look for and develop solutions that respond to the specific needs of individual neighborhoods.”

Three types of neighborhoods, or “conservation areas,” have been identified as appropriate for this technique:

1. Areas surrounding or bordering an existing or proposed local historic district, providing a “buffer” or “transitional” area of protection;
2. “Pre-natal” historic districts that cannot meet the 50-year rule or otherwise lack sufficient character or support for such designation; and
3. Areas of social or economic value, for example utility for affordable housing, with no “historic” status.

The scope of review in a conservation district varies according to the purpose and the administering agency. Districts with a historic preservation goal tend to mimic the historic district “certificate of appropriateness” model. Districts administered by planning and zoning commissions, whose purpose is broader than historic preservation, consider uses, aesthetics, neighborhood character and property values. Elements of the built environment that are regulated because they contribute to neighborhood identity include lot frontage, lot size, building entrances, building height, and building placement on a lot. Building design elements of concern include roof shape, proportion and rhythm of openings, building materials, textures, and color.

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6 Stipe at 4.
9 Morris at 17.
10 Julia Miller, Protecting Older Neighborhoods Through Conservation District Programs (National Trust for Historic Preservation: 2004) at 5.
11 Stipe at 4.
12 Dennison at 2.
13 Dennison at 3.
Districts vary in the extent to which they regulate alterations, demolitions, and new construction. Nashville, Tennessee, for example, has created several historic overlay districts, including Historic Preservation (HP) Districts and Neighborhood Conservation (NC) Districts. In HP Districts, no structure may be constructed, altered, repaired, relocated, or demolished unless the proposed project complies with the HP District regulations. By contrast, alterations and repairs are not regulated in Nashville’s more permissive NC Districts.

Neighborhood conservation districts that follow the “neighborhood planning” model implement neighborhood plans, which are often a prerequisite to adoption of the district. Effective plans will incorporate neighborhood history, land use inventory, description of housing stock, inventory of the character of the built environment, capital improvement needs, commercial development or revitalization activities, and an architectural survey of the area’s architectural and urban design elements and patterns that distinguish the neighborhood.

The following are some key terms in understanding the neighborhood conservation technique:

- **Design review** is the regulatory mechanism for controlling change to the built environment, whether the district regulates new construction only, or includes review of alterations and other exterior improvements. (See Section 13)

- **Overlay district** is a means of adding or “overlying” regulations over an existing zoning district, adding provisions that supersede the underlying zoning standards or procedures if inconsistent. Neighborhood conservation districts typically are implemented using this zoning technique.

- **Downzoning** is often undertaken in the form of a reduction in the allowed density, height, FAR, or other standards of existing zoning regulations that may exceed what is actually present in a particular neighborhood.

- **Contextualism** refers conformity with the overriding theme in many districts. But that is balanced by a desire for new buildings to meld with the old rather than imitate. As noted in Nashville’s guidelines for new construction, “new buildings should not imitate past architectural styles... it is usually impractical to imitate the architecture of the past... it creates “pseudo-old” buildings... New buildings should continue this tradition [of reflecting change in building tastes and technology over the years] while complementing and being compatible with other buildings in the area.”

- **Downtown and Corridor Plans.** These plans rely heavily on the use of design guidelines and, sometimes, incentives to achieve renovation of older downtowns or commercial corridors. Prominent examples include the downtown plan for Scottsdale, Arizona, the series of overlay zones for the airport, watershed and state park and five

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14 See Adam Lovelady, Broadened Notions of Historic Preservation and the Role of Neighborhood Conservation Districts, 40 URBAN LAWYER 147, 158 (Winter 2008).
15 See id. at 159.
16 See id.
17 Morris at 19.
18 Quoted in Morris at 22.
gateway highway corridors in Raleigh, North Carolina; and the creation of special highway districts to encourage employment opportunities in Plano, Texas.¹⁹

- **Special Zoning/Design Districts.** These “tailored” zoning districts are created to meet the needs of an existing area (as opposed to setting parameters for future build-out). They are an emerging phenomenon related to neighborhood conservation districts.²⁰ Examples are New York’s “Special Midtown District” and Chicago’s “Planned Manufacturing District.”

Preserving “community character” and “livability” through control of an area’s design aspects has been referred to as “the ‘soft’ side of growth management.”²¹ Neighborhood Conservation districts, like other design-oriented community character techniques, are not stand-alone, and must be closely interrelated with other growth management efforts in order to be effective. Also, they depend on a strong development market for their efficacy: “Fine points of project and building design are significant only if and when development takes place. Even historic preservation is dependent on attracting profitable uses for old buildings and neighborhoods.”²²

### 14.02 Effectiveness in Achieving Stated Purpose(s)

Neighborhood conservation districts are considered by planners who work with them to be effective in achieving their purposes. A 1992 survey of 18 such districts conducted for St. Paul, Minnesota concluded that:

architectural and historic preservation oriented districts with limited design review can be a useful supplement to the traditional historic district. They function best . . . when applied to areas with a history of good maintenance and little exterior change and/or where residents are strongly opposed to full-fledged design review. In areas where there is a pattern of low maintenance and unsympathetic exterior alterations, conservation districts with limited design review are less effective at preserving neighborhood character.²³

Neighborhood conservation districts are usually created in response to a petition or request by a neighborhood group and the residents of the proposed district are involved in the planning process and the development of the applicable regulations. In the Town of Chapel Hill, North Carolina, for example, initiation of a neighborhood conservation district requires the submission of a petition by the owners of at least 51% of the land area in the proposed district.²⁴ As a result, the district boundaries can be drawn to encompass areas with similar characteristics while excluding incompatible areas, and the regulations can be tailored to protect specific or unique characteristics, features, activities, or themes identified by the residents. Generally speaking, the regulations may address historic or aesthetic qualities; however, they are also used successfully to guide the design of new infill development, protect existing development patterns, encourage the redevelopment of transitional or fractured neighborhoods and recapture the design elements that are viewed as having produced lively, thriving mixed-use neighborhoods prior to zoning. This type of “contextual” regulation can be used to maintain a low-density pattern of development

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²⁰ *Id.* at 165.
²¹ Porter at 173.
²² *Id.*
²³ Zellie at 15.
²⁴ Chapel Hill Land Use Management Ordinance § 3.6.5 (Neighborhood Conservation Districts).
with lower building heights and lot coverage limitations based on the existing buildings. These measures can eliminate the incentive for tearing down existing homes by limiting any new development to the established pattern.\textsuperscript{25}

The Lockeland Springs – East End neighborhood of Nashville has been cited as an example of a neighborhood with consecutive waves of architectural styles (turn of the century bungalows, 1950’s urban renewal, 1980’s duplexes) that in the late 1980’s was moving toward “demolition by neglect.” The city adopted an overlay conservation district guided by the theme of contextualism: “that is, new buildings must meld with the old. They may stand out for their uniqueness, but not for their newness.”\textsuperscript{26} The overlay district is credited with having stabilized property values and minimized incompatible infill development.\textsuperscript{27}

Examples of other jurisdictions that have adopted neighborhood conservation districts are:

Raleigh, North Carolina, where a Neighborhood Conservation Overlay District is tied to a neighborhood plan, and controls “built environmental characteristics.” The district may apply only to areas of 15 contiguous acres or more which are 75-percent developed, and where development began at least 25 years prior to adoption of the overlay zone.\textsuperscript{28}

The Tazewell Pike Neighborhood Conservation Overlay District in Knox County, Kentucky, which uses design standards to encourage traditional urban design and a diversity of uses historically present in the community, in conjunction with standards governing building bulk, setbacks, height, scale and massing, and facade articulation.\textsuperscript{29}

The Kansas City, Missouri, Neighborhood Conservation Program for funding neighborhood improvements, which represents a non-regulatory commitment of public funds to neighborhood conservation.\textsuperscript{30}

In 1998, the Connecticut legislature enacted the “Village District Act,” enabling local governments to establish “Village Districts” in “areas of distinctive character, landscape or historic value.”\textsuperscript{31} The Village District approach includes “maintenance of public views” and “design, paving materials, and placement of public roadways” as well as more typical architectural elements. Three towns have adopted this district concept to date.\textsuperscript{32}

\textsuperscript{25} Adrian Scott Fine and Jim Lindberg, “Taming the Teardown Trend,” \textit{Forum News} (July/Aug. 2002)
\textsuperscript{26} Morris at 22.
Neighborhood conservation districts have also been used in some jurisdictions to preserve “suburban” neighborhoods. Unlike in-town neighborhood conservation districts that are typically based on detailed studies and plans, these suburban neighborhood conservation districts are relatively simple and rely upon standard suburban zoning provisions. For example, the Laurel Hills Neighborhood Plan for the Laurel Hills neighborhood located outside the Interstate 440 loop around Raleigh, N.C., is a one page document that states goals such as to (1) “[p]reserve the unique character of the Laurel Hills, Neighborhood [that] . . . is a result of the existing large lots and placement of the houses on the lots [,]” and (2) “[p]rotect and enhance property values in the neighborhood.” The zoning to implement the district goals is fairly standard (e.g., one-half acre minimum lot size, fifty-foot minimum setback, and thirty-five-foot maximum building height). 14.03

14.03 IMPACT ON PROPERTY VALUES

To the extent that neighborhood conservation districts are effective at improving the quality and appropriateness of alterations and new construction, they support property values and can stabilize a downward cycle. However, they often protect existing development patterns which can have a negative impact on the speculative, or development value of property depending on the location, density, and height of the existing buildings.

14.04 IMPACT ON DEVELOPMENT COSTS

Design review can be a significant component of Neighborhood Conservation Districts, and may increase development cost by adding time for agency or administrative review and calling for large amounts of information to be submitted before a building permit will be issued.

14.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

When the density and height limitations are based on an existing suburban or lower density development pattern, the restrictions imposed by a neighborhood conservation overlay district will limit the extent to which the land can be redeveloped to take greater advantage of the size of the parcels and/or the more generous regulations in the underlying zoning classification. This limitation may shift development to other neighborhoods or other jurisdictions.

14.06 IMPACT ON HOUSING AFFORDABILITY

Housing preservation is often an objective of Neighborhood Conservation Districts. Such districts typically list as one of their objectives, the promotion and retention of affordable housing. Typically financial assistance and incentives are used in combination with Neighborhood Conservation Districts to encourage rehabilitation and maintenance of older housing stock, whether rental or owner-occupied. Where it helps to conserve older housing stock, this technique contributes to housing affordability. To the extent that an adopted Neighborhood Conservation District adds to the cost of new development through a more involved development review process, this technique could contribute to increased housing costs.

14.07 SUMMARY OF PROS AND CONS

PROS:

- When a neighborhood lacks sufficient support for a full-fledged local historic district, a neighborhood conservation district offers a viable alternative for historic preservation.

- This technique is more “lenient,” susceptible to local definition, more flexible, melds with the local planning process and administrative structure, and involves “associative values” beyond historic or architectural merits.  

- Design and appearance initiatives “can play a significant role in supporting and reinforcing other elements of growth management programs . . . .”

CONS:

- Neighborhood conservation districts typically add review steps and restrictions and/or involve downzoning to achieve their purpose.  There are potential legal pitfalls that beset architectural review and design standards, generally related to the legality of “aesthetic zoning” and due process concerns because of standards or guidelines that are vague as to their meaning.  Restrictions on building appearance may raise First Amendment freedom of expression challenges.  Factors to consider are whether the state recognizes aesthetic regulation as valid, whether the ordinance is vague and allows too much discretion, and whether the restrictions imposed are a valid means of furthering neighborhood conservation.

14.08 INCENTIVE-BASED ALTERNATIVES

In proposing a “conservation area” without a regulatory mechanism, Professor Stipe argued in 1993 that “it is time to supplement this traditional [historic preservation] regulatory stick with a proactive carrot. . . the ideal conservation area becomes a device by which a city or county imposes on itself a special responsibility to undertake ambitious, specifically defined planning and design tasks targeted to the maintenance and improvement of the area so designated.”

Such a scheme is neither regulatory, nor necessarily incentive based.  It does, however, recommend public initiatives, including revolving loan funds to promote home ownership or improvements to historic buildings.

Many communities have sought to promote improved design and appearance through regulatory provisions that provide incentives to encourage response to specific public design objectives.  The best known examples affect major city downtowns rather than residential neighborhood conservation districts:  New York’s bonuses for pedestrian plazas and other amenities; Seattle’s density bonuses for 25 “public benefit” features; Hartford, Connecticut’s “downtown

34 Stipe at 2.
35 Porter at 173.
36 Dennison at 4.
37 Stipe at 2.
development district” for 17 features offering incentive density bonuses; Bethesda, MD’s preference for special quality projects around its metro station, to name a few. With the exception of Bethesda, these incentive programs operate in tandem with a prior downzoning. As one expert observes, “the problem with all incentive zoning programs is that they depend on real estate market activity and pricing levels to produce results. During the office heyday of the 1980s, developers used incentives to build as much space as quickly as possible. . . . In many cities, however, sharp reductions in market activity and profit levels in the late 1980s yielded far fewer public benefits through incentives. . . . Incentives also raise the issue of ‘zoning for sale’ and highly discretionary decision making. . . . The essential ingredients for achieving a fair result in such negotiations are well-conceived design objectives and detailed guidelines to guide decisions.”

39 Porter at 167.
SECTION 15: SCENIC DISTRICTS AND CONSERVATION EASEMENTS

15.01 PURPOSE AND KEY TERMS

Scenic districts and conservation easements are “another approach to preserving community character…[by] protect[ing] key views from key areas to prominent features.” A 1999 report on aesthetics and community character notes:

The concern over view protection is not a new one and regulatory efforts to protect scenic views date back to the 1800s…In the 1930s, a scenic roadway movement swept the country and resulted in the creation of the Blue Ridge Parkway and Skyline Drive, among others…[V]iew protection is being rediscovered and reawakened with a vengeance. Polls show that protection of view sheds, view corridors, and scenic roadways enjoys wide political support.

The purpose of this type of growth management technique is the preservation of significant natural or built features valued by a community. Aesthetic or preservation objectives often dovetail with the environmental goals of protecting “sensitive lands,” for example in ridgeline and mountain protection programs.

A scenic district is usually a zoning technique, while a “conservation easement” (or “restrictive covenant”) is a non-regulatory tool which can limit specific development rights while leaving other property rights and ownership intact. Conservation easements are often gifted by or purchased from property owners. However, easements are sometimes the subject of exactions imposed as a condition to discretionary development approvals.

The most common techniques used in protecting scenic areas are:

Easement: A grant of one or more of the property rights by the property owner to and/or for use by the public, a corporation, or another person or entity. An affirmative easement gives the holder a right to make some limited use of land owned by another. A negative easement is an easement that precludes the owner of the land from doing that which the owner would be entitled to do if the easement did not exist.

Conservation Easement: A conservation easement is “an example of a negative easement…[which] can prohibit all future development or it can specify particular development activities that are prohibited.” The authority to purchase development rights through a conservation easement must be granted by state enabling legislation. Depending on how the easement is created, it may be enforceable only in equity, by injunction, or at law, with monetary damages. Certain characteristics of common law easements make

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3 Duerkson at 47.
5 The America Planning Association Growing Smart Legislative Guidebook at 9-61.
6 Id. The America Planning Association Growing Smart Legislative Guidebook includes in Section 9-402, a model Purchase of Development Rights statute.
them ineffective for conservation purposes. Rules for enforcing easements vary among states, so that enforceability and assignability of conservation easements is sometimes uncertain. To resolve this difficulty, the National Conference of Commissioners on Uniform State Laws adopted in 1984 a “Uniform Conservation Easement Act” (the “UCEA”). As of 2003, 23 states had enacted conservation easement enabling legislation that is based on the UCEA and twenty-six states had enacted enabling legislation that was not modeled on the UCEA.

**Viewshed Protection Ordinance**: This approach is usually enacted through a zoning regulation and may incorporate tools such as height restrictions, setback requirements, design review, sign controls, landscaping and environmental impact standards.

**15.02 Effectiveness in Achieving Stated Purpose(s)**

There are numerous examples of effective scenic districts. The State of Washington’s Shoreline Management Act of 1971 requires preservation of access as well as the protection of public views along the shoreline. Denver imposes height limits so buildings do not block views of the Rockies. Similarly, Burlington, Vermont, protects views of Lake Champlain. Cincinnati’s Environmental Quality-Hillside Overlay District has been used to protect natural features and views along the Ohio River Valley. The City of Pittsburgh has adopted a Hillside Preservation Ordinance and building heights are restricted adjacent to the Monongahela River to protect river views. Salt Lake County’s Foothills and Canyons Overlay District restricts or prohibits development on slopes in excess of a 30% grade in order to limit the visual impacts of development, but also to protect the fragile hills. These districts typically regulate both the visual impacts of development and the disturbance of the land form.

An example of a successful conservation easement program is Wisconsin’s “Great River Road” where easements were purchased beginning in the 1950s to protect views of the Mississippi River from adjacent highways. The program has been successful and endured for the following reasons: (1) limited rights were acquired; (2) the area experienced low development pressure; and (3) the Wisconsin Department of Transportation maintained its commitment to enforcing the easements.

The City of Austin, Texas, has taken a proactive approach to natural resource protection and aggressively monitors properties that it wishes to acquire outright or over which it wishes to acquire and place conservation easements. The City acquired three thousand acres of land as part of an ambitious public-private partnership that utilizes conservation easements and outright acquisition to maximize the amount of contiguous protected land leading from the center of Austin into an adjacent county. This sizable

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8 Id. at 9-62.
9 Elizabeth Byers & Karin Marchetti Ponte, THE CONSERVATION EASEMENT HANDBOOK 12 (2nd ed. 2005).
10 Duerkson at 44.
12 Porter at 168.
13 Duerkson at 41.
14 General Plan: Pittsburg 2020, Selected Goals and Policies, City of Pittsburg, available at http://apps.ci.pittsburg.ca.us/sirepub/cache/2/0iicf545ieyi0c55k1vyc5j55/19624032620120811120.PDF (accessed March 26, 2012); Duerkson at 44.
16 Duerkson at 49.
acquisition connects to lands protected by conservation easements held by a number of local nonprofit organizations to create a thirty-five mile protected corridor with valuable wetlands and wildlife habitat.  

Although conservation easements are an established legal mechanism based on common law property law principles, their legal status has been challenged. In addition, the provisions making favorable federal tax benefits available for the donation of an easement to a charitable organization were the subject of Congressional hearings that led to reforms being enacted in 2006.

15.03 IMPACT ON PROPERTY VALUES

Because they protect natural and cultural resources considered to be valuable community assets, such as mountain or ocean views, scenic districts and conservation easements can have a positive overall impact on the values of properties that are able to view the attribute. Where development rights are limited by restrictions on location, height, lot occupancy or other standards, they may impose a burden on individual property owners who must protect the view for others. From a property rights standpoint, a conservation easement is preferable to zoning and other regulatory restrictions on development for a number of reasons. It is voluntary, the property owner can choose the organization or entity to which the easement will be granted, and the property owner can draft the easement to include specific provisions that may provide for limited use consistent with the purposes of the grant of the conservation easement.

15.04 IMPACT ON DEVELOPMENT COSTS

Where scenic districts require a review and permit process, either by a state or local government body, those additional requirements may add time, complexity and uncertainty to the permitting process, potentially increasing a developer’s costs.

15.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

To the extent that scenic districts and conservation easements are adopted to limit development impacts, such as the location, density or height of buildings and structures on landscapes, viewsheds or other regulated areas, they will affect the patterns of development.

There is some debate regarding the appropriateness of the perpetual nature of most conservation easements and the impact that such easements may have on future generations. Critics have argued that the current generation does not have the capacity, or even the right, to engage in long-term conservation planning that is designed to predict the preferences of future generations and limit land to a non-development state forever. They have also questioned the assumption that if land is, in fact, developed, it can never go back to being “undeveloped.” Efforts to terminate perpetual conservation easements, arguably made irrelevant or impossible to comply with due to unforeseen circumstances,

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could involve costs and potential liability issues that would deter future generations from undertaking such efforts.  

15.06 IMPACT ON HOUSING AFFORDABILITY

Scenic districts and conservation easements do not have a direct relationship to the cost of housing. However, by preserving valued amenities, they may contribute to price stability or appreciation.

15.07 SUMMARY OF PROS AND CONS

PROS:

- Protecting scenic attributes through the acquisition of easements or by regulation within a scenic district can help to enhance property values in the affected areas by preserving significant natural or built features.
- Easements are flexible and can be tailored to the protection requirements of the particular property and to the desires of the individual landowner.
- Easements keep property in private hands and on the tax rolls and also carry a lower initial price tag than outright acquisition.  
- Easements can serve as a planning implementation tool for agencies with no regulatory authority such as a land trust or state transportation department.
- Perpetual conservation easements can be used to protect lands with important and fragile scenic and environmental attributes than may otherwise be negatively impacted by development.

CONS:

- Scenic districts that involve zoning restrictions can have a significant burden on individual property rights and development costs.

22 See, e.g., Hicks v. Dowd, 157 P.3d 914 (Wyo. 2007) in which the plaintiff (Hicks) challenged Johnson County Wyoming’s attempt to extinguish a conservation easement donated to it as a charitable gift for the purpose of preserving and protecting the conservation values of a ranch in perpetuity. The easement prohibited subdivision and other uses of the ranch inconsistent with that purpose. The new owners of the ranch (the “Dowds”), who had purchased the ranch subject to the perpetual easement, asked the Board of County Commissioners to release the easement on the grounds that coalbed methane operations on the ranch would force them into violation of the easement and expose them to potential liability. In response, the Board, without court approval, executed a deed transferring the easement to the Dowds, intending by doing so to terminate the easement. Hicks challenged the Board’s action. The Wyoming Supreme Court dismissed the case on the ground that Hicks did not have standing to sue to enforce a charitable trust, but it invited the Wyoming Attorney General (“AG”), as the supervisor of charitable trusts in the state, to become involved. In 2008, the AG filed a complaint in District Court requesting that the deed transferring the conservation easement to the Dowds be cancelled and declared null and void. (See Salzburg v. Dowd, Compl. for Declaratory J. Charitable Trust, Mandamus Relief, Breach of Fiduciary Duties, Violation of Constitutional Provisions 13 (July 8, 2008)). In 2009, the case settled and the Stipulated Judgment declared the County’s attempted transfer of the easement to the Dowds to be null and void and that the original easement remains in full force and effect.


24 Ohm at 178; 186.
Perpetual conservation easements may limit the ability of future generations to make independent land use decisions.

15.08 INCENTIVE-BASED ALTERNATIVES

Providing for cluster development in areas where, for example, vistas or ridgeline protection are a concern, is a non-confiscatory way to protect the resource while allowing development. Section 10 discusses cluster development. Performance standards rather than inflexible, absolute height or other design criteria are also preferable to rigid design standards.

Transfer of development rights (TDR), while not strictly an incentive, is a market-based mechanism that addresses the loss of value resulting from the property restriction and allows it to be transferred to another parcel. TDR is discussed further in Section 9. TDR has been used to protect sensitive lands (e.g. the New Jersey Pine Lands and Hackensack Meadowlands) preserving rural character and farmland (e.g. Montgomery County, Maryland Rural Density Transfer), and critical areas (e.g. the Santa Monica Mountain TDR program of the California Coastal Commission and the Severable Urban Rights program used to protect the Florida Everglades outside the National Park.)

25 These programs are discussed in James C. Nicholas and Brian D. Leebuck, “Transferable Development Rights and Alternatives after Suitum,” The Urban Lawyer Vol. 30, No. 2 Spring 1998 at 441-475.
SECTION 16: TREE PRESERVATION

16.01 PURPOSE AND KEY TERMS

Communities adopt tree preservation ordinances and regulations in an effort to protect trees for their environmental, aesthetic and economic benefits. Among the environmental purposes asserted for tree preservation efforts are: (1) protection against soil erosion through stabilization of the soil and the creation of wind breaks; (2) stabilization of steep slopes and a reduction in water pollution; (3) enhancement of air quality; (4) energy conservation through the cooling effects of tree canopy; (5) water conservation through reducing evaporation and decreasing the amount of water that runs off a site rather than infiltrating back into the ground; (6) serving as buffers against noise; (7) maintenance of woodland and wetland wildlife habitat and ecology; (8) providing resistance against colonization of an area by non-native plant species; (9) reduction of the urban “heat island” effect through increased shading; and (10) capture of carbon dioxide (CO₂) (carbon sequestration) in furtherance of community-based climate change avoidance goals.¹

Among the aesthetic benefits that trees are said to provide are a “scale” and “sense of place.”² Trees are said to “foster psychological well-being”³ and to make an area “pedestrian friendly”.⁴ Trees also are protected to evoke other community character concerns like an association with a particular historic event or period, or a rural cultural heritage.⁵

Tree preservation proponents cite economic studies showing that people are willing to pay more for tree lots than for ones that have been cleared, and, conversely, assert that clearing trees impairs the stability of property values.⁶ Other economic benefits attributed to considering tree preservation in the development process are a reduction in the cost of providing landscaping and stormwater detention. At a larger scale, attention to tree preservation is said to enhance an area’s “quality of life” and “image” as part of an overall economic development strategy.⁷

With such a wide range of purposes attributed to tree protection, it is perhaps not surprising that tree preservation regulations themselves vary widely in scope and applicability. A common early form of tree protection laws, still in effect in many communities, focused on protecting against and compensating for the removal of public trees, such as those within street rights of way or on parkland.⁸ Subsequently, communities shifted their attention to trees located on private property. Some of these communities

² Duerksen/Richman at 9-10.
³ McPherson et al at 235.
⁵ See Duerksen/Richman at 40.
⁷ Duerksen/Richman at 15-16.
⁸ See e.g., Massachusetts Scenic Roads Act, General Laws c. 40, sec. 15C.
focused their tree protection regulations only on large trees or trees of a particular species or “specimen”
trees. However, others looked also, or instead, at preserving tracts of woodland by regulating the
percentage of tree canopy that must be preserved on a private development site. The percentages used
around the country range from as low as 15% in some jurisdictions, to as high as 70% in others. Many of
these regulations impose costly and time-consuming permit application requirements, such as a
comprehensive inventory of vegetation existing on a development site. Some regulations govern ongoing
maintenance of trees, including restrictions on pruning privately owned trees, and limitations on the use
of vehicles or other activities near trees targeted for protection. Regulations vary in their geographic
scope, as well. Some apply throughout a jurisdiction, while others apply only in specific areas such as
along designated riverways or roadways.\(^9\)

Many tree conservation ordinances require mitigation for trees removed from a site. This may take the
form of on-site replanting of several smaller trees for each large tree removed, or requiring payment into a
fund for planting elsewhere in the jurisdiction.\(^10\) Some jurisdictions, such as the state of Maryland,
impose an affirmative obligation of “afforestation” or the planting of trees on development sites falling
below a certain ratio of tree-coverage to lot area — regardless of whether the developer is responsible for
the shortfall of trees, or whether it purchased the site in that condition.\(^11\)

It is helpful to an understanding of tree protection regulations to be aware of the meaning of terms that are
frequently used in such provisions:

- **Afforestation** is the conversion of open land into forest, and refers to the requirement that open
  land be planted with trees to increase vegetative cover.\(^12\)

- **Canopy** or “crown” is the above-ground parts of a tree consisting of the branches, stems, buds,
  fruits, and leaves.\(^13\)

- **Dbh** refers to a tree trunk’s “diameter at breast height,” which is typically measured at four and a
  half feet above the ground.\(^14\)

- **Dripline** is (an imaginary) vertical line extending from the outermost edge of a tree canopy to the
  ground.\(^15\)

- **Specimen tree** is one of several terms used to denote trees of a particular size or species that are
  the subject of special protection under a tree protection regulation. One source cites the
definition from Montgomery County, Maryland: “[I]ndividual trees which are healthy which
have a diameter at breast height of 24 inches or greater, or which otherwise are noteworthy
because of species, age, size, or other exceptional quality, such as uniqueness, rarity or status as a
landmark or species specimen.”\(^16\)

\(^9\) See Duerksen/Richman at 3,7, 38-39, 41; Cooper.
\(^10\) Duerksen/Richman at 29.
\(^12\) Duerksen/Richman at 46.
\(^13\) Duerksen/Richman at 105 – Appendix C.
\(^14\) Duerksen/Richman at 105 – Appendix C. Selected Sample Definitions.
\(^15\) Duerksen/Richman at 105 – Appendix C.
\(^16\) Duerksen/Richman at 36.
16.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(S)

The wide range of approaches to tree preservation regulations make it difficult to draw generalizations about how effective such measures are at achieving their intended purposes. One study of California jurisdictions found that the most effective ordinances were those that required tree planting in new commercial and residential development (thought to be effective by more than two-thirds of respondents), while those directed at abating tree hazards or otherwise protecting trees on private property not undergoing development were less effective, and those directed at protecting forest during development were thought to be the least effective of all.\(^\text{17}\) Tree protection legislation has burgeoned at the local level, with hundreds of communities adopting tree conservation ordinances over the last decade.\(^\text{18}\) There is also an increasing amount of variety among the types of tree ordinances adopted.\(^\text{19}\) Many communities have found that these ordinances are a successful way to protect trees and help replant trees in areas where trees have been previously cut down.\(^\text{20}\) The success of these programs is dependent upon the willingness of the community to enforce the tree protection ordinances and whether the regulation takes into account local characteristics.\(^\text{21}\)

Regulations that are adopted without regard for the particular ecological, climatic, topographic, and other characteristics of the jurisdiction are unlikely to be successful. For that reason, local governments should be discouraged from “borrowing” regulations from dissimilar jurisdictions.\(^\text{22}\) An ordinance that is helpful in maintaining native palm species in Florida may not be beneficial or workable in a New England town concerned for its native hardwoods.

Similarly, requirements should be developed with a mind toward precisely what the jurisdiction is seeking to protect, taking care not to be over or under-inclusive. For example, while many tree ordinances use trunk size as a criterion for deciding whether a particular tree is subject to regulation, a uniform trunk size is not always an appropriate reference point across all species. An ordinance that protects trees one foot in diameter will cover a large number of oak trees, but very few dogwoods, even though the latter may be a species of more concern to local planners. Simply lowering the size threshold will likely encompass even more oaks, even as it picks up a few dogwoods. Mt. Pleasant, New York, is an example of a community that has adopted size criteria that depend on the species of tree.\(^\text{23}\) Tampa, Florida, is cited as an example of a community that uses a point system to target trees with desirable characteristics depending on species.\(^\text{24}\)

The better regulations provide planning staff with specific guidance as to what areas to preserve while at the same time leaving discretion and flexibility to work with the developer to achieve community goals in the context of particular site constraints. A flaw identified in some ordinances is that they provide insufficient guidance to planning staff and developers concerning what vegetation should be retained. Without guidance, the development review process may not result in preserving vegetation of a type and at locations that are important to the purposes of the ordinance. Ordinances lacking sufficient guidance are subject to legal challenge, and are seen as being neither fair nor effective.\(^\text{25}\)

\(^{17}\) Thompson at 29.

\(^{18}\) Chris Duerksen, et al., Got Trees, ZONING PRACTICE 1 (July 2006).

\(^{19}\) Id.

\(^{20}\) Id.

\(^{21}\) Id.

\(^{22}\) Duerksen/Richman at 7, 35, 50.

\(^{23}\) Cooper at 274.

\(^{24}\) See Duerksen/Richman at 39.

\(^{25}\) Duerksen/Richman at 41.
A further consideration regarding the effectiveness of a tree preservation ordinance is the extent of administrative burden that it places on the local jurisdiction. Many ordinances exempt single residential lots or small-scale development. Where tree removal is controlled on all parcels, no matter how small, the burden on local government and the regulated public may be more than the incremental benefits to be gained for tree preservation.\footnote{Duerksen/Richman at 43, 46.} One survey of California jurisdictions found that barely half of the jurisdictions surveyed thought that their ordinances were adequately enforced.\footnote{Thompson et al at 29.}

A number of jurisdictions have gained attention for their particular approaches to tree conservation. The state of Maryland passed legislation in 1991 requiring forest preservation, and afforestation or reforestation on both private and public lands.\footnote{Duerksen/Richman at 3.  MD Code Ann. Natural Resources, Title 5, Subtitle 16.} Maryland’s Forest Conservation Act is credited with there being 120% more forest retained and planted than cleared for development during the first five years of the Act.\footnote{Galvin et al at 278.} The New Jersey Pinelands Act requires all local governments in the district to enact ordinances that address vegetation protection during land clearance.\footnote{Duerksen/Richman at 3.} Lake County, Illinois, is known for its requirement that 70 percent of mature woodlands on a site be protected from development.\footnote{Duerksen/Richman at 40-41.} Freeport, Maine, is cited for an unusual approach involving a limitation (7,500 square feet) on the size of any opening in the forest tree canopy.\footnote{Duerksen/Richman at 41.} Thousand Oaks, California requires a permit for any pruning of live oak trees.\footnote{Duerksen/Richman at 44.}

\section*{16.03 Impact on Property Values}

Proponents of tree preservation requirements defend them on economic grounds with the observation that trees can add considerably to the value of property. Indeed, a large specimen tree has been said to be worth thousands of dollars.\footnote{Duerksen/Richman at 44.} One Georgia study is cited as finding, based on comparable sales, that each large front yard tree created an increase in sales price on the order of $500.\footnote{McPherson et al. at 239.} Another study of 4,800 parcels surrounding a nature reserve in urbanized Riverside County, California, found that a decrease of 10 percent in distance to the nearest oak stands and to the edge of the permanent open space land resulted in an increase of $4 million in total home value and an increase of $16 million in total land value in the community.\footnote{Duerksen, et al. at 2.} Whether tree preservation ordinances themselves enhance property values, however, is open to question. Ordinarily, one would expect restrictive regulations to have a negative effect on property value in that they limit the extent to which the property can be used for development purposes, thereby making the land less valuable in the market. At the extreme, such ordinances can be viewed as downgrading the ownership interest in private property by confiscating the traditional property right to cut timber.\footnote{Brian W. Blaesser, Discretionary Land Use Controls: Avoiding Invitations to Abuse of Discretion, 14th ed., (Thomson/Reuters-West: 2011) §1:27.} Prohibitions on the removal of specimen or historic trees could, at an extreme, have a drastic effect on property value by rendering it impossible, as a practical matter, to develop a property containing such features. In such a case, the landowner would need to evaluate its prospects for making a regulatory takings claim against the jurisdiction.

\begin{thebibliography}{99}
\item Duerksen/Richman at 43, 46.
\item Thompson et al at 29.
\item Duerksen/Richman at 3.  MD Code Ann. Natural Resources, Title 5, Subtitle 16.
\item Galvin et al at 278.
\item Duerksen/Richman at 3.
\item Duerksen/Richman at 40-41.
\item Duerksen/Richman at 41.
\item Duerksen/Richman at 44.
\item Duerksen/Richman at 5 and Appendix B.
\item McPherson et al. at 239.
\item Duerksen, et al. at 2.
\end{thebibliography}
The Georgia Supreme Court examined this issue in a case in which a property owner and Homebuilders Association challenged a tree preservation ordinance alleging that the ordinance on its face was an unconstitutional taking of their property. The court found that because the ordinance merely “regulates the way in which new and existing trees must be managed during the development process,” and does not destroy owners’ ability to develop their property, the owners were not deprived of all economically viable use of their land.

The dissenting justice, Justice Carley, argued that the ordinance should be reviewable under the U.S. Supreme Court’s takings test for discretionary exactions as articulated by the U.S. Supreme Court in the Dolan case. The Dolan test is divided into two parts: First, the court must determine whether an essential nexus exists between a legitimate state interest and the permit condition of the ordinance. Second, “there must be an individualized determination that the required exaction is roughly proportional to the nature and extent of the impact of the proposed development.”

Justice Carley pointed out that the majority had given scant attention to the actual provisions of the tree ordinance. He provided a brief and instructive summary of the ordinance, starting with the ordinance’s broad statements of purpose, including:

- the protection of the public health, safety, general welfare, and aesthetics of the County and all of its citizens; the promotion of several environmental benefits for the citizens and their communities; the protection of specimen and historical trees; the prevention of the loss of mature trees and the ensuring of appropriate replanting; and, the enhancement of the quality of life in the County.

He also noted that the ordinance, subject to certain exemptions, conditioned the issuance of every building or land development permit in the county on an applicant’s submission of a tree survey and a tree protection plan for approval by the County Arborist.

Justice Carley argued that the ordinance failed the first prong of the Dolan test because the mandatory reforestation provision of the ordinance, which required developers to plant trees in areas where there were no trees previously, was not supported by environmental documentation. In his view, the ordinance also failed the second prong because the ordinance imposed an exaction which was not “roughly proportional” to the impact of the development nor did it provide an opportunity for an individualized determination. The ordinance in question did not have different requirements based on the type of development or the area in which the development would occur. These problems were compounded by the ordinance’s lack of standards to guide its implementation.

While Justice Carley was the minority, his dissent provided an insightful analysis as to why and how the Dolan two-part test for exactions could be used to challenge a tree preservation ordinance as applied to a particular property owner or developer.

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38 Greater Atlanta Homebuilders Association v. DeKalb County, 588 S.E.2d 694 (Ga. 2003).
39 Greater Atlanta, 588 S.E.2d at 698.
41 Id. at 386-391.
42 Greater Atlanta, 588 S.E.2d at 699 (Justice Carley dissenting), citing to Code of DeKalb County § 14-39(a).
43 Id. (Justice Carley dissenting), citing to Code of DeKalb County § 14-39(c). (e).
44 Greater Atlanta, 588 S.E.2d at 702.
45 Id. (Justice Carley dissenting).
46 Id. (Justice Carley dissenting).
47 Id. at 702-03
In New Jersey, the Supreme Court rejected a challenge to a tree removal ordinance brought by the New Jersey Shore Builders Association.\textsuperscript{48} The court upheld an ordinance enacted by the Township of Jackson, overturning (in part) a trial judge’s decision that the ordinance did not bear “a real and substantial relationship” to the purpose of the ordinance and it therefore failed to meet the standards of New Jersey’s Municipal Land Use Law.\textsuperscript{49} Curiously, the court held that the tree ordinance did not regulate the “use of land” and therefore it did not need to meet the standards of the MLUL, but merely had to meet a “rational basis” test to be valid under the town’s general police power.\textsuperscript{50} The court found that the Association failed to meet its burden to overcome the ordinance’s presumption of validity, and observed that the Association, in challenging the ordinance, “cannot see the forest for the trees.”\textsuperscript{51} Despite these findings, the court recognized that the ordinance remained in limbo because of the lower court’s ruling that the ordinance was invalid based on vagueness, a ruling that was not challenged on appeal to the Supreme Court.\textsuperscript{52}

16.04 IMPACT ON DEVELOPMENT COSTS

Some common tree preservation regulations have a significant effect on development costs. Requirements for afforestation impose a costly burden on a developer to take affirmative steps to remedy a situation that it did not even create, by planting trees to increase forest cover. Likewise requirements to replace removed trees, either on or off-site, can add to development costs. One study of California municipalities and counties found that developers paid for and planted 90 percent of the trees added to the urban landscape in 1997, and that this percentage represented an increase from 75 percent ten years earlier.\textsuperscript{53} Viewed purely from a development cost perspective, any prohibition or limitation on tree clearing, and even requirements for best management practices to avoid damaging trees during construction, can prevent a developer from undertaking the lowest cost methods of development, for example by making it more difficult to bring in large construction equipment or constraining site design. Many modern tree preservation ordinances mandate detailed tree surveys encompassing every part of even a large development parcel. Typically these surveys must be completed and certified by a qualified professional. Such efforts can add considerably to the “soft” costs of development. The additional time it takes to complete the review and approval process is another source of increased “soft” costs associated with some tree preservation ordinances.

16.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

Tree preservation ordinances impact the amount and patterns of land development by limiting the extent to which a developer can clear trees from a property to accommodate new buildings and paved surfaces. Plan review provisions can have the effect of reconfiguring a development on a site to avoid forested areas. Those provisions that require a certain percentage of tree canopy to be retained, or that require afforestation or replacement planting on site, function as density restrictions that can serve to increase the size of the parcel that is required for any particular magnitude of development, (to the extent that development density is not already limited by zoning or other land use regulatory provisions).

\textsuperscript{48} New Jersey Shore Builders Ass'n v. Township of Jackson, 970 A.2d 992 (N.J. 2009).
\textsuperscript{49} New Jersey Shore Builders Ass'n, 970 A.2d at 995.
\textsuperscript{50} New Jersey Shore Builders Ass'n, 970 A.2d at 1002.
\textsuperscript{51} New Jersey Shore Builders Ass'n, 970 A.2d at 1005.
\textsuperscript{52} New Jersey Shore Builders Ass'n, 970 A.2d at 1006.
\textsuperscript{53} Thompson et al., at 10.
16.06 IMPACT ON HOUSING AFFORDABILITY

Tree preservation, reforestation or afforestation requirements will generally increase development costs, and those increased costs will be passed on to the purchaser to a greater or lesser extent depending on the structure of the local housing market, thereby affecting the affordability of housing. Despite the potential for negative impacts on individual property rights discussed above, one of the main purposes cited by communities that impose tree preservation requirements is the preservation of property values across the community as a whole. All else being equal, neighborhoods or jurisdictions in which trees are preserved and planted will tend to be more attractive and desirable and consequently support higher housing prices than equivalent neighborhoods lacking trees. In regions where attitudes towards tree preservation vary from jurisdiction to jurisdiction, these market effects may make it more difficult to provide affordable housing in communities with strict mandates concerning trees, without the use of other regulatory techniques such as density bonuses or inclusionary zoning to counteract these market effects.

16.07 SUMMARY OF PROS AND CONS

PROS:

 Proponents of tree preservation ordinances have identified a number of benefits to maintaining tree cover on public and private property, many of which accrue to society as a whole, rather than to a particular property owner.

 Even to an individual property owner, tree ordinances can have significant beneficial effects. For example, my property value may be enhanced if my neighbors are prevented from clear-cutting their lots.

CONS:

 Ordinances that impose extensive restrictions on cutting trees on private properties represent a significant intrusion into what is traditionally considered to be a core attribute of private property ownership.

 Such ordinances typically complicate and add cost to the development process.

16.08 INCENTIVE-BASED ALTERNATIVES

Commentators and communities have been creative in seeking to alleviate the burden imposed by intrusive tree preservation regulations. Development rights credits, which are a form of transferable development rights (TDR), have been suggested as a means of alleviating hardship that could result from the imposition of tree preservation requirements in a way that reduces or eliminates development potential. Special property tax status for land set aside as a result of a tree preservation mandate is another suggested way to alleviate the fiscal burden on a property owner that is prevented from developing a portion of its property.  

It is also possible to devise a tree preservation ordinance that has incentive-based provisions built into it. The most common incentive approach is to reward the preservation of existing tree cover within new developments by reducing landscaping requirements on a proportional or higher basis. Another approach taken by some jurisdictions is to provide development bonuses, including increased densities

54 Duerksen/Richman at 27, 62.
55 Duerksen/Richman at 61.
and building heights and reduced setbacks, when the applicant is able to present a plan that preserves more trees than the ordinance would require.\textsuperscript{56}

\textsuperscript{56} Duerksen/Richman at 62.
SECTION 17: FORM-BASED CODES

17.01 PURPOSE AND KEY TERMS

In contrast to conventional land development regulations, form-based development regulations – known as “form-based codes” -- are designed to place the ultimate physical form of the development in a superior position to the uses to which individual property can be put. Form-based codes are:

A method of regulating development to achieve a specific urban form. Form-based codes create a predictable public realm by controlling physical form primarily, with a lesser focus on land use, through city or county regulations.

Form-based codes look different than conventional zoning regulations because they tend to be more graphically intense, but their most unique attribute is the recommended process by which they are initially developed. These regulations are inherently place-specific, so a great deal of planning and public participation (often undertaken through a “charrette” planning process) typically occurs well before the regulations are drafted. It is through this process that the community expresses its desired physical outcome, and memorializes it by a vision or illustrative plan. The standards ultimately contained in the form-based code are derived from this urban design vision.

Contrary to conventional belief, form-based codes do not “toss out” uses as a means of regulation. For example, uses are presented in the SmartCode as “Building Function Standards.” The SmartCode, now in its ninth version, is a comprehensive model form-based code promulgated by Duany Plater-Zyberk & Company. The SmartCode is increasingly being proposed in various forms, from Gulf Coast communities to the City of Miami. Like most form-based codes, the Building Function Standards in the SmartCode are presented in a table that is designed to be flexible, allowing the market to decide what goes on inside the building types. Also, form-based codes cannot ignore the relevance of land uses in one particular legal context: Federal statutes such as the Fair Housing Amendments Act, the Telecommunications Act of 1996, and the Religious Land Use and Institutionalized Persons Act (RLUIPA), preempt local land use regulations to the extent that they are found to violate the use-specific protections established under each statute.

Although form-based codes are designed to be place-specific, most contain the following identifiable concepts and component parts, which address topics common to zoning, subdivision, and other land development ordinances.

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1 This subsection is substantively based on Robert J. Sitkowski, Update on Form-Based Development Regulations, Proceedings of 23rd Annual AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION LAND USE INSTITUTE (August 2007). The content of that article appearing in this subsection is used with his express permission.
2 www.formbasedcodes.org/definition.html
3 A short list of example codes can be found at www.formbasedcodes.org/awards_2008.html.
5 See Chad D. Emerson, THE SMARTCODE SOLUTION TO SPRAWL (Environmental Law Institute, 2007).
6 A list of currently-pending SmartCode implementation projects is presented at www.smartcodecomplete.com/learn/links.html.
8 This list of elements was derived from the following sources: Daniel Parolek, Karen Parolek and Paul Crawford, FORM-BASED CODES: A GUIDE FOR PLANNERS, URBAN DESIGNERS, MUNICIPALITIES, AND DEVELOPERS (2008)
**Regulating Plan.** The regulating plan is a map, similar to, but more detailed than, a zoning map, that typically shows streets and public open spaces and designates the specific locations where the various building form standards will apply. A regulating plan is an essential means for translating a vision or illustrative plan into place-specific development regulations. The regulating plan in some form-based codes simply replaces the official zoning map or other regulatory maps.

Most regulating plans, however, look quite different from traditional zoning maps, and are presented in many different formats. Some regulating plans, such as the one for a neighborhood in Farmers Branch, Texas, identify street frontage types. This regulating plan identifies the building form standards that apply to a parcel based on the coding assigned to the facing street, instead of coding the entire parcel. This regulating plan also shows the “required building line” (also sometimes known as a “build-to line”) and other standards for public and private improvements. Other regulating plans identify which building types may be constructed on individual lots as well as the sizes of those individual lots. When a building-type regulating plan is proposed by a developer for a specific site, it may indicate one building-type or a narrow range of building types that may be constructed on each lot (for example, townhouses, mixed-use buildings, or detached homes).

Many newer regulating plans, chief among them those implementing the SmartCode, are based on a physical organizing system called “The Transect” — a continuum of human habitation from urban core to rural.9

**“Urban” or “Building Form” Standards.** These standards, addressing location, bulk, height, coverage and use, among other things, are commonly presented in a graphic form with supporting text.

**Public Realm.** This term refers to “those parts of the urban fabric that are held in common such as plazas, squares, parks, thoroughfares and civic buildings.”10 The public realm is a central organizing principle in the form-based code because it ties together the principles of walkable, interconnected aspects of a neighborhood, and the concern for how streets, lots, and buildings fit together.

**Public Space Standards.** These regulations address the widths and dimensions of streets, parking areas, sidewalks, paths, street trees and furniture, parks, plazas, and other standards applicable to the creation of the Public Realm.

**Administration and Definitions.** A definitions section is usually included because some of the terms used in a form-based code may not typically be included in conventional zoning or subdivision regulations. Since another of the goals of a form-based code is to promote predictability in process and effect — allowing development applications that meet all requirements to be approved administratively rather than through a public hearing process. Typically, a clearly defined application and project review process is included either in the form-based code itself or by reference to another section of the municipality’s land development regulations.

**Other Components.** In addition to the above components, some form-based codes contain standards dealing with the layout and dimension of blocks, building types, and landscaping. Some also include architectural standards, which govern the building details and materials that are permitted and the ways in which they can be incorporated into specific building elements.

(Hereinafter PAROLEK); Form-Based Codes Institute, *Definition of a Form-Based Code* (June 27, 2006), at www.formbasedcodes.org/definition.html; Peter Katz, *Form First*, PLANNING (November 2004) at 17.

9 See Andres Duany and Emily Talen, *Making the Good Easy: The Smart Code Alternative*, 29 FORDHAM URB. L. J. 1445 (2002); Andres Duany and Emily Talen, *Transect Planning*, 68 J.AM. PLAN. ASS’N. 245 (Summer 2002). See also *J. URB. DESIGN* (SPECIAL ISSUE), OCT. 2002 (containing seven papers examining applications of The Transect).

17.02 Effectiveness in Achieving Stated Purpose(s)

Generally speaking, the effectiveness of form-based codes depends on the extent to which a community has taken the time to fully articulate its goals. In the context of form-based codes, this is largely accomplished through the charrette process. The elements of a successful charrette are discussed in other NAR publications.\textsuperscript{11} The standards derived from the master plan (or vision plan) resulting from the charrette become the regulations governing development community-wide or within a defined area. Accordingly, the translation of the master plan into regulations is the critical juncture in this process. This step must be accomplished with a high degree of precision, in order to avoid producing physical outcomes inconsistent with the vision in the master plan.

Also important to the successful adoption of a form-based code is the integration of the code into the state statutory framework. Several states have adopted specific legislation authorizing the use of such codes.\textsuperscript{12} In the absence of such legislation, code drafters need to consider how to best integrate form-based codes into traditional use-based local ordinances and regulations. Of particular concern is the need to ensure that proper standards are included to avoid arbitrary and overly discretionary approval processes.\textsuperscript{13}

Form-based code techniques are quite new. Consequently, while there are a number of form-based codes in place throughout the country, primarily concentrated in California under that state’s Specific Plan legislation, it is too early to judge whether they are achieving their purpose of creating mixed-use, dense, pedestrian-friendly places.

17.03 Impact on Property Values

The extent to which the form-based code can affect property values is largely dependent on where and how the code is applied. In those cases where the code is used in a redevelopment (or “infill”) context, it can generally be expected to increase property values if the code is carefully written to promote development that reinforces or enhances the already-existing character of the area. Likewise, where the area to be redeveloped has been significantly neglected or abandoned, use of the code to create a “place” where none presently exists can generally be expected to increase property values in that area. In a “greenfield” context, the positive impact of a form-based code may not be so dramatic, except in those cases where the conventional zoning regulations have prevented a more intense, mixed-use development. In those cases the existence of form-based options may increase property value as the type of mixed-use development authorized has achieved some degree of market acceptance. The depth of that market is as yet unknown.

17.04 Impact on Development Costs

The “charrette” process may bring with it relatively significant costs at the front end of a form-based codes project. The writing of regulations based on this exercise is also time-intensive and can be costly. Accordingly, if a developer proposes and funds the creation of a form-based code for a specific area, the costs associated with creating the form-based code may be passed on to future purchasers and tenants. On the other hand, if the municipality itself engages in the production of the form-based code, the direct cost of the code production would not be borne by the market.

\textsuperscript{11}See Charrettes: The Community Planning Tool That Improves Public Participating at www.realtor.org/smart_growth.nsf/Pages/charrettes. This NAR webpage also contains a PowerPoint presentation that NAR created in cooperation in The National Charrette Institute.


\textsuperscript{13}Id. at 183.
As with review and approval processes under conventional land development regulations, there is also a cost associated with the local government permitting process under a form-based code. However, if the code is sufficiently prescriptive, it is possible that the majority of development permits can be granted as of right, thereby streamlining the development approval process. In those cases where the codes are not sufficiently detailed or where the municipality prefers to keep development approvals under the form-based code discretionary in nature, there would be no cost savings over a conventional regulatory process that utilizes discretionary review for development approvals.

While not specific to form-based codes, one study examining the economic return on New Urbanist developments\(^\text{14}\) found that such developments typically resulted in increased development costs, but that homes in these developments generally sold at a premium over homes in comparable conventional developments\(^\text{15}\).

### 17.05 Impact on Amount and Patterns of Land Development

Because form-based codes promote mixed-use and higher density, they directly affect the amount and patterns of land developed in a community. If formulated with a sufficient level of detail, a form-based code can clearly establish the pattern of land development where it is applied. The regulating plan is intended to be largely predictive of the location of public improvements and buildings.

### 17.06 Impact on Housing Affordability

Since one of the promises of a form-based code is to achieve a “fine grain” of mixed-use, including multiple housing types, it may be possible for the code to create a market environment in which affordable housing can be achieved. This outcome would be especially true where a form-based code explicitly establishes different housing types in a redevelopment area where no residential development presently exists. To date, most developments that have proceeded under form-based codes have tended to be above average cost for the region. Nevertheless, affordability options should be enhanced as form-based codes become more common.

### 17.07 Summary of Pros and Cons

**PROS:**

- When the form-based code is sufficiently detailed and prescriptive, local governments can achieve predictable types and patterns of physical development.

- Form-based code regulations purposefully create dense, mixed-use and pedestrian-friendly places.

- To the extent the form-based code allows significant by-right development, it can streamline the development process, with resulting cost savings for developer applicants and municipalities.

- A form-based code may be easier to use than a conventional land development code because it gives direction primarily through graphics and relies less on text provisions.

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\(^\text{14}\) Form-based codes are often linked to New Urbanist influenced land development patterns, and have been identified as the “preferred instrument for implementing new urbanist ideas of all scales and in all setting.” PAROLEK at xv.

CONS:

- The acceptance of a form-based code requires all stakeholders to engage in a way of thinking about development that is not the norm in all places.
- There may be significant up-front costs associated with organizing a charrette and preparing the form-based code.
- Acceptance of the level of prescription required in form-based codes and the perception that they lack flexibility may be politically difficult to overcome.
- Form-based codes may be perceived as too specific to a given area relative to the master plan visioning effort and code drafting that are required to produce them.\(^\text{16}\)

17.08 INCENTIVE-BASED ALTERNATIVES.

To the extent that a community already enjoys a tradition of well-designed places, the establishment of a form-based code may be unnecessary. In those communities seeking to improve the quality of their urban design but also wanting to maintain flexibility in their regulations, incentive-based development regulations that allow developers to propose projects in specific locations with increased density or mixed uses in exchange for a higher level of urban design can provide a viable alternative to the form-based code.

\(^{16}\) See e.g., Christopher Duerksen, Saving the World Through Zoning, PLANNING at p. ___ (January 2008); City of Santa Barbara, Single Family Design Guidelines Update/Neighborhood Preservation Ordinance Update, ISSUE PAPER “H” - FORM-BASED ZONING (November 3, 2004); Smart Growth/Smart Energy Tool Kit, FORM-BASED CODES at www.mass.gov/envir/smart_growth_toolkit/pages/mod-fbc.html.
SECTION 18: MIXED-USE REGULATIONS

18.01 PURPOSE AND KEY TERMS

Defining Mixed-Use Development and Mixed-Use Regulations

Various real estate industry organizations, advocates, and researchers have attempted to define the term **Mixed-Use Development**. For purposes of the discussion in this section, the following definition of this term is used:

Mixed use developments contain a complementary mix of uses such as residential, retail, commercial, employment, civic and entertainment uses in close proximity – sometimes in the same building. Compatibility issues are addressed through performance standards, transition tools, careful site layout and building design, rather than by separating uses into single use zones.

**Mixed-Use Regulations** are zoning, subdivision, and related land-use regulatory mechanisms, such as planned unit developments and design review that are used by local governments to permit, encourage, or require Mixed-Use Development.

Early Form and Modern Form

Historically, human settlements have predominantly been composed “mixed-use” developments, with homes and business being interspersed and populated being concentrated in certain focal points of higher density. However, the rise of industrialism began to alter this pattern, with manufacturing uses being separated from residential uses. Single-use (Euclidian) zoning emergence in the 1920s further limited mixed-use development as a form of development, and mixed-use was largely left to the downtowns of major cities. But prior to the influence of smart growth and New Urbanism in the 1990s on development patterns, a project might be described as “mixed-use” because it combined more than one use on the same site, without regard to whether the project incorporated residential use, or was designed to truly integrate the uses — both being key concerns of smart growth and New Urbanism. Beginning in the 1990s, a combination of changes in demographics, lifestyles, and consumer preferences gave impetus to Mixed-Use Development as a modern form of development designed to create “live-work-play” environments in which people can experience these three essential elements of daily life in closer proximity than has been

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1 For example, a combination of organizations from retail, office, industrial and multi-family developers and owners recently endorsed the following definition: “A mixed-use development is a real estate project with planned integration of some combination of retail, office, residential, hotel, recreation or other functions. It is pedestrian-oriented and contains elements of a live-work-play environment. It maximizes space usage, has amenities and architectural expression and tends to mitigate traffic and sprawl.” National Association of Industrial and Office Parks Foundation, Joseph S. Rabianski & J. Sherwood Clements, *Mixed Use Development: A Review of the Professional Literature*, (November 2007) (hereinafter “RABIANSKI”). The organizations endorsing this definition include the International Council of Shopping Centers, NAIOP – the Commercial Real Estate Development Association, the Building Owners and Managers Association, and the National Multi Housing Council. An earlier definition offered by the Urban Land Institute in a technical bulletin from the 1970s stated: “A ‘mixed-use development’ means a relatively large-scale real estate project characterized by: 1. three or more significant revenue-producing uses …, 2. significant functional and physical integration of project components …, 3. development in conformance with a coherent plan.” Robert E. Witherspoon, et al., *Mixed Use Development: New Ways of Land Use* (ULI: 1976).

possible within conventional land use patterns.\(^3\) This trend has had impacts across all forms of real estate development, starting with residential development, but now matched especially in the retail sector as well as in other sectors of the real estate industry.\(^4\) Preference surveys and sales data over the last decade have found that regardless of the labels given to these mixed-use, neighborhood-style residential developments — New Urbanism, Traditional Neighborhood Development, Transit Oriented Development, Livable Communities, Smart Growth, or LEED-ND (Neighborhood Development) — they are desired by an increasing portion of the home buying population. Some studies indicate that as much as thirty percent (30%) of the marketplace is demanding mixed-use living environments. As a result, mixed housing types and mixed uses are becoming more prevalent.\(^5\) In the retail sector, a key component of mixed-use, the change has been widespread and relatively swift. Today, there are only a small handful of enclosed malls under construction in the United States, after a massive building boom from the 1950s through the 1990s that saw over 2,000 of such centers built.\(^6\) Much of the discussion in the retail marketplace is about greyfield development, “de-malling,” lifestyle centers, downtown revitalization or retrofits, and the retail components of Mixed-Use Developments.\(^7\)

**Benefits of Mixed-Use Development**

A 1999 study for the Federal Reserve Bank of Minneapolis identified the following as the commonly-cited benefits of Mixed-Use Development:

- Creating a “sense of place;”
- Increasing economic vitality and expanding economic market opportunities;
- Supporting long-term economic stability by providing tax base and jobs for communities, building and maintaining markets for businesses, and enhancing investment potential for lending institutions and investors;
- Increasing transportation options such as walking, biking or busing, subsequently reducing auto-dependent travel;
- Maximizing use of public investment and infrastructure, i.e., roads, sewer, water;
- Maximizing use of land and supporting sustainable development;
- Providing affordable and market-rate housing options; and
- Encouraging historic preservation, reuse or redevelopment of existing buildings.\(^8\)

**Historical Concerns and Legal Limitations Regarding Mixed-Use**

Mixed-Use Development is not entirely new. Before widespread industrialization occurred in the United States around the turn of the last century, cities and towns were required by the dominant modes of transportation — principally walking, horsepower, and railroads — to be developed compactly and with a


\(^7\) Marcus & Millichap Report; *Bohl* at 62-63.

general mixing of uses. During the first two decades of the 20th century, however, the scale and operational impacts of industrialization magnified the incompatibility of certain land uses, particularly, industrial with residential. This circumstance gave rise to a public health-based movement to regulate and, more importantly, to separate uses that were perceived to be incompatible. During this period, the advent of mass-produced, cheap, and reliable automobiles and the undertaking of national highway improvement programs provided the technical means to achieve that separation of residential uses from other non-residential uses.

**The Standard State Zoning Enabling Act.** In the 1920s, this new land use regulatory regime was advocated at the national level and very quickly found acceptance at the local level, resulting in the conventional land use regulatory system that is prevalent in various forms still today. First promulgated by an advisory committee of the United States Department of Commerce in the early 1920s, the Standard State Zoning Enabling Act (“SSZEA”) was directed at mitigating the negative impacts of industry on residential and other non-industrial uses at a time when populations were more concentrated in urban areas. The SSZEA, with relatively few modifications, was the template for most state zoning enabling acts, and its standard provisions can still be found in many current state zoning enabling acts. Although different approaches are not expressly prohibited and the regulatory tools authorized, such as height, number of stories, and size of buildings, are generally applicable to all types of uses, the purposes and objectives of zoning regulation in the SSZEA are focused on separation of uses into districts, “prevention of overcrowding,” preservation of light and air, and similar concerns, all of which can be interpreted in ways that frustrate the objective of integrating uses to achieve Mixed-Use Development.

**The Standard City Planning Enabling Act.** The Standard City Planning Enabling Act (“SCPEA”) which, along with other model subdivision statutes circulated in the 1930s, is the principal basis for subdivision enabling statutes in the United States, evidences the same bias toward the separation of uses and the “avoidance of congestion of population” in the provisions regulating the subdivision of land. For example, in Section 14 of the SCPEA, the purposes for which the subdivision of land could be regulated, are principally ways to reduce density through the provision of “proper arrangement of streets,…adequate and convenient open spaces for traffic, utilities, access of fire-fighting apparatus, recreation, light and air, and for the avoidance of congestion of population, including minimum width and area of lots.” The laying out and construction of streets to accommodate pedestrians and multiple modes of travel and to facilitate the mixing of uses are not objectives found in subdivision enabling statutes modeled on the SCPEA.

While zoning and subdivision enabling statutes based upon these model acts have evolved since the 1920s, the extent to which Mixed-Use Regulations are possible within a particular state depends upon the

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10 See McQuillin, *The Law of Municipal Corporations* (West 2006) at § 25.04 (hereinafter *McQuillin*).
11 See SSZEA, §§ 1 and 2; Robert J. Sitkowski and Brian W. Ohm, “Form-Based Land Development Regulations,” *The Urban Lawyer*, Vol. 38, No. 1, 163, 167 (Winter 2006) (hereinafter *Sitkowski & Ohm*).
14 In the commentary to the last clause, regarding minimum width and area of lots, the SCPEA’s authors noted that one of the fundamental purposes of platting regulations, in addition to insuring a proper street plan, is also to insure that property shall not be subdivided into narrow lots which will bring in their train a host of evils, notably congestion of population, as well as an unsatisfactory type of housing development.
state’s particular constitutional and statutory structure which, in turn, determines the power of a municipality to depart from the provisions under a state’s zoning and subdivision enabling legislation. The structure of a state’s laws generally falls into one of two categories: (1) Dillon’s Rule state; (2) Home Rule state. These two categories are discussed below.

**Dillon’s Rule States.** The term **Dillon’s Rule** refers to a decision written in 1868 by Iowa Judge John F. Dillon. The rule states that the powers of a political subdivision (i.e., municipality, county, town, township, or village) are strictly limited to only those powers that the state legislature has expressly granted to them, that are necessarily or fairly implied in or incident to the expressly granted powers, and that are essential to the accomplishment of the declared objects and purposes of the local government, and not simply convenient.\(^\text{15}\) In states where the courts have held that Dillon’s Rule applies, the argument is made that without an express grant of authority by statute from the state legislature, a municipality or county does not have the power to adopt Mixed-Use Regulations. Some commentators dispute that conclusion.\(^\text{16}\)

**Home Rule States.** Home Rule refers to the delegation of power from the state to municipalities and counties to act in areas of concern without prior state statutory authority. The delegation of home rule powers to municipalities is usually done through the state constitution. A typical state constitutional provision will authorize local governments to adopt ordinances and regulations in areas concerning their “municipal” or “corporate” affairs. In order to implement constitutionally-granted home rule authority, most local governments will adopt a “charter” specifying their home rule authority. What that home rule authorization encompasses will usually be a matter of state court interpretation. In most of the home rule states, the courts have held that land use regulation is included in the grant of home rule, even though some may hold that land use controls are a matter of shared state and local concern.\(^\text{17}\) Local governments in states that fall within the category of home rule jurisdictions have more latitude to adopt land use regulations that allow for or mandate Mixed-Use Development, but their state courts may still be asked to address questions of whether Mixed-Use Regulations as proposed conflict with the state’s zoning enabling act or some other statutory provision.

**Impediments to Mixed-Use Development Under Conventional Zoning**

Because of the fundamental premise of conventional zoning, namely, the importance of separating uses and establishing provisions designed to support that approach to land use regulation, any effort to create Mixed-Use Regulations must overcome certain structural impediments in conventional zoning.

**Single-Use Zones** – Under conventional zoning, separation of uses means separating residential uses from retail uses, industrial uses from office uses, and so on. Broad use categories are often broken down further so that residential zoning districts, for example, are restricted according to housing type – detached single-family housing in one zoning district, two- and three-family housing in another zoning district, townhouses in a third district, and apartments or multi-family housing in yet another district. This structure makes it difficult to provide for the integration of residential, retail, and commercial uses and of building and housing types that is critical to the success of Mixed-Use Development.

**Dimensional Limitations** – Dimensional limitations in conventional zoning ordinances are intended to work hand-in-hand with the separation of uses in order to also keep the buildings containing such uses separated. Thus, ample minimum lot sizes and front, side, and rear yard setbacks push buildings back

\(^{15}\) See McQuillin at 4:11.

\(^{16}\) See Sitkowski & Ohm at 167 (arguing that there is very little in a typical Mixed-Use Regulation that cannot find support in a state zoning enabling statute based on the SSZEA).

from the street and away from each other. This is potentially fatal for effective Mixed-Use Development, which requires close integration of uses and puts special emphasis on the arrangement of buildings in relation to public spaces, especially streets. Height restrictions can also be a significant problem if vertical as well as horizontal mixing of uses is desired in a Mixed-Use Development. Maximum floor area ratios (FARs), maximum building lot coverage levels, and minimum open space requirements can also all substantially impact the achievement of the development densities and integrated design necessary to make Mixed-Use Development function as intended.

Parking Requirements – The accommodation and location of off-street parking areas for cars is also a major factor in the design of all types of development. Conventional zoning provisions requiring minimum parking ratios determined by highly specific use types thwart the potential for shared parking. The typical zoning provision that all parking required for new development must be accommodated entirely on the same lot as the uses to be served, without taking into account any available public or on-street parking, is also an impediment to the flexibility in parking needed in Mixed-Use Development. In addition to parking requirements, conventional zoning or development regulations may tend to defer to trip generation estimates from the Institute of Transportation Engineers (ITE) Trip Generation report, which generally undervalues mixed-use efficiencies due to internal, non-vehicle trips, thereby overestimating traffic impacts of a proposed development.\textsuperscript{18}

The interaction of mixed-use projects with contemporary zoning can be seen in a recent Supreme Court of Delaware decision, in which the court overturned a local denial of a mixed-use project.\textsuperscript{19} The court found that the town’s minimum lot size requirements for multifamily dwellings were not applicable because the project’s mixture of uses meant that it no longer qualified as a “residential multiunit structure.”\textsuperscript{20}

Impediments to Mixed-Use Development Under Conventional Subdivision Regulations

As with the zoning issues discussed above conventional local subdivision ordinance provisions can also frustrate efforts to achieve Mixed-Use Development. Typical provisions that impede the ability to do Mixed-Use Development are:

- Excessive minimum right-of-way and roadway widths that result in streets that are too wide in relation to adjacent buildings;
- Required minimum turning radii and corner building clearances that make already wide streets even wider at intersections and discourage pedestrian crossings;
- Failure to make provision for street classifications that are often used in Mixed-Use Development, such as alleys; and
- Failure to require development and pedestrian amenities such as sidewalks and street trees, on-street/parallel parking, and traffic calming measures, which further reduces the walkability that is essential to successful Mixed-Use Development projects.

Recognizing the need to authorize more flexibility in their state zoning and subdivision statutes to allow for Mixed-Use Development, a number of states have either modified their statutory provisions or provided separate statutory schemes. The following describes some of these state statutory modifications to authorize Mixed-Use Development.

\textsuperscript{19} Dewey Beach Enterprises, Inc. v. Board of Adjustment of Town of Dewey Beach, 1 A.3d 305 (Del.Supr. 2010).
\textsuperscript{20} Id. at 309-310.
State Zoning and Subdivision Enabling Authority Modifications for Mixed-Use Regulations

California: In 2004, California adopted an amendment to its government code to specifically authorize Mixed-Use Regulations:

The text and diagrams in the land use element [of the applicable general plan] that address the location and extent of land uses, and the zoning ordinances that implement these provisions, may also express community intentions regarding urban form and design. These expressions may differentiate neighborhoods, districts, and corridors, provide for a mixture of land uses and housing types within each, and provide specific measures for regulating relationships between buildings, and between buildings and outdoor public areas, including streets.21

The effect of this enabling act change was relatively minor. California was already a leading jurisdiction for Mixed-Use Regulation before its adoption and has remained one since.

Connecticut: Adopted in 1998, the Connecticut Village Districts Act authorizes zoning commissions and planning & zoning commissions to establish “village districts” as part of the regulations adopted under their general zoning enabling legislation or any special act so that municipalities can protect the distinctive character, landscape, or historic value of the areas so identified in the municipal Plan of Conservation and Development.22 The scope of such regulations includes the design and placement of buildings, the maintenance of public views, the design, paving materials, and placement of public roadways, and other elements that the commission may deem appropriate to maintain and protect the character of the district. Simply put, commissions are granted broad discretion in regulating a wide variety of aesthetic concerns, be it in the idiom of Mixed-Use Development or otherwise. Based on an informal review, at least 13 municipalities have adopted village district zoning in Connecticut since the inception of the Act.

Massachusetts: The Massachusetts Smart Growth Zoning Act,23 adopted in 2004, specifically authorizes municipalities to adopt “smart growth zoning districts” as overlays to their existing zoning in “eligible locations,” consisting of areas (1) near transit stations; (2) of concentrated development, including town and city centers and existing commercial and rural village districts; and (3) “that by virtue of their infrastructure, transportation access, existing underutilized facilities, and/or location make highly suitable locations for residential or mixed use…districts.”24 Minimum by-right residential densities are specified and at least 20% of the units in the district as a whole and 20% of the units in any single development of 12 or more units must be affordable. Such districts are specifically authorized to provide for “mixed use development” containing a mixture of single and multi-family residential, commercial, institutional, industrial and other uses “all conceived, planned and integrated to create vibrant, workable, livable and attractive neighborhoods.”25 The act is framed as a voluntary municipal opt-in with specific state financial incentives for rezoning and building permit issuance paid directly to municipalities.26 The Massachusetts Department of Housing and Community Development reports that 33 Smart Growth Zoning Overlay Districts have been adopted to date, covering a total of 1436 acres and permitting 12,350 new units of housing as-of-right.27

21 Cal.Gov’t. Code § 65302.4.
23 Codified at Mass. Gen. L. c. 40R.
Pennsylvania: Pennsylvania adopted its Traditional Neighborhood Development authorizing statute as a part of a major Smart Growth-related reform to its municipal government code in 2000. The statute’s second express purpose is to:

encourage innovations in residential and nonresidential development and renewal which makes use of a mixed use form of development so that the growing demand for housing and other development may be met by greater variety in type, design and layout of dwellings and other buildings and structures and by the conservation and more efficient use of open space ancillary to said dwellings and uses;…

Based on information provided by a local consulting firm, at least 10 municipalities have adopted TND ordinances in Pennsylvania.

Wisconsin: Effective January 1, 2002, Wisconsin law has mandated that every city and village with a population of at least 12,500 adopt a specifically-enabled traditional neighborhood development ordinance. The requirement for TND ordinances affects approximately 60 cities and villages in the state. Cities or villages that reach a population of at least 12,500 were required to enact a traditional neighborhood development ordinance within 11 months of the time the population of the city or village reaches at least 12,500. The law defines traditional neighborhood development as “a compact, mixed-use neighborhood where residential, commercial, and civic buildings are within close proximity to each other.” The law also specifies that the ordinance is not required to be mapped. The traditional neighborhood development requirement is meant to provide an option for developers seeking an alternative approach to conventional development. While the legislature did not require cities and villages to map the ordinance, local communities may, at their option, map Traditional Neighborhood Development districts. Cities and villages therefore may treat the ordinance requirement as a zoning district designation, an overlay zone, a floating zone, or as a modified approach to planned unit developments. In 2008, Thousand Friends of Wisconsin reported that it has polled 50 of the affected cities and villages statewide and found that 25, or 50%, had complied with the mandate to adopt a TND ordinance, while another 16 were in the process of complying, and a further 9 had not taken any action to comply.

18.02 Effectiveness in Achieving Stated Purpose(s)

The ability of Mixed-Use Regulations to achieve their stated purposes depends upon more than simply providing for the “mixing” of uses. There are three basic considerations that must go into formulating Mixed-Use Regulations: (1) Regulatory provisions needed to support and help a Mixed-Use Development perform as intended; (2) Mechanism(s) used to implement Mixed-Use Regulations; (3) whether the Mixed-Use Regulations should be mandatory.

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31 Wis. Stat. § 66034.
Additional Regulatory Provisions Essential to Supporting Mixed-Use Development

Planned Sustainability – The principles of Mixed-Use Development should be based on or reflected in a comprehensive land use plan that addresses land-use, environmental, energy, and market considerations.

Compact Development – For the land uses and infrastructure to interact effectively with one another and the people who will use the area created by the Mixed-Use Regulations, the resulting development must be dense, but also at a scale that is suitable for live-work-play concerns.

Accessibility and Connectivity – Within the Mixed-Use Development, easy pedestrian movement is very important, but the district or area must also be connected to adjoining areas by accommodations for public transit and safe road systems.

Design Standards or Guidelines – The design of a successful Mixed-Use Development differs significantly from the design of a single-use project because greater attention must be given to the relationships of buildings to their streets, to one another, and to adjacent developments. Designing a successful Mixed-Use Development is more complex and requires much more attention to the detail of structures and how they work together. Mixed-Use Regulations that incorporate appropriate design standards and guidelines based on generally accepted principles of good design need to be tailored to specific circumstances, while simultaneously wrestling with the question of what should be standards (i.e., mandatory) and what should be guidelines (i.e., permissive). The question of a local government’s legal authority to regulate for design and “aesthetics” under the applicable enabling statute must also be addressed.34 (See Section 13)

Flexibility – The principles of Mixed-Use Development should be based on or reflected in a comprehensive land-use plan that addresses land use, environmental, energy, and market considerations.

Mechanisms for Implementing Mixed-Use Regulations

If the Mixed-Use Regulatory provisions are sufficiently detailed and well crafted, regulations that permit Mixed-Use Development by-right, without the necessity of any discretionary review process such as a special permit or planned unit development (PUD) process, are preferable. When Mixed-Use Development is allowed by-right, with minimal administrative review, predictability is increased for the developer and the vision articulated by the community through the Mixed-Use Regulations is more likely to be achieved. However, this level of commitment to Mixed-Use Development is not possible in every jurisdiction, so other approaches are often used. One approach is to use the planned unit development (PUD) technique. Most local land-use regulatory systems provide for some form of PUD in which a single tract, usually of some minimum size and under single ownership or control, can be given special treatment with regard to design, uses, dimensions, and parking, through a discretionary review and approval process.35 Another technique that can be used is the overlay zone. This is a special purpose zone that is “laid over” one or more existing base zoning districts to achieve certain defined objectives without having to resort to modifications of each underlying zoning district. All property located within an overlay zone is then governed by the provisions of both the applicable base zoning district as well as the overlay zone. Initially, the objectives to be achieved by overlay zones were principally environmental, such as the protection of aquifers or other natural resources. More recently, however,
overlay zones have been used to preserve historic districts, promote better design, and, increasingly, to promote Mixed-Use Development. Finally, there is the option of creating in the text of the ordinance a provision for a **floating zone**. The floating zone or district is mapped on the official zoning map, replacing the base zoning district, upon application by the property owner or developer acting on behalf of the owner. The map amendment is adopted by the local legislative body only if the floating zone amendment application satisfies the mixed use criteria for establishing the floating zone. The principal advantage of a floating zone is the ability to create a relatively detailed, specific base zone that is structured with the provisions necessary to support Mixed-Use Development.\(^{36}\)

**Encouraged Versus Mandatory Mixing of Uses**

Finally, there is the question of whether to require certain levels of use or even certain building types determined to be necessary to create a viable Mixed-Use Development, or whether to adopt provisions that encourage the mixture of uses, but do not mandate the details. For example, in developments that are primarily retail in character and scope, should there be a minimum percentage of other uses, such as ten percent (10%) office or twenty percent (20%) residential? Should multi-level buildings with different uses by floor (i.e., “vertical mixed-use”) be required to be a component in all cases? Should certain uses, such as drive-through fast food restaurants, be limited to maximum percentages in a true mixed-use development? These questions require thoughtful consideration and debate within the particular community in light of local market considerations before reaching a decision whether to make such provisions mandatory or permissive.

**Local Mixed-Use Regulations: Zoning and Subdivision Ordinance Modifications**

**Mandatory Mixed-Use: New or Modified Base Zoning Districts:**

**Omaha, Nebraska** (New and Modified Conventional Base Zoning Districts and Subdivision Code Changes): The City of Omaha made selective zoning code changes to implement a new City-wide Urban Design Element of their comprehensive plan in 2007. Among those changes were substantial modifications to an existing Mixed-Use (MU) district that the City maps at comprehensive plan-designated “Four Corners” locations throughout Omaha to provide for urban design standards, building design guidelines, and required mixing of uses. In particular, at least ten percent (10%) of the land area of an MU district must be used for office uses and no more than twelve percent (12%) of an MU district’s area can be used for “free-standing fast food restaurants.” A new residential district – entitled the Walkable Residential District – was added as an option for designation of new growth areas in the City. In these new districts, a wider variety of housing types and accessory dwelling units are permitted, maximum floor area ratio (or FAR) was eliminated as a regulator, a build-to/set-back line for 60% of the front facades of houses was introduced, and a minimum front-facing garage setback of 25’ was imposed. In addition, a maximum block perimeter of 2,000 feet was adopted. Omaha Subdivision Code changes included new horizontal curve radii standards for certain street types and new streetyard and sidewalk standards to improve pedestrian connectivity.\(^{37}\)

\(^{36}\) Among many such examples, floating zones for mixed-use development have been adopted in Chesapeake City, Maryland, and Gainesville, Florida, where the districts have been term “traditional neighborhood development districts.” *Planning Advisory Service Report No. 526, Codifying New Urbanism*, American Planning Association/Congress for the New Urbanism (2004), at Appendix A, Part 3.

Effectiveness: The code changes in Omaha have generally been successful, resulting in current proposals for at least two large mixed-use developments in recent years, despite an otherwise slow economy for new development.\(^{38}\) In order to address issues subsequent to the code’s adoption, the City has had to modify certain building code requirements that were inconsistent with mixed-use, such as certain plumbing codes and restrictions on living above workspace.\(^{39}\)

Farmers Branch, Texas (New Form-Based Code): This new, replacement zoning for the area of Farmers Branch, Texas, adjacent to a proposed light-rail station on the Dallas Area system, follows the basic tenets of form-based codes, including a regulating plan, comprehensive regulation of building envelopes based on street frontages, streetscapes, and building design features.\(^{40}\) This code is also emblematic of the particular way in which form-based codes address vertical use mixing. For example, the building envelope standards for “Shopfront Colonnade Sites” require retail uses on the ground floor of multi-story buildings while upper stories are to house either commercial or residential uses.\(^{41}\)

Effectiveness: All of the critical elements of successful Mixed-Use Regulations appear to be present. One important barometer of the code’s success will be whether the local real estate market is able to support the required first floor retail space. Several mixed-use projects that recently have been constructed or permitted are featured on the City’s website, although some of these projects pre-date the adoption of the code.\(^{42}\)

Optional Mixed-Use: Planned Unit Developments, Overlays, Floating Zones:

Lakewood, Ohio (Floating Zone/Mixed-Use Overlay): Lakewood’s Mixed-Use Overlay District, adopted as Chapter 1135 of the city’s zoning ordinance, is a fairly typical unmapped floating zone available for new Mixed-Use Development pursuant to a Development Plan process. Once adopted, the zone allows for flexibility in uses and dimensions under a “consistent with the surrounding properties” standard. To obtain the floating zone treatment, a proposal must offer at least one of nine “advantages” including “[d]esigns which encourage a mix of retail, service, office, housing, live-work units, and public activities to coexist in a manner that reflects human scale and emphasizes pedestrian orientation, taking advantage of the vitality that mixed uses can bring to the community.”

Effectiveness: The City’s zoning map indicates that only one, small area has been rezoned to a Mixed-Use overlay.\(^{43}\) Further, it may be observed that the urban design standards in this ordinance do not appear to be well developed, which may hinder Lakewood from achieving the desired form of Mixed-Use Development.

Columbia Pike Plan, Arlington County, Virginia (Form-Based Overlay Zoning): This form-based code is an optional development approval process designed to help revitalize the Columbia Pike corridor of Arlington County, located in Virginia just outside of Washington, D.C. The code includes regulating plans, required building lines, parking setbacks, building envelope standards, architectural standards, and streetscape standards. As with the Farmers Branch code, above, there are vertical use mixing requirements, so that, for example, retail use is required on the ground floor of “Main Street Sites.”

\(^{38}\) Conversation with Connie Spellman, Omaha by Design, September 15, 2011.

\(^{39}\) Id.

\(^{40}\) For more information, see Farmers Branch Station Area Code, available at: http://www.farmersbranch.info/Planning/stationareacode.html, last visited: April 25, 2008.

\(^{41}\) Farmers Branch Station Area Code, Chapter III, Section B.

\(^{42}\) See http://www.ci.farmers-branch.tx.us/work/planning/recent-development/mixed-use-development, last visited on September 15, 2011.

Developers who use the form-based code process receive an expedited approval process and, if developing in a revitalization district, are eligible for county investment.\footnote{See the webpage for the code and the broader Columbia Pike revitalization plan at the Arlington County Department of Community Planning and Development: http://www.arlingtonva.us/departments/CPHD/forums/columbia/current/CPHDForumscolumbiaCurrentCurrentStatus.aspx, last visited: April 25, 2008.}

**Effectiveness:** A 2009 EPA study reported that since the adoption of the code, over $1 billion in new development, in more than 10 separate projects, was in the design and/or construction stage.\footnote{US EPA Smart Growth Implementation Assistance Program, Implementing Living Streets: Ideas and Opportunities for the City and County of Denver; Appendix C (April 2009).}

**City of St. Louis Park, Minnesota** (Mixed-Use PUD): Division 8 of Article IV of the city’s zoning ordinance is a conventional mixed-use PUD provision, allowing Mixed-Use Development of two varieties – commercial mixed use (CMX) or civic mixed use (CIVMX) – pursuant to conditions related to conformity with the city’s comprehensive plan land-use designations for the area, conformity with any redevelopment plan previously adopted, and conformity with the performance standards of the mixed-use PUD. The performance standards include a maximum nonresidential density of 1.5 FAR and a maximum residential density of 50 dwelling units per acre, a required recreational open space requirement, reduced parking requirements for joint/shared parking, and flexible building design standards.\footnote{St. Louis Park Zoning Ordinance, § 36-266}

**Effectiveness:** The city’s zoning map\footnote{Available at: http://www.stlouispark.org/pdf/zoning_map.pdf, last visited September 15, 2011.} indicates that at least five sites are currently zoned within the MX PUD designation, including the 125-acre Excelsior & Grand New Urbanist redevelopment of a former commercial greyfield site.\footnote{See project description webpage on the Congress for the New Urbanism website, available at : http://www.cnu.org/node/869, last visited: April 25, 2008.} These positive results can be attributed in large part to the fact that the ordinance contains provisions that address the three categories of consideration for successful Mixed-Use Development described at the beginning of Section 18.02 above.

### 18.03 Impact on Property Values

Mixed-Use Development is intended to permit more uses (commercial in addition to residential) and a more intense use of land. Greater flexibility of uses and more intense use of land should increase property values. However, when mixing of uses is required or new, and unfamiliar design features are mandated, Mixed-Use Regulations can reduce property values if the local market is not ready for these innovations. Property values may also suffer if debt and equity providers who are unfamiliar with Mixed-Use Development discount properties with this type of zoning until its success in a given market is proven through sufficient comparables.

### 18.04 Impact on Development Costs

Although Mixed-Use Development should allow for a potentially more profitable development through the greater flexibility in uses and more intense use, it can negatively impact development costs. Programming, design, the permitting timeline, and financing are different from conventional development. This difference may result in increased transactional costs for the project team and for local officials reviewing the development. Financing can be more difficult and expensive for mixed-use development.\footnote{RABIANSKI at 11.}
18.05 Impact on Amount and Patterns of Land Development

Mixed-Use Development is specifically intended to affect the amount and shape the patterns of land development. This type of development should increase the level of development on all sites, thereby reducing aggregate demand for land for new development. The resulting pattern of land development should be more compact and more oriented toward infill and centrally-located sites.

18.06 Impact on Housing Affordability

Mixed-Use development should result in an expansion of housing supply by allowing land to be developed more intensely for residential use. This increase in supply should improve housing affordability on a broad, market-wide basis. Because it allows for a greater variety of development contexts, Mixed-Use Development also encourages production of housing in a wide variety of formats and price points. However, to the extent that Mixed-Use Development increases development costs, those costs may ultimately be passed on to purchasers of new homes, potentially resulting in a negative impact on housing affordability.

18.07 Summary of Pros and Cons

PROS

- Mixed-Use Development allows developers and land owners to meet growing market demand for live-work-play environments.
- Mixed-Use Development can increase property values by allowing for a wide variety of uses and more intensive use of a property through compact development.
- Mixed-Use Development can improve housing affordability by promoting a wide range of housing types at a variety of price points.

CONS

- If use mixing requirements and/or design standards are mandated in a particular local market that is not yet ready for mixed use, forcing Mixed-Use Development on specific sites can negatively impact property values and may negatively impact housing affordability by making development of the affected property infeasible.

18.08 Incentive-Based Alternatives

As discussed above, mandatory Mixed-Use Regulations can have limited effectiveness if certain provisions such as well-crafted urban design standards are not included or use-mixing requirements are not carefully calibrated to local market acceptance. Incentive-based approaches to facilitate Mixed-Use Development, including expedited permitting, dimensional flexibility, and increased residential and commercial density, may be more appropriate than mandating mixed use. In addition, as described above, Mixed-Use Regulations can be applied through use of a PUD that provides for flexibility and tradeoffs with the private sector, or a market-initiated floating zone. Ultimately, the effectiveness of these incentive-based alternatives to mandated mixed-use provisions depends upon local market acceptance of Mixed-Use Development.
PART V: AFFORDABLE HOUSING

SECTION 19: INCLUSIONARY ZONING/HOUSING

19.01 PURPOSE AND KEY TERMS

Inclusionary zoning is a technique that originated in the 1970s to generate affordable housing via private development. But it relates to “Smart Growth” objectives in several ways. By providing housing for all market levels, it furthers the social goal of sustaining a balanced, diverse community.¹ When new development includes affordable housing, then development of cheaper, outlying land to achieve affordability is, in theory, curbed. Where growth management/growth control measures either encourage gentrification of older areas or increase the cost of housing by severely limiting land available for development, inclusionary zoning attempts to ensure that affordable housing gets built, countering the exclusionary effects of growth management programs.²

The National Association of Homebuilders (NAHB) comments:

In many high-growth markets, teachers, police officers, fire fighters and other public servants are commuting 50 to 100 miles to work each day because they can’t find affordable housing to rent or buy close to their jobs...Growth boundaries, large-lot zoning and resistance to infill development are pushing people to satellite cities in search of homes that are affordable to middle income families.³

Underscoring the importance of this issue, the Fannie Mae Foundation captioned its November 2000 conference “Fair Growth: Connecting Sprawl, Growth Management and Social Equity.”⁴ Noting that smart growth has been primarily concerned with protecting open space, curbing sprawl and improving regional transportation, the Foundation advocated “Fair Growth” as a set of “land use practices that attempt to curb urban sprawl without endangering housing affordability and access to jobs for minorities and low income residents.”⁵

¹ Angela Glover Blackwell, President of Oakland (CA) based Policy Link, states that while the smart growth movement aims to promote “the three “E”s of sustainable development … Environment, Economy and Equity” thus far the discussion has focused on the first two. (Quoted by Andrew LePage in the Sacramento Bee, 9/25/00, “Downside to Fixing Up Cities: ‘Smart Growth’ Policies May Hurt Poor Residents”.
² The Colorado Department of Local Affairs, Division of Local Government finds: “At their worst, some growth management plans are thinly veiled attempts to exclude affordable, multi-family housing or large-scale commercial or industrial development from a community. …Fair share provisions can help keep land costs reasonable by ensuring that there are adequate supplies for all types of development.” http://www.state.co.us/whalltls.htm (accessed March 26, 2012).
The interrelationship of sprawl and affordable housing in high-growth areas is succinctly outlined in a 1999 study of the Basalt/Glenwood Springs, Colorado area.6

[H]ousing prices have been escalating at a faster rate than income...rents have increased 48 percent faster than wages, and for-sale housing has increased roughly 2.5 times faster than wages...The fallout from these patterns can be numerous...[M]any households end up devoting a high proportion of their income to housing, or move to areas further down valley where housing is cheaper. Additional impacts...can include:

- increased traffic
- loss of community
- delayed homeownership
- overcrowding
- high rates of households with unrelated roommates (to split housing costs)
- inability of employers to fill jobs
- turnover in the population due to a disadvantageous housing situation relative to other communities.

Inclusionary zoning responds to these problems by “requiring housing developers to dedicate a certain percentage of their constructed projects to low or moderate income housing.”7 This technique may be applied to both rental and owned units, and single and multi-family housing.8 Inclusionary zoning can rely on mandatory or incentive features to achieve its purpose but, in either case, requires dedication of a percentage of units being proposed in a housing development.

Inclusionary zoning is often confused with housing linkage. Both mechanisms for producing affordable housing through new development. Linkage, which is further addressed in Section 20, “refers to the practice of requiring developers to contribute either in-kind or by payment to the off-site construction of low or moderate income housing or other ‘needs’ of the community.”9 From an historical perspective, as one authority has noted, while “the initial impetus for inclusionary housing programs was clearly suburban in nature, [by the ‘80s]...developments in America’s central cities... created a new form of inclusionary program, grounded in the linkage between downtown office and commercial development and the rise and fall of surrounding urban residential neighborhoods.”10 In practice, the distinctions are often blurred, with many “inclusionary” programs allowing payments to housing trust funds or other alternative measures.

The purposes of an inclusionary zoning regulation are:

1. Creation of low and moderate income, “affordable,” housing units;

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6 Healthy Mountain Communities, Regional Affordable Housing Initiative http://www.hmcnews.org/housing/Regional%20Initiative/home.htm (last visited Sept. 15, 2011).
9 Taub, at 125.
2. Private sector subsidy for construction, achieved either by distributing the cost of affordable units among the market-rate units and/or by lowering the per-unit development cost by increasing density;

3. Sometimes, achieving economic integration by making affordable units indistinguishable from market rate units and locating them within market-rate developments.

Inclusionary zoning programs typically include the following elements:

- A density or other bonus to those who participate (for voluntary programs, the bonus is the incentive; for mandatory programs, it is used as compensation to avoid a “takings” claim);
- Income limits for eligibility of buyers or renters;
- A distribution mechanism (lottery or other method);
- Pricing criteria for the affordable units;
- A period of control over resale price on rental increase;
- Building standards, including how affordable units are designed and located.\(^{11}\)

Key terms in the area of affordable housing and inclusionary zoning are:

**Affordable Housing:** Affordability is usually defined as “affordable” to a family whose income is at or below median income for a defined locale. For example, the Town of Cary in Wake County, North Carolina, in its 2020 Affordable Housing Plan, assesses the local housing needs for Low Income (30 to 50% of Area Median Income (“AMI”)), Moderate Income (51 to 80% AMI) and Middle Income (81 to 120%) AMI renters and homebuyers.\(^{12}\) The NAHB-Wells Fargos Housing Opportunity Index (“HOI”) measures the percentage of homes sold that a family earning the median income can buy based on standard mortgage underwriting criteria.\(^{13}\) The HOI incorporates “information on state, county, date of sale, and sales price of homes sold. The monthly principal and interest that an owner would pay is based on the assumption of a 30-year fixed rate mortgage, with a loan for 90 percent of the sales price (i.e., 10 percent downpayment).”\(^{14}\) Cost information also includes estimated property taxes and property insurance, but does not include mortgage insurance.\(^{15}\) Another common standard is that a family pay no more than 30% of its annual income.\(^{16}\)

**Incentive Zoning:** The use of zoning bonuses originated in New York City and Chicago during the 1950s and 1960s, when those cities wanted certain public amenities (such as plazas and arcades) or design features (such as greater building setbacks) without the expenditure of public funds. Incentive zoning offers bonuses, usually in the form of increased density of units, floor area ratio or building height, in

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\(^{12}\) Town of Cary, North Carolina, 2020 Affordable Housing Plan, available at [http://www.townofcary.org/Assets/Planning+Department/Planning+Department+PDFs/affordablehousing/2020affordablehousingplan.pdf](http://www.townofcary.org/Assets/Planning+Department/Planning+Department+PDFs/affordablehousing/2020affordablehousingplan.pdf)


\(^{14}\) Id.

\(^{15}\) Id.

\(^{16}\) For example, this standard is used in Connecticut, C.G.S. Section 8-30g(6), Affordable Housing Land Use Appeals (Chapter 126a), to define the affordable units to be set aside. This statute, like many others, also defines income eligibility as 80% of area median income.
exchange for the provision of specified amenities, which now encompass infill or mixed-use development and transit oriented development, as well as affordable housing.  

Inclusionary Zoning: An ordinance that either ties development approval to, or creates regulatory incentives for, the provision of low and moderate income housing as part of a proposed development.  

Moderate, Low and Very Low Income: Most state and local programs that address affordable housing rely on definitions and income levels established by the U.S. Dept. of Housing and Urban Development (“HUD”). However, between programs there is some variance in the distinctions between “moderate,” “low” and “very low” income. For example, the federal tax credit for low-income housing refers to “very low income” as “at or below 50 percent of the area median gross income” and low income as at or below 80 percent. In another document, HUD defines income levels as follows:

- Middle – 81 to 100% of area median income
- Moderate – 51 to 80% of area median income
- Low – 31 to 50% of area median income
- Extremely Low – less than 30% of area median income

Generally speaking, inclusionary zoning has not been used as a tool for creating housing for households at the extremely low income level.

19.02 Effectiveness in Achieving Stated Purpose(s)

The key elements for an effective inclusionary zoning program are:

- **Required Affordability Percentage:** “The ordinance must establish a reasonable and non-excessive goal for the development of low and moderate income housing and must establish other land-use standards which do not interfere with the achievement of that goal.” Non-excessive would mean that no more than 5 to 15 percent of the units would be required to be affordable. For example, a statewide study of California municipalities’ and counties’ experience with inclusionary zoning requirements found that the mean percentage of affordable housing required in both rental and for-sale developments was 13%, while the modal level was 10%.  

- **Target Affordable Unit Income Ranges:** The ordinance should determine the income ranges for households occupying the affordable units based on careful study of the community’s affordable housing needs and in a manner consistent with any requirements under state law regarding affordable housing production. Along with the affordability percentage, this ordinance element is critical in determining the burden placed on developers in an inclusionary zoning program. An informed decision needs to be made whether and to what extent units should be targeted at

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18 Mallach, cited by White at 17.


20 HUD Consolidated Plan Training Manual 2000, Housing and Homeless Needs Assessment, at 2-2. These income levels apply to all categories of housing.

21 Mallach at 107. *See* Non-Profit Housing Association of Northern California and the Coalition for Rural Housing, *Inclusionary Housing in California: 30 Years of Innovation* (San Francisco, CA: 2003) at iii (*IZ in California*).

22 *IZ in California* at iii.
households in the moderate-income or “work force housing” range (households earning from 80% to 120% of area median income or “AMI”), as opposed to low- to very low-income households (households earning from 50% to 80% and less than 50%, respectively, of AMI), or some mixture of the two.23

- **Compliance Alternatives:** The ordinance should provide for alternatives (such as in-lieu fees) for developments that cannot satisfy the inclusionary requirement due to an unusually high cost of construction for a particular site. But in-lieu fees, if too low, may not generate enough money to construct housing units, and the collection of funds, by itself, does nothing to get the housing built. In addition, available sites for housing constructed with in-lieu fee revenue may lack proximity to transit, job centers, and other amenities, leading to higher transportation costs for residents.

- **Incentives and Mitigation:** Up-zonings and other land-use changes to increase residential development capacity should accompany inclusionary zoning. This will help offset the financial impact of inclusionary requirements and fees.

- **Affordable and Market-Rate Unit Integration:** Inclusionary units should be integrated within the project so as not to be distinguishable from the market-rate units. In this regard, it has been found that “income mix works or does not work according to whether the mix occurs in a well-designed, well-constructed, and well-managed development. These latter factors are the crucial determinants of satisfaction. Income mix and racial mix are, in themselves, of no particular relevance.”24

- **Applicability Based on Project Size:** An appropriate threshold for development size subject to an inclusionary requirement should be established. In California, it has typically been 5 to 25 units.25 In Montgomery County, Maryland, the threshold is 50 units or more.26

- **Affordability Control Period:** The time period for retaining affordable units varies widely. In Montgomery County, Maryland, there is a ten-year control period on for-sale units and 20 years for rental units.27 In California, the mean control period for rental housing is 42 years, while the mean control period for homeownership housing is 34 years.28

**Creation of Affordable Housing**

When the inclusion of affordable units is mandatory, this technique has been effective in creating affordable housing units. Voluntary programs are effective where the underlying density is much lower than the bonus allowed, but typically produce housing affordable to moderate, not low, income households. Montgomery County, Maryland – one of the earliest mandatory inclusionary zoning programs in the country – has had the greatest success in producing affordable units. Between 1973 and

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23 In some cases, the ordinance may provide the developer with a choice of providing fewer affordable units but at a higher level of affordability or more affordable units at a lower level of affordability. See *IZ in California* at 10.
25 Siegel at 2. Some communities have eliminated the threshold requirement altogether. For example, the City of Carlsbad, California, applies the requirement to all residential projects, regardless of size, and collects a mandatory in-lieu fee for projects of six (6) or fewer units. See Institute for Local Self Government, *California Inclusionary Housing Reader* (Sacramento, CA: 2003) at 21.
26 Business and Professional People in the Public Interest, *Opening the Door to Inclusionary Housing* (Chicago, IL: 2003) (*BPI Study*) at 90.
27 Siegel at 6.
28 *IZ in California* at iv.
2000, that program was responsible for the construction of over 11,500 moderately priced dwelling units.\textsuperscript{29}

Other jurisdictions where this technique has succeeded in producing affordable housing are:

\textit{California:} One hundred and seven (107) cities and counties had produced over 34,000 units by 2003, with over 94\% of the programs mandatory.\textsuperscript{30} A 1991 survey by the California Association of Realtors\textsuperscript{30} provides evidence that voluntary programs were not successful in producing affordable units. Riverside County’s higher density bonus produced units that were not priced low enough to meet the county’s needs. The city of Chula Vista had offered density bonuses, mortgage credit certification and nonprofit support, but found it was not generating sufficient low-income units.\textsuperscript{31} The study also found: “[I]n order to counter allegations that growth controls exclude low-and moderate-income buyers from a community’s housing market, many cities which have such ordinances have incorporated an inclusionary component.”\textsuperscript{32} The 2003 \textit{Inclusionary Zoning in California} study referenced above confirms that the trend away from voluntary programs has accelerated. The 94\% mandatory figure from that study represents an almost 30\% shift from voluntary to mandatory programs over the 30-year period analyzed in the study.\textsuperscript{33}

\textit{New Jersey:} As a result of two exclusionary zoning lawsuits, \textit{Mount Laurel I} in 1975 and \textit{Mount Laurel II} in 1983, the state required all jurisdictions to develop and implement mandatory “fair share” housing programs targeted to people below 80\% of median income. Although more than 55,000 units reportedly had been produced as of 1999, a subsequent report estimated that only 15,000 affordable homes have actually been built. Of those, 6,300 were built in high poverty urban neighborhoods, contrary to the anti-exclusionary intent of the \textit{Mount Laurel} decisions.\textsuperscript{34}

The ineffectiveness of the New Jersey program has been attributed to the fact that the regional fair share housing allocation is not mandatory. “[A]s in California, much of the early progress made in bringing municipalities into compliance with the court’s ruling came at the hands of local legal action. In dozens of cases, community advocates sued local governments which had failed to outline effective plans to meet their housing needs...Ironically, it is now developers—seeking density bonuses from reluctant zoning boards—who bring most of the \textit{Mount Laurel} cases to court.”\textsuperscript{35} The New Jersey experience is unusual in that the emphasis is on producing units “rather than the intrinsic value of inclusion,” so that rehabilitation, municipally-sponsored construction, accessory apartments and group homes count, and offer a wider range of options.\textsuperscript{36} The North Carolina Low Income Housing Coalition also found that, “as in other programs featuring voluntary participation, results have been mixed.” According to the most recent update from the New Jersey Council on Affordable Housing (“COAH”), since 1987, 60,242 new units have been produced and 14,854 units have been rehabbed.\textsuperscript{37}

\textsuperscript{29} \textit{BPI Study} at 90; David Rusk, “Overcoming America’s Core Problem: Concentrated Poverty,” in \textit{Cities in the 21st Century}, Urban Land Institute, 2000, Washington, DC, at 18. (Rusk)
\textsuperscript{30} \textit{IZ in California} at 8.
\textsuperscript{32} \textit{Id.} at 5.
\textsuperscript{33} The 2001 edition of the \textit{Growth Management Fact Book} reported a figure of 66\% for the percentage of California inclusionary zoning programs that were mandatory as of 1992.
\textsuperscript{34} Rusk, “Mt. Laurel – More Honored in the Breach” sidebar in Rusk, at 20.
\textsuperscript{35} North Carolina Low Income Housing Coalition, \textit{Fair Share Housing: New Jersey}.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} New Jersey Council on Affordable Housing (COAH) Reports (3/1/11) at \url{http://www.nj.gov/dca/services/lps/hss/transinfo/reports/units.pdf}
Virginia: The state authorized voluntary inclusionary programs in 1990 and mandatory programs in 1997. After Fairfax County’s 1970 inclusionary zoning ordinance was declared unconstitutional, a system of “proffers” was used until 1997. The current program is modeled on Maryland’s MPDU System and has, between 1990 and 2003, produced over 2,000 units. In Arlington County, where construction costs and rents are high, the County’s incentive density bonus is not profitable for a developer because the additional affordable units would sell at half the market rate. In Loudoun County, an Affordable Dwelling Unit program begun in 1993 had produced 509 affordable units serving households earning at 50-80% of AMI through June 2001.

Florida: Sanibel Island passed an inclusionary zoning ordinance in 1984 using a density bonus incentive. “As is the case with almost all incentive-based programs, no housing units were produced by the private sector…Sanibel, like Vail, Colorado, and other resort communities share the problem of providing shelter for needed employees who will support the resort based economy…in areas of excessively high-priced land.” Tallahassee and Palm Beach County have recently adopted inclusionary housing regulations. Tallahassee’s is mandatory and Palm Beach County’s is more voluntary. The current housing slump has prevented any observation of results.

Colorado: Boulder’s mandatory inclusionary housing program, adopted in 2000, followed 15 years of a voluntary inclusionary program that produced few results. Under the new program, new residential projects must provide at least 20% of their units as permanently affordable. The mandatory program has helped the City produce 664 new affordable housing units in the first seven years of its operation.

In 1995, Longmont adopted a mandatory inclusionary requirement of 10% in cases of annexation. This requirement had produced 545 affordable units as of November 2002, with an additional 444 more units proposed at that time. The City’s fee waiver and density bonus program had produced no affordable units as of 2003.

Massachusetts: The City of Boston’s Inclusionary Development Policy, adopted by the Mayor as an Executive Order rather than by the City’s Zoning Commission as an amendment to the zoning code, requires a 10% on-site affordable housing set-aside for all residential development projects of 10 or more units seeking zoning relief. The required set-aside increases to 15% for off-site units and fee-in-lieu options (at a rate of $200,000 per unit). As of May 1, 2006, the City reported that it had created 665 new affordable housing units through its policy.

Private Sector Subsidy

Two factors determine how effective inclusionary zoning generates private sector subsidies: the strength of the market and whether requirements are mandatory. It is generally acknowledged that “[p]oor economic conditions create additional barriers to the successful implementation of inclusionary programs.” Inclusionary zoning relies on a strong housing market to support production of below market rate units. Montgomery County, Maryland, may be the one exception to this rule. Developers


there reportedly have an incentive to produce affordable units, even in a down-cycle, for purchase by the housing authority.\textsuperscript{45}

In California, over 40\% of the jurisdictions with inclusionary housing requirements provide direct subsidies to developers in addition to the state-mandated density bonus and other incentives.\textsuperscript{46} In Montgomery County, Maryland, private developers have constructed all the units, but the public housing agency or other nonprofit has the option of purchasing them. This is a provision adopted by many other jurisdictions as well, guaranteeing a market for the units and long-term control over resale and affordability. Combining voluntary inclusionary measures with incentives such as density bonuses and restrictive underlying zoning is more likely to produce results.

The fundamental question underlying inclusionary zoning is whether it is right to place the burden of producing affordable housing on the developer rather than the community at large, particularly where an existing housing shortage is to be rectified.\textsuperscript{47} Proponents find inclusionary zoning to be a feasible way for developers to assist with a community problem while opponents charge that it will raise the cost of existing and new homes and shift a problem created by government policies to the developers. The debate continues to this day.\textsuperscript{48}

\textbf{Economic Integration}

Inclusionary zoning achieves the purpose of creating economically integrated communities when affordable units are constructed within a market rate project. Allowing housing fund contributions or off-site developments to meet fair share goals or merit an incentive bonus diminishes the integration effect, but may still have a positive impact where off-site development supports the mixed-income goal.\textsuperscript{49} Many inclusionary programs in California require the affordable units to look like the market-rate units. Dispersal throughout the project and equal site access are also common requirements that help achieve the goal of integration.\textsuperscript{50}

In New Jersey, only seven percent (7\%) of the new suburban affordable housing is occupied by former city residents. “Most suburban affordable housing is occupied by elderly suburbanites or children of current residents seeking starter homes in the communities where they grew up. These are worthwhile goals, but they are not the primary goals of the New Jersey Supreme Court’s \textit{Mt. Laurel} decision which sought to eliminate exclusionary zoning.”\textsuperscript{51}

Over a decade ago, another commentator observed that the beneficiaries of inclusionary zoning are not the urban poor, but:

“subsidy seekers” - young couples, divorced single mothers, the elderly, and other middle-class people who are knowledgeable enough to take advantage of the system...In reality, it makes absolutely no difference whether the few winners of subsidized units are “low-income,” “middle-income” or even “upper-income.” Housing is housing, and the only way to have more of it is to

\textsuperscript{45} Rusk at 19: “When demand for market-rate housing slumps, Montgomery County’s more progressive builders keep their crews busy building MPDU’s – for which there is always a market.”
\textsuperscript{46} \textit{IZ in California} at 17.
\textsuperscript{47} For a detailed discussion of this issue see Merriam, et al., \textit{Supra}, or the summary of this edited panel discussion, “Inclusionary Zoning: Who Pays?” \textit{Planning}, August 1985.
\textsuperscript{49} Rusk at 20, citing a separate Seton Hall University study; \textit{see also BPI Study} at 17-18.
\textsuperscript{50} Siegel at 3.
\textsuperscript{51} Rusk at 20.
build more of it. The only benefits of Mt. Laurel will come from the density bonuses, which will allow more housing units to be built.52

**Legal Challenges to Inclusionary Zoning**

Although in the early 1970s the Virginia Supreme Court struck down Fairfax County’s first-in-the-nation mandatory inclusionary zoning ordinance, which required a 15% set-aside, as beyond the county’s authority under Virginia’s zoning enabling statute and a taking of private property without just compensation under the Virginia Constitution,33 appellate court cases since generally have upheld the validity of mandatory inclusionary zoning programs.54 However, in 2006, the Wisconsin Supreme Court voided the City of Madison’s inclusionary zoning requirement with respect to rental units, holding that the inclusionary requirement was preempted by a state statute prohibiting rent control.55 Whether a municipality has the authority to adopt a mandatory inclusionary zoning program depends upon the applicable zoning enabling statute, whether that authority is preempted by other state statutes, and the holdings of state court regulatory takings decisions.

19.03 IMPACT ON PROPERTY VALUES

Studies over the last 15 years have generally found that property values were not reduced by virtue of being located near affordable and/or higher-density housing developments.

- In its 1993 review of affordable and high density housing “myths and facts,”56 the California Planning Roundtable observed that no study in that state had shown that affordable housing projects reduce property values. This finding was reaffirmed in a subsequent 2002 review by the same group.57

- The Innovative Housing Institute analyzed trends in Montgomery County, Maryland, and Fairfax County, Virginia, market-rate housing re-sale prices between 1992 and 1996, to test whether the presence of below-market rate housing would lower the value of non-subsidized homes in the vicinity. The study report concluded that “the presence or proximity of subsidized housing made no difference in housing values as measured by relative price behavior in a dynamic market.”58

- The National Center for Real Estate Research at the National Association of Realtors® published a review of available studies on the topic in September 2002 concluding that a variety of residential property value impacts—ranging from positive to negative—can result from proximity

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to affordable housing (described in the report as “assisted housing”), scale and concentration, and its neighborhood context. 59

19.04 IMPACT ON DEVELOPMENT COSTS

Like linkage and impact fees, inclusionary zoning relies on private sector subsidy of construction. In a survey of its members, the NAHB found that 10 to 20 percent of the cost of building a new home can be attributed to regulations. 60 By including density bonuses, other zoning waivers, and/or fast track permitting, most inclusionary zoning ordinances attempt to offset the developer’s subsidy of affordable units by reducing the per-unit cost of the development.

19.05 IMPACT ON AMOUNT AND PATTERNS OF LAND DEVELOPMENT

Unlike growth boundaries, urban services areas, transfer of development rights, or other techniques which direct the location and pattern of growth, inclusionary zoning does not directly affect patterns of land development. However, where demand for housing is elastic, and other jurisdictions do not impose mandatory inclusionary measures, development would be likely to move to the less costly, less regulated area.

19.06 IMPACT ON HOUSING AFFORDABILITY

The purpose of inclusionary zoning is to increase supplies of affordable housing (see above discussion of effectiveness). Where it may have a negative effect is in the distribution of subsidy costs among market rate units; no data is available in published sources to quantify that effect. Still, it is logical to assume that, depending on market conditions, market rate units are priced higher to account for the developer subsidy of the inclusionary units. However, one recent study from 2007 concluded, based on econometric analysis, that mandatory inclusionary zoning requirements lead to decreased housing production and higher prices throughout the marketplace because they force developers to exit the marketplace or price market-rate units higher in order to subsidize the required affordable units. 61

Two key factors contributing to affordability are increasing density and streamlining the permitting process. A 1991 report from Portland demonstrated that higher density and a mix of housing types mandated by the 1981 Metropolitan Housing Rule combined with the 120-Day Rule for local action on discretionary permits had created “a climate in which the private sector still produces housing that is affordable for most homebuyers.” 62 Incorporating such features in an inclusionary program would benefit the affordability of both market and below-market rate units. In Massachusetts the Smart Growth Zoning Act adopted in 2004 has a mandatory 20% affordability requirement. This requirement applies in special overlay districts that may be established but must contain minimum by-right residential densities. Communities receive financial incentives to adopt these overlay districts.

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19.07 SUMMARY OF PROS AND CONS

PROS:

- Affordable units in a mixed income housing development can be made indistinguishable from adjacent market rate housing, thus avoiding the stigma often attached to affordable housing.

- By using incentives (density bonuses, special permitting treatment), inclusionary zoning achieves the social good of developing affordable housing and seeks to offset some of the developer’s per-unit costs.

- While many government subsidized housing programs have the effect of concentrating affordable housing in certain areas of a community or region, inclusionary zoning fosters mixed socio-economic neighborhoods by integrating affordable housing throughout the community.

- Integrating affordable housing within new residential developments gives equal access to better schools, better commercial centers, good parks, and a higher quality of life often found in newer neighborhoods.

- Mandating the provision of affordable housing gives local governments another tool to meet the housing needs of the full spectrum of residents.

- Deed restrictions and resale controls on homeowners who sell within a defined period of years (usually 30 years) and permanent affordability requirements on rental units, if enforced, ensure the long-term affordability of units.

- Where applied, in-lieu fees and equity recaptures provide local governments with the revenue to purchase or build more affordable units or to finance renter assistance programs.  

- Mandatory provisions may be more acceptable in communities opposed to up-zoning (increased density) as a solution to affordable housing shortages.

- Inclusionary zoning is a local technique subject to local control, not dependent on state or federal subsidies or the direct involvement of outside agencies. There is greater certainty as to affordable housing requirements, which over time, may result in lower land costs.

- Inclusionary programs that rely on voluntary incentives have the benefit of allowing the developer to determine participation and whether it will be cost effective.

- At a time when financial resources needed to undertake the high cost of development are limited, inclusionary zoning provides a means of encouraging the construction of affordable housing.

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63 The above “PROS” (1-7) were identified by the California Association of Realtors® statement of “pros and cons” for inclusionary zoning, [http://www.car.org/governmentaffairs/localgovernmentaffairs/inclusionary/izproscons/](http://www.car.org/governmentaffairs/localgovernmentaffairs/inclusionary/izproscons/).


65 These two “PROS” and additional inclusionary housing sources are discussed on the Association of Bay Area Governments website, [http://www.abag.ca.gov/planning/toolkit/26inclusionary.html](http://www.abag.ca.gov/planning/toolkit/26inclusionary.html).

CONS:

- It is unfair to place the burden of providing affordable housing solely on developers. The lack of affordable housing is a societal problem, and all of society should share the responsibility of and the cost of addressing it.

- Inclusionary zoning does not address the factors that contribute to the high cost of market rate housing, i.e., high land costs, lack of available sites, low densities, developer fees and exactions, cumbersome permitting process, etc.

- Inclusionary zoning places financial hardships on developers. Ultimately, they may no longer be able to provide housing in the community because the costs are too high or they will pass the cost on to market rate buyers thus making it more expensive for those buyers to acquire a home.

- Deed restrictions and resale price controls restrict homeowners’ ability to realize a reasonable profit on the resale of their home and therefore reduce the incentive for them to maintain their home. This makes it harder to resell inclusionary units, and therefore, hurts the real estate market.

- The cost of implementing an inclusionary zoning ordinance for a local government entity is significantly high. Most local governments cannot afford the amount of staff resources and experience required to implement and administer an effective program.

- Incentives such as reduced land costs and land restrictions, increased availability of housing sites, and reduced fees make the development process less costly and time-consuming, and can be a more effective way for local government to provide affordable housing.

- The practice of in-lieu fees is a tax on developers and their customers.\(^\text{67}\)

- Inclusionary zoning programs are generally not effective at producing low-income units, nor do they have the “anti-exclusionary” effect where the beneficiaries are existing residents or middle to middle-upper income residents.

19.08 INCENTIVE-BASED ALTERNATIVES

Some examples of incentive-based alternatives are:

**Community Land Trusts:** In areas where gentrification is an issue, nonprofit housing organizations can form community land trusts, or buy land and build below-market housing. The trust could permanently own the land and sell only the structures. This strategy can help stabilize the cost of homes by separating the cost of the units from the value of the land,\(^\text{68}\) but resale restrictions would still be necessary.

**Maximum Floor Area:** Rather than directly regulating price, a community may consider establishing a maximum floor area for at least a percentage of the single-family dwelling units within any proposed residential subdivision. This technique ensures that development includes a mix of housing choices, including smaller homes where cost would be reduced by reducing size. Market rate developments with a variety of sizes and styles helps to provide homes in a variety of price ranges. Cumberland Region Tomorrow, a regional land-planning organization dedicated to fostering well-planned development in the

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\(^\text{67}\) All of the above are “CONS” identified by the California Association of Realtors.®

\(^\text{68}\) LePage at 2 ([Sacramento Bee Article]).
Middle Tennessee Region encourages municipalities to use zoning tools to limit housing size and provide a variety of housing sizes and choices to suit individuals at all income levels.69

**Expedited Review of Affordable Housing Proposals:** “Fast track permitting” is a preferable alternative to mandatory programs and is offered in Fort Collins, Colorado, and Monterey County, California.70 The advantages of this approach are that it signals that the municipality is serious about affordable housing because it has put those types of projects “first in line,” and it has the potential to be a sufficient incentive to attract residential developers who are frustrated with a cumbersome or time-consuming review process.

**Development Fee Waivers or Reimbursement of Fees:** In some cases, all fees (school and traffic impact fees, water and sewer fees, park fees, building permit fees, etc.) are waived or otherwise abated. Examples of jurisdictions that have used this technique are:

- **Arvada, Colorado** – A development fee waiver “for all housing developments which will be granted a federal subsidy for rent or mortgage payment.”

- **Longmont, Colorado** – Up to 100 percent waiver of certain fees, using a five-year affordability period for single-family development, ten-years for multi-family.

- **Hillsborough County, Florida** – Impact Fee Relief Program waiving water, sewer, rights-of-way, parks and transportation fees. In one affordable apartment project, almost $500,000 in fees was waived.

- **Martin County, Florida** – The County will defer the payment of impact fees for a 15-year renewable period, after which the lien is excused if the original occupant still resides in the unit. The fee is payable on re-sale unless the new occupant meets the income criteria.

- **Santa Fe, New Mexico** – Fee waivers for development proposals offering 75 percent of the units to households at or below 80 percent of the median family income.

- **Orange County, North Carolina** – School construction impact fee rebates ($3,000 per unit in Chapel Hill and Carrboro, $750 elsewhere) to nonprofit groups building affordable units for first-time home buyers.

**Growth Control Exemptions:** In high-growth areas which have enacted moratoria, growth caps, Adequate Public Facilities Ordinances, or other growth management/growth control tools, allowing exemptions for affordable housing is a strong incentive.

- **Arvada, Colorado** exempts “low/moderate income housing,” from its residential building permit allocation system.

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The Town of Cary, North Carolina allows 5 percent additional development above the adequate public facilities ordinance limit for affordable housing projects.\footnote{Town of Cary Affordable Housing Tool Kit, http://www.townofcary.org/Assets/Planning+Department/Planning+Department+PDFs/affordablehousing/toolkit.pdf at 11.}

**Higher Density:** Back-to-back houses, zero lot-line zoning and accessory apartments are a means of extending the current housing stock or allowing existing development sites to absorb higher-density housing. Increasing density is the most commonly recognized way to reduce housing cost and thereby create affordable housing units. The National Association of Home Builders has repeatedly called for federal, state, and local measures to facilitate the development of multi-family housing as a way to address the need for affordable housing.\footnote{See for example, NAHB’s March 2011 Multifamily Issues Report, http://www.nahb.org/fileUpload_details.aspx?contentID=156592.}

Orlando, Florida - “pioneered” allowing subdivisions to include “tandem single-family development” as a conditional use on lots that allow duplex development.

Babylon, New York - passed a two-family dwelling law that allows owners of existing houses to add a second living space which may be either sold or rented.

**State Mandated Special Treatment of Affordable Housing Applications:** Special procedures provide an incentive to developers to include affordable housing.

Massachusetts’ “Anti-snob Zoning Act”\footnote{G.L. 40B, §§ 20-23.}, (also known as the Comprehensive Permit Statute or Chapter 40B) has since 1969 provided expedited review of low and moderate income proposals through the use of a “comprehensive permit” process that centralizes development review in the Zoning Board of Appeals. The Zoning Board of Appeals on a comprehensive permit application may override local regulatory requirements where the requirements would preclude development that would be used to satisfy statutory thresholds for affordable housing within the municipality.\footnote{Richard Huber, et al. “Low- and Moderate – Income Housing: The Anti Snob Zoning Act, Linkage, Inclusionary Zoning and Incentive Zoning” Chapter 5, *Massachusetts Zoning Manual*, Supp. 1999 §§ 5.3 and 5.4.2.}

Connecticut’s Affordable Housing Appeals Act of 1990, as amended, provides an expedited appeals procedure for a developer who has been denied an application which meets criteria for an affordable housing project. The Connecticut Statute “reverses the presumption of the validity ordinarily accorded to land use decisions” so that the burden is on the local commission to justify its decision in denying or requiring unreasonable modifications of a proposed application.\footnote{Julie M. Solinski “Affordable Housing Law In New York, New Jersey, and Connecticut: Lessons for Other States” in *Journal of Affordable Housing*, Volume 8, #1 Fall 1998, p. 63. Ms. Solinski finds that the Connecticut
Using Government Funds: Leveraging or subsidizing the production of affordable units with public money is an effective technique. One approach links municipal deposits to financial institutions which provide loans and other resources for affordable housing development. For example, Loudoun County, Virginia, linked a proportion of the county’s deposit in local financial institutions with the affordable housing activities of those institutions. Activities included affordable housing mortgages, marketing, first-time homebuyer seminars, home mortgage funding with no private mortgage insurance, residential construction funds, targeted residential construction funds, and other housing activities initiated by the bank. Atlanta, Georgia; Charlotte, North Carolina; and Durham, North Carolina, either have or are considering similar programs. These are excellent examples of public-private partnership which extend beyond the limits of inclusionary housing provisions. Another method is to provide grants to affordable housing developers. Columbus, Ohio, in 1995 partnered with two developers and a state savings bank to produce mixed-income housing within the city’s school district. This program has been cited in a HUD report entitled “Models That Work.” Highpoint, North Carolina, operates an “Infill Housing Reimbursement Program” which subsidizes at $10,000 per home the construction of homes for first-time buyers in inner-city neighborhoods.

There are numerous programs which assist on the demand side by providing either down payment, or closing cost, or second mortgage assistance, or supporting employee home ownership, all of which assist the buyer.

Modifying the “Regulatory Barriers” to Affordable Housing: Zoning and subdivision controls affect the cost of housing by restricting density, thereby restricting the supply of housing as well as the cost per unit of land. Substantive standards such as limiting construction to single-family dwellings, setback, minimum lot size, minimum floor area, and other design restrictions often increase housing costs or permit fewer dwellings to be placed on particular land parcels. The increasingly common requirement of offsite facilities as a condition of rezoning or development approval passes costs on to the consumer (see sections on impact fees and development exactions). A report recommends innovative zoning techniques such as zero lot line, cluster and mixed-use zoning as ways to reduce the cost effects of traditional zoning standards.

Using Government-Owned Land: State and local governments often own land that is either vacant or underutilized. The government can sell or lease this land to developers subject to requirements that ensure that the projects will include an affordable housing component.

and New Jersey statutes have been more effective than New York’s enabling legislation authorizing density bonuses for affordable housing, p. 52.

70 “High Priority Affordable Housing Tools” “Town of Cary, NC.

71 Id. at 8-12.

SECTION 20: HOUSING LINKAGE

20.01 PURPOSE AND KEY TERMS

Housing linkage is a type of local regulation that requires or induces developers of office buildings or other, typically “downtown” non-residential uses to build housing, to pay a fee in-lieu of construction into a housing trust fund, or to make equity contributions to a low-income housing project. The exacton may be either a condition for permit approval or a prerequisite for receiving some type of development incentive, such as a density bonus. The concept arose, in part, as a response to a decrease in federal housing subsidies in the 1980s.

Linkage can be viewed as an employee-centered device for the production of affordable housing, the modern equivalent of the “company town” concept. This housing is often referred to as “workforce housing.” The underlying rationale for a housing linkage program is that new non-residential development creates a need for housing by attracting employees to an area. The new workers need places to live, transit systems, day-care facilities, and the like.

The term inclusionary zoning has often been used interchangeably with housing linkage. However, these two concepts are different. Inclusionary zoning refers to the practice of requiring housing developers to dedicate a certain percentage of their housing construction project to low- or moderate-income buyers or renters or to support other “needs” of the community. Inclusionary zoning is addressed in Section 19. Housing linkage, on the other hand, refers to the practice of requiring developers of office and commercial space to contribute, either in-kind, or by payment to a fund used for off-site construction elsewhere, of low- or moderate-income housing or other “needs” of the community.

20.02 EFFECTIVENESS IN ACHIEVING STATED PURPOSE(s)

It is critical for the implementation of a linkage program that the local commercial real estate market be strong. Therefore, it is no coincidence that housing linkage regulations were prevalent in the mid-1980s and again in the late 1990s and the early part of the 2000s. These programs first emerged in the nation’s largest cities, such as San Francisco, Boston, Seattle, and Miami, which, at the time, were experiencing significant increases in commercial development. Numerous smaller cities – including several in California (most significantly Berkeley, Oakland, Sacramento, and Santa Monica); Hartford,

4 White at 26.
7 City of Walnut Creek, California, Staff Report Regarding the City’s Commercial Linkage Fee Ordinance (January 4, 2005) at Table V-5 (available at: http://www.walnut-creek.org/citygov/depts/cd/housing/linkfee.asp). The full list of California cities and counties with jobs-housing linkage programs as of late 2004 included Palo Alto, San Francisco (city and county), Marin County, St. Helena, Oakland, Corte Madera, Berkeley, Sunnyvale, Santa Monica, Alameda, Petaluma, San Diego, Napa (city and county), Sacramento (city and county), Cupertino, Livermore, and Pleasanton. Walnut Creek’s jobs-housing linkage program was adopted in February of 2005 (the Walnut Creek Study).
Connecticut; Aspen, Colorado; and Cambridge, Massachusetts – as well as larger cities such as Chicago and Washington, D.C., have also experimented, to varying degrees, with linkage programs in the two decades following. The relative success of these programs has hinged largely on the strength and duration of the building “booms” in these particular jurisdictions.

A critical requirement affecting the legitimacy of a housing linkage program is that it possess a “rational nexus” between the proposed development and the amenity to be funded, in this case housing. This relationship is necessary for the linkage program to survive a constitutional challenge on due process grounds. One of the rationales commonly asserted in support of linkage programs is that large-scale commercial developments bring in middle- and upper-income dwellers, who displace lower-income dwellers and that the creation of lower-income housing is necessary to offset these effects.  

Housing linkage programs should address the following issues:

- Whether the program is mandatory or incentive-based;
- The type of development that triggers the obligation;
- The target group for whom housing is to be created;
- The formula by which the housing impact will be calculated;
- The rate of the housing linkage fee;
- The mechanics of the program; and
- The administration of the program.

The two largest linkage programs in the country, San Francisco, California, and Boston, Massachusetts, have been reviewed for their effectiveness.

San Francisco Jobs-Housing Linkage Fee Program

In 1981, San Francisco became the first U.S. city to adopt linkage policies, for several reasons: community opposition to continued downtown development was growing (based on the argument that it was having an adverse effect on San Francisco’s expensive housing market and troubled mass transit system); the city was seeking new revenue sources to offset property tax loss caused by the passage of Proposition 13 in 1978; active community based coalitions were pressuring the city to develop and preserve affordable housing and to improve its municipal transit system; and federal aid for housing was starting to decline.

Under the program, known as the Office Housing Production Program (or OHPP), all developers of buildings exceeding 50,000 square feet in the central business district were required either to provide new or rehabilitated housing or to pay an in-lieu fee of $5.00 per square foot to the city for housing.

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9 Schukoske at 1015.
complex formula gave developers more credit for producing or subsidizing low and moderate income housing than for market rate housing. 11

From 1981 to 1985, office developers agreed to subsidize 3,793 residential units and 44% of those units had been completed as of April 1985. 12 In August 1985 the City adopted its “Downtown Plan,” which incorporated expanded linkage policies for housing and transit. The Plan also established the Office of the Affordable Housing Production Program or OAHPP, which required that if office developers themselves produced units, 62% of them must be affordable; if the office developers pay in-lieu fees, then 100% of the units must be affordable; and, a system of credits contained in the Affordable Housing Production Program was eliminated. The exaction fee was set at $5.34 per square foot.

In February 2001, the Board of Supervisors enacted an ordinance which changed the name of the program from the Affordable Housing Production Program to the Jobs-Housing Linkage Program; expanded the reach of the program to include hotels, entertainment space, retail space, and research and development space over 25,000 square feet; substantially increased the applicable fees; and required a study every five years to determine the demand for housing created by commercial development. 13 From 1981 to 2004, the San Francisco linkage program collected approximately $40 million for the provision of affordable housing. 14 As of May 2011, San Francisco’s linkage fees on a per square foot basis were: $19.96 for office uses, $18.62 for retail and entertainment uses, $14.95 for hotel uses, and $13.30 for research and development uses. 15

**Boston Jobs-Housing Linkage Fee Program**

The Boston linkage program, enacted in 1983 and modeled on San Francisco’s, initially required a $5.00 per square foot “housing exaction fee” from certain large commercial developments requiring zoning relief for completion. The fee applies to any “development impact project” falling within a zoning classification known as Development Impact Projects (“DIPs”). The linkage program applies to projects requiring some special zoning relief, such as a variance or conditional permit, involving more than 100,000 square feet of new commercial construction or rehabilitation work, and containing certain specific commercial uses or directly resulting in a reduction of the supply of low- or moderate-income housing. 16

Any project deemed to be a DIP requires the approval of a plan by the Boston Redevelopment Authority (“BRA”). To gain the required zoning relief, such a plan must meet two requirements: the BRA must find after public hearing that the plan conforms to the general needs of the city and will not harm the neighborhood; and an agreement between the developer and the BRA must be in place obligating the developer to pay a linkage fee or making an in-kind contribution of low or moderate income housing. The fee is paid to an administrative agency known as a Neighborhood Trust in twelve equal annual

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11 Id.
12 Id.
13 Ordinance 28-01, codified at Section 413 of the San Francisco Municipal Code.
14 Walnut Creek Study at Table V-5; Boston Redevelopment Authority, Office of Policy Development and Research, Survey of Linkage Programs in U.S. Cities with Comparisons to Boston at 3 (May 2000). This is the last
15 San Francisco Planning Department, Development Impact Fee Adjustments-Effective May 1, 2011, http://www.sf-
16 John J. Griffin, Jr., ”Inclusionary Zoning and Linkage in Boston and Cambridge, Massachusetts”, Chapter in
installments.\textsuperscript{17} As of October 1984, nine projects had been approved and it was estimated that developers of the nine projects would pay $24.5 million in linkage fees after their completion.\textsuperscript{18}

In May 2000, the BRA issued a report in which it concluded that its linkage program has produced more funds for affordable housing creation than any other program in the country—more than $45 million had been allocated for the construction of nearly 5,000 housing units.\textsuperscript{19} The BRA attributed the strong performance of its program to four factors:

- Higher fees than most cities;
- Full-city coverage;
- Broad coverage of development types; and
- Flexibility to reduce disincentives of development.\textsuperscript{20}

As of September 2011, Boston’s commercial housing linkage fee is $7.87 for each square foot of gross floor area in excess of one hundred thousand square feet.\textsuperscript{21}

20.03 Impact on Property Values

One would expect that property values in an area subject to a linkage program would be lower than the value of the same property absent the linkage requirement, because linkage represents a direct additional cost of development in that area. Of course, by their very nature, commercial development projects on properties in urban cores generally have high property values already, and indeed one premise of linkage programs is that the additional cost of the linkage requirement will be low enough compared with other pro forma entries not to discourage the new development or cause it to move elsewhere.

20.04 Impact on Development Costs

Housing linkage programs directly and measurably increase development costs because they require that direct expenditures be made on housing construction or in lieu of payments for housing.

20.05 Impact on Amount and Patterns of Land Development

A successful linkage program should increase the amount of affordable/workforce housing constructed in a jurisdiction with such a program. Except to the extent that they may serve to discourage some development because of their impact on developer profit, housing linkage programs otherwise probably have little effect on the amount or patterns of land development.

20.06 Impact on Housing Affordability

Since the premise of housing linkage programs is to promote low and moderate income housing, these programs presumably provide housing affordable to those in the low and moderate income range. There is no reason to expect that linkage programs targeted only at commercial development would have any significant effect on the general housing market. However, to the extent that linkage is applied to market

\textsuperscript{17} Id.
\textsuperscript{18} Keating at 137.
\textsuperscript{19} Survey of Linkage Programs in U.S. Cities With Comparisons to Boston at 3.
\textsuperscript{20} Id.
\textsuperscript{21} Boston Zoning Code, Article 80B, Section 80B-7.4.A.1.
rate or luxury housing developments, the costs of the linkage program will likely be passed along to buyers or tenants of units in the affected developments if the local market will allow such price increases. Absent a shifting of these costs to consumers, the costs would be borne by developers or landowners.

The goal of linkage programs is to provide affordable housing in the lower price ranges. This is done by either reducing the value of developable land or by increasing the prices of “other” housing.

20.07 SUMMARY OF PROS AND CONS

PROS:

- Assuming that the local government can show the required nexus between the commercial or other nonresidential development and its impact in terms of housing, a linkage program could lessen the negative effects associated with downtown gentrification and help to create affordable housing.

CONS:

- Housing linkage will not succeed if the local market does not support increased commercial development.\textsuperscript{22}
- It is unfair to single out new commercial development as the cause of general and complex transit and employment issues in the inner city.\textsuperscript{23}
- If the housing linkage exaction fees are set too low, then revenue generated will be insufficient to provide enough of the facilities or services to solve the problems ostensibly caused by the development.\textsuperscript{24}
- If the housing linkage exaction fees are set too high, the resulting increase in development costs and commercial rents may deflect commercial development from the central city to the suburbs.\textsuperscript{25}
- The argument has been made that housing linkage is no more than a cynically veiled effort to tax one segment of society for redistribution to another while the “getting is good.”\textsuperscript{26}

20.08 INCENTIVE-BASED ALTERNATIVES

There are at least two incentive-based alternatives that achieve the same goals as those sought to be achieved by housing linkage programs.

Incentive Zoning would allow developers who want to exceed maximum floor area ratios or obtain density bonuses to agree to provide housing in exchange for receiving these incentives. Incentive zoning differs from linkage policies in that developers receive a tradeoff, such as additional rentable space, under the former but not under the latter.\textsuperscript{27} These types of incentives could also be applied in a mixed-use

\textsuperscript{22} Andrew and Merriam at 200.
\textsuperscript{23} Keating at 140.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{27} Keating at 140.
zoning context, through which greater floor area ratios and/or density bonuses would be allowed for the residential buildings than for the commercial structures.

**Special Assessment Districts** can be created to cover all or most affected businesses and the revenues generated by special assessments could be used for the same purposes as linkage exaction fees. This would spread the cost burden to all benefitted businesses instead of imposing them on specific developments.\(^{28}\) Special Assessment Districts are discussed in Section 6.

\(^{28}\) *Id.*
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## GROWTH MANAGEMENT TECHNIQUES

### SUMMARY CHART

<table>
<thead>
<tr>
<th>TECHNIQUE</th>
<th>How Effective in Achieving Stated Purpose(s)</th>
<th>Impact on Property Values</th>
<th>Impact on Development Costs</th>
<th>Impact on Housing Affordability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Urban Growth Boundaries (UGBs)</td>
<td>Moderately effective except in areas of diffuse population</td>
<td>Increase values for properties within UGB compared to those outside</td>
<td>May be reduced if densities inside UGB increase</td>
<td>Increase housing prices</td>
</tr>
<tr>
<td>Growth Phasing</td>
<td>Generally effective when tied to CIP</td>
<td>Increases values for properties in areas slated for growth</td>
<td>Costs reduced if public facilities available at time of development</td>
<td>Increases housing prices unless preference given to affordable housing projects</td>
</tr>
<tr>
<td>Rate of Growth Controls</td>
<td>Effective in limiting actual growth rate but can cause development to “leap frog”</td>
<td>Growth controls limit land supply, driving up prices</td>
<td>May increase costs to extent not tied to availability of public services and facilities</td>
<td>Increase housing prices unless preference given to affordable housing projects</td>
</tr>
<tr>
<td>Moratorium</td>
<td>Generally effective in halting development</td>
<td>Generally has the effect of downzoning property</td>
<td>No direct effect</td>
<td>Increases housing prices if purpose is to halt residential development</td>
</tr>
<tr>
<td>Adequate Public Facilities (APF) and Concurrency</td>
<td>Moderately effective but may divert growth to outlying areas</td>
<td>Increase in areas where public facilities made available</td>
<td>Complexity of permitting and timing delays likely to increase costs</td>
<td>Increase housing prices if APF does not allow supply to keep up with demand</td>
</tr>
<tr>
<td>Impact Fees</td>
<td>Generally effective in apportioning infrastructure costs of development to those benefiting from development</td>
<td>May decrease price developer otherwise willing to pay for land, in effect, shifting cost to landowner; land not subject to impact fees may be more attractive and hence more valuable</td>
<td>May reduce costs to extent costs are fairer and more predictable</td>
<td>Increase the price of new and existing homes</td>
</tr>
<tr>
<td>Special Assessment District (SAD)</td>
<td>Generally effective because can be tailored to need</td>
<td>May increase values to extent makes land developable</td>
<td>No direct impact</td>
<td>SAD assessment may reduce housing demand and lower housing prices</td>
</tr>
<tr>
<td>Tax Increment Financing (TIF)</td>
<td>Generally effective in achieving purposes within TIF district</td>
<td>Generally increases property values within TIF district. Outside TIF district, results can vary</td>
<td>Generally will lower development costs</td>
<td>Can negatively effect housing affordability unless TIF program requires affordable housing component</td>
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<tr>
<td>Open Space Preservation Techniques</td>
<td>Clustering/TDR generally effective if market support; fees in-lieu less effective</td>
<td>Can negatively impact values of properties restricted under TDR or by buffer standards</td>
<td>Clustering can produce cost economies, but uncertainty created by process</td>
<td>Reduced supply of land can cause higher prices unless offset by transfer of density elsewhere</td>
</tr>
<tr>
<td>Transferable Development Rights (TDR)</td>
<td>Effective in certain jurisdictions but generally has had mixed results</td>
<td>TDR reduces value where downzoning is part of establishing TDR program</td>
<td>Can increase costs where TDR program is based on discretionary review process</td>
<td>Depends how TDR program structured, e.g., if allows density bonuses for affordable housing</td>
</tr>
<tr>
<td>Cluster and Planned Unit Development</td>
<td>Generally effective</td>
<td>Some evidence of higher appreciation rate than conventional subdivision, if open space protected as part of development</td>
<td>Lower costs because of reduction in costs of infrastructure</td>
<td>Design flexibility allows mix of housing types, including affordable housing</td>
</tr>
<tr>
<td>Sustainable Development Regulations</td>
<td>Because programs have only recently been adopted information regarding effectiveness is limited</td>
<td>Unless development costs are significantly increased by compliance with new standards impact should be negligible</td>
<td>Will likely result in additional upfront costs</td>
<td>Additional upfront costs in short term will negatively affect housing affordability; in long term, greater operating efficiencies of more sustainable housing units should make those units more affordable</td>
</tr>
<tr>
<td>Development Design Review</td>
<td>Depends upon extent to which based on careful study and clear standards</td>
<td>Generally positive effect</td>
<td>Generally adds to development costs</td>
<td>Increases cost of housing, unless affordable housing exempted from design review or included as part of community design</td>
</tr>
<tr>
<td>Neighborhood Conservation District</td>
<td>Generally effective</td>
<td>Generally positive effect</td>
<td>Can increase costs through review requirements</td>
<td>May help to conserve older housing stock</td>
</tr>
<tr>
<td>Scenic District and Conservation Easement</td>
<td>Generally effective</td>
<td>Can be burdensome to individual property owners</td>
<td>Increase costs to extent involve design review which can add uncertainty and complexity</td>
<td>No direct effect, though by preserving amenities, they contribute to price stability or</td>
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<tr>
<td>Tree Preservation</td>
<td>Mixed results</td>
<td>May enhance property values to a certain extent, but may also infringe upon traditional property rights</td>
<td>Prohibitions and limitations on tree clearing and best management practices, add to costs</td>
<td>Generally adds to development costs which, if passed on to purchasers, will increase housing prices</td>
</tr>
<tr>
<td>Form-Based Codes</td>
<td>Depends in large part on whether community has fully articulated its goals; codes are too new to judge effectiveness</td>
<td>Will generally increase property values when applied to infill areas. Also, positive effect in greenfield areas if allow for more intense, mix-use development</td>
<td>May add additional costs if developer must propose and fund creation of form-based code; development review process may also add additional costs compared to conventional land use regulations</td>
<td>Generally positive if form-based code requires provision of different housing types</td>
</tr>
<tr>
<td>Mixed-Use Regulations</td>
<td>Depends upon combination of (a) regulatory provisions designed to support and help Mixed-Use Development perform as intended; (b) the types of mechanisms used to implement Mixed-Use Regulations and (c) whether the Mixed-Use Regulations are mandatory or not</td>
<td>To the extent Mixed-Use Regulations allow for more intense use of land, property values should increase; however, if local market is not familiar with mixing of uses and design features, Mixed-Use Regulations could reduce property values</td>
<td>Because programming, design, the permitting timeline, and financing are different from conventional development, mixed use development is more complex and can result in increased development costs</td>
<td>By allowing land to be developed more intensely for residential use as part of a mixed use project, a resulting increase in housing units should improve overall housing affordability; however, if the increases in development costs are passed on to purchasers of new homes, housing affordability could be negatively impacted</td>
</tr>
<tr>
<td>Inclusionary Zoning/Housing</td>
<td>Effective when made mandatory; if voluntary, underlying density must be lower than bonus allowed</td>
<td>No evidence that affordable housing projects reduce property values</td>
<td>Increases development costs primarily as result of additional regulations</td>
<td>Provides affordable housing</td>
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<td>Housing Linkage</td>
<td>Effectiveness depends upon strength and duration of market</td>
<td>Lowers values of properties subject to linkage, as compared to those not subject to linkage</td>
<td>Increase costs by requiring direct expenditures by developer</td>
<td>Has been successful in generating funds for affordable housing</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>implementing affordable housing program</td>
</tr>
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