

ZONING AND LAND USE IN RHODE ISLAND

SMART GROWTH

by

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VII SMART GROWTH

A. Defining Smart Growth

1. **Tool Box.** What is Smart Growth? It is a tool box of ideas and legislative actions which are used by local and state governments, and the Federal Government, to guide the pattern of growth and development of a community, ranging in size from a local village to an entire nation. Within this tool box there are many different types of tools, used separately or in conjunction with each other, to manage growth. These include tools to manage **how much growth will occur, what type of growth will it be, how soon will it occur, where will it occur (both within and without a community), what it will look like when it happens, and who will pay for it.**

When they hear the terms "smart growth" or "growth management" (both of which will be used interchangeably herein), many people think of "no" growth. There is the stereotype of the person who moves to a rural setting and then having acquired his piece of bucolic country land, wants to shut the door and not let anyone else in.

Although a stereotype, it is based on fact. However, not all smart growth proponents want to stop all growth, and this article is based on the assumption that the reader is interested in a balanced presentation of smart growth in theory and as practiced by rational people who care what happens to their community, but accept the inevitability of change.

a. How Much Growth? Limits on the quantity of growth take

many forms. One of the simplest tools is to buy land and take it out of production for development. On its face, this is one of the most expensive ways. However, as demonstrated by studies (See Southern New England Forest Consortium, Inc. reports: *Costs of Community Services for Southern New England* and *Land Conservation, Development and Property Taxes in Rhode Island*), land that is purchased and preserved as open space (whether farmed, forested, used for recreation, or just left open) creates the least burden on municipal finances. That is when you consider the cost to support the land (police, fire, public works, and of course schools), open space land provides the greatest positive cash flow to a town, while conventional residential development (with kids) provide the greatest negative cash flow.

The land may be acquired by many entities, such as the municipality, a municipal or statewide land trust, a nature organization, or the state. Funds can be obtained from private donors, charitable foundations, and the state and federal government, usually on a matching basis. The land may be used for many non-growth purposes, including low intensity agriculture. The land may be acquired in fee, or only the development rights may be bought, with the prior landowner allowed to retain possession and non-developmental use.

The quantity of growth may also be managed by amending the zoning of certain or all parcels in a community to provide for less density (commonly called down-zoning). This is an inexpensive process but is often fraught with political controversy, and raises the issue of a taking as is discussed in Section E below.

b. What Type of Growth? The type of growth is most commonly controlled by zoning ordinances, and amendments thereto which may change the zoning of certain parcels from residential or commercial, or vice versa.. Although simple in theory, such growth management is complicated to implement in practice, especially as to unintended consequences. For example, if a rural community decides to put a large industrial research and development park on currently unused land, it may seem like only a positive impact to have the increased non-residential tax base and more job opportunities for the existing inhabitants. However, it is likely that many of the new jobs will be filled by newcomers to the community who will also want to live in town and send their children to public schools. Eventually, the financial cost of the added residential development (to say nothing of the cost to rural character) may outweigh the added industrial tax revenues.

c. When Will The Growth Happen ? The timing of growth is a hot item in Rhode Island right at the moment. Many communities have recently adopted or are currently adopting growth spacing and phasing ordinances since 1995, or building permit caps. These include: South Kingstown, Richmond, Charlestown, Hopkinton, West Greenwich, Exeter, Portsmouth, Lincoln, Cumberland, and Foster. These growth control ordinances usually try to set the pace of development so as not to outpace the infrastructure available to that development. At the current time, that infrastructure is usually schools. This is because schools have an enormous financial impact on communities, usually more than all other municipal services combined. Also, it takes

time to bring a new school on line, usually three to five years. Therefore, the growth of the community must be phased in so as not to absorb that capacity prematurely and overwhelm the school system. This is even further complicated by the presence of multiple community school districts (such as Chariho, Exeter-West Greenwich, and Foster-Glocester) where the control of the infrastructure development is not even in the hands of the town leaders.

This control of timing can take place at many different stages of development. There is mandatory phasing of subdivisions, wherein a developer would be limited to how many lots could be recorded (and thus available for sale) each year. However, this fails to control infill development of existing empty lots and the possibly rapid build out of previously approved but unbuilt subdivisions. The most common time for such a limit to be imposed is at the issuance of the building permit.

d. Where Will the Growth Occur? This element of where is what many people think of when they hear the term smart growth. It also relates to the term sprawl. The eponymous organization, Grow Smart Rhode Island, has defined sprawl as follows:

An inefficient, scattered, auto dependent pattern of development that creates artificial geographic barriers between normal daily activities, wastes natural resources and taxes, underutilizes existing infrastructure in cities and other built up areas, broadens the geographic and psychological distance between different classes and races and stunts long term, quality

economic growth. (www.growsmartri.com)

The key concept of smart growth in this context is that growth should occur near where the infrastructure is available to handle such growth. The argument is that this imposes less of a general societal cost for development. A good example is in the provision of such utilities as electricity and natural gas. If the utility company must lay extra miles of pipe or line for a few houses sprawled across the countryside, then all users must share the incremental cost. But if new customers can be created in infill lots along existing utility lines, the added customer base with very little extra fixed costs will benefit all customers. It should be of little surprise that one of the foremost early anti-sprawl spokesmen in Rhode Island was the Chairman of the Providence Gas Company.

This issue is one that takes place on both the statewide level and the local level. Statewide, it is argued that we should be siting new development in Providence and the urban core, and not in South County (which does not exist as a legal entity, but is generally thought of as encompassing Washington County and the Town of Jamestown). At the local level, development should occur in the existing villages and not in outlying farmlands.

It should be mentioned that the concept of brownfields which are environmentally contaminated sites (usually but not always in urban areas) is also related to the sprawl issue. One of the prime tactics of anti-sprawl is to clean up and redevelop these brownfields sites which are usually near existing infrastructure and are otherwise

often abandoned and a blight.

e. What Will the Growth Look Like? This element is multifaceted too. At its simplest, it encompasses development plan review (previously called site plan review), to provide for a local authority to pass judgement on aesthetics and layout. It may go beyond this to include a specific Design Manual whose use is mandatory (such as in South Kingstown).

A common tactic has been the use of the Acluster@ subdivision. This technique clusters all growth into a small section of a development parcel, utilizing smaller lot sizes (if single family detached housing is being developed) but NOT reducing the density of the overall parcel. The remainder of the parcel is left as open space with various uses and legal protections so as to remain open space.

A newer (at least to Rhode Island) development is Flexible Zoning or Conservation Development. At first glance, it is a cluster subdivision. But in reality, it reverses the usual order of design for a development. Conservation Development is an approach to land development that begins with the developer studying the topography of land to make an analysis of how the building project can best be situated to preserve the maximum amount of open space and natural resources possible.

Conservation Development differs from conventional development in several respects. Conventional development requires the developer to strictly comply with minimum lot size, set-backs, other dimensional regulations and road standards. This emphasis on regulatory compliance requires the developer to focus more on regulations,

often at the expense of land conservation. Under conventional development, a developer will typically consult the regulations, then devise a plan to locate oversized house lots on overly wide streets, leaving whatever small area that is leftover as open space.

Conservation Development offers another approach.. The Conservation approach calls for the allowance of flexibility and variations within the dimensional requirements of the zoning ordinance to allow the developer to keep land conservation as a primary objective. The term *Flexible Zoning* describes the approach of relaxing strict regulatory compliance for the limited and specific purpose of encouraging the preservation of open space, land conservation and rural character. The Conservation Development or *Flexible Zoning* concept strives to insure that zoning regulations have a relationship to local conditions and resources.

Conservation Development begins by examining how open space can be used to conserve natural features located both within and surrounding the development, and often connecting through the development to other off-site features. This examination of the topography of the land becomes a joint effort under the Conservation approach. Both the developer and the planning board go on site and walk the land and confer on the conceptual site plan. They study the land's natural features such as wetlands, streams, steep slopes, rock outcropping, unusual vegetation, existing trees, etc.. This analysis allows the land planner or landscape architect to leave such natural resources undisturbed and place buildings and roads only on the least amount of upland as possible.

e. Who Will Pay For Growth? This issue is also a hot one in Rhode

Island. The rationale for impact fees has its roots in the earliest forms of zoning dating back to the 1920s when developers subdivided large tracts of land outside the central cities and then expected government to simply step in and pay for all the services and associated costs of constructing facilities. Zoning was the first step in a series of regulatory controls that gave municipal government the tools to control costly and unbridled growth. However, zoning by itself could not anticipate the timing of development. Hence, local government turned to growth management plans and ordinances to regulate the rate of growth.

In the prosperity that followed the end of the second world war, suburban development accelerated at a rapid pace. Most municipalities were content to rely on zoning and subdivision regulations to control growth, in part because of large subsidies from state and federal sources to pay for the costs of growth. That is to say, the cost of development continued to be borne by taxpayers at all levels. Local governments were able to fund educational, public safety and other municipal facilities with general obligation bonds which were paid for by the residents. These costs were often supplemented by state assistance for many municipal functions, including state aid to education. In addition, the federal government had a major role in funding and defraying the cost of local infrastructure that includes massive central city type projects such as urban renewal, public sewer and water systems, road projects and the like. Perhaps the largest federal assistance comes in the form of our interstate highway system. Starting in the 1950s and continuing to this day, the interstate highway system has contributed as

much to suburban sprawl as any other single act of government.

By the 1970s and 1980s, federal assistance for local infrastructure projects started to dwindle. Revenue sharing and block grants replaced categorical grants and that reduced the overall share for municipal buildings such as town halls, libraries, public works facilities and schools. As for roads, the interstate system is essentially complete in this region and now the emphasis is on replacing worn-out bridges and upgrading roads. There is less money today for municipal public works than there was even twenty or thirty years ago.

Municipal government must look to other means of spreading the costs of growth more equitably among existing and future residents. Some forms of impact exaction already exist. Subdivision developers are required to build roads to meet a town=s standards for road construction. These include proper drainage and sometimes the infrastructure to support the new subdivision. Dedication of open space and other installation of betterments are not uncommon any more. Cluster subdivisions require open space in perpetuity. In many cases, developers are required to correct potential traffic problems including the installation of traffic signals or widening access roads to serve new subdivisions. But these forms of non-monetary exactions are site specific.

Impact fees as a method of financing local facilities is not new in this country. It gained popularity as communities were faced with rapid growth and dwindling state and federal dollars to pay for public facilities and turned to creative means to raise money without overtaxing existing residents. Some communities (such as Cranston and South

Kingstown) have collected impact fees for new development for years. However, in 2000, the General Assembly passed the Rhode Island Development Impact Fee Act (RIGL ' 45-22.4-1, et seq.) which explicitly authorized the collection of such fees and detailed the manner in which they were to be calculated, collected, held, and spent. It is discussed in Section D below.

In addition to enabling legislation, the courts have shaped the form of a legally defensible impact fee program. The U. S. Supreme Court provided the definitive principle for impact fees in *Nollan vs. California Coastal Commission*. Simply put, there must be a close and obvious relationship between the fee and the purpose it serves. For that reason, the needs assessment and subsequent actions by a municipality must document the need for new or expanded facilities, establish reasonably accurate anticipated growth costs to the municipality, and the impact fee must be related to the need and projected costs for capital facilities.

2. Smart Growth vs. No Growth. It must be mentioned that in the State of Rhode Island, we are essentially a stagnant population. From 1980 to 1990, we lost population. From 1990 to 2000, we maintained the same population. The population that we do have is changing location within the state, as it continues a 40-year pattern of decentralization and flight from the old urban centers. But even then, many of the rural communities outside of Washington County experienced minimal population growth in the 1990-2000 decade. The question is asked, but not answered herein: Are the

philosophical and sociological constructs of smart growth appropriately applied in a no growth situation?

B. Pros and Cons of Smart Growth in Development and Land Use

1. **Pros** The **Pros** of smart growth have been discussed generally above, especially with regard to the prevention of sprawl. The costs to society in general, and usually to the individual developer, are less when development occurs in a compact form close to existing infrastructure. Impact fees help to insure that those who directly benefit the most from new development pay their fair share of the costs of new infrastructure to support that new development. Finally, there is the intangible benefit to a community that keeps its character, and its own individual identity as a distinct place.

2. **Cons** The **Cons** of smart growth revolve around the American mythology of the **frontier** and the concept that a man or woman could find their piece of land on the wide open prairie (after the government had conveniently displaced the aboriginal natives to confined reservations), stake his or her claim, and homestead it and own it. Once owning the land, the owner could do anything he or she (usually he) wanted to do with it. This ideal is often referred to in the analogy that a **man's home is his castle**. Clearly, smart growth limits the use of an individual's property. If someone really wants to commute a long distance from work to home and live on a five acre lot on a dead end cul-de-sac, should government be prohibiting that? It is my contention

that government should NOT prohibit it, but does have the authority to make the individual pay the true cost to society for his or her individual choices.

C. Emerging Legal Issues in Smart Growth

1. **Substantive Due Process.** When South Kingstown enacted a Development Pacing and Phasing ordinance as an amendment to its zoning ordinance on May 13, 1996, it was swiftly challenged. *Anthony Fiore et. al. v. Town of South Kingstown et. al.* (R.I. Superior Court, WC96-0293, February 15, 1999). The challenge resolved itself to one of substantive due process on a Motion For Summary Judgement by the Town. The court (Justice Gagnon) upheld the Town on the challenge, and the case was appealed to the Rhode Island Supreme Court, which upheld it on other grounds (see below). Since the Supreme Court did not reach the substantive due process issues on the merits this time, it is worth examining these issues in anticipation of the next time.

The key question is whether the ordinance at issue was rationally related to a legitimate governmental purpose, and how deep should a court go to examine that rational relationship.¹

"Substantive due process, as opposed to procedural due process, addresses the essence of State action rather than its modalities; such a claim rests not on perceived procedural deficiencies but on the idea that the government's conduct, regardless of

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The author is grateful to Michael DeSisto, Esq, for the use of the following discussion of substantive due process, from his brief to the Rhode Island Supreme Court

procedural swaddling, was in itself impermissible!" *Jolicoeur Furniture Co v. Baldelli*, 653 A.2d 740, 751 (R.I. 1995) (quoting *Amsden v. Moran*, 904 F.2d 748, 753 (1st Cir. 1990)). A substantive due process inquiry focuses on "what" the government has done, as opposed to a procedural due process inquiry which focuses on "how and when" the government did it. *Amsden*, 904 F.2d at 754.)

A regulation that takes property violates substantive due process if it is arbitrary, discriminatory or irrelevant to a legislative policy. *L.A. Ray Realty, et al. v. The Town Council of the Town of Cumberland, et al.*, 698 A.2d 202, 211 (R.I. 1997). Substantive due process prevents the abuse of governmental power that is conscience shocking or legally irrational, that is not keyed to a legitimate state interest. *Id.* "[B]efore a constitutional infringement occurs, [the] State action must in and of itself be egregiously unacceptable, outrageous, or conscience shocking." *Amsden*, 904 F.2d at 754.

Legislative acts that do not impinge on fundamental rights or employ suspect classifications are presumed valid, and this presumption is overcome only by a clear showing of arbitrariness and irrationality. *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994). It is not necessary that the legislative act actually advance its stated purpose. *Id.* If it advances any legitimate public purpose, there is no substantive due process violation. *Construction Industry Assoc. v. Petaluma*, 522 F.2d 897, 906 (9th Cir. 1975).

Therefore, for plaintiffs to establish a substantive due process violation, they must first prove the Ordinance was "clearly arbitrary, unreasonable, having no substantive

relation to the public health, safety, morals or welfare." *Dodd v. Hood River County*, 59 F.3d 852, 864 (9th Cir. 1995) quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121 71 L.Ed. 303 (1926). Put another way, to survive challenge the Ordinance must merely be rationally related to a legitimate governmental purpose. *Schenck v. City of Hudson*, 114 F.3d 590, 594 (6th Cir. 1997).

South Kingstown enacted its Ordinance to "equitably allocate available capacity for additional development among applicants over time, and to guide the form of development so as to minimize burdening the facilities, natural resources, and cultural resources whose adequacy is essential to capacity." South Kingstown Zoning Ordinance, Article 23, Section 2300 - Purpose. Its intent is to provide for the housing needs of all population groups consistent with the Town's Comprehensive Community Plan, Capital Improvement Program and Land Use 2010: State Land Use Policies and Plan. *Id.* The stated purpose of the Ordinance control of residential growth to enable the Town to meet current and future infrastructure needs is a legitimate government goal or purpose. See, e.g., *Schenck*, 114 F.3d at 590 (Hudson's slow growth zoning ordinance constitutes a legitimate state interest); *Construction Industry Assoc.*, 522 F.2d at 909 ("Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace" are legitimate governmental interests); *Euclid*, 272 U.S. at 393-394 (desire to decrease traffic congestion, increase safety and security and economic administration are legitimate purposes).

In South Kingstown, the plaintiffs' disagreement was with the conclusions drawn

from the data used by the Town. The plaintiffs believed the data demonstrated that, not only could the building permit quota be increased, it was unnecessary. Therefore, Plaintiffs wanted the trial court to review the conclusions drawn by the Town from the data to determine whether their belief was correct.

However, in a substantive due process challenge to a legislative enactment, the background information upon which it is based will not be reviewed by the courts, nor are the courts to second guess the policy decision reached by the legislative body. Rather, the enactment will pass a substantive due process challenge as long as the means that it embodies are substantially related to a legitimate governmental purpose. Here, the means embodied by the Ordinance - (limiting the number of building permits) - is indeed substantially related to a legitimate governmental purpose (- control of residential growth until its infrastructure meets current and future needs).

It is ironic that the leading case in Rhode Island involved the same exact plaintiffs, acting under a different corporate name, and the same town as defendant. A few years prior, a Fiore family company, South County Sand & Gravel Co., Inc. asked the Federal Courts to make a similar inquiry into South Kingstown's Soil Erosion Ordinance. *South County Sand & Gravel Co., Inc. v. Town of South Kingstown*, 160 F.3d 834 (1st Cir. 1998). In that case, the Town enacted an ordinance prohibiting earth removal businesses from expanding their gravel pits horizontally in surface area by more than 25% of their existing excavated area unless they were first issued a special use permit. Plaintiff challenged the ordinance on substantive due process grounds.

The court began its analysis of the case by stating that it could invalidate the ordinance only if the ordinance had "no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Id.* at 836 (quoting *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 243 (1st Cir. 1990)). The court pointed out that this is a relatively low hurdle to clear. *Id.* The court found that the challenged ordinance articulated a legitimate governmental goal: to prevent the loss of the Town's natural resources including wildlife habitat, groundwater quality and scenic value. *Id.* The court also found that controlling earth removal is an appropriate means of achieving that goal. *Id.*

Plaintiff argued that the ordinance was irrational because the 25% rule was not based on a study or other discernable rationale. Plaintiff argued that the figure was made up by the Town's attorney (who happens to be the author of this article) because no town official could explain the basis for the 25% figure. The court responded by stating that plaintiff misapprehended the nature of rationality review. *Id.* at 839. The court stated plaintiff was essentially arguing that the 25% rule would not advance the Town's environmental goals and "[s]uch an argument asks us to debate the effectiveness of municipal policy - and that is well outside our compass." *Id.* "Courts ordinarily do not look behind such legislation to determine who knew what, or to what extent (if at all) the legislative body (here, the Town Council) was informed when it made a particular judgment. In the ordinary course, the background knowledge upon which enacted

legislation is based is irrelevant. (Citations omitted.) Whether or not a particular piece of legislation is bad policy, it will still survive an abstract substantive due process or takings challenge as long as the means that it embodies are substantially related to a legitimate governmental purpose." Id. Accordingly, The court ruled that that particular ordinance did not violate plaintiff's substantive due process rights.

2. **Ripeness.** The Rhode Island Supreme Court very recently ruled on the previously discussed substantive due process challenge to the Town of South Kingstown's growth management ordinance in Anthony Fiore et. al. v. Town of South Kingstown et. al. ___ A.2d ___, No. 99-482-C.A. November 7, 2001 (RI 2001). However, instead of reaching the merits, the Court decided the case in favor of the Town on the grounds that the plaintiffs' claims were not ripe. The plaintiffs had never even applied for a building permit, let alone been denied one, and at the time that the Motion For Summary Judgement was being heard by the trial court below, there was no delay at all in building permit issuance.

D. Legislative Trends

1. **Impact Fees.** In 2000, the General Assembly passed the Rhode Island Development Impact Fee Act (RIGL ' 45-22.4-1, et seq.) which explicitly authorized the collection of such fees and detailed the manner in which they were to be

calculated, collected, held, and spent.

There are several requirements that must be incorporated in any new ordinance that may be adopted by a municipality. The entire text of Title 45 Chapter 45-22.4 is attached hereto. However, the major points are summarized below:

' 45-22.4-2 requires that the state legislative findings and intent must be incorporated in the local ordinance.

' 45-22.4-3 provides several definitions that must also be incorporated in the ordinance. Among other things, this section defines the term *public facility* to include school facilities. This is important because most Rhode Island towns are currently using impact fees to concentrate on schools.

' 45-22.4-4 provides for the calculation of impact fees, which also includes the preparation of a *needs assessment* for the type of public facility for which impact fees are to be levied. The needs assessment is required to identify levels of service standards, projected capital improvements needs, and distinguish existing needs and deficiencies from future needs.

45-22.4-5 provides that the collection and expenditure of impact fees must be reasonably related to the benefits accruing to the development paying the fees. There are also provisions that mandate:

Impact fees must be deposited in a special proprietary fund;

Impact fees shall not be imposed for remodeling, rehabilitation, or other improvements to an existing structure, or rebuilding a damaged structure.

' 45-22.4-6 provides that impact fees must be refunded with accrued interest if such fees are not expended or encumbered within eight or twelve years.

' 45-22.4-8 provides that the adoption of impact fees shall be by majority vote by the Town Council, in accordance with the Council=s procedure to adopt town ordinances.

2. **Building Permit Caps.** In 2001, the Rhode Island General Assembly enacted an amendment to the Rhode Island Comprehensive Planning and Land Use Act. Two subsections were added to R.I.G.L. 45-22.2-13

A(2)(i) Nothing in the chapter shall be deemed to preclude municipalities from imposing limitations on the number of building permits or other land use approvals to be issued at any time, provided such limitations are consistent with the municipality's comprehensive plan in accordance with this chapter and are based on a reasonable, rational assessment of the municipality's sustainable capacity for growth.@

A(e)(ii) In the event of a dire emergency not reasonably foreseeable as part of the comprehensive planning process, a municipality may impose a limitation on the number of building permits or other land use approvals to be issued at any time, provided that such limitation is reasonably necessary to alleviate the emergency and is limited to the time reasonably

necessary to alleviate the emergency. A

In light of the previous action of the Supreme Court not to reach the merits in the *Fiore v. South Kingstown*, this new statute may severely limit any future challenge of growth cap ordinances, because it eliminates any question that the legislature has enabled local municipalities to enact such ordinances.

E. Takings Implications of Smart Growth

As discussed above, whether a smart growth ordinance is a taking will depend on two main concerns. The first point, dealt with above, is whether the ordinance addresses a legitimate public purpose (which smart growth has been found to be) and if the ordinance is reasonably related to that purpose. The second point, if the first hurdle is passed, is to determine if the ordinance is a "compensable" taking.

A taking is only compensable if it denies an owner ALL beneficial use of the property. It must also interfere with the owner's "reasonable investment backed expectations." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, United States Supreme Court (1978) The taking must be of a use that is part of the landowner's title to begin with (and not foreclosed by common law doctrines such as nuisance). *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027, 112 S.Ct. 2886, 2899, 120 L.Ed.2d 798, 820 (1992). Takings doctrine has recently been amplified (or obscured) by the recent United States Supreme Court Case emanating from Rhode Island, *Palazzolo v. Rhode Island et. al.*, ____ U.S. _____, No. 99-2047 (June 28, 2001).

Suffice to say, a takings analysis for smart growth ordinances is no different than the analysis for any other land use or planning ordinance.