

1-1-1979

LAWRENCE B. BURROWS: GROWTH MANAGEMENT: ISSUES, TECHNIQUES AND POLICY IMPLICATIONS

Dwight H. Merriam

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Dwight H. Merriam, *LAWRENCE B. BURROWS: GROWTH MANAGEMENT: ISSUES, TECHNIQUES AND POLICY IMPLICATIONS*, 1 W. New Eng. L. Rev. 639 (1979), <http://digitalcommons.law.wne.edu/lawreview/vol1/iss3/6>

This Book Review is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

BOOK REVIEW

GROWTH MANAGEMENT: ISSUES, TECHNIQUES AND POLICY IMPLICATIONS. By Lawrence B. Burrows. New Brunswick, New Jersey: Center for Urban Policy Research 1978.

*Reviewed by Dwight H. Merriam**

In 1975, the Urban Land Institute published a three-volume, 1,779 page treatise on growth management.¹ It was quite definitive and useful as a general reference, but unusable as a basic introduction to the subject. In 1977, the American Society of Planning Officials sponsored a book entitled CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT.² Presumably, this book was intended to make some sense out of the often inexplicable judicial tomfoolery that emerges when judges juggle public and private property rights while standing on the police power/taking teeter-totter.³ The effort failed not only because of the impossibility of the task, but because the authors necessarily devoted substantial portions of the book to explaining basic development control techniques. Finally, out of the book mill at the Rutgers Center for Urban Policy Research there now comes a book that fills the need for a basic introduction to the subject of growth management.

The new book, GROWTH MANAGEMENT: ISSUES, TECHNIQUES AND POLICY IMPLICATIONS, by Lawrence B. Burrows, is a true primer on growth management.⁴ In a readable 141 pages, it presents a rather full introduction to the subject. Burrows outlines fifteen management techniques used in over thirty-five locales in twelve states and provides sufficient background to educate the uninitiated reader. He also offers sufficient in-depth analysis to hold

* Associate, Robinson Robinson & Cole, Hartford, Connecticut. Adjunct Faculty, Western New England College School of Law. B.A., University of Massachusetts, 1968; M.R.P., University of North Carolina, 1973; J.D., Yale Law School, 1978.

1. MANAGEMENT & CONTROL OF GROWTH (Urban Land Institute 1975).

2. D. GODSCHALK, D. BROWER, L. MCBENNETT, & B. VESTAL, CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT (1977).

3. For a much livelier and stimulating discussion of one of the major constitutional problems in this area, the taking issue, see B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977).

4. L. BURROWS, GROWTH MANAGEMENT: ISSUES, TECHNIQUES AND POLICY IMPLICATIONS (1978) [hereinafter cited by page number only].

the interest of the more experienced student who might grow weary when faced with just another collection of land use planning war stories. The book is not without its shortcomings, both minor and major. These include the lack of an index, the inexplicable failure to discuss the important techniques of density transfer, a somewhat inartful organization, and a rather disappointing conclusion.

The author, presently an associate with the economic consulting firm of Gladstone Associates, began work on the book while a research assistant at the Rutgers Center for Urban Policy Research.⁵ This background is reflected in the introductory chapter in which Burrows discusses a survey of 400 developers and presents an overview of the growth management techniques described in the book. Burrows correctly notes that even if an effective growth management strategy can be developed, it is not in itself a cure-all, since growth management is really successful only in developing communities.⁶ Growth management techniques were designed to guide the conversion of previously undeveloped land. Land use management strategies in slow-growth and no-growth urban environments, however, are based on these same control techniques. These techniques include public acquisition of fee simple or lesser interests in land, tax abatement, zoning, moratoria, subdivision control, the use of the official map, and capital improvement programming. Growth management seeks to go beyond the sometimes monistic objectives of existing developmental controls in order to solve two problems characteristic of development at the urban fringe: the rate of growth and the sequence of growth.

An unrestricted growth rate can overwhelm a local government's ability to provide even basic health-related services. A random, sprawled pattern of development, based upon site selection resembling Brownian movement, unnecessarily increases the cost of supplying basic services and utilities. The traditional planning tools are much too crude to sculpture artful solutions for these rock-hard problems. For example, zoning as a growth control technique can only indirectly affect the pace of development by varying spatial density. As a sequencing technique, zoning is nearly useless because it is unable to direct the location of development once the zone districts are designated.

Although controlling growth is not a new phenomenon, Bur-

5. P. iv.

6. P. 11.

rows claims that communities are now integrating traditional fragmented techniques in comprehensive strategies.⁷ Unfortunately, the data he provides in the introductory chapter does not substantiate this claim. Almost half of the 400 developers surveyed had encountered a sewer moratorium, less than a third had experienced adequate public facility ordinances, and only six percent encountered the more direct approach of population caps and annual permit limitations. This evidence does not tend to show a comprehensive planning approach. What is suggested is the intuitively apparent—the drawbridge mentality of privileged communities that ignore local and regional housing needs in a misguided effort to preserve their bucolic bounty and fecund fisc. Despite Burrows' failure to specifically substantiate his claim of the emergence of a modern comprehensive planning strategy, one is impressed by the extensive citation to secondary authority found in the footnotes at the end of each chapter. Burrows has obviously drawn on a substantial body of published and unpublished literature to support his analysis. The meticulous research and useful bibliography are clearly some of the strengths of the book as a primer.

The book is organized into three sections: first generation techniques, second generation techniques, and a conceptual approach for a growth management model. The older, first generation techniques include public acquisition of open space, zoning, interim development controls, and division of land. Categorized as second generation techniques are urban service areas, cap rates, annual permit limitations, and adequate public facilities programming. There are some problems with this organizational format. Experienced planners and lawyers may be uncomfortable with this organization since some of the "old" techniques, such as use of special permits,⁸ are constantly undergoing modification and are, therefore, really "new" techniques. Kirk Wickersham, Jr., for example, has developed a radical land use control system based on permits.⁹ Further, Burrows labels adequate public facilities programming as a "new" technique, although communities have used capital improvement programming as a development guidance instrument for centuries.¹⁰ These incidents of faulty organization,

7. P. 13.

8. Burrows offers the use of special permits as a zoning technique. See pp. 41-43.

9. K. WICKERSHAM, JR., *Reform of Discretionary Land Use Decision-Making Point Systems and Beyond*, 1 ZONING & PLAN. L. REP. 65 (1978).

10. The first long-term financial plan for a governmental unit in the United

however, do not reflect adversely on Burrows' knowledge. They serve to illustrate that land development control takes place in a complex system of subtle relationships that is iterative and addresses many social, political, and economic conflicts.¹¹

The first "old" technique Burrows discusses is the public acquisition of open space, including purchase of fee simple interests, acquisition of easements, tax concessions, and compensable regulations. A curious omission is the failure to describe state and local programs for purchase of development rights, even though such efforts are referred to in the two pages on easements.¹² Burrows' brief note on compensable regulations¹³ revives an old idea developed by Jan Krasnowiecki and Ann Strong that land can be restricted beyond the point where a court might find a "taking," but compensation would be payable only at the time when the loss in value was actually realized,¹⁴ and then only on the basis of the value of the property at the time the restrictions were imposed.¹⁵ Burrows correctly recognizes that the expense of public acquisition is a serious drawback to this growth management technique, but that it can be helpful as part of a comprehensive strategy.¹⁶

Burrows' rather brief critique of zoning is best summarized in his statement that "[t]he irony is that zoning can be an innovative and novel device to solve the problems of uncontrolled growth, but the inflexibility inherent in these schemes resists further refinements."¹⁷ Unfortunately, Burrows does not comprehensively address all available zoning techniques. He only touches on planned

States was probably one announced by the Minneapolis Board of Education in 1916. R. SCOTT, *AMERICAN CITY PLANNING* 253 (1969). The use of capital improvements to direct growth can be traced back over many centuries. For example, Sixtus V, the Franciscan Pope, shaped the development of Rome in the sixteenth century by building a network of streets connecting the seven main churches and holy shrines. S. GIDEON, *SPACE, TIME AND ARCHITECTURE* 92-98 (1967).

11. See A. CATANESE, *PLANNERS AND LOCAL POLITICS* (1974); F. RABINOVITZ, *CITY POLITICS AND PLANNING* (1970).

12. Pp. 21-22. For an overview of development rights programs, see Merriam, *Making TDR Work*, 56 N.C.L. REV. 77 (1978). A recent bibliography is D. MERRIAM & A. MERRIAM, *A BIBLIOGRAPHY ON THE TRANSFER OF DEVELOPMENT RIGHTS* (Council of Planning Librarians Exchange Bibliography 1338, August 1977).

13. Pp. 25-27.

14. For example, when the property was sold.

15. Planners and lawyers would do well to reconsider the utility of compensable regulations. For an excellent discussion of compensable regulations, see D. Hagman, *Compensable Regulation*, in D. HAGMAN & D. MISCZYNSKI, *WINDFALLS FOR WIPEOUTS* 254-307 (1978).

16. P. 18.

17. P. 41.

unit development and totally ignores special development districts. These are two powerful techniques, related to Euclidian zoning, capable of directing the impact and pace of development, as well as its location. Growth management is too often reduced to crude measures of numbers of dwelling units or new residences. Just as a room can be made to appear larger with properly scaled furnishings and attention to lighting, the impact of development can be reduced through careful site design and the internalization of added costs through exactions.¹⁸ Planned unit development and special development districts can be utilized to achieve these goals.

Next, Burrows offers a short but useful overview of interim development controls. This technique involves the use of the planning pause, building moratorium, or water or sewer moratoria to preserve the status quo while new plans and regulations are developed. Burrows recommends that "extreme caution" be used in considering the adoption of these controls because of the imbalance in housing production which may be produced, the resulting discrimination against low and moderate income development, the hardships created for those who cannot await the end of a moratorium, and the promotion of "leap frog" sprawl when development skips over the controlled area to more rural and less restricted areas.¹⁹

Burrows identifies four types of regulations and policies used to manage growth through direction of location, pace, and quality of land development. These are subdivision regulations, annexation policies, the official map, and exactions.²⁰ Subdivision regulations are second only to zoning in their importance as a land use guidance technique. They enable a community to specify roadwidths, building setbacks, sewerage, drainage systems, and the like for proposed subdivisions. Annexation is the judicial absorption of one area by another, thus allowing a community to expand its geographical limits. While annexation policy is an important adjunct to other growth management techniques, it is of no use in the Northeastern United States where all of the land is already located within town and city boundaries. The official map, when enabled by state legislation, provides the local planning authority with the power to designate future streets and public improvements. The

18. See E. HALL, *THE HIDDEN DIMENSION* 169-71 (1966); Gutman, *Site Planning and Social Behavior*, 22 *J. SOC. ISSUES* 103-15 (1966).

19. P. 54.

20. Pp. 57-66.

map, however, does little to control growth since its purpose is only to keep areas available for future uses and not to restrict all uses.

Burrows' discussion of exactions illustrates his occasional failure to completely follow through in his analysis. Exactions are ostensibly used by communities to make developers pay their own way by installing all needed improvements, dedicating or reserving land for public uses, or paying fees in addition to, or in lieu of, other types of exactions. Burrows argues that requiring developers to pay the cost of certain improvements imposes greater costs on home purchasers, not simply because they will pay more for their homes, but because the cost to the developer of borrowing money is greater than the interest costs that local government would incur.²¹ On its face, this argument appears to have some validity, but Burrows fails to recognize the tax expenditure effects of public borrowing. Interest rates are lower on public bond issues because lender-taxpayers receive interest income free of federal income taxes, and usually free of state income taxes. This loss in revenues is made up by other taxes, and so a tax expenditure is incurred from state and local bond issues. Thus, a taxpayer in Idaho pays more in federal income taxes to compensate for the loss of revenue incurred when a Florida resident exempts income received on a public bond sold to finance a sewer extension.

Burrows correctly perceives that exactions, by accident or intent, can function as exclusionary measures.²² Excessive requirements for improvements will increase the cost of land and housing. To avoid unnecessary exclusion as a result of these additional expenses, Burrows recommends that an "upper limit" be set on exaction requirements.²³ He also suggests a density bonus or development points approach whereby a developer would receive permission to develop at greater than normal densities in exchange for building a number of units for low and moderate income families.²⁴ A more direct approach, not mentioned by Burrows, would be community assumption of part of the development cost and imposition of mandatory percentage requirements for low and moderate units.

Burrows' well written fifty-page overview of "old" techniques,

21. P. 66.

22. *Id.*

23. *Id.* Unfortunately, Burrows fails to say how such a limit should be defined.

24. *Id.*

if not scholarly and comprehensive, is more than adequate for the reader who desires some familiarity with the issues and techniques involved. It is sufficiently in-depth for an introductory work and is successful as a primer.

The next section of the book concerns second generation techniques. In the introduction to Section II, Burrows explains that the bifurcation of traditional land use controls by the Standard State Zoning Enabling Act and the Standard City Planning Enabling Act has made it nearly impossible to control growth and sequencing simultaneously.²⁵ Zoning controls the use, bulk, height, and spacing of buildings, while subdivision regulations control the planning of sites. The best control strategy that a community can employ with this limited arsenal consists of setting zoning controls at a threshold level just below the level at which development could occur. The result is only limited control with the planning and zoning commissions acting as parade marshals for the ragtag stream of rezoning requests that march through the charade of public hearings. Burrows identifies four new techniques which can be part of an integrated system of growth management capable of directly controlling growth and sequencing: urban service areas, cap rates, annual permit limitations, and adequate public facilities programming.

Urban service areas are prelimited areas in which development is permissible. These areas directly control sequencing and indirectly control growth by channeling future development. "Defining the boundary is critical," Burrows remarks with characteristic aplomb.²⁶ He recommends that boundaries be set as part of the comprehensive planning process, that they be realistic and subject to annual review, that sufficient reserve land be available to limit the bidding up of land prices, that relief provisions be included to limit judicial review, and that services provided be negotiated and reduced to written agreements.²⁷ This willingness to address such practical considerations is a noteworthy strength apparent throughout *GROWTH MANAGEMENT*. Burrows outlines urban service area programs in several communities²⁸ and concludes with the admonition that the urban service area technique at best can control

25. P. 69.

26. P. 73.

27. Pp. 73-74.

28. These include the following: Manatee County, Florida; Eugene-Springfield, Oregon; Sacramento County, California; and Minneapolis-St. Paul, Minnesota.

sequencing only indirectly, and cannot control the rate at which population will be absorbed.

Chapter Seven concerns "Cap Rates" and is appropriately the shortest chapter in the book. A cap rate is simply an absolute ceiling on population—the ultimate growth control technique short of the police state and casual genocide. It is a rather controversial technique. A cap rate charter amendment was defeated in Boulder, Colorado, and the Boca Raton, Florida cap rate was found unconstitutional. Burrows warns that a valid cap rate program must be based on sound empirical evidence and subject to annual review. Moreover, he avers that cap rates have no ability to control sequencing because after developers get through the front door they will as soon bed down in the pantry as the parlor, constrained only by the ultimate force of market conditions.

The annual permit limitation is a rationing scheme that differs from the cap rate by allowing development only after given infrastructure and aesthetic requirements are met. Annual permit limitations go much further in addressing the problems of the pace and sequencing of growth. Burrows provides a worthwhile critique of the well-known example of the Petaluma plan, drawing on comments made to him by Professor Krasnoweicki.²⁹ Two deficiencies are apparent in the Petaluma plan. First, competition for development permission places too much emphasis on highly subjective criteria, with distribution of points for infrastructure on an "all or nothing" basis.³⁰ Second, evidence based on first-year allocations indicates that the Petaluma plan has been unable to redirect growth of multi-family housing into the relatively undeveloped westside sector.³¹ Burrows concludes his discussion of annual permit limitations by quoting Norman Williams: "[I]t is reasonable to assume that the rationing of building permits does not provide a satisfactory solution to this problem without a sequence dimension."³² In short, even the best annual permit limitation programs, standing alone, do little to control location of development.

29. P. 87 n.12; *Construction Indus. Assoc. of Sonoma County v. City of Petaluma*, 375 F. Supp. 574 (1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). Following the example of Petaluma, several other communities are considering permit limitations. Examples are El Dorado County, California (500 units per year); Escalon, California (75 units per year in a town of 3,000 people); and Davis, California (reduction to 115 units per year from 315 because of loss of revenues due to Proposition 13). 6 HOUS. & DEV. REP. (BNA) 525-26 (Oct. 16, 1978).

30. P. 88.

31. P. 89.

32. P. 90 (quoting N. WILLIAMS, *AMERICAN LAND PLANNING* 353 (1974)).

In his last chapter on techniques, Burrows identifies adequate public facilities programming (APF) as a growth management technique capable of directing, rather than retarding, growth.³³ Under this technique, development approval is conditioned upon a showing that the proposed project is consistent with certain service facility specifications such as water, roads, and schools. Variations on the same theme go by the names "phased growth" and "timing and sequence controls" (TASC). This technique merely seeks to avoid outbreaks of development in areas where public facilities are inadequate. It attempts to parallel new development with growth of infrastructure. Phased growth is not a new idea. Many examples are available from the 1950's.³⁴ The decision of greatest impact concerning the use of this technique is *Golden v. Ramapo*,³⁵ handed down by the New York Court of Appeals in 1972. In *Ramapo*, New York's highest court upheld the constitutionality of a TASC ordinance that required developers, in game show fashion, to obtain a total of fifteen "points" from five categories of public facilities prior to receiving permission to develop. The points were allocated on the basis of the quality of the facilities and their availability to the proposed project. The five selected categories were sewers, drainage, parks/recreation, roads, and firehouse.

The *Ramapo* decision was viewed by many practicing planners, planning school faculty members, and planning students as the planners' equivalent of the second coming.³⁶ Careful analysis of the *Ramapo* ordinance, coupled with the tempering wisdom of hindsight, however, has revealed many flaws. As Burrows carefully chronicles, *Ramapo* has fallen behind in its plan to provide the facilities necessary to accommodate growth. Moreover, provision of some of the required facilities is beyond local control, and the several "escape hatch" clauses in the ordinance which permit the developer to take the initiative in providing facilities, negate effective control over growth and sequencing.³⁷ Perhaps the fundamental flaw in the ordinance is the view that facilities must always precede

33. P. 93.

34. P. 95.

35. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1972). For a discussion of the *Ramapo* plan from the planner's perspective, see Emanuel, *Ramapo's Managed Growth Program*, 4 PLANNERS NOTEBOOK No. 5 (American Institute of Planners (1974)). See P. 104.

36. This is at least the most significant zoning case since *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). P. 104.

37. Pp. 105-08.

growth; that supply must come before demand.³⁸ This is a rather unrealistic view. Supply of and demand for public services are interactive, with demand characteristically preceding supply. To force the installation of adequate public facilities before development may be more than the local fisc can bear. Burrows concludes that the underlying problem is not simply a proper division between the public and private sectors of the burden of providing facilities, but rather the allocation of the burden among various levels of government.³⁹

Even though APF, TASC, and other ingredients found in the alphabet soup of facilities programming do not always suit the planner's palate, they conjure up pleasant memories of an old technique—capital improvement programming (CIP). CIP is nothing more than deciding what and where new public facilities will be provided during some future period.⁴⁰ By serving as an incentive, the facilities guide the pace and location of future development. Developers are encouraged to capture the positive economic externalities of a new school or public tennis courts by building close enough to make the facility accessible.

CIP is essential to the more sophisticated planning approaches, but is also available as an independent technique that need not be forced into the procrustean bed of local regulation. Instead, the local legislative authority need only design and adopt a capital budget program to promote its planning objectives. This process, unlike zoning, necessarily requires explicit consideration of what the community desires as its future spatial form. CIP is no panacea, but it works, is accepted, and forces local decisionmakers to consider comprehensive planning. The goal in designing local growth management systems is not to provide chimeras of control, but rather to force a continuing discussion of growth-related issues, to stimulate the creation of comprehensive plans for accommodating growth, and to provide the community with implementation powers. For the talented and sophisticated few, APF, TASC, and the like will work. But for most, renewed reliance on the traditional techniques of zoning, subdivision regulation, and capital improvement programming provides the best basis for management of local growth.

Conspicuously lacking in GROWTH MANAGEMENT is any sub-

38. P. 106.

39. P. 110.

40. The typical CIP planning period is two to six years.

stantial discussion of regional planning. One of the most important problems of growth management is the mitigation of accompanying exclusionary impact. The *NAACP v. Township of Mt. Laurel*⁴¹ decision and sound planning practice suggest the need for regional planning strategies. Our Balkanized system of local property taxation forces neighboring communities to compete for ratables to bolster the local fisc; however, environmental problems do not respect political boundaries. Now may be the time—with this unique melding of seemingly intractable social, fiscal, and environmental problems—for the development of true regional planning.

Burrows provides little guidance on such new approaches as regional planning, and ends with two chapters that are little more than curious postscripts. The penultimate chapter, "Legal Considerations," is an excellent overview of such critical legal problems as standing to challenge growth management regulations.⁴² The reader would receive a greater benefit from this legal analysis, however, if it came earlier in the book and was worked into the discussion of the various techniques. The final chapter is a four-page presentation of a conceptual approach for a growth management model. It offers some good advice, but is too general to be of much help. Perhaps more cannot be expected of a primer. The danger, however, is that some hapless planner will attempt to develop a local program on the basis of Burrows' one-page block diagram,⁴³ with the same results as the law student who tries to get by on headnotes alone. What is needed for such a major task is a definitive manual with check lists to assist communities in selecting and orchestrating techniques to manage growth. This is obviously beyond the scope of Burrows' work. *GROWTH MANAGEMENT* was intended to be, and is, an excellent primer for both the layman and the professional.

41. *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1976).

42. P. 115.

43. P. 133, Exhibit VII.