AREAS OF PRACTICE
Planning and Zoning
Growth Management Tools and Techniques

What is Growth Management?
Growth Management is the concept of controlling or limiting the rate, amount, type or direction of growth that occurs in a city or region. Cities have applied growth management techniques for a variety of reasons: growth was occurring too quickly for the city to adequately plan for it; growth was outpacing the financial ability of the jurisdiction to provide services; growth was occurring in locations or in patterns that were detrimental to the long term interests of the jurisdiction; desirable open space was being lost; or the residents simply felt that rapid growth was changing the character of their city and they wanted to delay that change as long as possible.

Cities have attempted a broad range of growth management techniques over the past 30 or so years, with varying degrees of success. Most of the methods have a variety of pros and cons associated with them, with the negatives generally involving unwanted or unexpected secondary effects. The following is a summary of the major forms of growth management concepts and tools that have been used.

Growth Control/Permit Limitations
Early concepts of growth management were usually termed “Growth Control.” In this case, cities set actual limits on the rate or amount of growth that they were willing to allow. That typically took the form of an annual cap on the number of residential permits they were willing to issue. Petaluma, California was the leader in this type of growth control in the early 1970’s, with a limitation of 500 building permits per year, as established by City ordinance. Developers sued and the case eventually went to the U.S. Supreme Court, which in a landmark ruling upheld the limitation. Boulder, Colorado has pursued a similar approach to limiting building permits for the past 30-years.

The major problem with simple limits on permits is that this approach doesn’t recognize the complex causes of growth demand, it doesn’t by itself improve the pattern or form of growth, it may worsen sprawl, and it leads to higher cost of housing within the growth controlled area. Boulder in particular has gone through a long series of adjustments to its Growth Control program to try to address those issues.

Urban Growth Boundaries
A currently popular tool is to create an urban growth boundary around a region and disallow urban density development outside of that boundary. Portland is famous for its urban growth boundary, but Washington State has a similar planning requirement for its cities. Growth boundaries are established based on the calculated demand for growth over a given period of time, such as 10 or 20 years. They can be expanded periodically as more land is needed, through a defined public process.

The benefits of growth boundaries are that they reduce the premature consumption of cheap land on the urban fringe, they boost the value of land in older neighborhoods, they result in denser and more efficient development patterns, and they allow flexibility and growth through periodic adjustments.
Cities enforce concurrency either through policies or through actual ordinances. In the case of second tier approaches, it can appear to residents that the city is not actually managing growth due to the need to allow development ahead of some services. Capital programming can be very difficult and politically oriented, and it is impossible to always obtain agreement from other service agencies. As a result, concurrency is usually achieved in part but seldom in whole.

Other Tools
These are the basic forms of Growth Management, but there are a variety of other tools that have elements of growth management about them:

Jobs/Housing Balance
A common problem in large urban areas is a regional imbalance in the distribution of jobs and housing. Large central cities often have a majority of the jobs, while smaller outlying communities get an increasing share of the housing. This leads to transportation and air quality problems, inequities in tax base, and affordability problems.

To combat this, state or regional planning agencies often attempt to require jurisdictions to plan for a more desirable balance of housing to jobs. Acceptable rations vary by jurisdiction, but a ratio of 1.35 jobs per housing unit is often viewed as acceptable. To achieve this, they may ask central cities to zone less land for commercial and industrial development and zone more land for residential, and ask outlying cities go the opposite direction. Some cities, such as San Francisco, have required that all non-residential developments above a given size include a residential component.

In areas where there is a strong state planning act, cities can be required to demonstrate efforts to create a jobs/housing balance through their comprehensive plans and land use maps. Still, jobs/housing balance is typically policy-based rather than ordinance-based which means that implementation is usually voluntary rather than mandatory.

Inclusionary Zoning
Directly related to jobs/housing balance is affordable housing, or the lack thereof. When developable land is restricted, land values get very high and developers find the highest profit margins to be on upper end housing. Consequently, affordable housing gets pushed to the outer limits of the region where land costs are lowest. That has social, economic and transportation costs for every city in the region.

To address affordable housing needs, cities often adopt requirements for affordable housing as a portion or percentage of all new housing developments. That typically results in a combination of allowance for higher densities and a requirement for subsidy by the developer. This has the effect of distributing affordable housing more equitably throughout a city, raising overall densities and minimizing sprawl.

Cities with restrictive growth control ordinances often end up with stringent inclusionary zoning ordinances in order to maintain any stock of affordable housing or housing diversity.
On the negative side, they are frequently accused of driving up housing costs, but that fact is debatable. Growth boundaries require the county to agree to limit growth outside of the boundary and other nearby cities to have similar requirements, otherwise they just push development further out.

**Public Greenbelts as Urban Boundaries**

A variation on the urban growth boundary concept is that of public greenbelts. In this case, city residents agree to tax themselves to buy the land on the perimeter of the city in order to put it into public ownership and prevent development. This is part of the Boulder, Colorado approach. They combined the process of limiting building permits with public acquisition of land around the outer perimeter of the City.

The problem with this method is that it makes it difficult or impossible to expand growth boundaries to meet future needs, it increases housing costs inside the boundary, and unless other cities in the region adopt similar tools, it just pushes growth outside the city and leads to sprawl on the other side of the greenbelt.

**Concurrency Requirements**

The most common form of growth management is service “concurrency.” In this method, cities adopt level of service standards for some or all the basic urban services that are provided and then allow development permits only when it is demonstrated that those service levels will be met. This is a simple concept but can be very complicated to administer.

Cities have to begin by looking at the services they or others provide and establish acceptable but reasonable standards for each of them:

- Streets – Volume to capacity ratios by type of street
- Fire – Response times
- Police – Officers per 1,000 population
- Parks – Acreage per thousand population/service radiiuses
- Sewer – Conveyance and treatment capacity
- Water – Availability/pressure, etc.
- Schools – Capacity/service radius

For city-provided services, it requires facility planning based on anticipated land use patterns and capital improvement programming/budgeting based on anticipated growth rates. For non-city provided services, it requires close coordination with the actual service providers so that they do the same planning and programming in line with city desires.

One major problem is that the revenue that is generated to pay for services often comes in only after development is constructed and impact fees or taxes are collected. To deal with this, cities have adopted “tiers” of concurrency. That means that basic services must be available at the time of construction (first tier), but full services or higher rates of service must be demonstrated to be funded and programmed to occur within five years of development (second tier).
Clustering
When preservation of open space is the primary growth management issue, cities can adopt ordinances requiring that new development be designed to preserve open space. That typically means clustering development at higher densities on a portion of a property and leaving the remainder of the site undeveloped. The conditional use permit process is usually used to allow cluster development.

Cluster development is a fairly conventional zoning tool and is only indirectly related to growth management.

Transfer of Development Rights
A more radical form of open space preservation can occur through transfer of development rights. In this case, a jurisdiction defines the boundaries of the area it wants to protect from development and declares it a sending area. Another area where jurisdiction wants to promote development is declared a receiving area. Developers in the receiving area must then buy development credits from the landowners in the sending area before they can build on their property.

TDR programs are great in concept, but are seldom used successfully because of the complexity and cost of running such a program. You must ensure that the receiving area is large enough to accommodate the credits that are available in the sending area, there has to actual demand to buy those credits in the receiving area, property owners have to agree that more development is desired in the receiving area, property owners in the sending area have to believe that they can sell their development rights for the amount that they could make through actual development, and there usually needs to be a public bank to buy credits when a sending area landowners need to sell them and then hang onto them until a receiving area developer needs to buy them. Few jurisdictions have managed to put all those things together.

Incentives - Density Bonuses/Fee Waivers/Expedited Processing
Sometimes cities can achieve certain types of growth management through incentives. In this case, cities establish priority growth areas, or priority development types, and then grant developers incentives for those who will meet those priorities. Incentives can include higher density, waiver of application fees, expedited processing or any other method a developer might find helpful.

Building Moratoriums
A strictly temporary tool is a building moratorium. In this case, cities need to find that there is some urgent problem related to ongoing development that can be corrected with a new ordinance or plan, but they need time to draft it and put it into effect. State planning laws typically allow cities to declare urgency and stop all permitting until the new regulations can be prepared. Moratoriums are usually allowed for 6-months at a time, but have also been used for much longer periods, as in Lake Tahoe. The ability to extend moratoriums varies from state to state.
Capital Programming and Budgeting
The Concurrency section has basically covered this, but it probably bears mentioning that even without a concurrency ordinance, how and where a city plans for services can definitely control the direction and amount of development that occurs. If a city refuses to either plan or fund roads or sewers in a particular area, it makes it less likely that area will develop. The adage that roads and sewer drive development is very true.

Summary
Growth control or management programs have great overlap with traditional land use planning and zoning methodologies. The primary distinction is that growth management deals more directly with the rate of growth while zoning and planning deals more directly with the type and location of growth.

The fundamental issue with growth management is that there may be many secondary impacts associated it. Local growth management programs may exacerbate suburban sprawl, worsen jobs-housing balances, reduce affordable housing and worsen traffic congestion. Consequently, growth management is best implemented on a regional level rather than on a strictly local level.

Of the various growth management strategies, the “concurrency” approach is probably the least problematic from a secondary impact perspective. The urban growth boundary approach, when adopted regionally, is probably the most successful in terms of efficiently using land and changing patterns of growth.
what is growth management?

The concept of controlling:
- the rate;
- the amount;
- the type or
- direction of growth

Then one day, the twain met.
why growth management?

- Growth was occurring too quickly to plan
- Growth was outpacing ability to provide services
- Growth was occurring in the wrong locations or patterns
- Growth was converting desirable open space
- Growth was changing the character of place

forms of growth management

Direct tools
- State level control of land
- Growth control/permit limitations/phased growth
- Urban growth boundaries
- Urban services area
- Greenbelt
- Building moratoriums
- Concurrency

Indirect tools
- Jobs/housing balance
- Inclusionary Zoning
- Transfer of development rights (TDR)
- Incentives/density bonus/fee waivers/expedited permitting
- CIP
- Cluster Development
### State Level Growth Management

- Hawaii (1960)
- Florida (1972 and 1985)
- Oregon (1973)
- Washington (1991)
- Maryland (1997)

### Growth Control/Permit Limitations/Phased Growth Programs

**Examples**
- Ramapo (point system)
- Petaluma (caps)
- Boulder (% growth)

**Issues**
- Arbitrary
- Cost of housing
- Leap frog development
- Constant monitoring
urban growth boundaries and urban service areas

Urban Growth Boundary (UGB)

An urban growth boundary is a pre-determined regional boundary set to control urbanization by designating the inside area for high density urban development, the outside area for low density rural development.

Purposes:
• Controls growth
• Increase density inside the UGB
• Preserve farmland and rural areas
• Prevent sprawl
UGB - Oregon example

- Boundary delineated by cities or Portland METRO
- Approved by the State
  - Determined by 20 year population growth
  - Density at no less than 10 dwelling units per net acre inside Portland; and 6-8 in outlying suburban areas.
- Boundary changed by appeal to State
  1/year based on population changes and land designation priority ('Urban reserve', 'Non-resource land', 'Marginal land', Farm or Forest land).
- Boundary review mandatory every 20 years and every 5 years in Portland Metro.
UGB - Washington State example

- Boundary is delineated by city working with county (or county determines)
  - Determined by 20 year population growth
  - Density at no less than 4 dwelling units per net acre
- Boundary changed by appeal to county 1/year based on population changes.
- Boundary review mandatory every 10 years.

urban service areas (USA)

An urban service area are boundaries set to identify area where urban services will or will not be extended; generally more flexible than UGB.

**Purposes:**

- Control the rate of growth
- Efficient and cost effective service delivery
- Control the rate of farmland and rural areas conversion
- Provides an orderly expansion of growth; avoids leap frog development.
ISSUES with UGB’s
• Planning capacity
• Needs regional cooperation
• Oversight capacity and enforcement
• Not always politically feasible

ISSUES with USA’s
• Planning capacity
• Needs regional cooperation
• Developer and political pressure to expand early
• Lack of regulation outside the area limits

Idaho Area of City Impact (ACI)
ID Code §67-6526
• Provides the ability for cities to plan outside their jurisdiction.
• Designation is usually but not always first step to annexation.
• Map designation is negotiated.
• Ordinance adopted to determine what planning tools apply is negotiated.
other direct tools

Greenbelts
- Public land purchase around the city
- Boulder example

Building Moratoriums
- Temporary
- Need time to address urgent issue
- Limited in application (usually)

Concurrency

indirect growth management tools

Jobs/housing balance
- Residential and non-residential land use
- Usually voluntary

Inclusionary zoning
- Affordable housing as % of new housing

Incentives/density bonus/fee waiver/expedited processing
- Establish priority area
- Incentivize development in priority area
Functional Areas of Practice – Suggested Reading List
Lesson 2 – Comprehensive Planning & Growth Management

Section 1: Comprehensive Planning
APA PAS Reports
Planning and Urban Design Standards
• “Comprehensive Plans”; pp. 6-9
Local Planning: Contemporary Principles & Practice
• “Comprehensive Plans”; pp. 218-221
  o “Content of comprehensive plans”; pp. 218-219
  o “Essential qualities of a comprehensive plan”; p. 218
  o “Adapting the plan to the community”; pp. 219-220
  o “New approaches”; pp. 220-221

Section 2: Growth Management
APA PAS Reports
• PAS 538 - Project Rating/Recognition Programs (Smart Growth). 2006.
APA PAS Quick Notes
• QN35 – Development Impact Fees. 2011
• QN36 – The Farmland Protection Toolbox 2012
Planning and Urban Design Standards
• “Growth Management”; pp. 604-615
  o “Adequate Public Facilities & Concurrency Management”; pp. 604-605
  o “Development Impact Fees”; pp. 609-610
  o “Smart Growth Audits”; pp. 611-612
  o “Transfer and Purchase of Development Rights”; p. 610
  o “Transportation & Land Use Connection”; pp. 613-615
  o “Urban Growth Areas”; pp. 606-607
Local Planning: Contemporary Principles & Practice
• “Agricultural land preservation & growth management”; pp. 314-315
• “From Zoning to Smart Growth”; pp. 298-307
  o “Growth management approaches”; pp. 299-304
  o “Characteristics of selected growth management programs”; pp. 300-301
  o “Smart Growth”; pp. 304-307
• “Smart Growth in brief”; pp. 117-122
JAPA

APA Links
APA Policy Guides
• Agricultural Land Preservation
https://www.planning.org/policy/guides/adopted/agricultural.htm

- Impact Fees
  https://www.planning.org/policy/guides/adopted/impactfees.htm
- Smart Growth
  https://www.planning.org/policy/guides/adopted/smartgrowth.htm

Growth Management Tools
  http://www.planning.org/divisions/planningandlaw/propertytopics.htm

Growing Smart
  http://www.planning.org/growingsmart/

Smart Growth
  http://www.planning.org/theneewplanner/2011/spr/smartgrowth.htm

Section 3 – Zoning and Land Development Administration

APA Zoning Practice
- 2009-11: Distinguishing Between Detrimental and Benign Nonconformities
- 2012-6: Avoiding Idiotic Variances
- 2012-11: Beyond the Density Standard
- 2013-5: Avoiding Common Form-Based Code Mistakes – Part 1
- 2013-6: Avoiding Common Form-Based Code Mistakes – Part 2
- 2013-7: Putting Sustainable Zoning Into Practice

APA PAS Quick Notes
- QN1 – Form-based Zoning. 2004
- QN6 – Zoning for Mixed Uses. 2006
- QN10 – Site Plan Review. 2007
- QN22 – Understanding Planned Unit Development. 2009
- QN38 – Zoning Ordinance Variances. 2012
- QN41 – Conditional Uses. 2012

Planning and Urban Design Standards
- “Planned Unit Development”; pp. 599-600
- “Site Plan Review”; pp. 652-654
- “Subdivision Regulation”; pp. 597-598
- “Zoning Regulation”; pp. 593-596
- “Zoning Regulations – Innovations”; pp. 601-603

Local Planning: Contemporary Principles & Practice
- “Zoning Codes: Form & Function”; pp. 287-291
  - “Planned Unit Developments”; p. 288
  - “Form-Based Codes”; pp. 288-289
  - “Performance zoning”; p. 289

APA Links
Flexible Zoning Techniques
  http://www.planning.org/divisions/planningandlaw/propertytopics.htm

Miami 21 Form-based Code

Hybrid Code
  http://www.planning.org/planning/2012/feb-goinghybrid.htm
NON-APA Links (Subject to Change)
- Transect Zoning
  http://www.transect.org/transect.html
- What's in a Form-Based Code
  http://www.formbasedcodes.org/what-are-form-based-codes
- Miami 21 Form-based Code

Section 4: Educational, Institutional and Military Facilities

APA PAS Reports
- PAS 562 - Planners and Planes: Airports and Land-Use Compatibility. 2010

APA Zoning Practice
- 2011-5: Land-Use Compatibility near Military Bases: A Planner’s Perspective

Planning and Urban Design Standards
- “Elementary, Middle and High Schools”; pp. 203-206
- "Industrial Parks"; pp. 440-441
- "Military Airport Safety Zones"; p. 290
- "Military Base Closure & Conversion"; pp. 631-632
- "Medical Facilities"; pp. 214-218
- "Office Parks"; pp. 442-443

Local Planning: Contemporary Principles & Practice
- “The university and the city”; p. 206-209

JAPA
- Noreen C. McDonald (2010); School Siting, Journal of the American Planning Association, 76(2): 184-198 (discusses Clarence Perry’s “Neighborhood Unit”)

APA Links
Airports in the Region
  http://www.planning.org/resources/ontheradar/airports/

Section 5: Urban Design

APA Zoning Practice
- 2006-4: Zoning for Universal Design and Visitability
- 2009-7: Regulating the Architectural Character of a Community
- 2011-3: Creating Design Guidelines That Work: Empowering the Local Planner
- 2011-11: Controlling Strip Development with Design Guidelines

APA PAS Quick Notes
- QN28 – Universal Design. 2010
- QN42 – Community CPTED. 2013

Planning and Urban Design Standards
- “Design Considerations”; pp. 460-500
  ▪ “Safety”; pp. 472-477
    ▪ CPTED; p. 472
  ▪ “Scale and Density”; pp. 468-471
  ▪ “Streetscape”; pp. 491-500
  ▪ “Urban Analysis”; pp. 463-467
  ▪ “Walkability”; pp. 478-480
  ▪ “Wayfinding Systems”; pp. 488-490
- “Design Guidelines”; pp. 655-658
- “Urban Design Plans”; pp. 10-13

**Local Planning: Contemporary Principles & Practice**
- “Design review”; pp. 319-325
- “Pedestrian and bicycle planning”; pp. 366-373
- “Place making” (Walkability); pp. 122-127

**APA Links**
**Where Does Design Fit in?**

**Urban Designers Issue a Call to Arms**
# Using a Performance-Based Approach to Development Controls

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Using a Performance-Based Approach to Development Controls

I. INTRODUCTION

A. Problem statement

- Does your community have a zoning ordinance with scores of zoning districts, listing hundreds of permitted uses and dozens of standards but with few meaningful distinctions? If so, see Section II and Section IV. B.

- Does your community have vulnerable environmental features that are being disrupted by development despite the community’s detailed zoning and land development regulations? If so, see Section IV. A.

- Do you notice that development in your community has become stereotyped and lacks variety? If so, see Section I.

- Do development approvals in your community require dozens of zoning conditions, special permits, variances, and exceptions to its detailed zoning and land development rules? If so, see Section II.

- Are public meetings for rezoning approvals needlessly prolonged by long debates about relatively insignificant details? If so, see Section III.C.2.

- Are you concerned about how your community can implement its goals for providing greenspace, affordable housing, mixed-use development, or transit-oriented development? If so, see Section III.B.

If you answered “yes” to one or more of these questions, then read on—we may have good news for you!

B. What is the performance-based approach to development controls?

The performance-based approach is a flexible alternative to conventional zoning and land development regulations. Performance measures focus on results, not detailed uses and specifications for development. The performance-based approach requires developers to keep the impacts of development within acceptable parameters but allows the developer flexibility in how to design uses on the property to meet the end results desired by the community.

Conventional zoning groups all development into certain districts and then lays out specific, detailed prescriptions for development in each zoning district. It makes long lists of allowed uses in each zone and fixes minimum dimensions for the placement, height, and configuration of buildings and site improvements. In the end, there are so
Using a Performance-Based Approach to Development Controls

many rules that it is confusing, and there are few meaningful distinctions between zones. This issue is discussed further in Section II.

By contrast, the performance-based approach defines the desired end result and leaves the details to the developer. It presents the public goal to be met, such as protecting water quality or ensuring adequate infrastructure, sets a measurable threshold or standard, and then allows the developer flexibility on how the standard is met on his property.

C. What is the role of the performance-based approach to development controls in achieving smart growth?

Performance-based development controls provide useful and effective tools for achieving many smart growth objectives. According to Douglas Porter, performance standards can be employed in flexible zoning systems that:

• promote orderly development by ensuring appropriate locations, desirable densities, compatible relationships, and a proper balance of uses;
• encourage patterns and types of development that minimizes infrastructure and other development costs;
• improve administration of the development approval process and insulate it from political pressures;
• provide for land use types and locations responsive to market needs without excluding significant uses;
• stimulate high-quality site and building design; and
• preserve environmental resources. (Porter et al., 1988)

Performance-based development controls started in the early 1950s as a product of the National Industrial Zoning Committee. The committee espoused industrial performance standards designed to protect adjacent communities from the effects of smoke, noise, vibration, odor, and glare emitted by heavy manufacturing operations. New technology, materials, and building techniques made these standards more efficient than prescriptive standards that governed the minimum distance the factory had to be located from adjacent residences. (O’Harrow, 1951)

Once industrial performance standards became commonly accepted, other applications of performance-based development controls became popular in the 1970s. This interest in performance measurement arose from the emergence of the environmental movement in America and public concerns over the effects of all types of development on the environment, especially degradation of water quality and habitat. (See Ian McHarg’s popular text, Design with Nature.)

One of the first applications of performance standards outside industrial parks is in the management of environmentally sensitive areas. Performance standards can be designed to mitigate the environmental impacts of development through:
Using a Performance-Based Approach to Development Controls

- the preservation of open space in developing areas;
- management of site areas that are cleared, disturbed, or graded for development;
- the management of impervious surface in watersheds and other environmentally sensitive areas;
- the preservation of tree canopy on a site in the development process;
- limiting the encroachment of development into floodplain, wetlands, steep slopes, and sensitive habitat.

Performance-based development controls often comprise the keystone of successful land regulation systems in major metropolitan areas around the country. These growth management systems are designed to explicitly manage the timing, intensity, and location of development. Performance measures have been devised to build into regulations a direct relationship between development and its impact on public facilities, including roads, drainage facilities, fire protection, water supply, wastewater treatment, and parks.

Performance standards are useful in expanding the role of traditional land use and zoning tools to create better quality urban places. Many communities include standards for development density or Floor Area Ratios (FAR), either as a substitute for regulating types of commercial uses or in conjunction with specific land uses or zoning districts. Some notable zoning ordinances, such as that of the City of New York, combine performance measures with bonus density incentives to encourage development to include public amenities such as plazas or open space. For example, in the Central Business District, the developer of a new building would receive a 10 percent increase in the maximum permitted FAR if the building provided a public plaza that met minimum standards for its size, location, and accommodations.

Figure 2: Floor Area Ratio
Both of these building masses represent the same Floor Area Ratio (FAR):
Using a Performance-Based Approach to Development Controls

More sophisticated applications of performance-based development standards combine multiple factors into a formula and award points for the degree to which the land under development is serviced by existing or planned public facilities. A well-known example is the Zoning Ordinance of the City of Ramapo, New Jersey. The Ramapo timed-growth ordinance requires each development to earn a minimum of 15 points before it is awarded a development permit. Points are earned based on the availability or provision of various levels of public facilities as shown in Figure 2. Developers seeking permits in locations that are not accessible to existing public services face the dilemma of waiting until the local government provides services to the land in question, or providing the public services at their own expense.

Figure 3: Point System for City of Ramapo Timed-Growth Ordinance

<table>
<thead>
<tr>
<th>Facility</th>
<th>Standard</th>
<th>Points</th>
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<tr>
<td>Sewer</td>
<td>System Availability:</td>
<td></td>
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<tr>
<td></td>
<td>Public sewers available</td>
<td>5</td>
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<tr>
<td></td>
<td>Package sewer plant</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>County-approved septic systems</td>
<td>3</td>
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<tr>
<td></td>
<td>All others</td>
<td>0</td>
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<tr>
<td>Drainage</td>
<td>Percent Required Drainage Capacity Available</td>
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<tr>
<td></td>
<td>100% or more</td>
<td>5</td>
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<td></td>
<td>90% to 99.9%</td>
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<td>80% to 89.9%</td>
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<td>50% to 64.9%</td>
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<td>Less than 50%</td>
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<td>Improved Public Park or</td>
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<td>Recreation Facility</td>
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<td></td>
<td>Direct access</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Within ½ mile</td>
<td>3</td>
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<tr>
<td></td>
<td>Within 1 mile</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Further than 1 mile</td>
<td>0</td>
</tr>
<tr>
<td>Accessibility to Existing</td>
<td>Distance to Major, Secondary, or Collector</td>
<td></td>
</tr>
<tr>
<td>Public Streets</td>
<td>Road with Curb and Gutter</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Direct access</td>
<td>5</td>
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<td>Within ½ mile</td>
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<td></td>
<td>Within 1 mile</td>
<td>1</td>
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<tr>
<td></td>
<td>Further than 1 mile</td>
<td>0</td>
</tr>
<tr>
<td>Fire Station</td>
<td>Distance to Nearest Fire Station</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Within 1 mile</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Within 2 mile</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Further than 2 mile</td>
<td>0</td>
</tr>
</tbody>
</table>

Using a Performance-Based Approach to Development Controls

The use of flexible, density-based performance standards can also be applied to residential developments. For instance, the City of Orlando, Florida, allows average density zoning for residential development. Instead of specifying minimum lot sizes and setbacks, they allow developers to arrange the lots and houses in flexible ways as long as the average density does not exceed a specified maximum. That way the developer can arrange lots and house locations flexibly and provide a wider variety of housing types. It also allows the subdivision of lots to more closely follow the natural terrain. Using density zoning, a developer can cluster the homes on the best sites and set aside recreation areas and open space where there is prime vegetation, floodplain, wetlands, sensitive habitat, or steep slopes. The same number of housing units result as in a conventional subdivision, but there is less disturbance of the land and destruction of natural habitat. The developer also gains financially because clustered lots can lower site development cost. Direct cost savings come from less grading, smaller drainage structures, and shorter lengths of street and utility lines. This type of development may also be achieved through what is known as conservation subdivision design. (See Smart Growth Tool Kit on this topic.)

Similar arrangements that combine average density standards with bonus density increases are used elsewhere as an inducement for developers to provide affordable housing (Montgomery County Maryland), to build direct entrances to rapid transit facilities (Portland, Oregon), to provide public plazas (New York and Seattle) and to construct mixed-use development (Orlando, Florida). This use of performance measures is referred to as “incentive zoning.”

Recently, applications of performance standards and incentive zoning have been developed to encourage more attractive, efficient, and compatible arrangements of buildings, facades, landscaping, and public circulation along urban streets. The advantage of this performance-based approach is that it provides more design flexibility and encourages developers to be more innovative. It creates a “win-win” regulatory framework that controls site impacts, improves aesthetics and amenities, and allows for innovations such as mixed-use development. In the words of Douglas Porter,

“Theoretically, in a regulatory system based solely on performance standards, any use could locate adjacent to any other use, provided that it could satisfy the criteria and standards contained in the ordinance.” (Porter et al., 1988)

II. WHAT ARE THE ALTERNATIVES TO PERFORMANCE-BASED DEVELOPMENT CONTROLS?

Alternative #1: Conventional zoning
Using a Performance-Based Approach to Development Controls

Conventional, prescriptive forms of zoning and subdivision regulations have been the “stock and trade” of local government land regulations since the Standard Enabling Act in the 1920s provided the basis for mass-produced zoning and subdivision ordinances. Local governments had relatively untrained staff and volunteer Planning Commissioners who relied on the formulaic basis of ordering all subdivisions to be made exactly the same with rules that were easy to understand and administer, such as:

**Figure 4: Example of Prescriptive Zoning Standards**

<table>
<thead>
<tr>
<th><strong>R-1</strong></th>
<th><strong>Single-Family Residential District</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Permitted uses</td>
<td>Single family detached residences; all other principal uses prohibited.</td>
</tr>
<tr>
<td>Minimum lot size</td>
<td>1 acre</td>
</tr>
<tr>
<td>Minimum setbacks</td>
<td>Front yard – 40 feet; Side yard – 20 feet; Rear yard – 40 feet</td>
</tr>
<tr>
<td>Maximum building height</td>
<td>35 feet</td>
</tr>
<tr>
<td>Minimum heated floor space</td>
<td>1,400 square feet</td>
</tr>
</tbody>
</table>

However, today’s community leaders have begun to question the end products of prescriptive land use controls. There has been increasing public discourse about the role of zoning in the dissolution of central cities, spread of large-lot subdivisions, monotonous architecture, strip commercial development in suburbs, and the dislocation of daily activities into separate sectors of the metropolitan areas where most of us live. There are at least seven, oft-repeated shortcomings of prescriptive standards used in conventional zoning and subdivision regulations:

1. *Conventional zoning makes residents captive to automobile-dependent lifestyles.* It legislates that land be divided into districts of homogeneous uses to separate “incompatible uses” as far as possible in order to uphold property values. The unintended consequence is to spread land uses out so thinly that residents must “burn a quart of gasoline to buy a gallon of milk” (Crockett, 1996).

2. *While zoning is intended to be static, the underlying demand for the use of land is dynamic.* Conventional zoning is based on following a long-range, end-state Master Plan. However, this is an ill-conceived virtue in the modern world in which we live. Seldom does a community truly share a future vision of the community defined now in sharp detail and kept sacrosanct over time. The land development market is in constant flux with changes in economic cycles, technology, and environmental standards. At the same time, the value of any given parcel is affected by the development activity of both the public and private realms. New roads are built, water and sewer systems are extended, new schools are built, development and redevelopment occurs on adjacent parcels. This makes an ever-changing context for the “highest and best use” of property that is too complex to predict or preserve over the long run.
Using a Performance-Based Approach to Development Controls

3. Conventional zoning practice fails to achieve stability and predictability. If zoning was truly in conformity to a comprehensive master plan, then once a zoning ordinance and map were adopted, there would be little basis or need for changes. In fact, the adoption of the conventional zoning ordinance starts a process of countless changes in the rules. Developers purchase property speculatively and then jockey for special exceptions, variances, and rezoning approval to more intense districts to capitalize on the windfall conferred by through the noblesse oblige of the local Planning Commission (Babcock, 1966).

4. Prescriptive standards used in conventional zoning and subdivision regulations cannot ensure high-quality development. At the scale of the suburban landscape, prescriptive zoning standards dictate sprawl. The rules permit subdivisions with wide, featureless streets; sterile expanses of parking lots; and monotonous lines of predetermined development patterns.

At the scale of the individual house, zoning mandates repetitious floor plans with endless sets of garage doors lining the streets. This motivates the Planning Commission to condone intentional underzoning of land in order to “bring the developer to the table.” By requiring a developer to seek rezoning, the Planning Commission gains leverage to negotiate special zoning conditions imposing ad hoc design solutions one lot at a time. Such a system spawns unpredictable, and often capricious, zoning administration.

5. Conventional zoning is based on exclusion. In less than 40 years from its inception, zoning moved from exclusion of funeral parlors, abattoirs, and heavy industry to the exclusion of the poor for the purpose of social and fiscal gains. In the early seventies, the practice of deliberate exclusion for financial advantage came to be known as “fiscal zoning.” This term refers to the ways in which many local jurisdictions use zoning to protect and improve their local tax base at the expense of neighboring jurisdictions.

6. Conventional zoning opens land development decisions to excessive levels of official discretion susceptible to public emotion rather than reason. To quote Babcock:

“Some hearings are more like the ancient circuses in the coliseum of Rome in the days of Nero except that the Christians then got a better deal from the lions than some applicants do from the planning commission. Now, instead of thumbs down or up the planning commissioner asks for show of hands. Too often decisions are not based on facts or master plans, but on pressures of bitterly complaining or approving neighborhood improvement associations.” (1966)

This gives rise to the next issue.

7. Conventional zoning often ignores regional interests. Many local zoning boards compete at the regional level to attract industry, which adds tax base, while at the same
time, increasing minimum lot sizes and home sizes in order to exclude apartments and “starter homes.” This forces these uses into other areas within the same metropolitan area with zoning ordinances that are less fortified. Many local governments continue to use exclusive zoning and excessive development requirements in a “protectionist” manner that undermines regional interests. This practice is difficult to prevent because of the “home rule” powers in most state constitutions.

**Alternative #2: Make more complex prescriptive standards as the area grows**

Like many other forms of government regulation, prescriptive standards used in conventional zoning and subdivision regulations ratchet upward to more detailed and complex rules over time. A series of rezonings and exceptions lead to new rules written to repair the breach and guard against further encroachment. Still more rules are needed to reverse the unintended consequences of last month’s zoning text amendment. The ever-upward spiral of rule making adds more detailed requirements and the division of zoning districts into more subdistricts. Each new zoning district is appointed with finer degrees of distinction between permitted and conditional uses, lot sizes, home sizes, setbacks, and other standards. The average citizen, and some Planning Commissioners, cannot find the reasoning behind many of these regulations or to explain the small distinctions between many similar zoning districts. At the extreme, there are zoning districts that apply to only one parcel or that have never been applied at all because the requirements are too onerous or unrealistic for property developers to want to use them.

Another example of administratively complex prescriptive regulations that can be replaced with more flexible, performance standards is the principle of transportation concurrency. This procedure has been used extensively in the state of Florida in the 1990s, where new developments were not permitted in areas where the addition of their traffic would cause the level of service on adjacent streets to exceed a specified level. This system gave rise to an increasingly complex administrative process (the concurrency management system) and actually pushed new development into exurban areas and stalled downtown redevelopment efforts in cities that had well-established infrastructure. An alternative is presented in Section IV.C.

Readers who are concerned about administrative complexity should also review Section III.C.3.

**III. THINGS TO CONSIDER BEFORE USING PERFORMANCE-BASED DEVELOPMENT CONTROLS**

**A. What you need first**
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Performance-based development controls are not for everyone. Before getting started on a performance-based approach, a local government should perform a self-assessment of the following factors that are based on the experience of communities that have successfully employed performance-based land development regulations:

1. Local conditions
   - The community needs to have land that it expects to develop or redevelop.
   - There should be clearly defined natural resources, community character, and/or public infrastructure capacity that the community wants to conserve in the course of development.

2. Motivating situations
   - There should be a general sense of public discontent with past zoning practices.
   - There should be a desire to use a scientific or rational basis for making development decisions, and not one that is susceptible to subjective decision making.
   - There should be the willingness to lessen the involvement of public officials in day-to-day planning administration.
   - There should be a desire to reduce the frequency of rezonings and variances.
   - There should be interest in making the approval process more understandable for the average citizen.

3. Planning experience
   - The performance-based approach to development controls relies more on a policy-driven comprehensive plan than on a detailed land use map. The community without explicit land use policies should be prepared to make a major update of the comprehensive plan before drafting performance standards in its zoning and land development ordinances.
   - The community must have a firm grasp of principles of managing land development.
   - The community should be ready to change its land control system to:
     - guide change around rational principles rather than predict its exact form;
     - mitigate the impacts of development on infrastructure systems, community character, and natural resources;
     - provide more flexible building design and placement to take advantage of special site conditions and preserve natural resources;
     - stimulate redevelopment that will allow more choices of uses and higher densities;
     - allow tradeoffs of density and other benefits in return for amenities and contributions to public needs, such as infrastructure and affordable housing
   - There must be an adequate database of information upon which to base performance standards.
4. People
   - The community should have:
     - some sophisticated developers in leadership positions who want to work cooperatively with local officials for more creative and innovative development patterns; and
     - capable professional staff, consultants, and public officials who are prepared to spend the necessary amount of time to draft and test workable standards, write clear provisions, and work with citizens and developers to achieve consensus.

B. Relationship to the Comprehensive Plan

The Standard State Zoning Enabling Act required that the local zoning ordinance “be made in accordance with a comprehensive plan” that gives property owners a sense of assurance of the continuity of the zoning scheme. However, most of the early comprehensive plans were simply maps of the “end state” master plan or “build out” map showing all the community’s land consumed by development. There was seldom any thoughtful explanation about why the community should develop in this way and how decisions about land use are to be made.

Courts have consistently stated that a policy-oriented comprehensive plan gives important legitimacy to zoning and other land use regulations that are supported by the policies of the plan. However, Comprehensive Plan policies should not set forth standards for community development in such vague or global terms that there is no clear way to achieve them and there are no clues to measuring their attainment. Ultimately, a well-crafted set of policies, together with maps and documentation in the comprehensive plan, provide the underlying logic for the performance standards that are incorporated in the zoning ordinances, so that the two documents—plan and ordinance—operate in tandem.

A comprehensive plan prepared in support of performance-based development controls should provide the following features:
   - clear, measurable policies;
   - a map indicating different areas of the communities where policies are tailored to specific situations;
   - documentation measuring the impacts of development on the community’s resources; and
   - community-defined thresholds indicating satisfactory and unsatisfactory levels of impacts for the various performance measures of development.
Using a Performance-Based Approach to Development Controls

A policy map is used to identify areas of the community that have different policy needs because they:
- are in different stages of development;
- need different levels of public services;
- serve different regional functions and activities;
- share different historic or cultural characteristics; and
- have different natural features and resources.

These map features are not the same as parcel-specific land use maps or maps of Euclidean zoning districts used in conventional comprehensive plans. They are maps of policy areas that more nearly follow boundaries of neighborhoods, natural resources, and public service areas. They show where specific policies are applied to guide development and public improvements within each of the community’s neighborhoods and activity centers. The map ensures that the nature and intensity of development respects each unique area of the community and performance standards are compatible with the needs of each. Areas, or character districts, may be known by descriptive terms, such as “corridors,” “developing activity centers,” “redevelopment areas,” “agricultural communities,” or “conservation areas.”

Different groups of policies would be identified for each of these areas. The kinds of policies needed in these areas should address issues such as:
- natural resources and environmental protection
- infrastructure needs
- intensity of land use
- land use mix
- development character; and
- land use compatibility.

Another vital link between the comprehensive plan and performance-based development controls is technical documentation. One of the most difficult steps of establishing performance-based development controls is deciding what standards to use and how to measure performance.
Using a Performance-Based Approach to Development Controls

**Figure 5: Measurable Policies in Comprehensive Plans**

<table>
<thead>
<tr>
<th>Comprehensive Plan element</th>
<th>Examples of vague policies</th>
<th>Measurable policies to support performance-based controls</th>
</tr>
</thead>
<tbody>
<tr>
<td>Economic Development</td>
<td>Promote adequate employment opportunities accessible to the labor force.</td>
<td>Within major activity centers, provide a 10% bonus density for mixed-use development that provides a ratio of jobs to housing units within the range of 1.0–1.6.</td>
</tr>
<tr>
<td>Natural and Historic Resources</td>
<td>Protect environmentally sensitive areas from intense development.</td>
<td>Within water supply intake watersheds, allow no more than 25% impervious cover.</td>
</tr>
<tr>
<td>Community Facilities</td>
<td>Limit development to levels that will not unduly contribute to traffic congestion.</td>
<td>Maintain level of service “D” at peak hours on designated state and federal routes.</td>
</tr>
<tr>
<td>Housing</td>
<td>Ensure that infill development is compatible with existing neighborhoods.</td>
<td>In the Redevelopment Area, infill development shall score at least 50 points for residential compatibility using measures illustrated in the Redevelopment Area Sector Plan.</td>
</tr>
<tr>
<td>Land Use</td>
<td>Address aircraft noise impacts in areas surrounding International Airport.</td>
<td>Sound attenuating construction (10 dbA) is required for all residential construction within the 65 Ldn noise contour shown in the International Airport Aircraft Noise Study, March, 2001.</td>
</tr>
</tbody>
</table>

The kinds of data most needed include measures of the impacts of different intensities of development on the environment—water quality, air quality, wetlands, erosion, loss of vegetation, and habitat—and the impacts of different intensities of development on public facility capacity—drainage, traffic, water, wastewater, solid waste, school enrollment, parks and recreation, and so forth.

Along with the cause and effect relationships, it is also necessary to present and justify the community’s threshold standards for each of these impacts. For instance:

- What level of water quality is acceptable?
- How much traffic is too much?
- How far should parks be from newly constructed neighborhoods?
- How does the neighborhood define compatibility for infill development?

Figure 5 provides comparative examples of policies for each element of the comprehensive plan. Note the difference between vague policies and policies that are written to support performance-based land use controls.
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C. Administrative and enforcement issues
   1. Legal Framework

   The constitutionality of zoning evolved from case law concerning the regulation of nuisances. Before zoning was ever used, courts upheld local actions to suspend industrial or agricultural practices that polluted the air, water, or land. These cases were based on the police power of local governments, held to be necessary to protect neighboring property owners from the harmful effects of pollution related to the use or development of land. The classic US Supreme Court case of *Village of Euclid v. Ambler Realty Company* marked the first time our highest court extended the case law on nuisances to local zoning ordinances where they are used to regulate the use and development of land in a way that promotes the public health, safety, morals, or general welfare.

   From a legal standpoint, performance-based development controls are directly related to the doctrine of nuisance regulations. To the extent that performance standards directly set the limits of acceptable environmental impacts of development, they are well positioned under the police power.

   Most legal authorities support the notion that the application of performance standards, rather than Euclidean zoning, is a parallel application of the nuisance doctrine to preserve open space, light, clean air, or excess environmental impact of development or use of land. According to Jaffe, over a 37-year period from 1957 to 1993, there were only 15 cases of litigation over performance-based measures, and all addressed industrial rather than residential or commercial performance standards (Jaffe, 1993).

   In addition, there have been legal tests of the performance-based approach to zoning based on the premise that zoning ordinances should apply uniform standards to property within the same zoning district. Courts were asked to determine whether performance standards violate the standard of uniformity implied by the Standard State Enabling Act. However, court rulings on this principle have held that proper use of performance zoning does not violate the intent of uniform treatment of land use within zoning districts (Porter et al., 1988).

   In theory, constitutional challenges to the application of land use controls turn on two fundamental issues: (1) due process in the execution of the law, as protected by the Fourteenth Amendment; and (2) the prohibition of taking of private property without just compensation under the Fifth and Fourteenth Amendments.

   **Due process**

   Performance-based standards are no more vulnerable than conventional zoning to constitutional challenges based on the principle of substantive due process. The reasoning for a legal challenge would be:
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1. whether performance-based controls advance the governmental purpose of promoting the public health, safety, morals, and general welfare; and
2. whether performance-based controls are appropriate means for accomplishing this purpose.

The latter aspect of due process is typically related to local ordinances or procedures that are prone to “arbitrary and capricious” administration or are written in a way that is unconstitutionally vague. A related due process claim could be that using performance-based measures amounts to the improper delegation of authority. This type of challenge would allege that the performance-based procedure has shifted decision making from public officials to administrators without providing a sufficient rationale or measurable standards.

Court decisions testing performance-based standards based on due process have generally supported this tool. The exception would be the cases of some local governments that employ vague or subjective standards. In Kenville Realty Corporation v. Board of Zoning Appeals, a New York court invalidated industrial standards that turned on vague terms like “offensive,” “obnoxious,” and “detrimental” without any measurable standards. However, a Pennsylvania court upheld a performance-based noise ordinance that employed actual sound measurements in decibels. However, as technology continues to change measurement of scientific phenomena, a local government who adopts scientifically based standards has a responsibility to keep up with current scientific research about the impacts of land uses and the related health effects of noise, vibration, water quality, air quality, or any other phenomena that it regulates with performance measures.

Performance-based standards may become more vulnerable to a due process challenge when they leave scientific applications and enter the realm of aesthetics. Architectural controls that were challenged fell into two categories. One sought to ensure that infill development be compatible with existing architectural styles. The other type was aimed at extensive new subdivisions, in an effort to prohibit monotony in external appearance. The key to surviving this type of legal challenge is to replace vague terms like “shall be harmonious with,” or “will not adversely affect” or “will be compatible with,” with more specific criteria. It is good practice to write concise and explicit descriptions of the acceptable materials, colors, grade lines, or cornice lines, and so forth, to demonstrate that these are the community’s norms drawn from history or in actual practice.

Finally, a potential line of attack of performance-based development controls under the US Constitution follows the “takings” doctrine. The most prevalent type of takings claim is that the application of the regulation to a specific property amounts to a taking of all reasonable use by the property owner. Nonetheless, according to Porter (1988), performance-based controls that are based on properly documented, objective standards are on superior legal ground to conventional Euclidean zoning and prescriptive subdivision regulations: “The nexus or essential link between the mitigating measure and
Using a Performance-Based Approach to Development Controls

the development impact must be established when the performance standards are initially designed and enacted, and therefore it is virtually woven into the very fabric of the performance criteria themselves” (Porter, 1988). In addition, most performance-based standards allow property owners flexibility in how to meet the regulations.

An exception might be a performance-based regulatory system that contained so many conflicting standards that all standards could not be met simultaneously or one that was too strict in environmental standards. For instance, one form of performance-based environmental controls bases a developers’ yield on site-capacity calculations applied to net buildable area, strictly forbids subdivision or disturbance of any floodplain, wetland, and steep slopes and requires extensive riparian buffers. There may be some parcels of land that are so covered in these characteristics that, upon applying these standards there is no developable lot area remaining, thus resulting in a taking challenge. While performance-based controls may heighten the risk, the same types of outcomes have previously occurred in jurisdictions that applied conventional prescriptive controls.

A fair question to ask at this point would be, “If performance standards are legal, and so much more efficient than conventional prescriptive regulations, then why doesn’t everyone use them?” Some of the answers have to do with the track record of use of performance-based controls over the past 20 years, based on political concerns, public acceptability, administrative complexity, and cost.

2. Political Concerns and Public Acceptability

The Euclidean zoning approach is a time-honored institution that is familiar to its many stakeholders—local residents, homeowner associations, property owners, homebuilders, developers, professional planners, attorneys, judges, Planning Commissioners, and local elected officials. Even when they criticize the results of zoning, they have acted together to preserve its basic tenets because they have learned its idiosyncrasies and have learned how to play the game (Babcock, 1966).

Zoning is also an arena where local officials have learned to exercise public discretion, autonomy, political power, and control that they consider to be very important. In the arena of public hearings for rezoning and site plan review, this control is played out one parcel at a time. Although the results are not always predictable, the decision-making process is visible, explicit, and public.

To many local stakeholders, performance zoning undermines the public process of negotiating individual land-development permits. In the performance-based approach, the big decisions are made “up front” in deciding on the policies of the Comprehensive Plan and setting up the standards and measurements of the performance-based ordinance. The developer has new options and discretion to be innovative due to the flexibility of the performance-based system. However, to the average resident, the results for a specific
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property seem unpredictable. The performance-based approach seems to replace the elected officials’ tight control through rezoning approvals with a new system that is supposed to be “self-executing,” subject only to the review by professional staff using technical information as the primary means to determine if the permit will be granted.

The result is that before using performance-based development controls, a local government needs to be prepared to ask and answer at least five questions that will be posed by the stakeholders in the process:

1. Why use performance-based controls?
2. Who makes the rules?
3. What rules should we be flexible about?
4. How are the rules applied?
5. Who wins and who loses?

The answers to these questions will give policy makers an important indication of the public acceptability of the performance-based approach in your community. Based on its history and values, each community will perceive the answers to these questions differently.

Why use performance-based controls? According to the most extensive published review of the applications of performance-based development controls,

“Every one of the communities studied adopted flexible zoning systems with the intent to simplify zoning administration and accelerate development approval.” (Porter, 1988)

The related objectives include streamlined regulations, speedier review of development applications, and improved professionalism in outcomes. Other community goals for performance-based controls might include protecting the environment, improving the variety and quality of development through development innovations, and improving the compatibility of diverse land uses. Once a community is clear about its motivation, then it should evaluate each additional step to be sure it is true to this course.

Who makes the rules? The answer is that, under the performance-based approach, the public makes the rules—but the rules must be made before they are in the heat of battle over a specific development plan. Typically the rules behind performance-based development controls are based on policies set first in the Comprehensive Plan, and then detailed in measurable standards in the zoning and land development regulations. The difference is that, once the rules are set, it behooves the public to rely on the staff to fairly administer them on a site-by-site basis, upholding the policy set by the public.

However, most performance-based systems retain a balance of public input and staff decision making. Some local governments, like Largo, Florida, use a multi-tiered public involvement system in which development decisions with major public consequences are
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subject to more public review, while the less onerous decisions have increasing amounts of authority for expedited administrative approval.

How are the rules set? By law, the Comprehensive Plan policies and the text of the development regulations must be adopted by local officials in an open, public process with hearings, public debate, and local discretion. The performance standards and the measurements that they rely on must be the new focus of public discussion, not just the colors of parcels on the zoning map. In most cases, technical studies need to be performed that investigate the relationship between the impacts of different forms and practices of land development and the relevant factors of land development controls—the public health, safety, morals, aesthetics, and general welfare. This will require expert study of the natural environment, the local economy, public health, aesthetics, and community values to show how land use compatibility, environmental protection, and economic use of public facilities will be achieved. This study should result in more public choices—a range of impacts from which the public may choose among. These impact studies should be presented in layman’s terms and made as clear as possible. Once the performance standards go into place, permits will be governed by these rules. If they are properly constructed, many previous discretionary reviews can be replaced by routine staff administration.

What rules should we be flexible about? Most local governments that use performance-based controls use them for specific purposes, integrating performance measures for some aspects of development, with conventional prescriptive controls for others. For instance, the most commonly used performance measures are for protecting humans from nuisances related to undesirable environmental changes—harmful levels of noise, smoke, or flooding. Others would prefer to have more effective standards for traffic, housing choices, or land use compatibility. These are matters of local priority. It is crucial that the standards be measurable and enforceable. It is better to continue with conventional, prescriptive regulations than to try to implement performance standards for subjects that lack community consensus or where its attainment cannot be feasibly enforced or measured for technical or administrative reasons.

Who wins and who loses? The answer to this question will depend on how well-crafted and administered are the performance-based controls.

• Concerned public: With proper preparation and education, a sophisticated public generally supports performance-based controls as a sign of good government. This requires that they are actively involved in the policy-setting stage at which they see how the regulations respond to public concerns over issues like protecting the environment, maintaining neighborhood integrity, and restoring predictability in development decisions. The public also needs to maintain good access to the major decisions and have confidence in their professional staff. If these conditions are not met, or the new system leads to unintended consequences, public sentiment can sour,
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especially if the public believes they are being left out of the big development decisions.

- Developers: A well-executed system will provide streamlined approvals for most routine development approvals. It will also provide developers with more flexibility for innovative development patterns, such as mixed-use development, than would have been prohibited under conventional zoning. However, a performance-based system may shift some relatively expensive site engineering costs to the preapplication phase in order to satisfy impact measures of impacts on infrastructure and environment. These costs were formerly experienced after zoning. Their lenders will not know prior to the more expensive predevelopment and application process, whether or not a project will be approved, or what density or intensity of use will result. Therefore, a performance-based ordinance that is too detailed or complex can increase predevelopment costs and uncertainty to an extent that developers are forced to do their work elsewhere.

- Local government: A well-crafted performance system implemented in a contentious community will relieve public officials of many hours of heated public meetings, although it may require hiring more experienced staff. A smoother operating development process can also lead to a healthier local economy and tax base. A poorly crafted ordinance may lead to increased frustration for elected officials, and cause them to need more staff and suffer staff turnover.

- Environmental quality:
  A development control system using performance standards for environmental features wisely can allow developers to keep the same or better yield on property, while conserving intact the sensitive areas of the site. However, the best a performance-based system can do is maintain current environmental quality—it cannot reverse damage done in previous times. Also, as mentioned before, an overly complex performance-based system can lead to takings challenges that are very costly to all concerned.

3. Administrative Complexity

Often performance-based development controls must overcome a real or perceived increase in administrative complexity. Increased administrative complexity may result from some or all of the following:

- Increased requirement for technical capability of staff – The conventional prescriptive process for zoning grew up before the era of professionally trained planners. The planning staff, if any, was often chosen from the ranks of bureaucrats who were
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content to be directed by the Planning Commission. This system relied on simple, prescriptive zoning ordinances in order to reduce public costs for staff.

Perhaps Richard Babcock captured this syndrome when he quoted a Pennsylvania planner who said:

“Planners ...like to know when they come to work today there aren’t going to be any new problems or new issues to face. I’m going to settle down to that comfortable old zoning ordinance and review five applications today for a change in zoning and make a recommendation on it. See?” (1966)

- Communities who are still in this era will need to review staffing levels and the technical qualifications of staff. In the conventional prescriptive zoning process, the planner reviewing the rezoning application determined the development potential of a piece of property based on the gross area of his property and the zoning district being sought. The expected yield of the zoning application is based on the different prescriptive standards of setbacks, height, and parking specified in the zoning ordinance, applied to the total acreage of the property. However, in the typical performance-based approach, the yield of the property depends on physical features of each site. It can only be determined by applying the performance standards to a detailed site survey. Adopting performance-based development controls that require these kinds of measurements may require some local governments to make wholesale changes and major additions to staffing levels to ensure that their staff includes professional planners who are prepared to take on a role that is more technical in nature.

- Instrumentation – Some performance-based standards, such as industrial performance standards for noise, vibration, and smoke; environmental standards for turbidity; or level-of-service standards for traffic operations, require technical field measurements and computations. Maintaining and enforcing these standards requires specialized instrumentation, such as sound-level meters, and computer programs. Unfortunately, some jurisdictions have adopted performance-based controls that specify these kinds of measures, but they do not have the budget to purchase instruments capable of measuring or analyzing these phenomena. Therefore they are incapable of verifying information submitted by the applicant or assuring compliance when they receive complaints.

- Public input – The more technical basis of site review associated with performance-based development controls can have a dulling or even frustrating effect on public input. More public hearings will concern decisions that turn more on engineering calculations than on perspective renderings and socioeconomic perceptions of neighboring residents. In those cases, the layperson attending the rezoning or permit
hearing may feel disenfranchised. It takes better forms of communication and public education for both elected officials and community residents to ensure public confidence in the performance-based approach.

Communities using performance-based development controls have taken steps to ameliorate the complexity of their procedures in a variety of ways:

- Pre-application conferences – One approach taken by Fort Collins, Breckenridge, and Largo is to require pre-application conferences to review standards and application requirements for developers. This ensures that applicants can be prepared with the appropriate information the first time. They also use this pre-application conference to sort applicants into different levels of review and permitting. This enables quick decisions for simple requests.

- Special districts – Another more basic approach to counteract concerns about the complexity of performance-based development controls is to adopt them in a partial or incremental fashion. For instance, use an overlay district for one area of the jurisdiction that has a relatively unique situation, such as a watershed protection area, and apply performance standards only within this limited area. This will give staff, elected officials, and the development community a controlled area in which to test the effectiveness of this tool.

- Parallel codes – In some local governments, a new performance-based code is adopted as an optional approach, without rescinding the conventional code. Developers have the choice of submitting development proposals under either system—conventional or performance based.

4. Cost to Implement
The costs of implementing a new performance-based ordinance for development control can be minimal or quite substantial, depending on the situation at the time of the decision and the type of performance standards being used. Some communities that make incremental changes to substitute performance standards for a few special circumstances, such as noise controls, may be able to do so with little additional cost except purchasing a sound meter and sending one or more specialists to a four-hour course on noise measurement.

For more extensive performance-based ordinances, additional costs include the initial costs of preparing the ordinance, including consulting fees and technical studies to prepare base data for performance measurement. All of this requires additional financial support from public budgets, especially if the new ordinance is intended to mesh development controls with comprehensive plan updates and innovative growth-management programs.
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The ongoing costs include the costs of enhancing staffing and administration levels, updating ordinances when technology changes, and continued education of staff, officials, developers, and the public. To cite an example, in 1985, Fort Collins, Colorado, had 82,000 residents. A staff of five planners worked on long-range planning and the review of current development, with the equivalent of three planners working at any one time on development review. The planners spent roughly two weeks out of every month preparing detailed memoranda to the board reviewing development proposals.

There are also cost impacts that may be felt in the development industry. There may be a shift in some site engineering costs to occur “up front” in the pre-application phase instead of in the post-approval stage. These developer expenses may include the costs of preparing more detailed engineering drawings and calculations documenting the existing tree cover, topography, wetlands, and steep slopes, or calculations of impacts on public facilities such as roads and drainage structures. In the conventional zoning approach, such data may not be required, or they are not submitted until after the zoning is approved, the developer has secured financing, and he or she is ready to start construction. The additional costs of these investigations can be thousands of dollars per acre. These costs become particularly onerous if the developer is unable to secure approval after his site engineering has been prepared.

IV. CASE STUDIES

A. A model code for capacity-based environmental protection measures in Bucks County, PA

This case study is intended to demonstrate the application of two important principles of performance-based development controls:

- flexibility in the design of residential development; and
- limiting the intrusion of development into areas of natural resource protection.

Bucks County, Pennsylvania was among the first places to adopt the performance-based development controls in the 1970s. Their ordinance is a model that has been applied in 29 municipalities in Bucks County, PA, and adapted in other development codes throughout the country, including Bath Township, MI; Queen Anne’s County, MD; Hardin County, KY; Largo, FL; and others.

Buck’s County is a county north of Philadelphia with a population of approximately 600,000 persons. It contains 54 municipalities of differing sizes and political constituencies experiencing growth pressures. The county created the model ordinance in an attempt to encourage a more coordinated approach to growth and to slow the rapid conversion of farms and woodlands to residential subdivisions. The extended use of large-lot zoning was consuming land too rapidly and made provision of public services very expensive. It also drew legal challenges of exclusionary zoning from property
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owners and developers. Developers have a choice between performance-based standards or conventional prescriptive standards specifying minimum lot sizes, setbacks, and so on, but they receive more density for using the performance-based subdivision design and may earn density bonuses for certain site design features.

The model ordinance also contains procedures for analyzing water quality; standards for parking, landscaping, and lighting; a 17-page section on transportation standards; and a 24-page list of plant materials (Porter, 1988).

This is a step-by-step guide to the process used in the Bucks County ordinance for calculating site capacity using the performance-based measures of Open Space Ratios, Net Density, and Impervious Surface Ratios.

**Step 1** – Determine the base site area by subtracting unusable areas, principally rights of way and easements or parcels that are cut off by railroads or streams.

**Step 2** – Map the natural resources on the site—streams, lakes and ponds, floodplains, steep slopes, forest, and agricultural soils.

**Step 3** – Calculate the net unusable resource protection land on the site by multiplying the acres of natural resource areas of the site by the Open Space Ratio shown in Figure 6 that corresponds to each type of resource protection land.

**Step 4** – Calculate recreation land by applying a percentage (ranging from 10% in urban districts to 20% in suburban districts) to the land area not already restricted from use because of natural resources.

**Step 5** – Compute total site open space by adding resource protection land plus recreation land.

**Step 6** – Calculate the minimum district-level open space requirement by multiplying the base site area (including natural resource land) times a base Open Space Ratio that varies by the type of developed use. Examples of this ratio are shown in Figure 7.

**Step 7** – Determine the required open space area by determining the larger of the two open space calculations (Step 5 vs. Step 6).

**Step 8** – Determine the net buildable site area by subtracting the required open space from the base site area.

**Step 9** – Determine the number of lots or dwelling units permitted on the site by multiplying the net buildable site area by the density (dwelling units per acre) that is set for each development district. See Figure 7 for examples.

**Step 10** – Determine the maximum impervious surface area for the site by multiplying the base site area (Step 1) times the Impervious Surface Ratio for the district. Examples of this ratio are shown in Figure 7.

**Figure 6: Open Space Ratios**

<table>
<thead>
<tr>
<th>Resource</th>
<th>Open Space Ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Floodplains and floodplain soils</td>
<td>1.00</td>
</tr>
<tr>
<td>Streams, lakes, or ponds</td>
<td>1.00</td>
</tr>
<tr>
<td>Wetlands</td>
<td>1.00</td>
</tr>
<tr>
<td>Slopes – 8–15%</td>
<td>0.60</td>
</tr>
</tbody>
</table>
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<table>
<thead>
<tr>
<th>15–25%</th>
<th>0.70</th>
</tr>
</thead>
<tbody>
<tr>
<td>over 25%</td>
<td>0.85</td>
</tr>
<tr>
<td>Forest</td>
<td>0.80</td>
</tr>
<tr>
<td>Pond shore</td>
<td>0.80</td>
</tr>
<tr>
<td>Lake shore</td>
<td>0.70</td>
</tr>
<tr>
<td>Agricultural soils – Class I</td>
<td>0.90</td>
</tr>
<tr>
<td>Class II</td>
<td>0.85</td>
</tr>
<tr>
<td>Class III</td>
<td>0.80</td>
</tr>
</tbody>
</table>

Source: Kendig, 1973

**Figure 7: Open Space and Impervious Ratios by District for Performance Subdivisions**

<table>
<thead>
<tr>
<th>District</th>
<th>Open Space Ratios</th>
<th>Net Density (DU/Acre)</th>
<th>Impervious Surface Ratios</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture</td>
<td>.90</td>
<td>5.00</td>
<td>.08</td>
</tr>
<tr>
<td>Scenic</td>
<td>.85</td>
<td>4.60</td>
<td>.08</td>
</tr>
<tr>
<td>Rural Residential</td>
<td>.80</td>
<td>3.70</td>
<td>.10</td>
</tr>
<tr>
<td>Suburban</td>
<td>.40</td>
<td>5.60</td>
<td>.16</td>
</tr>
<tr>
<td>Urban</td>
<td>.30</td>
<td>6.66</td>
<td>.38</td>
</tr>
<tr>
<td>Urban Core 1</td>
<td>.25</td>
<td>8.66</td>
<td>.44</td>
</tr>
<tr>
<td>Urban Core 2</td>
<td>.20</td>
<td>13.35</td>
<td>.46</td>
</tr>
</tbody>
</table>

Source: Kendig, 1973

Two more innovative provisions are contained in the model ordinance:

**Mixture of dwelling unit types:**

Required mixture of residential prototypes: the original Bucks County Performance Zoning ordinance contains development standards for 13 residential development prototypes, ranging from a single-family detached unit to high-rise apartments. The ordinance recommends that larger developments of 60 units or more provide a specified mixture of units by type, as shown in the Figure 8.

**Figure 8: Dwelling Unit Mix by Size of Development**

<table>
<thead>
<tr>
<th>Dwelling units in development</th>
<th>Minimum number of dwelling unit types</th>
<th>Maximum % of any one type of dwelling unit</th>
<th>Minimum % of any one type of dwelling unit</th>
</tr>
</thead>
<tbody>
<tr>
<td>1–60</td>
<td>1</td>
<td>100</td>
<td>20</td>
</tr>
<tr>
<td>61–150</td>
<td>2</td>
<td>60</td>
<td>15</td>
</tr>
<tr>
<td>151–400</td>
<td>3</td>
<td>40</td>
<td>10</td>
</tr>
<tr>
<td>401 or more</td>
<td>4</td>
<td>40</td>
<td>5</td>
</tr>
</tbody>
</table>

Source: Center for Excellence for Sustainable Development
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**Bonus densities**
Developers who exceed minimum open space ratios or provide public amenities in the design of their developments receive additional density allowances of up to 50 percent. Some examples are given below:

- Open space – 5% bonus for increasing open space ratio by 5%
- Moderate-Income Housing – Up to 15% bonus for nonsubsidized housing selling below a specified price level
- Recreation facilities – 5–10% bonus for providing a public recreation facility
- Home-Ownership – 5–10% bonus for 60–100% owner-occupied dwelling units
- Stormwater Management – 10% bonus for providing approved off-site or on-site stormwater facilities that mitigate an existing deficiency or provide excess capacity

Even with the county’s model ordinance, the use of this form of performance zoning has been limited. Performance-based systems based on natural resource protection are not applicable in areas that have built out most of their land areas. Out of the 54 municipalities in Bucks County, 23 did not adopt the model ordinance because they were already so intensely developed that they had no opportunities remaining to preserve sensitive areas.

Of the 29 Bucks County municipalities that did adopt performance zoning, many adopted “watered-down” versions that eliminated or varied many of the provisions. Since its original inception in 1973, Bucks County has also modified the original version to relax some standards and to eliminate the bonus provisions (Porter, 1988).

A web link to the contemporary version of the Bucks County Performance Zoning Model Ordinance may be found in the Model Ordinance section at the end of this toolkit.

**B. Streamlining conventional codes for mixed-use development in Largo, FL**

Largo is a city in the Tampa-St. Petersburg metropolitan area with an approximate population of 60,000. In the early 1980s Largo was growing very rapidly. In 1982, the City had a new Comprehensive Plan and was required by state law to enact land development regulations to implement a growth management system. The city staff began a process to rethink its land development controls. They wanted to streamline duplicative and conflicting regulations that were contained in 54 separate ordinances covering tree protection, floodplain regulations, platting requirements, and others into a single comprehensive one that incorporated performance-based development controls. The City Council also wanted to increase the flexibility of the ordinance to respond to market demand for different development products—mixed-use development, zero lot-line housing, and more intense downtown development and redevelopment.
Passage of the new code required a more extensive public process than the city had known before. They personally notified each of the city’s 17,000 property owners for each public meeting and held workshops with the City Commissioners, as well as realtors, developers, engineers, builders, and community activists.

The central tenet of the performance-based system adopted in 1983 is a two-tier system of land use controls. The first tier is a set of four policy, or character districts that establish different development policies for different areas of the city:

- **Environmental Conservation** – allows a low intensity of development and large amounts of recreation/open space in areas that are characterized by large proportions of environmentally sensitive land.
- **Management** – areas of the city where development capacity is moderate to high, and where all land uses are allowed except the residential/office/retail mixed-use designation.
- **Redevelopment** – surrounds the downtown district and encourages redevelopment and revitalization to complement the mixed-use character of the area. The area has capacity for high-intensity development.
- **Downtown** – promotes high-intensity mixed-use development and allows all uses except heavy industry and outdoor recreation.

The second tier of controls comes through a set of 14 land uses and densities established in its Comprehensive Plan. The ordinance assigns each of the 14 land uses to the four policy districts to varying degrees using three classes:

- **Class 1**: uses allowed by right
- **Class 2**: uses allowed conditionally with mitigations such as transportation system improvements, impervious surface ratios, buffers, and sign and parking standards
- **Class 3**: prohibited uses

Therefore, the code allows almost any project to be built in almost any district as long as basic performance requirements of density and compatibility are met.

Performance standards are the backbone of Largo’s code, and include:

- Residential performance standards based on density-based standards for five residential land use categories that encourage innovative development;
- Requirements for dedication of parkland and open space;
- Buffering standards with varying widths and plant density based on intensity of use;
- Floor area ratios and Impervious surface standards that vary by policy district for each use; and
- Transferable development rights and density bonuses provide mechanisms to protect environmentally sensitive land.
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Another important aspect of the Largo development code is the way in which it balances the review and permitting process among administrative and public processes. Five types of approval procedures are provided:

- **Type I** – routine applications that involve direct administrative action by rule that can be processed by administrative staff without public hearings;
- **Type II** – somewhat more discretionary process for certain decisions in which nearby property owners are notified and may request hearing;
- **Type III** – major development reviews made subject to a public hearing, such as final subdivision plats, initial plans for certain types of residential development; Class 2 applications that require mitigations; and variance applications seeking relief from hardships;
- **Type IV and Type V** – public hearings to review appeals and act on amendments of ordinances that incorporate high levels of legislative discretion and interpretation. (Porter, 1988)

The Largo performance-based system succeeded in streamlining the development process. An evaluation of the 59 development applications filed during the first six months after the new code eliminated the need for 69 additional applications for variances, rezonings, plan amendments, and special exceptions. They also would have required 209 public hearings under the old code, compared to the 55 hearings that were required under the performance-based code (McElroy, 1985).

However, a little more than 10 years later, Largo reverted back to conventional zoning as the city became almost completely developed. Citizens expressed growing anxiety over the unpredictability of the performance-based regulations and conventional zoning regulations were deemed to be more effective to address site-specific concerns associated with compatible forms of infill and redevelopment. Neighborhood and corridor plans have been prepared in order to allow more neighborhood input and predictability on sensitive issues such as establishing suitable transitions and to mitigating development impacts on existing neighborhoods (Porter, 1988).

**C. Performance-based controls for congestion management in Seattle, WA, and Atlanta, GA**

Both Seattle and Atlanta have used similar ordinances that employ performance-based controls to reduce traffic congestion in high-density areas of the city. Each uses a provision found in an overlay district in the zoning ordinance that applies to development with in a specific high-traffic area.

Seattle’s version is Section 23.71.018, titled “Transportation Management Program” in the Northgate Overlay district adopted in 1994. The Northgate area is a fast-growing activity center.
This provision applies to two types of development:

- a new commercial development that expects to generate 25 or more employee or student vehicle trips in any one hour of the afternoon
- a new multifamily development that expects to generate more than 50 vehicle trips in any one hour of the afternoon.

Developments that meet either of these conditions are required to prepare a Transportation Management Program (TMP) as a condition of receiving a permit for development. The TMP is designed to reduce the number of vehicle trips made by single-occupant vehicles (SOVs). The goal of the Transportation Management Program is to promote use of public transportation, carpools, and vanpools, or other means, such as off-peak working hours.

The performance of the TMP goal is measured in terms of percentage reduction of SOV trips compared to the baseline of 85% in 1990. (In other words, in 1990, 85% of the vehicles going in and out of establishments in the Northgate area had only one occupant.) The goal is to reduce the percentage of SOVs by the following amounts:

- 15% reduction by 1995
- 25% reduction by 1997
- 35% reduction by 1999

Progress in achieving this reduction is monitored through an annual report submitted by the permit applicant to the Director of Engineering. Among other things, the report provides data to verify the reduction in SOV trips, the description of the programs or incentives that are intended to reduce SOV trips, and the number and proportion of people participating in the programs.

If the Director of Engineering determines that the property owner has not made adequate progress toward achieving the specified goals, he can recommend that the owner modify the TMP program to make it more effective or pursue enforcement action against the owner under the land use code, including issuance of fines.

The City of Atlanta has a similar provision requiring a TMP in its zoning ordinance that applies only to the Buckhead/Lenox Special Public Interest District. In the Buckhead/Lenox area, preparation of a TMP is required to receive a permit for an office building or group of office buildings that is larger than 100,000 square feet. The Atlanta ordinance requires applicants to construct such office buildings to prepare a TMP that is designed to reduce by 25% the number of SOV work trips generated by the subject office buildings between 7 a.m. and 9 a.m. The reduction must occur within a five-year period that begins with the date the permit is issued. The commuting alternatives that can be used to meet the target are:

- Commute alternatives, such as public transit, carpooling, and vanpooling;
- Alternative work hours, such as staggered work hours or compressed work weeks,
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- Telecommuting or flextime;
- Transportation demand strategies, such as vanpool programs, and public information and financial incentives for carpoolers; or
- Parking limitations, such as priority parking for carpoolers, use of lower-than-average ratios of parking spaces to floor space, or shared parking.

Every five years thereafter, the owner of the proposed office building is required to file a new TMP and a report documenting the effectiveness of the program.

Since this provision has been implemented, the Buckhead Area Transportation Management Association has been formed and is coordinating planning of a shuttle bus system to knit together the dense office, retail, and residential uses in the SPI and to tie them to MARTA. According to Aaron Fortner, most of the actions in the TMP are taking place at the initial point of zoning approval. Implementation of the TMP provision has had a dramatic effect in reducing parking ratios and is expected to bring about a long-term reduction in single-occupant vehicle travel in the area. The City of Atlanta continues to expand the application of the TMP requirement, and has incorporated it into several other overlay districts, including the Lindberg SPI, Piedmont SPI, and Midtown SPI (Fortner, 2001).
V. LESSONS LEARNED

Stepping back to review the “big picture” of performance-based development controls leads to the following 10 observations and lessons learned:

- Performance-based development controls need to be couched in a multitiered framework of growth management established in the Comprehensive Plan. This requires the local government to do more work up-front to establish a guidance framework in the comprehensive plan with policies, impact measures, and design criteria.

- Performance-based land development regulations offer a versatile tool with many applications from site-level design to regional growth management. If applications are properly chosen and clearly written, the performance-based approach may encourage more innovative forms of development by allowing more flexibility.

- In the performance-based approach, most decisions are not “yes” or “no” decisions like rezonings, but revolve around how the site and uses will be developed. More site engineering and design information is required up-front from the developer in exchange for greater likelihood of approval. A preapplication meeting between the developer and the planning office is a necessity to make this work.

- Performance-based approaches that allow more routine decisions to be managed by administrative rule rather than by legislators acting in public hearings can streamline the development process for developers, while producing fairer and more consistent outcomes.

- Increased reliance on administrative process and decisions by staff means that there is less for elected officials to decide. The primary level of negotiation with the developer shifts to the staff level. Staff continuity is important in maintaining an institutional memory on prior decisions and their rationales (Porter, 1988).

- Flexible provisions are only as good as the standards and criteria by which they are implemented. The formulation of performance-based development controls requires competent staff and consultants who will spend the necessary amount to time to draft and test workable standards, write clear provisions, and work with public officials, developers, and property owners to reach consensus.

- One of the biggest challenges in using performance measures is deciding on the specific measures and thresholds to use as development standards. Scientific data is the best and most credible defense, Nonetheless, in many cases, according to Lane
Kendig, “planners must rely on art, not science, because proven scientific measures simply are not available” (Kendig, 1980).

- Performance standards lead to a land development management process that is less about overall vision and more about guiding day-to-day decision making. This leads to an implicit trade-off between flexibility and predictability.

- In practice, flexibility becomes a two-edged sword. The flexibility to decide on the mix of single-family detached houses and multifamily homes on a given site provides market flexibility and reduces risk for the developer. It may also result in a development that fits an irregular terrain with less damage to the environment. However, many community stakeholders feel unsure about how this decision will affect their interests and consider this to be an unacceptable level of predictability. Some communities have tried to incorporate stringent safeguards for these kinds of issues but created a system that is too complex to administer and one that quashed developer interest in their communities.

- Performance measures that are based solely on site-level analysis are effective at managing the short-term impacts of development of individual sites, but they cannot address the cumulative impacts of all development projects on a community’s traffic, public facilities, and environment.
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VI. IMPLEMENTATION GUIDELINES

A community that wants to establish a performance-based system of development controls might follow this process:

- Form a broad-based committee of motivated stakeholders to identify and discuss the planning issues that the community wishes to address. Involve the elected officials, planning commissioners, professional planners, homebuilders, developers, realtors, community associations, and environmentalists. Success in creating a performance-based approach requires an atmosphere in which professionals and citizens are equally motivated to experiment in order to make land development zoning and land development regulations work better for them (Porter, 1988).

- Carefully review the Comprehensive Plan to ensure that its policies provide the basis for performance standards. Many communities start on a performance-based regulatory scheme in order to implement themes raised in their Comprehensive Plans. Others find that they need to extensively revise the Comprehensive Plan before attempting to draft performance-based development controls.

- Seek direction from competent professional planners or consultants on the best approach to take. Look for someone who has firsthand experience in how performance-based ordinances have actually performed. Make sure that you interview the administrators of other local governments before using regulations taken from another jurisdiction to be sure that the situation is comparable, what were the unintended consequences, and whether the results they experiences are what you also want.

- Plan ample time and resources to thoroughly inventory natural resource and infrastructure capacity and to address technical issues related to the impact of development on the environment, infrastructure, public services, and taxes.

- Successful applications require testing the standards on hypothetical but realistic project examples to determine the feasibility and desirability of the requirements. Not only does this process lead to adjustments in preliminary figures, but it also teaches staff and public officials how the standards interact (Porter, 1988).

- When writing the ordinance, pay close attention to the thresholds, standards, and measures. Many communities are using a hybrid approach that uses performance standards in limited ways, while retaining conventional prescriptive standards for some areas that have been functioning well. Review the administrative process to be sure you have the right balance between administrative and legislative processes for each type of decision to which the performance procedures will be applied.
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- Review the capabilities of current professional staff and members of boards and commissions that are affected by the change to performance-based system and consider whether changes or additions should be made.

- Plan to spend at least six months on public education before starting a performance-based system of development controls. The education includes public officials, professional staff, homebuilders, developers, community organizations, and citizens.

- Monitor the implementation of your ordinance after the first six months, and then at least every other year to see how well it is accomplishing your goals and how it has changed development patterns. Figure 9 has some evaluation measures to consider.
A. Effect on the Approval Process
1. Length of time for approval
2. Complexity of approval procedures
3. Staff time and budget required for review
4. Number of agencies involved
5. Number and complexity of forms
6. Number of meetings and hearings involved
7. Number and complexity of studies and information
8. Consistency of reviews and decisions
9. Number of professional disciplines required in submission and review
10. Amount of participation by general public
11. Degree to which the public influences the final approval
12. Degree to which technicians influence the final approval
13. Degree to which elected/appointed officials influence the final approval
14. Extent to which decisions have been appealed
15. Extent to which decision have been called up before final approval
16. Extent of litigation
17. Ease of learning the system for technicians, developers, and the general public.
18. Vulnerability of the system to political intrusion.

B. Effect on the Development Industry
1. Predictability of time for approval
2. Predictability or consistency of decisions
3. Probability of favorable approval
4. Application fees and deposits
5. Application preparation costs
6. Freedom from arbitrary constraints
7. Extent to which the system requires developer exactions
8. Degree to which the system restricts the pace of development

C. Effect on the Community’s Goals
1. Growth management
2. Historic preservation
3. Revitalization of CBD
4. Transportation improvements
5. Compatibility of adjoining uses
6. Market appropriateness of resulting uses
7. Production of affordable housing
8. Preservation of environmentally sensitive features
9. Creation of usable open space
10. Character and quality of site design
11. Character and quality of building design
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VII. ADDITIONAL RESOURCES


Using a Performance-Based Approach to Development Controls


Model Ordinance

Following the example of Bucks County, Pennsylvania, you might organize a performance-based land use ordinance into the following sections:

- **Article I** establishes the statement of purpose and authorization of the ordinance.
- **Article II** provides a list of definitions of the special terms used in the ordinance, including floor area ratio, impervious surface ratio, and open space ratio, the key criteria underlying the performance-based system.
- **Article III** establishes a set of zoning districts within which the key regulatory standards vary in order to create development patterns appropriately tied to varying conditions of environmental features and public facilities.
- **Article IV** establishes the specific development standards for districts, including provisions governing selections of uses, densities, buffers, and the management of open space. It establishes performance standard residential subdivisions, containing all types of dwelling units, as permitted uses in all residential zoning districts.
- **Article V** is the heart of the performance-based system and contains a table of appropriate factors of density, open space ratio, and impervious surface ratios for each zoning district. It also contains the worksheet for site capacity calculations that are applied to each site proposed for development in order to divide each site into buildable areas, resource protection areas, and to establish the maximum yield of dwelling units on a given development site.
- **Article VI** addresses nonconforming uses.
- **Article VII** addresses conditional uses.
- **Article VIII** provides for development alternatives and bonuses; and
- **Article IX** addresses administration and enforcement.

The full text of the current Bucks County Performance Zoning Ordinance may be found here: [http://www.smartcommunities.ncat.org/codes/bucks.shtml](http://www.smartcommunities.ncat.org/codes/bucks.shtml)
Let the Courts Guide You: Planning and Zoning Consistency

By Brian W. Ohm

The idea that local land-use decisions should be consistent with an independently adopted local comprehensive plan is a fundamental concept of planning practice.

An increasing number of states have adopted legislation requiring consistency between certain land-use regulations, such as zoning and subdivision ordinances, and a local comprehensive plan. Many states also have adopted legislation that requires other decisions (including sewer extensions, the creation of tax increment finance districts or redevelopment districts, etc.) to be consistent with a comprehensive plan. In California, for example, the State Office of Planning and Research identifies 38 statutory or administrative code provisions that require consistency between a certain action and the comprehensive plan (or “general plan” as defined under California law).

The state legislation that requires consistency often uses terms such as “consistent with,” “in conformity with,” or “not in conflict with” interchangeably. However, the statutes requiring consistency usually offer little guidance about how to determine whether a decision is consistent with a local comprehensive plan. The state planning office also developed the following general rule for consistency determinations, which the California courts accept:

An action, program, or project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment.

More specific guidance for how to apply the legislative requirement for consistency is often left to the determination of the courts.

This issue of Zoning Practice explores some of the case law developed by the courts as they interpret statutory requirements for consistency. It focuses primarily on cases arising in California, Maine (two pioneers with legislative requirements for zoning/planning consistency since the early 1970s), Florida, and Washington.

What is striking is the relative paucity of reported court decisions in some states with consistency requirements. However, states such as California and Florida, which expressly provide for citizen enforcement of consistency determinations, seem to generate the most cases. The impact of these determinations can be important. A zoning ordinance that is inconsistent with the comprehensive plan at the time it is enacted is “invalid when passed” as determined by Leshner Communications v. City of Walnut Creek, 52 Cal. 3d 531 (1990); see the similar conclusion in Price v.ayette County Board of Commissioners, 131 Idaho 426; 958 P.2d 583 (1998). The following are some general rules developed by state courts to guide consistency determinations.

IS THE PLAN COMPLETE?

When courts review cases for consistency determinations, the review is not intended to second-guess the merits of the policies that appear in a local comprehensive plan. Judicial review is focused on compliance with state law. Before a court can make a consistency determination, attention needs to be paid to whether the comprehensive plan is complete and adequate. In other words, does the comprehensive plan comply with the applicable procedural and substantive legal requirements? For example, if state law requires that a comprehensive plan include a housing element, does the plan, in fact, have such an element? In Neighborhood Action Group v. County of Calaveras, 156 Cal. App. 3d 1176,
1184 (1984), the California Court of Appeals held that a finding of consistency based on an inadequate general plan was a legal impossibility. Challenges to the adequacy of the comprehensive plan, however, require some connection between the particular approval and the claimed inconsistency in the plan; see Garat v. Riverside, 2 Cal. App. 4th 259 (1991).

Another important principle is that all elements of a general plan have equal legal status. For example, in Sierra Club v. Board of Supervisors of Kern County, 126 Cal. App. 3d 698 (1981), the California Court of Appeals struck down a provision in the general plan that stated if there is a conflict between the land-use element and the open space element, the land-use element controls. Recognizing the comprehensive nature of comprehensive planning, the court found that no element is legally subordinate to another.

“SHALL” VS. “SHOULD”

Assuming a local comprehensive plan meets all the procedural and substantive requirements of state law, courts then focus on whether a local determination of consistency (or inconsistency) is supported by the facts. When reviewing consistency determinations, courts will pay attention to how a policy is written. For example, courts acknowledge distinctions in local policies between the use of “shall” or “must,” which courts define as a mandatory policy, and “should” or “may,” which courts view as a discretionary policy.

One example is the Supreme Judicial Court of Maine’s decision in Adelman v. Town of Baldwin, 2000 ME 91: 750 A.2d 577. The case involved a citizen challenge to the town’s approval of an application to construct a telecommunications tower. The citizens argued that an amendment to the town’s zoning ordinance, which added communication towers as a conditional use in the highlands and rural areas, was inconsistent with the town’s comprehensive plan. In support of their argument, the citizens relied on four sections of the comprehensive plan that referenced restricting development in the highlands and protecting the rural character of the community. The court found that the citizens did not prove the ordinance amendment was inconsistent with the town’s comprehensive plan. The court noted that the sections of the comprehensive plan cited by the citizens did not mandate action but merely suggested recommended conduct. Three of the four sections used the permissive term “should” and none of sections used mandatory language such as “must” or “shall.” The court, therefore, found these sections did not prohibit the construction of a communications tower. The court also noted four other sections of the comprehensive plan that could be interpreted to encourage the development of the communications tower.

Another example is the California Court of Appeals decision in Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Board of Supervisors, 62 Cal. App. 4th 1332 (1998). The case involved a challenge by a city, a land conservancy, and a citizen group to the county’s approval of a low-density residential subdivision of 566 lots on 7,868 acres. While the proposed development was consistent with the land-use map of the general plan, the court found that the proposed development was clearly inconsistent with the “fundamental, mandatory, and specific” policy of the land-use element of the county’s general plan. The policy at issue stated that low-density residential uses “shall be further restricted to lands contiguous to community regions and rural centers . . . and shall not be assigned to

Does your comprehensive plan mandate action or merely suggest recommended conduct? For example, while zoning may allow the construction of telecommunications facilities in rural areas, the preservationist goals of the comprehensive plan may use language—often discretionary language such as the word “should”—that undermines its very purpose. Such inconsistencies can lead to costly and time-consuming legal battles.
lands which are separated from community regions or rural centers by the rural residential land-use designation. . . . "Community regions and rural centers were specified town by town in the county’s plan.

A final example is the Florida Court of Appeals decision in Pinecrest Lakes, Inc. v. Shidell, 795 So. 2d 191 (Fla. App. 2003). The case in Martin County involved a 156-unit multifamily development proposal on 21 acres, with a density of 6.5 units per acre. The Martin County comprehensive plan designated the area as “medium-density residential” with a maximum of eight units per acre. The county determined that the proposed development was consistent with the county comprehensive plan. The adjacent land owners—and ultimately the courts—disagreed. The adjacent land was developed at a density of 0.94 units per acre. The Martin County comprehensive plan had a tiering policy to address how new development would be added to existing single-family residential communities. The tiering policy of the plan required that the new development include a transition zone equal in depth to the first block of lots in the existing development of “comparable density and compatible density unit types.” The court found that the new development was inconsistent with the county’s comprehensive plan because the two-story apartment buildings were not “comparable and compatible” to the existing single-family homes. Since the plan stated that a density transition zone “shall” be established, the court found that a transition zone was a mandatory requirement and not a discretionary guide.

The nature of the policy (discretionary versus mandatory, general versus specific), therefore, can be a critical factor for consistency determinations. Using “may” in comprehensive plans can provide greater discretion in consistency determinations whereas “shall” can provide greater legal weight to the directive of the policy.

THE ABSENCE OF SPECIFIC POLICY
While the nature of policy language is important for consistency determinations, the absence of a specific policy enabling a particular aspect of a project is not necessarily grounds for a finding of inconsistency. In City of Old Town v. Dimoulas, 2002 ME 133, 803 A.2d 1018, the Supreme Judicial Court of Maine held that the absence of language in a comprehensive plan expressly allowing a specific use in a certain area does not necessarily mean the use is not allowed and that some amount of that use is not inconsistent with the city’s comprehensive plan. Dimoulas involved a neighborhood grocery store that had operated for several years in a residential area. The store property was zoned as residential, and neighborhood grocery stores were allowed in residential zones. The Dimoulas family decided to add tables and chairs where customers could eat deli and bakery items purchased at the store. However, the city determined the addition of tables and chairs brought the store outside the definition of a neighborhood grocery store. The Dimoulases requested that the city rezone the property to a commercial zone. The city denied the request. As allowed under Maine law, the Dimoulases then presented the rezoning request to the voters in a referendum. The voters approved the rezoning. In response, the city initiated a lawsuit seeking to declare the rezoning void because it failed to comply with the city’s comprehensive plan. The city identified several sections of its comprehensive plan that it contended the rezoning violated. The court noted that these provisions did not prohibit commercial development. The city also argued that the absence of a statement affirmatively allowing commercial development should be interpreted to mean that no commercial development is permitted. The court disagreed, citing general descriptive language in the plan that referenced commercial activity in the area where the store was located.

Another example is No Oil, Inc. v. City of Los Angeles, 196 Cal. App. 3d 223 (1988). In that case, the California Court of Appeals found oil drilling to be consistent with the designation “open space for the managed production of resources” in a comprehensive plan. The court’s decision was based in part on the absence of specific contradictory language in the plan that would lead the court to find that oil drilling was not the “managed production” of a natural resource.

CONSISTENCY, NOT PERFECTION
Dimoulas is an example of the approach followed by many courts that generally look for “harmony” or “compatibility” between the action taken and the comprehensive plan when reviewing consistency determinations. These types of consistency issues can be challenging when dealing with mixed use development projects. For example, a future land-use map may designate an area for residential development. A community may also want to protect some neighborhood commercial development in the area. The community should have policies and standards allowing for neighborhood commercial in the area even though the precise area for the neighborhood commercial is not mapped. Despite the residential designation on the plan, a neighborhood commercial project should be compatible with the comprehensive plan, given the policy language providing for that use. Courts recognize that comprehensive plan maps are usually general in nature and are not to provide a precise parcel specific map. See, generally, Las Virgenes Homeowners Assoc. v. County of Los Angeles, 177 Cal. App. 3d 312 (987).

The quest for harmony is also prominent when there are multiple policies that may apply to a project. Achieving consistency with all the policies may be difficult. In Sequoia Hills Homeowners Assoc. v. City of Oakland, 23 Cal. App. 4th 704 (1993), the California Court of Appeals recognized that a
Policies and Precedence of the Plan

Some courts acknowledge the integrative nature of comprehensive planning. Comprehensive plans are intended to provide consistent policy direction for multiple community functions such as transportation, housing, land use, parks, open space, and utilities. Consistency determinations, therefore, need to balance designations in the community’s future land-use map with other plan policies and considerations that further refine what is appropriate in the context of the issues and concerns identified in a community’s plan. Simply evaluating consistency against future land-use designations may be insufficient when there are other mitigating factors identified in the plan.

One example is the Washington Supreme Court’s decision in City of Bellevue v. East Bellevue Community Council, 138 Wn. 2d 937, 983 P.2d 602 (1999), involving a neighborhood organization’s challenge to the city’s rezoning of an area consistent with the highest density range specified in the plan. The court upheld the challenge because the court found the rezoning inconsistent with the city’s comprehensive plan.

The plan designated a range of residential densities for a relatively undeveloped area of the city. To implement these plan recommendations, the city rezoned the area for residential development at the highest densities allowed in the density ranges. The Community Council, a neighborhood planning organization that has authority to reject rezoning applications under Washington law, denied the rezonings as inconsistent with the comprehensive plan.

While the community council acknowledged that the rezoning conformed to the density ranges in the comprehensive plan, it argued that it should be at a lower density within those ranges consistent with other provisions in the comprehensive plan. The council based its consistency argument on the comprehensive plan’s designation of level of service on roadways in the area as “D-,” combined with policies that existing single-family neighborhoods should be protected from encroachment from more intense uses, that land-use densities should be encouraged that would not intensify vehicular congestion, and that restrictions would be considered on land development and density as a viable means of controlling traffic congestion. The court agreed, noting that the city had flexibility within the density range to use a different zoning designation that would be consistent with these other policies.

Another example is the Court of Appeal of California decision in Napa Citizens for Honest Government v. Napa County Board of...
Supervisors, 91 Cal. App. 4th 342 (2001), in which the court held that the county's amendment of a specific plan for an industrial area near its airport was inconsistent with the county's general plan. The industrial land use was in an area designated in the general plan for industrial uses. However, the circulation element of the general plan identified traffic problems and the housing element identified a housing shortage. According to the court, the County cannot state a policy of reducing traffic congestion, recognize that an increase in traffic will cause unacceptable congestion and at the same time approve a project that will increase traffic congestion without taking affirmative steps to handle that increase. It also cannot state goals of providing adequate housing to meet the needs of persons living in the area, and at the same time approve a project that will increase the need for housing without taking affirmative steps to handle that increase.

As a result, the court found that the amendment would frustrate the general plan's goals and policies, and hence, was not consistent with the general plan.

**COMPREHENSIVE PLANNING VS. SPECIFIC IMPLEMENTATION TOOLS**

As the Supreme Court of California noted in Lesher Communications, Inc. v. City of Walnut Creek, 52 Cal. 3d 531, 541 (1990), zoning and planning consistency requires that local communities amend zoning ordinances to conform to the plan, and not vice versa: “The tail does not wag the dog.” Nevertheless, because of the general nature of comprehensive plans, consistency issues can arise when more than one zoning district may be consistent with the land-use categories designated in a comprehensive plan. Zoning/planning consistency does not eliminate the need to comply with standards and requirements found in the applicable zoning ordinances. A developer may propose a rezoning that is consistent with the comprehensive plan to permit a project that is not consistent with the existing zoning for the property, just because a landowner demonstrates that a pro-

### CLARK COUNTY, WASHINGTON, URBAN PLAN DESIGNATION TO ZONE CONSISTENCY CHART

(Shaded areas indicate allowed zones in each designation)

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This table is located in the land-use element of the comprehensive plan for Clark County, Washington.
posed use is consistent with a comprehensive plan, the consistency requirement does not mean the landowner is presumptively entitled to the planned use.

In Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993), the Florida Supreme Court addressed a situation where 29 different zoning classifications were considered potentially consistent with a residential use classification on the comprehensive plan’s future land-use map. The property consistent with the plan. In Citizens for Mount Vernon v. City of Mount Vernon, 133 Wn.2d 861, 947 P.2d 1208 (1997), the Washington Supreme Court held that when pre-existing zoning regulations explicitly prohibit uses allowed in the comprehensive plan, the more specific pre-existing regulations govern the land-use decision. This provides an incentive for communities to update their ordinances within a reasonable period of time following the enactment of a comprehensive plan.

Issues may arise when a community has adopted a new comprehensive plan, but has not yet updated its ordinances to be consistent with the plan.

This is different than the case where, even though a local government has not enacted a new zoning district referenced in a newly adopted comprehensive plan, the local government may be able to approve a development as consistent with the plan when that development is proposed under other ordinances that are consistent with the plan. In Pinecrest Homeowners Association v. Glen A. Coninger & Associates, 151 Wn.2d 279, 87 P.3d 1176 (2004), the Washington Supreme Court examined the application of a plan amendment adopted by the Spokane City Council that the city determined should take effect immediately. The city, however, had not yet enacted the new mixed-use zoning district described in the plan amendment. Nevertheless, the city determined that a development proposal that used existing zoning districts allowing mixed use was consistent with the city’s amended comprehensive plan. The court upheld the city’s action against a challenge by a neighborhood group.

CONCLUSION

This issue of Zoning Practice begins to examine some of the case law developed nationally as courts address issues related to consistency determinations. The cases highlighted are intended as a guide to help planners think about such determinations. However, one must exercise caution when generalizing the meaning of consistency. While the concept that certain actions should be consistent with a comprehensive plan is well accepted in the field of planning, variations in state enabling laws and judicial precedent make it difficult to develop universally acceptable rules to guide consistency determinations. As recognized by the Nebraska Supreme Court, “To determine whether an ordinance complies with a comprehensive plan is not a mechanical test,” see Giger v. Omaha, 232 Neb. 676; 442 N.W.2d 182 (1989). Nonetheless, the evolving jurisprudence reported above is instructive. Courts give deference to local determinations of consistency, though not always. As a result, courts are constantly helping to refine what is meant by consistency and the role of comprehensive planning.

Digital copies of California’s general plan guidelines and select zoning/planning consistency matrices are available to Zoning Practice subscribers by contacting Michael Davidson, editor, Zoning Practice, at the American Planning Association, 122 South Michigan Avenue, Suite 1600, Chicago, IL 60603, or by sending an e-mail to mdavidson@planning.org.

3-D rendered sign by Mark Evans; concept by Lisa Barton.

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HOW DOES YOUR COMMUNITY ACCOMMODATE THOSE IN NEED?
A Sound Approach to Regulating Social Service Facilities

By Margaret Wuerstle, AICP

The real and perceived impacts of social service facilities on America’s neighborhoods have been a controversial topic of discussion in many jurisdictions across the country.

Social service uses such as homeless shelters, halfway houses, supportive housing, and soup kitchens have a clear social value and usefulness. They can also have undeniable adverse impacts on residential and business environments. The challenge confronting government leaders is how to provide humane, dignified, and comprehensive solutions to poverty and homelessness while ensuring healthy urban neighborhoods for everyone.

UNDERSTANDING THE ISSUES OF REGULATING SOCIAL SERVICE FACILITIES
Deinstitutionalization refers to “the replacement of long-stay psychiatric hospitals with smaller, less isolated, community-based alternatives for the care of mentally ill people” (Lamb and Bachrach, 2001). The rationale was based on the concepts that the mentally ill would live better lives in community-based care than they could under state hospital conditions, and that such care would be more therapeutic and more cost-effective than hospital-based care. Studies indicate that the expectations of deinstitutionalization have not been achieved. Consequently, a new generation of deinstitutionalized persons with severe mental illness is homeless and creating significant challenges to service providers and communities (Lamb and Bachrach, 2001).

Federal law defines a homeless person as one who “lacks a fixed, regular, and adequate nighttime residence . . . and has a primary night residence that is: (a) a supervised publicly or privately operated shelter . . . (b) an institution that provides temporary residence for individuals intended to be institutionalized, or (c) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings” (APA Policy Guide on Homelessness, 2003). Additionally, the chronically homeless are individuals that typically have mental illness or substance abuse issues in addition to extreme poverty, and as a consequence, these individuals experience long-term homelessness (Lamb and Bachrach, 2001).

According to a recent National Coalition for the Homeless survey of state and local homeless coalitions and service providers, 49 percent of all respondents indicated that more than 10 percent of their clients were homeless due to a foreclosure (Downing et al, 2009). Consequently, social service providers are expanding their services, and religious institutions are now providing much more than worship services. A 2003 point-in-time count conducted in Cincinnati established the benchmark on chronically homeless as 54 percent of homeless individuals on any given night. Further benchmarks have now established that 58 percent of the chronically homeless have substance abuse issues; 33 percent have mental health problems; and 21 percent may be dual-diagnosed with substance abuse and mental health issues (Cincinnati Consolidated Plan, 2005–2009). One can reasonably assume that individuals with alcohol and substance addictions or untreated mental illness are prone to unpredictable behaviors. It is the occurrence of these erratic, offensive, and sometimes dangerous behaviors that have created the concerns reported by neighborhood residents.

Religious institutions have expanded their ministries in response to the needs of their congregations and provide emergency shelters, soup kitchens, and even car repair services for needy individuals. The Federal Religious Land Use and Institutionalized Per-
Persons with disabilities are individuals with mental or physical impairments that substantially limit one or more major life activities. The disability discrimination provisions of FHA do not protect persons who currently use illegal drugs, persons who have been convicted of manufacture or sale of illegal drugs, sex offenders, juvenile offenders, or persons with or without disabilities who present a direct threat to the persons or property of others. FHA does protect people who are recovering from substance abuse. In Massachusetts, the Worcester Regional Research Bureau released a study in response to civic concerns over the concentration of social service programs in certain areas of the City of Worcester that presented justification for using zoning regulations to preserve the integrity of neighborhoods. More importantly, the study confirmed that individuals actively using drugs and alcohol are not protected under FHA and further offered that individuals must be “in recovery” for at least 30 days before they are considered to have a disability that is protected under federal law (Worcester Regional Research Bureau, 2005).

**CINCINNATI TAKES STOCK**

A 2007 court decision that upheld a zoning approval for a 100,000-square-foot integrated social service facility, known as the CityLink project, was the “ tipping point” that forced Cincinnati to pursue zoning text amendments for the regulation of social service facilities. Residents in the Over-the-Rhine (OTR) and the West End neighborhoods in Cincinnati are particularly fearful of the impacts caused by the saturation of human service facilities and tried to prevent CityLink from opening in their neighborhoods. Once the court decision was issued, concerned citizens from OTR, West End, and other neighborhoods petitioned the city council to take action to address the concentration of controversial social service facilities.

The council and the planning commission both felt that land uses should be sited only in those areas that the city determined to be appropriate and not as a result of unintended loopholes caused by a lack of clarity in the zoning code. To this end, city officials directed staff to amend the zoning code to include clear definitions for social service agencies and to specify the zoning districts that would permit these uses. Additionally, on June 25, 2008, the city council passed Resolution #41-2008 directing the city manager to use his authority, to the extent permitted by law, to adhere to the policy “that social service agencies and programming shall not be concentrated in a single geographic area and shall not locate in an area that is deemed impacted.”

On September 10, 2008, 14 social service agencies and individuals filed a complaint in U.S. District Court for the Southern District of Ohio in response to the resolution. The social service providers asserted that the resolution constituted a violation of the substantive due process rights secured by the 14th Amendment of the U.S. Constitution because it failed to define what was meant by “an area that is deemed impacted,” “concentration” in a single geographic area, or “social service agency.” Without definitions of the critical terms contained in the policy adopted by the resolution, the orders given to the city manager were considered to be vague and overbroad. The vagueness of the terms would deprive the social service providers of their substantive due process rights to know what conduct was expected of them regarding social services and programming in neighborhoods (Greater Cincinnati Coalition for the Homeless, et al v. City of Cincinnati, 1:08CV603, S.D. Ohio 2008).

Additionally, the social service providers claimed that the resolution violated the Equal Protection clause of the U.S. Constitution also found in the 14th Amendment. The complaint argued that the city had no study or any other
documentation to justify this conclusion. Without any data to support the conclusions, the resolution impacted the social service agencies located in or providing services in the OTR neighborhood by denying equal protection of the law as guaranteed by the U.S. Constitution, and holding some organizations to a different standard than other agencies performing similar services in other neighborhoods without any justification for that different treatment.

Staff established the Cincinnati Social Service Committee (SSC) when the planning commission directed staff to create zoning text amendments with input from the social service providers and neighborhood representatives. A total of 28 meetings were held with the goal of developing zoning text amendments that would address the definitions, location, and concentration of social service agencies in the city. The SSC consisted of a broad representation of social service providers and concerned citizens who worked to provide meaningful feedback to city officials.

The regulation of social service facilities is a complex issue that requires an understanding of some of the causes of poverty and homelessness, as well as the legal issues associated with regulations that affect religious establishments and protected classes of individuals. The identification and definition of “controversial social service facilities” is an essential component in understanding this issue and assessing the need for regulations for these uses. Over 3,000 nonprofits were identified in Greater Cincinnati and its adjacent counties. The SSC neighborhood representatives were concerned with those social service uses whose clients might display negative behaviors or activities in close proximity to residential areas. In the end, the discussions focused mostly on homeless shelters, integrated social service campuses, soup kitchens, and certain types of supportive housing such as “wet houses” or the Housing First Model.

The Housing First Model of supportive housing has gained momentum in recent years as a viable alternative to the standard care for persons who are homeless with serious mental illness or alcohol and substance addictions. Housing First offers immediate, permanent housing without requiring treatment compliance or abstinence. Unlike traditional standard programs, which require “treatment first” or detoxification and sobriety before independent housing will be provided, Housing First programs separate housing from treatment, considering treatment as being voluntary and housing being a fundamental need and human right.

Best practice trends also point to collaboration of certain agencies and services by sharing a common physical location. Many successful examples exist throughout the United States. The Haven for Hope campus centralizes a multitude of services for the homeless including an 800-bed emergency shelter 1.5 miles west of downtown on a 22-acre site in San Antonio, Texas. The purpose of this facility is to provide a comprehensive process from beginning to end that allows for the transformation of a person coming off the streets. It includes Prospects Courtyard, a covered open area for the chronically homeless who are not yet comfortable entering a building.

Traditional theories indicate that social service facilities should maximize access for their clients while minimizing the cost of services. Accordingly, many social service providers have concentrated in struggling lower income neighborhoods where there is low-cost rent, affordable real estate, and little opposition from property owners. The social service representatives on the SSC felt that social services did not have a direct correlation to negative community impacts; on the contrary, available research highlighted the positive impact of social service facilities on adjacent communities, such as an increase in property values and decrease in crime.

Residents, on the other hand, expressed concerns over the “negative” impacts of social service agencies on the host neighborhoods. Many of the identified impacts were related to drug abuse and mental illness, which are more consistent with the services provided for the homeless, although not necessarily across the board. The resident representatives identified the following impacts: public intoxication; violence; profanity; panhandling; solicitation; proliferation of litter; evidence of public urination; large numbers of individuals loitering; open containers of alcohol; suspicious behavior/drug usage or sales; erratic behaviors by clients; quality of life—increased crime and high frequency of Part 1 and Part 2* crimes (see note at end of this article for a discussion of these crimes); safety; frequent police and other emergency calls, diverting limited emergency response resources from the balance of the community; poorly maintained properties; negative perception of certain neighborhoods; loss of neighborhood desirability based on perception; potential decrease in property values; disincentive to business investment; deterrent to owner occupancy (flight); regional magnet effect for “outsiders” and the homeless.

Of this list, the loss of property value due to the concentration of social service agencies was of primary concern. However, few studies substantiate this claim. Many studies show that affordable housing and group homes do not have a negative effect on property values. Some studies even show that property values increase.

In conjunction with the work of the SSC, staff of the Department of City Planning and Buildings used other strategies in an attempt to determine “controversial” uses and to document their impacts. Surveys were sent to real estate appraisers to determine if any inferences could be made about the effect of social service facilities on property values. Site assessments of social service facilities were carried out to identify observable impacts on neighborhoods. Finally, crime data from the Cincinnati Police Department was obtained on the calls for service (CFS) and arrests in each of the five police districts.

Ten staff members from various city departments and the Police Department completed a total of 403 site assessments on 74 social service facilities. “Unsafe neighborhood,” “loitering,” “intimidating suspects,” “maintenance,” and “areas of concealment” were identified most often. However, two shelters had reports of violence, public urination, littering, suspicious behavior, and drug sales or use, drug paraphernalia on-site, prostitution, open containers, and public intoxication.

Local police also provided crime statistics on the 74 facilities and on CFS for three years for each city block that contained one of these facilities. In addition, the police supplied information on arrests for Part 1 and Part 2 crimes in each of the police service districts. The site assessments along with the Police Department data revealed that one large
homeless shelter generated more calls for police service and the highest number of arrests for Part 2 crimes than any other social service facility in the city. Furthermore, police statistics for the period from January 1, 2008, to August 12, 2008, indicated there were more than 2,000 total arrests of individuals who gave an OTR Neighborhood address as their place of residence. More than 1,200 of those arrests were of individuals who listed the homeless shelter as their place of residence. Approximately two-thirds of these 1,200 arrests occurred within a half-mile radius of the shelter.

IDENTIFYING A CONCENTRATION OF SOCIAL SERVICE FACILITIES

The concentration of services and facilities for the chronically homeless and the synergy of problem behaviors can overwhelm the carrying capacity of a neighborhood. The term concentration implies that at some point the number of facilities will overwhelm the permanent population. When that carrying capacity is reached, the economic demographics begin to deteriorate and, ultimately, a struggling community emerges.

In a 2002 report prepared for the National Association of Realtors, George C. Galster, a professor of Urban Affairs at Wayne State University, stated that, “assisted housing of various types had positive or insignificant effects on residential property values nearby in higher valued, less vulnerable neighborhoods, unless it exceeded thresholds of spatial concentration or facility scale [and] evinced more modest prospects for positive property value impacts in lower value, more vulnerable neighborhoods, and strength of frequently negative impacts was directly related to the concentration of sites and scale of the facilities.”

Accordingly, the over-concentration of social services may lead to fewer positive impacts for both residents and those seeking social service programs, which is the opposite of the positive impacts expected from efficiencies of scale when like services are provided in close proximity. Studies also indicate that if the facilities are not properly managed and clients engage in illegal or offensive behaviors, there will be negative impacts on the neighborhood.

The degree of concentration is an important factor to be weighed against considerations of need, cost, and service efficiency. The Department of Justice (DOJ), the Department of Housing and Urban Development (HUD), and most courts that have addressed the issue of distance separation agree that density restrictions are generally inconsistent with the FHA. However, they also believe that “... if a neighborhood came to be largely composed of group homes, that could adversely affect individuals with disabilities and would be inconsistent with the objective of integrating persons with disabilities into the community ... a consideration of over-concentration could be considered in this context” (U.S. Department of Justice, 1999).

LOCAL REGULATORY PRACTICES

Concerns over property values and secondary impacts due to the location of social service facilities have led many communities across the United States and Canada to implement various controls on what they consider to be “controversial social service facilities.” The most commonly used regulations include distance separations between like facilities, limitations on the size of facilities, good neighbor-management plans, and population ratios. A limited number of jurisdictions have implemented council use permits and mandatory licensing requirements.
Distance separations refer to zoning regulations that impose a separation between like uses such as homeless shelters or halfway houses. The purpose of distance separations is to control the density or concentration of uses that may have negative impacts on neighborhoods.

Green Bay, Wisconsin, uses separation requirements for community-based residential facilities. No community-based residential facility may be established in Green Bay within 2,500 feet of any other such facility except with a conditional use permit (§13-1603.b).

Rochester, New York, requires that homeless shelters obtain a special permit from the planning commission. A requirement of the application submittal is the documentation of other facilities within a quarter mile of the proposed shelter (§120-141.D). The city has had this requirement in their code since 1970s.

Oklahoma City requires that its planning department staff identify similar uses within one mile of a proposed emergency shelter or feeding site facility. Similar uses in this category include domestic violence shelters, other emergency shelters and feeding sites, forced detention or correction facilities, residential facilities for dependent and neglected children, residential facilities for drug or alcohol treatment centers, and transitional mental health residential facilities (§59-9350.27.B).

Detroit requires that no shelter be located closer than 500 feet from another shelter or closer than 500 feet from an adult foster care facility, pre-release adjustment center, or substance abuse service facility (§61-12-89). Regulations that limit the number of beds in a group living facility, the total square footage of a facility, or the amount of square footage required per person living in a facility are size limitations. Building codes usually require a minimum square footage per individual residing in a residential structure. Some zoning codes require a much higher square footage per person than the building codes, thereby limiting the number of persons that can be housed on a site. A review of online zoning codes revealed that several cities limit the size of certain types of social service facilities.

A good neighbor plan refers to additional regulations that are required to ensure that the management of certain types of uses consider the potential negative impacts on surrounding neighborhoods and develop strategies for mitigating those impacts. Imposing reasonable requirements for adequate supervision for children in group-living facilities does not violate FHA. It would seem reasonable then, that requiring adequate supervision for any individuals that may not be able to respond to an emergency due to disability would also not violate FHA.

Portland, Oregon, encourages providers to locate in existing structures and work with the neighborhood. They require a written security plan that inhibits loitering, public drunkenness, drug trafficking, and criminal activity. The provider is to keep the area within 200 feet of the shelter free from litter and graffiti (§33.285).

Some communities have enacted licensing regulations to ensure safe and healthy facilities, compatibility with surrounding neighborhoods, and to discourage the inordinate concentration of facilities in neighborhoods.

Detroit adopted the Homeless Shelter Licensing ordinance in 1995 to ensure that whenever children, women, and men become homeless they will have decent, safe, and healthy refuge. The standards put into place include 24-hour access for shelter residents for restrooms and medications, adequate staff-to-resident ratios, sheets changed on a weekly basis, assurance of school attendance for minors, fire safety regulations, and nutritious meals (Ordinance No. 7-95).

Phillipsburg, New Jersey, requires that homeless shelters obtain a $700 license annually. Standards for denial of a license include the nature and development of the surrounding property; proximity of churches, schools, and public buildings; the effect on traffic; the number of other similar entities; and suitability of the applicant to establish, maintain, and operate a homeless shelter (§347-5).

A few local governments have enacted regulations that tie the number of permitted

**REFERENCES**


facilities to the population of neighborhoods, census tracts, political districts, or the jurisdiction as a whole. Cities that had or currently have population ratio limitations include: Covington, Kentucky, which permits one youth shelter per 25,000 persons in the city and no more than one addiction treatment facility per 25,000 persons residing in the city (§6.13).

Miami, which requires a special exception and does not allow community-based residential facilities in any census tract where residents of existing community residential homes or community-based residential facilities comprise two percent or more of that census tract’s current total population (§934.2.2.2).

Many jurisdictions include additional development regulations in their zoning codes that address performance standards and compatibility issues.

Mesa, Arizona, has enacted comprehensive performance standards for social services facilities. In addition to obtaining a council use permit, social service facilities must comply with size limitations, hours of operation, and design requirements for basic amenities such as restrooms, drinking water, and seating areas ($11.20-27).

Council use permits are individually and explicitly approved only by a city council for specific uses. Mesa was the only city identified that requires social service providers to apply for a council use permit before locating in the appropriate zoning district. Guidelines are provided for use in evaluating a proposed facility.

While research shows that jurisdictions are concerned with the potential negative impacts of certain social service uses, no studies could be found that documented the specific negative impacts caused by such uses. Cincinnati’s planning staff contacted many of the cities that have implemented regulations on social service facilities to answer the following questions:

• Why had the municipality adopted regulation for these particular uses?
• What impacts did these uses have on neighborhoods that justified regulations?
• How did the municipality document the impacts of these uses (i.e., was a report prepared, or a survey or site assessments conducted)?

All of the responding jurisdictions stated that they had not completed specific studies. They did identify many of the same impacts voiced by Cincinnati residents. The concentration of facilities was also a concern to several jurisdictions. In general, communities regulating such facilities felt that only a limited number of facilities could be absorbed before neighborhoods would experience significant deterioration in quality of life.

**DOCUMENTATION: A SOUND APPROACH**

Many cities are attempting to limit the negative impacts of controversial social service facilities through various zoning techniques, licensing requirements, and good-neighbor plans despite the absence of specific documentation that there is a direct correlation between these uses and the negative impacts identified by neighborhood residents. Anecdotal complaints by host neighborhoods and testimony given at public meetings have prompted leaders in many municipalities to implement regulations that would reduce the impacts on neighborhoods.

Several conclusions can be drawn from the Cincinnati experience. Not all social service facilities that provide programs for the needy have negative impacts on neighborhoods. The negative behaviors and impacts repeatedly identified by residents and municipalities are more related to drug abuse and mental illness. The social service facilities providing services to chronically homeless individuals are more likely to have negative behaviors or activities occurring in close proximity. The types of uses that largely provide programs for chronically homeless individuals include addiction treatment facilities, halfway houses, homeless shelters, supportive housing, offender transitional housing, and food and meal distribution.

Identification of the uses to be regulated, precise definition of these uses, and documentation of their impacts are necessary elements in substantiating the regulations. Jurisdictions considering new regulations should undertake the following steps prior to developing and implementing the regulations:

1. Document the location, type, and operation of existing facilities.
2. Document the property values before and after new facilities are opened.
3. Document the behaviors, impacts, and condition of properties through site assessments.
4. Document crime data on police calls and arrests at operating facilities.
5. Work with real estate appraisers to obtain information on impacts and property values.

**CONCLUSIONS**

Certain social service facilities must be regulated to protect the rights of property owners and the economic well-being of a municipality. If corporations or industries were negatively impacting low-income, high-poverty neighborhoods, this would be an environmental justice issue. The controversial nature of the issues surrounding poverty, homelessness, mental illness, and addictions makes the regulation of social service facilities exceptionally difficult. However, like every other land use, social service providers should strive to be a good neighbor. Their missions must include provisions for community improvement in addition to improvement to lives of those in need.

Zoning cannot regulate people’s behaviors or activities that occur on the streets or sidewalks, but it can regulate land uses where these behaviors occur and control their proximity to sensitive uses such as schools, parks, and residences. Only limited change will be brought about by a zoning strategy alone. It will take a comprehensive strategy and many tools to address issues as complex as poverty and homelessness. However, zoning can be one of the tools used to sustain the quality of our neighborhoods and protect them from deteriorating influences.

* Part 1 crimes include homicide, rape, robbery, aggravated assault, burglary, theft, theft from autos, and auto theft. Part 2 crimes include assault/menacing, arson, counterfeits, fraud, embezzlement, receiving, vandalism, weapon offenses, vice, sex offenses, drug offenses, gambling offenses, offenses against the family, DUIs, liquor establishment offenses, drunkenness, disorderly conduct, vagrancy, suspicion, traffic offenses, and parking offenses.
How does your community accommodate those in need?