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## Litigating Land Use in Massachusetts: Defining Municipalities' Legitimate Use of Rate of Development Restrictions

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## LITIGATING LAND USE IN MASSACHUSETTS: DEFINING MUNICIPALITIES' LEGITIMATE USE OF RATE OF DEVELOPMENT RESTRICTIONS

*A developer whose project is delayed for months or years--or stopped altogether--by obstreperous abutters sometimes decides not to suffer alone. He tells his lawyer to sue those pesky neighbors. Unfortunately, his attorney reminds him, it is much easier for the developer to be sued than to sue. His neighbors, after all, are simply exercising their constitutional and statutory rights to petition the government for redress of their grievances, springing from their unwillingness to have the developer's office building or shopping center in their backyards.<sup>1</sup>*

*The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.<sup>2</sup>*

### INTRODUCTION

Land use litigation is one of the most hotly contested areas of Massachusetts law. With scarce land left to develop, Massachusetts municipalities, developers, and property owners consistently clash over the proper use of land in the Commonwealth's communities.<sup>3</sup> Rate of development restrictions are one of several land management tools that curb new devel-

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<sup>1</sup> See Paul E. Wilson, 'A Large Fortune Or A Small Fortune' To Drop That Appeal: Developers Charge Project Opponents With Illicit Motives In Recent Land Use Damages Litigation 36 URB. LAW. 571, 571 (Summer 2004) (explaining inherent constitutional right of landowners to litigate land use disputes on constitutional grounds).

<sup>2</sup> Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

<sup>3</sup> See R. Robert Linowes & Don T. Allensworth, THE POLITICS OF LAND-USE LAW: DEVELOPERS VS. CITIZENS GROUPS IN THE COURTS 74 (1976) (discussing existence of zoning litigation in a relatively small group of states, including Massachusetts); see also Mark Bobrowski, *Affordable Housing v. Open Space*, 30 B.C. ENVTL. AFF. L. REV. 487, 488 (2003) (discussing the clash between Massachusetts advocates of open space and promoters of affordable housing). The Author contends, "the conflict between open space and affordable housing advocates is, for the most part, avoidable. It is Massachusetts' short-sighted system of land use regulation and utter lack of planning for municipal or regional land use that have created this controversy." *Id.*

opment.<sup>4</sup> A rate of development restriction, or rate cap, imposes limits on the amount of new units a developer can build during a specified period; the restrictions limit the volume of new development in a community.<sup>5</sup> Such restrictions, enacted by a municipal ordinance or bylaw, limit the growth of housing development within a community.<sup>6</sup> Although the immediate results of rate caps often please community protectionists and municipalities, they can equally create controversy among property owners seeking to subdivide and developers.<sup>7</sup>

Generally, land use litigation forces the judiciary to delicately balance the competing interests of landowners, developers, and the community. However, “too often, land use law resembles a legal war, rather than a set of laws designed to foster the livability of American communities.”<sup>8</sup> Communities’ rate of development restrictions, imposed with the aim of protecting municipal character and resources, can nevertheless affect and limit the alienability of landowners’ property, posing a constitutional dilemma.<sup>9</sup> This legal obstacle forces landowners seeking development to sue for redress from the municipality’s law and municipalities to defend the suit.<sup>10</sup> In 2004, the Massachusetts Supreme Judicial Court, (hereinafter “SJC”), in *Zuckerman v. Hadley*,<sup>11</sup> ruled that a town’s zoning bylaw implementing rate of development restrictions on landowners was unconstitutional under the Due Process Clause of the U.S. Constitution.<sup>12</sup> The SJC held that the development restriction served no legitimate zoning pur-

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<sup>4</sup> See *Sturges v. Chilmark*, 402 N.E.2d 1346, 1350-51 (Mass. 1980) (describing the authority that a Massachusetts town or community has in regulating its particular land use).

<sup>5</sup> See *infra* note 65 and accompanying text.

<sup>6</sup> See *id.*; see also Pioneer Institute <http://pioneerinstitute.org/municipalregs/pdf/Rate+of+Development.pdf> (last visited February 12, 2006) (explaining “[t]here are a number of ways that municipalities regulate the ‘rate of development’ of residential units. Some municipalities enact town-wide caps limiting the number of units that can come on line annually or biannually. The number of permits is often set at the average in the previous years”).

<sup>7</sup> Rodney Cobb, *Land Use Law: Marred by Public Agency Abuse* in *TRENDS IN LAND USE LAW FROM A TO Z* 277 (Patricia E. Salkin, ed. 2001) (discussing “[e]ven the best systems of land-use planning produce conflicts via effective mechanisms other than traditional lawsuits costing years and small fortunes to reach the often universally dissatisfying results”).

<sup>8</sup> See *id.* and accompanying text.

<sup>9</sup> *Sturges*, 402 N.E.2d at 1351.

<sup>10</sup> R. Robert Linowes & Don T. Allensworth, *The POLITICS OF LAND-USE LAW: DEVELOPERS VS. CITIZENS GROUPS IN THE COURTS* 74 (1976) (explaining the direct correlation between communities with more expansive zoning and the extent of ordinances and bylaws subject to legal challenge).

<sup>11</sup> 813 N.E.2d 843 (Mass. 2004).

<sup>12</sup> *Zuckerman v. Hadley*, 813 N.E.2d 843, 850-51 (Mass. 2004) (holding the extent of the rate of development restriction unfairly limited the property owner from the full realization of the property’s value). The Court ruled that fifteen (15) years had passed providing sufficient time for the town to conduct planning, thus the rate of development restriction served no legitimate purpose. *Id.*

pose.<sup>13</sup> The court reasoned that a town could temporarily enact zoning restrictions while planning growth, but a “choke hold against future growth” is barred by the U.S. Constitution.<sup>14</sup> Therefore, following *Zuckerman*, Commonwealth municipalities, developers, and landowners must examine the purpose and duration of community rate of development restrictions with considerably more scrutiny than before.

This note will provide guidance to municipalities, developers, and property owners in Massachusetts in light of the SJC’s decision in *Zuckerman v. Hadley* in which the court held that rate of development restrictions must serve a legitimate public purpose and must have a limited duration.<sup>15</sup> The note analyzes the permissible uses and scope of growth rate restrictions throughout the Commonwealth’s zoning ordinances and bylaws.

Towns and cities impose rate of development restrictions on new housing development to curb the amount of new growth within a specified period.<sup>16</sup> Pursuant to Mass. Gen. Laws ch. 40A, Massachusetts cities and towns individually regulate land use throughout the Commonwealth.<sup>17</sup> This vast home-rule power often forces municipalities and landowners into litigation to protect their property interests.<sup>18</sup> The note fully considers what constitutes a legitimate development restriction and makes recommendations for municipalities and landowners to decrease overall land use litigation.

Section I of this note explores the historical and constitutional context of land use litigation in the United States and Massachusetts. This section also explains the issues of duration and purpose that courts traditionally examine to uphold rate restrictions with a focus on landowner relief. Section II provides a detailed analysis of the *Zuckerman v. Hadley* holding. Section III analyzes the judiciary’s ability to balance competing land use interests through litigation post-*Zuckerman*.

The note emphasizes municipal interests in implementing rate of development restrictions with respect to a landowner’s bundle of property rights. Moreover, this note examines the legal hurdles of land use and ex-

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<sup>13</sup> *Id.* at 851.

<sup>14</sup> *Id.* at 850 (reasoning the town of Hadley’s initial purpose of enacting the rate of development restriction was appropriate, allowing the town to plan and accommodate growth). The *Hadley* court, however, ruled, “fifteen years have passed, and the town has had more than ample time to fulfill that legitimate purpose.” *Id.* In addition, the town’s fiscal justifications did not justify a permanent ban outright. *Id.*

<sup>15</sup> *Id.* at 845.

<sup>16</sup> See *infra* note 65 and accompanying text.

<sup>17</sup> MASS. GEN. LAWS, ch. 40A, § 7 (2003) (stating that while communities have the ability to control local zoning, jurisdiction for land use conflicts rests in the superior court and the land court). Land and superior court “shall have the jurisdiction to enforce the provisions of this chapter, and any ordinances or by-laws adopted thereunder, and may restrain by injunction violations thereof.” *Id.*

<sup>18</sup> See *id.*

plains why litigation is often a necessity for municipalities, landowners, and developers to protect their varied and vital property interests.

## I. HISTORY

### A. Constitutional Test

Land use restrictions delicately balance the landowner's interest in development against a municipality's concern for the rate and nature of development within a community.<sup>19</sup> Under the Due Process Clause of the 14<sup>th</sup> Amendment, a municipal zoning bylaw or ordinance must be rationally related to the community's land use goals.<sup>20</sup> In the landmark case of *Village of Euclid v. Ambler Realty Co.*,<sup>21</sup> the United States Supreme Court held that a municipal's zoning purpose must be reasonably and substantially related to the community's goals.<sup>22</sup> A zoning bylaw cannot be "clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals, or general welfare."<sup>23</sup> This landmark decision established the judicial review standard to evaluate zoning conflicts between a municipality and a landowner.<sup>24</sup> To determine whether a zoning ordinance is valid, it is necessary to evaluate the specific ordinance in its particular context; a generalized determination of the provision's validity based on other cities or towns is insufficient.<sup>25</sup> Further, a court must assess the provision's validity by considering the totality of the circumstances surrounding the particular restriction, including the geography of the location and its particular characteristics.<sup>26</sup> Under the standard of review set forth in *Village of Euclid*, plaintiffs must first seek redress pursuant to the zoning ordinance or bylaw, and if that action fails, then make a claim that the zoning regulation is unconstitutional under the terms of the Due Process

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<sup>19</sup> *Zuckerman*, 813 N.E.2d 843, 845 (Mass. 2004) (ruling that restrictions of unlimited duration on rate of development restrictions imposed by a municipality "are in derogation of the general welfare and thus are unconstitutional").

<sup>20</sup> U.S. Const. amend. XIV § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

<sup>21</sup> 272 U.S. 365 (1926).

<sup>22</sup> *See id.* at 388, 393-95 (ruling there must be a public welfare relationship between a zoning ordinance and the goals it aims to achieve based on the local and environment of the community landscape).

<sup>23</sup> *Id.* at 395 (requiring a discrete rational relationship between the zoning ordinance and the public policy goals set forth).

<sup>24</sup> *See supra* note 23.

<sup>25</sup> *Village of Euclid, Ohio*, 272 U.S. at 388 (emphasizing that the appropriateness of a particular building or use as defined within a zoning provision must be given particular weight within a particular locale).

<sup>26</sup> *See id.*

Clause.<sup>27</sup> The expansive standards of *Village of Euclid* remain the primary constitutional guidelines for community land use and development restrictions today.<sup>28</sup>

### *B. Issues of Duration and Purpose*

Developers, landowners, and municipalities often rely on the requirements set forth in *Village of Euclid* to promote their claim in land use litigation.<sup>29</sup> More specifically, state and federal courts have held that the duration and purpose of a zoning provision are primary considerations when evaluating whether to uphold rate of development restrictions.<sup>30</sup> Courts justify sustaining municipal development restrictions based on the overriding public policy that municipalities are often challenged to maintain equilibrium within a community's housing market.<sup>31</sup> Thus, courts allow cities and towns to enact restrictions on housing development, so long as the restriction serves a reasonable purpose under the *Village of Euclid* guidelines.<sup>32</sup>

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<sup>27</sup> *Id.* at 395-96; *see also* *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 82-83 (holding deference should be given to zoning ordinances when acting in the best interest of the public and within the realm of constitutionally permissible police power); *see also* *Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974) (reaffirming that there is no precise determination of an unconstitutional zoning ordinance based on the particular facts of the provision and the land).

<sup>28</sup> *See Village of Euclid, Ohio* at 392 (stating, "[w]ith the growth and development of the state the police power necessarily develops, within reasonable bounds, to meet the changing conditions").

<sup>29</sup> Clyde Forrest, Jr., *Relief from Zoning Ordinance*, 16 AM. JUR. TRIALS 99, §7, footnote 13, (last updated June 2004) (arguing that "more than any other decision, established the legal basis and constitutionality of the zoning process, and it is relevant to either side of the case" in land use litigation).

<sup>30</sup> *See Sturges*, 402 N.E.2d at 1350 (stating that limited time restrictions are constitutional when utilized to complete comprehensive population growth studies); *see generally* *Construction Indus. Ass'n of Sonoma County v. Petaluma*, 522 F.2d. 897 (9th Cir. 1975) (upholding the constitutionality of time restraints on development); *see also* *Golden v. Planning Bd. of Ramapo*, 30 N.Y. 2d 359, 379 (1972) (reasoning that a development restriction was constitutional because the suburban area was trying to curb expansion in an burgeoning housing market).

<sup>31</sup> *See Golden*, 30 N.Y. 2d at 362 (upholding the constitutionality of a development restriction enacted to control suburban population sprawl).

<sup>32</sup> *Construction Indus. Ass'n of Sonoma County v. Petaluma*, 522 F.2d. 897, 906 (9th Cir. 1975) (upholding the constitutionality of time restraints on development for the public welfare). There is a reasonable time and reasonable purpose standard under *Village of Euclid*. *Id.*

*C. Litigating Against Zoning Ordinances- The Evolution of Landowner Relief*

Since *Village of Euclid*, landowners have consistently petitioned the courts for relief from zoning ordinances and bylaws that restrict housing development.<sup>33</sup> As land becomes more expensive, land use litigation has steadily increased and judicial interpretation has played an increasing role in determining whether a zoning provision is arbitrary or constitutionally viable.<sup>34</sup> In *Berman v. Parker*,<sup>35</sup> the Court held that “the definition of the state’s police power to regulate land use is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition.”<sup>36</sup> Further, the Court reasoned, “subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”<sup>37</sup> Courts often must interpret municipalities’ land use intentions by examining bylaws and ordinances through the litigation process.<sup>38</sup> State and federal courts therefore are in the precarious position of examining zoning restrictions in search of a rational purpose to meet due process requirements against the backdrop of the state’s ill-defined, but undeniably broad, police powers.<sup>39</sup> Landowners currently seek redress in the courts after exhausting their statutory remedies provided in the zoning bylaw.<sup>40</sup> Although municipalities assure landowners, developers, and the courts that they are using rate of development restrictions to combat rapidly changing community character, courts sometimes view such provisions as contrary to the “general welfare” of the public.<sup>41</sup>

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<sup>33</sup> See *supra* note 1 (stating various litigation approaches developers use to counter municipalities arbitrary restrictions on future development to protect community character).

<sup>34</sup> See *supra* note 29 (discussing conflicting rights of landowners and communities and the manner in which they are resolved through the litigation process).

<sup>35</sup> 348 U.S. 26 (1954).

<sup>36</sup> *Berman v. Parker*, 348 U.S. 26, 32 (1954) (arguing that there is a broad definition of police power that can be regulated).

<sup>37</sup> See *supra* note 36 (holding that the judiciary has a narrow role of judicial interpretation of zoning ordinances). The court held that there was no specific definition of police power; rather it was a factual determination made by reviewing the facts of each particular case. *Id.*

<sup>38</sup> See generally Christine Donelan Hubbard, Esq. *Judicial Construction of Zoning Ordinances and Bylaws* (MCLE, Inc. 2002) (discussing the relevance in judicial interpretation of zoning ordinances, including the manner utilized by courts to determine municipalities’ intent in regulating land use).

<sup>39</sup> *Cuyahoga Falls, v. Buckeye Cmty. Hope Found. et al.*, 538 U.S. 188, 188 (2003) (holding that a city’s growth restriction and refusal to issue a permit did not constitute “egregious or arbitrary government conduct”).

<sup>40</sup> See *supra* note 1 and accompanying text.

<sup>41</sup> See generally Jill Devine, *Golden v. Planning Bd. of Ramapo Revisited: Old Lessons For New Problems*, 12 PACE L. REV. 107 (Winter 1992) (analyzing public interest

*D. Current Massachusetts Law: Limited Duration and Purpose*

The Massachusetts rule on upholding rate of development restrictions steadily evolved in the decades leading up to *Zuckerman v. Hadley*.<sup>42</sup> In 1980, the SJC held in *Sturges v. Chilmark*<sup>43</sup> that a "municipality may impose reasonable time limitations on development, at least where those restrictions are temporary and adopted to provide controlled development while the municipality engages in comprehensive planning studies."<sup>44</sup> The *Sturges* court firmly established that a municipality may impose reasonable restrictions on growth development to balance the public policy issues of high population growth and provide for planning the potential expansion of municipal services in an "isolated, substantially rural area."<sup>45</sup>

The *Sturges* court ruled that there was a rational basis for the development restrictions using a two-prong test to analyze the respective zoning provision.<sup>46</sup> First, the court considered whether the municipality had sufficient legislative power to enact the bylaw or ordinance.<sup>47</sup> Second, the court analyzed whether a sufficient rational basis for the zoning bylaw or ordinance existed without denying a landowner due process under the 14<sup>th</sup> Amendment.<sup>48</sup> In applying the two-prong test, the SJC emphasized that so

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concerns in zoning disputes and the use of development restrictions by municipalities to combat a changing community character); *see infra* note 25.

<sup>42</sup> *Zuckerman*, 813 N.E.2d at 851 (Mass. 2004) (holding that rate of development restrictions do not serve a legitimate purpose if they are not used to complete growth planning and do not exist for a limited duration).

<sup>43</sup> 402 N.E.2d 1346 (Mass. 1980).

<sup>44</sup> *See id.* at 1350-51 (ruling rate of development restrictions were rationally related to a legitimate governmental purpose when specific, enumerated reasons for halting development existed); *see also* MASS. GEN. LAWS, ch. 41, § 81D (2005) (mandating that

A planning board established in any city or town under section eighty-one A shall make a master plan of such city or town or such part or parts thereof as said board may deem advisable and from time to time may extend or perfect such plan . . . Goals and policies statement which identifies the goals and policies of the municipality for its future growth and development. Each community shall conduct an interactive public process, to determine community values, goals and to identify patterns of development that will be consistent with these goals.

*Id.*

<sup>45</sup> *Sturges*, 402 N.E.2d at 1351.

<sup>46</sup> *Id.* at 1350-54 (holding that the rate of development restrictions were valid and bore a rational relation). The intent of the rate of development restrictions enacted by Chilmark was to slow growth. *Id.* The court held that environmental concerns, including subsoil conditions, warranted the growth limitations while the town conducted planning studies. *Id.* Reasoning that Martha's Vineyard has "unique and perishable qualities." *Id.* at 1352.

<sup>47</sup> *See id.* at 1353.

<sup>48</sup> *See id.* at 1350, 1353. (reasoning that there is a presumption of validity, but that the regulation has not been "dealt with in a vacuum"). The court will allow evidence, not limited to town meeting or planning board findings, to show a "reasonable prospect of a



long as there was a “rational relation to any permissible public object which the legislative body ‘may plausibly be said to have been pursuing.’”<sup>49</sup> The court, however, did not conclusively nor explicitly define the meaning of “temporary” within its holding.<sup>50</sup> In determining the validity of zoning bylaws and ordinances, courts are traditionally deferential to municipalities.<sup>51</sup> The SJC recently held in *Gove v. Zoning Board of Appeals of Chatham*<sup>52</sup> that there is a “highly deferential test” to determine whether a municipality’s zoning ordinance is constitutional.<sup>53</sup> The court in *Gove* reasoned that there was a reasonable relationship between Chatham’s restriction on development and a legitimate state interest.<sup>54</sup> The *Gove* court emphasized that there were public safety concerns that justified the zoning restriction.<sup>55</sup>

## II. ZUCKERMAN V. HADLEY: DEFINING PERMISSIBLE RATE OF DEVELOPMENT RESTRICTIONS IN MASSACHUSETTS

In *Zuckerman v. Hadley*, plaintiff, Martha Zuckerman (“Zuckerman”) owned 66.52 acres of land in the Town of Hadley, Massachusetts (“Hadley”).<sup>56</sup> The town zoned Zuckerman’s land in an “agricultural-residence zoning district.”<sup>57</sup> Hadley’s previous zoning bylaw allowed sin-

tangible benefit to the community. *Id.* at 1353 citing 122 Main St. Corp. v. Brockton, 84 N.E.2d 13, 16 (Mass. 1949).

<sup>49</sup> See *id.* at 1353, citing *Blue Hills Cemetery, Inc. v. Bd. of Registration in Embalming & Funeral Directing*, 398 N.E.2d 471 (Mass. 1979) (holding that environmental impact, specifically subsoil conditions, were a justifiable connection to uphold the rate of development restriction).

<sup>50</sup> See *supra* note 45 at 1353.

<sup>51</sup> *Gove v. Zoning Board of Appeals of Chatham*, 831 N.E.2d 865, 870 (Mass. 2005); see also *infra* note 53 and accompanying text.

<sup>52</sup> 831 N.E.2d 865 (Mass. 2005).

<sup>53</sup> *Id.* at 870 (overruling *Lopes v. Peabody*, 629 N.E.2d 1312 (Mass. 1994) and holding that deference is given to a municipal ordinance and the zoning ordinance is constitutional unless there is no rational relationship). A heightened review of analysis “substantial relationship” is not needed. *Id.* citing *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074, 2084 (2005) (ruling that “if a government action is found to be impermissible—for instance because it fails to meet the ‘public use’ requirement or is so arbitrary as to violate due process—that is the end of the inquiry).

<sup>54</sup> *Gove*, 831 N.E.2d at 870-71 (reasoning that despite deference to the municipality, the Plaintiff put forth no evidence that refuted the town’s argument that the zoning ordinance was reasonably related to protecting the environment and rescue during natural disasters). The property, located on Little Beach in Chatham is vulnerable to storms and environmental disaster. *Id.* at 756. The lot is 1.8 acres of land and is located within a storm “vulnerability” zone. *Id.* at 757.

<sup>55</sup> See *supra* note 54.

<sup>56</sup> Brief of Plaintiff - Appellee at \*2, *Zuckerman v. Hadley*, No. SJC-09169 (April 29, 2003).

<sup>57</sup> See *Zuckerman*, 812 N.E.2d at 847.

gle residence homes built as-of-right in this district.<sup>58</sup> In October 1988, Hadley introduced a rate of development restriction for building permits for previously allowed by-right uses of land within its boundaries.<sup>59</sup> Hadley's amendment placed a permanent cap on the amount of building permits issued in any year to a developer seeking to build on land acquired under common ownership.<sup>60</sup> The rate of development restriction capped the amount of new houses built, delaying new construction for up to ten years.<sup>61</sup> The town maintained that the primary purpose of the development restriction was to maintain the rural character of the land and provide a seamless transition to a more populated community.<sup>62</sup> In July 2000, Zuckerman sued the town of Hadley, arguing that the rate of development restriction for "as-of-right" uses of land unconstitutionally limited her ownership of the land and constituted a regulatory taking.<sup>63</sup> The town defended arguing that the rate of development restriction was a "reasonable and rational response to valid concerns for the undesirable effects of speculative development on Hadley's character and economic wellbeing."<sup>64</sup>

In October 2002, the Massachusetts Land Court ruled in favor of Zuckerman and held that Hadley's permanent rate of development restriction violated Massachusetts law and the U.S. Constitution.<sup>65</sup> As a result,

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<sup>58</sup> Boston Housing Authority Website <http://www.cityofboston.gov/bra/zoing/zoning.asp> (last visited March 10, 2006) (as-of-right is defined as uses of land development "automatically allowed by the zoning code"); *see also id.* at 846 (citing the Town of Hadley Zoning Bylaw, ROD Amendment):

15.0.1: Building permits for the construction of dwellings on lots held in common ownership on the effective date of this provision shall not be granted at a rate per annum greater than as permitted by the following schedule. 15.1.1: for such lots containing a total area of land sufficient to provide more than ten dwellings at the maximum density permitted for the District in which such lots are located: one tenth of the number of dwellings permitted to be constructed or placed on said area of land based on said maximum permitted density.

*Id.*

<sup>59</sup> *See Zuckerman*, 813 N.E.2d at 847.

<sup>60</sup> *See id.* at 845 (outlining the limitations of development in Hadley by the amendment). Hadley's building permits for lots deeded in common ownership were limited and phased over a period of up to ten years. *Id.* The town held that the rate of growth needed to be curbed to protect environmental, public safety, and educational services. *Id.*

<sup>61</sup> *See id.* and accompanying text. Under the rate cap, the Plaintiff, who had a parcel of property sufficient to build approximately forty single-family homes, was limited to building four units a year for ten years. *Id.* at 847.

<sup>62</sup> *Id.* at 845-46 (highlighting the town's argument that the rate of development restriction was enacted to preserve and phase for future housing development).

<sup>63</sup> Brief of Plaintiff - Appellee at \*1, *Zuckerman v. Hadley*, No. SJC-09169 (April 29, 2003).

<sup>64</sup> Brief of Defendant - Appellant at 45, *Zuckerman v. Hadley*, No. SJC-09169 (Dec. 23, 2003).

<sup>65</sup> A rate of development restriction places limitations on the amount of new homes developed within a specified period, generally annually. Rate of development restrictions

the court did not ultimately address the takings issue because Zuckerman satisfactorily proved that the restriction was unconstitutional under Massachusetts General Laws and the U.S. Constitution.<sup>66</sup> The Hadley rate of development restriction, as adopted, existed from 1988 until the SJC ruled that it was unconstitutional in August 2004.<sup>67</sup> The court held that the restriction was unconstitutional because “due process requires that a zoning bylaw bear a rational relation to a legitimate zoning purpose.”<sup>68</sup>

In *Zuckerman*, the SJC clarified the permissible duration and purpose of development restrictions, as ruled on in *Sturges*, holding that a town’s zoning restrictions must serve a legitimate public purpose and must be of a limited duration.<sup>69</sup> The court resolved an ambiguity present since the *Sturges* ruling by explicitly holding that a zoning bylaw or ordinance of unlimited duration is unconstitutional “absent exceptional circumstances.”<sup>70</sup> In its analysis, the court held that Hadley had the power to adopt the 1988 zoning amendment enacting the rate of development restriction.<sup>71</sup> The court, however, refused to accept the town’s argument that a rational relationship existed between the rate of development restriction and its unlimited duration because there had been no decrease in potential population growth since the town adopting the amendment.<sup>72</sup> The court held that the development restriction enacted for an unlimited time did not serve a legitimate zoning purpose because there were alternative methods to curb growth, including amending zoning bylaws, hiring a planner, or adopted cluster zoning to relieve the town’s population growth pressure on a more limited basis.<sup>73</sup> The *Hadley* court ruled that a zoning bylaw is not

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provide municipalities with greater control over the methods and amount of new construction in a town or city. See generally *Home Builders Ass’n of Cape Cod, Inc. v. Cape Cod Comm’n*, 808 N.E.2d 315, 316-18 (Mass. 2004); see also *Zuckerman*, 813 N.E.2d at 847.

<sup>66</sup> See also *Zuckerman*, 813 N.E.2d at 847.

<sup>67</sup> *Zuckerman*, 813 N.E.2d at 846 (explaining from the time that the rate of development restriction was enacted the town commissioned several comprehensive planning studies to determine its growth). During and after the completion of the studies, the rate of development restriction remained valid until the Supreme Judicial Court’s ruling in August 2004. *Id.*

<sup>68</sup> See *supra* note 20; see also *Zuckerman*, 813 N.E.2d at 848.

<sup>69</sup> See *id.* at 843-45 (ruling that restrictions of unlimited duration on rate of development restrictions imposed by a municipality “are in derogation of the general welfare and thus are unconstitutional”); see also *Sturges*, 402 N.E.2d at 1347 (1980).

<sup>70</sup> See *Zuckerman*, 813 N.E.2d at 845. (holding that such exceptional circumstances were not present in this case and that such growth restrictions do not serve the general welfare).

<sup>71</sup> See *id.* at 847-48 (ruling that the town had the power to pass the amendment, then analyzing the constitutionality of the town’s rate of development restriction).

<sup>72</sup> See *id.* at 849 (rejecting the town’s argument that the town’s reasoning for adopting the rate of development restriction had not passed since its inception).

<sup>73</sup> See *id.* at 846-49 (emphasizing that there are various zoning tools on the state and the local level which can be used to alleviate population growth pressure and limit growth to ensure the maintenance of a community’s character).

constitutionally legitimate if it delays development for an “unlimited duration” or halts growth without planning for future development.<sup>74</sup> Thus, a growth restraint designed to permanently limit housing development, absent studies to forecast future housing growth, is an illegitimate zoning use and thus unconstitutional.<sup>75</sup>

### III. LOOKING AHEAD - TESTING THE LEGITIMACY REQUIREMENT WHILE BALANCING COMPETING INTERESTS THROUGH LITIGATION

#### A. Community Interests- Protecting Municipal Character

In *Zuckerman*, the SJC cautioned municipalities that restricting growth for an unlimited duration and not for the purpose of studying growth is an illegitimate zoning purpose.<sup>76</sup> Community leaders and critics of development restrictions invariably clash over the most viable and cost effective manner to secure and protect Massachusetts land.<sup>77</sup> While communities seek to justify their rate of development restrictions to control or adequately plan for growth, state and federal courts have held that the ultimate result of such restrictions may unduly interfere with landowners’ rights.<sup>78</sup> To substantiate the zoning restrictions implemented, Massachu-

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<sup>74</sup> See *id.* at 849 (explaining further that there are a variety of constitutional zoning tools available to cities and towns including cluster zoning, lot size requirements, and special district designation).

<sup>75</sup> See *id.* (ruling absent comprehensive planning purposes and studies on a community’s growth, unlimited duration rate of development restrictions are “unavoidably detrimental”).

<sup>76</sup> See *Zuckerman*, 813 N.E.2d at 849 (ruling that [r]estraining the rate of growth for a period of unlimited duration, and not for the purpose of conducting studies or planning for future growth, is inherently and unavoidably detrimental to the public welfare, and therefore not a legitimate zoning purpose”).

<sup>77</sup> Tom Pierce, *A Constitutionally Valid Justification for the Enactment of No-Growth Ordinances: Integrating Concepts of Population Stabilization and Sustainability*, 19 U. HAW. L. REV. 93, 94 (1997) (discussing the inevitable clash between citizens who seek to “control growth” and those who argue that such no growth regulations create subsequent problems in the community).

<sup>78</sup> See generally Katherine E. Stone and Philip A. Seymour, *Regulating the Timing of Development: Takings Clause and Substantive Due Process Challenges to Growth Control Regulations*, 24 LOY. L.A. L. REV., 1205, 1224 (June 1991) (arguing that 1970’s era landowners may have successfully asserted that property was interfered with by growth regulations). The author further argues that today developers and landowners must hold land “with the knowledge that local government agencies may adopt growth management regulations.” *Id.*

setts municipalities cite a concern for a lack of developable land for building in their zoning ordinances and bylaws.<sup>79</sup>

Communities also properly justify their use of rate of development restrictions based on increased burden on municipal services, particularly public schools, as well as increased concerns about increased population density and traffic.<sup>80</sup> Further, communities cite the negative outcomes associated with a lack of comprehensive planning instituted to effectively stabilize growth.<sup>81</sup> Professor Mark Bobrowski, has suggested, “without a comprehensive plan for municipal build out, all development becomes ad hoc, with no broader vision of the proper balance between affordable housing, open space, or any other municipal or regional concern.”<sup>82</sup> Using home rule in Massachusetts, pursuant to Chapter 40A, local officials hold the key to development and permitting for new construction; municipalities guard their community’s most prized resource—land with an eye towards restricting growth to protect municipal services.<sup>83</sup>

The SJC, however, has held that there must be exceptional circumstances to permanently limit growth in a community.<sup>84</sup> Furthermore, because communities have total control over their land under Massachusetts General Laws, Chapter 40A, if one community implements a rate of devel-

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<sup>79</sup> *Zuckerman*, 813 N.E.2d at 848-49 (contending that Hadley’s argument promotes the view that the restriction is necessary based on the “potential effect” on the town’s character).

<sup>80</sup> Laura Hunter Dietz, *Prevention of Development; Slow Growth*, 83 AM. JUR. 2D *Zoning and Planning* §69 (stating that a rational basis may be present for slowed growth when communities become aware that they are incapable of providing adequate services and facilities as required, given the completion of a comprehensive plan).

<sup>81</sup> See MASS. GEN. LAWS ch. 41 § 81D (2005) (stating that a Master Plan “shall be a statement, through text, maps, illustrations or other forms of communication, that is designed to provide a basis for decision making regarding the long-term physical development of the municipality).

<sup>82</sup> Mark Bobrowski, *Affordable Housing v. Open Space*, 30 B.C. ENVTL. AFF. L. REV. 487, 488 (2003) (further holding that a lack of comprehensive planning and permitting leads to significant conflict between affordable housing advocates and open space preservationists that was largely created by the judiciary and the legislature and suggesting that there can be a significant balance without trading preservation or open space but reconciling and compromising to provide both to Massachusetts). The Author also states “[a]dvocates are forced to go to the barricades parcel by parcel, application by application.” *Id.*

<sup>83</sup> *Zuckerman*, 813 N.E.2d at 849 (“recogniz[ing] the enormous pressures faced by rural and suburban towns presented with demands of development, and that towns may seek to prevent or to curtail the visual blight and communal degradation that growth unencumbered by guidance or restraint may occasion”).

<sup>84</sup> See *Johnson v. Town of Edgartown*, 680 N.E.2d 37, 41-42 (Mass. 1997) (holding that the need to protect the sensitive ecology of the Great Pond in Edgartown, Martha’s Vineyard was sufficient to implement extensive zoning restrictions). The court explained that including three-acre zoning when there was a regional and state wide interest in protecting the island’s environment and also specifically holding that the case illustrated “special circumstances” and that similar zoning may or may not be upheld based on the facts of each parcel of land. *Id.*

opment restriction, there is an inevitable influx of development in surrounding communities.<sup>85</sup> However, if surrounding communities also implement restrictions based on a concern for increased growth, a domino effect can pervade the state.<sup>86</sup>

The SJC has also ruled that there is a clear distinction between permissible growth rate restrictions in suburban areas and similar restrictions in rural areas of the Commonwealth.<sup>87</sup> In *Sturges*, the court held

in a rural, as opposed to a suburban, setting where no showing has been made of regional demand for primary housing, the public interest in preserving the environment and protecting a way of life may outweigh whatever undesirable economic and social consequences inhere in partly 'closing the doors' to affluent outsiders primarily seeking vacation homes.<sup>88</sup>

The court distinguished between a rural and suburban setting in Massachusetts.<sup>89</sup> The court has also held that a zoning bylaw will be up-

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<sup>85</sup> Peter Buchsbaum, *On Developing Issues in State and Local Government Law, Recent Developments in Land Use, Planning and Zoning Law: Timed Growth Ordinances Rejected in New Jersey*, 31 URB. LAW. 823, 823-24 (Fall 1999) (asserting that states with a "tradition of home rule in which each municipality is an island kingdom" there may be a domino effect on other communities by shifting the development and growth from one community to the next); see generally MASS. GEN. LAWS, Chapter 40, §1 (2005) (quoting "[c]ities and towns shall be bodies corporate, and ... shall have the powers, exercise the privileges and be subject to the duties and liabilities provided in the several acts establishing them...[C]ities shall have all the powers of towns and such additional powers as are granted to them by their charters or by general or special law, and all laws relative to towns shall apply to cities").

<sup>86</sup> Buchsbaum, *supra* note 85 (citing *Toll Brothers, Inc. v. West Windsor Township*, 756 A.2d 1056 (N.J. Super. Ct. App. Div. 2000) (invalidating a time growth scheme in New Jersey because it was analogous to moratoria on building and thus inoperable under the state's land use law); see also Paul J. Boudreaux, *Looking the Ogre in the Eye: Ten Tough Questions for the Antisprawl Movement*, 14 TUL. ENVTL. L.J. 171, 179 (Winter 2000) (questioning whether a municipality by municipality approach is a viable solution). The Author argues, "allowing localities to follow their own course of development permits them to subvert metro-wide needs." *Id.*

<sup>87</sup> *Sturges*, 402 N.E.2d at 1352.

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*; see also Quintin Johnstone, *Government Control of Urban Land Use: A Comparative Major Program Analysis* 39 N.Y.L. SCH. L. REV. 373, 406 (1994) (emphasizing the historical difference between urban, suburban and rural areas). The author states:

[z]oning in its earlier form contemplated a land control program that could rationally and fairly determine in advance how urban areas should develop in the future: what changes would be permitted in developed areas and what kinds of improvements and uses would be permitted in undeveloped ones. For already developed areas, the usual objective was to create stability by perpetuating current uses and limiting prospects for change.

held if its reasonableness is "fairly debatable."<sup>90</sup> The court, however, clearly distinguishes such bylaws from development restrictions based on the necessity of the growth limits.<sup>91</sup> Thus, courts will examine whether the ordinance is intended to protect existing housing or if the restriction seeks merely to protect environmental concerns in the absence of a housing need.<sup>92</sup>

In light of *Zuckerman v. Hadley*, communities must establish a clear and legitimate reason for curbing growth; a mere unexplained and unending delay for planning purposes is insufficient to uphold a restriction.<sup>93</sup> Furthermore, municipalities should be aware of the special circumstances that Massachusetts courts now require if there is a significant limitation on building within a community or an outright ban on new development.<sup>94</sup> While the courts will employ a facts and circumstances test in deciding whether to permit development bans, a lengthy limitation to build new housing will be upheld only under "special circumstances."<sup>95</sup> While environmental preservation is a legitimate purpose served by decreasing development, other motivations such as gradually phasing in growth and expanding public services have not been upheld in the Commonwealth, and neighboring states, as permissible uses of local police power.<sup>96</sup> Nonetheless, rate of development restrictions continue to be largely limited to states such as Massachusetts because of high development demand and housing costs.<sup>97</sup>

*Id.*

<sup>90</sup> *Johnson*, 680 N.E.2d at 40.

<sup>91</sup> *Zuckerman*, 813 N.E.2d at 851 (ruling that while the zoning restriction had a purpose, its permanence could not serve a legitimate purpose alone without further extenuating circumstances).

<sup>92</sup> *See Johnson*, 680 N.E.2d at 40-41.

<sup>93</sup> *Zuckerman*, 813 N.E.2d at 851 (holding that fifteen years was an extreme amount of time to complete planning to justify zoning restrictions to curb growth and protect the town's agricultural resources).

<sup>94</sup> *See supra* note 84 and accompanying text; *see also supra* note 92.

<sup>95</sup> *Johnson*, 680 N.E.2d at 42 (holding that the proximity of the land to a coastal pond was sufficient to hold that three-acre zoning should be upheld in the area). The court ruled that because of delicate environmental considerations and potential detrimental impact on the tourism industry, the large lot zoning to decrease buildable units would be upheld). *Id.* *See also* *Prime v. Zoning Bd. of Appeals of Norwell*, 680 N.E.2d 118, 122-23 (Mass. App. Ct. 1997) (holding that the protection and safety of an aquifer was a sufficient public interest to uphold a zoning ordinance for public health and safety).

<sup>96</sup> *Zuckerman*, 813 N.E.2d at 851; *see generally* *Stoney-Brook Development Corp. v. Town of Pembroke*, 394 A.2d 853, 854 (N.H. 1978) (ruling that in New Hampshire a justifiable use of police power will suffice to adopt a slow growth ordinance, but growth control ordinances cannot primarily prevent development, just regulate and monitor the scheduling of development).

<sup>97</sup> *Johnstone*, *supra* note 89 at 419 (stating that growth management programs are not a nationally utilized tool in zoning but rather are used in states or regions which experience swift growth and pressures to develop).

While it is evident that communities will attempt to utilize growth restrictions despite the ruling in *Zuckerman*, restrictions must be for a limited duration and limited purpose, or as part of a comprehensive planning process, absent exigent circumstances.<sup>98</sup> As landowners and developers continue to challenge zoning bylaws in the post-*Zuckerman* era, municipalities will fight an uphill battle to prove that their decision to permanently or semi-permanently limit growth is reasonable and a legitimate use of police power.<sup>99</sup> Comprehensive planning is a tool allowing municipalities to protect the morals and safety of their citizenry while implementing growth limitations.<sup>100</sup> As the court warns municipalities, however, "restraining the rate of growth for a period of unlimited duration, and not for the purpose of conducting studies or planning for future growth, is inherently and unavoidably detrimental to the public welfare, and therefore not a legitimate zoning purpose."<sup>101</sup>

### *B. Landowner's Bundle of Property Rights*

Massachusetts landowners are also in a precarious position.<sup>102</sup> While landowners often appreciate the rate of development restrictions in their city or town, they may be subsequently burdened by those same limitations when attempting to sell or develop their land.<sup>103</sup> The legitimacy guidelines for rate of development restrictions advanced by the *Hadley* decision will likely benefit landowners in the future.<sup>104</sup> The legitimacy rule

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<sup>98</sup> *Zuckerman*, 813 N.E.2d at 851; see also *supra* note 84; see also *Pierce*, *supra* note 77, at 107 (stating "in most cases a moratorium will fail unless it is understood to be temporary in nature"). The Author also contends that building limitations will not be upheld generally unless there is clear evidence of a public necessity or proof of environmental harm. *Id.*

<sup>99</sup> *Johnstone*, *supra* note 89 at 418-20 (describing the various concerns that often present themselves when town's attempt to control growth through restrictive measures including environmental concerns, increased financial strains on a community, and property tax implications).

<sup>100</sup> See *supra* note 14 and accompanying text.

<sup>101</sup> *Zuckerman*, 813 N.E.2d at 849.

<sup>102</sup> *Bobrowski*, *supra* note 82 (demonstrating the rarity of both open land for development and the amount of affordable housing that exists in the state). The Author explains that Massachusetts Executive Office of Environmental Affairs' research found that "of the 5.2 million acres- the total land area of Massachusetts- 1.1 million acres have been permanently protected as open space, equal to the 1.1 million acres that have been developed," with less than 9 percent of the total housing units deemed affordable. *Id.*

<sup>103</sup> *Ross B. Lipsker & Rebecca L. Heldt, Regulatory Takings: A Contract Approach*, 16 FORDHAM URB. L. J. 195, 211 (1987/1988) (discussing the development of litigation to balance municipalities' regulations against individuals' property rights). The Author includes an analysis of whether a particular zoning provision constituted a burden or a benefit of society to be weighed against a property owner's bundle of rights. *Id.*

<sup>104</sup> *Zuckerman*, 442 Mass. at 851 (quoting, "except when used to give communities breathing room for periods reasonably necessary for the purposes of growth planning generally, or resource problem solving specifically, as determined by the specific circum-



clearly balances the delicate issues that Massachusetts residents and municipalities face— by attempting to use home rule to maintain the character of a community, while simultaneously enabling stable and continuous growth and allowing landowners to further develop their land as they see fit without permanent growth caps.<sup>105</sup>

The bundle of rights held by landowners includes the right of enjoyment of their land as well as the right of disposition.<sup>106</sup> Some landowners may support rate of development restrictions because they secure a community's housing prices, greatly influence subsequent resale value, and widen the property tax base.<sup>107</sup> Conversely, other landowners seeking to subdivide and develop their property face a challenge when a community has outright banned or phased development.<sup>108</sup> Although the standard for upholding development restrictions that meet constitutional requirements seems, on its face, to please both landowners' interests and municipalities, in the future, it may please neither.<sup>109</sup> It may not please either those who seek to curb development or those waiting to develop, thus litigation ensues.<sup>110</sup> As Bobrowski explains, "Massachusetts' woefully short-sighted land use regulations and inadequate emphasis on regional and local planning have caused the present crisis."<sup>111</sup> The author further contends however, "[w]ith a few modifications to our state land use laws, these progres-

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stances of each case, such zoning ordinances do not serve a permissible public purpose, and are therefore unconstitutional").

<sup>105</sup> See generally *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (stating that property owners have a full bundle of rights that may be subject to a governmental taking). The court held that an elimination of one of the strands of the bundles does not constitute a taking under the law. *Id.*

<sup>106</sup> *Block v. Hirsh*, 256 U.S. 135, 155 (1921) (stating, "[t]he fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed). The court ruled further that "the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay." *Id.*; see *supra* note 105 and accompanying text.

<sup>107</sup> *Johnstone*, *supra* note 89 at 420-21 (contending that there are both residents seeking to limit development to decrease the burden on municipal services and conversely residents that "have been waiting years for anticipated big profits from selling out to developers" and are now prevented from doing so); see also Paul K. Stockman, *Anti-Snob Zoning in Massachusetts*, 78 VA. L. REV., 535, 540 (March 1992) (stating "many municipalities impose restrictive zoning laws in an effort to protect the tax base and to keep local residential property taxes low, a technique referred to as 'fiscal zoning.'").

<sup>108</sup> See *Hansen & Donahue, Inc. v. Town of Norwood*, 809 N.E.2d 1079, 1081-82 (Mass. 2004) (describing the process of a landowner's protections against a zoning ordinance or bylaw and the judicial process to address the perceived harm).

<sup>109</sup> Bobrowski, *supra* note 116 at 502.

<sup>110</sup> See generally Michael S. Giaimo & David A. Mills, *Steering Your Way Through Local Zoning Requirements*, (MCLE, Inc. 2002).

<sup>111</sup> Bobrowski, *supra* note 109 at 502.

sive causes may forge an alliance for positive change.”<sup>112</sup> Today in Massachusetts, municipalities may acquiesce to landowners who seek to curtail development by enacting time constrained growth restrictions for planning purposes.<sup>113</sup> Such growth restrictions could include an inventory of town services, planning studies, and an analysis of environmental concerns.<sup>114</sup> Furthermore, closely regulated growth has the potential to improve a community’s municipal services and increase housing availability in an organized and structured fashion while maintaining community character.<sup>115</sup> While critics argue that any growth inevitably transforms a municipality’s character, the time and purpose requirements provide communities the necessary time and resources required to effectively analyze proposed housing development and make appropriate adjustments.<sup>116</sup>

The limitation of permanent rate of development restrictions absent exigent circumstances allows landowners to develop their land within the context of reasonable municipal restrictions while also reassuring residents who advocate for delayed development during municipal planning.<sup>117</sup> Developers argue that any zoning restrictions can be onerous, time-consuming, and costly.<sup>118</sup> The SJC, however, explicitly held that a town

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<sup>112</sup> See *id.*

<sup>113</sup> *Boudreaux*, *supra* note 86 at 172 (asserting that there is a risk that municipalities will begin to implement unsystematic zoning provisions to limit growth within their boundaries). The Author argues that “a whatever-means-necessary approach to battling sprawl means allowing local jurisdictions to adopt their own antisprawl measures, which are touted as battling ‘excessive growth’ for that jurisdiction. Such uncoordinated restrictions hold the potential for regional protectionism. This may simply shift growth elsewhere and may duplicate many of the problems of governmental ‘fragmentation’ that metropolitan critics so deplore.” *Id.*

<sup>114</sup> See *Zuckerman*, 813 N.E.2d at 849 (stating that restrictions must “specifically contain time limitations or” only “extend...for such limited time as is reasonably necessary to effect its specific purpose”).

<sup>115</sup> See *id.* and accompanying text.

<sup>116</sup> *Bobrowski*, *supra* note 82 at 488 (advocating that communities take sufficient time and resources to analyze their land use “to guide rational municipal decision-making in legislative and adjudicatory action”).

<sup>117</sup> Timothy Choppin, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 GEO. L. J. 2039, 2056-57 (July 1994) (arguing that the primary objective of zoning provisions seeking to maintain community standards and character is to ultimately protect the investment backed expectations of land owners in their current home). The “governmental unit thus acts to protect its investment in property by excluding uses and building types it deems a threat to property values.” *Id.*

<sup>118</sup> *Zuckerman*, 813 N.E.2d at 846 (noting that like many towns, Hadley may, in an effort to preserve its character and natural resources, adopt any combination of zoning by-laws, and participate in a wide variety of State-enacted programs, that may, as a practical matter, limit growth by physically limiting the amount of land available for development). Further, the court explained that Hadley may also slow the rate of its growth within reasonable time limits to allow it to engage in planning and preparation for growth. *Id.* The town may not adopt a zoning to limit the rate of growth for an indefinite or unlimited period. *Id.*

may not place a permanent injunction on building and that restricting building in general is only permissible for “growth planning” or “resource problem solving.”<sup>119</sup>

The *Zuckerman* ruling will likely encourage municipalities to develop creative and effective solutions to their zoning concerns.<sup>120</sup> Although skeptics argue that municipalities will find alternative means of curtailing growth in place of the power to impose permanent rate of development restrictions, the holding in *Zuckerman* is clear: the imposition of permanent or semi-permanent restrictions on development will be invalidated, absent exigent circumstances.<sup>121</sup> In the future, courts will be increasingly cognizant of municipalities’ attempts to permanently curb development in light of the *Zuckerman* ruling, causing Massachusetts cities and towns to evaluate and evolve their zoning bylaws and ordinances by finding other administrative tools to correctly ensure responsible and stable municipal development.<sup>122</sup>

#### IV. CONCLUSION

Massachusetts’ municipalities and legal practitioners should look to the reasonableness guidelines that the SJC laid out in *Zuckerman* to determine the boundaries of reasonable zoning limitations. Community leaders, property owners, and towns will continuously question and push to justify their actions in preventing or promoting growth. Property owners have a constitutional right to use their property, while municipalities have a right to manage land resources with reasonable controls to protect the public. These competing interests are best served in the Commonwealth with a common understanding of the developable landscape that reflects both the preservation and responsible use of land.

As a small state, Massachusetts’ natural resources, property, and human capital are treasured. Landowners and developers aggressively pursue protecting their property interests. Municipalities work diligently to serve their constituents and guard municipal land and services. It is now firmly established that hindering development through permanent rate of development restrictions absent exigent circumstances is unconstitutional. However, municipalities remain mindful of the other zoning tools to curb

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<sup>119</sup> See *id.* at 851, referencing *Sturges*, 402 N.E.2d at 1356.

<sup>120</sup> Timothy Choppin, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 GEO. L. J. 2039, 2070 (July 1994) (discussing that reforms with zoning provisions at the state level are critical). “The most effective means of producing local governments into revising their own land development regulations is to craft new enabling acts governing the exercise of development regulatory powers.” *Id.*

<sup>121</sup> See *supra* note 69 and accompanying text.

<sup>122</sup> Choppin, *supra* note 117 at 2056 (discussing the “highly deferential review of local land development”).

growth. Developers, towns, cities, and property owners will certainly explore creative options to assert their control over the land in the Commonwealth. Inevitably, Massachusetts courts will serve as a neutral arbitrator to resolve the differences of parties engaged in this hotly contested debate.

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