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Norman Wengert

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# CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT

by

DAVID R. GODSCHALK, DAVID J. BROWER, LARRY D. McBENNETT  
and BARBARA A. VESTAL

Chicago, The ASPO Press, American Society of Planning Officials,  
1977, Pp. 295, \$17.95.

Growth management is becoming the focus of much local planning. In part, the phrase is just a new and catchy label for what planners have been trying to do for many years. But in part, it represents an innovative approach to planning and land use control requiring different planning concepts and different kinds of data. Evidence of the importance of growth management is indicated by the three volume collection of essays on the subject published by the Urban Land Institute in 1975 (of which David J. Brower was co-editor).

As with most land use planning and control, implementation of growth management schemes involves allocation or re-allocation of land values and profit expectations with the result that constitutional challenges are inevitable. *Constitutional Issues of Growth Management* is a highly useful, thorough, and systematic review of constitutional questions posed by growth management attempts in various jurisdictions to date as dealt with by federal and state courts. It will appeal to planners, although lawyers will find it a useful synthesis of the variety of decisions and opinions on the subject.

The book is divided into five parts: Introduction; Constitutional Challenges; Illustrative Cases; Policy Considerations; and Supplementary Materials (being a three part appendix). Legal/constitutional problems and doctrines are described in detail in Part 2, Chapters 2 through 8 being entitled respectively: Constitutional Bases for Growth Management; The General Due Process Challenge; The Taking Challenge; The Regional Welfare Challenge; The Equal Protection Challenge; The Right to Travel Challenge; and Emerging State Environmental Protection Challenges.

Uniquely valuable, particularly for classroom purposes, are the hypothetical or fictional examples contained in Chapter 1 and in Chapters 9 through 12, by means of which the authors distill the fundamental problems and judicial opinions encountered in various situations and approaches to growth management. By means of these hypothetical cases, the authors avoid the distractions and irrelevancies which so often confuse actual cases. Careful consideration of these hypothetical cases should, therefore, provide useful guidance to planners seeking to develop growth management schemes.

This book is done so well that one hesitates to raise negative criticisms. But perhaps these too may be useful.

First, except perhaps in the hypothetical cases, and there only to a degree, the presentation cannot help but confuse the non-lawyer. Since the authors examine the topic from the point of view of fifty states and the federal courts, they obviously present many inconsistencies and disparities and leave the reader who is not a lawyer with a sense of high uncertainty. For good or ill, growth management planning is made in the context of particular state law.

Second, the study lacks a philosophical or jurisprudential framework spelling out the desired and the feasible constitutional concepts, positions, and applications. To a large extent, this is typical of American legal writing. But in a field as mixed up as planning and land use control law, scholarship has an obligation to deal with the "ought" and the "should," as well as with what is in judicial opinions. In the final chapter (at page 206) the authors tentatively suggest "Planners . . . may have an important role in educating the courts about the potential scope and nature of growth management." I would assert that legal scholars must show busy lawyers and judges the philosophical "way to go." American legal scholarship has been too modest in this regard. Perhaps the time has come to follow the tradition of European continental scholarship—as a result of which professors are cited in appellate decisions almost as frequently as other court opinions. The obligation of scholars is especially weighty when case law is clouded and uncertain.

Finally, insufficient attention is paid to the jurisdictional issues implicit in effectuating growth management planning. The complex relationships between cities, counties, Councils of Government, and the state must be dealt with, for in many states constitutional amendments may be required before effective growth management can be achieved. Summarizing McQuillin (*The Law of Municipal Corporations*) overlooks the fact that much growth management will have to be implemented by county governments (not generally considered municipal corporations), and that in many states bitter city-county jurisdictional conflicts are typical. In most states, cities do not have extra-territorial jurisdiction, and annexation is often a weak device for extending city jurisdiction. Politically, many counties approach land use from the biases of the developer and the speculator! And while in legal theory counties and cities are creatures of the state, political realities have often given them an independence that will frustrate state efforts to encourage growth management.

NORMAN WENGERT\*

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\*Professor of Political Science, Colorado State University, Fort Collins, Colorado 80521; Member of the Wisconsin Bar.