

## **THE GROWTH CONTROL DEBATE – Why is it occurring now, what’s wrong with many of the suggested solutions and what’s the “real answer”.**

Sprawl, slow growth, pro growth, no growth, smart growth – these terms dominate local and state political conversation as well as news headlines. The discussion and debate divides and alienates elected officials and our citizens from an essential segment of our local economy – which is the building and development industry. This divisiveness is not productive and should be avoided. This article attempts to provide an understanding of the building industry perspective on the Growth Control & Infrastructure Funding issue. These issues are not new nor are they unique to Virginia. But much misunderstanding and many misconceptions exist among our citizenry and even our elected officials, as well as those aspiring to local and state office. We all have an obligation to become better informed and understand each other’s perspectives and motivations in this debate.

This discussion is presented in five general areas:

- Background
- Growth Control Motivations
- Solutions proposed by Growth Control advocates – “Impact Fees” & “APF”
- Existing Growth Controls – The Available Solutions
- The Revenue Solution

### **BACKGROUND**

By way of background, several regions of Virginia had, until recently, experienced a very healthy economy after the 1990-1991 recession. Job growth had been strong; particularly in the Northern Virginia suburbs—this largely due to the strength of the Information Technology and Communication sector of the economy. Businesses that now in 2003, are struggling.

This prosperity which has benefited many Virginians with job security and increasing income has also brought with it something that some may not want; that is new neighbors and the prospect of even more new neighbors.

**Job growth brings population growth, which by necessity means new home construction and land development to house these new Virginians—our new neighbors.**

Many of these new homes, particularly the townhomes and apartments, were necessary to house the young Virginians (our children) that grew up in our communities and went to elementary and high schools that were paid for by you, your parents, and even grandparents. These kids were fortunate enough to find a job and a home in Virginia and did not have to look elsewhere.

But now some of our neighbors have banded together (even created a formal coalition) to challenge the entry of the new neighbors into our communities. This idea is politely referred to as “Growth Control.”

Some on this growth control bandwagon would even like to stop growth in their community—although they will not usually admit it.

Some simply say they want to slow the pace so the community can “take a breath”—but just try to get a consensus on what is the fair and reasonable rate of housing construction necessary to accommodate their community’s population growth.

Even more interestingly try to gain a consensus from the growth control advocates on where the additional housing and new neighbors should live—and don’t be surprised if it’s not in my back yard (or school district).

This is not a new debate; it has been recurring periodically over the last 30 years or more. Early in the maturation process of every suburban community, when the population growth and housing development really accelerates, the rate of change becomes very noticeable particularly in communities where the existing population base is relatively small such as in Loudoun County.

Here-to-fore, vacant tracts of land are converted from what some thought was their privately-owned park or open space to the new residential subdivision.

Schools, which you thought, were just for you and your existing neighbors, must now be shared with your new neighbors. New schools do not get built fast enough, crowding occurs or redistricting changes

school boundaries and your child is moved to a different school. Politicians (your elected local officials) tell you that taxes may have to be raised to pay for the new schools and teachers and tax increases have become a political dirty word.

All of this represents change and in some cases rapid change; and if there is one thing we have learned over the years is that many people resent change; some even fear it. When this growth and change in your community lasts for a sustained period, it is usually met with a “backlash”—a desire to “stop” it or at least “get it under control.”

The resurrection of the Growth Control debate is an inevitable consequence of our recent prosperity. An economic downturn was inevitable, but despite the slow-down in job growth, new home construction has remained relatively strong, driven by low interest rates and a flight from rental apartments (where vacancy rates are now high).

Even with the recognition by some that housing construction (both locally and nationwide) is one of the few bright spots in the economy the growth control advocates continue the pressure for greater legislative authority to curb housing. Interestingly, concerns over the economy have not significantly dampened the growth management debate, and the Virginia legislature continues to study growth related proposals.

Community and political leaders that have been around for the last twenty to thirty years recognize the cyclical and recurring nature of this “no growth” debate.

In 1972, Fairfax County had the infamous “Pause for Planning” which resulted in the so called PLUS Program adopted in 1975—this followed several years of sustained rapid growth in Fairfax County during the mid and late 1960s—when some bragged Fairfax had the largest school bus fleet east of the Mississippi and was building a classroom a day.

In 1989 responding to the fear that, of all things, commercial and industrial development was getting out of hand, Fairfax County once again engaged in Growth Control. This time downzoning the “Commercial” and “Industrial” Districts to reduce employment use density. Wouldn’t Prince William

County and several other jurisdictions throughout Virginia desirous of employment growth, loved to have had this problem?

It is also possible to identify the motivations behind Growth Control.

## **GROWTH CONTROL MOTIVATIONS**

**First, there is the dirty, six-letter word—Sprawl.** Very hard to define but we're sure you will know it when you see it—or more likely, you will identify it as the new subdivision that is proposed down the road from you even though it's very similar to the subdivision you live in. Do you realize your home may be part of the problem?

Most of us live in the suburbs, where the growth is occurring, and probably live in a development that some of the Growth Control advocates would label as Sprawl. Some of these same groups and individuals--and you know who they are--are visible by their strident admonition that we must change the way we live in order to avoid building more roads, reduce traffic congestion and to save the environment and farm land.

Further, the Growth Control advocates believe that the alleged sins of Sprawl not only include the environmental consequences. It is also claimed that it results in the inefficient provision of public services and facilities. Actually this is more the result of another growth phenomenon called "**Leap Frog**" development which sometimes is confused with Sprawl.

These folks advocate urban **in-fill** development as opposed to more suburban development on the urban-rural fringe. Sounds great, but guess what? Builder Focus Groups conducted around the country time and again point out how most Americans and, yes even Virginians, want to live in a single-family house on a tract of land at least a quarter of an acre in size and preferably larger.

Interestingly, there is a growing fear among the residents of many established suburban neighborhoods where services and facilities exist that the push for in-fill development will disrupt their community. Again, people resist change even when others have deemed it to be in the public interest.

All too often, citizens are against both "sprawl" and "infill," if it's in their neighborhood.

The **second major motivator of the Growth Control advocates is money**—yours and mine.

Public services and facilities cost money and the demand is increased by the region's job growth and population growth, including growth in school age children. It is not caused by the construction of the new homes or the development of new subdivisions and communities. The builder and developer is acting to provide shelter, as well as office and commercial buildings to accommodate this growth in the same way the local School Board is building the schools to accommodate the increase in school population. This demand, particularly for schools, is putting pressure on local governments to raise revenue to pay for school construction and teacher's salaries.

Unfortunately, the real estate tax is the single largest revenue source for most, if not all local governments in Virginia. As public facility construction needs increase due to job and population growth, so does the need to increase the revenue from the real estate tax. This increase occurs either as a result of the local governing body increasing the tax rate or as a result of the real estate assessment increasing because of market values increasing. Real estate assessments are driven by the market place and not directly by local government actions. Local governments could indirectly influence the market value of real estate by restricting the supply of land (through zoning regulations). If the supply of properly zoned land necessary to meet market demand is restricted the land values of that which is zoned may increase.

As the real estate tax burden increases, homeowners often believe the increased government spending is to pay for growth and the reaction is swift and negative. The result – the cry that “growth should pay for itself.” This reaction is exacerbated when the rate of real estate tax increase is rapid and the amount significant. This usually occurs when the demand for housing is greater than supply and housing values are rising rapidly as they have in the last few years.

Even though the increase in home value is to the ultimate benefit of the owner, the resulting tax increase must be paid from the taxpayer's income, which has no relationship to the real estate value.

The net result of these economic realities is that the existing homeowners resent the larger real estate tax bill which hasn't necessarily provided an increase in government services for them – or at least they may not think so or recognize the increase in service.

The politicians' reaction to the taxpayer unrest and search for "solutions" is to shift the burden to others – the easy target is the builder and/or developer, who is creating the new homes – but not the growth.

Finally, and sadly, there are a growing number of Growth Control advocates who are motivated by a desire to redistribute the wealth. They believe it necessary and fair and honorable to take money from those they feel are prospering from growth by building homes and developing real estate—the builder/developer. Some who believe that the imposition of an Impact Fee on new homes has got to be a part of the answer to the Growth Control puzzle are in this category.

The motivations behind the Growth Control movement have not changed in the last 30 years and neither have the proposed solutions.

## **SOLUTIONS PROPOSED BY GROWTH CONTROL ADVOCATES**

### **Impact Fees**

Impact Fee enabling authority is sought by some local governments as the answer to raising revenue for local infrastructure, particularly schools.

Anyone who fairly and honestly evaluates the concept of the Impact Fee, which is levied, as a hidden tax on the purchaser of a new home, will recognize that it is neither fair, equitable nor a reliable source of income. The homebuilder or developer does not pay the Impact Fee. The purchaser of the new home will pay this fee, which will be in the purchase price like all other costs incurred by the builder. Impact Fees will raise the price of homes and will eliminate many potential buyers from qualifying. Ultimately, it will be those less fortunate that will get hurt the most.

Impact Fees are not fair because the "new-home" purchaser is not always the new resident of the community who has moved into the region from "out of town" to take the new job. It is the "new family" that represents the real growth of the community that has caused the increased demand for facilities such as schools. The new family or growth of the community moving in from outside the area frequently buys a "previously owned, resale home," not wanting to wait the 4-8 months for the new home to be constructed. Conversely the "new-home" is frequently purchased by an existing resident of

the community who is moving within the area. In some communities as many as 60-90% of all new homes are purchased by existing residents of that community. This existing resident is actually helping the local economy with the purchase of the new home along with the inevitable purchase of the goods and services that frequently accompany a new home such as furniture, hardware, interior accessories and landscaping.

A point often lost in the Impact Fee debate is that the fee amount bears no relationship to the price of the new home. (The public policy issue often overlooked is how Impact Fees, if rationally applied, will disproportionately negatively impact the lower priced housing; housing which is often purchased by the lower income and young families who are struggling to make the first home purchase with no equity from a previous home. A hidden consequence of this struggle to qualify for the first home purchase, which is exacerbated by the Impact Fee cost, is that the home buyer must look further and further into the outlying suburbs to find affordable housing. This contributes to longer commutes and unnecessarily increases the demand for public services and facilities in those outlying communities. Impact Fees will, in fact, contribute to, you guessed it – Sprawl!) To pass legal muster, the fee must bear a reasonable relationship to the payer's (the new home buyer ultimately) proportionate share of the cost of the facility to be constructed with the Impact Fee revenue. This is referred to as a rational nexus. In the case of schools, school construction cost when divided by the total number of students must be fairly and equally divided among all the homes that will generate that student population, regardless of the price of the home.

Therefore, the Impact Fee amount is based on the number of students expected from that home, whether it is a \$150,000 starter town home or a \$550,000 upscale single family home on a large lot. And while there is frequently a difference and slightly greater number of school age children in the more expensive single family home, it is not sufficient to overcome the disparity in financial consequence that the Impact Fee has on the less expensive home. The \$150,000 homebuyer will pay almost 4 times the percentage of the new home price in Impact Fees than will the more expensive \$550,000 home buyer, assuming the fee is roughly the same for each house.

In short, the imposition of Impact Fees is bad public policy and for lots of reasons.

The fundamental issue is whether an Impact Fee placed on the “new home” (not necessarily the new resident) is fair and reasonable. The building and development industry suggests it is not, and the General Assembly of Virginia should not expand this authority.

If we really wanted growth to pay for itself, as we often hear, then we should establish a “Border Tax” and levy the fee on every “new family” moving into the community whether they buy a new home or a previously owned existing home. As ridiculous as it sounds, it would be fairer and intellectually honest as a solution than the Impact Fee.

### **Adequate Public Facility Ordinances (APFO)**

The most radical reaction to the symptoms of growth is the proposal for an Adequate Public Facility (APF) ordinance, which is sometimes called “Concurrency” or “Level of Service” (LOS). APF Ordinances or other similar schemes restricting building permits would allow the local government to impose a moratorium or limits on subdivision or housing permit approval if certain public facilities are deemed by the governing body to be inadequate.

The moratoriums on housing, resulting from APF Ordinance building restrictions in one jurisdiction, simply encourage sprawl and leapfrog development into the adjoining outlying jurisdiction. This furthers traffic congestion, and simply pushes the public facility problem to the neighboring community. Think about it - are APF or other building restriction schemes really the answer to the regional job, population and housing growth issue? Absolutely not! The imposition of building moratoria, even when temporary or short term, does not solve the problem of generating revenues.

### **A new twist on APF is the “Affordability Index”**

This proposal is also similar to the concept of “Adequate Public Facilities” ordinances in that its stated purpose is to link the pace of growth to the local government’s ability to pay for new capital facilities. In truth, however, it is not the County’s ability to pay for new infrastructure that is at issue here. No statutory limit or financial insufficiency bars the local government from incurring debt to pay for needed infrastructure. It is largely a political matter of not wishing to place “undo[sic] stress on existing taxpayers.”

We take the position that the market, responding to our constitutionally guaranteed freedom to move and choose our place of residence as regulated by the “Existing Growth Controls” and not an arbitrary limit imposed by local government, should control the number of building permits issued in any given time period.

These simplistic solutions of Impact Fees, APF or the combination of the two are not needed to either control growth or raise revenue for school construction. Local governments have enough authority now to plan and control growth but frequently lack the will, and in some cases, the expertise to properly use it.

## **EXISTING GROWTH CONTROLS – THE AVAILABLE SOLUTIONS**

### **What does growth control or managing growth really mean?**

Controlling growth means regulating or deciding:

1. **Where growth is to occur**—where geographically within the community are certain uses to be permitted.
2. **What is to occur**—for example, which use such as commercial, residential, etc., is to occur.
3. **How much of a given use is permitted**—such as the density of residential uses or intensity of commercial uses.
4. **How it should occur**—essentially the regulation of design such as building heights, setbacks, and parking requirements

**And finally,**

5. **When** it should occur – the “timing of growth”.

The “**where,**” “**what**” and “**how much**” of Growth Control is accomplished through the governing bodies exercise of the Comprehensive Plan process and the adoption of the Zoning Ordinance and subsequent amendments.

The “**how it should occur**” or regulation of land development layout and design is accomplished with requirements and restrictions and standards established by the Zoning Ordinance and the Subdivision

Control Ordinance, along with construction standards and specifications adopted by the governing body, as well as the State Health Department, Highway Department and others.

The “**timing of growth**” within a multi-jurisdictional region or Metro area is largely controlled by the rate of regional job growth and in-migration and new-household formations—none of which can be materially influenced by any one jurisdiction.

However, within any jurisdiction the governing body can greatly influence, if not control, the timing and direction of growth within certain geographic areas within its borders through thoughtful, careful, long-range planning and using a strategy combining the Comprehensive Plan, the Capital Improvement Program (CIP) and public sewer and water expansion policy.

The locality can go a long way toward deciding when as well as where suburban residential development will occur.

Local governments have an incredible amount of authority and discretion in dealing with most of these issues. The local governing bodies are allowed wide discretion in enacting and amending Zoning Ordinances because of their knowledge of local conditions and the needs of their communities. The courts will not substitute its judgment unless there is a clear abuse of power.

Local governments also have almost total latitude in adopting the Comprehensive Plan. The Comprehensive Plan is an expression of policy, philosophy and guidance. The locality decides where it is going to allow certain uses by adopting its land use plan and enacting its Zoning Ordinance, which divides the community into different and separate use districts. The Zoning Ordinance is one of several local government tools available to implement the Comprehensive Plan.

The locality can deny higher density residential in certain areas and encourage it in others in order to optimize the use of existing infrastructure including schools, sanitary sewer, and mass transit facilities or bus routes. For example, several years ago Prince William County adopted a Zoning Ordinance text amendment “downzoning” its townhouse density from 10 dwelling units per acre to 6 dwelling units per acre. Another example of Growth Control with existing tools.

In addition, Prince William County adopted a Comprehensive Plan establishing a vast area of low density known as the “Rural Crescent” in which it established a policy whereby no services or facilities are to be expanded thereby discouraging even the 10-acre minimum lot subdivision, which is otherwise permitted by right.

In 1982, Fairfax County accomplished a similar “down-planning” and “downzoning” of approximately 40,000 acres from one and two acre lots to five acre lots. This was sustained by the Court, which allowed only approximately 20 of the hundreds of landowners to continue development on 1-2 acre lots since they had established a vested right to do so. In short, Fairfax County drastically reduced the density in much of the southwestern part of the county and the courts supported the action.

Most recently in 2002, Loudoun County “down-planned” and subsequently “down-zoned” much of the western two-thirds of the county. This action increased the allowable minimum lot size from 3 acres to 20 acres and 50 acres. This increase in minimum lot size reduced the number of permissible lots and future homes by as many as 80,000. Some existing residents see this growth management move by the Loudoun County government as a positive, desirable decision. Others recognize that the future population that would be housed in the 80,000 homes will now be forced to look beyond Loudoun in Clarke and Frederick Counties in Virginia, or to Frederick County, Maryland and Jefferson County, West Virginia.

The Zoning Ordinance and Site Plan and Subdivision Control Ordinances provide the tools to determine design parameters such as setbacks, yard requirements, building heights, minimum open space, parking, and landscape requirements as well as recreation requirements in certain residential districts.

Land dedication for schools and parks can be obtained at no cost to the locality if appropriate and sufficient density incentives are included in the Subdivision Control and Zoning Ordinance. Fairfax County has successfully used this strategy for over 30 years, which has resulted in a world-class stream valley park system and acquiring almost all of its elementary school sites since the early 1960s for “free.” In this regard Fairfax County had a fair and reasonable ordinance and it worked.

Localities can do much more than they do to influence the timing of significant residential development within certain areas of the jurisdiction. True, it cannot stop or even necessarily slow the pace of a

market driven housing sales rate within the overall community or jurisdiction—nor should it be allowed to unless we are ready to sacrifice a fundamental liberty which we have thus far preserved in Virginia. But, and there is always a but, localities can adopt a Capital Improvement Program (CIP) which results in spending public dollars and providing expanded infrastructure including schools only in areas where the government wants private development during the foreseeable future. In addition to the CIP, working with VDOT, Counties can influence the Six-Year Road Program to ensure that those admittedly few dollars are not spent in the wrong place (unless, of course, safety dictates otherwise).

Other than zoning, the existence of sanitary sewer facilities and municipal water supply is the most significant factor in determining whether “suburban density” residential development can occur. The Comprehensive Plan can clearly articulate which areas of the jurisdiction are to be “opened up” with public sewer and water. The governing body can establish where sewer and water is to be located and when. The locality can accomplish this directly, if sewer and water systems are provided as a part of the municipal government, or indirectly by working closely with its appointed Service Authorities.

Finally, the local Planning Commission and the governing body have control over whether or not any public utility, building, or facility can be constructed. The section of the Code of Virginia, which deals with the “Legal Status of the Plan”, gives the locality the ability to prevent construction of the public facility if it is not in accordance with the adopted Comprehensive Plan. This is a powerful tool.

**The use of these available strategies to control timing does not mean the locality could or should shut down all private development simply because it decides it cannot or will not afford more schools or other public facilities.** But it does allow the governing body to determine which areas of the jurisdiction will accommodate residential subdivisions developed on sewer and water and when. In essence, creating a time phasing of development so that the locality can do a better job of anticipating where and when schools will be needed. For example, Loudoun County during the 1970s and ‘80s postponed development for years in their Route 50 corridor southwest of Dulles Airport by refusing to plan the area’s growth and not extending sanitary sewer further up the Broad Run Watershed.

Fairfax County invoked a similar strategy in its Pohick Watershed during the 1970s and early 1980s when much of its development occurred—development was allowed in the main branch and middle run

of the Pohick but prohibited in the South Run during the 1970s by not providing the sewer extension in that subshed.

In conclusion, it is now possible for the locality to determine the “where,” “what,” and “how much” of growth. Local governments have all the tools and authority they need and they do not need more. In fact to reinforce this point, a quote from a local Government County Attorney who is active in this debate and knowledgeable on the subject is worth noting, “...my view is that it is possible to accomplish much of the goals that you all might individually have through the legislation that’s on the books right now if you proceed in a consistent way and that’s not only in drafting regulations that are consistent with your Comprehensive Plan but acting consistently after that...”

While it is not easy for localities to just stop growth, its timing can be influenced and it can be directed into or away from certain geographic areas to help with school planning and efficiency in providing new facilities.

It should not be easy for localities to stop growth or interfere with the builders’ attempt to understand and respond to the market driven demand for his product. The builder’s product is, after all, only in demand because of the job growth in the community which is advocated by not only the current administration, but by every Governor as far back as one can remember, as well as many local government community leaders.

The General Assembly, has in the past, sought to achieve and maintain the delicate balance between the individual property rights of its citizens and the health, safety, and general welfare of the public as promoted by reasonable restrictions on those property rights.

Recognizing this need for balance, the General Assembly passed SB570 in the 1998 session in an attempt to protect those property rights which would otherwise be injured when a governing body exercises its considerable power to downzone land and amend the land use regulatory ordinances creating greater restrictions or requirements (see section 15.2-2307 of the Code of Virginia). At the time of its passage, the reaction among some local officials and editorial opinion writers would have had you believe that the General Assembly took away the localities’ power to plan and zone. This is a gross

distortion of what the legislature did and we should not be tempted to undo or diminish in any way the long overdue protections and balance provided by that law.

**In summary, the building and development industry is and will likely continue to be unequivocally opposed to APF, Impact Fees, and other schemes that may attempt to combine the two, as well as, any attempt to modify the vested rights legislation (15.2-2307). However, the development industry is very sympathetic to local governments need to raise revenue and construct new schools and otherwise expand the public infrastructure in our more rapidly growing communities.**

#### **WHERE DOES ALL OF THIS LEAD US AND WHAT'S THE REAL ISSUE AND SOLUTION.**

**The building and development community believes the legitimate issue is not Growth Control but Revenue Generation.** The prosperity and job growth of the mid to late 90's that has brought population growth and residential development had also brought increased State revenue from income and sales taxes during much of the late 90's. Much of those revenues were not shared with the high growth communities that generated them. These local governments struggled to meet the State's constitutional mandate of educating our children and had to rely heavily on the local real estate tax revenue.

The real estate tax is becoming almost as unpopular as the "car tax." As the demand for housing outpaces the supply, prices on all homes tend to rise, including existing homes! This results in an increase in assessments with a consequent increase in the real estate tax burden – unless, of course, the local government reduces the tax rate commensurate with the increase in assessment. The real estate tax burden is often increasing at a rate faster than incomes such that the taxpayer really feels the tax pain and there is little consolation in the fact that his home value increased – unless he is on the verge of selling.

If the General Assembly and Administration would adequately fund school construction, a major motivator in the debate over Growth Control could be diminished if not eliminated. We could then focus on whether the other more parochial issues pushing the debate are worth the extreme solutions advocated by such groups as the "High Growth Coalition" and other growth control advocates.

The more mature Northern Virginia jurisdictions have experienced the same or similar demands on schools and other infrastructure resulting from rapid residential growth. These localities weathered the storm and got through it relying on the existing enabling legislation and without APF ordinances or School Impact Fees. They solved their problems of school construction finance with solid long-range school planning and programming and the use of bond debt. And even though it may have been painful at times for the local governing body, they accomplished it with little or no state help. If the state would participate financially, then certainly today's high growth localities can do it as well.

If the state won't raise revenue for local school construction then it needs to provide the local government authority for fair, equitable, broad based and reliable measures to raise the revenue locally. These tools may include: local income tax and/or sales tax dedicated to infrastructure; equalizing taxing authority between municipalities and counties and/or a special real estate sales tax for local expenditure on infrastructure. These measures avoid the real estate tax problem of a recurring tax that bears no relation to the taxpayers' ability to pay and where the taxpayer has no control over the event or circumstance that triggers the need to pay the tax (as with the car tax).

**What Virginia does not need to do is succumb to the political expedient of stopping new home construction through APF moratoria or by imposing an Impact Fee on a very small segment of our citizens who are buying new homes and who are underrepresented in the process.**

Impact Fees or other exactions such as cash proffers designed to raise revenue for needs that aren't unique to the individual development but are for the general good do not meet the test of being fair, equitable, broad based and reliable. Remember, in many communities as much as 60-90% of all new homes are purchased by existing residents. And these families do not represent the growth of the community and they are contributing to the local economy and thus to local and state revenue, the entire time of their life, even after their children are educated by the public schools – assuming they even had children in the public schools in the first place.

In short, we should not single out the new homebuyer to shoulder a disproportionate share of the tax burden which is necessary to pay for our growing communities. It is, after all, this buyer of new homes and the home building industry that is credited by many economists and national political leaders with keeping our fragile economy from falling into a full fledged recession.

This article was prepared by Douglas R. Fahl, Executive Vice President with Dewberry & Davis LLC. Mr. Fahl is a planner and engineer with over 30 years experience in urban and regional planning, the land use regulatory process, land planning and site engineering.