

2010 VACo Supervisors Conference

January, 2010

Richmond, Virginia

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Welcome !

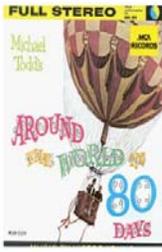
Supervisors

to



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Around [the world of]
Land Use
in 60
Minutes



Produced under the auspices of the Local Government Attorneys of Virginia, Inc.

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Starring

Jay Stroman as Phileas Fogg

Jay features as Spotsylvania County Attorney. Jay has starred in other local government productions, most recently as Gloucester, then Isle of Wight, County Attorney.

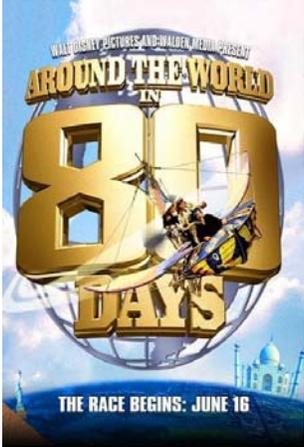


Sharon Pandak as Dassepartout

Since her long tour as Prince William County Attorney, Sharon performs as counsel to localities with Greehan, Taves, Pandak & Stoner_{PLLC}. She features as Orange County Attorney.

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a Story about how far localities can go in Virginia. The journey begins with ...



THE RACE BEGINS. JUNE 16

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Possible “or’s” ??



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FUNDAMENTALS OF LAND USE PLANNING AND ZONING

what you need to check out BEFORE
you take off:



the **MAP** the Local Land Use
Regulatory Framework in
Virginia Code

- Comprehensive Plan 
- Zoning Ordinance 
- Subdivision Ordinances &
Development Regulations 
- Capital Improvement Program



The Dillon Rule

Localities only have powers which G.A. gives

or all powers except those G.A.

takes away (home rule) –

**DOES IT REALLY
MATTER ?**



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you are in for a first class waltz

- **BROAD ENABLING AUTHORITY** with **SIGNIFICANT RESTRICTIONS** and new **guidance.**



Blue subtitles are names of songs from the 1956 and 2004 versions of THE Movie

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Virginia Supreme Court

The "Judge"



- Generally gives presumption to *substantive* local government decisions
- *Procedural* deficiencies can be fatal
- Disfavors downzonings

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The chase.....



Government must balance public and private sector rights in making land use decisions.

Failure to do so can result in litigation, G.A. action, or ballot box changes.



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Comprehensive Plan

River of Dreams

- **THE Land Use Guide – not law**
- **Is part of a coherent policy**
- **Grounded in reality**
- **Reasonable planning assumptions**
- **Treats similar areas similarly**
- **Amend judiciously**
- **Must review every 5 yrs**



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[not] lost in America

Consistent adherence to a good Comp Plan is the best bulwark for zoning and other land use decisions



(Failure to follow the plan does not make a zoning action illegal)

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Capital Improvements Program (CIP)

- **Plans capital improvements for next 5 years,**
e.g. roads, public buildings, sewers
- **Updated annually**
- **Identifies facilities,**
priority & timing, how
will be paid for
- **Critical to using cash
proffers & impact fees**



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- **CIP can be used to:**
 - **focus public facilities into areas where locality wants development**

(away from those where don't want growth)
 - and
 - **accelerate desired development**
- **CIP should be consistent with and implement the Comp Plan,**
- **Funding for public infrastructure to match projected development must be available or projected, or**

the locality may come up short

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Zoning Ordinance

Temple of Dawn

**Contains most of the
LEGAL requirements for
local
land use**



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Zoning Ordinance should

- **Be consistent with Comp Plan**
- **Follow controlling law**
- **Have a factual underpinning and be facially reasonable**
- **Be coherent and readable**
- **Assure a level of certainty**
- **Not irrationally discriminate between similar properties**
- **Not be purely aesthetic**
- **Not be socio economic in disguise**
- **Not be illegal spot zoning**
- **Have a rational basis for grandfathering of old uses**



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Special Use Permits (SUPs) aka (SEPs) (CUPs)

condition proposed development to mitigate its impacts



- **BOS may grant** SUPs "under suitable regulations and safeguards," i.e. "conditions" through zoning action
 - Conditions do not require approval of permit holder
 - **SUPs allow** greater control over the use of land
 - **BOS can revoke** SUP for lack of compliance w/ conditions
- Limitations:** cannot require for by right subdivisions
cannot require for by-right clusters

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Proffers - Conditional Zoning

- **BOS may accept "reasonable regulations and provisions" (proffers)(Broadest proffer authority) Accepted proffers become law.**
- **Rezoning applicants may offer proffers as inducements to the BOS to rezone the land.**
- **BOS can refuse a proffer.**
- **Are *in addition to* existing regulations for a particular zoning district**

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Broadest Proffers may include:



- Reasonable **cash contribution**
- **Dedication** of real or personal property for open space, parks, schools, fire departments or public utilities
- **Payment** for, or construction of, off-site public improvements
- **Better design – environmental protection**

(Some jurisdictions have more limited proffer authority)



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Limitations on Proffer Authority

- **Cash proffers** must generally be spent within 7 years or cash goes to the Commonwealth Transportation Board.
- **Cannot require** a Property Owners' Ass'n to assess fees for certain public facilities
- **BOS may** use cash proffers for similar alternative improvements in the vicinity of the original improvements.
- **BOS can** require payment of cash proffer prior to payment of building code fees if applicant agrees.
- **BOS must** have a map indicating properties with proffered conditions.



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Landowners have proffered:

- Right-of-way dedications and road construction
- Public school and fire station sites
- Parks
- Cash for construction of public facilities
- To reduce the permissible uses or allowable densities
- Increased buffers or tree coverage
- To preclude storage or handling of unsafe undesirable materials
- Community design guidelines/architectural styles
- To preserve historic property or open space
- To construct affordable housing
- To use more stringent air or water quality practices
- Timing provisions




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Accept Proffers Carefully

It's a small world...

- Proffers should:
 - Further the Comp Plan and improve the application.
 - Be *in addition to* the zoning regulations.
 - Mitigate adverse impacts and make the subject development more compatible with its neighbors.




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Drafting for the Future – SUP conditions and Proffers

**Questions to ask
about any proposed
SUP condition or
Proffer:**

Who?

What?

When?

Where?



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Subdivision Ordinance – regulates divisions of land and a bit more

- 1. Locality limited in enacting subdivision ordinance**
- 2. Approval/Denial of specific proposed subdivision plat or plan by PC/staff is a ministerial not a discretionary act**
- 3. Use of Subdivision Ordinance as main tool of land use planning is limited.**



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Design & Construction Standards Manual

A largely administrative “how to” supplement to the Subdivision and Site Plan ordinances.

Addresses process and fees for review of plans



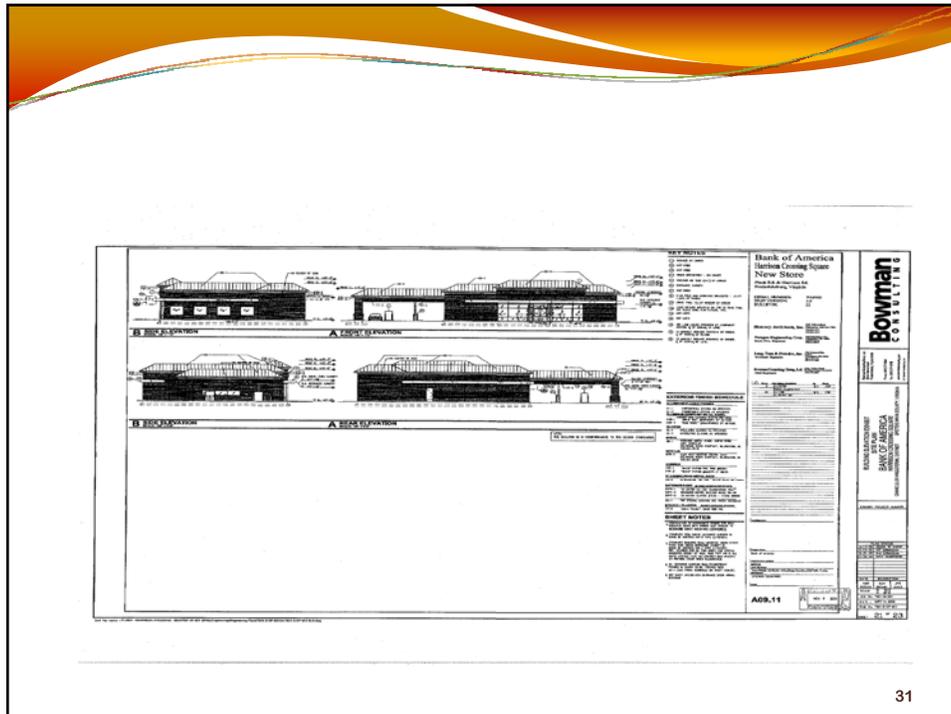
Development Regulations should flow from the Comp Plan and Zoning Ordinance

The Subdivision Ordinance and Standards Manual should be:

- Consistent with and implement the **Comp Plan** and **Zoning Ordinance**, and
- Further the **goals** of those documents.



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Important for Subdivision and Site Plans:

- ✓ Have a clear –detailed ordinance consistent w/ State law
- ✓ Obtain material sufficient to evaluate whether plan meets ordinance requirements
- ✓ Seek outside expertise as necessary (VDOT, Health Dept, DEQ, DCR)

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***The locality
did what?***

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Procedural Issues in Making Land Use Decisions

- ✓ **Create a Good Record:**
 - **Zoning Decisions are entitled to legislative presumption**
 - **Record is very important.** (critical to provide legal notice; follow FOIA requirements)
 - **Perception of the procedural process is key, i.e. due process.**



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Consensus is Useful – notice is REQUIRED

- **Notice** – tell people what to expect (**follow legal requirements**)
- **Public hearings/meetings**
 - Planning Commission – **generally required**
 - *ad hoc* citizen groups; community associations.
- However, governing body must **act** on a rezoning/SUP application **in accordance with statutory criteria**.
- **Governing body cannot delegate its duty, or its decision making, to the public.**



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First Class Waltz

- **Adopt, review, amend the Comp Plan/Zoning and Subdivision Ordinance/Regulations in accordance with the Virginia Code.**
- **Courts want to be sure procedures set forth by the Virginia Code and local ordinances have been followed.**



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Vested Rights

- **Derive** from case law and statutory provisions
- **Limit** the locality's ability to change certain land uses

(Supreme Court has recently helped localities by giving strict construction to vested rights)



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THE PASS – OFF



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Tools for



Progressive Land Use Planning



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the wager

- Desirable quality of life and environment
- Improved land use and regulation of uses
- Early conscientious planning is critical to reaching a long term vision

... are you in ?

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Impetus to Change Land Use Plans and Regulations

- Got "burned" by landowner – i.e. **toxic dump**
- *Want to attract economic development*
- The Feds/State/Region/interstellar aliens made us
- The Hordes are coming
- *Got elected on the issue*
- **Environmental issues**
- Constituents want change
- **Want to improve the quality of life**



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Additional Catalysts for Change

- Changes in "the world"
- Costs of Public Infrastructure



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Land Use Framework – the Value of Linkage



- Without linkage localities are limited in addressing land use issues with a subdivision ordinance or at the site plan stage

because they must generally



approve a proposed subdivision or site plan if it meets ordinance requirements.



Rezoning Decisions

Land Ho

Individual Rezoning and SUP decisions are HOW the BOS implements its Comp Plan



PRIME CONSIDERATION

in making a zoning decision on a **specific property**, *should be consistency* with the Comp Plan & Zoning Ordinance.



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Invitation(s) to a bull fight ...

Moratoria on development – Generally not defensible/ No authority
(Temporary suspensions might be allowed under very limited circumstances)

Locality cannot pass emergency zoning ordinances.
(can adopt reasonable interim ordinances
– all ordinances are interim until revised)

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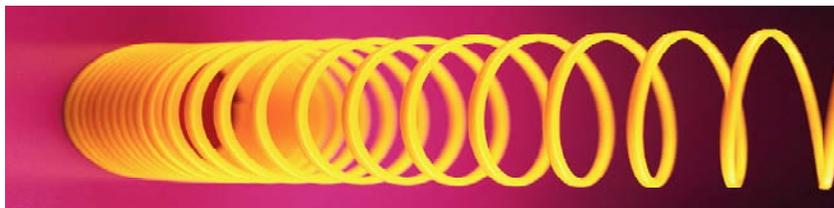
**Localities have tools to make
development more concurrent with
public facilities to serve it.**



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Look at the **MAP** again

- Comprehensive Plan 
- Zoning Ordinance 
- Subdivision Ordinances & 
- Development Regulations
- Capital Improvement Program 



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Reasonable rezoning requests that are 

inconsistent with the Comp Plan and the CIP may be denied

 **IF the tools are used *effectively***

Legislation is needed to require phasing of development at the subdivision and site plan stages. (Also sometimes called "APF")

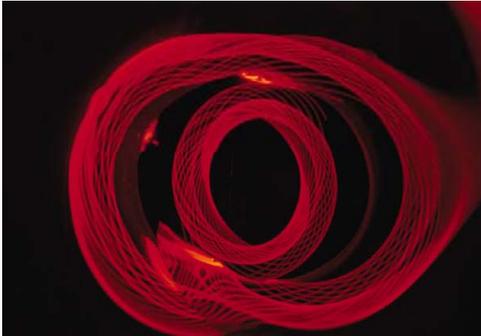
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A "secret" tool

(only because many localities do not use it effectively)

- **Review of Public Facilities** 

consistency with Comp Plan ("2232 review")



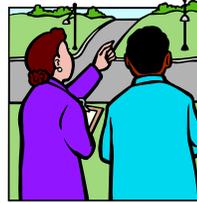
(also effective mapping of public facilities)

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Other Land Use Tools:

Jetpack Journey

- **Overlay districts**
- **Impact Fees and Proffers**
- **Transfer & Purchase of Development Rights**
- **Conservation Easements & Open Space Act**
- **Public/Private Partnerships – special taxing districts, special public-private funding of necessary infrastructure**
- **Public funding and location of infrastructure**
- **Linking land use and transportation**



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Overlay districts/Corridors/related districts – examples:

- **Airport Overlay**
- **Conservation Overlay**
- **Rehabilitation, Redevelopment Overlay**
- **Historic Overlay**
- **Protected Mountain Ridge Overlay**
- **Tourism District**
- **Dam Break Inundation Zone**
- **Agricultural, Forestal and Open Space Districts**

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The “Bermuda Triangle” Debate

an incomplete comparison for illustrative purposes only

Proffers

- Voluntary
- Adapt to the Project
- Very flexible
- Can't use on stale zonings
- Less predictable to developer
- Allows for ongoing community input and negotiation with developers
- Can disrupt land use planning
- Generally, financially better for locality

Impact Fees

- Mandatory
- Can impose at subdivision and site plan stage irrespective of zoning
- Predictable to developer
- Predictable to locality
- Less financial benefit to locality
- Inflexible



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Public/Private Partnerships – some examples

- Special service districts
- Sanitary districts
- Development agreements
- Community development authorities
- Tax increment financings



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NEW CHALLENGES AND OPPORTUNITIES from the STATE

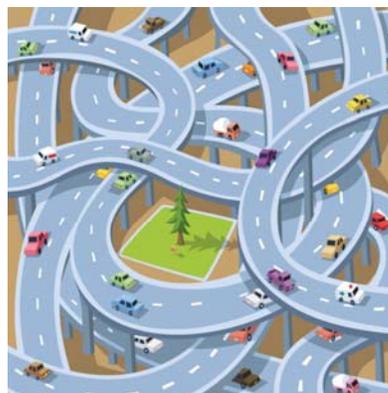
- **Linking Land Use and Transportation**
- **Urban Development Areas**
- **Access Management Regulations**
- **Stormwater Management Regulations**
- **Future ?**
 - **Modifications to Proffer and Impact Fee Statutes**
 - **TMDL requirements**
 - **Others**



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Linking of Land Use & Transportation

- **The WHY**



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Linking of Land Use & Transportation



Rendezvous in Paris

- Localities must now show transportation corridors of statewide significance on Comp Plans
- Rapidly evolving State role in linking land use with transportation
- Localities will be challenged to coordinate with State and in region in months to come
- Access management, UDAs, certain road distinctions, etc. are part of evolving process

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Some Issues which present hurdles to good planning

[potential] Pagoda[s] of Pillage



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- **Impact of Family Subdivisions**



- **Impact of Alternative On-site Septic Systems**



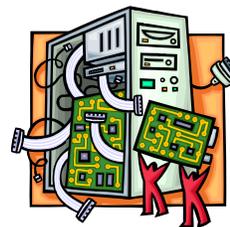
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DOWNZONINGS aren't easy

[Assembling or] Dismantling Carmen

Two types:

- **Piecemeal**
- **Comprehensive**



Piecemeal downzonings can only be accomplished under certain circumstances and are subject to **stricter scrutiny** than

Comprehensive downzonings have a presumption and are evaluated under the arbitrary and capricious standard.

BOTH TAKE LOTS OF PLANNING and COMMUNITY EDUCATION to SUCCEED

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Local tools to preserve Open Space

- **Comprehensive Plan**
- **Zoning Ordinance**
 - **Planned Unit Developments (PUDs)**
 - **Cluster Developments**
 - **Proffers**
 - **Tax Credits**
 - **Other Options**
- **Subdivision Ordinance (ltd.)**
- **Incentive Zoning**
- **Land Use Taxation**
 - **Ag & Forestal Districts**



Transfer & Purchase of Development Rights (TDRs & PDRs)

- **TDRs** Through ordinance scheme property owners can trade allowable density (can also be done in limited way by proffer).



- **PDRs**
Locality or other entity can purchase development rights in order to reduce density to fit land use plan.

Often **open space or conservation easements** are created.

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Avoid other localities' mistakes:

- **Link Comp Plan, etc. – do good planning**
- **Do necessary studies and consult experts**
- **Develop clear regulations/ordinances with sufficient detail**
- **Build a record**
- **Consult with counsel early and often**
- **Act consistently**
- **Try to build consensus**
- **Act within the law**



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Citizens, Developers, Courts, the Legislature

invitation to a bull fight

- **Key challenge** may not be in court but public opinion. All parties desire input, clarity, credibility and predictability.
- Land use proposals, which “do not go down well locally,” can **find their way into debate** by **General Assembly** or the subject of legislation.



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Community Involvement - Role of Public Input

- ✓ **Public input can assist BOS and PC in consistency.**

- ✓ It can also be “painful”



- ✓ **Public input can help BOS and PC raise expectations for higher quality development and land use scheme.**

- ✓ **BOS and PC should help focus public expectations.**

sky symphony [?

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Localities must balance rights of the public and private sectors

- **Financial health**
- **Improve Quality of Life - for residents & businesses**
- **Property values**
- **Protecting the environment and quality of life is good for economic development and vice versa.**
- **To avoid being sued – by the landowner/developer**
- **To avoid being sued – by neighbors, interest groups, state or federal regulatory agencies**
- **To maintain credibility**



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Effective Growth Management

- **Ability to Incorporate Input** --- **Clarity of Action** --- **Predictability**
- **Having a clear Plan and linking all tools effectively**
- **Starting the venture,**
- **Finishing the venture**



- **“Very impressive, I’d have let go by now,”** P. Fogg remarking on Passepartout’s perseverance

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Good luck
with your Extraordinary
Adventure

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THANK YOU

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Inc.*

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Credits

- To all affiliated with the 1956 Version of “Around the World in 80 Days” and the 2004 Remake (may those persons, and Actors Equity, never see this production).
- To **Jules Verne**, who taught us the power of imagination and would have drafted an amazing Comprehensive Plan.
- To **David Nevin**, who would have surely gone from Supervisor to Governor mid-term.
- To **Jackie Chan**, who would have been a very interesting Planning Director.



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The End



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QUESTIONS ???



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