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LAND USE GROWTH CONTROLS: A CASE STUDY OF SAN JOSE AND LIVERMORE, CALIFORNIA

Stuart L. Deutsch*

This is the first part of a two-part article concerning the growth control ordinances passed by initiative in San Jose and Livermore, California. In Part I the author describes and analyzes the San Jose and Livermore ordinances and discusses some of the issues which underlie the growth control controversy. Part II will analyze the California Supreme Court decision concerning the validity of the San Jose ordinance. Included in the second part will be a discussion of the legal categories used by the supreme court in its analysis of the ordinance. It is anticipated that such categories will include the right to travel, due process and equal protection rights of builders and residents, and the police power of the city.**

I. INTRODUCTION

Land use controls have had a significant effect on the growth and development of urban areas. In the last few years, growth

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I would like to thank Randy Leong, third year student at the University of Santa Clara Law School, whose research assistance has been invaluable as well as excellent.

Finally, Professor Lance Liebman of Harvard Law School offered valuable advice during the drafting of this article.

As a last word, it should be noted that the author was co-author of the San Jose initiative and acted as a consultant to the Livermore initiative organizers.

** Since this article went to press, the California Supreme Court, on Dec. 26, 1974, approved the San Jose Ordinance in a 4-3 decision. The decision will be analyzed in Part II of the article.

control techniques have emerged as an important and increasingly common form of land use control. Unlike traditional land use controls which indirectly affect the number of residents in an area, the new growth controls, such as development moratoria or performance standards systems, have been designed and implemented for the express purpose of slowing or stopping the growth rate of a jurisdiction.¹

The emergence of these new growth control techniques has generated substantial controversy—legally, politically and socially.² The arguments raised by those involved in the growth control controversies provide an interesting and revealing look at the entire spectrum of issues which have long been associated with the American system of local land use controls.

To explore the system of land use controls at a point of tension, and to analyze directly the problems and controversies of growth controls, this article will discuss the growth control ordinances passed by initiative in two San Francisco Bay Area cities, San Jose and Livermore, California.³

The Livermore ordinance requires that before a permit to build may be issued, performance standards must be met in three areas: education, sewage capacity and water supply. The ordinance forbids any new residential development in Livermore unless adequate provision is made for these services in light of anticipated population growth.⁴

1. The term "growth controls" has been used by commentators to describe many different land use techniques from large lot zones to cluster zones to open space zones to the concept of land use controls in general. See STANFORD ENVIRONMENTAL LAW SOCIETY, HANDBOOK FOR CONTROLLING GROWTH, ch. IV (1973) [hereinafter cited as GROWTH CONTROL HANDBOOK]; TASK FORCE ON LAND USE AND URBAN GROWTH, ROCKEFELLER BROS. FUND, THE USE OF LAND: A CITIZENS GUIDE TO URBAN GROWTH, ch. IV and V (1973) [hereinafter cited as USE OF LAND]; Freilich & Ragsdale, *Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Controls in the Minneapolis-St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009 (1974) [hereinafter cited as the *Minneapolis Report*]. See text accompanying notes 37-49 *infra*, for a typology of growth controls as defined by the author.

2. For views of some of the recent controversies which go beyond an analysis of legal doctrine and present legal controversies within their political and social context, see case studies in GROWTH CONTROL HANDBOOK at 82-116 and F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971) [hereinafter cited as QUIET REVOLUTION]. See also Alonso, *Urban Zero Population Growth*, DAEDALUS, J. OF THE AM. ACADEMY OF ARTS & SCI., Fall, 1973, at 191-206; Harris, *Californians are Saying No to Growth in a Spreading Revolt That Makes Strange Allies*, CALIFORNIA J., July, 1973, at 224 [hereinafter cited as Harris]; Johnson, *Should the Poor Buy No Growth?*, DAEDALUS, J. OF THE AM. ACADEMY OF ARTS & SCI., Fall, 1973, at 165-89.

3. An identical ordinance was passed in the town of Pleasanton, California. See note 73 *infra* for a brief history of Pleasanton.

4. See text accompanying notes 119-126 *infra*.

In San Jose, the growth control ordinance takes the form of a city-wide performance standard relating to overcrowding in public schools. It forbids residential zoning actions by the city council if the schools which will serve the residents of the new development are or will become overcrowded. An exception applies if the prospective developer contracts with the affected school district to provide temporary facilities. The ordinance also creates a role for school districts in land use decisions whenever schools may be affected adversely by city council actions. Finally, the ordinance mandates a comprehensive study of the problems of the city and the interrelations of environmental, population and economic factors.⁵

This article will concentrate on the city of San Jose and its growth control ordinance. San Jose is the largest city in the country to establish growth controls.⁶ It is also one of the fastest growing cities in the United States, and since World War II, has been firmly wedded to the notion that bigness and growth are synonymous with success.⁷ The article will provide background material by briefly discussing some examples of growth controls proposed or being implemented across the United States. Next, it will offer a typology of growth control ordinances. The article will then discuss the history of the cities of San Jose and Livermore and analyze the growth control ordinances passed by the electorate of those cities. Next, the judicial response to these ordinances will be considered. The article will offer the author's impressions of the motives behind the political and social controversy created by the ordinances. In addition, it will discuss the characteristics of those groups likely to become involved in growth control controversies. Finally, the author will offer some thoughts concerning basic issues which underlie both the growth control controversy

5. See text accompanying notes 94-118 *infra*.

6. San Jose's population is over 500,000 today, according to City Planning Department estimates. Other cities which have adopted growth controls have had populations of under 100,000: Palo Alto (56,000), Petaluma (approx. 30,000), Ramapo (approx. 60,000) and Boca Raton (41,000).

7. See text accompanying notes 52-56 *infra*, for San Jose's population statistics. San Jose's growth ethic is discussed in STANFORD ENVIRONMENTAL LAW SOCIETY, SAN JOSE: SPRAWLING CITY (1971) [hereinafter cited as SAN JOSE STUDY]:

It is not true, however, that the haphazard development in San Jose has taken place without significant government encouragement. This encouragement was evident shortly after World War II, when some \$80,000 was spent to attract industry to the area. It was begun in earnest in 1950, when A.P. Hamann was hired as San Jose City Manager. Hamann, 'an avowed city builder,' greatly influenced the city's direction

The [*San Jose*] *Mercury*, the City Manager and the City Council all operated under the assumption, both implicit and explicit, that unchecked growth *per se* was beneficial.

Id. at 16-17.

and present-day land use controls in general. This is not to say that all the basic issues will have been raised or considered in the case studies presented. Rather, it is to suggest that these basic issues should be confronted by the courts which ultimately will determine the validity and legitimacy of the use of growth controls.

II. GROWTH CONTROLS ACROSS THE COUNTRY

In recent years, a new attitude toward urban growth has become evident in the United States. This attitude does not accept traditional processes of relatively unconstrained, piecemeal urbanization as entirely desirable or inevitable.

Basically, . . . the new attitude towards growth in America is not economically motivated. The new mood appears to be a part of a rising emphasis on human values, on the preservation of natural and cultural characteristics that give distinctiveness, charm and desirability to a place as a humanly satisfying environment. The new mood may not be willing to sacrifice an achieved economic status by throwing out existing industry, but in many areas it seems ready to forego a measure of future economic advantage by keeping out new industry, maintaining a stable population, and preserving existing low density and scale.⁸

Advocates of growth controls, as reflected by the author of the foregoing passage, are questioning assumptions regarding the desirability of future population growth, traditional purposes and policies of land use controls, and traditional bases for economic health in local communities. The movement for increased control of growth has produced legislation and policies which are being considered and implemented at all levels of government.

For example, the federal government had never, prior to 1972, attempted to introduce population control policy at the national or state level. But Senator Jackson proposed legislation in that year which would include federal aid to states planning for population limitation.⁹ The Environmental Protection Agency's air-pollution control proposals for several major metropolitan

8. Reilly, *New Directions in Federal Land Use Legislation*, 1973 URBAN LAW ANNUAL 29, 56 [hereinafter cited as Reilly].

9. S. 268, 92d Cong., 2d Sess. (1973); introduced in House of Representatives and sent to House Interior and Insular Affairs Comm. on June 25, 1973; now pending in House Subcommittee on Environment. See generally D. Peterson, *Growth Control: An Emerging National Phenomenon*, 5-7, August, 1973 (paper presented at the Third Pacific Regional Science Conference, Honolulu, Hawaii) [hereinafter cited as Peterson]; Lamm & Davison, *The Legal Control of Population Growth and Distribution in a Quality Environment: The Land Use Alternatives*, 49 DENVER L. REV. 1, 37-49 (1972); Reilly at 49-55; Woodroof, *Land Use Control Policies and Population Distribution*, 23 HAST. L.J. 1427, 1443-50 (1972).

areas, including both San Francisco and Los Angeles, include population control and even population reduction proposals as part of the means to achieve air quality standards required under the Clean Air Act.¹⁰

At the state level, Hawaii,¹¹ Maine¹² and Vermont¹³ have established plans which give the state government substantial powers to control all new development. In Hawaii, the State Land Use Commission is empowered to divide the state into urban, rural, agricultural or conservation districts and to set regulations concerning development within each district.¹⁴ In Maine, an Environmental Improvement Commission has broad powers to regulate development that may substantially affect the environment. The Commission administers a permit program under which all new development involving more than twenty acres must be approved by the Commission. The Commission has the power to reject development completely where it decides that the development will be undesirable.¹⁵

In Vermont, a State Environmental Board administers a state land use plan and a permit system regulating all developments of more than ten acres, all new housing involving more than ten units and some public development. The Board, like the Maine Commission, also can refuse any development proposal inconsistent with the land use plan.¹⁶

Wisconsin,¹⁷ Minnesota,¹⁸ Delaware,¹⁹ and California,²⁰

10. FOURTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY, 155-68 (Sept. 1973) [hereinafter cited as ENVIRONMENTAL QUALITY]; Harris, *supra* note 2, at 224. For an analysis of the role of land use controls under the Clean Air Act see Mandelker & Rothschild, *The Role of Land Use Controls in Combatting Air Pollution Under the Clean Air Act of 1970*, 3 ECOLOGY L. Q. 235 (1973).

11. HAW. REV. STAT. ch. 205 (1961). See Note, *Land Use Regulation—A Survey of Recent Legislative Approaches*, 56 MINN. L. REV. 869, 881 (1972) [hereinafter cited as *Legislative Survey*]; QUIET REVOLUTION *supra* note 2, at 5-53.

12. ME. REV. STAT. ANN., ch. 206A, §§ 681-89 (1970). See QUIET REVOLUTION, *supra* note 2 at 187-204; *Legislative Survey*, *supra* note 11, at 874-76; Waller, *The Law of the Land: Development Legislation in Maine and Vermont*, 23 ME. L. REV. 315, 331 (1971) [hereinafter cited as Waller]. See also E. HASKELL, *MANAGING THE ENVIRONMENT: NINE STATES LOOK FOR NEW ANSWERS* 322-30 (1971) [hereinafter cited as HASKELL].

13. VT. STAT. ANN. tit. 10, §§ 6001-91 (1970). See QUIET REVOLUTION, *supra* note 2, at 54-107; *Legislative Survey*, *supra* note 11, at 882-84; Waller, *supra* note 12, at 316-31. See also HASKELL, *supra* note 12, at 293-321.

14. *Legislative Survey*, *supra* note 11, at 873.

15. *Id.* at 883-84.

16. *Id.*

17. WIS. REV. STAT. §§ 87-130 (1972). See QUIET REVOLUTION, *supra* note 2, at 235-61; *Legislative Survey*, *supra* note 11, at 895-201.

18. MINN. STAT. ANN. § 105.485 (1973). See *Legislative Survey*, *supra* note 11, at 879; Note, *The Minnesota Environmental Rights Act*, 56 MINN. L. REV. 575 (1972).

among other states, have created programs to protect shorelines and other special natural areas from growth and development. The Wisconsin Shoreline statute concentrates on shorelines in unincorporated areas and requires that counties adopt zoning and subdivision regulations meeting state standards to protect the shorelines.²¹ Minnesota has adopted a similar program.²² Delaware has forbidden further heavy industrial development in a coastal area up to five miles wide and has established a permit system for other manufacturing uses in the coastal strip.²³ California, by ballot initiative, created Coastal Zone Commissions with authority to approve or reject all new development within one thousand yards of the coastline.²⁴

Some states also have established new land use programs to be implemented at the local level. In California, under the Porter-Cologne Water Quality Act,²⁵ regional water-quality control boards have been granted the power to forbid new sewer hook-ups and hence to block most new development where water quality standards are being violated. Since 1971, such moratoria on development have been imposed in Marin County²⁶ and several other localities.²⁷

Under the interim ordinance provisions for land use control,²⁸ local governments in California have statutory authority to freeze development for as long as two years. In an emergency the freeze ordinance can be adopted for a four-month period without public hearings or other normal procedural safeguards.²⁹

At the regional level, the Tahoe Regional Planning Agency, with jurisdiction in both California and Nevada, has developed a plan which sets maximum population and development levels for the Lake Tahoe Basin.³⁰ Other regional organizations such as the

19. DEL. CODE ANN. § 7001 *et seq.* (1971). See QUIET REVOLUTION, *supra* note 2, at 299; *Legislative Survey* 894.

20. Cal. Coastal Zone Conservation Act of 1972, PUB. RES. CODE §§ 27000-650 (West Supp. 1973). See generally Winters, *Environmentally Sensitive Land Use Regulation in California*, 10 SAN DIEGO L. REV. 693, 724-37 (1973); Note, *Saving the Seashore: Management Planning for the Coastal Zone*, 25 HAST. L. J. 191 (1973).

21. *Legislative Survey*, *supra* note 11, at 897.

22. *Id.*

23. *Id.* at 894.

24. CAL. PUB. RES. CODE §§ 27000-650 (West Supp. 1973).

25. CAL. WATER CODE § 13000 *et seq.* (West 1971).

26. Harris, *supra* note 2, at 226.

27. Other moratoria have been instituted in Monterey Bay, San Francisco, Milpitas, Belmont, San Carlos and Redwood City. See Harris, *supra* note 2, at 224.

28. CAL. GOV'T CODE § 65858 (West Supp. 1973).

29. *Id.*

30. The Tahoe Regional Planning Agency was established by an interstate compact, authorized by 83 U.S.C. § 360 (1969). The land use plan was origin-

Association of Bay Area Governments,³¹ and the Twin Cities Metropolitan Council, Minneapolis-St. Paul, are studying or attempting to implement regional coordination and planning for growth problems.³² The Association of Bay Area Governments, which is composed of representatives of local government from the San Francisco Bay Area counties and cities, is studying the ramifications of proposed guidelines limiting the population of the Bay Area to 5.5 million in 1980. The Metropolitan Council of Minneapolis-St. Paul is developing a plan to limit population growth in the Minneapolis-St. Paul region and to guide expected growth into those parts of the area most appropriate for new development.

Some of the most dramatic, effective and controversial programs have been adopted at the local level. The city of Ramapo, New York established a plan to limit growth by timing development over an eighteen year period.³³ Boca Raton, Florida set a maximum number of dwelling units which would be allowed in the city.³⁴ Petaluma, California set a maximum number of new dwelling units to be constructed each year.³⁵ A proposal for the City of San Diego would limit new growth each year to a maxi-

ally proposed in 1971. (Regional Plan, Lake Tahoe Region, California-Nevada, proposed May 17, 1971.) See Ayer, *Water Quality Control of Lake Tahoe*, 58 CALIF. L. REV. 1273 (1970). See also D. HAGMAN, PUBLIC CONTROL OF CALIFORNIA LAND DEVELOPMENT 10-11 (Cal. Cont. Educ. of the Bar, Supp. 1973); QUIET REVOLUTION, *supra* note 2, at 291-93.

31. ENVIRONMENT QUALITY, *supra* note 10, at 222; Peterson, *supra* note 9, at 3.

32. See *Minneapolis Report*, *supra* note 1, which was written by a consultant to the Metropolitan Council, and QUIET REVOLUTION, *supra* note 2, at 136-63.

33. RAMAPO, NEW YORK, BUILDING ZONE AMENDED ORDINANCE § 416-13.1 *et seq.* (1969), *as amended*. See *Golden v. Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). Ramapo's plan and decision have generated a growing literature. See, e.g., F. BOSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 192-94 (1973) [hereinafter cited as TAKING ISSUE]; Freilich, *Developing Timing, Moratoria and Controlling Growth*, in 1974 SOUTHWESTERN LEGAL FOUNDATION ANNUAL INSTITUTE VOLUME ON PLANNING AND ZONING [hereinafter cited as *Development Timing*]; Boselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World*, 1 FLA. STATE L. REV. 234 (1973) [hereinafter cited as Boselman]; Elliot & Marcus, *From Euclid to Ramapo*, 1 HOFSTRA L. REV. 56 (1973); Freilich, *Editor's Comment: Golden v. Town of Ramapo: Establishing a New Dimension in American Planning Law*, 4 URBAN LAW X (1972); *Minneapolis Report*, *supra* note 1; Note, *Time Controls on Land Use: Prophylactic Law for Planners*, 57 CORNELL L. REV. 827 (1972); Note, *Zoning Law: Growth Restrictions*, 1 FORDHAM URBAN L.J. 516 (1973); Note, *A Zoning Program for Phased Growth: Ramapo Township's Time Controls on Residential Development*, 47 N.Y.U.L. REV. 723 (1972).

34. *Development Timing*, *supra* note 33, at 197-98; Peterson, *supra* note 9, at 2; USE OF LAND, *supra* note 1, at 35, 67.

35. See GROWTH CONTROL HANDBOOK, *supra* note 1, at 109-15. See also note 220 *infra*.

imum percentage of existing dwelling units, that percentage not to exceed the overall national growth rate.³⁶

III. A TYPOLOGY OF GROWTH CONTROL ORDINANCES

The growth control programs which have been proposed or adopted in the last few years can be placed into five categories. First, some growth controls take the form of performance standards, applied either on a temporary or permanent basis.³⁷ In such a scheme, the decision whether to allow further growth will depend on the existence or absence of specific criteria which can be measured and applied to proposed developments. Thus, in the now famous Ramapo system, permission to develop was tied to

[t]he availability . . . of five essential facilities or services: specifically (1) public sanitary sewers . . . ; (2) drainage facilities; (3) improved public parks or recreation facilities, including public schools; (4) State, county or town roads . . . ; (5) firehouses.³⁸

Second, some controls have attempted to set an absolute limit on growth and prohibit any new development after the limit has been reached. In Boulder, Colorado, voters narrowly rejected a referendum in November, 1971, which would have set a maximum population for the city.³⁹ In 1972, the electorate of Brentwood, California (population 2,800) rejected by a narrow margin an initiative to limit its ultimate size to 7,500 people.⁴⁰ In a variation of this scheme, Boca Raton, Florida set a maximum number of dwelling units to be allowed within present city limits and set rules regulating the initial zoning of areas annexed to the city.⁴¹

Third, while some controls have not attempted to limit the maximum population, they have limited the number of new housing units to be built in any one year. The Petaluma, California⁴²

36. Draft proposal, San Diego, California Slow Growth Ordinance, drafted by Sierra Club, San Diego Chapter, 1973. The proposed ordinance was never adopted.

37. For a discussion of performance standards as a land use tool, see McDougal, *Performance Standards: A Viable Alternative to Euclidean Zoning?*, 47 TULANE L. REV. 255 (1973); York, *A Model Ordinance to Control Urban Noise Through Zoning Performance Standards*, 8 HARV. J. LEGIS. 608 (1971); and Note, *Industrial Zoning and Beyond: Compatibility Through Performance Standards*, 46 J. URBAN LAW 723 (1969).

38. *Golden v. Town of Ramapo*, 30 N.Y.2d 359, 362, 285 N.E.2d 291, 295, 334 N.Y.S.2d 138, 143 (1972). See note 33 *supra*.

39. USE OF LAND, *supra* note 1, at 57-61.

40. San Francisco Chronicle, April 13, 1972, at 26, col. 8.

41. USE OF LAND, *supra* note 1, at 35, 67.

42. GROWTH CONTROL HANDBOOK, *supra* note 1, at 109-15. It should be noted that Petaluma's plan has been held invalid by Judge Lloyd Burke of the Federal District Court for the Northern District of California in an opinion

scheme would permit no more than five hundred units of new housing to be constructed each year. The ordinance also allocates the units among the three neighborhoods of the city, and determines who shall receive development permission according to a formula which takes into account the capacity for public services in each area, the quality of the plans and amenities to be provided, the provision for low and moderate income dwelling units, and the present population inequality among the three areas.⁴³

A draft of a slow growth ordinance for the City of San Diego, proposed by the Sierra Club chapter of that city, would limit the number of new dwelling units per year to a percentage of existing dwelling units. The percentage would be determined by the "fractional growth rate." This rate, no greater than the national population growth rate, would be set by the City Council each year. Public hearings would be held and, based on the opinions of local citizens expressed at these hearings, the Council would determine a growth rate "consistent with the health, safety and general welfare of the people of San Diego."⁴⁴ This limitation of the city growth rate would sharply curtail growth in rapidly expanding San Diego.⁴⁵

Fourth, some cities have considered purchasing land available for development, either in fee or as open space easements.⁴⁶ Palo Alto, California, reacting to a study showing that the city could save money by purchasing its foothills rather than by supplying services for new development, is considering spending substantial sums over the next decade to purchase the hills behind the city.⁴⁷ The present city park in a section of the hills already

finding that the ordinance violated the right to travel guaranteed by the United States Constitution. See *San Jose Mercury*, Jan. 18, 1974, at 1, col. 1. See note 220 *infra*.

43. See Petaluma Environmental Design Plan, Adopted by the City Council of the City of Petaluma, §§ (a) The Petaluma Official Development Policy, Resolution No. 5760 N.C.S., June 7, 1971; (b) The Petaluma Environmental Design Plans and Maps, Resolution No. 6008 N.C.C., March 27, 1972; (c) The Resolution of Policy Respecting Residential Policy and Population Growth, Resolution No. 6028 N.C.S., April 17, 1972; (d) The Petaluma Residential Development System, Resolution No. 6113 N.C.S., August 21, 1972; (e) The Petaluma Housing Element, Resolution No. 6126 N.C.S., September 5, 1972. See also GROWTH CONTROL HANDBOOK, *supra* note 1, at 109-15.

44. See note 36, *supra*.

45. *Id.*

46. See *Kamrowski v. Wisconsin*, 31 Wis. 2d 256, 142 N.W.2d 793 (1966), in which the court upheld the purchase of an open space easement as a valid purchase of a property right by a local government.

47. The report is Livingston and Blayney, Foothills Environmental Design Study, Report No. 3 to the City of Palo Alto, 1970, [hereinafter cited as Palo Alto Study]. It is a cost-benefit study which found "that permitting any development at this time would be a mistake." *Id.* at 58. For a discussion of the report and Palo Alto's response see GROWTH CONTROL HANDBOOK, *supra* note 1, at 86-89, and USE OF LAND, *supra* note 1, at 155-59, 229.

owned by the city would be expanded. Other parts would be left in their natural state. In Marin County, north of San Francisco, approximately two-thirds of the County's 300,000 remaining developable acres have been placed in an open space reserve through the purchase of open space easements or through open space zoning.⁴⁸

Finally, temporary total moratoria often are used to control growth. Although this category of growth controls resembles the performance standard category, a significant distinction between the two should be noted. Under a performance standard ordinance, development is allowed if certain standards are met. Under a temporary total moratorium, however, an entire type of development is forbidden, regardless of whether any specific building project would be able to meet a set of standards. The city of Milpitas, California, unable to service new development and in need of a period for planning and reflection on its future, imposed such a moratorium on all new construction in 1972.⁴⁹

The growth control ordinances passed by initiative in San Jose and Livermore fall within the performance standard category. The San Jose ordinance restricts residential development in areas where school services are not adequate. Under the Livermore ordinance, a permit will not be issued to build in an area which has inadequate sewage capacity, water supply and school facilities.

IV. HISTORY OF SAN JOSE AND LIVERMORE

San Jose

Back in 1950, San Jose was a lush farm community nestled at the foot of San Francisco Bay. Most of its 95,000 inhabitants lived in neat frame houses and worked in the prune and pear orchards nearby. The view of the Diablo Mountains to the east was pristine; a brief stroll from their doorsteps lay rich greenery carpeting Santa Clara Valley.⁵⁰

San Jose is located about fifty miles south of San Francisco, in the heart of the Santa Clara Valley, once one of the richest agricultural valleys in the United States. "For 100 years prior to 1950, San Jose was surrounded by a garden of prune, apricot, cherry and walnut orchards. Vineyards flourished on the foothill slopes."⁵¹

48. GROWTH CONTROL HANDBOOK, *supra* note 1, at 97-102.

49. Harris, *supra* note 2, at 225.

50. NEWSWEEK, Sept. 14, 1970, at 68. See also SAN JOSE STUDY, *supra* note 7, at 5.

51. SAN JOSE STUDY, *supra* note 7, at 5-6.

In 1950, the city's population was 95,280 people,⁵² and it covered an area of approximately seventeen square miles. By 1960, the population had grown 114% to 204,196 people, and the city had expanded its limits almost four times, to encompass fifty-six square miles.⁵³ During the 1960's the growth rate maintained its pace, so that by 1970 the city's population was 446,504.⁵⁴ Territorial expansion also proceeded apace during the decade, and the city in 1970 encompassed 136 square miles,⁵⁵ with an additional sphere of influence of approximately 150 square miles.⁵⁶

Unfortunately, the area expansion did not create a city with traditional urban boundaries. One urban study has noted that "San Jose's shape defies description. . . . The city limits wander haphazardly over the map."⁵⁷ Looking at a map of San Jose, one might describe it as resembling the fossilized remains of a giant winged reptile, with one wing and some key parts of the skeleton missing.

Not only do its boundaries render an amorphous shape to the city, but they also enclose a large amount of wasted land. According to one planning estimate, more than thirty-five square miles of land either were left vacant or are underutilized within the developed areas of the city.⁵⁸ These gaps increase the cost of providing public services, isolate sections of the city, and foster a misleading appearance of open space.

The recent growth of San Jose can be measured in other ways. In 1960 there were 68,890 dwelling units within the city;⁵⁹ by 1970 the total had doubled to 136,400 units.⁶⁰ The city government received general revenues of \$32,415,000 in the 1964-1965 fiscal year, and expended \$35,889,000.⁶¹ Its general debt was \$67,430,000.⁶² By 1970, general revenues had increased to

52. UNITED STATES BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK (1967) 581 [hereinafter cited as DATA BOOK (1967)].

53. *Id.* at 474, 581. According to the SAN JOSE STUDY, *supra* note 7 at 6, however, the San Jose Planning Dept. believes that the city contained sixty-four square miles in 1960.

54. UNITED STATES BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK (1972) 642 [hereinafter cited as DATA BOOK (1972)].

55. *Id.*

56. SAN JOSE STUDY, *supra* note 7, at 5-6.

The sphere of influence is estimated by the San Jose Planning Department. Under the policies of the Local Agency Formation Commission for Santa Clara County, the entire sphere of influence may be subject to annexation by San Jose.

57. SAN JOSE STUDY, *supra* note 7, at 7.

58. *Id.* at 7 n.6.

59. DATA BOOK (1967), *supra* note 52, at 476.

60. DATA BOOK (1972), *supra* note 54, at 847.

61. DATA BOOK (1967), *supra* note 52, at 482.

62. *Id.* at 483.

\$63,300,000,⁶³ expenditures had risen to \$69,500,000,⁶⁴ and the general debt had jumped to \$105,000,000.⁶⁵

During the period 1965-1970, the average number of building permits issued was 7,377 annually.⁶⁶ Since 1970, however, the number of new dwelling units built per year has been increasing. In 1971, building permits were granted for a total of 10,650 new units,⁶⁷ and the average number of new building permits since 1970 has approached 9,000.⁶⁸ Public school population has trebled since 1960.⁶⁹

More importantly, the character of the city of San Jose has changed markedly over the growth period. A lovely agricultural city has become a vast urban sprawl, marked by a rundown central city, endless miles of highways, roads and commercial strip development, and suburban tracts of little character.⁷⁰ Air pollution, insufficient sewage capacity and water supply, lack of public open space, and traffic congestion have become serious problems.⁷¹ Residents have lost both a sense of local identity and an effective say in local government.⁷²

Livermore

Substantially smaller than San Jose,⁷³ the city of Livermore has had a very different history. While San Jose was undergoing explosive growth after World War II, Livermore remained an isolated town noted principally as the center of a wine-producing region. Its population in 1950 was a mere 4,364 people.⁷⁴ By

63. DATA BOOK (1972), *supra* note 54, at 648.

64. *Id.* at 649.

65. *Id.*

66. *Id.* at 648.

67. San Jose Planning Department, Residential Building Activity Summary, Mar. 17, 1973.

68. *Id.*

69. Public school population in San Jose has risen from 51,575 in 1960 (See DATA BOOK (1967), *supra* note 44, at 475) to 120,104 attending kindergarten through high school in 1970 (DATA BOOK (1972), *supra* note 46, at 64).

70. For critical analysis of the history of development in San Jose and Santa Clara County, see R. Fellmeth, Power and Land in California (Preliminary draft 1971) (Final draft 1973) [hereinafter cited as Power and Land], and especially Vol. II of the Preliminary Draft, at V-1 through V-107.

71. SAN JOSE STUDY, *supra* note 7, at 9-13.

72. *Id.* at 7, 22-23.

73. According to the United States Census, 1970, the area of Livermore is 11.9 square miles and population is 37,703. The city planning department estimated the 1973 population to be 47,650.

The town of Pleasanton, which also passed the growth control initiative, is even smaller in population: 18,328 in 1970. The 1973 population was estimated at 28,000, according to the San Francisco Sunday Examiner and Chronicle, April 9, 1972, at A-8, col. 4.

74. George R. Musso, Director of Planning, Livermore, California, Statement

1960 the inhabitants numbered only 16,058,⁷⁵ almost all of whom lived in single family homes.⁷⁶

In the mid-1960's, however, a new section of interstate highway cut through the hills separating the Livermore-Amador Valley from San Francisco and Oakland. As a result, Livermore joined the group of bedroom communities available for commuters. Population more than doubled by 1970, jumping to 37,703;⁷⁷ the next decade promises substantially more population growth.⁷⁸

Naturally, as population grew in the late 1960's and early 1970's hillsides turned into tracts of homes and apartment complexes,⁷⁹ and school population soared.⁸⁰ The result of this rapid growth was the overtaking of the water supply and of the sewage treatment plant, the creation of double sessions in schools, automobile-created air pollution, and traffic congestion.⁸¹ As stated in one analysis of Livermore:

Air pollution is so serious that on 28 days in 1972 it exceeded the upper limits of federal health standards. . . . Sewage facilities were becoming inadequate and the President's impoundment of Congressional funds threatened the ability of the city to expand its sewage treatment plant. Finally, water was becoming such a problem that as early as December, 1971, a threatened water shortage induced the growth-oriented City Council to curtail the issuance of building permits.⁸²

An ordinance passed in December, 1971, established a maximum of 1,500 building permits to be granted within city limits, and prohibited the granting of a building permit except

Concerning Building Moratorium, City of Livermore, at 1 (October 5, 1973) [hereinafter cited as Musso Statement].

75. DATA BOOK (1967), *supra* note 52, at 581.

76. DATA BOOK (1972), *supra* note 54, at 642.

77. *Id.*

78. Interview by author with Clarence Hoenig, President of Save All Valley Environments [SAVE], which sponsored the Livermore initiative in Livermore, California, May, 1973. See also Musso Statement, 1.

The growth has continued in Livermore, with the 1973 population estimated by the City Planning Department at 47,650, Musso Statement, 1, and by the Stanford Environmental Law Society at 54,000, GROWTH CONTROL HANDBOOK, *supra* note 1, at 90.

79. According to the 1970 census, Livermore's housing units increased by 124.4% between 1960 and 1970. In 1972, city officials were estimating that the 15% growth rate per year would increase unless stopped by a quota or moratorium of some sort.

80. School population in 1970 was 11,064 pupils, and some schools had been on double sessions for almost ten years. Interview with Clarence Hoenig, in Livermore, May, 1973. Unfortunately, school statistics for 1960 are not available, but school population has more than doubled in the decade.

81. See The Livermore Independent, Oct. 17, 1971, at 1, col. 6.

82. GROWTH CONTROL HANDBOOK, *supra* note 1, at 90.

on an already-existing lot of record.⁸³ The building permit curtailment, however, was considered not sufficient, too late and too temporary by some residents of the city.⁸⁴ The Livermore residents had witnessed the explosive growth in the San Jose area, and they were fearful that their city would experience similar growth in the future. As a result they decided to organize a growth control campaign prior to the development of further growth-related problems.⁸⁵

V. THE ORDINANCES

Some general comments should be made concerning the growth control ordinances passed by initiative in San Jose and Livermore. Both are performance standard ordinances tied to specific problems: schools in San Jose, and school, water supply and sewage capacity in Livermore. Neither is a "stop growth" ordinance, since the performance standards established do not apply to non-residential development and do not necessarily prohibit further residential development. The ordinances in both San Jose and Livermore were adopted by initiative after the city councils refused to pass them,⁸⁶ and both were the result of the efforts of ad hoc citizens groups.⁸⁷ The passage of each ordinance constituted a significant political upset, since the official power structures of each city and the traditionally effective non-governmental interests opposed the growth control measures.⁸⁸ Each ordinance may be viewed as a symbol of frustration rather than as a comprehensive program to meet the problems of uncontrolled growth. Neither program, even if it survives court challenge, will provide the full planning process or the funding necessary for solving explosive growth problems. That such ordinances were passed

83. Musso Statement, *supra* note 74, at 2; GROWTH CONTROL HANDBOOK, *supra* note 1, at 90, 93. Additional permits have been authorized twice since 1971. Musso Statement, *supra* note 74, at 2.

84. Interview with Clarence Hoenig, in Livermore, May, 1973. See GROWTH CONTROL HANDBOOK, *supra* note 1, at 90.

85. *Id.*

86. Indeed, after the Livermore initiative qualified for a place on the ballot, the City Council put a similar but weaker ordinance on the ballot as well. It was defeated by the voters. GROWTH CONTROL HANDBOOK, *supra* note 1, at 92.

87. In San Jose, the ad hoc group was called Citizens for Rational Planning, and was composed of representatives of such groups as the League of Women Voters, Alliance of Homeowners, Almaden Mother's Group, and the Sierra Club. GROWTH CONTROL HANDBOOK, *supra* note 1, at 107. In Livermore, the group was called Save All Valley Environments and included a former mayor, a past president of the school board and other local activists. *Id.* at 90.

88. Opponents in San Jose included the Mayor and a majority of the members of the City Council, builders, construction unions, the Chamber of Commerce and some minority organizations. GROWTH CONTROL HANDBOOK, *supra* note 1, at 103, 106-08. In Livermore, opponents included the entire City Council and the builders association. *Id.* at 90-92.

by the electorate, however, represents a warning that a far-reaching re-evaluation of the desirability of urban growth must begin, and that city officials must reconsider city policies which are based on the premise that population increase is the indicator of prosperity and success.⁸⁹

One important difference in the political support for each ordinance should be noted. In San Jose, the extent of the mandate for growth control is uncertain. Although the growth control initiative was on the ballot in an election where a majority of city council seats were being contested, only 21% of the eligible voters actually cast their ballots in the election. Fifty-three percent of those voting supported the initiative.⁹⁰ The 21% turnout is about average for a San Jose local election.⁹¹ Hence, one may question whether the initiative was a critical issue for most residents, or whether the slow growth movement captured the imagination of the voters in a broad popular movement.

In Livermore, however, the turnout of 68% of the eligible voters was far greater than normal.⁹² The initiative received 55% of the votes cast.⁹³ Here it is clear that the initiative did represent an important issue for the voters, and the result appears to be an expression of the concerns and goals of the residents of the city.

San Jose

The San Jose ordinance is tied exclusively to school problems: specifically, the fact that nine of the twenty-three school districts within the city limits were either overcrowded or on double sessions.⁹⁴ The perceived relationship between the school problem and land use policies is well set out in the introduction to the ordinance:

1. The protection of the health, safety, and general welfare of the citizens of the city of San Jose requires that further

89. Changes have occurred in both cities, including the election of growth control supporters to city councils and the implementation of new growth control studies and policies. In Livermore, the City established a maximum number of new building permits to be granted and is now considering an eight step proposal to control growth. *Id.* at 93-96; Musso Statement, *supra* note 74, at 1-3. In San Jose, new studies are underway concerning growth and the revision of the general plan for the city.

90. Official canvass, City of San Jose Municipal Election, Tuesday, April 10, 1973 (San Jose City Clerk's Office).

91. *Id.* Bond elections between 1957 and 1966, however, attracted an average of 35% of registered voters. SAN JOSE STUDY, *supra* note 7, at 22.

92. GROWTH CONTROL HANDBOOK, *supra* note 1, at 92. In Pleasanton the voter turnout was 69%. San Francisco Chronicle, April 13, 1972, at 1, col. 2.

93. GROWTH CONTROL HANDBOOK, *supra* note 1, at 92. In Pleasanton the initiative received 54% of the vote. San Francisco Chronicle, April 13, 1972, at 1, col. 2.

94. San Jose Mercury-News, April 8, 1973, at 101, col. 1.

residential development not be allowed to occur in any neighborhood of the city where essential community services do not meet certain minimum standards.

2. Adequate schools, in which children are not required to be in overcrowded classrooms or on double sessions, are among the most vital of the community services that must be provided in conjunction with all new residential development.

3. The school districts in San Jose have done their utmost to keep up with expanding residential developments in San Jose, but have been unable to do so.

4. Under the circumstances, the failure of the San Jose City Council to require the provision of adequate schools as a condition to new residential development has created a major crisis, in which a substantial number of children do not have adequate facilities for education.

5. For the foregoing reasons, it is necessary and appropriate that residential development be restricted for a temporary period of two years, during which time studies can be made of the school problem and other issues related to further residential development.⁹⁵

The program enacted by the ordinance contains three elements. The first element affects residential zoning decisions by the City Council:

[Section] 1. For a period of two years from the date this ordinance becomes effective, the City Council of San Jose shall not zone, pre-zone, or re-zone any land for residential use, if such land is located in a school district where the total area of school building construction per pupil of estimated enrollment, counting the estimated enrollment of the proposed development itself, will be less than that computed under the following schedule:

Type of School	Enrollment	Sq. Ft. per Pupil
Elementary school comprising kindergarten and grades 1 to 6 inclusive	300 or more	55
.		
Elementary school comprising grades 7 and 8	750 or more	75
.		
High school comprising grades 9 to 12 inclusive	750 or more	85

[Section] 3. The provisions of Section 1 . . . shall not apply if there is filed with the City Council, by or on behalf

95. San Jose Initiative Ordinance 16764, April 27, 1973 (Proposition B on the Ballot of April 10, 1973).

of the governing bodies of all school districts in which the subject land is situated, written certification that the party seeking residential use has entered into binding agreements to provide a satisfactory temporary alternative to permanent school construction.⁹⁶

Thus, until April 27, 1975,⁹⁷ all residential zoning decisions by the City Council may be circumscribed by the school crowding indicator. Where additional units will not cause a diminution below the minimum of the available square footage per pupil, no control is imposed. (This will be true of large portions of the city.) Even where there are overcrowded schools, however, the City Council will not be precluded from zoning actions, and may still grant the zoning applications of developers. In order for the City Council to take a zoning action, an agreement between the developer and the affected school district must be filed with the Council showing that a temporary alternative to permanent school construction will be provided.

School districts and developers have entered into several agreements under this section, utilizing four basic means of satisfying its provisions.⁹⁸ First, some developers have agreed to make direct payments to the school district, to be used to defray the cost of temporary facilities (usually classroom trailers placed adjacent to overcrowded schools). The builder typically pays for the number of students likely to be generated by the new development according to a standardized student generation formula, rather than according to an actual count of students living in the project.⁹⁹ Under this scheme, the developer will pay the basic rental cost of the unit and often will bear the costs of installation and of dismantling the unit at the end of the year and restoring the school grounds to their former condition.

Other developers have simply guaranteed a line of credit for the school district and promised to reimburse the district if additional costs are generated by the new development.¹⁰⁰ Presuma-

96. *Id.* §§ 1, 3.

97. The effective date of the ordinance was April 27, 1973. By its terms, the ordinance limits these controls to two years. *Id.* § 1.

98. Telephone interviews with Dr. John Davis, Administrative Assistant, San Jose Unified School District, and Morgan Woolett, Assistant Director, Planning Resources Office, County of Santa Clara Board of Education, April, 1974. (By R. Leong, third year student at Santa Clara University School of Law) [hereinafter cited as Interviews].

99. One contract, involving the Berryessa School District, provided that "the pupil generation factor for elementary school age children shall be 0.831 for each single-family detached residential unit." In another contract the factor was specified as follows: "Junior high school students—0.31 per household, Senior high school students—0.27 per household." Copies of contracts on file with the *Santa Clara Lawyer*.

100. Interviews, *supra* note 98.

bly, this method has been used where the district has sufficient present capacity, but fears overcrowding in a future year.

Third, some developers have agreed to delay their construction according to an agreed timetable which the district believes will allow it to provide permanent facilities.¹⁰¹ Under this scheme temporary facilities are not provided, but the speed of development will be geared to the building timetable of the school district. Finally, some developers have agreed to dedicate land or school construction costs rather than provide temporary facilities.¹⁰²

The second element of the San Jose ordinance is a permanent addition to the zoning ordinance. It authorizes a school district to protest City Council re-zoning actions. Where a protest has been filed, an additional affirmative vote of the Council is required to approve a re-zoning action:

[Section] 4. If prior to the closing of the City Council hearing on a proposed ordinance zoning or rezoning property to a residential use, or granting any permit of any kind for residential use there is filed with the City Council, by or on behalf of the governing body of any school district in which the subject property is located, a written protest against the adoption of the proposed ordinance or permit, on the ground that said governing body has found that said ordinance or permit would tend to cause impaction¹⁰³ in any individual school or schools in said district, then in that event the City Council shall not adopt said ordinance unless said Council first overrules such protest by an affirmative vote of five or more of its voters.¹⁰⁴

The intent of this section is twofold. First, it gives the school district governing boards an opportunity to formally and effectively express their concerns about new residential zoning within their district boundaries. While historically a school district has been able to comment on proposed zoning actions, such comments traditionally have carried little weight.¹⁰⁵ Districts seldom have been able to do more than exercise moral suasion or attempt to develop political power bases—attempts that rarely have proved successful. Feeling rather impotent, school districts seldom have commented on proposed projects unless a particular project would clearly create substantial problems of overcrowding in the

101. *Id.*

102. *Id.* CAL. BUS. & PROF. CODE § 11525.2 (West Supp. 1974) authorizes dedication of land for school purposes in certain subdivisions.

103. In the ordinance, impaction is a synonym for overcrowding.

104. San Jose Initiative Ordinance 16764, § 4, Apr. 27, 1974.

105. Interview with Duane Bay, Director of Planning Resources Office, County of Santa Clara Board of Education, in San Jose, June, 1973.

schools.¹⁰⁶ Under section 4 of the growth control ordinance, however, a district, by filing a protest, can force a supermajority of the Council members (five of seven) to approve any detrimental zoning action. This power may be more significant than it appears on its face, because three present members of the City Council supported the initiative and have expressed an intention seriously to consider all protests in deciding zoning actions.¹⁰⁷

Secondly, it is the intent of the section to retain the zoning power within the legislative, elected branch of city government. An unpersuasive protest, or a politically powerful developer, or a particularly desirable project (one would like to think that a project mixing low and moderate income units with other units would meet this test) could still be approved by the City Council, provided five of the seven members voted affirmatively.

It should be noted that, because the state has preempted the field of subdivision regulation, the ordinance does not affect city approval of subdivisions, except where a zoning action is required first.¹⁰⁸ Building permits, which are not granted by the City Council, are also not affected.

The third element of the ordinance directs that a study be made of the problems connected with residential development in the City of San Jose:

[Section] 2. During the aforesaid two year period, the City of San Jose, in cooperation with all entities in any way responsible for community services within the City, and with maximum citizen participation, shall undertake a thorough study of all problems connected with further residential development in the City, including, but not limited to, the following:

(a) How all further residential development can be allowed to take place only with insurance that all necessary community facilities will be provided concurrently with such development.

(b) Whether further residential development should be allowed if it violates any environmental standards, particularly those pertaining to water and air pollution, or overtaxes the ground water supply.

(c) What are the costs and benefits of further residential development, and how can the City ensure that any development that does take place shall constitute a net benefit to the City.

106. *Id.*

107. The announced supporters are council persons Janet Gray Hayes, Suzanne Wilson and James Self. Wilson and Self were first elected to the City Council in the Apr. 10, 1973, election.

108. See CAL. BUS. & PROF. CODE §§ 11510, 11511, 11525.2 (West Supp. 1974).

(d) How further residential development can be required to include an equitable proportion of housing for all income levels.

(e) What the optimum population level is for the City of San Jose, considering all environmental, economic and other human factors.

(f) What actions can be taken to ease the shift of the San Jose economy to one less dependent on residential growth.¹⁰⁹

This directive is potentially the heart of the ordinance. The mandated study, however, will have no immediate impact on the city's growth problems, and thus its inclusion in the ordinance makes the entire growth control measure appear symbolic. While a few projects may be affected or even blocked by the initial sections of the ordinance, it is unlikely that a significant impact on the present growth rate will be felt for some time.¹¹⁰ The City had enough land already zoned for housing in the "growth area" of San Jose—primarily . . . where the overcrowded schools are—to accommodate 44,000 housing units

In addition, another 6,270 possible units are included in growth area zoning or annexation proposals now in the city "pipeline" awaiting council approval.

Housing units are constructed at the rate of nearly 10,000 a year in normal building activity here, according to planners—and the figures indicate that with or without the initiative, there is enough in the mill already to maintain that normal level for more than two years.¹¹¹

Nevertheless, the study which is mandated by the ordinance will force San Jose to reconsider its expansionist policies. It will alert the public to the issues raised by uncontrolled growth and thereby facilitate more informed decisionmaking in the future. The study will attempt to show the relationship between the environmental and quality-of-life considerations which have usually been ignored in the planning process, and the economic and traditional city planning considerations which have been the basis for past planning decisions. It will attempt to determine the actual costs of new residential development in the city, and whether and to what extent the costs imposed on the city for public services

109. San Jose Initiative Ordinance 16764, § 2, Apr. 27, 1974.

110. The County Planning Department reported that new housing construction in the first seven months of 1973 was such that at the present rate the year's total would exceed the totals in 1971 and 1972. San Jose Mercury, Oct. 3, 1973, at 15, col. 4. The main impact of the ordinance has been that the school districts in overcrowded areas have been able to force developers to supply temporary facilities. Interview with Morgan Woollett, *supra* note 98.

111. San Jose Mercury-News, Apr. 8, 1973, at 101, col. 2.

can be treated as a significant factor in making future development decisions.¹¹²

Equally significant, given the danger that stop growth or growth limitation programs will result in the exclusion of minorities from residential areas,¹¹³ the study will explore strategies for the provision of low and moderate income housing within the city and for the avoidance of the creation of a "tight little island"¹¹⁴ of San Jose.

Finally, the study will consider the possible economic problems which may be encountered in the community—particularly by those working in building trades—when growth is no longer the mainstay of the city's economic vitality. According to opponents of the initiative, new residential construction in San Jose generates at least forty million dollars per year in wages alone.¹¹⁵ In addition, "each construction employee out of work affects another 2.5 employees in other related or corollary industries."¹¹⁶ Thus, it is fair to assume that, if construction in San Jose is substantially curtailed, wages greatly in excess of the forty million dollar figure will have to be generated to replace the direct economic benefits to San Jose derived from present levels of construction. A determination must be made, however, concerning how much of this economic benefit should be offset by the loss of environmental and quality-of-life factors caused by increased growth. Indeed, one of the most difficult aspects of the study will be the determination of a means of measuring or taking into account these previously economically unquantified factors.

Unfortunately, the study has gotten off to a slow start. Although the city has budgeted \$100,000 for the study, it is still in the "planning stages" and apparently is opposed by the Mayor.¹¹⁷

112. For a completed study of the net effect of additional residential development on a city, see *Do New Residential Developments Pay Their Own Way? A Case Study of Half Moon Bay, California*, SAN JOSE STUDY, *supra* note 7, at Appendix A; see also, Palo Alto Study, *supra* note 47; Harris, *supra* note 2, at 225.

113. See text accompanying notes 230-235 *infra*.

114. The phrase "tight little island" comes from Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969).

115. See advertisements appearing in the San Jose Mercury (e.g. April 8, 1973, at 2, col. 2) during the campaign period, as well as campaign circulars distributed by the initiative's opponents. One such circular was entitled: "The Power Grab Backers of Measure B Say It Won't Hurt the San Jose Economy. How About 40 Million Dollars of Hurt Just For Starters?" (Copy on file with the Santa Clara Lawyer.)

116. Declaration of Louie P. Tersini, President of the Builders Association of Santa Clara-Santa Cruz Counties, in Petition for Writ of Mandate at 50, Builders Ass'n of Santa Clara-Santa Cruz Counties v. Superior Court, Civil No. SF 23085 (Cal. Super. Ct., filed Jan. 25, 1974).

117. Interview with Don De La Pena, Office of City Hall, in City of San Jose,

Nevertheless, plans are underway for the city to carry out the study over the next few months.¹¹⁸

Livermore

The Livermore ordinance is also a performance standard ordinance. Unlike San Jose's measure, however, the Livermore ordinance sets standards for sewage capacity and water supply, as well as school facilities, which must be met before residential building permits may be issued.

The ordinance states:

A. The People of the City of Livermore hereby find and declare that it is in the best interest of the city in order to protect the health, safety and general welfare of the citizens of the city, to control residential building permits in said city. . . . Additionally, it is the purpose of this initiative measure to contribute to the solution of air pollution in the City of Livermore.

B. The specific reasons for the proposed Petition are that . . . the resulting impact from issuing residential building permits at the current rate results in the following problems mentioned below. Therefore, no further residential building permits are to be issued by the said city until satisfactory solutions, as determined below in the standards set forth, exist to all the following problems:

1) EDUCATIONAL FACILITIES—No double sessions in the schools nor overcrowded classrooms as determined by California Education Code.

2) SEWAGE—The sewage treatment facilities and capacities meet the standards set by the Regional Water Quality Control Board.

3) WATER SUPPLY—No rationing of water with respect to human consumption or irrigation and adequate water reserves for fire protection exist.¹¹⁹

This ordinance is unclear and poorly drafted. The terms "double sessions" and "overcrowded classrooms" are not defined in the California Education Code.¹²⁰ "Double sessions" can be defined by reference to common practice, since the term is frequently used to refer to a situation where different groups of students in the same grade are attending the same school at different

Apr., 1974 (By R. Leong, third year student at Santa Clara University School of Law). The mayor referred to has now left office and has been replaced by a sympathetic member of the city council. As late as January 7, 1975, consultants for the study have not been selected.

118. *Id.*

119. Livermore Initiative, Apr. 11, 1972.

120. Interview with Walter Hays, then member of the City Council of San Jose and co-author of San Jose Initiative, in San Jose, Dec., 1972.

times of the day because of a lack of space. The definition of an "overcrowded classroom," however, is less clear. A classroom could be said to be overcrowded if it has less than a required minimum number of square feet per pupil, or, if additional desks and chairs must be installed to meet the needs of an increased number of pupils, or, if the classroom merely seems to be more full than desirable. Under the San Jose ordinance the definition of an overcrowded school is clarified through the use of an Education Code standard¹²¹ and by reference to a ratio between total school area and pupils. Such a clarification is lacking in the Livermore ordinance.

The failure of the ordinance to define its terms raises several questions. For example, can one overcrowded classroom in a school prevent the granting of a building permit in that neighborhood? Can the city refuse all building permits so long as that classroom remains overcrowded? Can a developer be forced to provide temporary classrooms as a condition to obtaining a building permit? If he voluntarily donates such facilities, may he then *demand* a permit? None of these questions is answered by the Livermore ordinance.

The standard for water supply is also unclear. "No rationing" is not a meaningful standard by which to determine the adequacy of water supply in Northern California, where water scarcity often requires water rationing. In addition, water supply is controlled by non-city agencies, which determine the policy on water availability according to regional needs and demands.¹²² Often information concerning whether rationing is occurring, or whether water is being managed to meet the expected demand in the near future, is not easily available. Similar criticisms can be made of the sewage standard, since a regional water quality control board makes the determination as to whether standards are being met.

In addition, the ordinance does not establish an administrative agency to consider whether existing school, water and sewage problems require denials of building permits. Further, there is no agency to propose and carry out solutions. The term "satisfactory solutions" in section B of the ordinance is vague, and can

121. CAL. EDUC. CODE § 19582 (West 1969) establishes a standard in which minimum area available to students is related to state construction aid; see Memorandum From Acting City Attorney to City Council of San Jose, Application of Initiative Ordinance No. 16764, Proposition B, May 16, 1973, at 3.

122. Water is supplied by the California Water Company. See Memorandum of Points and Authorities in Support of a Temporary and Permanent Injunction, Associated Homebuilders of Greater East Bay, Inc. v. City of Livermore, Civil No. 425754 (Cal. Sup. Ct. filed July 11, 1972). In addition, the Alameda County Flood Control and Conservation District determines water availability and use in Alameda County. See GROWTH CONTROL HANDBOOK, *supra* note 1, at 95.

have meaning only if there is an agency with the authority to work towards solutions when needed.

Finally, the ordinance attempts to control an aspect of the development process which is considered non-discretionary in California.¹²³ A building permit is granted by the Building Inspector's office upon presentation of plans which on their face meet the requirements and have the approval of various city departments. The office is not authorized to determine the existence of "satisfactory solutions" without guidance from an administrative agency and clearly enunciated policies set by that agency or the City Council.¹²⁴ The city's answers to these criticisms will be discussed later in this article.¹²⁵ It should be noted here that these criticisms are directed only against the ordinance on its face, since its enforcement was blocked by a trial court prior to implementation.¹²⁶

VI. JUDICIAL TREATMENT OF THE ORDINANCES

Law suits were filed by builders associations of San Jose and Livermore attacking the validity of the newly enacted growth control ordinances.¹²⁷ The fates of the two ordinances, however, have been quite different.

On December 29, 1972, the Livermore ordinance was declared invalid.¹²⁸ The trial judge found the ordinance to be, invalid and void because of being overbroad in scope and lacking in reasonably definable, or ascertainable, administrative standards and procedures. . . .

. . . .

No administrative body is charged with the determination of "satisfactory solutions," nor is there any mandate that efforts be made on behalf of the City even to attempt to provide a satisfactory solution. . . .¹²⁹

123. *Palmer v. Fox*, 118 Cal. App. 2d 453, 258 P.2d 30 (1953); 56 CAL. JUR. 2d *Zoning* §§ 171, 232 (1960).

124. Memorandum from City Attorney to City Council of Livermore, Feb. 4, 1972, at 1, 5-7.

125. See text accompanying notes 127-155 *infra*.

126. *Associated Homebuilders of Greater East Bay, Inc. v. City of Livermore*, Civil No. 425754 (Cal. Super. Ct., Prelim. Injunction granted July 24, 1972).

127. The validity of the Livermore ordinance was attacked in *Associated Homebuilders of Greater East Bay, Inc. v. City of Livermore*, Civil No. 425754 (Cal. Super. Ct., filed July 11, 1972). The validity of the San Jose ordinance was attacked in *Builders Ass'n of Santa Clara-Santa Cruz Counties v. City of San Jose*, Civil No. 293759 (Cal. Super. Ct., filed July 16, 1973).

128. *Associated Homebuilders of Greater East Bay, Inc. v. City of Livermore*, Civil No. 425754 (Cal. Super. Ct., Dec. 29, 1972) (mem. decision).

129. *Id.* at 2.

In addition, the ordinance was found to be "lacking in certainty as to standards prerequisite to the issuance of building permits. . . ." ¹³⁰

Finally, the court concluded that "the ordinance in question is a zoning ordinance" and, hence, must "comply with the requirements for the enacting of zoning ordinances prescribed by applicable sections of the Government Code. . . ." ¹³¹ Since Livermore is a general law city, ¹³² those Code sections require that both the city planning commission and the City Council hold public hearings prior to the enactment of a zoning ordinance. ¹³³

It appears that the looseness and informality of *this* ordinance was the reason for the trial court's decision. While the public hearing requirements noted by the trial court significantly limit the use of the initiative in general law cities in California, ¹³⁴ the more important issues to be considered in determining the validity of a growth control ordinance are questions of due process and equal protection, as well as the question whether an improper taking has occurred. In addition, an important consideration is the relationship of comprehensive planning programs and regional needs to attempts to control growth. These problems were not considered by the trial court, a significant omission given the importance of the issues. ¹³⁵ Thus, the trial decision should not be considered a significant precedent against all growth control ordinances.

The trial decision was affirmed by a California court of appeal. ¹³⁶ The court found that the Livermore ordinance was a land use control ordinance and, as such, could not be enacted by the

130. *Id.* at 3.

131. *Id.*

132. Any city containing a population of more than 3,500 inhabitants may frame a charter for its own government, consistent with and subject to the California Constitution. CAL. CONST. art. 11, § 8(a). Cities which do not have their own charter are deemed to be general law cities and their actions are governed by the general laws of the state.

133. CAL. GOV'T CODE §§ 65854-56 (West 1966).

134. *Hurst v. City of Burlingame*, 207 Cal. 134, 277 P. 308 (1929); *Taschner v. City Council of City of Laguna Beach*, 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (1973). See generally Meanley, *Zoning by Initiative to Satisfy Local Electorates: A Valid Approach in California?*, 10 CAL. WESTERN L. REV. 105 (1973).

135. The court did note that,

[T]he effect of such legislation is to erect a wall around the city of Livermore against any new construction of residential buildings, reminiscent of the walled cities of antiquity.

Associated Homebuilders of Greater East Bay, Inc. v. City of Livermore, Civil No. 425754 (Cal. Super. Ct., Dec. 29, 1972) (mem. decision). However, the court's brief opinion, as well as the briefs and arguments, concentrated on the validity of the use of the initiative process and the adequacy of standards in the ordinance.

136. *Associated Home Builders v. City of Livermore*, 41 Cal. App. 3d 677, 116 Cal. Rptr. 326 (1974).

initiative process in a general law city in California.¹³⁷ In reaching its conclusion, the court analyzed the impact of the initiative ordinance on the development process and found that "a very substantial interference with land use is apparent from the provisions of the initiative."¹³⁸ Relying on earlier California cases, the court noted that, "due process . . . requires compliance with state zoning law procedures where a land use control measure is involved," and that "the due process clause of the fourteenth amendment of the United States Constitution requires that an individual whose property is 'affected by local land use controls' be given an opportunity for a hearing before he is deprived of any significant property interest."¹³⁹

The court explicitly refused to consider any of the other issues raised by the ordinance.¹⁴⁰ The case is now on appeal before the California Supreme Court.¹⁴¹

As was the case at the trial level, the consideration of the validity of the ordinance proceeded with virtually no recognition of the broader issues involved. In its opening brief the city devoted only four of sixty pages to the question of the potential exclusionary nature of the ordinance.¹⁴² That portion of the brief is devoted to assertions that the environmental needs of the city are sufficiently high to justify such a regulatory ordinance, which is "a bona fide exercise of the police power and *excludes no one*. . . ."¹⁴³ Questions such as the nature of the comprehensive planning process, the consideration of regional needs by a city, the effect of the ordinance on traditional concepts of private property rights, and the issues concerning the excluded low income and minority groups were not considered in the city's brief.¹⁴⁴

137. *Id.* at 679-83, 116 Cal. Rptr. at 328-30.

138. *Id.* at 684, 116 Cal. Rptr. at 331.

139. *Id.* at 685-86, 116 Cal. Rptr. at 332, *citing* People's Lobby, Inc. v. Board of Supervisors, 30 Cal. App. 3d 869, 106 Cal. Rptr. 668 (1973) and Scott v. City of Indian Wells, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972).

140. *Id.* at 686, 116 Cal. Rptr. at 333.

141. The petition for hearing was granted on Nov. 4, 1974.

142. The Closing Brief devoted eleven of thirty-three pages to these issues, but mainly to answer questions raised by respondents. Defendants' and Appellants' Closing Brief at 16-27, Associated Homebuilders of Greater East Bay, Inc. v. City of Livermore, 1 Civil No. 33383 (Cal. Ct. App., filed Mar. 1, 1973).

143. Defendants' and Appellants' Opening Brief at 23, Associated Homebuilders of Greater East Bay, Inc. v. City of Livermore, 1 Civil No. 33383 (Cal. Ct. App., filed Mar. 1, 1973) (emphasis in original).

144. For a consideration of the problems of the excluded and some suggested solutions, see text accompanying notes 200-235 *infra*.

On Sept. 10, 1974, the California Court of Appeal found the Livermore ordinances to be invalid. The court held that since the ordinance is a zoning law, it cannot be adopted by the initiative process. Associated Homebuilders of Greater East Bay, Inc. v. City of Livermore, 1 Civil No. 33383 (Cal. Ct. App.,

In contrast with the result in Livermore, on November 20, 1973, the San Jose ordinance was declared valid.¹⁴⁵ The trial court found that "[t]his ordinance does not unlawfully delegate City Council powers" to school districts through the protest mechanism in section 3, since the ultimate decision concerning zoning rests with the City Council.¹⁴⁶ More importantly, however, the court found, in response to an assertion that the ordinance violated the equal protection clause of the fourteenth amendment,¹⁴⁷ that no unreasonable classifications had been established between developers or property owners based on the condition of the school serving the proposed development. Nor did the court find a violation of due process rights in the control mechanism established.¹⁴⁸ Finally, the court held that as a chartered city San Jose could validly pass a land use control ordinance by the initiative process without holding the hearings which would be required of a general law city.¹⁴⁹

The Builders Association immediately requested a hearing before the California Supreme Court. The court agreed to hear the case and oral argument was heard on April 4, 1974.¹⁵⁰

As was true in Livermore, the initial trial and appeal seem to have taken place within a framework which completely ignores some key issues and gives relatively little weight to others. The bulk of the arguments presented by both sides to the California Supreme Court dealt with the issue of whether the initiative is a valid means of passing a land use control ordinance and whether the ordinance improperly commingles the powers of the city and independent school districts.¹⁵¹ Less than one-fourth of the Buil-

Sept. 10, 1974).

The Associated Homebuilders of Greater East Bay has filed a second suit against the Livermore City Council, in which it alleges that the council has pursued a course of action designed to control growth and exclude people from the city in violation of the United States Constitution. Associated Homebuilders is seeking an injunction against

'the enforcement of the school fee, the building permit limitation, the interim large lot zoning and freeze on subdivisions, the entire schedule of fees and the policy of refusal to extend municipal services beyond the city limits.'

San Francisco Sunday Examiner and Chronicle, Aug. 25, 1974, at "Sunday Homes" section, p. A, col. 5.

145. Builders Ass'n of Santa Clara-Santa Cruz Counties v. City of San Jose, Civil No. 293759 (Cal. Super. Ct., Nov. 20, 1973) (mem. decision).

146. *Id.* at 2.

147. Complaint, Builders Ass'n of Santa Clara-Santa Cruz Counties v. City of San Jose, Civil No. 293759 (Cal. Super. Ct., filed July 16, 1973).

148. Builders Ass'n of Santa Clara-Santa Cruz Counties v. City of San Jose, Civil No. 293759, at 2-3 (Cal. Super. Ct., Nov. 21, 1973) (mem. decision).

149. *Id.* at 3.

150. Interview with Walter Hays, former member of the City Council of San Jose and co-author of San Jose Initiative, in San Jose, April, 1974.

151. Petition for Writ of Mandate at 17-32, Builders Ass'n of Santa Clara-

ders Association's brief dealt with questions of due process and equal protection, comprehensive planning, and the constitutional rights of persons who might wish to move to San Jose.¹⁵²

The city's reply devoted only one-sixth of its pages to these critical questions.¹⁵³ In its brief the city asserted that "the ordinance is completely consistent with the San Jose general plan and all policies implementing it."¹⁵⁴ Significantly, however, the brief failed to consider the implications of either the ordinance or the general plan for the Santa Clara Valley region; nor did it consider what implications the ordinance might have for traditional property rights concepts or its probable effect on low income potential residents.¹⁵⁵ These are crucial issues which the supreme court must face, and they may result in the court's finding the ordinance invalid, even if the city prevails on all the issues which were raised and discussed in the briefs.

VII. MOTIVES OF PROPONENTS

In order to understand the issues raised not only by these two ordinances, but also by other recent growth control movements, it is necessary to examine the motives and goals of the proponents of urban growth regulation.

First, the obvious stimulus to growth control legislation is the overwhelming growth rate of urban development in various parts of the United States. For example, Ramapo, New York became a convenient town from which to commute to New York City, and as a result the city's population increased substantially. Livermore was faced with a similar situation when a new section of the interstate highway opened making the drive from the community to San Francisco and Oakland convenient and relatively short. In San Jose, the population has doubled in each decade since World War II, and population forecasts predict a continuing high growth rate. It is obvious, however, that increasing population by itself was not enough to generate the success of the growth-control initiative in San Jose, since that city has experienced a growing

Santa Cruz Counties v. Superior Court, Civil No. SF 23085 (Cal. Super. Ct., filed Jan. 25, 1974); Points and Authorities in Opposition to Petition for Writ of Mandate at 1-37, Builders Ass'n of Santa Clara-Santa Cruz Counties v. Superior Court, Civil No. SF 23085 (Cal. Super. Ct., filed Jan. 25, 1974).

152. See Petition for Writ of Mandate at 34-46, Builders Ass'n of Santa Clara-Santa Cruz Counties v. Superior Court, Civil No. SF 23085 (Cal. Sup. Ct., filed Jan. 25, 1974).

153. See Points and Authorities in Opposition to Petition for Writ of Mandate at 37-45, Builders Ass'n of Santa Clara-Santa Cruz Counties v. Superior Court, Civil No. SF 23085 (Cal. Sup. Ct., filed Jan. 25, 1974).

154. *Id.* at 40.

155. See text accompanying notes 200-235 *infra*.

population for over twenty years. Rather, the success of the initiative was a result of a combination of factors.

Over the past few decades, substantial changes have affected the environment surrounding the San Jose resident. As one commentator has observed:

Urbanists cite it [San Jose] as the archtype slurb, a sprawling confusion of look-alike houses, shopping centers, and filling stations, criss-crossed by freeways that whiz shoppers and workers away from a once bustling downtown business district¹⁵⁶

The orchards and open fields have been replaced by additional houses and roads. The effect of this change has been an elimination of the sense of graciousness and spaciousness which was once associated with the city.

It has been noted in one study that:

The loss to the community due to conversion of orchard lands to urban development is inadequately measured merely by the dollar loss of agricultural income. Although it is difficult to quantify, the local orchard lands provided a very real benefit to the city's residents. One need only imagine them in bloom, smelling the freshness of the air, and hearing the peaceful sounds of the country to know the benefit was real. Now they have been replaced by endless stretches of tract homes, jumbles of commercial signs, and the noises and odors of freeway traffic.¹⁵⁷

When a once serene and picturesque area undergoes rapid population growth, the residents naturally are inclined to feel a sense of loss. Their fear of further encroachment upon the beauty of their environment often provides the impetus for the slow growth ordinances with which this article is concerned. Indeed, given the locations of growth control movements discussed in this article, one might postulate that a background of natural beauty and grace is virtually a precondition for the development of a growth control movement.¹⁵⁸

Problems of air and water pollution, inadequate transportation, crowded schools and increased taxes also generate support for growth control. Air pollution has become a serious problem in parts of San Jose, which has experienced some of the highest

156. *Correcting San Jose's Boomtime Mistake*, BUSINESS WEEK, Sept. 19, 1970, at 74; also quoted in SAN JOSE STUDY, *supra* note 7, at 5.

157. SAN JOSE STUDY, *supra* note 7, at 8-9.

158. The growth control movements mentioned in this article took place in San Diego, Cal., Petaluma, Cal., Ramapo, N.Y., Boulder, Col., Marin County, Cal., Lake Tahoe Region and states such as Minnesota, Wisconsin, California, Hawaii, and Vermont. All share magnificent natural surroundings and abundant outdoor recreational facilities, with the possible exception of Ramapo.

pollution levels in the San Francisco Bay Area.¹⁵⁹ Not only is the air pollution an annoyance and a health hazard, it is a personal affront to the residents when it becomes so thick that the nearby Diablo mountains become invisible (an increasingly frequent occurrence). The backdrop to life becomes not a magnificent natural view but a brown cloud which appears to stretch endlessly in all directions.¹⁶⁰

Water pollution, water supply and solid waste disposal problems also serve as prods to growth control. In both San Jose and Livermore, water suppliers have had to import large quantities of water. Warnings are given regularly that shortages are imminent and that serious long-term problems are developing.¹⁶¹

Despite the construction of endless miles of roads and highways, transportation has become clogged in the city center of San Jose, creating additional frustrations for motorists.¹⁶²

Equally as dramatic, in San Jose and Livermore, school quality has appeared to drop. In San Jose nine of the twenty-three school districts have become overcrowded, and double sessions are required in at least four of the districts. The double sessions affect at least 12,000 students, or approximately ten percent of all pupils attending San Jose schools.¹⁶³

Coinciding with the deteriorating quality of life and environment are tremendous explosions in property taxes and costs to the city of providing the public services necessary to accommodate growth. While property taxes have been rising virtually everywhere, they have generally risen faster in the rapidly growing areas. The tax increases are perceived by residents as a substantial burden and affront, since they are used to pay for the very causes of their dissatisfaction. In addition, the increases are likely to become an even greater burden as growth and territorial expansion continue.¹⁶⁴ As noted by one study of this process in San Jose:

[T]he enormous growth of the city's land area has caused the cost of utilities and the property tax rate to rise and the bonded debt *per capita* to nearly double in the past 20 years. San Jose accomplished its eightfold increase in size . . . by annexing far-flung areas connected to the contiguous mass of the city only by roads or by narrow strips of land. This an-

159. SAN JOSE STUDY, *supra* note 7, at 12.

160. As one writer has described San Jose's "backdrop": "[t]oday . . . the mountains are still there—but you can't see them for . . . the smog." NEWSWEEK, Sept. 14, 1970, at 68.

161. SAN JOSE STUDY, *supra* note 7, at 108-09.

162. Power and Land, *supra* note 70, at 90; SAN JOSE STUDY, *supra* note 5, at 10-11.

163. San Jose Mercury-News, Apr. 8, 1973, at 101.

164. Power and Land, *supra* note 70, at 98-99.

nexation policy was justified by the theory that any new development would bring more taxpayers into the city and thus reduce the tax rate.

No special assessments were levied for the extension of sewer . . . lines to outlying areas, because it was thought that such extensions would be amortized by subsequent development of the unincorporated gaps left between new developments and the main body of the city. However the City Council did not—and still does not—set forth any policies that would influence developers to fill these undeveloped gaps. As a result, the city has had to meet the continued high costs of far-flung urban development by seeking state and federal subventions, and by floating numerous general obligation bond issues. The bonded indebtedness per capita has nearly doubled in the last twenty years from \$80.95 to \$154.92. This in turn has caused steady increases in the tax rate.

In fiscal 1969-1970 over one-third . . . of the revenue from San Jose's . . . property tax rate was spent for debt retirement. This ratio is almost twice as high as that of any other large city in California. San Jose's bonded indebtedness has become so great that the city actually spends less of its tax dollar for general purposes today than it did in fiscal 1956-1957.¹⁶⁵

Growth control policies are also a response to the loss of identity and control keenly sensed by the citizens of an area undergoing rapid growth and change. As stated earlier, the form of San Jose is virtually indescribable (at least without a flight of fancy). Many people living in parts of San Jose hardly are aware of the fact that they live in the city. Others, who live in unincorporated areas or in another city often do not realize that they are not living in San Jose.¹⁶⁶

But the problem would not be solved merely by clearly identifying those who live within the borders of the city. A sense of identity with a city and a sense of control over its policies are the product of an awareness of the city's governmental processes and its history. Where change is dramatic and continuing the sense of history is lost for the longtime residents. The city government becomes a complex, confusing, unfamiliar entity, since it has been forced to change rapidly to meet new conditions. Even private institutions within the city become more diffuse and less visible to the people they serve.¹⁶⁷

Growth also brings an influx of people unfamiliar with the

165. SAN JOSE STUDY, *supra* note 7, at 14-15 (footnotes omitted).

166. See Power and Land, *supra* note 70, at 81-84.

167. USE OF LAND, *supra* note 1, at 213-17.

city, its history and governmental processes. The newcomers arrive with no sense of how the city works and little access to its developing government. In addition, these new residents feel a special frustration since their knowledge of the history and governmental processes of their previous community rarely helps them understand the workings of the new city.

Those who care about the city and attempt to influence the policies of its officials soon realize that the city's amorphous nature creates a substantial barrier to their effective use of political influence. Those who have been frustrated in their attempts to influence city officials believe that it is the developer and growth-oriented citizens who are able to influence city policy at will and effect changes within the city at the expense and to the detriment of the majority of its residents.¹⁶⁸

Another, less attractive, motive behind the support of growth controls has been a desire to exclude low income and minority groups from suburban areas.¹⁶⁹ This motive has raised serious doubts concerning the propriety of growth control movements. Although San Jose has a large Spanish-surname population, it has a small Asian-American population and virtually no black residents.¹⁷⁰ Many, if not most, areas within the city are substantially homogeneous: middle class Anglos live in block after block of suburban tract homes. Some of the support for growth control comes from those who fear that further growth will mean an influx

168. A history of the influence of the developer and other growth-oriented citizens is documented in *SAN JOSE STUDY*, *supra* note 7, at 24-28. See also *USE OF LAND*, *supra* note 1, at 213-17.

169. Although San Jose is a city of 500,000 people, it more nearly resembles eastern and western suburban areas than central cities. Hence in this contest San Jose can be included in the analysis of suburban areas. There is a rich and varied literature concerning the exclusionary effects of suburban land use practices. See, e.g., Bigham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 *VAND. L. REV.* 1111 (1972); Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 *YALE L.J.* 483 (1973); Cutler, *Legality of Zoning to Exclude the Poor: A Preliminary Analysis of Evolving Law*, 37 *BROOKLYN L. REV.* 483 (1971); Freilich & Bass, *Exclusionary Zoning: Suggested Litigation Approaches*, 3 *URBAN LAW* 344 (1971); Hagman, *Urban Planning and Development—Race and Poverty—Past, Present, and Future*, 1971 *UTAH L. REV.* 46; Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court*, 59 *CALIF. L. REV.* 1384 (1971); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 *STAN. L. REV.* 767 (1969); *Symposium: Exclusionary Zoning*, 22 *SYRACUSE L. REV.* 465 (1971); Comment, *Toward Improved Housing Opportunities: A New Direction for Zoning Law*, 121 *PENN. L. REV.* 330 (1972); Note, *Exclusionary Zoning From a Regional Perspective*, 1972 *URBAN L. ANNUAL* 239; Note, *The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge*, 81 *YALE L.J.* 61 (1971).

170. 21.9% of the population are of Spanish heritage (*DATA BOOK* (1972)), *supra* note 54, at 643, and only 2.5% are Black (*UNITED STATES DEPARTMENT OF COMMERCE STATISTICAL ABSTRACT OF THE UNITED STATES* 23 (1972)).

of "others" into their neighborhoods. This fear has become especially prevalent among suburban dwellers because of increased pressures from minority communities for access to suburban areas, and because of an increase in federal, state and local programs encouraging the building of low cost housing. This fear was expressed by housing developers and apartment managers in a survey conducted in San Jose as part of a 1972 study of fair housing in Santa Clara County.¹⁷¹

San Jose was the major situs for the case of *James v. Valtierra*,¹⁷² in which minority group plaintiffs attacked the California constitutional requirement that voter approval be obtained before public housing can be constructed. The San Jose electorate had voted to deny permission for a public housing project. The results of the election challenged in *Valtierra* reflected a general consensus of San Jose residents at that time and offer further evidence of the existence of an exclusionary motive behind the voters' support of growth controls. *Valtierra* also suggests that a similar motive may lie behind other growth control movements.

The evidence is by no means one-sided, however, concerning whether exclusionary motives have played a critical role in the support for the San Jose ordinance. San Jose, like Ramapo, New York, has been praised for the number of publicly assisted housing units it has built under programs which do not require referenda.¹⁷³ There is a substantial amount of moderate income housing, especially within the city.¹⁷⁴ In addition, the housing stock is relatively new, with more than half the units having been built since 1960 and only about one-fifth built prior to 1950.¹⁷⁵ Thus, low and moderate income housing is not as inadequate as in major cities elsewhere.

It should be noted also that San Jose has adopted a balanced community program which will attempt to guide new development

171. S. DEUTSCH, *FAIR HOUSING IN SANTA CLARA COUNTY*, 14-18 (U. of Santa Clara Press 1971).

172. 402 U.S. 137 (1971).

173. See, e.g., *The Joint Housing Element: 1971*, Santa Clara County 86 (Oct., 1971).

174. San Jose, in 1970, had a total of 136,246 units, including approximately 83,000 owner-occupied houses and 48,000 rental units. Almost 50% of the owner-occupied units had a value of under \$25,000 in 1970. 52% of the rental units rented for less than \$150 per month. The bulk of both types of housing were in moderate rather than low income ranges.

This is not to say that there is not a shortage of units in these ranges, since almost two-thirds of the population has an income which requires a house selling for under \$25,000 or an apartment renting for less than \$150 per month. See San Jose Housing Element § II (preliminary draft 1973) for a detailed analysis of the housing situation in San Jose.

175. DATA BOOK (1972), *supra* note 52, at 646; see generally San Jose Housing Element § II (preliminary draft 1973).

so that the proportional representation of different economic and racial groups in housing in each area of the city will be roughly equivalent to the proportion of different economic and minority group members living within the entire city.¹⁷⁶

Thus, proponents of growth controls are motivated by various factors. An increase in population alone, although a significant factor, often is not sufficient to initiate support for a growth control movement. Rather, such support is usually the product of a deteriorating environment characterized by the problems outlined above. In addition, some of the support for growth controls comes, unfortunately, from those who believe that such controls will prevent an influx of minorities into their neighborhoods.

VIII. GROUPS LIKELY TO BE INVOLVED IN GROWTH CONTROL CAMPAIGNS

Proponents

The major proponents in the San Jose and Livermore growth control campaigns, as have been the major proponents in similar movements elsewhere, were the environmental activists within the city. This group was composed of a coalition of people from organizations such as the League of Women Voters, the Sierra Club and homeowners associations.¹⁷⁷ These are the people who have organized and who regularly participate in the local government processes, often as dissenters from a wide range of traditional local government policies. They are also the people who have been called "elitists" by commentators who are critical of their goals and who see many of their actions as fundamentally exclusionary and reflective of their middle class orientation.¹⁷⁸

176. See Housing Element of the General Plan, City of San Jose, at 2C-73, May, 1974. Policy 1 states:

Take all physically and legally available steps in order to encourage variety and mix in housing types and to provide adequate choice for housing persons of all income levels in San Jose.

Policy 3 states:

Take all necessary and legally available steps in order to encourage economic mix or income heterogeneity in individual housing developments and thus to promote mix in the costs of housing units in new subdivisions, apartment complexes and planned developments.

The author was a consultant to the "Balanced Community" Subcommittee of the City Housing Task Force charged with working out the details of the policy.

177. The chairperson of the Citizens for Rational Planning, the proponents of the initiative in San Jose, was a former vice president of the League of Women Voters. The League's President was a member of the executive committee. Another executive committee member was the president of a homeowners association. The Sierra Club local chapter actively supported the initiative. See GROWTH CONTROL HANDBOOK, *supra* note 1, at 107.

178. See generally M. CLAWSON, MODERNIZING URBAN LAND POLICY 205 (1973); Boselman, 248-50.

A second group of supporters was composed of the usually uninvolved citizens who were dissatisfied with the problems of the city and who were disappointed in the local government for its failure to provide the services and schools they had expected and to protect the amenities and natural benefits they had enjoyed when they arrived.¹⁷⁹ Many of these people had fled from the mounting problems of other, older cities only to face these same problems in their new environment. They were not activists before arriving, and didn't expect to be activists in their new homes, but they saw no alternative once the problems of uncontrolled growth alerted them to the need for affirmative action.¹⁸⁰ Once aroused, they are likely to produce a formidable political power which may have a long-lasting, substantial impact on local government policies and processes.

A third group of supporters was a minority of members of the local government structure.¹⁸¹ Although the City Council refused to pass the ordinance in either city, the initiative was supported by almost half of the City Council in San Jose.¹⁸² In addition, school district governing bodies supported the controls, as well as (unofficially) members of the planning department and other city staffs.¹⁸³ The government supporters saw the ordinance as an opportunity to catch their official breaths and re-establish some sense of city control over development. In San Jose, despite a substantial amount of previous planning activity, the study mandated by the ordinance was viewed as a means of enabling the supporters to take a more comprehensive look at city planning. City problems could be studied as a whole and approached systematically—something never before attempted.

Opponents

The opponents of the San Jose and Livermore initiatives also can be categorized in distinct groups. First, and most obvious, were the developers¹⁸⁴ who saw their way of life and opportuni-

179. See GROWTH CONTROL HANDBOOK, *supra* note 1, at 106.

180. For an analysis of the migration to the suburbs see THE REPORT OF THE COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, POPULATION AND THE AMERICAN FUTURE chs. 3, 6, 8, 14 (1972).

181. Obviously, where the city adopts the growth control program without resort to the initiative process, the local government members will be a majority of the city's power structure.

182. See note 107 *supra*.

183. At least four school districts officially announced support for the initiative, according to campaign literature of the proponents, along with major teachers organizations. City officials, including members of the Planning Staff and City Attorney Office, cooperated with the proponents in planning the initiative. Interview with Walter Hays, *supra* note 120.

184. In San Jose, the developers spent approximately \$15,000 in an attempt

ties for profit severely threatened by growth controls. Many developers feel that they have an absolute right, even a "property" right, to buy and develop—with city-supplied utilities—any land for which they are able to arrange financing.

Nearly as vocal in their opposition to growth controls were labor organizations, especially those associated with the construction trades. They feared for their jobs, as well as the economic health of their sector of the community.¹⁸⁵ For the labor organizations and the individual workers, opposition to the growth control movement represented a form of class struggle, in which the blue collar working man was fighting to survive against the professional and the white collar worker, who were attempting to preserve "frivolous" amenities.¹⁸⁶

A third opposition group, closely allied with labor and developers, was the city government structure which had traditionally supported and favored growth. The policies and dreams they had pursued, to create a bigger and greater city, were threatened. This was especially true in San Jose, where the city's general plan calls for a population of 1.8 million by the year 2010, and a city airport larger than the present San Francisco airport before the year 2000.¹⁸⁷

A fourth group of opponents of growth controls were minority group organizations.¹⁸⁸ These organizations feel that growth controls, at least in impact if not in intent, will prevent minority group members from moving into more desirable areas of the city or into the city at all. From their perspective some grudging gains have been made, especially in the suburbs, for minority Americans.¹⁸⁹ They are convinced that growth controls will slow or stop this process and bottle up minority residents in the slums of the abandoned central cities. The school district involvement is viewed as evidence that the growth control movement is an at-

to defeat the initiative, and have borne the expenses of the court challenge. Surprisingly, although a labor organization attempted to block placement of the Livermore initiative on the ballot, labor groups have not otherwise been active in the challenges to the ordinances. GROWTH CONTROL HANDBOOK, *supra* note 1, at 91, 107; Interview by R. Leong with Claire Benson, President of Citizens for Rational Planning, in San Jose, Apr. 1973. See also San Jose Mercury, Apr. 12, 1973, at 1, col. 1.

185. The major labor effort to defeat the San Jose initiative was manifested by the advertisements mentioned in note 115 *supra*. See also San Jose Mercury, Apr. 12, 1973, at 1, col. 1; USE OF LAND, *supra* note 1, at 52-53.

186. See M. CLAWSON, MODERNIZING URBAN LAND POLICY, 205 (1973).

187. See SAN JOSE STUDY, *supra* note 7, at 13.

188. See USE OF LAND, *supra* note 1, at 42, 53-55.

189. See generally articles cited in note 169 *supra*. See also NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, THE IMPACT OF HOUSING PATTERNS ON JOB OPPORTUNITIES (1968); U.S. COMMISSION ON CIVIL RIGHTS, ABOVE PROPERTY RIGHTS 9-11 (Dec. 1972).

tempt to keep the schools as homogenous and segregated as possible.

A final group of opponents consists of the people residing in the city who believe in the growth ethic and the concept of progress as it has long been espoused in the United States. Along with the developers and city officials in a city such as San Jose, this group believes that a city has a destiny to grow and become great. They equate growth with greatness, and are not disturbed by the costs and side effects of the growth process.¹⁹⁰ They see themselves as beneficiaries of the growth and expansion of a city such as San Jose, and are proud to be living in a progressive, growing city. Their feelings should not be underestimated or discounted in analyzing the local growth control movement and possible backlashes which may develop from it.¹⁹¹

IX. SOME THOUGHTS CONCERNING THE ISSUES RAISED BY THE GROWTH CONTROL MOVEMENT

Growth controls represent a very different use of the police power when compared with both traditional Euclidean zoning¹⁹² and the non-Euclidean techniques developed in recent years.¹⁹³ A major theme of the prior history of land use controls has been the cooperation and assistance of professional developers.¹⁹⁴ The Standard Zoning Enabling Act¹⁹⁵ and its progeny¹⁹⁶ were often

190. See SAN JOSE STUDY, *supra* note 7, at 18-20.

191. One example of the possible backlash by growth-oriented groups can be seen in the present controversy over location of an oil refinery in New Hampshire. According to the Boston Globe, Apr. 18, 1974, at 18, col. 1, the residents of Newmarket, New Hampshire have voted to welcome the refinery after it was rejected by the voters of Durham, New Hampshire. Durham and Newmarket share the same bay, and the same ecological and growth factors which influenced Durham to reject the refinery exist for Newmarket. Indeed, Durham and other nearby areas which oppose the refinery will be strongly affected by the refinery should it ultimately be located in Newmarket.

192. Most of the early zoning ordinances provided for cumulative zones (*i.e.* residential uses could be in commercial zones, residential and commercial uses in industrial zones, *etc.*). These types of ordinances are often termed "Euclidean" since they were the subject of litigation in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

193. See J. DELAFONS, *LAND USE CONTROLS IN THE UNITED STATES* 16-69 (2d ed. 1969) [hereinafter cited as DELAFONS] for a history of Euclidean zoning. Non-euclidean techniques are discussed in detail in Aloi, *Legal Problems in Planned Unit Development: Uniformity, Comprehensive Planning, Conditions, and the Floating Zone*, 1 REAL ESTATE L.J. 5 (1972). See generally D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 67-72, 117-22 (1971) [hereinafter cited as HAGMAN].

194. DELAFONS, *supra* note 193, at 28-40.

195. U.S. DEPT. OF COMMERCE, *STANDARD ZONING ENABLING ACT* (1926). The act is reprinted in C. BERGER, *LAND OWNERSHIP AND USE* 612-17 (1968).

196. Most states have adopted zoning enabling statutes which are based on the Standard Zoning Enabling Act. See, *e.g.*, CAL. GOV'T CODE §§ 65300-02, 65600-701, 65800-51 (West 1966); ILL. ANN. STAT. ch. 24, 11-13-1 to 11-13-19, 34-3151

used as protective devices for the developer specializing in a geographical area. By guaranteeing minimum standards of quality for development, the land use controls protected the economic viability and potential of a particular area. The local developer could be sure that his competitors, especially those who would not remain long in his locale, would not develop the area in an unacceptable way.

In addition, many of the land use controls, particularly those utilized since the adoption of non-Euclidean techniques, facilitate the process of development. An exclusive industrial zone or shopping center zone protects the developer from interference by other uses.¹⁹⁷ A floating zone¹⁹⁸ or planned unit development¹⁹⁹ offers an opportunity to purchase land prior to zoning changes which might otherwise raise the price of the undeveloped land. Such zones also give the developer an opportunity to mix uses and otherwise increase the attractiveness of the project.²⁰⁰

In contrast, growth controls challenge the symbiotic relationship which has arisen between the developer and the city. Either the developer is prohibited absolutely from building, or he is faced with demands for the provision of services, the cost of which are not easily recoupable. Hence, growth controls directly threaten his economic interest.

In addition, growth controls may represent a threat and impediment to the provision of adequate housing for low and moderate income families, including a disproportionate number of minority group families.²⁰¹ Regardless of the motives or intentions of proponents, growth controls, especially if adopted by a large number of communities, have the effect of reducing the supply of land available for development. Therefore, "a major increase in housing cost can be expected. This will effectively exclude all but upper income groups from the areas . . . by restricting the amount of land available for housing and increasing its

to 34-3161 (Smith-Hurd Supp. 1974); PA. STAT. ANN. tit. 53, § 10601 *et seq.* (Purdon 1972).

197. See Note, *Industrial Zoning to Exclude Higher Uses*, 32 N.Y.U.L. REV. 1261, 1267-69 (1957). See also HAGMAN, *supra* note 193, at 109-10.

198. A floating zone is a type of zone classification which is not applied to a particular parcel of land but rather exists in text form in the zoning code. Whenever a development is proposed which comports with the "floating zone," the area may be designated in an ordinance as being within such a zone. See HAGMAN, *supra* note 193, at 117.

199. A planned unit development is a zoning technique used to handle large scale single ownership projects. Under this technique zoning regulations focus on density requirements rather than on specific rules for each individual lot. See *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968).

200. For a general discussion of planned unit developments see Aloï, *Legal Problems of Planned Unit Developments*, 1 REAL ESTATE L.J. 5 (1972).

201. See notes 169 and 189, *supra*.

costs.”²⁰² Any cost increase will be a proportionately greater burden on those who are least able to afford the housing. Given the relationship between housing location and job opportunities, and the rapid increase in jobs in the areas most likely to adopt growth controls, the trend could result in a reversal of most of the gains in housing opportunities so painstakingly achieved during the 1960’s.²⁰³

Consequently, the developer and representatives from lower income and minority groups may be expected to lead the fight against the ordinances. The remainder of this article will discuss the issues that this conflict will raise for court consideration and the kinds of judgments courts will be forced to make in deciding those issues.

Re-evaluation By The Courts

The courts will be forced to engage in a re-evaluation of the meaning of private property and of the extent of a city’s police power. The concept of private property rights and the meaning of property ownership has been undergoing fundamental changes in recent years.²⁰⁴ The cliché “bundle of sticks”²⁰⁵ may now have reached the point, however, where it will no longer sustain a campfire, at least in the eyes of the opponents of growth controls. What can property ownership mean, other than the “right” to pay taxes, if one can be told that only minor or economically marginal uses are available for a period as long as eighteen years,²⁰⁶ or perhaps even permanently, because a maximum population point has been reached? In such a circumstance will the private owner at least be able to demand compensation through an inverse condemnation claim?²⁰⁷ Is the right to demand compensation really the equivalent of the right to own property?

On the other hand, can local government fulfill its role, or even function, if a strict property rights analysis, emphasizing the ownership rights of the property owner and minimizing the police

202. Boselman, *supra* note 178, at 248.

203. See notes 169 and 189 *supra*.

204. See note 193 *supra*.

205. The cliché “bundle of sticks” is one hoary with antiquity, that is, it was used while the author was in law school. It is used by property professors as an expressive metaphor for conceptualizing property rights. Why it has been seen as effective by generations of law professors escapes this author, but he accedes to its use as an ancient and honored practice.

206. See *Golden v. Planning Bd. of Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

207. For an example of a successful inverse condemnation suit see *Klopping v. City of Whittier*, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

See generally Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 1-51 (1971).

power of the local jurisdiction, is to be applied? Surely a local government is not obliged to stand idle while the population of the city grows faster than the government's capacity to provide necessary services. The strong and convincing criticisms lodged against urban sprawl, haphazard development, the destruction of the environment, and the loss of important quality-of-life values must be considered by the courts.

The solution to this problem will be difficult to achieve. It may be anticipated that there will be very different solutions adopted by different courts and state legislatures as they confront the fundamental issues involved. However, a few principles can be proposed for consideration.

First, it is essential that consideration of the validity of a growth control ordinance not focus on the effect the ordinance may have on the property of a single land owner. Today, most courts approach land use problems as if the claims of an individual landowner exist in a vacuum separate from the needs or claims of other property owners or of the community as a whole.²⁰⁸ As a result, many courts authorize development or invalidate statutory schemes without recognizing the substantial burdens and external costs that are being shifted onto the public.²⁰⁹

An example of such tunnel vision is provided by *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*.²¹⁰ In that case the plaintiff development company owned property in a swamp within the township. A zoning ordinance had been enacted by the township board which imposed significant restrictions on the use of the swampland. Plaintiff brought an action against the township, seeking to have the ordinance declared unconstitutional. The New Jersey Supreme Court held that since the purpose and practical effect of the ordinance was to appropriate private property for a flood water retention basin or open space use, the ordinance constituted a taking of land for public purpose without just compensation and was unconstitutional.²¹¹ As a result of the decision, the usefulness of the swamp as a wildlife preserve was impaired and a serious flood hazard was created for a substantial number of other property owners in the area.²¹² The New Jersey Supreme Court was overly concerned with the claim of the development company that it had a right to a high economic

208. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 151-55 (1971) [hereinafter cited as Sax].

209. *Id.*

210. 40 N.J. 539, 193 A.2d 232 (1963).

211. *Id.*

212. Large, *The Land Is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039, 1058-59.

return on each parcel of land it owned, and so failed to realize that the company's claim could only be satisfied by forcing other property owners to bear additional costs.

On the other hand, an excellent example of a court's ability to understand the interrelations of property and ecological factors is *Just v. Marinette County*.²¹³ Reviewing a property owner's claim of right to fill part of a wetland on a lakeshore, the Wisconsin Supreme Court stated:

The changing of wetlands and swamps to the damage of the general public by upsetting the natural environment and the natural relationship is not a reasonable use of that land which is protected from police power regulation.²¹⁴

The court considered the interrelationship between a single property owner's use of his land and the needs of other property owners and the community as a whole and found the general needs paramount:

To state the issue in more meaningful terms, it is a conflict between the public interest in stopping the despoilation of natural resources, which our citizens until recently have taken as inevitable and for granted, and an owner's asserted right to use his property as he wishes. . . .

An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.²¹⁵

Most growth control legislation, however, will not be directed at the preservation of special environmental features such as swamps, lakes or coastlines. The question, then, is whether a similar recognition of the interrelationship of property use and public needs should be applied to situations involving growth controls.

As stated earlier,²¹⁶ the impetus for the growth control movement often has been a deteriorating environment in localities undergoing rapid growth. While less tangible perhaps than a lake or swamp, the air, noise and surroundings of the residents of growing areas are equally natural and equally subject to injury by growth processes.

More generally, however, the individual development decisions of numerous property owners and developers soon result in a growth problem for the community. Flexibility devices such as the planned unit development²¹⁷ and the cluster zone,²¹⁸ and even

213. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

214. *Id.* at 17-18, 201 N.W.2d at 768.

215. *Id.* at 14, 17, 201 N.W.2d at 767-68.

216. See text accompanying notes 155-64 *supra*.

217. See note 199 *supra*.

218. Cluster zoning involves the grouping together of dwellings to increase

the idea of subdivision regulations for entire tracts of land, have developed from a recognition that planning cannot be effective if conducted in piecemeal fashion, lot by lot.²¹⁹ A parallel recognition, that the needs and desires of the entire community should determine the questions of whether and at what rate development will occur, is essential to proper consideration of the problems posed by growth.

There is a danger, however, that if the community is allowed to determine these questions, the private developer will lose all freedom of choice, and, in effect, the local government will become the prime developer of all land within its jurisdiction. This result is not necessarily inevitable if, as a second principle, the property owner is allowed to retain the right to decide whether to develop his land, and, within the rules set forth by the growth control and other land use regulations, how to develop it.

An example of this process is the Petaluma, California plan.²²⁰ In Petaluma, developers were invited to apply for devel-

dwelling densities on some portions of a development while leaving other portions free of buildings.

219. See DELAFONS, *supra* note 193, at 18-28, 32-37, 39-40.

220. The plan is set forth in the GROWTH CONTROL HANDBOOK, *supra* note 1, at 109-15. The public factors identified in the ordinance are divided into two general categories:

Availability of Public Services and Facilities

1. the capacity of the water system to provide for the needs of the proposed development without system extensions beyond those normally installed by the developer;
2. the capacity of the sanitary sewers to dispose of the wastes of the proposed development without system extensions beyond those normally installed by the developer;
3. the capacity of the drainage facilities to adequately dispose of the surface runoff of the proposed development without system extensions beyond those normally installed by the developer;
4. the ability of the Fire Department of the city to provide fire protection according to the established response standards of the city without the necessity of establishing a new station or requiring addition of major equipment to an existing station;
5. the capacity of the appropriate school to absorb the children expected to inhabit a proposed development without necessitating adding double sessions or other unusual scheduling or classroom overcrowding;
6. the capacity of major street linkage to provide for the needs of the proposed development without substantially altering existing traffic patterns or overloading the existing street system, and the availability of other public facilities (such as parks and playgrounds) to meet the additional demands for vital public services without extension of services beyond those provided by the developer.

Quality of Design and Contribution of Public Welfare and Amenity

1. site and architectural design quality which may be indicated by the harmony of the proposed buildings in terms of size, height, color, and location with respect to existing neighborhood development;
2. site and architectural design quality which may be indicated by the amount of [*sic*] character of landscaping and screening;
3. site and architectural design quality which may be indicated by the arrangement of the site for efficiency of circulation, on- and off-site traffic safety, privacy, etc.;

opment permission under the standards established as part of the program to limit the number of new units per year. Thus, the developer would make the initial decision of whether and what land to develop. With a fixed number of development permissions available, however, the city would decide which developer in a specific year would be able to build, based on the public factors identified in the ordinance.²²¹

A similar decision-making process is involved in the Ramapo plan.²²² Under this plan, however, the city, in effect, guarantees permission to develop within an eighteen year period, and promises to provide the necessary utilities. Although this plan does not appear to infringe on the traditional conception of the private right to develop land to the degree the Petaluma plan does, since permission must be granted within a determined period, the land use controls regulating population density and types of housing,

4. the provision of public and/or private usable open space and/or pathways along the Petaluma River or any creek;

5. contributions to and extensions of existing systems of foot or bicycle paths, equestrian trails, and the greenbelt provided for in the Environment Design Plan;

6. the provision of needed public facilities such as critical linkages in the major street system, school rooms, or other vital public facilities;

7. the extent to which the proposed development accomplishes an orderly and contiguous extension of existing development as against "leap frog" development;

8. the provision of units to meet the city's policy goal of 8 per cent to 12 per cent low- and moderate-income dwelling units annually.

In the first category points are assigned on a scale of 0 to 5; in the second, on a scale of 0 to 10. A proposed development must score at least 25 points in category one and 50 points in category two before it can receive approval.

Id. at 112-13 (footnote omitted).

Unfortunately the Petaluma plan was found to be invalid by Judge Burke of the United States District Court, Northern District of California. *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974). Judge Burke found that "[t]he 'Petaluma Plan' is an effort to avoid the problems that accompany contemporary trends in population growth" having the effect of "exclud[ing] substantial numbers of people who would otherwise have elected to immigrate into the city" in violation of "the freedom to travel [which] . . . has long been recognized as a basic right under the Constitution, or a 'fundamental right.'" *Id.* at 581.

After both the district court, on May 29, 1974, and the Ninth Circuit Court of Appeals, on July 2, 1974, refused to stay the order of the district court enjoining enforcement of the ordinance, Justice Douglas of the United States Supreme Court granted a stay of the district court order on September 18, 1974. The case is now on appeal to the Ninth Circuit Court of Appeals. Interview by author and R. Leong with Robert Anderson, attorney for the City of Petaluma, in Orinda, California, August 1, 1974.

The concept of the right to travel and its impact on the validity of growth controls will be analyzed in part II of this article.

221. Interview with Robert Anderson, *supra* note 220.

222. The decision process is described in detail in *Golden v. Planning Bd. of Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), and in articles cited in note 33 *supra*. See also text accompanying notes 37-42 *supra*.

along with the phased development plan, have a significant effect on private development decisions.

The courts should be guided also by the principle that comprehensive planning must be involved in the decision to limit or stop growth, and that planning must take into account regional and national, as well as local, needs. This principle is a necessary concomitant of the principle that traditional property concepts must be re-evaluated,²²³ since the public needs and goals to be considered must be formally expressed in advance by the community in order to protect the property rights of the individual.

Under this principle, courts will be forced to explore more thoroughly the nature of the comprehensive planning process which is expected of local government and the place within that process for regional and national needs. Comprehensive planning clearly has been established as a prerequisite to valid land use controls,²²⁴ but what does this concept entail in the context of growth controls? Surely, courts will be forced to view the comprehensive plan as something more than the sum total of the zoning ordinance and policies adopted by the local government.²²⁵ To be valid, a comprehensive planning process leading to growth controls should at least include the process and considerations which lead to the creation of the Ramapo master plan. This plan was described by Judge Scileppi as follows:

Experiencing the pressures of an increase in population and the ancillary problem of providing municipal facilities and services, the Town of Ramapo, as early as 1964, made application for a grant . . . to develop a master plan. The plan's preparation included a four-volume study of the existing land uses, public facilities, transportation, industry and commerce, housing needs and projected population trends. The proposals appearing in the studies were subsequently adopted . . . and implemented by way of a master plan. The master plan was followed by the adoption of a comprehensive zoning ordinance. Additional sewage district and drainage studies were undertaken which culminated in the adoption of a capital budget, providing for the development of the improvements specified in the master plan. . . .²²⁶

223. See text accompanying notes 204-19 *supra*.

224. See generally Heyman, *Innovative Land Regulation and Comprehensive Planning*, 13 SANTA CLARA LAW. 183 (1972).

225. The distinction between a general or master plan and the zoning ordinance has not been recognized in the United States. Rather, the zoning ordinance has often been held to express the plan or even to be the plan. See Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1157-73 (1955); HAGMAN, *supra* note 193, at 51-58.

226. *Golden v. Planning Bd. of Town of Ramapo*, 30 N.Y.2d 359, 366, 285 N.E.2d 291, 294, 334 N.Y.S.2d 138, 142 (1972) (footnote omitted). See note 33 *supra*.

Even with the adoption of this process, however, the courts still will be confronted with numerous fundamental questions. It will be necessary to determine whether, under the rubric of comprehensive planning, a carefully developed master plan and accompanying ordinances can reliably predict and dictate how property should be used for as long as a generation. In fact, such long range planning *is* necessary—with perhaps some outside time limit of twenty or twenty-five years—subject to claims based on radically changed circumstances or technology. Without the acceptance of a planning process which incorporates such long range control, the planning process will remain haphazard and the significant problems which initiated the growth control movement will continue to arise.

Another question raised by this method of planning will be whether a genuine planning process exists if a decision has been made to bar *all* future development. If the decision to ban development is based on a determination of the physical limitations of the area, the answer to this question definitely should be yes. However, in most cases, the growth capacity of an area is a relative concept. Given the regional and national needs which should be included in any planning decision, permanent bans on all new development should not be allowed without clear proof that all issues have been considered in detail.

Finally, the courts will be forced to determine whether comprehensive planning can be conducted at the local level. The growth controls discussed in this article were enacted at the local level, with each jurisdiction acting as an independent entity. Yet, while legally independent, no local government is genuinely an independent entity. Most cities are purely accidental creations of some past or continuing process of boundary definition. Often a city is separated from neighboring cities only by posted signs.²²⁷ Even though the city may be physically distinguishable, it is still linked by its location and economic, cultural and human relationships to its region and the nation.

To protect the regional interests and the regional viewpoint regional planning agencies should be created to assess regional needs, and these agencies should have sufficient influence with the city governments to affect city planning decisions.

In addition, limits on local planning must be established to protect regional and national interests. First, the state should establish minimum standards for both the process and content of

227. For example, in the course of a thirty-minute walk in one small section of Santa Clara County a pedestrian may cross municipal boundaries approximately twenty times. Power and Land, *supra* note 70, at 81-84.

local planning regardless of the regional influence. The standards could be enforced by developing a state planning process and by creating independent state entities to shape and perhaps even override local planning decisions.²²⁸ Second, planning grants and conservation and development assistance could be offered to the cities by the state, to encourage regional considerations in the cities' planning decisions. Third, courts should not hesitate to invalidate growth control ordinances which attempt to wall off local jurisdictions which are not facing serious growth problems in the region and state. Further, courts and legislatures should give serious consideration to stripping very small jurisdictions of their planning powers, if their size or interrelation with a region makes it inappropriate for these jurisdictions to exercise land use controls independently.

However, since land use planning is often one of the two most important functions of local government,²²⁹ the deprivation of the power to establish land use controls might cause an even greater alienation of most citizens and might totally destroy any sense of identity with the city or of control over its destiny. Such a trend might be fundamentally anti-democratic and could have implications far beyond the immediate questions of growth control or even land use regulation.

In addition, prior to the growth control movement, important environmental and social values were not being considered in the planning and development process. With the advent of growth controls, however, these concerns began to be included in local planning. It is possible that a switch to a regional focus in planning actually could result in a return to the undesirable process of the past. Regional planners, in their search for a more effective economic development system, might overlook environmental considerations and the needs of the excluded in the same way that local planners presently do.

Finally, and as a practical matter, the land use powers of each local jurisdiction are deeply entrenched and have long been recognized by the legal system. It is unlikely that local planning will be replaced with regional planning, by either legislative or court mandate, in the near future. Therefore, it is probable that the

228. This process has been used in Massachusetts through the so-called Anti-Snob Zoning Law. MASS. ANN. LAWS ch. 40B, §§ 20-23 (1973). These statutes set a minimum percentage of low income housing to be built each year according to a complex formula. Local government agencies cannot reject a proposal for low income housing if the housing available fails to meet the state formula.

In Vermont, under the Land Use and Development Act, note 13 *supra*, state requirements for land use controls are established and state controls supersede local controls in most instances.

229. Education is the other key function of local government.

local system will continue to favor its own needs over those of the entire region or the nation unless it is carefully controlled.

The Excluded

Closely associated with the problems discussed to this point is the problem of the excluded. The same individuals who have been excluded from the desirable areas of cities by today's land development processes may also be victims of the new growth controls. The poor minority group member living in a decaying central city may find his options and opportunities for better housing even more remote and the suburbs even more hostile when growth controls are added to the existing exclusionary land use devices. All of the issues contested under the rubric of exclusionary zoning may be exacerbated if growth controls are implemented on a large scale.²³⁰ Courts will have to be extremely sensitive to the effects of growth control ordinances as well as to the motives behind the implementation of these ordinances.

It is important to note, however, that members of minority groups and the poor are being effectively excluded from most American suburban areas under the *present* system of land use controls. In addition, the cost of living increases which are associated with rapid growth are making it impossible for many people in the low income bracket to purchase homes in many residential areas.

The solution to the problem of the excluded would seem not to be the disallowance of growth controls, but rather the establishment of a system which actively encourages additional housing opportunities for the disadvantaged in the context of growth controls. A growth control system gives a substantial amount of leverage and bargaining power to the local government. As has been the case with some plans already adopted,²³¹ that leverage can be used to require that low and moderate income housing be included in new development. The implementation of growth controls might result in more housing opportunities for the excluded than are presently available under traditional land use controls, where costs are already high and little incentive exists for providing low cost housing.

230. See note 169 *supra*.

231. For example, the City of Petaluma established a requirement that between eight and twelve percent of new units built each year should be low and moderate income units. In determining which developers will be allotted building permissions, the City included the provision of low and moderate income units as a factor strongly in favor of the developer. See note 220 *supra*. The San Jose initiative includes, as part of the mandated study, consideration of how further development can be required to include equitable proportions of housing for all income levels. See text accompanying note 109 *supra*.

Minimum percentages of low and moderate income housing could be required as part of any new development authorized under a growth control ordinance.²³² In addition, a percentage of all housing authorizations in the jurisdiction could be set aside for low and moderate income housing units. These building permits would not be available for any other kind of development.²³³ If provision for low and moderate income units is made an important factor in determining whether building permits will be granted for other types of development, a strong incentive will be created to provide low income housing. Third, a state quota for low and moderate income units in each jurisdiction could be established.²³⁴ By assisting with the development of the units or by threatening to deny funds for failure to meet the quota, the state could insure that the required number of units are supplied. A State Development Agency with the authority and financial capability to construct the units would be a key part of such a scheme, especially if it could step in, following local failures, to meet the state quota.²³⁵

232. Such a program was established in Fairfax County, Virginia. The Virginia Supreme Court held the requirement invalid in *Board of Supervisors of Fairfax County v. De Groff Enterprises, Inc.*, 214 Va. 235, 198 S.E.2d 600 (1973).

The program is described as follows:

The county adopted a series of amendments to its zoning ordinance requiring that all residential planned communities, residential planned unit developments, planned apartment developments, multi-family districts (except high rises), and townhouse zones be developed with a minimum of 15 per cent low- and moderate-income housing. Of this, at least 40 per cent, or six per cent of the total, must be low-income housing.

The provisions apply to any development containing 50 dwelling units or more. The percentages must be applied to all categories of housing proposed for the development, and the average number of bedrooms "reflect the average number of bedrooms per dwelling unit for the planned development as a whole." The applicant may construct the units outside his development, with approval, if doing so does not result in an "undue concentration of low- and moderate-income families in a particular geographical area."

If government subsidies are not available, then the applicant is excused from the requirement. But if the county executive determines that the applicant is not "making persistent efforts in good faith to obtain the proposed subsidies and provide such dwelling units," the county executive is authorized to withhold clearances for the development until the applicant complies. The applicant's efforts are judged with reference "to the normal processing time and procedures required to obtain the various subsidies applied for."

BROOKS, LOWER INCOME HOUSING: THE PLANNERS RESPONSE 48 (1972), *quoted in* D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT CASES AND MATERIALS 903 (1973) (footnotes omitted).

233. Petaluma has included this provision in its plan. See note 231 *supra*.

234. See note 228 *supra*.

235. New York State established an Urban Development Corporation (U.D.C.) in 1968, giving it the power to override local zoning if necessary to build low- and moderate-income housing. N.Y. UNCONSOL. LAWS § 6266(3) (McKinney 1973-74). However, in 1973, after the power was used, the State Legislature stripped this power to pre-empt and granted local jurisdictions the

In the final analysis, the solution to the problem of the excluded will not come from forbidding growth control schemes, but by providing a substantial infusion of resources to solve the basic income inequalities and historical discrimination which has created and perpetuated the problem. Indeed, the existence of growth control schemes should provide the necessary local leverage more effectively to include housing opportunities for the low income families now excluded from suburban areas.

X. CONCLUSION

The emergence of growth control ordinances as a land use regulatory device can be attributed to a changing attitude toward population growth in an increasingly urbanized and crowded society. This article has examined the motivating forces behind the growth control movement and the legal issues it has raised. Focusing upon a case study of the particular ordinances passed by initiative in San Jose and Livermore, the article has analyzed the controversy generated by the attempt to place direct limits on a city's growth rate. This controversy has culminated in major lawsuits brought by builders associations of the two cities, attacking the validity of the ordinances in question. The judicial treatment given these ordinances will necessarily affect the mode of growth control schemes in these and other California cities. One important fact, however, should not be overlooked. The passage of these two growth control measures is the reflection of a new mood among the residents of San Jose and Livermore, who have awakened to the realization that continued uncontrolled growth in cities should not be considered the sign of progress it once was. It is unlikely that the judicial fate of these ordinances could alter that mood. Rather, growth controls in some form appear to be a permanent addition to the land use repertory.

power to veto U.D.C. projects *even if* the U.D.C. was complying with pre-existing local zoning and building regulations. The U.D.C. has nevertheless constructed substantial amounts of low- and moderate-income housing. See BROOKS, LOWER INCOME HOUSING: THE PLANNERS RESPONSE, 24 *et seq.*, quoted in D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT CASES AND MATERIALS, 892-95 (1973).