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THE EMERGENCE OF FLEXIBLE GROWTH MANAGEMENT SYSTEMS IN THE SAN FRANCISCO BAY AREA

*Richard T. LeGates**

I. INTRODUCTION

Lawyers whose practices involve land use or real estate development in rapidly growing areas of the United States are concerned with urban growth management. Municipal ordinances such as those pioneered in Ramapo, New York¹ and Petaluma, California,² which regulate the annual amount of residential building permitted, are central to urban growth management. These regulations are commonly referred to as residential tempo controls.

There are many reasons why civic leaders in fast-growing areas want to manage growth in their communities. The most commonly articulated reason is to pace residential construction to the development of infrastructure—such as streets, water systems and sewage facilities.³ Related is the desire to keep public services, such as police and fire department services and schools, from being overburdened by the demands of new residents.⁴ Many ordinances specify environmental goals such as preserving open space, agricultural land, wetlands or other environmen-

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1. *See* *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 363, 285 N.E.2d 291, 295, 334 N.Y.S.2d 138, 142, *appeal dismissed*, 409 U.S. 1003 (1972).

2. *See* *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897, 900-02 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

3. *See* D. MANDELKER, *LAND USE LAW* §§ 1.03-1.10 (2d ed. 1988).

4. D. DOWALL, *THE SUBURBAN SQUEEZE: LAND CONVERSION AND REGULATION IN THE SAN FRANCISCO BAY AREA* 11 (1984).

tally sensitive areas.⁵ Some city officials seek to protect the visual character of areas, such as ridgetops, for their aesthetic contribution to the community.⁶ Some ordinances either explicitly or implicitly seek to preserve the small town community character by limiting the absolute population size.⁷ Critics of growth management argue, however, that the true goals of many growth management ordinances are to exclude low-income residents and enhance home values.⁸

Controlling the tempo or timing of residential building is one way to assure that public infrastructure keeps pace with population growth. For example, a community that knows its population will grow by no more than 3% per year can develop a capital improvement program to expand necessary infrastructure in an orderly way. However, a community that experiences rapid and uneven growth will have a difficult time pacing needed infrastructure with development. Tempo control per se does not determine the location and character of growth. Nevertheless, if standards for approving projects which meet substantive criteria, such as preserving open space or avoiding ridgetops, are tied to the tempo controls, tempo control ordinances can affect what type of growth occurs.

At the heart of any plan for residential tempo control is a formula to limit the number of residential units to be built annually. Some communities specify a maximum number of new units which can be built,⁹ while others specify a maximum annual percentage increase in the housing stock or population.¹⁰ The maximum numbers or percentages and the methods for calculating them vary widely, as do the circumstances for exemptions, the systems to carry forward unused allocations, the provisions to borrow against future allocations, and the bases upon which cities decide who is permitted to build should building applications exceed permitted levels.

A review of current San Francisco Bay Area growth management practice indicates that residential tempo controls can be characterized as either residential point systems or flexible systems. Residential point systems list desirable project attributes to which numerical points may be assigned, and specify a process for ranking and selecting projects based upon these points. These systems attempt to establish objective criteria

5. See, e.g., GILROY, CAL., ZONING ORDINANCES § 50.61(b) (1985).

6. See *id.*

7. See *id.*

8. See, e.g., B. FRIEDEN, *THE ENVIRONMENTAL PROTECTION HUSTLE* 52-59 (1979).

9. See, e.g., Belmont, Cal., Ordinance 659 (July 17, 1979) (56 units per year).

10. See, e.g., St. Helena, Cal., Ordinance 89-1 (Jan. 9, 1989) (city shall not exceed a total population of 7900 persons by the year 2000 and the average population increase shall not exceed 2.4% per year).

for approving projects. In contrast, flexible systems establish more flexible methods for selecting projects than point systems. They utilize the political process to decide who gets to build. Those Bay Area communities which have the most experience with residential tempo controls have abandoned point systems in favor of flexible systems.¹¹

This Article explains urban growth management by describing the current status and recent experience of San Francisco Bay Area cities which have adopted residential tempo controls. The Article documents the movement away from residential point systems and the emergence of flexible growth management systems.

II. GROWTH MANAGEMENT WITH RESIDENTIAL POINT SYSTEMS

Eleven of the Bay Area's ninety-eight incorporated cities had residential tempo controls in effect as of January 1, 1990.¹² One of the Bay Area's nine counties, Napa, also had residential tempo controls in place at that time.¹³ These jurisdictions are by no means the only Bay Area communities engaged in growth management. As a result of state-mandated general plans, all Bay Area jurisdictions control residential development.¹⁴ In addition, Bay Area jurisdictions regulate land use through subdivision control, zoning, building and housing codes, and other land use regulations which affect the location and character of their physical development.

Ordinances regulating commercial growth emerged in the 1980s.¹⁵ For example, the city of Walnut Creek has stopped virtually all residential and commercial growth until specified traffic standards are met.¹⁶

11. See *infra* notes 202-323 and accompanying text.

12. See PETALUMA, CAL., MUN. CODE § 5 (1989); ST. HELENA, CAL., MUN. CODE § 34 (1989); PLEASANTON, CAL., MUN. CODE §§ 17.36.010-.100 (1988); NOVATO, CAL., MUN. CODE ch. 20, § 4 (1987); GILROY, CAL., ZONING ORDINANCES §§ 50.60-.67 (1985); PACIFICA, CAL., MUN. CODE ch. 5, §§ 9-5.01-.15 (1984); MORGAN HILL, CAL., MUN. CODE §§ 18.78.010-.330 (1979); Dixon, Cal., Resolution 8917 (Feb. 28, 1989); Livermore, Cal., General Plan Text Amendment 76-87 (Sept. 1, 1987); Union City, Cal., Ordinance 195-80 (Sept. 20, 1980); Belmont, Cal., Ordinance 659 (July 17, 1979).

13. See Napa County, Cal., Slow Growth Initiative Measure A (Nov. 11, 1980).

14. California requires all counties and general law cities to have general plans with specified mandatory plan elements. CAL. GOV'T CODE § 65300 (West 1983 & Supp. 1991). Zoning and other land use regulations must be consistent with the general plan. *Id.*

15. For example, in San Francisco, California, Proposition M: The Planning Initiative, effectively limits the number of square feet of office space which can be built to 475,000 square feet per year. SAN FRANCISCO, CAL., PROPOSITION M § 321(a)(1) (1986) (amending San Francisco's municipal code). Novato, California set an annual limit on the amount of new office space which could be constructed during 1988 and 1989. NOVATO, CAL., MUN. CODE § 20-4(b)(1987).

16. Walnut Creek, Cal., Measure H (Nov. 5, 1985).

Many communities have adopted traffic mitigation measures which may indirectly affect the timing of development.¹⁷ If growth management was broadly defined, it could encompass all of the above regulatory devices. This Article, however, focuses on communities that explicitly limit the amount of new residential construction which can occur each year.

Of the twelve Bay Area communities with residential tempo controls in effect as of January 1990, eight had adopted systems of growth management with residential point systems: St. Helena, Novato, Gilroy, Pacifica, Morgan Hill, Napa County, Union City and Belmont.¹⁸ This section discusses how these systems have functioned since the early 1970s. It first explores the experience of one city in which a point system adopted in 1977 has worked satisfactorily for more than a decade. It then discusses how, in seven cities, point systems have experienced significant shortcomings.

A. A Point System That Has Worked as Anticipated

The best example of a Bay Area city with a residential point system which has functioned more or less as planned is Morgan Hill. Morgan Hill is located in southern Santa Clara County¹⁹ and had a population in 1988 of 22,350.²⁰ In the mid-1970s, the effects of the economic boom in the Silicon Valley spread to Morgan Hill. In 1977, Morgan Hill, by initi-

17. E. Deakin, *Growth Control and Growth Management: A Summary and Review of Empirical Research* (unpublished manuscript presented at the Conference on the Growth Control Controversy in California, University of California, Los Angeles (June 16, 1988)) [hereinafter E. Deakin, *Growth Control*]; E. Deakin, *Issues and Opportunities for Transit: An Exploration of Changes in the External Environment and Land Use and Development Trends* (Jan. 1989) (unpublished manuscript prepared for the Transit 2000 Project, American Public Transit Assoc.).

18. ST. HELENA, CAL., MUN. CODE § 34 (1989); NOVATO, CAL., MUN. CODE ch. 20, § 4 (1987); GILROY, CAL., ZONING ORDINANCES §§ 50.60-.67 (1985); PACIFICA, CAL., MUN. CODE ch. 5, §§ 9-5.01-.15 (1984); MORGAN HILL, CAL., MUN. CODE §§ 18.78.010-.330 (1979); Napa County, Cal., *Slow Growth Initiative Measure A* (Nov. 11, 1980); Union City, Cal., *Municipal Code Ordinance 195-80* (Sept. 2, 1980); Belmont, Cal., *Ordinance 659* (July 17, 1979).

19. *See infra* p. 1071 app.

20. R. LEGATES, S. SCOTT & V. RANDETT, *BAYFAX 1989: THE 1989 SAN FRANCISCO BAY AREA LAND USE AND HOUSING DATA BOOK 55* (1989) [hereinafter *BAYFAX*]. Seventy-two percent of Morgan Hill's housing stock consists of single-family houses. *Id.* at 75. Seventy-one percent of the city's population is white; 29% is non-white. *Id.* at 61. Morgan Hill was the Bay Area's seventh most rapidly growing community between 1970 and 1980, experiencing a 163% population increase for the decade. *Id.* at 71. The city's population more than doubled between 1960 and 1970, growing by 106%. *Id.* at 68. In 1976, the year before the initiative establishing Morgan Hill's growth management system, the city's population increased by 21.4%. MORGAN HILL, CAL., MUN. CODE § 18.78.010 (1979).

ative, adopted a growth management program.²¹

Morgan Hill set its population goal for the year 2000 at 25,000 to 35,000.²² Each year, city officials subtract the total population of Morgan Hill from the year 2000 population goal, and then divide the difference by the number of years remaining until the year 2000.²³ The resulting figure represents the maximum number of units that can be built during the upcoming year.²⁴

In addition, Morgan Hill has a two-tiered evaluation system to determine what projects should be built. First, city officials evaluate the infrastructure capacity of projects according to a six-point rating system.²⁵ Next, proposed projects are rated under a separate point system based on their relative importance to the community.²⁶ Projects must score a threshold point level on each rating scale to qualify for an allotment.²⁷ When there are more applications than allotments, allotments are awarded based on overall rankings under the point systems.²⁸

The point system has been important in awarding allocations in Morgan Hill, where the demand for allocations has greatly exceeded the availability of allocations every year since 1977.²⁹ For example, during the 1987 through 1988 allocation period, 202 units were awarded from an estimated 1200 applicants.³⁰

In the ten-year period between 1977 and 1987, 1411 units were allo-

21. See Morgan Hill, Cal., Measure E (Nov. 8, 1977). The initiative provisions have been incorporated into the Municipal Code. See MORGAN HILL, CAL., MUN. CODE §§ 18.78.010-.330 (1979).

22. Morgan Hill, Cal., Mun. Code § 18.78.010(F).

23. *Id.* § 18.78.120(A).

24. *Id.*

25. *Id.* § 18.78.200. Projects are awarded from zero to two points in relation to their anticipated impact on schools, water, sewer, drainage, fire and traffic. *Id.* For example, if a project overburdens school capacity, one point or no points will be awarded. *Id.*

26. *Id.* §§ 18.78.210-.330. The criteria and maximum number of points awardable are: provision of school rooms (25 points); provision of open space (20 points); extent to which the proposed development accomplishes an orderly and continuous extension of development rather than leapfrog development (20 points); provision of needed public facilities such as street linkages (10 points); provision of parks, foot, or bicycle paths, equestrian trails, or pathways (10 points); provision of low-and-moderate income housing units (15 points); diversity of housing types (15 points); architectural design (15 points); site design (15 points); on- and off-site circulation, traffic safety and privacy (15 points); safety and security in individual structures (15 points); landscaping (10 points); and environmental preservation on the site (15 points). *Id.*

27. *Id.* § 18.78.180(E).

28. *Id.* § 18.78.140(C).

29. Telephone interview with Robert Diplock, Assistant Planner of Morgan Hill, Cal. (Apr. 4, 1989).

30. *Id.*

cated by competition: 58% multi-family units and 42% single-family units.³¹ On average, 141 units were built each year from 1977 to 1987, about one-third of the annual average constructed between 1970 and 1980.³² While growth management has slowed development in Morgan Hill, the city has continued to grow much more rapidly than other Bay Area cities. Between 1980 and 1988, Morgan Hill grew at an average annual rate of 4.0%—approximately three times the Bay Area's rate of 1.4%.³³

Morgan Hill exemplifies the results anticipated by the point system designers. An attractive semi-rural community realizes it soon will be subject to rapid urbanization.³⁴ It then sets a limit on the tempo of urbanization.³⁵ The permissible growth tempo is reduced from an explosive market rate—over 20% in Morgan Hill the year before growth controls were imposed³⁶—to a brisk, but manageable, rate of 4% after growth controls were imposed.³⁷

The city uses a system to rate proposed residential projects based on attributes important to the community.³⁸ Demand for housing allocations consistently exceeds the number permitted.³⁹ City officials rank projects based on how well they respond to community desires as reflected in the point system.⁴⁰ Each year, those projects which score the highest number of points are approved.⁴¹ Projects are then built at a rate which allows the city's infrastructure to keep pace.⁴² Better development at a managed pace proceeds.⁴³ The city requires a mix of single and multi-family units to meet the needs of a range of household types and income levels.⁴⁴ It encourages affordable housing and does no worse

31. Memorandum from Measure E Review Comm'n to Community Dev. Dep't (Nov. 17, 1987) (discussing past approvals of Measure E projects located east and west of Monterey Road) (on file at Loyola of Los Angeles Law Review office).

32. Telephone interview with Robert Diplock, *supra* note 29. Morgan Hill's population was 6485 in 1970 and 17,060 in 1980—a total increase of 10,575 people. BAYFAX, *supra* note 20, at 71. Assuming one housing unit for each three households, this would amount to new construction of an annual average of 352 units.

33. BAYFAX, *supra* note 20, at 57.

34. MORGAN HILL, CAL., MUN. CODE § 18.78.010(A)-(F).

35. *See id.* § 18.78.030.

36. Telephone interview with Robert Diplock, *supra* note 29.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

than other cities in the region in this regard.⁴⁵ The city is consistent; it does not grant major exemptions or change the point system.⁴⁶ Builders may complain about the limit, but it is predictable and fair.⁴⁷ More than a decade later the city has no intentions of changing the system.⁴⁸

Few Bay Area cities that adopted point systems have had an experience similar to Morgan Hill. Sewer moratoria have rendered some systems moot.⁴⁹ Some have consistently fewer applications than permitted allocations.⁵⁰ One has exempted all projects which would have triggered their system.⁵¹ Some cities have constantly changed their systems—frustrating developers and calling into question the integrity of their plans. Some residential point systems have been so complex that developers and elected officials cannot understand them.⁵² Some cities report that projects which had ranked highest in the number of points allocated have turned out to be disappointing when built. The next section discusses problems with point systems in seven Bay Area communities.

B. Cities Where Moratoria Have Suspended the Systems

In Gilroy and St. Helena, city legislators have adopted point systems, but residential building has been stopped by sewer moratoria.⁵³ Gilroy is a city in southern Santa Clara County,⁵⁴ which until recently, functioned as an agricultural center. In the 1970s, Gilroy experienced a spillover of population from Silicon Valley, located north of Gilroy, and anticipated very rapid residential development in the 1980s.⁵⁵ Gilroy adopted a growth management system as part of the city's zoning code in 1979.⁵⁶

Between 1984 and 1988, there was virtually no residential building

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See infra* notes 53-68 and accompanying text.

50. *See infra* notes 86-195 and accompanying text.

51. *See infra* notes 78-83 and accompanying text.

52. *See infra* notes 110-48 and accompanying text.

53. Telephone interview with Chuck Myer, Senior Planner of Gilroy, Cal. (Apr. 9, 1988).

54. *See infra* p. 1071 app. Gilroy's population was 28,850 in 1988. BAYFAX, *supra* note 20, at 55. Sixty-three percent of the city's housing stock consists of single-family housing. *Id.* at 75. In 1980, Gilroy's Hispanic population was 45%, the highest of any Bay Area city; the white population was 50%, and other minorities constituted the remaining 5%. *Id.* at 63. Gilroy's population grew by 71% between 1970 and 1980, *id.* at 68, and by 72% between 1960 and 1970. *Id.* at 71.

55. Telephone interview with Chuck Myer, *supra* note 53.

56. *See GILROY, CAL., ZONING ORDINANCES* §§ 50.60-.67 (1985).

in Gilroy as a result of a sewer moratorium.⁵⁷ Therefore, evaluation of Gilroy's experience must be based on data from 1980 through 1983.

The Gilroy ordinance permits the city council to set a rolling annual rate of residential building.⁵⁸ The rate is set for a three-year period, but it may be revised each year.⁵⁹ During the four years in which Gilroy's system was in effect, the council set limits of 100, 375, 400 and 425 units per year respectively—an annual average of approximately 325 units for the four years, which is about a 4.5% annual growth rate in the city's residential stock.⁶⁰

During the period in which Gilroy's ordinance was in effect, and residential building was not stopped by the sewer moratorium, the number of applicants was twice as great as the number of available allocations.⁶¹ Permits were granted based on a point system by which points were awarded for locational, housing mix, design and community benefit factors.⁶²

The Gilroy ordinance exempted government-funded residential projects, which were approved by a referendum vote, and small-scale projects of fewer than twenty units, which were specifically exempted by the city council.⁶³ Several government-assisted housing projects were built in Gilroy by South County Housing, the local nonprofit housing agency.⁶⁴ The San Francisco Bay Area Council estimates that Gilroy will complete ninety-five lower-income units—6% of the Association of Bay Area Government's (ABAG) "fair share" target for Gilroy.⁶⁵

Despite the sewer moratorium, Gilroy's ordinance appears to have

57. Telephone interview with Chuck Myer, *supra* note 53.

58. GILROY, CAL., ZONING ORDINANCES § 50.63.

59. *Id.* § 50.63(b)(2).

60. Telephone interview with Chuck Myer, *supra* note 53. In 1980, Gilroy had 9397 housing units. BAYFAX, *supra* note 20, at 80. The limit of 325 building permits constitutes about 4.5% of the 9397 housing units.

61. Telephone interview with Chuck Myer, *supra* note 53.

62. Locational factors included proximity to existing urban development, parks, police service, fire stations and schools. Gilroy, Cal., Residential Development Ordinance Rating Scale (Feb. 16, 1984). Projects also received location points if they provided infill and were free of seismic or other safety hazards. *Id.* Housing mix points came from projects which would add to the city-wide mix of housing types, for a variety of densities within a given development, and for low and moderate-income housing. *Id.* Design points were awarded for conforming the site plan to the natural setting, efficient circulation systems, energy conservation, and coordination of the site design with adjacent properties. *Id.* Community benefit factors awarded points if the project would provide land and/or buildings for a school, provide community or cultural centers or public art, and provide capital improvements. *Id.*

63. GILROY, CAL., ZONING ORDINANCES § 50.62(b)(3).

64. Telephone interview with Chuck Myer, *supra* note 53.

65. See BAYFAX, *supra* note 20, at 32-33, 86. In 1983, ABAG issued housing need projections for the region for the 1980s. *Id.* at 33. It also assigned a "fair share" goal for housing

worked as anticipated. There are no plans to change it.⁶⁶ A new sewer was completed in 1989, enabling the resumption of development under the original ordinance.⁶⁷

Due to a sewer moratorium, St. Helena also experienced little residential building during most of the time its residential growth management system has been in effect.⁶⁸ The St. Helena system is discussed further in the next section.

The fact that growth management systems in Gilroy and St. Helena have been suspended because of sewer moratoria does not necessarily mean that these systems are problematic or that they will not work well now that the moratoria have been lifted. It does, however, show that a more extreme remedy had to be applied to address one major infrastructure problem the ordinances were intended to address.

C. *A City Which Has Exempted Projects Which Would Otherwise Trigger Its Tempo Controls*

One Bay Area city has exempted projects which would have brought its tempo control system into play: Union City. Union City is an East Bay community of approximately 50,000 people located between Hayward and Fremont.⁶⁹ Union City adopted a residential development permit reserve system in 1981.⁷⁰ This system, which is still in effect today, limits the number of single-family detached, townhouse and condominium units which can be built in any given year to 300 units: 150 single-family detached units and 150 townhouse or condominium units.⁷¹ Union City, however, has placed no limit on the number of multi-family rental housing units which can be built each year.⁷²

Union City requires that the city council consider six infrastructure-

production for very low, low, moderate, and above moderate income households to every local jurisdiction. *Id.*

66. Telephone interview with Chuck Myer, *supra* note 53.

67. *Id.*

68. Telephone interview with Tony McClimans, City Planner of St. Helena, Cal. (May 5, 1989).

69. BAYFAX, *supra* note 20, at 54. Fifty-four percent of Union City's 1980 population was white; 28% was Hispanic. *Id.* at 61-63. Union City was the Bay Area's sixth-fastest growing city between 1970 and 1980, growing by 168%. *Id.* at 71. It grew by 122% from 1960 to 1970. *Id.* at 68. Seventy percent of the city's housing stock consists of single-family homes, many of which are moderately priced houses in new subdivisions. *Id.* at 75. The median 1988 sale price of a three-bedroom, two-bath house in Union City was \$190,000, which is moderate by Bay Area standards. *Id.* at 93.

70. Union City, Cal., Ordinance 195-80 (Sept. 15, 1980).

71. *Id.*

72. *Id.*

related factors before issuing a building permit.⁷³ These factors involve water, sewers, storm drainage, fire and police services, schools and street capacities.⁷⁴ If the city council determines that the development can be adequately served, it may issue permits subject to the limitations of the residential development permit reserve system.⁷⁵

Where applications for permit reserves exceed the total number available, the permits would be allocated based on how the project ranks on a five-factor scale.⁷⁶ These factors are architectural design, site orientation and street design, landscape and screening design, energy conservation, and access to transit trails and bikeways.⁷⁷ The Union City ordinance does not assign specific numbers of points to these factors.

Despite its elaborate tempo control system, Union City has exempted all development which would otherwise fall under its system.⁷⁸ Since 1981, most residential construction in Union City has taken place in two large exempt projects.⁷⁹ City officials exempted one project after the developers agreed to provide a school and other needed infrastructure.⁸⁰ Another project is exempt because it is being developed in accordance with a specific plan.⁸¹ Most other development since the system was adopted has been multi-family apartment units which are exempt from the system according to the ordinance.⁸² The number of non-exempt single-family detached homebuilding has always been too low to trigger the evaluation system.⁸³

While, on the surface, Union City's behavior in enacting a growth management system and then exempting projects which would trigger it may appear contradictory, it illustrates an important latent function which growth management systems perform in California cities today. Fiscal pressure from Proposition 13, which limits the ability of local governments to raise revenue from local property taxes,⁸⁴ has forced Califor-

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Telephone interview with Jon Holan, Associate Planner of Union City, Cal. (Dec. 7, 1988).

79. Those projects are the Lowry Road Project and the 5ll Area Project. *Id.*

80. *Id.*

81. *Id.*

82. Union City, Cal., Ordinance 195-80.

83. Telephone interview with Jon Holan, *supra* note 78.

84. CAL. CONST. art. XIII A. Proposition 13, passed in 1978, rolled back the assessed value of residential and commercial property in California to 1975 levels and limited property tax rates to 1% of that assessed value. *Id.* Under Proposition 13, assessed values may be increased by only 2% a year as long as the property remains in the same ownership. *Id.* This

nia cities to seek alternative revenue sources.⁸⁵ A major strategy for cities seeking additional revenues is to make new development pay its own way. By establishing barriers to development, cities such as Union City create additional leverage in negotiating with developers. Union City got the infrastructure and school impact mitigation which it wanted because city officials had established a legal framework within which to negotiate concessions.⁸⁶ Other Bay Area communities have never had to use their point systems at all.

D. Cities Which Have Never Used Their Point Systems

Four Bay Area cities and one county have enacted but never used their residential point systems: Novato, Belmont, St. Helena, Pacifica and Napa County.⁸⁷ Demand for housing allocations in these communities has never approached the levels permitted under their growth management systems and other land use restrictions.⁸⁸ In the case of Novato, the point system was never used because demand for allocations was overestimated.⁸⁹

1. Novato

Novato is a residential community of 46,000 people⁹⁰ located along

percentage has been far below the rate of inflation since 1978. When sold, the sales price of real property becomes the new assessed value. *Id.* As the property tax was the most important revenue source for local government, Proposition 13 had the effect of imposing an enormous cut on local government revenue when enacted, and has acted as a continuing limitation on local government's ability to raise revenue from the property tax.

85. See BAY AREA COUNCIL, *TAXING THE AMERICAN DREAM* 7-8 (1987).

86. Telephone interview with Jon Holan, *supra* note 78.

87. Memorandum from Mark Westfall, Novato City Planner, to Lawrence Tomasello, Novato Community Development Director (Dec. 2, 1988) (on file at Loyola of Los Angeles Law Review); Telephone interview with Michael Crabtree, Associate Planner of Pacifica, Cal. (Apr. 7, 1989); Telephone interview with Barry Cromarti, Assistant Planner of Belmont, Cal. (May 9, 1989); Telephone interview with Tony McClimans, *supra* note 68; Telephone interview with Robert Nelson, Planner III of Napa County (May 2, 1989).

88. Memorandum from Mark Westfall, *supra* note 87; Telephone interview with Michael Crabtree, *supra* note 87; Telephone interview with Barry Cromarti, *supra* note 87; Telephone interview with Tony McClimans, *supra* note 68; Telephone interview with Robert Nelson, *supra* note 87.

89. Memorandum from Mark Westfall, *supra* note 87 (discussing Growth Management Ordinance).

90. BAYFAX, *supra* note 20, at 54. Novato's neighbor to the north is Petaluma. See *infra* Appendix. Many of Novato's neighbors to the south in Marin County are expensive anti-growth communities. See D. DOWALL, *supra* note 4, at 92-103. Until the early 1980s, when it experienced substantial new construction, Novato was a relatively inexpensive community by Marin County standards. *Id.* The average price of a three-bedroom, two-bath home in Novato in 1988 was \$225,000, making it a mid-range city in terms of Bay Area housing prices and still relatively inexpensive by Marin County standards. BAYFAX, *supra* note 20, at 92-

the Highway 101 corridor in northern Marin County.⁹¹ Novato adopted a two-year growth management system in 1987.⁹² That system was never used, however, because the number of houses permitted has exceeded the number requested in each year.⁹³

Under the ordinance, the maximum number of units permitted to be built in 1988 and 1989 was 320.⁹⁴ Novato exempted certain types of construction from the ordinance restrictions: (1) residential construction in which 25% or more of the units were planned to be available to low- or moderate-income households with availability guaranteed for twenty years; (2) projects of ten or fewer units; (3) single-family homes; (4) housing for persons over sixty-two years of age; and, (5) certain units in either redevelopment areas or grandfathered in by a development agreement.⁹⁵

In 1988, Novato received requests for construction of 112 nonexempt dwelling units—about one-third of the number permitted.⁹⁶ All were approved.⁹⁷ One hundred thirty exempt units were also approved.⁹⁸ Similarly, in 1989, the city received fewer applications for nonexempt units than were permitted.⁹⁹

When enacting its growth management system, Novato determined the allowable number of units by calculating the average number of units built in the immediately preceding ten-year period.¹⁰⁰ By the time the ordinance was enacted, market conditions had changed such that fears of rapid growth proved unfounded.¹⁰¹ By contrast, in two other Bay Area communities, Belmont and Pacifica, severe tempo controls and anti-growth city councils dampened demand in what otherwise would likely have been rapid-growth environments.¹⁰² In both of these cities growth management was adopted by slow growth initiatives which set the annual rate of growth at 0.5%—about one-third of the Bay Area average.¹⁰³

93. Eighty-eight percent of Novato's population in 1980 was white. *Id.* at 60. Seventy percent of the city's housing stock consists of single-family houses. *Id.* at 75. Novato's population increased by 42% between 1970 and 1980 and by 73% between 1960 and 1970. *Id.* at 68.

91. *See infra* p. 1071 app.

92. Novato, Cal., Ordinance 1149 (Sept. 15, 1987).

93. Memorandum from Mark Westfall, *supra* note 87.

94. Novato, Cal., Ordinance 1149.

95. *Id.*

96. Memorandum from Mark Westfall, *supra* note 87.

97. *Id.*

98. *Id.*

99. *Id.*

100. Novato, Cal., Ordinance 1149.

101. Telephone interview with David Faw, Planner of Novato, Cal. (May 15, 1989).

102. *See* PACIFICA, CAL., MUN. CODE § 9-5.03 (1984); Belmont, Cal., Ordinance 659 (July 17, 1979).

103. *See* PACIFICA, CAL., MUN. CODE § 9-5.03; Belmont, Cal., Ordinance 659.

2. Belmont

Belmont is an affluent residential community of about 25,000 people¹⁰⁴ located in San Mateo County on the South Bay peninsula about midway between San Francisco and Palo Alto.¹⁰⁵ The city is nearly fully developed. New construction is almost entirely single-family detached homes on infill lots.¹⁰⁶ Belmont's growth management program was adopted by initiative in 1979.¹⁰⁷

The Belmont program permits only fifty-six new units a year: an annual average growth rate of 0.5% in the city's housing stock.¹⁰⁸ This management program employs a very rigid point system. Projects must meet minimum standards established by the city's zoning ordinance to be considered for an allocation.¹⁰⁹ Those that are deemed eligible are rated according to a formidable mathematical rating system.¹¹⁰ Positive points are awarded to projects which exceed Belmont's criteria. For example, projects that have less than normal grading or greater than normal tree coverage earn extra points. Points are subtracted for projects which fall short of the city's standards.¹¹¹

The essential concerns underlying Belmont's system are to minimize grading and to protect large, slow-growing trees.¹¹² Belmont is characterized by large numbers of oak, bay and other native trees in its hillsides and valleys which are vulnerable to soil damage.¹¹³

An applicant for one of Belmont's fifty-six annual residential allocations must submit data on all trees—defined as “any woody plant . . . [with a] circumference of nineteen (19) inches, or more, measured at

104. BAYFAX, *supra* note 20, at 55.

105. See *infra* p. 1071 app. Sixty-two percent of Belmont's housing stock consists of single-family houses. BAYFAX, *supra* note 20, at 75. Eighty-six percent of the population is white. *Id.* at 61.

106. Telephone interview with Barry Cromarti, *supra* note 87.

107. See Belmont, Cal., Ordinance 659 Measure A: The Citizen's Initiative for Orderly Growth (1979).

108. As of January 1, 1988, there were an estimated 10,179 units in Belmont: 6350 single-family and 3829 multi-family units. BAYFAX, *supra* note 20, at 75. Fifty-six new units, therefore, constitutes a 0.5% increase in this stock.

109. Belmont, Cal., Growth Management Program for Evaluation and Allotment of Residential Building Permits 7 (July 31, 1979) [hereinafter Growth Management Program].

110. *Id.* at 7-8.

111. *Id.* at 12-13.

112. *Id.* at 13-14.

113. *Id.* at 13.

twenty-four (24) inches above ground level."¹¹⁴

An unfortunate lot owner removing six *Robinia pseudoacacias* of different circumferences or removing a big cypresses macrocarpa, and planting a little *juglans hinsii* would have quite a mathematical puzzle on his hands based on the tree formula alone! In addition to that for trees, Belmont has formulas for evaluating grading, floor area ratios, height of buildings, setbacks, and lot width and size.¹¹⁵ The city uses a computer program to calculate points.¹¹⁶

Belmont has never actually evaluated the elaborate data it requires, because it has not received more than fifty-six applicants for residential allocations in any year since the point system was implemented.¹¹⁷ Two hundred twenty-six units were built between 1980 and 1988—an average annual rate of less than twenty-seven units.¹¹⁸ Recently, all housing construction has been semi-custom or custom single-family detached homes. The average resale value of a three-bedroom, two-bath home in Belmont in 1988 was \$359,000.¹¹⁹ Belmont is the only Bay Area city with a residential timing control system which has no exemption or special preference for low- or moderate-income housing. Moreover, the rating system does not award points for producing low- or moderate-income housing.¹²⁰ The city is expected to complete ten units of affordable housing this decade—4% of its fair share as calculated by the Association of Bay Area Governments.¹²¹

Belmont's system reflects the concerns of a nearly developed community with strong environmental values. Planners in Belmont believe that the system reflects its citizens' values.¹²²

114. *Id.* at 13-15. Tree points are calculated by the formula:

$$P (\text{points}) = B \times T \times A$$

where

B = a dummy variable used to convert the total tree size into points for the project. B is negative for removal; positive for replacement.

T = the type factor for the tree. (T factors for 25 trees are listed. For a fast-growing non-native tree like a *Robinia pseudoacacia* the T factor is .8; for a slow-growing native like an *Umbellularia californica* it is 1.7.)

A = C_2 divided by 4 (where C = the tree circumference).

Id.

115. *See id.* at 15.

116. Telephone interview with Barry Cromarti, *supra* note 87.

117. *Id.*

118. BAYFAX, *supra* note 20, at 75.

119. *Id.* at 92.

120. Growth Management Program, *supra* note 109, at 11-14.

121. BAY AREA COUNCIL, BAY AREA HOUSING PRODUCTION 1980-1990, at 1 (1989).

122. Telephone interview with Barry Cromarti, *supra* note 87.

3. Pacifica

Like Belmont, Pacifica has a very stringent growth management program adopted by initiative and supported by recent anti-growth dominance of Pacifica's city council.¹²³ The reason that fewer than the maximum number of applications for development have been received to trigger its point system is best explained by the local political climate and by land use controls which are independent of the tempo control system.¹²⁴

Pacifica is a residential community of about 36,000 people¹²⁵ located on the San Mateo coast south of San Francisco.¹²⁶ Pacifica is characterized by an attractive coastline and green rolling hills. Most development is in a small area of flat land near the coast and in the lower portions of valleys stretching inland from the coast.¹²⁷ Pacifica's growth management program was adopted by initiative in 1982 and was incorporated into the Pacifica Municipal Code.¹²⁸ The program has a ten-year life unless extended by voters before 1992.¹²⁹

Pacifica sets a limit of seventy new residential units per year.¹³⁰ All infill lots are exempt.¹³¹ The city estimated that there were approximately 199 buildable infill lots in Pacifica at the time the ordinance was adopted in 1982 and that an average of nineteen per year could be built for the ten-year period of the growth control ordinance.¹³² When the nineteen exempt infill lots are added to the seventy units allowable under the code, theoretically a maximum of eighty-nine units per year would be permitted¹³³—slightly more than ABAG's fair share target for Pacifica.

123. Telephone interview with Michael Crabtree, *supra* note 87.

124. *Id.*

125. BAYFAX, *supra* note 20, at 54. Seventy-one percent of Pacifica's population is white. *Id.* at 61. Thirteen percent is Hispanic, 5% Black and 10% other minorities. *Id.* at 60-63. The community's population in 1980 was 36,866, a net change of 846 people (2%) since 1970. *Id.* at 72. Between 1980 and 1988, Pacifica lost 516 people, which represents a population decline of 1%. *Id.* at 59. By contrast, between 1960 and 1970 Pacifica's population grew by 72%, adding more than 16,000 people. *Id.* at 68. In 1986, Pacifica estimated that, under densities permitted at that time, between 2190 and 4035 units could be built and that a realistic estimate of future residential potential was 1713 units until buildout. Telephone interview with Michael Crabtree, *supra* note 87. Donation of a major parcel of land to the Golden Gate National Recreation Area has since reduced possible residential building sites. *Id.*

126. *See infra* p. 1071 app.

127. Telephone interview with Michael Crabtree, *supra* note 87.

128. PACIFICA, CAL., MUN. CODE ch. 5, §§ 9-5.01-.15 (1984).

129. *Id.* § 9-5.13.

130. *Id.* § 9-5.03.

131. *Id.* § 9-5.04(c).

132. Telephone interview with Michael Crabtree, *supra* note 87.

133. BAYFAX, *supra* note 20, at 37.

In addition to exempting infill housing, the Pacifica ordinance exempts replacement housing, as well as a single 104 unit housing project for the elderly.¹³⁴

Pacifica's growth management program grew out of intense environmental activism.¹³⁵ Environmentally concerned citizens were particularly polarized by one condominium project which overlooked the beach.¹³⁶ Concerned citizens also distrusted the city council's development policies.¹³⁷ The explicit purposes of the ordinance were to control losses of coastal resources, agricultural land and open space, and to alleviate traffic congestion, sewer problems and urban sprawl.¹³⁸ The citizens' group which sponsored the initiative, Friends of Pacifica, subsequently gained control of the city council.¹³⁹ Its major focus has been on acquiring additional open space.¹⁴⁰ Presently, the city is considering the acquisition of additional open space and a further reduction in permitted hillside densities.¹⁴¹ This would further limit the possibility of future residential development.

Fewer units have been built in Pacifica each year than permitted, and the city has carried forward a surplus of units which could be built.¹⁴² For several years after the enactment of the ordinance, there was little infill construction, although some occurred in the late 1980s.¹⁴³ Since the 1982 implementation of the growth management system, difficult terrain and high land costs have made it economically unfeasible to develop much of Pacifica.¹⁴⁴

Pacifica has a point system second only to Belmont in complexity.¹⁴⁵ Of 649 possible points, projects may be awarded fifty points if they contain at least 25% low- to moderate-income housing, thirty points if the range is between 11% and 24%, and twenty points if the range is be-

134. PACIFICA, CAL., MUN. CODE ch. 5, § 9-5.04(d).

135. See M. Crabtree, *The Influence of Citizens Groups on the Development of the San Mateo Coast* (undated) (unpublished manuscript) (available at Loyola of Los Angeles Law Review).

136. Telephone interview with Michael Crabtree, *supra* note 87.

137. See M. Crabtree, *supra* note 135.

138. PACIFICA, CAL., MUN. CODE ch. 5, § 9-5.02(a).

139. Telephone interview with Michael Crabtree, *supra* note 87.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. First, a project is rated on its contribution to community services: traffic and circulation, sewage collection and treatment, water supply, schools, storm drainage, police protection, fire protection, and recreation and open space. Pacifica, Cal., Competitive Evaluation System

tween 10% and 11%.¹⁴⁶ Pacifica's point system has never been used.¹⁴⁷

4. Napa County

Napa¹⁴⁸ is the only San Francisco Bay Area county that uses a residential timing control system. Napa County's situation is somewhat similar to that of Belmont and Pacifica, though less extreme. The county's growth management system was adopted by initiative in 1980.¹⁴⁹ This system sets an annual rate of growth not to exceed 1% per year.¹⁵⁰ More units have been applied for in Napa than in Belmont or Pacifica, but not enough to trigger Napa's point system.¹⁵¹ Large agricultural preserves, large lot zoning, costly development standards, and an anti-growth political climate have dampened demand for construction in what would otherwise be an attractive, high-growth area.¹⁵²

Napa's growth management system was primarily motivated by environmental concerns¹⁵³ and has been incorporated into the county's general plan.¹⁵⁴ The purposes clause of the initiative measure lists the following concerns: loss of irreplaceable agricultural land, inadequate parks and recreation services, loss of open space, increased air pollution, loss of scenic vistas, and urban sprawl.¹⁵⁵

The Napa County program permits residential construction to accommodate an annual population growth rate not to exceed the Bay Area average or one percent, whichever is lower.¹⁵⁶ The Bay Area growth rate exceeds and is expected to continue to exceed one percent, so

(CES) Rating Criteria 1-2 (undated). These are, in turn, subdivided into 27 subcategories with a possible range of zero to 205 points. *Id.*

Next a proposed project is rated on design and aesthetics: landscaping, development siting and design, and housing mix. *Id.* at 3-6.

These are, in turn, subdivided into 35 subcategories with a possible range of points from zero to 449. *Id.* Finally a project may receive up to 25 points for project feasibility. *Id.* at 6.

146. *Id.*

147. *Id.*

148. Napa County is the center of the region's wine industry. Population is settled in the floor of the spectacularly beautiful and agriculturally productive Napa Valley. The city of Napa lies at the southern end of the valley and a string of smaller cities are connected by the highway running up the valley. *See infra* p. 1071 app.

149. *See* Napa County, Cal., Slow Growth Initiative Measure A (Nov. 4, 1980) [hereinafter Slow Growth Initiative].

150. *Id.*

151. Telephone interview with Robert Nelson, *supra* note 87.

152. *Id.*

153. Slow Growth Initiative, *supra* note 149.

154. *See* NAPA COUNTY, CAL., GENERAL PLAN 136-51 (1983) [hereinafter GENERAL PLAN].

155. Slow Growth Initiative, *supra* note 149.

156. *Id.*

the annual rate of increase in the Napa housing stock permits is effectively one percent.¹⁵⁷ Napa County uses calculations involving the population, number of housing units, vacancy rate, and estimated persons per household to arrive at the annual housing allocation figure.¹⁵⁸ Napa County's annual housing allocation is currently 118 units per year.¹⁵⁹ Napa County divides the total annual allocation into four categories of buildings, specifying percentages permitted for each category: (1) single-family dwellings built by or for a permit holder who is building only one dwelling unit per year; (2) any type of dwelling unit which requires no discretionary review, but the permit holder is building more than one dwelling unit per year; (3) any type of residential project for two or more dwelling units which requires discretionary review; and (4) ownership or rental units affordable to persons with moderate income.¹⁶⁰ Permits remain available in each category until used, but no more than two years' worth of allocations in any category may be issued in one year.¹⁶¹ Currently the number of units available by category are: (1) eighty units; (2) sixteen units; (3) sixteen units; (4) six units, respectively.¹⁶²

Napa County issues regulated building permits on a first-come, first-approved basis.¹⁶³ If all the permits in a given category have been allocated, and the backlog of projects approved for building permits exceeds the number of permits available, the city ordinance provides for the issuance of permits by lottery.¹⁶⁴ This has never happened.¹⁶⁵ In almost every year since Napa County adopted its system there have been fewer applications than permissible allocations.¹⁶⁶ Occasionally, close to the end of a year, the total number of applications has exceeded the permissible allocations for a category.¹⁶⁷ Such excess demand has been easily satisfied by briefly delaying issuance of the permit until the beginning of

157. Napa County presently uses the average annual rate of growth in the nine-county Bay Area which occurred between 1970 and 1980, 1.3%, as the figure for Bay Area growth. GENERAL PLAN, *supra* note 154, at 136. When 1990 census data are available, the new Bay Area rate will be based on annual average population growth in the Bay Area between 1980 and 1990. Since this will exceed 1%, no change in the permitted rate of growth for the county is anticipated.

158. *Id.* at 136-51.

159. *Id.* at 141.

160. Telephone interview with Robert Nelson, *supra* note 87.

161. GENERAL PLAN, *supra* note 154, at 141.

162. *Id.*

163. *Id.* at 143.

164. *Id.*

165. Telephone interview with Robert Nelson, *supra* note 87.

166. *Id.*

167. *Id.*

the next year.¹⁶⁸

5. St. Helena

St. Helena is a city with a population of approximately 5000¹⁶⁹ located at the northern end of Napa County's major wine region.¹⁷⁰ St. Helena's residential timing control system is similar to Napa County's system.¹⁷¹ It has adopted a point system for use in the event that applications exceed permitted units.¹⁷² St. Helena differs notably from Napa County with respect to the high percentage of affordable housing units it requires.¹⁷³

St. Helena revised its growth management system in February 1989 in anticipation of new residential growth pressures as a result of a new sewage treatment plant.¹⁷⁴ The program is contained in both the city's zoning ordinance¹⁷⁵ and the city's general plan.¹⁷⁶ It is not possible to say with certainty how St. Helena's system will work since it is relatively new. Its prior system is also difficult to evaluate because virtually no housing has been built in St. Helena since 1982 as a result of a cease and desist order from the Regional Water Quality Control Board.¹⁷⁷

The St. Helena system regulates the number of building permits which the city may issue based on a formula intended to reach a population benchmark of 7900 people by the year 2000—an annual average growth rate of 2.4%.¹⁷⁸

The St. Helena program represented a compromise between factions within the community which wanted no growth at all and those which believed the local housing market should provide some housing for mod-

168. *Id.*

169. BAYFAX, *supra* note 20, at 56.

170. *See infra* p. 1071 app.

171. *Compare* St. Helena, Cal., Ordinance 89-1 (Jan. 9, 1989) with GENERAL PLAN, *supra* note 154.

172. St. Helena, Cal., Ordinance 89-1.

173. Telephone interview with Tony McClimans, *supra* note 68.

174. *Id.*

175. *See* St. Helena, Cal., Ordinance 89-1.

176. *See* ST. HELENA, CAL., GENERAL PLAN (1989).

177. Telephone interview with Tony McClimans, *supra* note 68. The Regional Quality Control Board prohibited issuance of additional residential building permits until a new sewage treatment plant was completed to adequately treat waste water in St. Helena. *Id.*

178. St. Helena, Cal., Ordinance 89-1, § 34.03. The formula calls for the city each year to: divide the California State Department of Finance total population figure for the city by the number of persons per household in the city, multiply this figure by .02, subtract from the figure calculated the total of the immediately preceding years exemptions. *Id.* Prior to adopting the present system the city regulated the number of building sites which could be created each year. *Id.*

erate income people.¹⁷⁹ The program provides that a maximum of 632 units may be built between 1988 and 1995¹⁸⁰—a number that ABAG has accepted as St. Helena's regional fair share of housing.¹⁸¹

St. Helena uses the same four categories of allocations that Napa County uses, but assigns a much higher percentage of each year's permitted allocation to affordable housing.¹⁸² The specified permit allocations are: (1) 20% for single-family dwellings built by or for a permit holder who is building only one dwelling unit per year; (2) 20% for any type of dwelling unit which requires no discretionary review,¹⁸³ but the permit holder is building more than one dwelling unit per year; (3) 20% for any type of residential project for two or more dwelling units which requires discretionary review; and (4) 40% for ownership or rental units affordable to persons with moderate income.¹⁸⁴ Permits remain available in each category until used, but no more than two years' worth of allocations in any category may be issued in one year.¹⁸⁵

Like Napa County, St. Helena plans to issue regulated building permits on a first-come, first-approved basis until the city has issued all permits in that allocation period.¹⁸⁶ In the event that the backlog of projects approved for building permits exceeds the number available in the applicable category for the next available allocation, St. Helena may allocate permits by lottery.¹⁸⁷ The city council has established criteria for the lottery.¹⁸⁸

The most notable feature of St. Helena's system is the requirement that a very high percentage of new housing be affordable. Sixty percent of all new units built are to be affordable units: two hundred fifty exempt affordable units and 40% of the balance of the units.¹⁸⁹ This contrasts with Napa County, which currently sets aside just six units per year—or 5% of the total—for affordable housing.¹⁹⁰

179. Telephone interview with Tony McClimans, *supra* note 68.

180. Memorandum from T. McClimans to the City Council of St. Helena (Jan. 9, 1989) regarding amendment to project allocation system) (on file at Loyola of Los Angeles Law Review).

181. *Id.*

182. *See* St. Helena, Cal., Ordinance 89-1 (Jan. 9, 1989).

183. Discretionary review by the City Council of St. Helena may arise when builders subdivide property or are subject to use permits. *Id.* § 34.04(b).

184. *Id.* § 34.05.

185. *Id.*

186. *Id.*

187. *Id.*

188. St. Helena, Cal., Resolution 88-X (Jan. 9, 1989).

189. St. Helena, Cal., Ordinance 89-1, § 34.04 (Jan. 9, 1989).

190. *See* GENERAL PLAN, *supra* note 154, at 140.

St. Helena defines "affordability" as "for-sale housing" that meets the United States Department of Housing and Urban Development (HUD) standard of being affordable to a household earning up to 120% of the median income for the area or unit renting for HUD Section 8 fair market rents.¹⁹¹ One hundred twenty percent of the 1989 median income in St. Helena for a household of four was \$44,050.¹⁹² At that time, a two-bedroom house would have to sell for approximately \$135,000 to qualify as affordable. In 1989, HUD Section 8 fair market rent for St. Helena was \$580 for a two-bedroom apartment.¹⁹³ It is impossible to build single-family detached or multi-family housing that meets these affordability standards through the private market, and it is extremely difficult to bundle subsidies to make such development possible.

In summary, Bay Area growth management programs which rely upon point systems have seldom worked as anticipated. Morgan Hill's experience, however, suggests that point systems realistically calibrated to community conditions and consistently applied can achieve the goals of their designers. By contrast, the experience of other Bay Area communities suggests that residential tempo controls with point systems are often problematic. Cities and counties contemplating such systems should consider some principles based on recent experience.

E. Principles Derived from Recent Experience

1. Make sure the tempo control system is needed

Most Bay Area cities which have adopted residential point systems could have achieved their objectives without the use of such systems. The clearest case is Novato's, where the city enacted a system for a two-year period.¹⁹⁴ Novato's system set a permitted level of construction which was three times what the market at that time permitted.¹⁹⁵ The system had no effect.¹⁹⁶ A more careful forecast of market demand would probably have led to the conclusion that Novato's ordinance was unnecessary at that time.

2. Consider alternative processes for approving large projects

Union City exempts large projects from its tempo control ordinance

191. St. Helena, Cal., Ordinance 89-1, § 34.04(b); see 24 C.F.R. § 881.201 (1990) (defining fair market rent).

192. Telephone interview with Tony McClimans, *supra* note 68.

193. *Id.*

194. See Novato, Cal., Ordinance 1149 (Sept. 15, 1987).

195. Telephone interview with David Faw, *supra* note 101.

196. *Id.*

in exchange for negotiated mitigation measures.¹⁹⁷ Many California communities now use other alternatives to tempo control: specific plans, development agreements and planned unit development regulations that control large developments. These legal tools are specifically designed to permit communities to mitigate the adverse impacts of large projects and assure that the infrastructure to support the development is provided. If a community regulates large developments using these tools, then the following is a more direct approach that is more in line with current California practice than indirectly achieving similar objectives by negotiating exemptions from a tempo control ordinance.

3. Develop a reasonable system for ranking projects

Given the opportunity to make effective desirable project criteria, politicians, concerned citizens and planners may go to excess. For example, Belmont's elaborate computer formulas for allocating fifty-six units per year¹⁹⁸ and Pacifica's 649-point system for allocating seventy units¹⁹⁹ are unnecessarily complex.²⁰⁰ Other communities—including Petaluma and Livermore, which pioneered tempo controls in California—concluded that the point systems they developed were not understandable to citizens, developers and politicians. As a result, these cities have now abandoned them.²⁰¹

4. Apply the system consistently

Morgan Hill is unusual in the consistency with which it has applied its tempo control law. Most cities constantly tinker with their systems—changing the number of units which can be built, the mix of unit types, criteria for exemptions, how to compute points, who reviews projects—exasperating developers, burdening decision-makers, and exposing the communities to legal challenges.

The above discussion suggests that some communities which have adopted residential tempo controls with point systems need not have done so at all. Others might have accomplished their goals better through specific plans, development agreements or planned unit development (PUD) ordinances. Communities for which tempo control point

197. Union City, Cal., Ordinance 195-80, § 4 (Sept. 15, 1980).

198. See Belmont, Cal., Ordinance 659 (July 17, 1979).

199. See PACIFICA, CAL., MUN. CODE ch. 5, § 95.03 (1984).

200. Telephone interview with Barry Cromarti, *supra* note 87.

201. See PETALUMA, CAL., RESIDENTIAL GROWTH MANAGEMENT SYSTEM USER'S GUIDE § 3 (1988) [hereinafter PETALUMA'S USER'S GUIDE]; CITY OF LIVERMORE, HISTORY AND OVERVIEW OF RESIDENTIAL DEVELOPMENT IN LIVERMORE 1-3 (1989) [hereinafter HISTORY OF RESIDENTIAL DEVELOPMENT].

systems are appropriate should craft systems which are simple and understandable, and apply them consistently.

An important alternative to tempo control systems which use points to rank projects are tempo controls without point systems. The Bay Area communities with growth management experience have recently moved away from tempo control point systems altogether to more flexible growth management systems.

III. THE EMERGENCE OF FLEXIBLE GROWTH MANAGEMENT SYSTEMS

While they vary in many respects, each of the growth management systems discussed above contains some form of point system for ranking proposed residential developments. In contrast, Petaluma,²⁰² Livermore,²⁰³ Pleasanton²⁰⁴ and Dixon²⁰⁵ have recently adopted systems which are not point systems. These cities stress flexibility in their systems. Their ordinances grant city councils substantial discretion, within more or less well-defined boundaries, in deciding what developments to approve.²⁰⁶ These flexible systems offer the hope of growth control which responds sensitively to underlying conditions. They avoid the rigidity of extreme point systems like those of Pacifica and Belmont.²⁰⁷ On the other hand, like any land use regulation system which vests discretion in planning departments and local elected officials, these flexible systems can only succeed when they are used wisely and fairly.

A. Petaluma

Petaluma, the city which pioneered growth management in California and implemented the state's first residential point system,²⁰⁸ has now abandoned the concept.²⁰⁹ Petaluma is a community with a population of 40,000 located about forty miles north of San Francisco on Highway 101.²¹⁰ From 1972 until 1987, Petaluma controlled growth with a quan-

202. See PETALUMA, CAL., MUN. CODE § 5 (1989).

203. See Livermore, Cal., General Plan Text Amendment 76-87 (Sept. 1, 1987).

204. See PLEASANTON, CAL., MUN. CODE § 17.36.010-.100 (1988).

205. See Dixon, Cal., Resolution 8917 (Feb. 28, 1989).

206. See PETALUMA, CAL., MUN. CODE § 5 (1989); PLEASANTON, CAL., MUN. CODE § 17.36.010-.100 (1988); Dixon, Cal., Resolution 8917 (Feb. 28, 1989); Livermore, Cal., General Plan Text Amendment 76-87 (Sept. 1, 1987).

207. PACIFICA, CAL., MUN. CODE ch. 5, §§ 9-5.01-.15 (1987); Belmont, Cal., Ordinance 659 (July 17, 1979); Growth Management Program, *supra* note 108.

208. See *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897, 900-02 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

209. See PETALUMA, CAL., GENERAL PLAN 7 (1987).

210. BAYFAX, *supra* note 20, at 54. Seventy-seven percent of Petaluma's housing stock

tified point system.²¹¹ In 1987, Petaluma abandoned its residential point system and adopted its current flexible system.²¹²

Petaluma was the first California city to implement a growth management program (the 1972 Petaluma Plan) with residential tempo controls.²¹³ In addition to limiting the number of residential units which could be built each year, the 1972 Petaluma Plan included policies to provide for a competitive evaluation system for residential allocations.²¹⁴ In addition, the plan established an urban limit line and greenbelt, limited annexations, limited expansion of water service and other infrastructure, and established a Site Plan and Architectural Review Committee.²¹⁵ The 1972 Petaluma Plan was widely used as a model by other communities after it was held to be constitutional in 1976.²¹⁶

From its incorporation in 1855 until completion of Highway 101 in 1956, Petaluma functioned as a center for poultry and dairy products.²¹⁷ By 1972, two distinct communities, physically and socially, existed: the charming, "old Petaluma" located west of the highway, and the new community of tract housing east of the highway.²¹⁸ The former was home to long-time residents involved in agriculture and local industry; the latter contained primarily new residents working in Marin County and San Francisco. Anticipation of continued rapid tract development triggered the Petaluma Plan.²¹⁹

In 1972, Petaluma limited building of new housing to 500 units per

consists of single-family detached housing. *Id.* at 74. Petaluma has a mix of incomes. Its population is overwhelmingly white with just a small number of Hispanics and a few other minorities. *Id.* at 33. The average sale price of a three-bedroom, two-bath house in Petaluma in 1988 was \$155,000, among the least expensive in the Bay Area. *Id.* at 93. Petaluma's population was 10,315 in 1950. *Id.* at 46. During the 1950s it expanded by about one third. *Id.* Petaluma's population grew by 77% in the 1960s, mostly due to a surge of housing construction at the end of the decade. *Id.* at 68.

211. KNOX & ASSOCS., PETALUMA GENERAL PLAN UPDATE: BACKGROUND REPORT: LAND USE & GROWTH MANAGEMENT 36-39 (1985).

212. PETALUMA, CAL., MUN. CODE § 5; PETALUMA, CAL., GENERAL PLAN.

213. R. LEGATES & T. SELFA, GROWING OLD GRACEFULLY: THE PETALUMA PLAN REACHES MIDDLE AGE (San Francisco State University Public Research Institute Working Paper No. 89-14 1988); see Petaluma, Cal., Environmental Design Plans 31-33 (Mar. 27, 1972).

214. Petaluma, Cal., Environmental Design Plans 31-33 (Mar. 27, 1972).

215. *Id.* at 31-35.

216. See Cannon, *California Town Thrives on Limited Growth; Petaluma Is Thriving on Limited Growth; Big Is Not Better Petaluma Decides*, Wash. Post, Aug. 1, 1977, at A1, col. 3.

217. *Id.*

218. *Id.*

219. Trombley, *Slow-Growth Initiatives Ignore the Larger Problem*, L.A. Times, Aug. 3, 1988, § 1, at 1, col. 5.

year.²²⁰ From 1978 to 1987, Petaluma limited new construction to 5% of the existing housing stock.²²¹ In 1987, Petaluma reverted to the 500-unit-per-year limit.²²² Petaluma places no limits on commercial or industrial growth other than those implied in the general plan, zoning, subdivision and other land use controls.²²³

While the process of land use approval can be time consuming, the paperwork required to obtain allocations in Petaluma is now minimal. The current approval process is clearly spelled out in a user's guide.²²⁴ Notice of Intent to Develop forms are circulated to potential developers and publicized annually.²²⁵ By the end of March each year, developers must submit forms describing projects they intend to build in the succeeding calendar year.²²⁶ The required documentation is simple and straightforward. Within two weeks of the due date for Notice of Intent to Develop forms, the city council grants allotments of development approvals for the next succeeding year.²²⁷

At the beginning of each year, the Petaluma city council determines the number of units which may be approved that year.²²⁸ The average number of units which can be built each year is 500, but the current system provides flexibility for peaks and troughs within three-year increments.²²⁹ No more than 1000 units may be built in any one year, and the total in any three-year period may not exceed 1500 units.²³⁰ The city may borrow a limited number of additional residential units in any year.²³¹ If the city council determines that it has not received enough development proposals by mid-year to meet its allocation, the city council may adjust standards and propose a supplemental allocation for that

220. *Id.*

221. KNOX & ASSOCS., *supra* note 211, at 36-37.

222. PETALUMA'S USER'S GUIDE, *supra* note 201, § 2.

223. *Id.*

224. *Id.*

225. *Id.* § 5.

226. *Id.* § 4.

227. *Id.*

228. *Id.* § 2.

229. *Id.*

230. *Id.*

231. *Id.* The Petaluma City Council may not borrow more than two years ahead. PETALUMA, CAL., MUN. CODE § 17.26.060 (1988). It may borrow no more than 200 units from the first succeeding year and no more than 100 units from the following year. *Id.* At no time may the allocation pool exceed 1000 units in any year or 1500 units in any three year period. *Id.*

year.²³² A developer may request reservations²³³ on his Notice of Intent to Develop form.²³⁴ The city council may grant reservations of units for future years at the same time it grants an allocation for the next calendar year.²³⁵

Projects containing 100% lower-income housing or 100% housing for households aged sixty-two or older are exempt from Petaluma's growth management system.²³⁶ These units are not included in computing the number of units permitted.²³⁷ Small projects are also exempt.²³⁸

Petaluma's point system did not work well.²³⁹ Developers had difficulty understanding the complex point system.²⁴⁰ City staff had difficulty administering it despite a computer program designed to compute points.²⁴¹ Projects which met minimum standards eventually obtained approvals.²⁴² The time-consuming and costly ranking process had little impact on actual approval or denial of projects.²⁴³ In order to achieve minimum numbers of points, developers included in their projects some expensive features, probably not wanted by occupants or really needed by the city.²⁴⁴ As a few large developers came to dominate homebuilding in Petaluma, and as the pattern of approvals became clear, developers submitted projects which were adequate, but not excellent.²⁴⁵ In addition, it was difficult to get a majority of the evaluation committee to meet.²⁴⁶ Finally, one member could unduly skew the total points awarded and complicate the approval process by ranking a project very low or very high.

Under the current system enacted in 1987, the city council sets "development objectives" in January of each year.²⁴⁷ These objectives may

232. PETALUMA, CAL., MUN. CODE § 17.26.060.

233. A reservation is a city commitment to grant allocations in future years. PETALUMA'S USER'S GUIDE, *supra* note 201, § 1.

234. PETALUMA, CAL., MUN. CODE § 17.26.050 (1988).

235. *Id.* § 17.26.030.

236. *Id.* § 17.26.060.

237. *Id.* § 17.26.040.

238. *Id.* Projects on less than 5 acres or of fewer than 15 units are exempt from the allocation system. *Id.* Units from these small projects are included in computing the total units permitted in any one year and for a three-year period. *Id.*

239. Interviews with Warren Salmons, Planning Director of Petaluma, Cal., and Michael Moore, Principal Planner of Petaluma, Cal., in Petaluma, Cal. (May 3, 1989).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. PETALUMA, CAL., MUN. CODE § 17.26.050.

indicate the council's preferences with respect to the housing mix (types and affordability), needed public facilities, needed infrastructure improvements, infill areas, the preferred balance of construction on the east or west side of the city, or other matters.²⁴⁸ If more projects are proposed in a year than the city council approves, projects are evaluated against the development objectives.²⁴⁹

Once a developer receives an allotment, that developer must use it or lose it.²⁵⁰ When a developer receives an allotment and does not have the necessary approvals by the end of the calendar year the allotment is forfeited.²⁵¹ Allotments are limited to 100 units per developer per year.²⁵² Larger projects may be negotiated through development agreements.²⁵³

Petaluma is an important city in the Bay Area due to its size, location in relation to the path of urbanization, and the extent of effort it has put into planning growth management.²⁵⁴ Two other cities—Pleasanton and Livermore—are even more strategically located. They are the central nodes in what is referred to as the Tri-Valley Area, about twenty miles east of San Francisco Bay at the border between Alameda and Contra Costa counties.²⁵⁵ In Pleasanton and Livermore, enormous suburban office park development is occurring. This development has resulted in a transformation of the employment and population structure of the region.²⁵⁶

B. Pleasanton

Pleasanton is a city with a population of 50,000²⁵⁷ located in north central Alameda County at the southwestern end of the Tri-Valley re-

248. *Id.*

249. *Id.* § 17.26.030.

250. *Id.* § 17.26.060.

251. PETALUMA'S USER'S GUIDE, *supra* note 201, § 3.

252. *Id.*

253. *Id.*

254. KNOX & ASSOCS., *supra* note 211, at 1-3.

255. *See infra* p. 1071 app.

256. *See* Beers, *Tomorrowland: We Have Seen the Future and It Is Pleasanton*, IMAGE MAG., Jan. 18, 1987, at 16-20, 38.

257. BAYFAX, *supra* note 20, at 54. Pleasanton's housing stock consists almost entirely of houses built in the last 15 years. Pleasanton, Cal., Growth Management Report: 1988, § 17.36.010 (1988) [hereinafter Growth Management Report]. Seventy-nine percent of the housing stock consists of single-family homes. BAYFAX, *supra* note 20, at 74. The population of Pleasanton is overwhelmingly white. *Id.* at 60. Incomes are high. *Id.* at 106. Between 1960 and 1970 Pleasanton was the second-fastest growing city in the Bay Area, with a 336% population increase. *Id.* at 68. Between 1970 and 1980 it grew 92%. *Id.* at 71.

gion.²⁵⁸ Since 1976, Pleasanton has amended its Growth Management Program many times²⁵⁹—most recently in August 1988.²⁶⁰ Since August 1988, the city has limited the maximum number of growth management approvals in any one year to 650 units, plus up to 100 residential units for lower income housing projects.²⁶¹

Formerly a small agricultural community specializing in hops, Pleasanton grew rapidly in the 1960s as a bedroom community.²⁶² In the late 1970s, Pleasanton emerged as a major center of business employment in the Bay Area.²⁶³ In 1982, Pleasanton approved the Hacienda Business Park, an 832-acre site planned to add 40,000 new jobs by its final buildout in 2005.²⁶⁴

Pleasanton first adopted a growth management program with residential timing controls in 1976 in response to sewer and water problems.²⁶⁵ The original growth management program was based on negotiations with the Regional Water Quality Control Board.²⁶⁶ The city agreed to limit its population growth rate to 2% per year as a condition of federal sewer funding.²⁶⁷ At the time, the city anticipated the 2% growth rate to continue for twenty years.²⁶⁸

Between 1976 and 1986, Pleasanton's Residential Allocation Program (RAP) had a point system similar to those formerly used in Petaluma and Livermore.²⁶⁹ This system proved difficult for local politicians and developers to understand.²⁷⁰ Quantifiable objective standards also limited the city council's ability to negotiate deals tailored to the council's perception of specific needs.²⁷¹ In 1986, Pleasanton abandoned the RAP program's point system.²⁷²

Pleasanton is one of three Bay Area jurisdictions which imposes a fee on residential development that goes into an affordable housing

258. See *infra* p. 1071 app.

259. Telephone interview with Chandler Lee, Principal Planner of Pleasanton, Cal. (Apr. 4, 1989).

260. See Pleasanton, Cal., Ordinance 1378 (Aug. 25, 1988).

261. See *id.*

262. Growth Management Report, *supra* note 257, § 17.36.010.

263. *Id.*

264. Telephone interview with Chandler Lee, *supra* note 259.

265. Pleasanton, Cal., Ordinance 1378.

266. Telephone interview with Chandler Lee, *supra* note 259.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

fund.²⁷³ Pleasanton's current system contemplates that most housing will be built by large developers building more than 100 units per year subject to agreements with the city.²⁷⁴ Pleasanton delegates power to negotiate these agreements to a negotiating team consisting of the mayor, city manager, city attorney and an appointed council member.²⁷⁵ This team has broad discretion over the contents of the agreements and precise conditions the negotiating committee will require for approval of the developer's plan.²⁷⁶

Negotiating the terms of most residential developments in Pleasanton is subject to a two-step process. Most housing is developed as planned unit developments.²⁷⁷ At the subdivision stage, city officials and the developer negotiate exactions and dedications as conditions of PUD approval and documented in subdivision covenants, conditions, and restrictions.²⁷⁸ At the second stage of development, additional approval requirements are negotiated before a developer receives a growth management allocation.²⁷⁹ Recently, negotiated agreements require extensive infrastructure improvements, both within the development and offsite.²⁸⁰ Some agreements include open space and traffic mitigation measures.²⁸¹ The extent of mitigation measures Pleasanton requires for development may be very extensive. For example, four new or remodeled freeway interchanges are being paid for entirely from private funds raised through the North Pleasanton Assessment District.²⁸²

After the city has negotiated long-term agreements with large developers, Pleasanton officials evaluate under a yearly evaluation process nonexempt projects with fewer than 100 units.²⁸³ The Pleasanton ordinance gives the city council almost unlimited discretion with respect to choosing projects when there are more applications than available

273. Growth Management Report, *supra* note 257, at 468. Pleasanton currently requires a \$400 fee per unit. Livermore imposes a \$500 fee on residential development; Petaluma requires a \$2,400 fee. BAY AREA COUNCIL, *supra* note 85, at 18-19.

274. Growth Management Report, *supra* note 257, at 470.

275. *Id.* at 469.

276. Pleasanton's Growth Management Procedures and Guidelines 2(c)(ii) provides that beyond the number of units allowed per year, "the agreement may include any other provision which may be necessary to promote the public health, safety, and welfare and to conform the project to all General Plan goals and policies." PLEASANTON, CAL., GROWTH MANAGEMENT PROCEDURES, § 2(c)(ii) (1988).

277. *See* Growth Management Report, *supra* note 257, at 460-72.

278. *See id.*

279. *See id.*

280. Telephone interview with Chandler Lee, *supra* note 259.

281. *Id.*

282. *See* Pleasanton, Cal., Municipal Ordinance 1378.

283. *See* GROWTH MANAGEMENT PROCEDURES, *supra* note 276, § 3.

units.²⁸⁴ Each year, the city council establishes the number of residential units to be constructed for the next year.²⁸⁵ If it chooses, the council may also establish the number of units within certain categories such as single-family or multiple units.²⁸⁶ Approval for smaller projects lapses eighteen months after the council approves such projects unless (1) construction has begun or the city council has approved a final map and (2) the subdivider has entered into a subdivision agreement for the project.²⁸⁷

C. Livermore

Livermore is a community with a population of 56,000²⁸⁸ located just east of Pleasanton in the eastern Alameda Tri-Valley Area.²⁸⁹ Livermore is the location of the University of California's Lawrence Livermore Laboratories and a thriving economy based on scientific research and government defense contracts.²⁹⁰ It has recently experienced suburban office park development, but on a smaller scale than has Pleasanton.²⁹¹

In 1987, Livermore implemented a system which contains standards for evaluating projects based on specific criteria rather than points.²⁹²

284. *Id.* § 3(d)(ii). That section provides:

In the event the total units . . . exceed the total yearly allocation for smaller projects, the City Council shall decide . . . the manner in which development approval shall be given. The City Council, in its discretion, shall select projects by lot, by apportioning approval on a pro rata basis, or by any other manner deemed appropriate by the City Council.

Id.

285. This number is subject to the cap of 650 market and 100 lower income units established in 1988. See PLEASANTON, CAL., MUN. CODE § 17.36.180 (1988).

286. *Id.* § 17.36.050.

287. *Id.*

288. BAYFAX, *supra* note 20, at 54. Seventy-nine percent of Livermore's housing stock consists of single-family homes. *Id.* at 74. Between 1960 and 1970 Livermore's population grew by 135%, making it the tenth-fastest growing Bay Area community in the 1960s. *Id.* at 68. In the 1950s Livermore grew even faster. Its population increased by 268% from 1950 to 1960. *Id.* By contrast, Livermore's population grew by 28% between 1970 and 1980 and by 17% between 1980 and 1988. *Id.* at 57, 71.

289. See *infra* p. 1071 app.

290. Telephone interview with Marc Roberts, Assistant Planner of Livermore, Cal. (Apr. 4, 1989).

291. *Id.*

292. See Livermore, Cal., General Plan Text Amendment 76-87 (Sept. 1, 1987). Livermore has had some form of growth management since passage of an initiative in 1972 which prohibited the issuance of residential building permits until sewer, water, and school facilities met specified standards. Livermore, Cal., Initiative Ordinance Re Building Permits: The SAVE Initiative (1972); HISTORY OF RESIDENTIAL DEVELOPMENT, *supra* note 201, at 1-3. This initiative, however, was never implemented. *Id.* It was struck down by a lower court, and by the time the California Supreme Court held it constitutional, Associated Home Builders v.

No numerical rating is attached to the criteria.²⁹³ Livermore's system is a hybrid between a rigid point system such as Belmont's, and a system with almost unlimited council discretion such as Pleasanton's.

This growth management program is referred to as the Housing Implementation Program (HIP).²⁹⁴ It sets a growth rate range of between 1.5-3.5% to be implemented in three-year HIP increments.²⁹⁵ Every three years, the city council adopts a revised Housing Improvement Program which (1) establishes the average annual rate of construction for the next three years; (2) sets policy with regard to the type and location of units desired; and (3) establishes project specific criteria.²⁹⁶ The rules established in a HIP remain in place for three years in order to let developers obtain and develop land with some degree of certainty that the rules will not be changed.²⁹⁷

In determining the HIP, the Livermore City Council is required to consider infrastructure issues regarding sewer, water, and street capacity, service requirements (police and fire), environmental impacts and constraints, low-and moderate-income housing needs, and the job growth rate at the time.²⁹⁸

In the first HIP cycle after the implementation of Livermore's system in 1987, the Livermore City Council established a growth rate of 3.5%, the maximum permitted.²⁹⁹ This rate permits the building of approximately 700 units per year, not counting exempt units.³⁰⁰

City of Livermore, 18 Cal. 3d 582, 610, 557 P.2d 473, 489-90, 135 Cal. Rptr. 41, 57-58 (1976), the city council had adopted a superseding growth management program setting a 2% annual growth rate for the city. HISTORY OF RESIDENTIAL DEVELOPMENT, *supra* note 201, at 1-3. Initially, the system operated on a first-come, first-served basis. *Id.* In 1979, a Residential Development Policy (RDP) system was adopted. *Id.* The system was amended frequently between 1979 and 1987. *Id.*

Livermore abandoned a fixed annual percentage growth rate of 2% and eliminated a complex point system in 1987. *See* Livermore, Cal., General Plan Text Amendment 76-87. The city found that, despite constant changes in the point system, developers continually obtained approval for projects which qualified in terms of the points in effect at that time, but were judged mediocre. Telephone interview with Marc Roberts, *supra* note 290. In place of a point system, Livermore has adopted what it calls criteria for evaluating projects. *Id.*

293. *See* Livermore, Cal., General Plan Text Amendment 76-87 (Sept. 1, 1987).

294. *Id.*

295. *See* LIVERMORE, CAL., 1990 HOUSING IMPLEMENTATION PROGRAM 2 (1988) [hereinafter 1990 HIP].

296. *Id.*

297. Telephone interview with Marc Roberts, *supra* note 290.

298. Livermore, Cal., Resolution 261-87: A Resolution Amending the Livermore General Plan Population Growth Rate Policies and Housing Element (Oct. 12, 1987).

299. *Id.*

300. Telephone interview with Marc Roberts, *supra* note 290.

Projects containing fewer than ten units are exempt.³⁰¹ In 1987, the city estimated that construction of exempt units could add between 1% and 1.5% to its growth rate.³⁰² In 1987 and 1988, several hundred exempt units were approved.³⁰³

Permitted units within a three-year HIP may be allocated to or transferred from the HIP program.³⁰⁴ The HIP program also permits the city to "borrow" up to 1.5% of the units from the next HIP cycle.³⁰⁵ While the 1987 program appears to set an annual flexibility rate of about 700 units, the system can provide significant peaks and troughs.³⁰⁶ In 1987, the city council approved only about 400 units, but in the following year, it approved 1717 units plus several hundred exempt units.³⁰⁷ Total approved and exempt units approximated 9% of the city's housing stock.³⁰⁸

In deciding whether to approve non-exempt units, Livermore uses criteria which are not quantified but which are made available in writing to developers and the general public.³⁰⁹ The city council may place some number of units in a reserve category to use for a specific geographical or unit type or to identify an emphasized category which, all things being equal, will receive allocations ahead of other projects.³¹⁰ For example, the council could place some number of units in reserve for low income or senior citizen housing. In 1988, the only attempted reservation consisted of fifty units set aside for a specific assessment district.³¹¹ In its first HIP, Livermore chose to favor housing on lots of 7500 square feet or greater which sell for \$200,000 or more.³¹²

In addition to specifying city-wide criteria, the current Livermore program emphasizes some project-specific criteria related to site design, open space, landscaping, architectural quality and other matters.³¹³ Developers proposing a project deemed "outstanding" by the city—on the

301. Livermore, Cal., Resolution 261-87.

302. Telephone interview with Marc Roberts, *supra* note 290.

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. LIVERMORE, CAL., 1989 HOUSING IMPROVEMENT PROGRAM: FINAL RANKINGS AND ALLOCATIONS (1990).

308. Telephone interview with Marc Roberts, *supra* note 290.

309. 1990 HIP, *supra* note 295, at 1.

310. *Id.*

311. *Id.* A condition of approval for this allocation was that the assessment district be formed. Telephone interview with Marc Roberts, *supra* note 290. It was not formed in time and the reservation was not used. *Id.*

312. *Id.*

313. *Id.*

basis of features not anticipated—may receive priority consideration under a flexible standard which rewards innovation.³¹⁴

D. Dixon

Dixon has also adopted a flexible growth management system. Dixon is a rapidly growing community in the path of urbanization along a highway corridor. However, unlike Pleasanton and Livermore, Dixon is a small, lower-middle class suburban community.³¹⁵ Dixon is located in the fast-growing Interstate 80 corridor in eastern Solano County.³¹⁶ While technically a part of the San Francisco Bay Area, Dixon lies far to the east of the urbanized Bay Area across a flat stretch of the Central Valley and close to Sacramento.³¹⁷ In 1986, Dixon adopted a ten-year initiative ordinance authorizing the city council to limit annual residential growth in the city's housing stock to 3% per year.³¹⁸ Dixon's growth management program is unique in that all residential building through 1996 has been fully determined. The Dixon ordinance calls for 80% of new construction to be family housing units, including single-family detached duplex units.³¹⁹

The Dixon program was implemented through negotiations with a small number of major developers. In 1987, the Dixon City Council specified that all units for that year were to go to three named subdivisions, and it specified precisely the number of units to go to each subdivision.³²⁰ At the same time, the city council also provided for the number of units to go to these and other subdivisions in 1988 and 1989.³²¹ In 1989, a city council resolution spelled out precisely where all units from 1989 through 1996 would be built and by whom.³²²

314. 1990 HIP, *supra* note 295, at 7.

315. Telephone interview with Seena Erickson, City Planner of Dixon, Cal. (Apr. 22, 1989).

316. See *Green Light on Growth in Dixon*, Sacramento Bee, Nov. 11, 1990, at H1, col. 1. Dixon consists primarily of new, moderately priced, single-family detached houses with some townhouses, condominiums and apartments. Telephone interview with Seena Erickson, *supra* note 315. Between 1960 and 1970 Dixon grew by 49%, between 1970 and 1980 it grew by 70%, and between 1980 and 1988 by 41%. BAYFAX, *supra* note 20, at 57, 68, 71. Eastern Solano county is one of the least expensive housing markets in the Bay Area. Telephone interview with Seena Erickson, *supra* note 315.

317. See *infra* p. 1071 app.

318. See Dixon, Cal., Resolution 8759: Policies for Implementing the General Plan and Measure B Housing Applications (Aug. 11, 1987).

319. Dixon, Cal., Measure B (Apr. 8, 1986).

320. Dixon, Cal., Resolution 8759 (Aug. 11, 1987).

321. Dixon, Cal., Measure B.

322. Dixon, Cal., Resolution 8917: General Plan and Measure B Policies and Housing Allocations for General Plan Phase I Housing Projects (Feb. 28, 1989).

Dixon does not exempt or otherwise favor low-income housing.³²³ It provides something similar to a density bonus for developers who participate in a small builder/owner option. If subdividers make lots available at market rate for small builders/owners, they receive an additional allocation up to the point at which 25% of the lots in a subdivision are small builder/owner lots.³²⁴ Infill projects in Dixon are exempted on an individual basis.³²⁵

IV. SUMMARY AND CONCLUSIONS

The above description of Bay Area growth management systems with tempo controls shows great variation among the systems and also among the outcomes which the systems produced. There is no easy formula for designing a single "best" system. The kind of system needed, if any, depends upon the land use, housing and population dynamics of the individual community and upon the local political situation. Nonetheless, some lessons emerge from the above history.

In the San Francisco Bay Area, only one city which adopted a quantified point system has kept it intact for the last decade and is satisfied that it works as anticipated—Morgan Hill. Most Bay Area cities which adopted point systems in the 1970s and early 1980s have constantly tinkered with their systems, thereby undermining the rationale of predictability and consistency the systems were intended to produce. The changes have often permitted major departures from the past. For example, Pleasanton recently allowed 2000 units to be built based on a contorted redefinition of affordable housing. Among other problems encountered were: (1) systems overridden by building moratoria; (2) point systems, such as those in Belmont, Pacifica, Petaluma and Pleasanton, with mathematically formidable tree rating systems that are so complex that developers and local elected officials cannot understand them; (3) systems, such as those in Livermore and Petaluma, which have produced housing that the cities did not particularly like; (4) a system in Union City, which has been bypassed through exemptions by the city which adopted it; and (5) five communities in which the number of applications for building permits has always been lower than the number permitted—Belmont, Napa County, Novato, Pacifica and Petaluma.

The larger Bay Area cities with the most development activity—Petaluma, Pleasanton and Livermore—have abandoned their point sys-

323. *See id.*

324. *Id.*

325. *Id.*

tems in favor of more flexible systems. The manifest purpose of the change to more flexible systems is to allow city councils greater discretion in regulating the tempo and character of their residential development. Implicit in the move is the recognition that quantified point systems have proven problematic.

An unarticulated, latent purpose of the flexible systems is to allow local governments greater leverage in negotiating infrastructure improvements, open space dedications and on- and off-site traffic mitigation measures. Pleasanton now grants almost unlimited discretion to a small team of city officials to negotiate the terms of development approvals. Petaluma and Livermore have somewhat more explicit substantive and procedural standards, but they grant their city councils great discretion in specifying the amount and the kind of permissible development. Whether these cities will pursue considered, consistent, and fair development policies with satisfactory outcomes, however, remains unclear.

Flexible growth management systems offer the hope of growth management and respond sensitively to underlying conditions in the community without the encumbrance of point systems. Well-informed city councils with the capacity to negotiate fair development may use flexible systems to produce better quality and more orderly development than that produced either without such controls or with poorly designed point systems. The flexible systems, however, also raise the specter of less certainty, greater fluctuations in permitted growth, favoritism, and compromised development.

At the present time, the systems which Petaluma and Livermore have recently implemented represent state-of-the-art thinking about residential growth management in the San Francisco Bay Area. Both cities have moved away from rigid point systems and allow their city councils considerable discretion. But both require written statements of criteria which the city council will use to judge projects—annual statements in the case of Petaluma and three-year cycles in the case of Livermore. These recent innovations are particularly worthy of consideration by other cities which have adopted or are contemplating growth management. It is too early, however, to judge how the movement towards more flexible systems will turn out in the long run.

In closing, some observations based on the history of zoning and land use regulation may be helpful. There has always been a tension between rigid and flexible systems of land use regulation. Early zoning laws listed permitted uses with no or very few exceptions. These early zoning ordinances had the virtue of clarity, but they lacked sensitivity to the complexity of community development. Over time, zoning law be-

came more subtle and generally more flexible. Standards for making map and text amendments evolved. Communities revised ordinances to include provisions for variances, conditional use permits, overlay and floating zones. They permitted planned unit developments, where appropriate, in place of grid developments. Some communities permitted contract zoning in which characteristics of a development were negotiated independently of the specified zoning. Most planners applauded the growth of flexibility devices in land use regulation. There has always been an undercurrent of concern and criticism, however, that too much discretion (1) breeds uncertainty, (2) allows planning commissions and city councils to engage in favoritism, and (3) undermines public confidence in the fairness and rationality of land use regulation. Clearly, some cities have abused their discretion.

Based on this review of recent evolution of urban growth management in the San Francisco Bay Area, it appears possible that urban growth management systems will evolve in several different ways. The most cumbersome point systems will likely disappear, except possibly in communities which really want to use them to discourage, rather than regulate, growth. If communities recognize that specific plans, development agreements, and planned unit developments are superior tools for achieving some goals sought in tempo controls, they may supplant their systems. In the mid-range future, it is likely that both simplified point systems and flexible systems will continue to exist.

The history of land use regulation suggests that over time professional practice regarding new forms of flexibility devices can mature in a positive way. Conditional use permits and planned unit developments were once viewed as radical and potentially dangerous experiments. Today, planners and lawyers have developed a professional understanding of these devices so that they are widely used and almost universally regarded as improvements to prior practice. Petaluma, Livermore and other communities which have struggled with growth management now have in place flexible growth management systems which are greatly superior to the ones they introduced in the 1970s. It is likely that they will be refined in the future and will spread to other communities. Hopefully, the new flexible residential tempo control systems will mature into sensitive land use regulation devices.

APPENDIX

**San Francisco Bay Area Jurisdictions
With Residential Tempo Control Ordinances:
1989**



