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Thomas P. Clark Jr.
*University of the Pacific; McGeorge School of Law*

Roger A. Grable

# Growth Control In California: Prospects For Local Government Implementation Of Timing And Sequential Control Of Residential Development

THOMAS P. CLARK, JR.*

ROGER A. GRABLE**

*In the last decade California has been characterized by intensive suburban development. Traditional methods of land use regulation have been ineffective in alleviating the resultant strain upon local governments in their attempts to adequately accommodate such growth. In 1969 the Town of Ramapo, New York amended its zoning ordinance to implement a revolutionary and comprehensive plan—timing and sequential controls—designed to phase residential growth to coincide with the town's ability to provide necessary services and facilities. Herein, the authors analyze the Ramapo Plan in terms of the legal questions raised thereby and the adaptability of the plan for use by California local governments. The authors conclude that timing and sequential controls amount to an efficient and legally valid tool for the control of residential development, providing that such a plan is implemented pursuant to a carefully reasoned and systematic long-range program for municipal growth.*

* A.B., 1965, University of Notre Dame; J.D., 1973, University of Missouri, Kansas City School of Law.

** B.S., 1967, Brigham Young University; J.D., 1970, University of California, Hastings College of the Law.

This article is based, in part, upon a memorandum prepared by the authors for the City of Irvine, California. The authors are associates in the law firm of Rutan & Tucker, counsel for the city. On February 26, 1974, the City of Irvine adopted a zoning ordinance containing timing and sequential controls.

California has suffered and will continue to suffer unprecedented population pressures. The overcrowded and deteriorating central cities have been incapable of absorbing increased housing demands, and residents who can so afford have been fleeing from the major urban centers at an alarming rate. The result has been intense pressure for rapid residential development in adjacent suburban areas which, in many cases, are similarly ill equipped to handle such an influx.[1] The situation is compounded by the fact that speculative developers, seeking to capitalize on this phenomenal migration, look to the outlying suburban areas where the absence of municipal services operates to reduce the cost of land. If such development is permitted to continue without restraint, the inevitable consequence will be as Professor Robert H. Freilich suggests,

> The burden of capital investment is then shifted to the public sector and the general tax rate soars to meet the need for public facilities to catch up to the development. This transfer of the true cost of development from the developer to the public sector has led to a series of unfortunate effects on the urban fringe:
>
> (a) Imbalance of growth between types of uses;
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> (b) Inability to provide public services to match private development;
>
> (c) Soaring tax rates on property due to inefficient provision of public services;
>
> (d) Poor quality of services provided due to rapid growth;
>
> (e) Land speculation, poor design, uncontrolled character and quality of private development, destruction of the natural landscape;
>
> (f) Inability to implement the planning process, lack of time to develop solutions, inadequate administrative and legal mechanisms;
>
> (g) Development of negative policies concerning social, racial and metropolitan solutions, formation of defensive incorporations and annexations, unwillingness to provide proper housing and facilities for diverse economic, racial and ethnic groups and irrational tax policies.[2]

Unfortunately, while many cities have been reluctant to succumb to increased development pressures, traditional concepts of planning, zoning and subdivision regulation have proven incapable of preventing urban sprawl, particularly leapfrog development. Until recently, it has

1. *See* Ragsdale & Clark, *Strategies for Metropolitan Stabilization*, 41 U. Mo. K.C.L. REV. 1 (1972).

2. Editor's Comment, *Golden v. Town of Ramapo: Establishing a New Dimension in American Planning Law*, 4 URB. LAW. No. 3, ix, ix-x (1972).

been thought that the scope of permissible governmental intervention was confined to the regulation and division of the territorial area of the community into use zones or, at the most, single integrated planned communities. Under this traditional view any process which sought to control or phase development was thought to be impermissible under planning and zoning enabling acts, as well as amounting to a taking without just compensation in contravention of both the state and federal constitutions.

In spite of these traditional concepts, a recent flurry of growth control programs has swept California. These programs vary substantially from community to community and reflect independent responses to the detrimental effects of unfettered development. This variation in response may be explained, in part, by the fact that the desire to control growth is a result of several divergent points of view. For example, many who champion environmental causes envision unrestrained residential development as the final blow to our faltering ecosystems. Indeed, the California Supreme Court has recognized that the "elimination of open space . . . is a melancholy aspect of the unprecedented population increase which has characterized [California] in the last few decades."[3] Some environmentalists would respond by halting all residential growth so as to preserve prime agricultural land and other open space in the interest of maintaining ecological balance and, at the same time, to retain the small-town, rustic character that typifies some rural and suburban communities. Another point of view is that of racial and economic separatists who expect suburban communities to provide insulation from low income families and racial minorities.[4] In the not too distant past, such insulation was accomplished by large-lot zoning and other exclusionary techniques. When the courts began rejecting these exclusionary devices as unconstitutional,[5] the more devout separatists found solace in the potential insulary effect of outright growth limitations.

3. Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 638, 484 P.2d 606, 610, 94 Cal. Rptr. 630, 634 (1971).

4. *See* Weissbourd & Channick, *An Urban Strategy*, THE APPRAISAL JOURNAL 108 (1970).

5. See, for example, *National Land and Investment Co. v. Kohn*, where the local governmental body bemoaned the problems of water pollution, inadequacy of roads, loss of greenbelt, and loss of rural character allegedly precipitated by increased population density. The court, nonetheless, invalidated the large-lot, low density zoning ordinance and observed:

> [Z]oning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and cannot be used by those officials as an instrument by which they may shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future.

419 Pa. 504, 527-28, 215 A.2d 597, 611-12 (1965).

In *Golden v. Planning Board of Town of Ramapo*,[6] New York's highest court discredited growth control devices motivated exclusively by either rationale. The *Golden* court upheld the validity of an innovative growth control plan implemented by the town of Ramapo. The court warned, however, that although it would permit a community to take measures to prevent the kind of deterioration that has transformed well ordered and thriving residential communities into blighted ghettos, it would not sanction the refusal of a community to confront the challenge of population growth with open doors.[7] Thus while the *Golden* court would reject growth limitations stimulated by exclusionary activists or by the misguided belief that insulation will protect the environment and enhance community autonomy, it has by its decision provided rapidly urbanizing communities with a responsive solution to the potentially debilitating effect of increasing population pressures.

This article will explore the legal ramifications of the *Golden* case and will consider the possible utilization by local governmental entities in California of the growth control plan, timing and sequential control, fashioned by the town of Ramapo.

## The Concept of Timing and Sequential Controls

At the outset it should be noted that growth controls, or the channeling of residential growth, is not a totally new phenomenon. In the past decade or so, a variety of techniques have been employed to retard growth[8] or to locate it more logically in terms of municipal expense and the feasibility of providing community services.[9] These methods have not, as a general rule, achieved a high degree of success.

Professor Henry Fagin has suggested that this failure to deal effectively with contemporary residential growth trends is the consequence of a one dimensional approach (spatial) to traditional urban planning. Professor Fagin recognized in 1955 that urban planning involves both time and spatial coordination and that without the former the latter must continue to fail. He pointed out that "[s]tatic space coordination [*i.e.*, traditional Euclidean zoning] is not merely inferior, it is

6. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1972).

7. *Id.* at 379, 285 N.E.2d at 302, 334 N.Y.S.2d at 153.

8. For example, the number of building permits which may be issued might be limited by: (1) the establishment of quotas, excessive fees, or even flat moratoriums on the issuance of permits; (2) outright fee simple purchases of undeveloped property; (3) tax incentives; (4) large-lot zoning; (5) staged zoning; and (6) statutory subdivision regulation.

9. See Cutler, *Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe*, 1961 Wis. L. Rev. 370.

impossible in a dynamic world."[10] The "time coordination" concept suggested by Fagin, commonly known as timing and sequential control of development, has two unique and distinct aspects: *tempo*—the rate of urban development, and *sequence*—the encouragement of immediate and intensive development of areas "ready" for such development by virtue of the availability of essential monies and services.[11] Fagin advances the following as valid, well considered motivations for regulating the timing and sequence of urban development which are, in his view, likely to be upheld by the courts:

(1) The need to economize on the costs of municipal facilities and services;

(2) The need to retain municipal control over the eventual character of development;

(3) The need to maintain a desirable degree of balance among various uses of land;

(4) The need to achieve greater detail and specificity in development regulation; and

(5) The need to maintain a high quality of community services and facilities.[12]

## THE RAMAPO PLAN—A MODEL FOR THE TIMING AND SEQUENTIAL CONTROL OF RESIDENTIAL DEVELOPMENT

The town of Ramapo, New York, adopted and expanded the concept espoused by Fagin when it enacted a controlled growth program in response to the town's alarming proliferation. In 1955, when the opening of the New York State Thruway made the community an easy 25-mile drive from the heart of New York City, Ramapo became a commuter suburb. A growth rate of almost 1,000 residential units per year was experienced in the unincorporated areas of the town despite the absence of adequate municipal facilities. Almost all of the growth had been reflected in single-family residential subdivisions developed by commercial builders. Urban sprawl, in its worst form, was predicted to be the inevitable result should the process continue unchecked.

In 1965, in response to this situation, Ramapo initiated the research and preparation of a master plan. The plan included analysis of the town's history, existing land uses, public facilities, transportation, industry, commerce, housing needs, and population trends. In 1966 the

10. Fagin, *Regulating the Timing of Urban Development*, 20 LAW & CONTEMP. PROB. 298, 299 (1955).
11. *Id.*
12. *Id.* at 300-01.

town adopted a comprehensive zoning ordinance to implement the plan. Two years later it adopted a capital budget which provided a firm commitment for the development of capital improvements over the next six years in accordance with the needs specified by the master plan. Following adoption of the capital budget, Ramapo approved an amended capital improvement program for the following twelve years. The capital budget and capital improvement program provided for a scheduled sequence of capital improvements, again in accordance with the specifications of the master plan.[13] Through this comprehensive planning framework, the town pledged itself to the establishment of an orderly growth policy commensurate with the progressing availability and capacity of its public facilities and services. Equally significant is the fact that the community was thereby committed to an eighteen-year program during which all public facilities, improvements, and services would eventually be furnished to the entire community. Based upon the foundation supplied by these initial planning stages, the town adopted an amendment to its zoning ordinance.[14] The function of this amendment was the implementation of timing and sequential controls and the consequent elimination of premature subdivision development and concomitant urban sprawl.

The amendment did not rezone or reclassify any land into different residential or use districts but rather operated to designate residential developments as a separate use classification which requires the obtaining of a special permit from the town board as a condition precedent to the issuance of building permits or subdivision plat approval. The standards for the issuance of these special permits are framed in terms of the availability to the proposed subdivision of five essentials: (1) public sanitary services or an approved substitute; (2) drainage facilities; (3) improved public parks or recreation facilities, including public schools; (4) state, county, or major, secondary town, or collector roads; and (5) fire fighting services.[15] The amended ordinance prohibits the issuance of a special permit unless the proposed residential development has accumulated fifteen "development points," computed on a sliding scale of values assigned to the specified improvements.[16]

13. This factual background is derived from Editor's Comment, *supra* note 2.
14. Ramapo, N.Y., Amendments to Building Zone Amended Ordinance of 1969, §46-13.1, Sept. 22, 1969.
15. *Id.*
16. *Id.* For example, point evaluation of drainage facilities available to the proposed subdivision is based upon the following percentages of full drainage capacity:
(a) 100% or more ——— 5 points
(b) 90%-99.9% ——— 4 points
(c) 80%-89.9% ——— 3 points

Minimum compliance with these point requirements prior to issuance of a building permit renders the development of residential subdivisions dependent upon the immediate availability of essential public improvements to the proposed plat. Moreover, the development points are related to the town's budget and capital improvement program, pursuant to which the town is committed to the completion of public capital improvements or projects within a period of eighteen years. Additionally, certain saving and remedial provisions were inserted in the ordinance to relieve the developer of potentially unreasonable restrictions. For example, the town board may issue special permits which immediately vest the right to proceed with residential development in such a year as the development meets the required point minimum but in no event later than the final year of the eighteen-year capital plan. Approved special use permits are fully assignable, and improvements scheduled for completion within one year from the date of an application are treated, for the purpose of computing point totals, as though they existed on the date of application. Furthermore, a prospective developer may advance the date of subdivision approval by providing those improvements which will raise the total number of accumulated development points above the requisite minimum established by the ordinance. To ease the financial burden on the developer, a commission was established to review applications for reduction of assessed valuations—a system analogous to California's Williamson Act.[17] Finally, the ordinance is flexible in that it permits exemption from the development point requirements should the town board determine that such a variance or modification is consistent with the overall spirit of the master plan.

Even if the development of a particular residential subdivision were to be forestalled by operation of the ordinance, the affected landowner is nevertheless allowed to use his land for numerous other purposes still permitted by the ordinance.[18] In this regard it was successfully argued in *Golden* that the adoption of timing and sequential controls, geared to a positive program of capital improvement, does not unrea-

(d) 65%-79.9% ..... 2 points
(e) 50%-64.9% ..... 1 point
(f) less than 50% ..... zero points

17. The Williamson Act permits owners of prime agricultural land to voluntarily place their land under an enforceable restriction in order to avoid assessment for potential uses. CAL. GOV'T CODE §51200 *et seq.*

18. These purposes include, but are not limited to, agricultural uses, commercial or laboratory breeding, church and non-profit uses, utilities, schools, cemeteries, airports, recreational facilities, community buildings, water towers and tanks, homes for the aged and nursing homes, mineral and gravel removal, day camps, summer colonies, and summer camps. Ramapo, N.Y., Amendments to Building Zone Amended Ordinance of 1969, §46-13.1A, Sept. 22, 1969.

sonably restrict development, but rather encourages it sequentially in areas capable of supporting housing at higher density levels without dispossessing the restricted landowner of all uses of his property.[19]

TIMING AND SEQUENTIAL CONTROLS—THE LEGAL QUESTIONS

The opponents of Ramapo's timing and sequential controls urged that the ordinance was invalid on one or more of the following grounds: (1) a denial of substantive due process under the fifth and fourteenth amendments to the United States Constitution, both on its face and as applied; (2) an unreasonable restriction on the free mobility of population, both interstate and intrastate; (3) a denial of equal protection under the fourteenth amendment to the United States Constitution; or (4) an unauthorized exercise of the town's zoning power (the so-called *ultra vires* attack).

The New York Court of Appeals found all of these contentions untenable, and an appeal to the United States Supreme Court was dismissed for lack of a substantial federal question.[20] A California local government which implements timing controls can expect to have to answer basically the same contentions in the California courts. It can also be expected that as the concept of growth control gains impetus throughout the country and as the demand upon the United States Supreme Court to authoritatively resolve the issue increases proportionately, the Court may decide to rule on these important questions, even though it has refused to entertain a case involving an innovative zoning concept since 1928.[21]

### *A. Substantive Due Process*

#### *1. Unconstitutional on its Face*

The argument that a regulation which seeks to time and sequentially control residential growth amounts to a denial of due process on its face raises the issue of whether the adoption of the regulation constitutes a reasonable and legitimate exercise of the police power. Negating the due process attack basically requires a showing that the legislative controls in question promote the public health, safety, and welfare.[22]

19. 30 N.Y.2d at 379, 285 N.E.2d at 302, 334 N.Y.S.2d at 153.
20. 409 U.S. 1003 (1972).
21. The last case was Nectow v. City of Cambridge, 277 U.S. 183 (1928).
22. As will be discussed later in this article, a finding that the particular timing and sequential control method under judicial examination does not effect a denial of due process on its face might serve to resolve an *ultra vires* attack as well. See text accompanying notes 64-100 *infra.*

The United States Supreme Court has defined the extent of its inquiry into the scope of the state police power in terms of the basic principle of "reasonableness." In *Goldblatt v. Town of Hempstead,*[23] the Court stated:

> The term "police power" connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of "reasonableness," this Court has generally refrained from announcing any specific criteria. The classic statement of the rule, in *Lawton v. Steel,* 152 U.S. 133, 137 (1894), is still valid today:
>
> > To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.[24]

Applying these tests, the court in *Golden* found the challenged Ramapo ordinance reasonable and recognized that the use of timing and sequential controls to prevent urban sprawl and premature development and to provide required municipal services in a systematic manner is clearly within the ambit of the police power.[25] Even the dissent in *Golden,* which challenged the ordinance on the grounds that the exercise of such powers should have been delegated to regional bodies, recognized that timing controls are an important and necessary element in the overall control of urban sprawl.[26]

### *a. Federal and State Recognition of the Need to Phase Growth as Evidence of "Reasonableness"*

The National Commission on Urban Problems was directed by President Johnson to study the numerous problems confronting modern urban areas. After two years of deliberation, five volumes of testimony, and nineteen separate technical reports, the Commission, in its final report,[27] surveyed the problems of suburban development, urban sprawl, and premature subdivision and recommended to the President and to the Congress the implementation of controls on the timing of development.[28]

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23. 369 U.S. 590 (1962).
24. *Id.* at 594-95.
25. 30 N.Y.2d at 379, 285 N.E.2d at 302, 334 N.Y.S.2d at 153.
26. *Id.* at 387, 285 N.E.2d at 307, 334 N.Y.S.2d at 160 (Breitel, J., dissenting).
27. THE NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY (1960).
28. At the metropolitan scale, the present techniques of development guidance have not effectively controlled the timing and location of development. Under traditional zoning, jurisdictions are theoretically called upon to determine in advance the sites needed for various types of development . . . .

In California, the Council on Intergovernmental Relations was given the responsibility by the California Legislature[29] to prepare advisory guidelines for local agencies to use in developing the mandatory elements of their general plans. In the guidelines the Council defines land use planning "as a means to the end of more orderly development . . . ."[30] The Council was clearly aware of the necessity for phased development when it stated: "The general plan is a guide for conservation, growth, and change over an extended period of time. It should clearly identify: areas to be conserved; areas to be changed; sequence or timing of change; nature and process of change."[31] In a discussion of the land use element, the Council declares the scope and nature of the land use element to include "[a]n outline for implementation, including a description of measures necessary to achieve land use objectives and policies and the timing or staging of plan implementation."[32] Moreover, as general methodology for the preparation of the plan, the Council recommends that the local government "identify the means of implementation, establish priorities, and, if appropriate, develop staged growth programs."[33]

A growth control bill was passed by the California Assembly on August 31, 1973, and sent to the Senate for consideration.[34] The bill, if enacted, would create a Citizen's Advisory Committee on Demography. In an attempt to define the potential problems and possible solutions, the Committee would be charged with the task of developing and recommending population goals and policies to guide California's growth and would suggest comprehensive programs designed to enable state, local, and regional agencies to implement a population policy. This action by the Assembly suggests legislative recognition of the developmental chaos which has been fostered by the present policy of permitting unfettered growth.

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In doing so, however, they have continued to rely on techniques which were never designed as timing devices and which do not function well in controlling timing. The attempt to use large-lot zoning, for example, to control timing has all too often resulted in scattered development on large lots, prematurely establishing the character of much later development—the very effect sought to be avoided. . . .

The commission recommends that State governments enable local governments to establish holding zones in order to postpone urban development in areas that are inappropriate for development within the next 3 to 5 years. *Id.* at 245.

29. CAL. GOV'T CODE §34211.1.

30. CALIFORNIA COUNCIL ON INTERGOVERNMENTAL RELATIONS, GENERAL PLAN GUIDELINES at II-3 (Sept. 1973).

31. *Id.* at III-1.

32. *Id.* at IV-1.

33. *Id.* at IV-2.

34. A.B. 1250, 1973-74 Regular Session. The bill is presently awaiting hearing in the Senate Committee on Governmental Organization.

*b. The Scope of the Police Power—Public Welfare, Reasonableness, and Legislative Prerogative.*

The United States Supreme Court recognized early in the history of zoning that the problems, needs, and values encompassed by the concept of public welfare vis à vis zoning are constantly changing. In upholding the constitutionality of comprehensive zoning in *Euclid v. Amber Realty Co.*,[35] the Court described zoning as a broad, expansive power capable of meeting new and unforeseen challenges of future public need. The Court said in clear and unambiguous language:

> [W]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. *Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.* Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable.[36]

This statement demonstrates a judicial awareness that the police power is sufficiently flexible to meet the needs of current problems and conditions—an awareness which has been continuously reemphasized in subsequent cases.[37] Thus it is not altogether unusual that the United States Supreme Court has consistently held since 1937 that debatable issues with respect to business, economic, and social affairs are for legislative, rather than judicial, determination.[38] Accordingly, the *Golden* court did not struggle long in sustaining the reasonableness of the exercise of police power by the town of Ramapo.[39]

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35. 272 U.S. 365 (1926).

36. *Id.* at 386-87 (emphasis added).

37. See, for example, Berman v. Parker, 348 U.S. 26 (1954), *discussed in*, Johnson, *Constitutional Law and Community Planning*, 20 LAW & CONTEMP. PROB. 199, 207-08 (1955):

> *Berman v. Parker* is of the utmost importance. Not only does it sanction a planning device which is the most promising yet attempted at the local level, but it also manifests a sympathetic and tolerant attitude toward community planning in general. The broad reading of the opinion is that the Constitution will accommodate a wide range of community planning devices, as states and local governments seek new ways to meet the pressing problems of community growth, deterioration, and change.

38. See, for example, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Sproles v. Binford, 286 U.S. 374 (1932); see also McClosky, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 S. CT. REV. 35.

39. The court concluded:

In summary, any governmental entity exercising the police power may impose its authority on behalf of its citizens if the interests of the public require interference and the means to that end are reasonable in light of existing conditions—debatable questions as to reasonableness being resolved by the legislature and not by the courts.

### 2. *Unconstitutional as Applied*

The question of whether timing and sequential controls amount to a denial of due process as applied to particular property basically involves the issue of whether the ordinance is so restrictive as to constitute an uncompensated taking in violation of the fifth and fourteenth amendments to the United States Constitution or Article I, Section 14 of the California Constitution. The United States Supreme Court has declared that a regulation under the police power may be so restrictive as to amount to a taking,[40] or that the regulation, as applied, may be wholly arbitrary and without substantial relation to the public health, safety, and welfare so as to be constitutionally invalid.[41] However, if a legitimate purpose is reasonably effected by the regulation, the Supreme Court has held that it must be sustained, even if a substantial diminution in property value would thereby result.[42]

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> In sum, where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and facilities which a substantial increase in population requires, *there is a rational basis for "phased growth" and hence, the challenged ordinance is not violative of the Federal and State Constitutions.*

30 N.Y.2d at 383, 285 N.E.2d at 304-05, 334 N.Y.S.2d at 156 (emphasis added).

In California the courts are also in accord with the United States Supreme Court's view that appurtenant to the exercise of the police power is the presumption that the measure is justified to promote the public health, safety, morals, and general welfare. Sommers v. City of Los Angeles, 254 Cal. App. 2d 605, 610, 62 Cal. Rptr. 523, 527 (1967). *Clemons v. City of Los Angeles* restates the general rule that the zoning authority's decision will be upheld so long as the matter remains a question upon which reasonable minds may differ. 36 Cal. 2d 95, 98, 222 P.2d 439, 441 (1950). Furthermore, according to *Sommers v. City of Los Angeles*, the police power cannot be defined by stated limitations, but rather it is "flexible and expandable to meet changing conditions of modern life." 254 Cal. App. 2d 605, 611, 62 Cal. Rptr. 523, 527 (1967).

40. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

41. Nectow v. City of Cambridge, 277 U.S. 183 (1928).

42. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

Beyond the judicial deference granted legislative prerogative, there is implicit in the theory of police power and the concomitant concept of public welfare, the propostion that incidental injury, such as loss of profit, is not sufficient to render a zoning regulation unreasonable. See Rehfeld v. City and County of San Francisco, 218 Cal. 83, 21 P.2d 419 (1933). The implication, however, like the police power itself, is not limitless. The doctrine of inverse condemnation has sought to draw a fine line of demarcation between regulations enacted pursuant to the police power and the disguised exercise of the power of eminent domain—the latter requiring the payment of just compensation. It has been held that inverse condemnation liability arises when the taking or damaging of private property is not so essential to the general welfare as to be sanctioned under the police power. House v. Los Angeles County Flood Dist., 25 Cal. 2d 384, 388, 153 P.2d 950, 952 (1944). The court phrased the principle in the follow-

Basically, once the regulation is established as within the power of the enacting entity, the question of "reasonableness" in the exercise of that power becomes one of balancing the injury caused the private sector against the public benefit realized by the challenged regulation. The court in *Golden* specifically found that the Ramapo ordinance, as related to petitioner's land, was far from arbitrary—rather it was a reasonable attempt to provide for the orderly development of land.[43] Moreover, the court rejected absolutely the contention that the ordinance was so restrictive when applied to petitioners as to amount to a uncompensated taking.[44] In applying the tests laid down by the United States Supreme Court, the *Golden* court found that petitioners had failed to satisfactorily demonstrate financial loss or deprivation in any of the following ways: that there was any reduction in the value of their property; that there was occasioned the deprivation of either the best or appropriate use of their land; or that the restrictions imposed by the ordinance were unduly broad or of uncertain duration.[45] The *Golden* opinion emphasized that any restraint was temporary and speculated that "within a reasonable time the property will be put to the desired use *at an appreciated value*" because of the capital improvements which would eventually be brought to the property via the public sector.[46] Moreover, since all areas of the town of Ramapo would be provided with facilities at some point during the eighteen-year period of the plan, the court observed that "[t]he net result of the ongoing development provision is that individual parcels may be committed to a residential development use prior to the expiration of the maximum period."[47]

Of course, it should be recognized that, notwithstanding the arguments exalting the reasonableness of timing and sequential controls, such controls place a heavy financial burden on developers. Holding unproductive land for a period of up to eighteen years is an expensive venture to say the least. It can be expected therefore, that opponents of timing and sequential controls will place substantial reliance on

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ing language:

> While the police power is very broad in concept, it is not without restriction in relation to the taking or damaging of property. When it passes beyond proper bounds in its invasion of property rights, it in effect comes within the purview of the law of eminent domain and its exercise requires compensation. If the distinction seems somewhat nebulous, it is because the police power limit of reasonableness is, along with the power it defines, a flexible and expanding concept. Each case must be evaluated on its merits and in light of the necessities of the surrounding circumstances.

Hunter v. Adams, 180 Cal. App. 2d 511, 523, 4 Cal. Rptr. 776, 784 (1960).

43. 30 N.Y.2d at 380, 285 N.E.2d at 303, 334 N.Y.S.2d at 153.
44. *Id.* at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 155.
45. *Id.* at 381-82, 285 N.E.2d at 303-04, 334 N.Y.S.2d at 154-55.
46. *Id.* at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 155-56 (emphasis added).
47. *Id.* at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 155.

the doctrine of inverse condemnation as a means of fiscally intimidating local governmental entities.

To avoid the payment of inverse condemnation damages and, at the same time, to sustain the controls, local governments must successfully argue that ordinances seeking to time and sequentially control residential subdivision growth have as their primary purpose and effect the reasonable regulation of the private sector for the paramount benefit of the public sector. The strength of this argument will ultimately depend upon the reviewing court's evaluation of the need to time growth and the reasonableness of the measures adopted pursuant to such need.

### B. *Restrictions on the Mobility of Population*

It may be argued that the implementation of timing and sequential controls in a particular locality operates to unduly interfere with a citizen's constitutional right to mobility. This argument is based in large part on two United States Supreme Court decisions, *United States v. Guest*[48] and *Shapiro v. Thompson,*[49] which affirm that "[t]he constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union."[50] It would appear to stretch one's sense of reason to assert that the implementation of timing and sequential controls has as its primary purpose the deterrence of interstate movement. On the other hand, it may be argued by opponents of such contols that they nevertheless operate incidentally to deter movement. The argument would proceed as follows: If all undeveloped land in the state were subject to timing and sequential controls, the influx of population into the state would have to be borne by the developed areas or precluded entirely; thus the result is either overpopulation and the attendant central city blight or the substantial interference with entrance into the state.

It is an undeniable fact, however, that every ordinance regulating land use has some effect on the growth of the community and consequently has impact upon the flow of population into the community. The *Golden* court recognized this axiom when it stated:

> It is the nature of all land use and development regulations to circumscribe the course of growth within a particular town or district and to that extent such restrictions invariably impede the forces of natural growth.[51]

48. 383 U.S. 745 (1966).
49. 394 U.S. 618 (1969).
50. 383 U.S. at 757; see also 394 U.S. at 629.
51. 30 N.Y.2d at 377, 285 N.E.2d at 301, 334 N.Y.S.2d at 151, *citing,* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

Additionally, the argument may be countered by responding, as did the court in *Golden* in the process of disposing of the issue, that timing and sequential controls are the product of farsighted planning calculated to promote the general welfare of the municipality—such a purpose is far removed from one designed to "chill the assertion of constitutional rights."[52]

Moreover, it can be postulated that the *ultimate* impact of timing and sequential controls upon population mobility will be far from restrictive. The ordinance and attendant controlled growth will permit a city to maximize its eventual density and, in turn, efficiently accommodate many more people than could possibly be accommodated by immediate and premature development.

### *C. Equal Protection*

The equal protection argument offered against the implementation of timing and sequential controls is basically a three-pronged assertion that can be categorized as follows: (1) the classification and separate treatment of owners of undeveloped residentially zoned property as opposed to owners of improved residential property, industrial property, and commercial property is unreasonable; (2) timing and sequential controls are in effect "snob" or "exclusionary" zoning techniques; and (3) timing and sequential controls operate to restrict one's "fundamental rights" to acquire, enjoy, own, and dispose of property and are therefore subject to justifiable infringement only in the promotion of a compelling governmental interest.

#### *1. Classification*

The essence of zoning is classification according to use. The United States Supreme Court has sustained such use classification as a valid exercise of the police power.[53] Further, a classification will not be set aside if any reasonable set of facts might justify it.[54] Residential development would appear to be an eminently reasonable classification[55]—regulation of the subdivision of residential real estate has long been recognized as a valid classification within both the states and the federal government. For example, the California Subdivision Map

52. Shapiro v. Thompson, 394 U.S. 618, 631 (1969).
53. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
54. See Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961).
55. See Associated Home Builders, Inc. v. City of Newark, 18 Cal. App. 3d 107, 95 Cal. Rptr. 648 (1971); see also Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

Act[56] establishes subdivision standards and prohibits the development and subdivision of parcels into five or more lots without prior subdivision plat approval. With respect to federal law, the Interstate Land Sales Full Disclosure Act[57] regulates the business of offering for sale lots in residential subdivisions.

The need for special legislative treatment of subdivision development has been recognized since *Mansfeld & Swett, Inc. v. Town of West Orange.*[58] It would seem irrational to require local governments to await subdivision development before they could proceed to regulate it, when one of their prime concerns is the control of new growth. Thus it should be argued that the restriction on the timing of this use, as opposed to others, is a completely reasonable one.

### 2. *Exclusionary Zoning*

The United States Supreme Court has said that a local government may validly exclude or limit certain uses even though the regulation operates to incidentally affect certain economic classes. Such exclusion by zoning is deemed valid so long as it does not incorporate racial classifications or affect fundamental interests.[59]

Moreover, while the Pennsylvania Supreme Court struck down large-lot *permanent* zoning as unconstitutional in *In re Kit-Mar Builders, Inc.*,[60] it nevertheless expressly approved the utilization of timing and sequential controls related to the capacity to provide municipal services:

> This is not to say that the Village may not, pursuant to its other and general police powers, . . . impose other restrictions or conditions . . . such . . . as *granting of building permits in stages or perhaps even a moratorium on the issuance of any building permits, reasonably limited as to time.*[61]

Thus the Pennsylvania Supreme Court has recognized, as did the court in *Golden,* the distinction between exclusion effected by permanently freezing development at present levels and the reasonable reg-

56. CAL. BUS. & PROF. CODE §11500 *et seq.* For a general discussion of the Subdivision Map Act and its relationship to the maintenance of environmental quality, see Comment, *Land Development And The Environment: The Subdivision Map Act,* 5 PAC. L.J. 55 (1974).

57. 15 U.S.C. §1701 *et seq.* (1971).

58. 120 N.J.L. 145, 198 A. 225 (1938) (upholding the constitutionality of residential subdivision regulation).

59. See James v. Valtierra, 402 U.S. 137 (1971); *cf.* Taschner v. City Council of Laguna Beach, 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (1972).

60. 439 Pa. 466, 268 A.2d 765 (1970).

61. *Id.* at 473, 268 A.2d at 768 (emphasis added), *quoting* Westwood Forest Estates, Inc. v. Village of South Nyack, 23 N.Y.2d 424, 428-29, 244 N.E.2d 700, 702-03, 297 N.Y.S.2d 129, 133-34 (1969).

ulation of future development designed to assure maximum population density consistent with orderly growth.

*3. Fundamental Interests*

The final equal protection claim is that an individual has the right to acquire, enjoy, own, and dispose of property, and that this right amounts to a fundamental interest. Proponents of this argument would claim that timing and sequential controls operate to classify and restrict this right and therefore can be justified only in the furtherance of a compelling state interest.

There are several answers to such a contention. First of all, the right to use property is not, and never has been, absolute. It is always subject to the legitimate exercise of the police power.[62] Beyond this, such rights have never been held to be "fundamental" by the courts. Indeed, the United States Supreme Court has been willing to find, aside from specific constitutional guarantees, only a few rights which it considers so fundamental as to warrant application of the "strict scrutiny" test.[63] Even if the right were eventually found to be fundamental, preventing urban sprawl and the attendant tax burdens and blight are, at least arguably, compelling interests justifying the infringement of such a right.

*D. The Ultra Vires Issue*

*1. The Ramapo Analysis*

Because the Ramapo plan has withstood attack in the highest court in the State of New York, it would appear to be appropriate to begin analysis of the *ultra vires* issue by briefly examining the argument made in *Golden.* The New York enabling legislation is virtually a verbatim restatement of the Standard State Zoning Enabling Act[64] which was promulgated by a federal advisory committee in 1926. Counsel for the town of Ramapo argued that the authority for the implementation of timing and sequential controls is provided by those portions of the Act which extend to local government the power to control density and to furnish adequate public services, particularly when such controls of residential development are related to capital investment. The court in *Golden* agreed and summarily dismissed the

62. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).
63. Such rights include voting, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), and the right to travel interstate, Shapiro v. Thompson, 394 U.S. 618 (1969).
64. U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926).

*ultra vires* contention, stating, "[T]his much is clear: phased growth is well within the ambit of existing enabling legislation."[65]

### 2. *The California Analysis*

In California, local governmental entities exist by virtue of their creation by the state and consequently have no power to act beyond those powers granted to them via the state constitution or statute.[66] Therefore, while the constitutional attacks previously discussed will be a major factor in the litigation of timing and sequential controls, the most significant question will undoubtedly be whether the local government is acting within the bounds of its constitutional or statutory powers. Unfortunately, because of the fact that there is no specific constitutional or statutory reference for the authority to "phase" growth, any such power exercisable by local governments must be derived by implication and extension of the powers expressly granted.

There is strong support for the proposition that the source of local government's power to zone primarily emanates from Article XI, Section 7 of the California Constitution[67] rather than from so-called zoning "enabling" legislation. For example, in an early California Supreme Court decision considering the validity of zoning, the court stated that "the power [to zone] is conferred upon municipalities in California by the fundamental law of the state *and* by a legislative enabling act."[68] Similarly, in *Scrutton v. County of Sacramento* the court remarked that "[i]n their intrinsic character and by express declaration the state laws on county and city zoning are designed as standardizing limitations over local zoning practices, not as specific grants of authority to legislate."[69]

The argument that local authority to zone is of constitutional origin was reinforced by the 1965 repeal and reenactment of Government Code Section 65800. Former Section 65800 amounted to a general statutory grant to local governments of the power to make zoning regulations by ordinance.[70] The substituted Section 65800 provides, *inter alia*,

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65. 30 N.Y.2d at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150.
66. *See* Hunter v. City of Pittsburgh, 207 U.S. 161 (1907).
67. "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." CAL. CONST. art. xi, §7.
68. Miller v. Bd. of Pub. Works, 195 Cal. 477, 482-83, 234 P. 381, 382 (1925) (emphasis added).
69. 275 Cal. App. 2d 412, 417, 79 Cal. Rptr. 872, 876 (1969).
70. CAL. GOV'T CODE §65800, *as amended*, CAL. STATS. 1961, c. 1111, §1, at 2836.

> [T]he Legislature declares that in enacting this chapter it is its intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters.[71]

In the recent case of *Taschner v. City Council of Laguna Beach*,[72] the court of appeal articulately documents the history of the judicial turmoil over the derivation of local government zoning power and concludes that the legislative acts with respect to Section 65800 should finally lay to rest any doubts as to the source of that power.[73] If correct in analysis to this point, *i.e.*, that the power of a local entity to enact land use controls is constitutional in origin, Government Code Section 65800 clearly establishes that the legislative intent was not to preempt local governments from the field except to the extent that specific statutory provisions would have that effect.

However, if we assume, for the purpose of complete analysis, that the California Supreme Court would eventually find that the true basis for local power to enact land use controls is *statutory* as opposed to constitutional, two issues would be raised: (1) is there enabling legislation in existence from which it can be implied that a local government has the power to time the rate of residential subdivision growth within its borders; and (2) if so, what aspects of municipal concern can properly be employed as rationale for the exercise of such power?[74]

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71. CAL. GOV'T CODE §65800, *added*, CAL. STATS. 1965, c. 1880, §6, at 4346.

72. 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (1973).

73. A full analysis of the source of power question requires a resolution of the conflict between Government Code Section 65850, CAL. STATS. 1965, c. 1880, §6, at 4346, *amended*, CAL. STATS. 1970, c. 1590, §11, at 3314, which appears to impose specific limitations on the types of land use control over which local governments have the power to regulate, and Section 65800, which reserves maximum control over zoning matters to local governments. General principles of statutory construction dictate that particular provisions should control over more general ones whenever a conflict exists. CAL. CIV. CODE §3534. Rigid application of this principle to Sections 65800 and 65850 would result in the conclusion that the more specific limitations of Section 65850 would control over the more general and conflicting provisions of Section 65800. However, the better reasoned approach, one more in line with the fact that Section 65800 is a legislative purpose provision, would result in the conclusion that Section 65850 can only be read with reference to the interpretive gloss supplied by Section 65800. Pursuant to this analysis, Section 65850's list of permissible local government land use activities is merely suggestive rather than exclusive. Any other interpretation would produce the anomalous result that the legislature has chosen to recognize local governments' broad constitutional powers in one statute and then proceeded to erode such powers in another section.

74. With respect to these issues, it should be noted at the outset that in *Golden* the implementation of timing and sequential controls by the town of Ramapo was found to be within the powers granted by New York zoning enabling legislation. While California, like New York, has fashioned its zoning enabling legislation after the Standard State Zoning Enabling Act, the language variance between the California and New York versions may be sufficient to preclude a valid analogy. For example, while the New York legislation provides that "such [zoning] regulations shall be made in accordance with a comprehensive plan and designed to . . . prevent the overcrowding of land . . . [in order] to facilitate the adequate provision of transportation, water,

*a. California's Statutory Land Use Scheme*

In California a local government's exercise of zoning powers must be consistent with its general plan.[75] The primary function of a local government's general plan is that of serving "as a pattern and guide for the orderly physical growth and development . . . of the county or city . . . ."[76] This goal is effectuated through the inclusion of various mandatory and permissive elements in accordance with which zoning regulations or ordinances must be enacted.[77] The legislature has mandated that the general plan consist of a statement of development policies including, in part, a land use element designating the general distribution, location, and extent of uses for housing, business, industry, open space, education, public buildings and grounds, solid and liquid waste disposal facilities, and other categories of public and private uses of land.[78] California law *requires* that the general plan include policy statements concerning transportation circulation and housing, and provides that the general plan *may* include a policy statement relating to public services and facilities such as sewerage, refuse disposal, drainage, and local utilities.[79] More specifically, the land use element requires a statement of standards with respect to "population density,"[80] and the housing element requires that provisions be made for *adequate* housing sites.[81]

The significance of the requirement of these elements as potential authority for local government to phase growth is reinforced by Government Code Section 65451 which requires the local planning agency, if so directed by the legislative body, to prepare *specific plans* that would *systematically implement* the general plan. The specific plans need not apply to the entire geographical area covered by the general plan, but must include regulations, conditions, programs, and proposed legislation detailing the location of housing, recreational facilities, educational facilities, public buildings, and existing and proposed streets and roads.[82] Further, Government Code Section 65303(g) makes direct reference to the subdivision of land in the permissive community design element:

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sewerage, schools, parks, and other public requirements," N.Y. TOWN LAW §263 (McKinney 1965), the parallel California statute merely specifies that "city zoning ordinances shall be consistent with the general plan of the . . . city . . . ." CAL. GOV'T CODE §65860(a). Therefore, it would be unwise for California local governments to rely exclusively upon the *Golden* court's resolution of the power question.

75. CAL. GOV'T CODE §65860(a).
76. CAL. GOV'T CODE §65400.
77. CAL. GOV'T CODE §§65302, 65303, 65860(a).
78. CAL. GOV'T CODE §65302.
79. CAL. GOV'T CODE §65303(e).
80. CAL. GOV'T CODE §65302(a).
81. CAL. GOV'T CODE §65302(c).
82. CAL. GOV'T CODE §65500 *et seq.*

> [The general plan may include a] community design element consisting of standards and principles governing the subdivisions of land, and showing recommended designs for community and neighborhood development and redevelopment, including sites for schools, parks, playgrounds and other uses.

Additionally, a local governing body is permitted to include supplementary elements dealing with subjects which, in the judgment of the planning agency, relate to the *physical development* of the county or city.[83]

Thus it can be argued that the California statutory provisions respecting mandatory and permissive elements are in effect broad guidelines enacted in an effort to give local governments some direction in charting their ultimate land utilization. It would follow, therefore, that local governments would be empowered to plan their orderly physical growth and development in a manner not only consistent with these broad guidelines, but also commensurate with their own legitimate development goals.

If the entity's development goal is the maximum, efficient utilization of land within its borders, the pivotal issue is whether these broad guidelines permit an entity to plan the time and spatial synchronization of its future growth to coincide with the planned availability of facilities and services. The Ramapo experience has shown that coordinating the rate of growth with the availability of facilities and services is a reasonable and practical means for effectuating the planning process and clearly serves as a pattern and guide for orderly physical growth. In fact, such orderly growth would be impossible if developers were unqualifiedly permitted to subdivide land for residential use and thereby force municipalities to provide facilities and services as a response to development rather than in anticipation of it. Thus it can be argued that time coordination is an essential aspect of the planning process and is implicit in the planning enabling legislation in California.

*b. The Subdivision Map Act*

The Subdivision Map Act[84] regulates the physical division of land in California. The full extent of this power, however, is nebulous. In an apparent attempt to define the limits of local regulation in this area, the Act provides that a local governing body may regulate the "design" and "improvement" of subdivision by local ordinance.[85]

83. CAL. GOV'T CODE §65303(j).
84. CAL. BUS. & PROF. CODE §11500 *et seq.*
85. CAL. BUS. & PROF. CODE §11525.

"Design" and "improvement" are defined as follows:

(1) "Design" refers to street alignment, grades and widths, alignment and widths of easements, and rights-of-way for drainage and sanitary sewers and minimum lot area and width. "Design" also includes land to be dedicated for park or recreational purposes. "Design" also refers to such specific requirements in the plan and configuration of the entire subdivision as may be necessary or convenient to insure conformity to or implementation of applicable general or specific plans of a city or county.[86]

(2) "Improvement" refers to such street work and utilities to be installed, or agreed to be installed by the subdivider on the land to be used for public or private streets, highways, ways and easements, as are necessary for the general use of the lot owners in the subdivision and local neighborhood traffic and drainage needs as a condition precedent to the approval and acceptance of the final map thereof. "Improvement" also refers to such specific improvements, the installation of which, either by the subdivider, by public agencies, by private utilities, or by a combination thereof, is necessary or convenient to insure conformity to or implementation of applicable general or specific plans of a city or county.[87]

It might be argued that any attempt by a local government to extend subdivision regulation beyond "design" and "improvement," as defined, should be invalidated by virtue of the doctrine of preemption. On the other hand, subsequently enacted sections of the Act appear to extend the scope of local regulation by permitting denial of either final or tentative tract maps on grounds not specifically related to "design" and "improvement." For example, Section 11549.5 of the Subdivision Map Act provides in relevant part that a governing body of a city or county shall deny approval of a final or tentative subdivision map if it makes any of the following findings:

(a) That the proposed map is not consistent with applicable general and specific plans; . . .

(c) That the site is not physically suitable for the type of development;

(d) That the site is not physically suitable for the proposed density of development; . . .

(f) That the design of the subdivision or the type of improvements is likely to cause serious public health problems.

86. CAL. BUS. & PROF. CODE §11510.
87. CAL. BUS. & PROF. CODE §11511.

Reading Section 11525 together with Section 11549.5 leads to the anomalous conclusion that a local governing body may regulate by ordinance only the design and improvement of subdivisions, but may altogether preclude subdivisions based on factors other than those announced by the regulatory portions of such ordinance. Thus the Subdivision Map Act would appear to provide that while the doctrine of preemption precludes local government use of precise timing controls at the subdivision regulation level, the same result can nevertheless be reached, in an *ad hoc* fashion, by refusal to approve a proposed subdivision map if the land is not, in the determination of the local governing body, "ready" for the type or density of development proposed.

It could be argued, however, that another method of implementing timing and sequential controls under the Subdivision Map Act would be use of the local government power to exact reasonable conditions for the design, dedication, improvement, and use of the land so as to conform to the safety and general welfare of the lot owners in the subdivision, as well as the general public. An exaction of this type was upheld by the California Supreme Court in the leading case of *Ayres v. City Council of Los Angeles.*[88] The court held that it is the developer who is seeking to acquire the advantages of lot subdivision and, therefore, the duty of compliance rests with him. The court also suggested that reasonableness is the hallmark of validity. A more recent appellate decision, *Scrutton v. County of Sacramento,*[89] quoted the following language from *Ayres* in an attempt to find a more precise standard:

> [W]here it is a condition reasonably related to increase traffic and other needs of the proposed [land use], it is voluntary in theory and not contrary to constitutional concepts.[90]

The court went on to state that

> [t]he *Ayres* formulation may be generalized by the statement that conditions imposed on the grant of land use applications are valid if reasonably conceived to fulfill public needs emanating from the landowner's proposed use.[91]

*Scrutton* also indicates judicial recognition of two kinds of local need—one being the protection against the potentially deleterious effects of the landowner's proposal,[92] and the other being the commu-

88. 34 Cal. 2d 31, 207 P.2d 1 (1949).
89. 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969).
90. *Id.* at 421, 79 Cal. Rptr. at 879, *quoting* 34 Cal. 2d at 42, 207 P.2d at 8.
91. 275 Cal. App. 2d at 421, 79 Cal. Rptr. at 879.
92. *Id.*

nity's needs for facilities to meet public service demands created by the proposal.[93] For this latter proposition, the court in *Scrutton* cited with approval *Bringle v. Board of Supervisors of Orange County*.[94] Although *Bringle* was a case involving the granting of a variance rather than subdivision dedication, the court reasoned that exactions for the approval of variances are controlled by the same standards as those exactions and dedications often required for subdivision approval.[95] Thus there are two lines of cases that can be employed to support the argument that a developer's refusal to provide the required capital facilities to meet the point requirements in a Ramapo-type zoning ordinance is a valid basis for denying approval to a subdivision. In further support of this argument, it might be noted that in a recent decision, *Associated Home Builders, Inc. v. City of Newark*,[96] a court of appeal rejected an equal protection argument in upholding a tax imposed on the business of constructing dwelllings, while taxing industrial and commercial structures at a lower rate. The court hypothesized that the local governing body's possible determination that residential dwellings required relatively greater fire and police protection and street use would sustain the classification.[97] It can be argued, by analogy, that conditioning the granting of residential building permits or subdivision approval on the adequacy of municipal services has the same genesis, *i.e.*, the increased demand created by the subdivision justifies requiring a developer to provide all services deemed necessary by the city in lieu of the tax imposed.

On the other hand, in *Associated Home Builders, Inc. v. City of Walnut Creek*,[98] which upheld the validity of park land dedication requirements,[99] the California Supreme Court recognized, without resolving the question, that while undeveloped land is a limited resource which is difficult to conserve in a period of increased population pressure, and new subdivisions diminish supply and increase demand for this precious commodity, the need for additional park land caused by the building of a subdivision can be distinguished from the more general or diffuse need created for such area-wide services as fire and police protection.[100]

Due to the possible limitations with respect to the use of the Sub-

93. *Id.*
94. 54 Cal. 2d 86, 351 P.2d 765, 4 Cal. Rptr. 493 (1960).
95. 275 Cal. App. 2d at 442, 79 Cal. Rptr. at 879.
96. 18 Cal. App. 3d 107, 95 Cal. Rptr. 648 (1971).
97. *Id.* at 110, 95 Cal. Rptr. at 649.
98. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).
99. CAL. BUS. & PROF. CODE §11546.
100. 4 Cal. 3d at 641-42, 484 P.2d at 613, 94 Cal. Rptr. at 637.

division Map Act to effect development timing, it would be advisable for a local entity to effectuate such a plan at the zoning level.

## GROWTH CONTROL PROGRAMS IN CALIFORNIA

Several local governments in California have enacted, or are considering enacting, growth control measures utilizing the various approaches previously discussed. Representative schemes will be briefly examined at this point for the purpose of evaluating their relative strengths and weaknesses and for the purpose of emphasizing the crucial role that the entire planning and implementation process played in the ultimate success of Ramapo's timing and sequential controls.

### *A. Association of Bay Area Governments*

On October 11, 1973, the Association of Bay Area Governments adopted a policy statement which articulated a long-range regional growth policy for the San Francisco Bay Area.[101] The statement proposed that a study be designed and conducted to predict the relative consequences, during the period of 1980 to 2000 of alternative growth rates on community and regional resources, expenditures, and the general quality of life. The policy statement also included a resolution declaring the Association's willingness to assist local governments by formulating long-range alternative regional growth plans and by recommending tools for local government use in the implementation of growth controls when such controls are deemed desirable.

The Association recognized that any attempt to control growth in one community might result in the redirection of population and economic growth into other surrounding communities. Moreover, the Association was sensitive to the fact that growth restrictions, particularly those resulting in the imposition of economic barriers, have the inherent potential to affect the availability of minority housing.

The Association's considerable interest in the area of land use regulation is mentioned here for the purpose of indicating the potential for regional participation in the growth control process. In the final analysis, regionally coordinated growth control systems would appear to be administratively superior to a series of inconsistent growth control programs unilaterally enacted by the various governmental entities which comprise the region.[102]

101. Ass'n of Bay Area Governments, General Assembly Resolution No. 3-73, Policy Statement: Formulation of Long-Range Regional Growth Policy, Oct. 11, 1973, on file at the *Pacific Law Journal*, Sacramento, Calif.

102. It is interesting to note that the dissent in *Golden* was predicated on the belief that growth control is a matter reserved for exclusive regional or state-wide regulation.

Prior to the drafting of the Association's policy statement, and without the aid of the long-range planning offered thereby, several Bay Area communities adopted ordinances seeking to control growth. Among these are Pleasanton and Livermore, whose plans are discussed immediately below.

### B. *Pleasanton and Livermore*

In both cities growth control ordinances were presented to the respective city councils by way of the initiative process.[103] The ordinances were designed to control the overall issuance of residential building permits. They stated, in substance, that no further residential building permits were to be issued by the cities until: (1) a sufficient number of educational facilities are established so as to avoid double sessions and overcrowded classrooms in the schools, as determined by the school district governing board;[104] (2) adequate standards and capacities for sewer treatment facilities are promulgated under Regional Water Quality Control Board guidelines;[105] and (3) requisite water supply levels are present to avoid rationing of water with respect to human consumption or irrigation and to provide adequate water reserves for fire protection.

Pursuant to the initiative ordinance, the City of Livermore adopted Ordinance No. 801, which limited the number of permits issuable, for the construction of dwelling units to 1,500.[106] The issuance of building permits for commercial and industrial construction was also restricted.[107]

In *Associated Home Builders, Inc. v. City of Livermore*[108] the Ala-

30 N.Y.2d at 393, 285 N.E.2d at 311, 334 N.Y.S.2d at 165 (Breitel, J., dissenting). Even the majority paused to observe:

> Of course, these problems cannot be solved by Ramapo or any single municipality, but depend upon the accommodation of widely disparate interests for their ultimate resolution. To that end, Statewide or regional control of planning would insure that interests broader than that of the municipality underlie various land use policies.

30 N.Y.2d at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150; see also Marks & Taber, *Prospects For Regional Planning In California*, 4 PAC. L.J. 117 (1973).

103. Livermore, Calif., Initiative Ordinance Re Building Permits, *approved* Apr. 11, 1972, *effective* Apr. 28, 1972; Pleasanton, Calif., Initiative Ordinance Re Building Permits, *approved* Apr. 11, 1972, *effective* Apr. 28, 1972.

104. See CAL. EDUC. CODE §1052 (directing each school district governing board to prescribe rules for the government and discipline of the schools under its jurisdiction).

105. See CAL. WATER CODE §13240 (directing each California Regional Water Quality Control Board to formulate and adopt water quality control plans for all areas within the region).

106. Livermore, Calif., Ordinance 801, Sept. 25, 1972.

107. *Id.*

108. Civ. No. 425754 (memorandum decision, Sup. Ct., Alameda Co., Dec. 29, 1972), *appeal docketed*, 1 Civ. 33383 (Cal. App. 1st dist.). It should be noted that on September 25, 1972, Civ. No. 425752, involving the City of Pleasanton as defend-

meda County Superior Court enjoined the City of Livermore from enforcing the initiative measure. The court concluded that the ordinance was void because of the absence of reasonably definable or ascertainable administrative standards or procedures.[109] The court also found that the ordinance lacked merit because it established only one assurance, *i.e.*, that there would be no further residential construction—the effect of which was to erect a wall around the city.[110] Apparently, the court's dissatisfaction with the ordinance was also based on its belief that a general law city has no power to enact a zoning ordinance by means of an initiative measure, nor the power to regulate subdivision development—a field fully occupied by the state under the Subdivision Map Act.[111] However, as has previously been discussed, an argument can be made that a local government's ability to control the design and improvement of subdivisions under the Act may provide a source of power for carefully drafted standards which condition the approval of residential subdivisions and have the effect of phasing growth.

Notwithstanding the court's remarks, the basic weakness in the ordinance would appear to be the fact that the controls imposed by the ordinance, taken as a whole, amounted to a moratorium or freeze on residential subdivision. Such an unqualified moratorium lacks the necessary reasonableness to be considered a valid interim development control. However, California courts will undoubtedly sustain a moratorium on residential development if it is imposed for a limited and definite period of time and if its purpose is legitimate, *e.g.*, to obtain additional information for public studies or to initiate specific action that will culminate in definition of the status of property rights.[112]

### *C. Milpitas*

The City of Milpitas, faced with an economic inability to construct required elementary and junior high school facilities, halted all residential development pending a planning study under the federally-funded 701 Program of the Housing Act of 1954.[113] The city's major concern

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ant, was consolidated with this action by court order. However, because of the failure of counsel for the City of Pleasanton to appear, the memorandum decision related only to the City of Livermore.

109. *Id.* at 2.

110. *Id.*

111. See *id.* at 3-4.

112. It should be noted that in March 1973 Livermore adopted an ordinance imposing a moratorium on residential development pursuant to Government Code Section 65858 (granting local governments the power to enact interim ordinances as urgency measures). Livermore, Calif., Ordinance 813, Mar. 19, 1973.

113. Milpitas, Calif., Ordinance 38.235, Dec. 5, 1972.

was that the development of residential uses, without simultaneous industrial and commercial development, would decrease the tax base and substantially interfere with the ability of the community to provide educational services at a level commensurate with the desires of the community and at a cost within the community's ability to pay. The moratorium on future development was accomplished by forbidding the issuance of any building permit, use permit, site or architectural approval, or any other permit relating to or authorizing new residential construction which would generate more pupils in the city's schools than could be properly educated in accordance with the present school tax rate.[114] Formulas are provided for determining the approximate number of pupils which would be generated by different types of new residential units. The city council is permitted to increase the allowable number of dwelling units by a limited amount if it finds that the city can accommodate the increased growth.[115] The moratorium placed on residential development by Milpitas is consistent with the interim development controls utilized by Ramapo. Interim controls are essential to prohibit development which would be inconsistent with a general plan as finally adopted. Accordingly, the use of interim controls has been upheld in California.[116]

### *D. Petaluma*

The City of Petaluma has established a Residential Development Control System in an effort to control the city's rapid rate of growth.[117] The Petaluma plan is similar in rationale and basic design to the Ramapo system but is significantly more complex in its detail. However, the Petaluma plan, unlike its Ramapo counterpart, contains defects that may prove fatal in the California courts.

The Petaluma City Council declared its ultimate goal to be the establishment of control over the quality, distribution, and growth rate of the city in the interest of:

(1) Preserving the quality of the community;

(2) Protecting the green open-space frame of the City;

(3) Insuring the adequacy of City facilities and services within acceptable allocation of City and school tax funds;

(4) Insuring a balance of housing types and values in the City which will accommodate a variety of families including fam-

114. *Id.* at XI 10-8.14.
115. *Id.* at XI 10-8.35.
116. Hunter v. Adams, 180 Cal. App. 2d 511, 4 Cal. Rptr. 776 (1960).
117. Petaluma, Calif., Residential Development Control System of the City of Petaluma, *adopted by* Petaluma City Council Resolution No. 6113 N.C.S., Aug. 21, 1972.

ilies of moderate income and older families on limited, fixed incomes; and

(5) Insuring the balanced development of the City, east, north, and west of the central core.[118]

If Petaluma's residential development control procedures were adopted pursuant to this policy, the city's motivation would probably be unassailable. The problem is that an additional city policy is announced in Petaluma's Environmental Design Plan[119]—the protection of the city's "small town character."[120] It is indeed questionable whether a city may, under its police power, control the rate of growth in pursuit of such a goal. Basically, the police power, like the due process clause of the fourteenth amendment, requires that in its exercise a city use reasonable means to achieve a legitimate end. Unlike Ramapo's desire to ultimately maximize development of the community, Petaluma apparently seeks to minimize growth. Thus the end sought by Petaluma raises serious doubts as to the plan's validity.

Moreover, the Petaluma plan raises the familiar issue as to whether the means utilized under the police power are reasonable. Petaluma has based its Residential Development Control System on the General Plan[121] and the Environmental Design Plan[122] evidencing a detailed and comprehensive planning process. In accordance with these plans, the Residential Development Control System establishes a procedure whereby any subdivider of more than four parcels is required to submit a development allotment application[123] to be assessed by an evaluation board.[124] The board is required to evaluate all properly submitted applications and to make recommendations to the city council based on criteria similar to, but more extensive than, those required by Ramapo.[125] Specifically, the board must consider whether the proposed development is in conformity with the city's plans and must tabulate development points reflecting the degree of availability of five major public facilities and services in accordance with a system similar to that contained in the Ramapo Zoning Ordinance.[126] After discarding

118. *Id.* at 1.
119. Petaluma, Calif., Petaluma Environmental Design Plan, *adopted by* Petaluma City Council Resolution No. 6008 N.C.S., Mar. 27, 1972.
120. *Id.* at 31.
121. Petaluma, Calif., Petaluma General Plan, *adopted by* Petaluma City Council Resolution No. 2929 N.C.S., Mar. 5, 1962.
122. Petaluma, Calif., *supra* note 119.
123. Petaluma, Calif., *supra* note 117, at 4-5.
124. *Id.* at 2.
125. *Id.* at 5-8.
126. In addition, Petaluma's Residential Development Control System includes eight elements not present in the Ramapo Zoning Ordinance. Each development application is examined by the Evaluation Board and rated, by the assignment of zero to ten points, on each of the following attributes:

those applications which are not in conformity with the plans or which fail to meet a minimum point requirement, the board turns the remaining applications over to the city council which then proceeds to grant building permits to a fixed number of developers achieving the highest scores.[127] Herein lies the probable defect in the means established to achieve the end. The Residential Development Control System establishes a maximum annual quota of 500 new dwelling unit permits,[128] which may be increased by the council in an amount not greater than ten percent in any given year,[129] for the purpose of maintaining the "small town character" of Petaluma. Consequently, the argument can be made that the city's concern over the adequacy of its facilities and services in relationship to mounting development pressures is not properly alleviated by the use of *quantitative* quotas—such a method operating only to regulate growth at an arbitrary rate. Unlike the Ramapo plan, Petaluma's growth rate restrictions appear to be completely unrelated to a comprehensive plan and evidence a failure to consider current demographic trends.

In *Construction Industry Association v. City of Petaluma*,[130] the United States District Court for the Northern District of California ruled that Petaluma's Residential Development Control System violates the constitutionally protected right to travel.[131] Apparently the court

(1) Site and architectural design quality which may be indicated by the harmony of the proposed buildings in terms of size, height, color and location with existing neighboring development.
(2) Site and architectural design quality which may be indicated by the amount and character of landscaping and screening.
(3) Site and architectural design quality which may be indicated by the arrangement of the site for efficiency of circulation, on and off site traffic safety, privacy, etc.
(4) The provision of public and/or private usable open space and/or pathways along the Petaluma River or any creek.
(5) Contributions to and extensions of existing systems of foot or bicycle paths, equestrian trails, and the green belt provided for in the Environmental Design Plan.
(6) The provision of needed public facilities such as critical linkages in the major street system, school rooms, or other vital public facilities.
(7) The extent to which the proposed development accomplishes an orderly and contiguous extension of existing development as against "leap frog" development.
(8) The provision of units to meet the City's policy goal of eight percent to twelve percent low and moderate income dwelling units annually.

*Id.* at 7.

127. *Id.* at 8-11.

128. *Id.* at 3.

129. *Id.*

130. No. C-73-0633-LHB (N.D. Cal., Apr. 26, 1974).

131. The court states that the right to enter and live in any state or municipality in the union is a "fundamental right," *Id.* at 16, and that a "zoning regulation which has as its purpose the exclusion of additional residents in any degree is not a compelling governmental interest, nor is it one within the public welfare." *Id.* at 27. The holding does not encompass exclusively the numerical limitations of the plan (500 new units a year), but also "any and all features of the plan which, directly or indirectly, seek to control population growth by any means other than market demands."

disapproved the existence of the quantitative quotas in the growth control plan, restricting growth to 500 dwelling units per year. The decision, however, has left unresolved the broader question of whether a city may control the rate and location of its residential growth in Ramapo fashion.

### *E. San Jose*

On April 10, 1973, the voters of San Jose approved a ballot measure which enacted an ordinance placing a two-year moratorium on zoning for residential purposes in neighborhoods where the degree of existing and planned school building construction per pupil fails to meet certain minimum standards.[132] The ordinance also required the commencement of interim studies on all issues relating to further residential development. The inclusion of the latter requirement might be sufficient to qualify the measure as a valid form of interim development control. If, on the other hand, the measure is interpreted as an absolute prohibition against new subdivisions on the ground that local school facilities are inadequate to cope with the influx of new families, the ordinance would most likely be found invalid. If the ordinance were construed not as a subdivision regulation but as a zoning regulation providing exceptions on a lot size basis, it would most likely be upheld as valid large-lot zon-

*Id.* at 27. Because virtually any land use or density regulation is designed to have at least some degree of impact on population growth, the implications of the decision are staggering.

It should be noted that the court briefly distinguished the case of Belle Terre v. Boraas, 43 U.S.L.W. 4475 (1974), wherein the United States Supreme Court upheld zoning which prohibited occupancy of a dwelling unit by more than two unrelated persons saying that the facts of that case, unlike *Petaluma*, did not involve the right to travel. However, the *Belle Terre* decision does not suggest that the right to travel argument could be used to invalidate a zoning ordinance and, indeed, the *Belle Terre* majority states that a local government may "lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people"—indicating that protection of existing residents from uncontrolled and high density growth is a valid zoning purpose. *Id.* at 4477. Even the dissent in *Belle Terre* did not employ the right to travel argument in urging the overturning of the ordinance. Indeed, Justice Marshall, in asserting that the *Belle Terre* ordinance violates the Constitution, said that it is proper for an ordinance to restrict uncontrolled growth, but that the *Belle Terre* ordinance violated the fundamental freedoms of privacy and association in doing so. *Id.* at 4479, Marshall, J., dissenting.

A sounder alternative to the absolutist position of the fundamental right theory of the *Petaluma* holding would be to judge the ordinance pursuant to the due process test which requires that it bear a rational relationship to a legitimate state interest and to take into account applicable regional plans and regional housing needs in determining the reasonableness of the local ordinance. The fault of the *Petaluma* decision is that besides a few idle speculations as to the plight of the region if "the 'Petaluma Plan' . . . were to proliferate throughout the San Francisco region," No. C-73-0633-LHB at 14, the court does not address the question of whether the plan would place an unreasonable hardship on the people of the region. Instead, the court takes the simplistic and precedent-defying position that any local government attempt to interfere with the residential real estate market is unconstitutional.

132. San Jose, Calif., Initiative Ordinance Re Restricted Zoning for Residential Purposes, *approved* Apr. 10, 1973, *effective* Apr. 27, 1973.

ing; assuming, of course, that adequate findings were present to justify such zoning based on the public health, safety, and welfare. However, if so construed, two additional problems would emerge. First, the ordinance would be subject to the same attack that caused the Livermore ordinance to be invalidated, *i.e.*, the illegality of zoning by initiative.[133] Secondly, local government endeavors to control the timing of residential development by the use of large-lot zoning "has all too often resulted in scattered development on large lots, [thus] prematurely establishing the character of later development—the very effect sought to be avoided."[134]

### *F. San Diego*

The City Council of San Diego has adopted a policy statement seeking to regulate growth.[135] The council is presently conducting public hearings on the possibility of modifying the existing community plan to incorporate a number of "phased development" guidelines. In essence, the council appears to contemplate a phased neighborhood development plan consistent with the general plan and other existing planning tools. Under such a plan the maximum development of dwelling units, as specified under a time schedule covering a five-year growth period, must correspond to the development of public facilities necessary to accommodate such growth. While the neighborhood development plan would suggest many proposals for eventual implementation, it would not immediately effect the enactment of new regulations, nor would it rezone property. It would, however, establish guidelines for the future preparation or amendment of city ordinances. The San Diego Plan appears to be very similar to the Ramapo plan and may therefore be considered a viable model for California local governments.

### *G. Palo Alto*

Palo Alto has recently rezoned a substantial foothill area from a low-density residential classification to an open-space classification.[136]

133. People's Lobby, Inc. v. Board of Supervisors of the County of Santa Cruz, 30 Cal. App. 3d 869, 106 Cal. Rptr. 166 (1973); *but see*, San Diego Bldg. Contractors Ass'n v. San Diego City Council, 35 Cal. App. 3d 384, 110 Cal. Rptr. 758 (1973) (holding that with respect to charter cities, at least in the case where the charter so specifies, ordinances may be enacted via the initiative process); Bayless v. Limber, 26 Cal. App. 3d 463, 102 Cal. Rptr. 647 (1972).

134. THE NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 245 (1960).

135. San Diego, Calif., City Council of San Diego, Council Policy No. 600-18: Residential, Commercial, Industrial Development, July 6, 1972.

136. Palo Alto, Calif., Ordinance 2654, June 5, 1972.

The California Court of Appeal, First District, is currently considering challenges to this action by the city,[137] and its eventual decision may answer the important question of whether a city can use open-space zoning as a flexible tool in shaping urban growth without exposing itself to the risk of inverse condemnation liability.

## CONCLUSION

Notwithstanding the possible drawbacks outlined above, timing and sequential controls present a unique opportunity for California local governments to avoid the blighted aftermath of suburban sprawl, to lower tax rates by providing municipal services when the city is ready rather than as dictated by the developer.

As indicated above however, all of the California cities which have reached the implementation stage of their growth control programs have eventually been called upon to defend their programs in either the federal or state courts. Accordingly, it is suggested that any local government seeking to devise a growth control program do so only after an extensive analysis of its needs. This analysis should begin with engineering and economic studies of the most feasible means of extending required public facilities and services throughout the planning area. This analysis will require close cooperation with other public agencies having jurisdiction within the limits of the local government's boundaries. These studies should be integrated with the local government's overall planning objectives and combined into a sequential development plan. Further studies should be conducted in light of the sequential development plan culminating in a capital improvement program designed to implement the plan. This entire process should be carefully and conscientiously undertaken. In this regard, it should be recalled that in the development and implementation of its timing and sequential controls, Ramapo expended hundreds of thousands of dollars over five years of exhaustive planning. Ramapo's plan followed a slow and deliberate process of planning and implementation. This factor undoubtedly operated as a major influence on the *Golden* court. It is submitted, therefore, that any attempt by a California local government to develop similar controls without the foundation of extensive planning demonstrated by Ramapo would meet with resounding failure in the California courts.

137. Beyer v. City of Palo Alto, Civ. No. P22974 (Sup. Ct., Santa Clara Co., July 12, 1973), *appeal docketed*, 1 Civ. 34134 (Cal. App. 1st dist.); Eldridge v. City of Palo Alto, Civ. No. 282965 (Sup. Ct., Santa Clara Co., Mar. 26, 1973), *appeal docketed*, 1 Civ. 33517 (Cal. App. 1st dist.).