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Foreword

Daniel P. Selmi

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FOREWORD

Daniel P. Selmi

I. INTRODUCTION: THE GROWTH DILEMMA

Accommodating economic and population growth within reasonable environmental constraints is, of course, a central dilemma of modern environmental legislation. Public opinion polls consistently show that citizens prefer both a booming economy and strict environmental controls. But if we have learned anything since the advent of the modern environmental regulatory era in the early 1970s, it is that accommodating these twin goals is far from simple.

One popular response to the problem of burgeoning growth over the last twenty years has been the adoption of so-called "growth management" ordinances, laws intended to resolve the tension between development in an area and preservation of the "quality of life" which led individuals to reside there in the first instance. The growth management movement in California has ebbed and flowed over the last two decades. Growth control ordinances were prominent in the early 1970s and led to landmark judicial decisions upholding the constitutionality of such procedures.¹ By the early 1980s the movement seemed to wane, as concern over the economy outweighed, or at least temporarily masked, concern over the effects of growth. In the mid to late 1980s, however, growth management once again caught the public's fancy. During this period the movement was intensely political, with voters often utilizing initiatives to signal their displeasure with the current state of affairs.

The focus of growth control by this time had shifted somewhat from earlier incarnations. The most common goal of the early growth control efforts was to prevent "premature urbanization." These laws attempted to direct growth so as to avoid unnecessary conversion of agricultural resources and to prevent urban sprawl.² By the late 1980s, the focus in California had shifted to assuring the availability of the public service infrastructure, as the dominant concern now centered on overcrowded

1. *See, e.g., Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 890 (9th Cir. 1985); *Associated Home Builders v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

2. *Construction Indus.*, 522 F.2d at 902 (city plan was designed to protect "small town character and surrounding open space" and "to prevent the sprawl of the city to the east and north").

freeways and inadequate transportation systems. The word "gridlock" often played a key role in debates over how growth should be approached. The term "growth control" was used less often; "growth management" became the operative phrase.

Both this renewal of the growth management movement in the late 1980s, as well as the shift in its emphasis, suggest that now is an opportune time for a symposium on the subject. Other factors also indicate that a comprehensive revisit of this topic would be particularly useful at present. For one thing, since lengthy case histories of various growth control mechanisms exist, we can examine their effectiveness and use these histories to inform the drafting of future ordinances. Additionally, at least in California, the choice of appropriate regulatory mechanisms for managing growth is currently the subject of intense debate. In particular, the discussion centers on the proper role of regional and state government in the managing of growth decisions which have historically been the province of local government.³ Finally, laws regulating growth inevitably raise the spectre of violations of the fifth amendment's prohibition against governmental takings of private property without compensation, and in recent years the Supreme Court has issued several decisions that bear directly on the constitutional limits of growth management ordinances.⁴ These decisions color the present discussion of how growth management should be approached and cast new light on the legal issues raised by growth management ordinances.

The Articles in this symposium examine growth management from four very different perspectives. First, two of them present what might be termed a "snapshot" of the current system in California. A second group analyzes currently debated issues about the appropriate institutional structure of a growth management regulatory scheme. Another set of three Articles is future-oriented; these Articles suggest how certain natural resource constraints, which currently exist and which will almost certainly increase, will likely impact the approach to growth manage-

3. See, e.g., *Governor Seeks Deferral of Growth Management Legislation*, CAL. ENV'L INSIDER, Feb. 15, 1991, at 9 (noting that Governor Pete Wilson had formed the "Governor's Interagency Council on Growth Management," and that "placing some form of control on the state's explosive growth" was a promise made by the Governor during the 1990 campaign. The article also noted that the Governor had requested state legislators who had introduced legislation to defer action on their bills until the newly formed Commission had made its recommendations); see also ASSEMBLY OFFICE OF RESEARCH, CALIFORNIA 2000: GETTING AHEAD OF THE GROWTH CURVE (1989); SENATE OFFICE OF RESEARCH, CAL. STATE LEGISLATURE, "DOES CALIFORNIA NEED A POLICY TO MANAGE URBAN GROWTH?" (1989).

4. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987); *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470 (1987).

ment in the coming decade. Finally, the last Article looks at growth management from a litigation perspective, emphasizing the effect of the recent Supreme Court decisions on claims that an ordinance effected a taking or violated due process. In toto, the Articles shed much light on the current state of growth control law while, at the same time, providing considerable food for thought on the direction that the law will take in the future.

II. FOUR PERSPECTIVES ON GROWTH MANAGEMENT

A. *The "State of the Art"*

In politically heated debates over growth management, assumptions about the effect of growth management measures on housing supply and development rates often are tossed out with little facts to back them up. The findings of Richard LeGates in his Article on the effect of growth management ordinances suggest that such assumptions should be questioned, as the actual impact of these measures may differ strikingly from their intended outcome.⁵ Professor LeGates studied how a variety of growth management ordinances, which municipalities in the San Francisco Bay Area enacted for the purpose of affecting the tempo of development in each jurisdiction, actually worked out in practice. The results are surprising in certain respects, for he finds a great variation in outcomes. For example, although a number of jurisdictions adopted explicit "caps" on yearly growth, some of those restrictions have never actually affected the growth rate due to lower than anticipated development rates in the jurisdictions.

Based upon his findings, LeGates offers constructive suggestions on the design of growth management systems. He also particularly notes the trend toward so-called "flexible" systems under which local elected officials are given greater discretion in implementing the growth management scheme. This trend mirrors a broader movement in the land use field toward negotiated development approvals, with the emphasis in the negotiations increasingly centered on the extent of the infrastructure improvements which the developer, rather than the municipality, will be obligated to provide.⁶ The "flexible" approach is, however, certainly not

5. LeGates, *The Emergence of Flexible Growth Management Systems in the San Francisco Bay Area*, 24 LOY. L.A.L. REV. 1035 (1991).

6. For example, California law authorizes local governments to negotiate and enter into "development agreements" with parties who wish to develop property. Among other things, these agreements will give developers permission to develop the property for a set period of time in return for commitments on improvements such as transportation infrastructure, public services, etc. See CAL. GOV'T CODE § 65860 (West 1983 & Supp. 1991).

the universal model; in many instances citizens have turned to the use of the local initiative power, and those initiatives are usually offered for the explicit purpose of curtailing the discretion of local government officials rather than enhancing it.

The legal ramifications of using initiatives as growth management tools are the subject of the Article by two prominent practitioners in the field, Daniel J. Curtin, Jr. and M. Thomas Jacobson.⁷ Curtin and Jacobson certainly know the subject of which they speak, having been involved in litigation over numerous local land use initiatives in California. Initiatives have a time-honored place in the progressive tradition of the state, and the courts have generally deferred to them even when they regulate land use.⁸ But as Curtin and Jacobson demonstrate, they give rise to difficult legal and policy problems when used to determine land use or manage growth, and those problems do not lend themselves to easy solutions.

Perhaps the biggest difficulty lies in reconciling the rigid requirements of an initiative, which often can be amended only by the voters and not by the local city council, with the complex statutory provisions requiring local governments to adopt and implement general plans.⁹ There is a certain amount of irony here; these general planning requirements were adopted at the behest of environmentalists over the objection of development interests, yet those same development interests now often wield them to argue that initiatives are invalid because they conflict with the state-mandated general plan process.

As detailed in the Curtin and Jacobson Article, this ongoing tension between the use of growth control initiatives and the fulfillment of statutory planning requirements promises to be the subject of much litigation in the near future. For now, the litigation scorecard seems to favor those who challenge such initiatives; the trend in recent decisions is decidedly against growth control via initiative.¹⁰ Indeed, there is some question

7. Curtin, Jr., & Jacobson, *Growth Control by the Ballot Box: California's Experience*, 24 LOYOLA L.A.L. REV. 1073 (1991).

8. See, e.g., *Building Indus. Assoc. v. City of Camarillo*, 41 Cal. 3d 810, 718 P.2d 68, 226 Cal. Rptr. 81 (1986) (noting that it has long been the court's policy to apply a liberal construction to the initiative power wherever it is challenged "in order that the right be not improperly annulled" and that "[i]f doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it" (citing *Mervynne v. Acker*, 189 Cal. App. 2d 558, 563-64 (1961))).

9. The California Government Code sets out detailed requirements of what general plans must contain and requires that subdivision maps and rezonings (for general law cities) must be consistent with those plans. In addition, the general plan must be internally consistent. See CAL. GOV'T CODE §§ 65300.5, 65302, 65860, 66473.5 (West 1983 & Supp. 1991).

10. See, e.g., *Leshner Indus. v. City of Walnut Creek*, 45 Cal. 3d 491, 754 P.2d 708, 247

about whether the California courts will allow any general plan amendment controlling growth through the initiative process. In a 1990 decision, *Leshner Industries v. City of Walnut Creek*,¹¹ the California Supreme Court pointedly observed that it had not yet confirmed that the amendment of a city's general plan—the usual vehicle for enacting a growth management ordinance—could be effected through the initiative process. The statement was remarkable from a court noted for narrow rather than sweeping pronouncements on the law, for the litigation did not even directly raise the issue and there was thus no need for the court to address it. The uncertainty over the availability of growth control initiatives, coupled with the finding of Professor LeGates that such measures often do not have the effect which their authors intended, suggests that in the future initiatives on the growth issue may be more important for the purely political message they send to local elected officials than for the actual regulatory effect they have on development.

*B. The Road from Here: Institutional Arrangements
and the State-Local Dichotomy*

Given the continued press for regulatory systems to manage growth, a principal question to be addressed is the institutional design of such systems. Assuming that radical approaches, such as deregulation or federal involvement in local planning, are neither possible nor wise, adjustments to the present planning structures seem the indicated course. In the lead Article of the symposium, Professor Robert H. Freilich and attorney S. Mark White sketch out their preferred solution.¹²

They offer a common-sense approach, emphasizing that growth cannot be managed solely by regulatory controls. As they observe, approaches adopting moratoria on development do not really solve the problem; they merely put it off to the future. Rather, to be effective a growth management scheme must be comprehensive, entailing structural and fiscal features as well as regulatory elements. The authors' approach is intended to address the growth problem as it is most commonly per-

Cal. Rptr. 362 (1988) (municipal initiative to prohibit city council from imposing a fee or tax to finance highway construction was preempted by state law); *Bank of the Orient v. Town of Tiburon*, 200 Cal. App. 3d 992, 269 Cal. Rptr. 690 (1990) (temporary development moratorium violated state law). The cases, of course are not totally one sided. See, e.g., *Northwood Homes v. Town of Moraga*, 216 Cal. App. 3d 1197, 265 Cal. Rptr. 363 (1989) (upholding initiative measure to protect open space).

11. 52 Cal. 3d 531, 802 P.2d 317, 277 Cal. Rptr. 1 (1990).

12. Freilich & White, *Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America's Major Quality of Life Crisis*, 24 LOY. L.A.L. REV. 915 (1991).

ceived in the early 1990s: As an infrastructure-centered problem in which public services, particularly the transportation infrastructure, are inadequate to serve populations brought in by new development. They recommend a "concurrency" approach which ties development to adequate infrastructure, emphasizing that planning is a necessity if concurrency is actually to occur.

Any approach which advocates enhanced governmental planning to solve growth problems, or which emphasizes the need for increased structural and fiscal responses to growth, must address the inter-governmental coordination required for implementation. The difficulty is that, for the past twenty years, local governments in California have been required to plan comprehensively for land development, yet the results in many instances have been disappointing. There is little reason to expect improvement in planning, absent effective new stimuli to prod local governments. One possibility is enhanced state or regional oversight of local land use decisions, but local government resistance to such suggestions has been tenacious and can be expected to continue, since local land use authority is certainly the principal power left in the local government domain and is jealously guarded.¹³ Thus, while the system that Freilich and White sketch out will require an enhanced state role, securing that role through legislation can be problematic.

The shape that such an increased regional or state role could take is the subject of Robert Odland's Article, which posits that California can learn from the experience in Florida.¹⁴ Odland argues the merits of an integrated statewide system of managing growth, not through state pre-emption of local power but through a concurrent state planning effort that would guide and be compatible with local planning efforts. The Florida structure also includes state review of local plans for consistency with state and regional plans, and it explicitly requires a "concurrency" management system linking development with infrastructure availability. Odland thus echoes the call of Freilich and White for enhanced planning, concluding that Florida has equated growth management with sound planning.

This type of greater state or regional oversight is not peculiar to Florida; other "second generation" planning statutes passed in recent

13. See *25 Years Later, SCAG Is Still a "Toothless Tiger"*, L.A. Times, Apr. 8, 1991, at A3, col. 1 (noting that the Southern California Association of Governments, the only overall regional planning agency for Southern California, has no real power and that at the agency's recent annual conference, "250 municipal and county officials who serve as delegates to SCAG again made clear that they oppose the agency gaining regulatory powers.")

14. Odland, *Growth Management: What California Can Learn from the Sunshine State*, 24 *LOY. L.A.L. REV.* 1109 (1991).

years have accorded an increased role to state and regional agencies, while allowing local government to retain most of its basic power over land use approvals.¹⁵ What is not clear is whether this increased regional and state role will improve the efficacy of growth management. It is this question which interests Douglas R. Porter of the Urban Land Institute, and he ventures some tentative conclusions in his Article.¹⁶

Porter uses case studies of four jurisdictions which have undertaken systematic local planning efforts as a means of estimating the effects of enhanced state oversight. Two of these jurisdictions were located in states with laws mandating planning and enforcing that mandate through state review, while the other two jurisdictions' laws did not include state oversight. Porter's conclusions are preliminary, but he does find that state oversight exerts some positive influences on local planning efforts. His conclusions, however, also seem to confirm what we might expect: that the implementation of good planning is primarily a function of local governmental will, and no amount of state oversight—absent complete preemption of local power—can completely reform the nature of local decision-making. In short, growth management is inherently a political process and will remain so even as the state role in it increases.

C. The Future of Growth Management: The Effect of Resource Constraints

Three other Articles in the symposium take a very different look at the concept of growth management. They are not concerned with current growth management systems but with the forces that will alter the way in which growth issues are approached in the future. Their common theme is that natural resource constraints may well dictate fundamental changes in growth decisions at the local level.

Professor A. Dan Tarlock of the Chicago-Kent College of Law, one of the most respected authorities in the fields of land use and environmental law, examines the effect that global warming could have on the allocation of water in the western part of the United States.¹⁷ Until recently, the legal infrastructure that allocates urban water for the most

15. For a discussion of these recent laws and recent trends in growth management ordinances, see D. BROWER, *UNDERSTANDING GROWTH MANAGEMENT* (1989). See also Deakin, *State Programs for Managing Land Use, Growth, and Fiscal Impact: A Report to the Senate Office of Research* (1990) (in part briefly summarizing growth management techniques in states other than California).

16. Porter, *Do State Growth Management Acts Make A Difference? Local Growth Management Measures Under Different State Growth Policies*, 24 *LOY. L.A.L. REV.* 1015 (1991).

17. Tarlock, *Western Water Law, Global Warming, and Growth Limitations*, 24 *LOY. L.A.L. REV.* 979 (1991).

part has taken growth as axiomatic, following the traditional public utility model which assumes the need to serve all customers. Professor Tarlock points out that a serious global warming problem will require reconsideration of this model. Specifically, the duty to serve new customers will not be automatic. Rather, an alternative to the traditional model, which Professor Tarlock finds currently in development and posing no insurmountable constitutional obstacles, will require that water demand be reduced rather than automatically accommodated.

Thus, water allocation decisions may well become a new form of growth control, with resource constraints rather than concern over congestion or premature urbanization forming the policy basis for the legal regime that develops. The issues raised in the article are intriguing and should spur some needed long-range thinking about the extent of the institutional response which global warming may require. But what is daunting about Professor Tarlock's vision is the magnitude of the changes that would lie ahead. The kind of water shortage he envisions would drastically alter the economic assumptions of an entire section of the country and, in turn, these alterations would force fundamental governmental changes of a vast order.

To take just one example, during the past winter California has faced a drought of almost unprecedented proportions, a situation eased only slightly by heavy March 1991 rains. Even during this drought, however, the water agency serving the Los Angeles metropolitan area continued to routinely annex new connections.¹⁸ When questioned, it cited the public utility model; drought or no drought, the agency was there to serve customers, not to act as a "growth control" organization. The agency's attitude shows that the kinds of institutional changes envisioned by Professor Tarlock would be wrenching.

The Article by Patrick Del Duca and Daniel Mansueto, two Los Angeles practitioners, approaches the growth constraint issue from a different medium: the availability of air, or more specifically, clean air.¹⁹ While water shortages may require the construction of an entirely new legal structure that will manage growth through the curtailment of water use, such a growth management structure actually now exists with respect to air pollution. As Del Duca and Mansueto chronicle, the current

18. See *MWD's Thirst For New Customers Continues*, L.A. Times, Mar. 31, 1991, § 1, at 1 ("Southern California's largest water agency has annexed thousands of acres of mostly dry hillside into its six-county service area and agreed to supply water to tens of thousands of new homes and business—even as its water supplies have dwindled during five years of drought.")

19. Del Duca & Mansueto, *Indirect Source Controls: An Intersection of Air Quality Management and Land Use Regulation*, 24 LOY. L.A.L. REV. 1129 (1991).

Clean Air Act regulatory structure requires vigorous growth management to be carried out in those areas, such as Los Angeles, which are unable to attain the national ambient air quality standards in any other way. This system is designed to curtail demand for transportation by single occupancy vehicles, and to result in shorter trips for those vehicles, thus reducing vehicle emissions.

As Del Duca and Mansueto convincingly demonstrate, however, it is unlikely that this massive change in land use decision making methods, which the Clean Air Act calls for, will ever be implemented. History will likely repeat itself; in the early 1970s, when the federal government showed signs of enforcing controls over so-called "indirect sources" of air pollution, controls which would have restricted local governments' authority over the siting of certain large-scale development, the political furor that resulted prevented any action. The odds indicate that a similar result will obtain in the 1990s. For example, under the present air quality plan for the South Coast Basin, the authority to implement indirect source and land use provisions is not clearly placed in a single enforcement body.²⁰ The political failure in California to settle this question is significant. It shows that the public may well opt for some measure of dirty air rather than see the air resource act as a significant constraint on local growth decisions.

Finally, another Los Angeles practitioner, Norman A. Dupont, looks at a third resource constraint that will effect growth decisions: solid waste.²¹ Here, as in the area of air pollution, the legal regime is forcing change. As Dupont explains, municipalities have traditionally disposed of the solid waste generated in their communities in so-called sanitary landfills. City planners, for their part, have not recognized the generation and disposal of solid waste as a potential limitation on municipal growth. Two recent federal cases, however, have concluded that municipalities may face extensive liability under federal hazardous waste clean-up laws for their solid waste disposal. Dupont sets forth his thoughts on how municipalities should cope with this looming liability, and concludes by advocating a nationwide recycling effort modeled after California's Integrated Waste Management Act of 1989.

20. See SOUTH COAST AIR MANAGEMENT DIST. & S. CAL. ASS'N OF GOV'TS, AIR QUALITY MANAGEMENT PLAN app. IV-G (Mar. 1989).

21. Dupont, *Municipal Solid Waste: The Endless Disposal of American Municipalities Meets the CERCLA Strict Liability Dragon*, 24 LOY. L.A.L. REV. 1181 (1991).

*D. Growth Control and the Courts: The Takings
and Substantive Due Process Theories*

The last Article in the symposium brings the discussion back to the present, day-to-day reality of litigation over growth management schemes. For governmental entities, reality takes the form of the spectre of large damage awards if their growth management program transgresses the boundary between vigorous, authorized land use regulation and inverse condemnation. One constant since the advent of growth management in the early 1970s has been allegations that moratoria and tempo controls violate the fifth amendment taking clause or violate substantive due process. In recent years, the litigation has become even more pronounced after the Supreme Court handed down its trilogy of takings cases in 1987.²²

In this final Article, Los Angeles practitioners Katherine Stone and Philip Seymour analyze the differences that exist between challenges to growth control ordinances brought on takings and substantive due process grounds.²³ They argue that, in general, growth control ordinances which cause delays in the development of particular properties can pass muster under either type of challenge. But the Article is perhaps most valuable as a vehicle which practitioners contemplating such cases can use to carefully think through the procedural and substantive distinctions that may exist between takings and due process challenges—distinctions that can make the critical difference between success and failure in this exceedingly murky area of the law.

III. CONCLUSION

The symposium should prove of interest to a wide range of individuals, ranging from practitioners concerned with the current workings of growth control laws to others, such as legislative aides, who must ponder the long-range strategies needed to manage growth effectively. It is both timely and informative.

22. See cases cited *supra* note 4.

23. Stone & Seymour, *Regulating the Timing of Development: Takings Clause and Substantive Due Process Challenges to Growth Control Regulations*, 24 *LOY. L.A.L. REV.* 1203 (1991).