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GROWTH CONTROL BY THE BALLOT BOX: CALIFORNIA'S EXPERIENCE

*Daniel J. Curtin, Jr.**
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I. INTRODUCTION

Since the early 1970s, many citizens, especially those in states experiencing dramatic population growth, have expressed outrage at the ill effects of unbridled real estate development. They have become fed up with the deteriorating quality of life, characterized by unprecedented traffic congestion, poor air quality, loss of open space, and a host of other maladies.

In California, voters in many of the state's cities and counties have reacted by using the initiative process to directly enact local growth controls. This Article begins by briefly describing California's experience in coping with dramatic population growth. It then examines the general legal basis for growth control measures. Next, the Article considers California's statutory mechanisms for the enactment of growth control legislation by voters, as well as some of the limitations on the use of initiatives for this purpose. The Article also discusses two California statutory provisions that may allow developers to "lock in" development rights despite subsequently enacted growth-restricting regulations. Finally, the Article briefly discusses some criticisms of "ballot box planning" as a means of regulating land use.

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II. GROWTH CONTROL IN CALIFORNIA: AN OVERVIEW

During the past two decades, California cities and counties have enacted a variety of growth control measures.[1] These measures include council-enacted interim ordinances[2] and permanent measures,[3] and voter-initiated measures.[4] According to a 1988 survey conducted by the League of California Cities in cooperation with the County Supervisors' Association of California,[5] seventy-one percent of California cities surveyed have enacted some type of growth restriction.[6] Additionally, over seventy-five percent of California's fifty-eight counties have some form of growth restriction.[7]

A large number of these growth control measures have been direct expressions of citizen concern, adopted by popular vote through the initiative process. Between 1971 and 1990, a total of 202 growth control measures were placed on local ballots in cities and counties throughout California.[8] One hundred thirty-six of these measures have been placed before the voters since January 1986.[9] The most growth control measures to appear on a single ballot was thirty-eight in 1990, of which eighteen—or approximately forty-seven percent—passed.[10]

Interestingly, the passage rate for these measures has steadily de-

1. See LeGates, *The Emergence of Flexible Growth Management Systems in the San Francisco Bay Area*, 24 LOY. L.A.L. REV. 1035 (1991) for a discussion of various growth control ordinances enacted in Northern California cities.

2. Section 65858 of the California Government Code authorizes a city to adopt, as an urgency measure, an interim ordinance prohibiting, for specified periods of time, land uses that may be in conflict with a general plan amendment, specific plan adoption or amendment, or rezoning that the city is contemplating. CAL. GOV'T CODE § 65858 (West 1983 & Supp. 1991).

3. "Permanent" growth control measures, in contrast to interim measures, are typically achieved through general plan amendments and/or enactments affecting the various regulations that implement the general plan. Note that even "permanent" measures are subject to amendment and repeal. *Id.*

4. The California Constitution enables voters to propose legislation and have it placed before the electorate for possible enactment. CAL. CONST. art. II, §§ 8-11. This is known as the initiative power.

5. M. Glickfeld & N. Levine, The New Land Use Regulation "Revolution": Why California's Local Jurisdictions Enact Growth Control and Management Measures (June 22, 1990) (unpublished manuscript available from the Lincoln Institute of Land Policy, 26 Trowbridge Street, Cambridge, MA 02138).

6. *Id.* at 18.

7. *Id.*

8. CALIFORNIA ASS'N OF REALTORS, *Summary of Local Land Use Measures* (Jan. 8, 1991), in CALIFORNIA BALLOT MONITOR para. I (rev. ed. Jan. 1991) (available from the California Association of Realtors, 525 South Virgil Avenue, Los Angeles, CA 90020).

9. *Id.* para. II(A) (Dec. 6, 1990).

10. *Id.*

clined over the past few years.[11] In 1986 and 1987, two-thirds of all growth control measures passed.[12] Since that time, increasing numbers of initiatives are being placed on the ballot, yet fewer are being enacted. Indeed, the passage rate for growth control measures declined in 1989 to approximately forty-three percent,[13] increasing slightly in 1990 to forty-seven percent.[14]

However, despite the recently declining passage rate of growth control measures, there is no indication that the public interest in placing these measures on the ballot has abated. As growth-related problems continue to escalate in California cities and counties, local initiative campaigns directed at all types of land use issues, including growth, seem unlikely to pass from the political scene. In California, where the population is increasing at a rate of approximately three-quarters of a million per year,[15] voters will likely continue to react to growth by turning to the ballot box.

A. Motivations for Growth Control

Two basic motivations underlie proposals for growth control. One is the concern that increased development will overburden a city's existing infrastructure and its ability to provide public services. Common areas of concern are overtaxed sewer capacity, overcrowded schools, water shortages and congested roads.[16]

A second, although not completely distinct motivation, focuses on "quality of life" concerns. These concerns typically reflect a desire to maintain a community's "character" by preserving open space, including agricultural, recreational, scenic and environmentally sensitive lands, retaining lower population densities and, in some cases, simply restricting population growth.[17] Avoiding traffic congestion is an especially common quality of life concern, making "gridlock" a buzzword in many campaigns to enact growth control measures.[18]

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11. *Id.*
12. *Id.*
13. *Id.* (6 out of 14 measures passed).
14. *Id.* (18 out of 38 measures passed).
15. M. Glickfeld & N. Levine, *supra* note 5, at 2.
16. *Id.* at 34.
17. For example, voters in the City of Morgan Hill passed an initiative in November 1990 (Measure P) that, in part, set a growth rate of 2.5% annually with a target population of 38,000 in the year 2010. *Local Land Use Measures Summary* (Dec. 5, 1990), in CALIFORNIA BALLOT MONITOR, *supra* note 8, at 2. Similarly, in 1973, the City of Petaluma adopted a plan limiting residential development to 500 units per year. *Id.* (June 26, 1990), at 1.
18. M. Glickfeld & N. Levine, *supra* note 5, at 34, tables 10A, 10B.

B. Types of Growth Control Measures

Growth control is typically achieved by amending a city's[19] general plan,[20] or by amending the various mechanisms for implementing the general plan, including specific plans[21] and zoning ordinances. These are the basic tools of land use regulation in California and, as such, they have proven appropriate for the task of controlling growth.

Most of the earliest growth control measures, enacted in the 1970s, focused on residential growth.[22] City legislators and voters have continued to enact limitations on residential development.[23] Some of these measures impose moratoria on residential development pending the provision of adequate public services and facilities.[24] Others place annual limits on new construction.[25] Still others require lower residential densities[26] or restrict development of open space lands.[27]

In addition to limitations on residential development, restrictions on commercial and industrial development have increasingly become the goal of citizen efforts in cities of all sizes, including Los Angeles and San Francisco.[28] These measures take the form of limits on building height,[29]

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19. Throughout this Article, the term "city" is often intended to mean "county" as well; "city council" is likewise often intended to include "county board of supervisors." Where the provisions for cities and counties vary, an attempt has been made to indicate the differences.

20. A general plan is the basic land use charter governing the direction of future land use in the local jurisdiction. Lesher Communications v. City of Walnut Creek, 52 Cal. 3d 531, 542, 802 P.2d 317, 323, 277 Cal. Rptr. 1, 7 (1990).

21. A specific plan implements the general plan by providing a detailed plan for the development of a specific area. CAL. GOV'T CODE §§ 65450-65453 (West 1983).

22. *See Local Land Use Measures Summary* (June 26, 1990), in CALIFORNIA BALLOT MONITOR, *supra* note 8, at 1-3 [hereinafter *Measures Summary* (June 26, 1990)].

23. For example, the voters of Contra Costa County in November 1990 passed Measure C (an initiative sponsored by the Contra Costa County Board of Supervisors) that establishes a "65/35" land preservation plan where: 1) 65% of all land is preserved for non-urban uses, such as agriculture, open space, wetlands, parks, etc.; and 2) urban development is confined to 35% of County land. *Id.* (Dec. 5, 1990), at 1.

24. For example, voters in the cities of Livermore (Measure B) and Pleasanton passed initiatives in 1972 imposing moratoria on the issuance of building permits pending resolution of deficiencies in public facilities. *Id.* (June 26, 1990), at 1.

25. For example, voters in the City of Oceanside passed an initiative in 1987 (Proposition A) limiting the total number of homes built each year. *Id.* at 12.

26. For example, voters in the City of Alameda passed an initiative in 1973 (Measure A) to amend the city charter to prevent the construction of multiple-family units except for replacement of low income and senior housing. *Id.* at 1.

27. For example, the voters in Solano County passed an initiative in 1984 (Proposition A) aimed in part at protecting agricultural land. *Id.* at 5.

28. CALIFORNIA ASS'N OF REALTORS, *supra* note 8, para. IV.

29. For example, voters in the City of Walnut Creek passed an initiative in 1985 (Measure A) limiting building heights to six stories. *Measures Summary* (June 26, 1990), *supra* note 22, at 6.

annual caps on office space development,[30] and moratoria on developments above a given size until specified public service requirements are met or traffic is reduced to identified levels.[31]

One especially interesting group of measures places aspects of the land use regulation process itself exclusively in the hands of voters. These measures require voter approval of future actions as widely varied as general plan amendments,[32] expenditures for major public works projects,[33] new hotel and motel construction,[34] sewer line extensions,[35] and approval of developments above a certain size.[36] While these provisions do not restrict development per se, they have the potential of having this effect. They are of special interest because they change the very manner in which land use decisions will be made by involving the voters directly in certain types of land use decisions.

III. THE LEGAL BASIS FOR, AND LEGAL LIMITATIONS ON, GROWTH CONTROL

The legal basis for land use regulation is a city's police power—the authority of a city to act to protect the health, safety and welfare of its residents.[37] The police power, as it applies to land use regulation, has been interpreted broadly.[38] In an oft-quoted statement of this principle, United States Supreme Court Justice William O. Douglas stated that the public welfare includes aesthetic and spiritual values, as well as physical and monetary ones.[39] Thus, "[I]t is within the power of the legislature to determine that the community should be beautiful as well as healthy,

30. For example, voters in the City of San Francisco passed an initiative in 1986 (Proposition M) reducing by fifty percent the amount of permissible office construction. *Id.* at 10.

31. For example, voters in the City of Walnut Creek passed an initiative in 1985 (Measure H) establishing a moratorium on many new major developments until traffic is reduced to specified levels. *Id.* at 7.

32. For example, voters in Solano County passed an initiative in 1984 (Proposition A) which requires voter approval of certain types of general plan amendments. *Id.* at 5.

33. For example, voters in Valley Center passed an initiative in 1988 (Proposition B) requiring voter approval of expenditures by a water district for major projects. *Id.* at 16.

34. For example, voters in the City of Monterey passed an initiative in 1986 (Measure E) to require voter approval of hotel/motel construction in specified areas. *Id.* at 9.

35. For example, voters in the City of Modesto passed an initiative in 1979 (Measure A) requiring voter approval of sewer line extensions into urban reserve areas. *Id.* at 2.

36. For example, the voters in the City of Del Mar passed an initiative in 1986 (Measure B) requiring voter approval for all future development over 25,000 square feet in the City's central commercial zone. *Id.* at 8.

37. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 31-32 (1954) (police power "is essentially the product of legislative determinations addressed to the purposes of government").

38. *Id.* at 35-36.

39. *Id.* at 33.

spacious as well as clean, well-balanced as well as carefully patrolled."[40]

The police power, though established by common law, is also set forth in various state constitutions.[41] The California Constitution, for example, confers on cities the power to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[42] A city's exercise of its police power will generally be upheld against an equal protection or due process-based constitutional challenge if it bears a reasonable relationship to a legitimate governmental purpose.[43] Three landmark cases have illuminated how this standard applies in the context of growth control measures.

The first major case was *Golden v. Planning Board of Ramapo*.[44] In *Ramapo*, the New York Court of Appeals upheld a measure which regulated the timing and sequential control of residential subdivision activity for periods of up to eighteen years.[45] This was the first instance of a state high court and the United States Supreme Court upholding the uncompensated restriction of development by means of timed and sequential phasing under the due process clause. The techniques upheld in *Ramapo* included: (1) linking timing and sequencing of development with capital improvements;[46] (2) tying the purchase of development easements to reduced tax assessments;[47] and (3) integrating the development plan, the capital improvement budget and the zoning ordinance.[48]

The leading California case upholding the concept of growth control is *Construction Industry Association v. City of Petaluma*.[49] The United States Court of Appeals for the Ninth Circuit upheld the City of Petaluma's plan, fixing its housing development growth rate at 500 dwelling units per year for a five-year period, and directing that building permits be divided evenly between single-family and multiple-family residential units.[50] The Petaluma City Council had declared that its ulti-

40. *Id.*

41. *See, e.g.*, CAL. CONST. art XI, § 7; FLA. CONST. art. VIII, § 1(f); N.Y. CONST. art. XVII, § 3.

42. CAL. CONST. art. XI, § 7.

43. Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 604, 557 P.2d 473, 485, 135 Cal. Rptr. 41, 53 (1976).

44. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

45. *Id.* at 383, 285 N.E.2d at 304, 334 N.Y.S.2d at 156.

46. *Id.* at 367, 285 N.E.2d at 294-95, 334 N.Y.S.2d at 142-43. The measure provided that property owners "may elect to accelerate the date of development by installing, at their own expense, the necessary public services." *Id.* at 382, 285 N.E.2d at 304, 334 N.Y.S.2d at 155.

47. *Id.* at 369, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

48. *Id.* at 368-69, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

49. 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

50. *Id.* at 908.

mate goal was to establish control over the quality, distribution and rate of growth in the city.[51]

The *Petaluma* court held that the concept of the public welfare, as served by the police power, was sufficiently broad to encompass Petaluma's goal of preserving its small town character, open space, low population density, and its desire to grow in an orderly and deliberate manner.[52] The court also stated that Petaluma's plan did not unconstitutionally burden interstate commerce because the plan was rationally related to the city's social and environmental welfare.[53] The court pointed out that it is "well-settled that a state regulation validly based on the police power does not impermissibly burden interstate commerce where the regulation neither discriminates against interstate commerce nor operates to disrupt its required uniformity."[54] Petaluma's plan was valid, the court held, because it created neither of these effects.[55]

In *Associated Home Builders v. City of Livermore*,[56] the California Supreme Court addressed how to determine whether a growth control measure, as an exercise of a city's police power, bears a substantial and reasonable relationship to the public welfare. The court proposed a three-part test: (1) what is the probable effect and duration of the ordinance; (2) what are the competing interests affected by the ordinance (for example, environmental protection versus the opportunity for people to settle); and (3) does the ordinance, in light of its probable impact, represent a reasonable accommodation of these competing interests?[57]

The court held that when considering these questions, the scope of the inquiry must extend to the welfare of those people whom the measure would affect significantly, rather than just those who currently reside in the city enacting the measure.[58] Thus, the court effectively required a "regional" analysis when assessing the impact of a growth control measure upon housing. Applying this "regional" test, the *Livermore* court upheld the city's growth control ordinance and found that the challengers of the ordinance had failed to show that it lacked a reasonable relationship to the welfare of citizens of the region.[59]

An example of the need to balance competing public concerns—and

51. *Id.* at 901-02.
52. *Id.* at 908-09.
53. *Id.* at 909.
54. *Id.*
55. *Id.*
56. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).
57. *Id.* at 608-09, 557 P.2d at 488-89, 135 Cal. Rptr. at 56-57.
58. *Id.* at 607, 557 P.2d at 487, 135 Cal. Rptr. at 55.
59. *Id.* at 610, 557 P.2d at 489, 135 Cal. Rptr. at 57.

a topic of considerable recent interest—is the tension between the desire to control growth and the need for affordable housing. The courts have determined that growth control can be an appropriate exercise of the police power.[60] However, California also has a rather elaborate statutory structure that is intended to promote the provision of adequate and affordable housing for the state's current and future residents.[61] What happens when the goals of growth control collide with the state's housing goals? The answer is not clear.

Each city and county in California is required to adopt, as a part of its general plan, a "housing element."[62] Housing elements are intended to be the primary means of ensuring that each locality meets its "fair share" of the region's need for housing affordable to all income groups, including lower income households.[63] Housing elements are required to identify and analyze existing and projected housing needs and to establish goals, policies, quantified objectives and scheduled programs to meet those needs.[64]

The statutory requirements for housing elements are the most comprehensive of the requirements for any general plan element,[65] and are expressions of California's strong state policy supporting the provision of housing.[66] These requirements appear, however, to contemplate a balancing of the need for housing with other matters of public concern. Section 65583(b) of the California Government Code[67] recognizes that a city's identified housing need "may exceed available resources and the community's ability to satisfy this need within the content of the general plan requirements."[68] In such a situation, the city is permitted to establish a housing objective reflecting fewer housing units than its fair share of the regional allocation.[69] It is not clear, however, to what degree other general plan policies, including slow-growth considerations, could justify reducing the quantified housing goals.[70]

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60. *See supra* notes 37-59 and accompanying text.

61. *See* CAL. GOV'T CODE § 65913 (West 1983 & Supp. 1991).

62. *Id.* §§ 65580-65589.8.

63. *Id.* § 65584.

64. *Id.* § 65583.

65. *See id.*

66. *See, e.g.*, Lesher Communications v. City of Walnut Creek, 52 Cal. 3d 531, 546, 802 P.2d 317, 326, 277 Cal. Rptr. 1, 9-10 (1990); Building Indus. Ass'n v. City of Camarillo, 41 Cal. 3d 810, 820, 718 P.2d 68, 74, 226 Cal. Rptr. 81, 86 (1986).

67. CAL. GOV'T CODE § 65583(b).

68. *Id.*

69. *Id.*

70. While it is beyond the scope of this Article to explore this issue fully, a fairly recent case is worthy of mention. In Northwood Homes, Inc. v. Town of Moraga, 216 Cal. App. 3d 1197, 265 Cal. Rptr. 363 (1989), the court upheld an open space preservation ordinance

IV. THE INITIATIVE POWER AND GROWTH CONTROL IN CALIFORNIA

Starting in the early 1900s, as a manifestation of the progressive movement led by President Theodore Roosevelt, Senator Robert La Follette of Wisconsin and Governor Hiram Johnson of California, approximately twenty-two states have adopted provisions for citizens to enact or repeal legislation at the state or local level—known respectively as the initiative and referendum powers.[71]

In some states, such as California, initiatives are presently allowed for many land use decisions that are legislative in character.[72] The states that have rejected the use of initiatives for land use regulation rely on several theories. Among them is the theory that land use initiatives circumvent the notice and hearing requirements otherwise applicable to the same types of enactments (such as general plan amendments and rezonings) by a city council.[73] Other states rely on the proposition that the relevant state law delegates the authority to regulate land use exclusively to the city council, thereby precluding regulation by initiative.[74] Another basis is the view that direct legislation regarding land use is inherently inconsistent with the comprehensive approach to planning required under the laws of many states.[75]

The initiative process has become an especially effective means of controlling growth in California. In general, the initiative power has traditionally enjoyed sympathetic treatment from the California courts,

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adopted by initiative. *Id.* at 1199, 265 Cal. Rptr. at 364. The measure restricted development of plaintiff's 113-lot residential project in the Town of Moraga. *Id.* at 1200, 265 Cal. Rptr. at 365. The plaintiff claimed, in part, that the measure was an invalid exercise of the police power because it failed to accommodate the region's housing need. *Id.* at 1201, 265 Cal. Rptr. at 365. The court rejected this claim, reasoning that the plaintiff had failed to show that the measure, by restricting the development of 113 units, had a significant impact on the region's housing supply. *Id.* at 1203, 265 Cal. Rptr. at 366. Furthermore, the court stated that the housing needs identified in the general plan are "simply goals, not mandated acts." *Id.* at 1204, 265 Cal. Rptr. at 367. It is not clear what the ramifications of this statement might be in the context of a challenged measure that is shown to have a substantial impact on the regional housing supply.

71. Freilich & Guemmer, *Removing Artificial Barriers to Public Participation in Land-Use Policy: Effective Zoning and Planning by Initiative and Referenda*, 21 URB. LAW. 511, 512 (1989).

72. Yost v. Thomas, 36 Cal. 3d 561, 569, 685 P.2d 1152, 1157, 205 Cal. Rptr. 801, 806 (1984); Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 596 n.14, 557 P.2d 473, 480 n.14, 135 Cal. Rptr. 41, 48 n.14 (1976). See *infra* notes 161-73 and accompanying text for a discussion of California's approach to defining the character of an initiative.

73. Freilich & Guemmer, *supra* note 71, at 545.

74. *Id.* at 551.

75. *Id.* at 550. For excellent discussions of all these theories, see *id.* at 527-33.

which have upheld broad interpretations of that power.[76] In particular, land use initiatives have been judicially exempted from certain requirements applicable to the same measures if enacted by the city council.[77]

Still, the initiative power does not give legislative carte blanche to the voters. There are significant limitations on the subject matter of initiative measures, and some of these limitations are particularly applicable to growth control enactments.[78] Further, there is some indication that applications of the initiative power are being more closely scrutinized by the courts, along with evidence of a new willingness to keep measures off of the ballot entirely when they fail to pass legal muster.[79]

A. Legal Basis and Procedure

To give the people a greater voice in government, California adopted the initiative and referendum processes by constitutional amendment in 1911.[80] The initiative power enables the voters to propose legislation and have it placed before the electorate for possible enactment.[81] The California Constitution reserves the initiative power to the voters in every California county and general law city.[82] Charter cities may adopt initiative and referendum provisions in their charters.[83]

The procedures for exercising the local initiative process are provided in the state's Elections Code for counties,[84] general law cities[85] and those charter cities that have adopted those procedures. To qualify an initiative for a city's ballot under the California Elections Code, the proposed ordinance must first be submitted to the city council through an

76. *See, e.g., Livermore*, 18 Cal. 3d at 591, 557 P.2d at 477, 135 Cal. Rptr. at 45.

77. *Id.* at 594, 557 P.2d at 479, 135 Cal. Rptr. at 47 ("Procedural requirements which govern *council* action . . . generally do not apply to initiatives, any more than the provisions of the initiative law govern the enactment of ordinances in council." (citation omitted)).

78. *See infra* notes 107-89 and accompanying text.

79. Committee of Seven Thousand v. Superior Court, 45 Cal. 3d 491, 512, 754 P.2d 708, 721, 247 Cal. Rptr. 362, 375 (1988); deBottari v. City Council, 171 Cal. App. 3d 1204, 1212, 217 Cal. Rptr. 790, 794 (1985).

80. *See* Act of June 2, 1911, ch. 22, 1911 Cal. Stat. 1655; CAL. CONST. art. II, §§ 8-11 (1966, amended 1976). The referendum power enables the voters to repeal recently enacted state and local legislation. *See* CAL. ELEC. CODE §§ 4050-4061 (West 1977 & Supp. 1991) (city referenda); *id.* §§ 3750-3756 (county referenda). These initiative and referendum processes were adopted, in part, as specific reactions to the dominance of the Southern Pacific Railroad in California politics. L. TALLIAN, DIRECT DEMOCRACY 34-44 (1977).

81. CAL. CONST. art. II, § 8.

82. *Id.* § 11.

83. *Id.* art. XI, § 8. A California city may adopt a charter for its own government. *Id.* The provisions of this charter will govern instead of the provisions of the general state law with regard to municipal affairs. *Id.*

84. CAL. ELEC. CODE §§ 3700-3720 (West 1977 & Supp. 1991).

85. *Id.* §§ 4000-4021.

initiative petition bearing the signatures of not less than ten percent of the city's registered voters.[86] After receiving a valid petition, the city council must either pass the proposed ordinance without change or submit the ordinance to the city electorate.[87] If a measure is placed on the ballot and a majority of the voters on a proposed ordinance vote in its favor, the ordinance becomes valid and binding on the city.[88]

B. Special Power of the Initiative in General, and Growth Control Initiatives in Particular

The California courts have generally adopted a very protective stance with regard to the initiative power. Referring to the initiative and referendum powers, the California Supreme Court has said, " '[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.' "[89]

The statutory provisions regarding initiatives provide another example of the special power enjoyed by legislation enacted by initiative. An ordinance proposed by initiative petition and adopted either by the city council without a vote, or by the voters, cannot be repealed or amended except by a vote of the people, unless the ordinance provides to the contrary.[90]

California courts have also determined that land use regulations enacted by initiative are exempt from some of the procedural requirements applicable to city council-enacted land use measures. For instance, in *Associated Home Builders v. City of Livermore*,[91] the California Supreme Court held that an initiative zoning measure need not comply with the general laws mandating public hearings before the planning commission

86. *Id.* § 4011. County requirements specify that the initiative petition must bear the signatures of not less than 10 percent "of the entire vote cast in the county for all candidates for governor at the last gubernatorial election." *Id.* § 3711. Initiative petitions signed by at least 15 percent of the registered voters of a city may qualify the measure for submittal at a special election. *Id.* § 4010. Petitions signed by at least 20 percent of the entire vote cast for all gubernatorial candidates at the last election may qualify a county initiative measure for a special election. *Id.* § 3709. Otherwise, the measure, if voted on, will be placed on the ballot with other measures at a regular election. *Id.* § 4011 (cities); *id.* § 3711 (counties).

87. *Id.* § 4011 (cities); *id.* § 3711 (counties).

88. *Id.* § 4013 (cities); *id.* § 3719 (counties).

89. Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976) (quoting Mervynne v. Acker, 189 Cal. App. 2d 558, 563-64, 11 Cal. Rptr. 340, 344 (1961)).

90. CAL. ELEC. CODE § 4013 (cities); *id.* § 3719 (counties).

91. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

and the city council, and giving notice to affected property owners.[92] The court reached its conclusion by determining that the legislature did not intend such a requirement to apply to zoning by initiative.[93]

Similarly, although council-adopted land use regulations are subject to the environmental review procedures of the California Environmental Quality Act (CEQA),[94] this procedural requirement is inapplicable to the same measures when enacted by initiative.[95]

Certain types of growth control measures, when enacted by the local legislative bodies, are subject to unique procedural requirements. However, those same measures, when put in place directly by the electorate, are treated differently. For example, under section 65863.6 of the California Government Code,[96] if a city adopts an ordinance under its authority to enact zoning regulations to limit the number of housing units that may be constructed annually, the ordinance must contain findings that justify reducing the housing opportunities of the region.[97] These findings must reflect the public health, safety and welfare interests promoted by the measure,[98] thereby showing that the competing public interests have been addressed. The California Supreme Court has held, however, that this requirement does not apply to ordinances enacted by initiative.

In *Building Industry Association v. City of Camarillo*,[99] the voters of Camarillo had adopted a restrictive growth ordinance which limited the number of dwelling units that could be constructed in the city to 400 per year.[100] The court held that section 65863.6 does not apply to initiative measures.[101] The court pointed out that the " '[p]rocedural requirements which govern *council* action . . . generally do not apply to initiatives, any more than the provisions of the initiative law govern the enactment of ordinances in council.' "[102] The court concluded that requiring the elec-

92. *Id.* at 596, 557 P.2d at 481, 135 Cal. Rptr. at 49.

93. *Id.*

94. CAL. PUB. RES. CODE §§ 21150-21155 (West 1986 & Supp. 1991).

95. Northwood Homes, Inc. v. Town of Moraga, 216 Cal. App. 3d 1197, 1206, 265 Cal. Rptr. 363, 369 (1989) (land use restrictions imposed by initiative not invalid for failure to comply with CEQA); Stein v. City of Santa Monica, 110 Cal. App. 3d 458, 168 Cal. Rptr. 39 (1980) (initiative adopting rent control ordinance held exempt from requirement of CEQA review which would have applied to same measure if enacted by local legislative body).

96. CAL. GOV'T CODE § 65863.6 (West 1983 & Supp. 1991).

97. *Id.*

98. *Id.*

99. 41 Cal. 3d 810, 718 P.2d 68, 226 Cal. Rptr. 81 (1986).

100. *Id.* at 815, 718 P.2d at 70, 226 Cal. Rptr. at 83.

101. *Id.* at 824, 718 P.2d at 76, 226 Cal. Rptr. at 89.

102. *Id.* at 823, 718 P.2d at 76, 226 Cal. Rptr. at 88 (quoting Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 594, 557 P.2d 473, 479, 135 Cal. Rptr. 41, 47 (1976)).

torate to make the findings required by section 65863.6 would "place an insurmountable obstacle in the path of the initiative process."[103]

Similarly, under section 65302.8 of the California Government Code,[104] if a city adopts or amends a mandatory general plan element which limits the number of housing units which may be constructed on an annual basis, such adoption or amendment must also contain findings that justify reducing the housing opportunities of the region.[105] Again, however, if the numerical restrictions are imposed by initiative, section 65302.8 does not apply.[106]

C. *Limitations on the Use of the Initiative*

Although California's legislature and courts have lightened the procedural burdens on growth control measures enacted directly by voters, the content of such measures is still subject to significant limitations. The following subsections describe various substantive challenges to land use initiatives, including growth control measures.

1. Improper exercise of the police power

The content of an initiative ordinance may not violate the California or United States Constitutions. Constitutional challenges typically involve claims that the growth control measure is an improper exercise of the government's police power because it violates the due process or equal protection rights of affected property owners.[107] Courts hold initiative measures to the same standards as council-enacted measures with regard to constitutional challenges. In *Arnel Development Co. v. City of Costa Mesa*,[108] which did not involve a growth control measure but, rather, a rezoning by initiative, the court held that "[t]he city's authority

103. *Id.* at 824, 718 P.2d at 76, 226 Cal. Rptr. at 89.

104. CAL. GOV'T CODE § 65302.8 (West 1983).

105. *Id.*

106. *See* Building Indus. Ass'n v. City of Camarillo, 41 Cal. 3d 810, 823-24, 718 P.2d 68, 75-76, 226 Cal. Rptr. 81, 88-89 (1986).

107. *See, e.g., id.* at 824, 718 P.2d at 76, 226 Cal. Rptr. at 89. An initiative may be challenged on a variety of constitutional bases. For example, in *Hawn v. County of Ventura*, an initiative giving approval power over airport site selection to the voters of a city, but not nearby residents of an unincorporated territory, was ruled an unconstitutional denial of equal protection. 73 Cal. App. 3d 1009, 1018, 141 Cal. Rptr. 111, 115 (1977). Additionally, in *Lee v. City of Monterey Park*, plaintiffs alleged that an ordinance limiting residential development to 100 units per year was an unconstitutional denial of due process because it was not reasonably related to the advancement of the public welfare. 173 Cal. App. 3d 798, 805, 219 Cal. Rptr. 309, 313 (1985). The trial court sustained the City's demurrer to this claim, and the court of appeal affirmed. *Id.* at 812, 219 Cal. Rptr. at 316.

108. 126 Cal. App. 3d 330, 178 Cal. Rptr. 723 (1981).

under the police power is no greater than otherwise it would be simply because the subsequent rezoning was accomplished by initiative."[109]

Developer Arnel had proposed to construct a fifty-acre development consisting of 127 single-family residences and 539 apartment units.[110] The city had approved a specific plan for development of the Arnel property, and pursuant to that plan had rezoned the property for planned residential development of both medium and low density.[111] Objecting to the developer's proposal, a neighborhood association circulated an initiative petition to rezone the property and two adjoining properties to a lower density single-family residential designation.[112] The initiative passed.[113]

The trial court found that the initiative's purpose was to rezone the property in order to defeat the Arnel project, despite the existence of an acute shortage of moderate-income housing in the city.[114] The court also found that the rezoning designation had been selected without considering the best use of the property or various zoning alternatives.[115]

On appeal, the *Arnel* court found that the measure suffered from two fatal flaws. First, the court noted that the people may not use an initiative to discriminate against a particular parcel of land, and that the courts may properly inquire as to whether the classification scheme had been applied fairly and impartially.[116] As the Costa Mesa ordinance clearly would have been held invalid as arbitrary and discriminatory if adopted by the city, it was also invalid when adopted by initiative.[117]

Second, the ordinance failed because it lacked a substantial and reasonable relationship to the public welfare.[118] The court first noted the "regional" scope of the inquiry, stating that "municipalities are not isolated islands remote from the needs and problems of the area in which they are located; thus an ordinance, superficially reasonable from the limited viewpoint of the municipality, may be disclosed as unreasonable when viewed from a larger perspective."[119] Accordingly, the relevant question is "whether the ordinance reasonably relates to the welfare of

109. *Id.* at 337, 178 Cal. Rptr. at 727.
110. *Id.* at 332, 178 Cal. Rptr. at 724.
111. *Id.* at 333, 178 Cal. Rptr. at 725.
112. *Id.* at 334, 178 Cal. Rptr. at 725.
113. *Id.*
114. *Id.* at 335, 178 Cal. Rptr. at 726.
115. *Id.*
116. *Id.* at 336, 178 Cal. Rptr. at 726-27.
117. *Id.* at 337, 178 Cal. Rptr. at 727.
118. *Id.* at 339, 178 Cal. Rptr. at 728.
119. *Id.* at 338, 178 Cal. Rptr. at 728.

those whom it significantly affects."[120]

Next, applying the three-step analysis from *Building Industry Association v. City of Livermore*,[121] the court held that no attempt had been made to accommodate the competing public interests that were present, namely, the acute shortage of moderate-income housing in Costa Mesa versus a desire for lower-density development.[122] The court concluded that "the initiative ordinance, which completely precludes development of multiple-family residences in the area, does not effect a reasonable accommodation of the competing interests on a regional basis and is therefore not a valid exercise of the police power."[123]

A federal district court has also overturned a land use initiative on constitutional grounds. In *Fry v. City of Hayward*,[124] an initiative retaining an open-space designation for a golf course was found to violate a property owner's equal protection rights.[125] Absent voter approval, the initiative precluded changes to the open-space designation for the property, which was surrounded by residential, commercial and industrial development.[126] The court applied the "rational basis" standard—a very easy standard for a city to meet—requiring only that there be a rational basis for the city's disparate treatment of the affected property.[127] The court found, however, that the City of Hayward had made no showing of any rational basis for the provisions of the initiative.[128] The court restated the rule that the fact that a measure is adopted by the voters, rather than a legislative body, will not immunize it from challenge based on constitutional grounds.[129]

2. Inconsistency with the general plan

a. "vertical" consistency

Under California law, every city and county must adopt a general plan as the "constitution" for that jurisdiction's physical development.[130] A general plan must include, at a minimum, seven mandatory elements:

120. *Id.* at 339, 178 Cal. Rptr. at 728.

121. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976). See *supra* notes 56-59 and accompanying text for a discussion of the *Livermore* three-part test.

122. *Arnel*, 126 Cal. App. 3d at 337-38, 178 Cal. Rptr. at 727-28.

123. *Id.* at 340, 178 Cal. Rptr. at 729.

124. 701 F. Supp. 179 (N.D. Cal. 1988).

125. *Id.* at 182.

126. *Id.* at 180.

127. *Id.* at 181-82.

128. *Id.* at 182.

129. *Id.*

130. CAL. GOV'T CODE § 65300 (West 1983 & Supp. 1991).

(1) land use, (2) circulation,[131] (3) housing, (4) conservation, (5) open space, (6) noise, and (7) safety.[132] Generally, all other land use regulations, actions or approvals must be consistent with the applicable general plan.[133] Whether a growth control measure is consistent with the applicable general plan is determined by comparing the substance of the measure with each of the elements of the general plan, including the seven mandatory elements and any optional elements included within the plan, and any maps and diagrams within the various elements.

If a subordinate land use regulation, whether enacted by the legislative body or directly by the voters, is inconsistent with the applicable general plan, a legal challenge to the regulation may result in its being found void *ab initio*. For example, in *deBottari v. City Council*,[134] a California appellate court held that a proposed referendum, which would have rejected a zoning ordinance, was invalid because, if passed, the resulting zoning would have been inconsistent with the city's general plan.[135]

At the request of a landowner, the Norco City Council amended the city's general plan and the zoning ordinance as they related to the landowner's property.[136] The amended general plan and amended zoning ordinance permitted high density development of the property.[137] In response to the city council's action, another landowner submitted a referendum to repeal the amended zoning ordinance and to require low density development.[138] The referendum, however, did not attempt to change the general plan's amended provision permitting more dense development.[139] Consequently, the result of passage of the referendum "unquestionably would be a zoning ordinance inconsistent with the

131. The circulation element is an infrastructure plan addressing the circulation of people, goods, energy, water, sewage, storm drainage and communications. GOVERNOR'S OFFICE OF PLANNING & RESEARCH, GENERAL PLAN GUIDELINES 82 (1990).

132. CAL. GOV'T CODE § 65302 (West 1983 & Supp. 1991).

133. *See, e.g.*, Lesher Communications v. City of Walnut Creek, 52 Cal. 3d 531, 541, 802 P.2d 317, 322, 277 Cal. Rptr. 1, 6 (1990) (zoning ordinance); Friends of "B" Street v. City of Hayward, 106 Cal. App. 3d 988, 989 (1980) (public works); CAL. GOV'T CODE § 65860 (West 1983) (zoning); *id.* §§ 66473.5, 66474 (subdivision approval). A number of other states have similar consistency requirements, including Hawaii, Oregon, and Florida. *See* FLA. STAT. ANN. § 163.3177 (West 1990); HAW. REV. STAT. § 46-4(a) (Supp. 1987); OR. REV. STAT. § 197.251 (1985).

134. 171 Cal. App. 3d 1204, 217 Cal. Rptr. 790 (1985).

135. *Id.* at 1212, 217 Cal. Rptr. at 795.

136. *Id.* at 1207-08, 217 Cal. Rptr. at 791-92.

137. *Id.* at 1212, 217 Cal. Rptr. at 793.

138. *Id.* at 1212, 217 Cal. Rptr. at 795.

139. *Id.* at 1208, 217 Cal. Rptr. at 791.

amended general plan."[140] The court held that voters do not have the right to reject zoning ordinances which would result in zoning inconsistent with a general plan.[141] Had the voters subjected both the general plan amendment *and* the changes to the zoning ordinance to referendum, however, the inconsistency would have been removed, making it likely that the referendum would have been valid.

A recent decision by the California Supreme Court, *Lesher Communications v. City of Walnut Creek*,[142] affirmed the rule that a zoning ordinance in conflict with a general plan is invalid at the time it is passed.[143] First, the court found that the City's traffic-based growth control ordinance, which was passed by initiative was, in fact, a zoning ordinance and not a general plan amendment.[144] The court then found the initiative to be inconsistent with the City's general plan[145] and, therefore, void *ab initio*.[146]

The *Lesher Communications* court rejected the language in *Building Industry Association v. Superior Court*,[147] which had indicated that the remedy for an ordinance found inconsistent with a general plan would be to cure the inconsistency rather than to find the ordinance invalid.[148] The *Building Industry* court had relied on section 65860(c) of the California Government Code,[149] which requires that:

> In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to such a plan, or to any element of such a plan, such zoning ordinance shall be amended within a reasonable time so that it is consistent with the general plan as amended.[150]

The *Lesher Communications* court held that section 65860(c) only applies to zoning ordinances that were valid when enacted, but later became inconsistent with the general plan as a result of the plan's subsequent amendment.[151] The *Lesher Communications* court rejected the notion that section 65860 permits validating ordinances that were

140. *Id.* at 1210, 217 Cal. Rptr. at 793.
141. *Id.* at 1212, 217 Cal. Rptr. at 794.
142. 52 Cal. 3d 531, 802 P.2d 317, 277 Cal. Rptr. 1 (1990).
143. *Id.* at 541, 802 P.2d at 322, 277 Cal. Rptr. at 6.
144. *Id.* at 544, 802 P.2d at 324, 277 Cal. Rptr. at 8.
145. *Id.* at 545, 802 P.2d at 325, 277 Cal. Rptr. at 9.
146. *See id.*
147. 211 Cal. App. 3d 277, 297, 259 Cal. Rptr 325, 338-39 (1989).
148. *Lesher Communications*, 52 Cal. 3d at 545, 802 P.2d at 325, 277 Cal. Rptr. at 9.
149. CAL. GOV'T CODE § 65860(c) (West 1983).
150. *Id.*
151. *Lesher Communications*, 52 Cal. 3d at 545, 802 P.2d at 325, 277 Cal. Rptr. at 9.

inconsistent with the general plan when adopted.[152]

b. *"horizontal" or internal consistency*

In addition to the requirement that land use regulations be consistent with the general plan, "horizontal" or internal consistency within the general plan is also required.[153] When growth control is to be accomplished via a general plan amendment, there is a possibility that the amendment will result in an internal inconsistency. For example, a growth limiting initiative may be inconsistent with the general plan's provisions relating to affordable housing. Any measure, whether enacted by initiative or the legislature, that will result in inconsistency within the general plan, is vulnerable to legal challenge.

c. *legal inadequacy of the general plan*

A related basis for limiting the voters' ability to enact a growth control or other land use measure is the legal inadequacy of the general plan itself. The consistency requirement is one of consistency with a legally adequate general plan.[154] Therefore, if the general plan fails to meet all of the statutory requirements, including internal consistency, a growth control measure intended to implement that general plan, whether enacted by the legislative body or the voters, may be found inconsistent with it.[155] For example, in *Sierra Club v. Board of Supervisors*,[156] a California appellate court found the general plan of Kern County, California invalid because it was internally inconsistent.[157] The court held that the zoning ordinance under review could not be consistent with an invalid general plan.[158] Consequently, the zoning ordinance was invalid at the time it was passed.[159]

It is likely that many jurisdictions have general plans that are vulnerable to legal challenge because they lack required content, are internally inconsistent, or suffer from some other flaw. This creates a promising avenue of attack on many land use initiatives. This approach, however, has some built-in limitations for those who wish to develop

152. *Id.*

153. CAL. GOV'T CODE § 65300.5 (West 1983).

154. Sierra Club v. Board of Supervisors, 126 Cal. App. 3d 698, 704, 179 Cal. Rptr. 261, 264 (1981).

155. Resource Defense Fund v. County of Santa Cruz, 133 Cal. App. 3d 800, 806, 184 Cal. Rptr. 371, 373-74 (1982).

156. 126 Cal. App. 3d 698, 179 Cal. Rptr. 261 (1981).

157. *Id.* at 704, 179 Cal. Rptr. at 264.

158. *Id.*

159. *See id.*

property within the jurisdiction. A successful challenge based on general plan inadequacy may remove an initiative from the ballot, or may result in the initiative's invalidation if already adopted. However, it may also act to bar a city from issuing any other discretionary land use approvals. For example, issuance of development approvals may be prohibited because such approvals may not be granted until the general plan meets the statutory requirements.[160] Thus, a developer may hesitate to challenge a growth-limiting initiative based on general plan inadequacy.

3. Initiatives may only enact legislative acts

The initiative power applies only to "legislative" acts.[161] California courts categorize types of land use decisions as either legislative or administrative, rather than requiring a case-by-case determination based on the characteristics of the individual decision, such as size of the affected area, or its effects.[162] Thus, in California, the adoption of, or amendments to, general plans,[163] specific plans[164] or zoning ordinances[165] have been held to be legislative acts; other decisions, such as variances,[166] use permits,[167] and subdivision map approvals,[168] have been categorized as administrative.[169]

In a variation on the "legislative acts only" theme, a California appeals court recently struck down an initiative because it directed the city council to adopt legislation, rather than adopting the legislation itself. In *Marblehead v. City of San Clemente*,[170] the appellate court invalidated an initiative that tied future development to the ability to meet specified service levels for traffic and a range of public services.[171] The court held

160. An example of the development-limiting effect of a determination of general plan inadequacy was provided in Committee For Responsible Planning v. City of Indian Wells, 209 Cal. App. 3d 1005, 257 Cal. Rptr. 635 (1989). In that case, the city was forced to seek court approval for all significant land use approvals while correcting its general plan, pursuant to the procedures under section 65755 of the California Government Code, CAL. GOV'T CODE § 65755 (West 1983 & Supp. 1991). *Committee For Responsible Planning*, 209 Cal. App. 3d at 1009, 257 Cal. Rptr. at 636.

161. Yost v. Thomas, 36 Cal. 3d 561, 569, 685 P.2d 1152, 1157, 205 Cal. Rptr. 801, 806 (1984); *Arnel*, 28 Cal. 3d at 516, 620 P.2d at 568, 169 Cal. Rptr. at 907.

162. *Arnel*, 28 Cal. 3d at 516, 620 P.2d at 568, 169 Cal. Rptr. at 907.

163. *Yost*, 36 Cal. 3d at 570, 685 P.2d at 1158, 205 Cal. Rptr. at 807.

164. *Id.* at 570-71, 685 P.2d at 1158, 205 Cal. Rptr. at 807.

165. *Arnel*, 28 Cal. 3d at 525, 620 P.2d at 573, 169 Cal. Rptr. at 912.

166. *Id.* at 518, 620 P.2d at 569, 169 Cal. Rptr. at 908.

167. *Id.*

168. *Id.* at 523, 620 P.2d at 572, 169 Cal. Rptr. at 911.

169. *Id.* at 518, 620 P.2d at 569, 169 Cal. Rptr. at 908.

170. 226 Cal. App. 3d 1504, 277 Cal. Rptr. 550 (1991).

171. *Id.* at 1507, 277 Cal. Rptr. at 554.

that the initiative, which contemplated amendments to the city's general plan, violated the California Constitution's provisions authorizing initiatives.[172] The measure, said the court, did not actually enact legislation, which is the constitutional authorization. Rather, the initiative directed the city council to enact legislation, in the form of a general plan amendment, in order to implement the policies in the initiative.[173]

4. Impairment of an essential governmental function

An initiative may not interfere with the efficacy of an essential governmental power, such as a city's power to grant a franchise[174] or site a courthouse.[175] This limitation applies even if the initiative ordinance is legislative, rather than administrative, in nature.[176] The limitation has been relied upon as the basis for voiding an initiative which would impair a city's fiscal management abilities.[177] This is a judicial extension of the constitutional limitation on statewide referenda regarding tax matters.[178]

5. Conflict with state law

General law limits cities in the exercise of their police power to enacting ordinances which will not conflict with provisions of general state law.[179] This limitation applies to measures adopted either by the city council or by the voters directly.[180] Thus, for example, a local initiative that granted a franchise for a toll-bridge was invalidated because preconditions set by state law, such as obtaining the approval of the State Engineer, were not met.[181] This restriction does not apply to charter cities with regard to municipal affairs.[182] With regard to matters of statewide concern, however, even charter cities will be precluded from enacting measures that conflict with state law, whether by council action or

172. *Id.* at 1510, 277 Cal. Rptr. at 553.

173. *Id.*

174. Newsom v. Board of Supervisors, 205 Cal. 262, 271-72, 270 P. 676, 680 (1928).

175. Simpson v. Hite, 36 Cal. 2d 125, 134, 222 P.2d 225, 230 (1950).

176. *Id.*

177. *See, e.g.*, Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 143, 550 P.2d 1001, 1012, 130 Cal. Rptr. 465, 476 (1976) (initiative is invalid if it will impair, for example, city's ability to meet its fiscal management responsibilities); City of Atascadero v. Daly, 135 Cal. App. 3d 466, 470, 185 Cal. Rptr. 228, 230 (1982) (initiative is invalid if it will impede city's taxing powers).

178. *See* CAL. CONST. art. II, § 9(a).

179. *Id.* art. XI, § 7.

180. Legislature v. Deukmejian, 34 Cal. 3d 658, 675, 669 P.2d 17, 27, 194 Cal. Rptr. 781, 791 (1983); Galvin v. Board of Supervisors, 195 Cal. 686, 235 P. 450 (1925).

181. *Galvin*, 195 Cal. at 696-98, 235 P. at 451.

182. CAL. CONST. art. XI, § 5(a).

initiative.[183]

In *Committee of Seven Thousand v. Superior Court*,[184] the California Supreme Court found invalid an initiative measure proposed in the charter city of Irvine, because it would have required voter approval for the imposition of certain developer fees for the construction of major new roads.[185] The court found that road construction of the type contemplated by the California statute authorizing the fees[186] was a matter of statewide concern, rather than a strictly municipal affair.[187] The court also found that California law grants exclusive authority to impose such fees to the Orange County Board of Supervisors and to the city councils within Orange County, rather than to the voters.[188] Thus, the court held, the voters' enactment of a voter-approval requirement for the imposition of the fees conflicted with and was preempted by the provisions of state law.[189]

D. Pre-election Challenges to Initiatives

The California courts appear to be showing an increased willingness to review an initiative or referendum measure for legal validity *prior* to its submission to the electorate.[190] The effect of a successful pre-election challenge can be substantial. If an initiative is kept off the ballot by a pre-election challenge, and the court's determination of the measure's invalidity is subsequently appealed, the initiative ordinance is inoperative unless and until the appeals process is successful, and the initiative is later enacted. If, however, the initiative is enacted by the voters, and is subsequently challenged in court, the initiative ordinance remains in effect until the judicial process, including appeals, has been exhausted. For example, a growth management measure enacted in Walnut Creek, California in November 1985 and challenged in *Lesher Communications v. City of Walnut Creek*,[191] was found invalid by the trial court in February of 1987. The measure's limitations remained in effect, however, until the California Supreme Court's decision affirming the trial court in Decem-

183. Bishop v. City of San Jose, 1 Cal. 3d 56, 61, 460 P.2d 137, 140, 81 Cal. Rptr. 465, 483 (1969).

184. 45 Cal. 3d 491, 754 P.2d 708, 247 Cal. Rptr. 362 (1988).

185. *Id.* at 495, 754 P.2d at 709, 247 Cal. Rptr. at 363.

186. CAL. GOV'T CODE § 66484.3 (West Supp. 1991).

187. *Committee of Seven Thousand*, 45 Cal. 3d at 507, 754 P.2d at 717, 247 Cal. Rptr. at 371.

188. *Id.* at 505, 754 P.2d at 716, 247 Cal. Rptr. at 370.

189. *Id.* at 509, 754 P.2d at 719, 247 Cal. Rptr. at 373.

190. *See, e.g., id.* at 498-99, 754 P.2d at 711-12, 247 Cal. Rptr. at 365-66 (action for writ of mandate commenced to prevent placement of initiative on ballot).

191. 52 Cal. 3d 531, 802 P.2d 317, 277 Cal. Rptr. 1 (1990).

ber 1990.[192]

Although courts generally prefer post-election review, in some cases a court will undertake to determine a measure's validity prior to its submission to the electorate. The decision to make such a determination, however, lies wholly within the discretionary power of the court.[193] Generally, courts weigh two competing values. On one hand, courts are concerned with preventing the waste of public funds.[194] On the other hand, courts are aware of the need to allow the public to vote because only then can the purposes of the initiative and referendum be achieved.[195] Balancing these concerns is relatively straightforward when a measure is invalid on its face. Where the issues are not so apparent, it is difficult to predict when a court will agree to review an initiative or referendum measure prior to an election. If a court does find a measure facially invalid, it will order either that the measure be removed from the ballot or that any vote taken be disregarded.

In *deBottari v. City Council*,[196] the California Court of Appeal considered the appropriateness of pre-election judicial review in the context of a referendum measure which sought to repeal rezoning ordinances enacted by the city council.[197] After a referendum petition was successfully circulated, the city council refused to either repeal the ordinances or submit the referendum to the voters as required by section 4055 of the California Elections Code.[198] The council relied on its determination that repeal of the ordinances would result in zoning inconsistent with the city's general plan. The court first determined that the city council had a mandatory duty under the referendum laws either to repeal the challenged ordinances or to submit them to referendum unless " 'directed to do otherwise by a court on a compelling showing that a proper case has been established for interfering with the [referendum] power.' "[199] The court went on to assess whether such a showing had been made by the city council.[200]

As an initial matter, the *deBottari* court noted two exceptions to the

192. *Id.* at 538, 802 P.2d at 320-21, 277 Cal. Rptr. at 4.

193. deBottari v. City Council, 171 Cal. App. 3d 1204, 1209, 217 Cal. Rptr. 790, 793 (1985).

194. *See, e.g.*, Gayle v. Hamm, 25 Cal. App. 3d 250, 257, 101 Cal. Rptr. 628, 634 (1972).

195. *See, e.g., id.* at 257-58, 101 Cal. Rptr at 634.

196. 171 Cal. App. 3d 1204, 217 Cal. Rptr. 790 (1985).

197. *Id.* at 1209-10, 217 Cal. Rptr. at 793.

198. *Id.* at 1208, 217 Cal. Rptr. at 792; *see* CAL. ELEC. CODE § 4055 (West 1977 & Supp. 1991).

199. *deBottari*, 171 Cal. App. 3d at 1209, 217 Cal. Rptr. at 792 (quoting Farley v. Healey, 67 Cal. 2d 325, 327, 431 P.2d 650, 652, 62 Cal. Rptr. 26, 28 (1967)).

200. *Id.* at 1210-12, 217 Cal. Rptr at 793-94.

general rule that " 'it is usually more appropriate to review constitutional and other challenges to . . . initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise.' "[201] First, a court may review challenges to initiative measures prior to an election where the electorate "lacks the '*power* to adopt the proposal,' " as when the initiative proposed would affect an administrative, rather than a legislative, matter.[202] Second, a court may review a measure prior to a vote when "the substantive provisions of the proposed measure are *legally invalid*."[203]

The court analyzed the referendum at issue in *deBottari* under the second of these exceptions. It held that because repeal of the zoning ordinance would result in the property being zoned in a manner inconsistent with the city's general plan, the "invalidity of the proposed referendum [had] been clearly and compellingly demonstrated,"[204] and the "referendum, if successful, would enact a clearly invalid zoning ordinance."[205] The court noted that: "Judicial deference to the electoral process does not compel judicial apathy towards patently invalid legislative acts."[206]

Under the *deBottari* rule, a challenging party might be successful if it could show, for example, that an initiative is inconsistent with the city's general plan or would cause the general plan to become internally inconsistent.[207] Such inconsistencies could be shown by a report ordered by the city council pursuant to sections 3705.5 or 4009.5 of the California Elections Code,[208] which authorize city councils and county boards of supervisors to request reports on the fiscal, land use and other effects of a proposed initiative.[209] For example, if the report requested by a city council shows that an initiative would be inconsistent with the city's general plan, the challenger could use that official report as the basis for urging the council to refuse to put the measure on the ballot. Alterna-

201. *Id.* at 1209, 217 Cal. Rptr. at 793 (quoting Brosnahan v. Eu, 31 Cal. 3d 1, 4, 641 P.2d 200, 201, 181 Cal. Rptr. 100, 101 (1982)).

202. *Id.* (quoting Brosnahan v. Eu, 31 Cal. 3d 1, 6, 641 P. 2d 200, 202, 181 Cal. Rptr. 100, 102 (1982) (Mosk, J., concurring and dissenting)).

203. *Id.* at 1210, 217 Cal. Rptr. at 793.

204. *Id.* at 1212, 217 Cal. Rptr. at 794.

205. *Id.* at 1213, 217 Cal. Rptr. at 795.

206. *Id.*

207. Concerned Citizens v. Board of Supervisors, 166 Cal. App. 3d 90, 95, 212 Cal. Rptr. 273, 276-77 (1985); Sierra Club v. Board of Supervisors, 126 Cal. App. 3d 698, 704, 179 Cal. Rptr. 261, 264 (1981).

208. CAL. ELEC. CODE §§ 3705.5, 4009.5 (West Supp. 1991).

209. *Id.*

tively, a challenger could use the report as the basis for seeking a court order to keep the initiative off the ballot.

The California Supreme Court upheld the pre-election invalidation of a proposed initiative measure in *Committee of Seven Thousand v. Superior Court*.[210] There, the court found that the measure was correctly kept off of the ballot because it conflicted with state law.[211]

In addition to substantive flaws in an initiative measure, courts have upheld pre-election challenges based on technical flaws in the initiative petition itself or elsewhere in the initiative procedure.[212] Initiative opponents, hungry for a basis for defeating a proposed measure, have frequently looked to procedural deficiencies as a means of accomplishing their ends.[213] Such procedural flaws will be a basis for invalidation, however, only if the purpose for the technical requirement is frustrated by the flaw.[214]

Under this rule, pre-election challenges to initiatives and referenda have been upheld because: a referendum petition contained only the number and title of the challenged ordinance rather than its complete text;[215] a referendum petition failed to include an exhibit setting forth the technical legal description and location of the affected real property;[216] and, an initiative petition was signed after notice of intent to circulate the petition was published, but prior to that notice being posted.[217]

E. Conflicting Initiatives on the Same Ballot

A phenomenon that appears to be increasingly common on the local level, as well as in California's statewide elections, is for competing initia-

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210. 45 Cal. 3d 491, 509, 754 P.2d 708, 719, 247 Cal. Rptr. 362, 373 (1988).

211. *Id.* at 495, 754 P.2d at 709, 247 Cal. Rptr. at 363. Because Irvine is a charter city, conflict with state law is a basis for invalidation only if a measure addresses a matter of statewide concern. *Id.* at 505-07, 754 P.2d at 716, 247 Cal. Rptr. at 370-71. See *supra* notes 184-89 for a discussion of the *Committee of Seven Thousand* decision.

212. *See, e.g., Lesher Communications*, 52 Cal. 3d at 531, 802 P.2d at 318, 277 Cal. Rptr. at 2.

213. *See, e.g.*, Insurance Indus. Initiative Campaign Comm'n v. Eu, 203 Cal. App. 3d 961, 250 Cal. Rptr. 320 (1988) (plaintiff claimed initiative violated single subject rule).

214. Assembly v. Deukmejian, 30 Cal. 3d 638, 652-53, 639 P.2d 939, 948, 180 Cal. Rptr. 297, 306 (1982).

215. Creighton v. Reviczky, 171 Cal. App. 3d 1225, 1229, 217 Cal. Rptr. 834, 836 (1985). A referendum petition must contain the complete text of the challenged ordinance. CAL. ELEC. CODE § 4052 (West 1977 & Supp. 1991).

216. Chase v. Brooks, 187 Cal. App. 3d 657, 664, 232 Cal. Rptr. 65, 70 (1986). Exhibits are required pursuant to CAL. ELEC. CODE § 4052.

217. Ibarra v. City of Carson, 214 Cal. App. 3d 90, 99-100, 262 Cal. Rptr. 485, 490 (1989). Notice must be posted prior to signature pursuant to CAL. ELEC. CODE § 4002(a) (West Supp. 1991).

tives to appear on the same ballot.[218] The California Elections Code addresses the question of competing initiatives on the same ballot and provides that, if the provisions of two or more ordinances adopted at the same election conflict, the ordinance receiving the highest number of affirmative votes shall control.[219]

Some initiatives have attempted to ensure applicability of these provisions of state law by including a "killer clause" as part of the initiative.[220] A "killer clause" will state that the measure's provisions are intended to, and do, conflict with the provisions of a rival initiative. Thus, the initiative receiving the most votes should "kill" the rival initiative, even if both pass.[221]

An example of the efficacy of Elections Code sections 3713 and 4016, and of a "killer clause," was provided in *Concerned Citizens v. City of Carlsbad*.[222] In *Carlsbad*, the California Court of Appeal ruled that a city can refuse to enforce a citizens' initiative that had been passed by the voters where the city's own ballot measure on the same subject, which was inconsistent with the citizens' initiative, received more affirmative votes.[223]

Concerned Citizens presented the City of Carlsbad with an initiative (Proposition G) to regulate housing development for a ten year period.[224] The measure would have created annual limits on new residential construction.[225] In response to Proposition G, the city council placed an alternative measure on the ballot, Proposition E, which tied the rate of development to the development of new public facilities.[226] In its "killer clause," Proposition E stated that it was inconsistent with Proposition G.[227] The voters passed both measures, but the council's measure received more votes.[228] Accordingly, the council enacted Proposition E and refused to enact Proposition G.[229]

Concerned Citizens sought to have Proposition G enforced, claim-

218. *See, e.g.*, Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n, 51 Cal. 3d 744, 799 P.2d 1220, 274 Cal. Rptr. 787 (1990) (both measures regulating political campaign contributions and spending).

219. CAL. ELEC. CODE § 3717 (West 1977) (counties); *id.* § 4016 (cities).

220. *See, e.g.*, *Taxpayers*, 51 Cal. 3d at 747, 799 P.2d at 1221, 274 Cal. Rptr. at 788.

221. *Id.* at 767, 799 P.2d at 1234, 274 Cal. Rptr. at 801.

222. 204 Cal. App. 3d 937, 251 Cal. Rptr. 583 (1988).

223. *Id.* at 943, 251 Cal. Rptr. at 587.

224. *Id.* at 939, 251 Cal. Rptr. at 584.

225. *Id.*

226. *Id.*

227. *Id.* at 940, 251 Cal. Rptr. at 584.

228. *Id.*

229. *Id.*

ing that it was not inconsistent with Proposition E.[230] The court of appeal held that Proposition E was clearly inconsistent with Proposition G, stating that Proposition E expressed "an unambiguous intent to supplant any [annual] numerical limit [on the rate of residential construction]."[231]

A recent California Supreme Court decision involved rival statewide initiatives passed on the same ballot, but is likely applicable to local initiatives as well. In *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*,[232] the California court addressed the degree to which the provisions of two measures dealing with political campaign reform should be made operative. The court relied on Article II, Section 10(b) of the California Constitution, which states that if provisions of two or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.[233] The court noted that each of the competing measures established a comprehensive regulatory scheme.[234]

The *Taxpayers* court rejected the notion that only those provisions from the "losing" measure that conflict with the provisions of the measure obtaining more affirmative votes, and those provisions that cannot be severed from the conflicting provisions, need be invalidated.[235] Rather, the court held that section 10(b) does not permit the court to engraft onto one regulatory scheme provisions intended to be part of a different scheme.[236] The court held:

> [U]nless a contrary intent is apparent in competing, conflicting initiative measures which address and seek to comprehensively regulate the same subject, only the provisions of the measure receiving the highest affirmative vote become operative upon adoption. If the measures propose alternative regulatory schemes, a fundamental conflict exists. In those circumstances, [the constitution] does not require or permit either the court or the agency charged with the responsibility of implementing the measure or measures to enforce any of the provisions of the measure which received the lesser affirmative vote.[237]

230. *Id.*
231. *Id.*
232. 51 Cal. 3d 744, 799 P.2d 1220, 274 Cal. Rptr. 787 (1990).
233. *Id.* at 764, 799 P.2d at 1233, 274 Cal. Rptr. at 800.
234. *Id.* at 770-71, 799 P.2d at 1236-37, 274 Cal. Rptr. at 803-04.
235. *Id.* at 747, 799 P.2d at 1221, 274 Cal. Rptr. at 788.
236. *Id.*
237. *Id.* at 770-71, 799 P.2d at 1236, 274 Cal. Rptr. at 803.

In a footnote, the court addressed when provisions of a "losing" measure may be given effect:

> Our construction of [the constitution] does not foreclose operation of an initiative measure that receives an affirmative vote simply because one or more minor provisions happen to conflict with those of another initiative principally addressed to other aspects of the same general subject. In the latter circumstance, if the principal purpose of the initiative can be accomplished notwithstanding the excision of the minor, incidental conflicting provisions, the remainder of the initiative can be given effect.[238]

V. REACTIONS TO INCREASED USE OF INITIATIVES TO EFFECT GROWTH CONTROL

There has been a variety of reactions to the increased use of initiatives in California as a tool to control growth. For instance, on a practical level, developers appear to be taking heightened interest in the use of two California statutory provisions that allow an early vesting of development rights, thereby providing insulation from subsequently enacted growth management measures. On a policy level, an increasing number of voices are questioning the long term advisability of allowing land use policy to be determined directly by the voters. There has even been some indication from the California Supreme Court that it would be receptive to hearing the question of whether local initiatives to amend general plans may exceed the scope of the initiative power.

A. Developer Interest in Vesting Development Rights via Statutory Mechanisms

Once a developer has a vested right to develop, that developer is largely immune from subsequent governmental actions that would preclude that development.[239] Consistent with the general rule that the voters may not do by initiative what the city council cannot do,[240] an initiative may not interfere with a vested right to develop. Thus, *when* a right to develop vests can be of real importance.

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238. *Id.* at 771 n.12, 799 P.2d at 1236-37 n.12, 274 Cal. Rptr. at 803-04 n.12.

239. Avco Community Developers v. South Coast Regional Comm'n, 17 Cal. 3d 785, 791, 553 P.2d 546, 550, 132 Cal. Rptr. 386, 390 (1976), *cert. denied*, 429 U.S. 1083 (1977).

240. Arnel Dev. Co. v. City of Costa Mesa, 126 Cal. App. 3d 330, 337, 178 Cal. Rptr. 723, 727 (1981) (initiative that defeated rezoning for city development plan held invalid where same action by city council would be arbitrary and discriminatory).

1. Common law vested rights doctrine in California

Under common law in California, the right to develop vests late in the development game. In *Avco Community Developers v. South Coast Regional Commission*,[241] the California Supreme Court reiterated the rule that not until a developer has obtained a building permit for its project, has completed substantial work and has incurred substantial liabilities in reliance on that permit, may the developer claim a vested right to finish the project within the scope of the permit.[242] The developer may not rely on land use regulations in effect when the property was acquired, when preliminary steps to development were taken, or when pre-building permit approvals, such as general plan amendments, rezonings or subdivision map or development plan approvals were obtained.[243] Thus, because the right to develop vests at such a late stage, a developer is often vulnerable to substantial losses of time and money if the applicable land use regulations change prior to obtaining a vested right.

2. Property development agreements

In an attempt to blunt *Avco Community Developers'* late vesting rule, the California legislature, at the request of the building industry, authorized use of property development agreements (development agreements).[244] A development agreement is an agreement between a property owner and a city under which the city agrees to apply to the subject property, unless provided otherwise by agreement, the policies, rules and regulations in effect at the time the development agreement was entered into.[245] In this way, the property owner is able to obtain protection against a subsequently enacted amendment to the general plan, zoning ordinance, or other land use regulation, whether enacted by the legislative body or by the voters through an initiative. Whether or not a subsequently enacted growth management measure that could *delay* construction will apply to property which is the subject of a development agreement may depend on the terms of the agreement itself. Although a development agreement was not involved, *Pardee Construction Co. v.*

241. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977).

242. *Id.* at 791, 553 P.2d at 550, 132 Cal. Rptr. at 389.

243. *Id.* at 793, 553 P.2d at 551, 132 Cal. Rptr. at 391.

244. CAL. GOV'T CODE §§ 65864-65869 (West 1983 & Supp. 1991). Several other states have development agreement statutes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-500.05 (1990); COLO. REV. STAT. §§ 24-68-101 to -106 (1988); FLA. STAT. ANN. §§ 163.3220-.3243 (West 1990); HAW. REV. STAT. §§ 46-121 to -132 (1985); NEV. REV. STAT. ANN. § 278.0201 (Michie 1990); N.J. STAT. ANN. § 40:55D-45.2 (West Supp. 1990).

245. *See* CAL. GOV'T CODE § 65866. The parties may, however, agree otherwise. *See id.*

City of Camarillo[246] is instructive regarding this point. In *Pardee Construction*, the right to develop a specific piece of property was guaranteed by a stipulated judgment resulting from the settlement of a lawsuit, rather than by a development agreement.[247] The court characterized the stipulated judgment as being in the nature of a contract.[248] The court held that a voter-enacted annual cap on residential development did apply to the property that was the subject of the stipulated judgment because the growth cap did not impair the terms of the stipulated judgment.[249] The *Pardee Construction* court found that the city, including the voters using the initiative, was free to regulate all matters not covered by the stipulated judgment and that the stipulated judgment did not expressly address the pace of development.

In order to avoid these consequences, some property owners have negotiated into their development agreements provisions that expressly address the timing of development. In this way, they hope to protect themselves from growth control measures that would delay build-out of their projects.

It should be noted that the legality of development agreements under this statute has not yet been tested in the courts. There is some question as to whether a city can contract away the future use of its police power.[250] Still, developer interest in the use of development agreements shows no sign of abating. This interest seems to be based, at least in part, on the increased volatility of land use regulation caused by the use of initiatives.

3. Vesting tentative maps

As another legislative response to *Avco Community Developers*, in 1984 California established a new statutory procedure for subdivisions—the "vesting tentative map."[251] The vesting tentative map statute gives subdividers who obtain approval of a vesting tentative map the right to proceed with development which is in substantial compliance with local ordinances, policies and standards in effect at the time the map application is complete.[252]

246. 37 Cal. 3d 465, 690 P.2d 701, 208 Cal. Rptr. 228 (1984).

247. *Id.* at 468, 690 P.2d at 703, 208 Cal. Rptr. at 229-30.

248. *Id.* at 471, 690 P.2d at 705, 208 Cal. Rptr. at 232.

249. *Id.* at 472, 690 P.2d at 706, 208 Cal. Rptr. at 232-33.

250. *See* Curtin & Skaggs, *Legal Issues and Considerations*, in DEVELOPMENT AGREEMENTS: PRACTICE, POLICY, AND PROSPECTS 1, 121 (1989).

251. Act of Sept. 13, 1984, ch. 113, § 8, 1984 Cal. Stat. 3740, 3744-46 (codified as amended at CAL. GOV'T CODE §§ 66498.1-66498.9 (West Supp. 1991)).

252. CAL. GOV'T CODE § 66498.1(b) (West Supp. 1991).

To our knowledge, there is only one court decision to date dealing with the vesting effect of a vesting tentative map. In *Davidon Homes v. City of Pleasant Hill*,[253] a trial court examined an initiative imposing a retroactive freeze on rezonings that resulted in increased density. The court held that the retroactive freeze did not nullify a vested right to develop in accordance with a vesting tentative map.[254]

In *Davidon Homes*, the city council had rezoned the project site and later approved a vesting tentative map for a sixty-nine-unit residential subdivision.[255] Three weeks after the map was approved, an initiative containing the retroactive limitation on rezonings was enacted.[256] The city then refused to process a final subdivision map, claiming that the subdivision conflicted with the initiative's density limitations, and that the initiative operated to revoke the vested rights granted through the vesting tentative map.[257] The court rejected that argument, holding that the vesting tentative map prevails over a subsequently adopted land use initiative.[258] The city did not appeal this court decision.

B. Criticisms of the Use of the Initiative for Land Use Measures

A relatively small, but perhaps significant, backlash to the use of initiatives to enact land use measures—particularly those with the far-reaching impacts of growth control measures—has begun to surface in California and elsewhere. At the core of the most valid criticisms of land use initiatives is the contention that such measures make good land use planning difficult, if not impossible.[259] The hallmarks of good land use planning are that decisions are well informed, the planning process is flexible and responsive to changing circumstances and values, and that decisions reflect a comprehensive planning process and accommodate competing public interests. Arguably, each of these goals is thwarted when land use planning is achieved via the ballot box.

Critics of land use initiatives claim that voters never have as much information available to them in making land use decisions as a professional planning staff, planning commission or city council does. More specifically, the fact that initiatives are exempt from the requirement of

253. No. 297988, slip op. (Contra Costa County Super. Ct. Sept. 23, 1987).
254. *Id.* at 4.
255. *Id.* at 2.
256. *Id.* at 2-3.
257. *Id.* at 3-4.
258. *Id.* at 4.
259. *See, e.g.*, Freilich & Guemmer, *supra* note 71, at 519-20; Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 839, 866-67 (1983).

environmental review under the California Environmental Quality Act (CEQA) means that decisions with a potentially enormous environmental impact may be made without the extensive review that CEQA requires.[260]

These concerns were recently highlighted by the California Supreme Court in *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*:[261]

> We observed many years ago that even the most conscientious voters may lack the time to study ballot measures with that degree of thoroughness. Noting the tendency of voters to rely on the title to describe the content of an initiative, we agreed implicitly with the Supreme Court of Oregon whose observation we quoted.
>
> " 'The majority of qualified electors are so much interested in managing their own affairs that they have no time carefully to consider measures affecting the general public. A great number of voters undoubtedly have a superficial knowledge of proposed laws to be voted upon . . . . We think the assertion may safely be ventured that it is only the few persons who earnestly favor or zealously oppose the passage of a proposed law initiated by petition who have attentively studied its contents and know how it will probably affect their private interests. The greater number of voters do not possess this information and usually derive their knowledge of the contents of a proposed law from an inspection of the title thereof, which is sometimes secured only from the very meager details afforded by a ballot which is examined in an election booth preparatory to exercising the right of suffrage.' "
>
> Those observations are no less pertinent today. "Voters have neither the time nor the resources to mount an in depth investigation of a proposed initiative. Often voters rely solely on the title and summary of the proposed initiative and never examine the actual wording of the proposal."[262]

This issue was addressed to some degree in the 1987 amendments to the California Elections Code.[263] Under these amendments, when a peti-

260. Stein v. City of Santa Monica, 110 Cal. App. 3d 458, 461, 168 Cal. Rptr. 39, 40 (1980); *see supra* note 95 and accompanying text.

261. 51 Cal. 3d 744, 799 P.2d 1220, 274 Cal. Rptr. 787 (1990).

262. *Id.* at 770, 799 P.2d at 1236, 274 Cal. Rptr. at 803 (citations omitted).

263. Act of Sept. 18, 1987, ch. 767, § 15, 1987 Cal. Stat. 2438 (codified as amended at CAL. ELEC. CODE § 4009.5 (West Supp. 1991)).

tion for an initiative measure is circulated, a city council may request and receive reports from any city agency on such issues as the measure's fiscal impact, its effect on the internal consistency of the city's general and specific plans, the consistency between planning and zoning, environmental impact, and any other matters the council identifies.[264] The insights which might result from such reports, however, can only influence the council's decision to enact the initiative measure or place it on the ballot, or the voters' decision on whether to enact the measure should it be placed before them. The measure itself may not be changed from its form when circulated for signature.[265] Thus, these council-ordered reports are very different from environmental impact reports prepared under CEQA, which often have the effect of modifying the land use decisions under review.

The charge that land use initiatives frustrate the flexibility and responsiveness to change that are required of good land use planning is supported by the fact that generally, ordinances adopted by local initiative may not be repealed or amended except by a subsequent vote of the electorate.[266] This statutory provision stands to reason; the purpose for granting the initiative power—empowering an electorate confronted by an unresponsive legislative body—would be vitiated by allowing the legislative body to "undo" what the people have accomplished through the initiative. As a result, however, a land use regulation adopted by initiative may be very difficult to amend. Even though the concerns that prompted the measure's passage may have subsided, generating sufficient voter interest in updating or repealing the measure to conform to changed circumstances may present a real problem. Further, regulations appropriate for a particular period in a city's development may linger well past their usefulness and may, in fact, impede orderly development.

This provision attracted the California Supreme Court's attention in *Lesher Communications v. City of Walnut Creek*.[267] The *Lesher Communications* court noted that it had never been called upon to consider whether a general plan may be adopted or amended by initiative and noted that it was not now required to address the issue.[268] The court

264. CAL. ELEC. CODE § 4009.5 (West Supp. 1991). For comparable provisions regarding county initiatives, see *id.* § 3705.5.

265. *Id.* § 3711 (counties) (West 1977 & Supp. 1990); *id.* § 4011 (cities).

266. *Id.* § 3719 (West 1977) (counties); *id.* § 4013 (cities).

267. 52 Cal. 3d 531, 802 P.2d 317, 277 Cal. Rptr. 1 (1990).

268. *Id.* at 539, 802 P.2d at 321, 277 Cal. Rptr. at 4. The California Supreme Court has held that, because adoption of a general plan is a legislative act, the referendum power is applicable. *Id.* (citing Yost v. Thomas, 36 Cal. 3d 561, 685 P.2d 1152, 205 Cal. Rptr. 801 (1984)). Furthermore, both the initiative and referendum powers have been held applicable to

stated, however, that "[s]everal amici curiae argue that, because compliance with the numerous substantive provisions of the Planning and Zoning Law can be achieved only by a legislative body, that law preempts the initiative power."[269] The court referred to statements of amici regarding section 65358 of the California Government Code,[270] which authorizes general plan amendments by the "legislative body."[271] Such amendments may be precluded by a general plan amendment enacted by initiative, because the terms of such an amendment may only be amended or repealed by another vote of the people.[272] The court expressed some concern over the validity of such an outcome:

> One not inconsequential impact of the enactment of a municipal initiative is the statutory requirement that any future amendment of the initiative ordinance be submitted to the voters for approval. As the Court of Appeal recognized, that statute may apply to limit the power to amend a general plan given the legislative body by section 65358. If so, an initiative amendment might impermissibly limit the authority and responsibility of the legislative body to periodically review and amend the general plan.[273]

It remains to be seen whether the court's expressed concerns could blossom into decisions invalidating those general plan amendments enacted by initiative. This outcome seems most likely with those initiatives of unlimited or lengthy operative effect that could not be amended by the legislative body.

Another disturbing aspect of land use initiatives is that the balancing of competing public interests may be lost from the land use planning and regulation process. In upholding Proposition13, California's tax reform initiative enacted in 1978,[274] the California Supreme Court characterized the initiative as a " 'legislative battering ram,' " which is deficient as a means of lawmaking in that it permits very little balancing of inter-

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zoning ordinances. *Id.* (citing Arnel Dev. Co. v. City of Costa Mesa, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980); Friedman v. City of Fairfax, 81 Cal. App. 3d 667, 672 n.5, 146 Cal. Rptr. 687, 690 n.5 (1978)).

269. *Id.*

270. CAL. GOV'T CODE § 65358 (West Supp. 1991).

271. *Id.*

272. *Lesher Communications*, 52 Cal. 3d at 539 n.7, 802 P.2d at 320 n.7, 277 Cal. Rptr. at 4 n.7; *see* CAL. ELEC. CODE §§ 3719, 4013. An exception applies when the initiative itself permits repeal or amendment other than by a subsequent vote of the electorate.

273. *Lesher Communications*, 52 Cal. 3d at 540 & n.8, 802 P.2d at 322 & n.8, 277 Cal. Rptr. at 5 & n.8.

274. *See* CAL. CONST. art. XIIIA, §§ 1-6.

ests or compromise.[275] Evidence of this is the fact that initiative measures which place numerical restrictions on housing development are exempt from the requirement of findings that address health, safety and welfare concerns.[276] Likewise, the fact that CEQA's environmental review provisions do not apply to initiative measures[277] means that the balancing procedures which are a part of that process do not come to bear.

A blanket statement that initiative measures are completely free of requirements to balance competing interests would, however, be inaccurate. The three-part balancing test set forth in *Associated Home Builders v. City of Livermore*[278] requires an inquiry into how competing interests were balanced in order to find that the initiative measure bears a reasonable relationship to a legitimate governmental interest and is, thus, a valid exercise of the police power.[279]

Still, initiative measures often provide narrow solutions to multifaceted problems. To the degree that this is true, they may stand in the way of effective planning, which by nature must be comprehensive and must consider the interrelationship between a host of factors.

VI. CONCLUSION: OUTLOOK FOR THE FUTURE

The use of local initiatives to enact growth control measures has enjoyed tremendous popularity in California. Recent election results, however, find less than half of the growth control initiatives successful. Several explanations for this result have been advanced, such as the emergence of more sophisticated and better-funded opposition campaigns, and an increasingly savvy electorate which is less likely to accept simplistic solutions to growth-related problems.

These explanations suggest that the nature of growth control initiatives may change somewhat. Successful initiatives in the future may occur more frequently in smaller jurisdictions, where proponents are less likely to be overwhelmed by well-funded opposition efforts. Also, growth control activists may attempt to draft future measures with a broader appeal and with the ability to better withstand more critical analysis.

In addition, the recent decision in *Lesher Communications v. City of*

275. Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 228-29, 583 P.2d 1281, 1289, 149 Cal. Rptr. 239, 247 (1978) (quoting V. KEY & W. CROUCH, THE INITIATIVE AND THE REFERENDUM IN CALIFORNIA 485 (1939)).

276. *See supra* notes 97-106 and accompanying text.

277. *See supra* note 95 and accompanying text.

278. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

279. See *supra* notes 56-59 and accompanying text for a discussion of the *Livermore* test.

Walnut Creek[280] may indicate that the California Supreme Court would be receptive to a challenge asserting that general plan amendments, or at least some types of general plan amendments, are beyond the scope of the initiative power. Undoubtedly, such challenges will be made.

Despite the more recent election results, however, and what may be hints by California's highest court, it seems premature to announce the demise of growth control by the ballot box. At the root of this movement are strong feelings held by large numbers of the state's voters that problems associated with growth are not being adequately addressed by state and local legislators. The movement must also be attributed to the fact that California law is particularly well suited to accommodate these measures. As long as these two factors are present, it is likely that growth control measures enacted by the voters will continue to be a part of California's political scene.

280. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).