Traffic-Linked Growth Control in California

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INTRODUCTION

The question is how California will grow, not if California will grow. Since 1960, California’s population has grown from fifteen million to twenty-eight million. By the year 2010, it will reach almost thirty-six million.1 Already the nation’s most populous state, California is receiving major migrations from the eastern United States, Asia, and Latin America. This growth brings opportunity but also growing pains as California’s way of life changes and as its citizens seek to cope with that change. Freeways are jammed. Pollution is mounting. Open space is disappearing. Hillsides are carved into subdivisions. Quiet towns are becoming busy cities.

In response to these growing pains, a political movement has emerged in California to control growth.2 The movement has manifested itself primarily in the form of local initiative measures sprinkled throughout the state. Long confined to the city level, the slow growth movement has expanded to the county level, is now gaining strength statewide, and may ultimately result in a statewide initiative.4 Growth control could become California’s hottest political issue since Proposition 13.5

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3. In this Comment, “city” means “city” and “county,” and “city council” means both “city council” and “board of supervisors.”
5. In the 1970’s, skyrocketing property values caused property taxes to soar in California. When the legislature failed to act, the voters took matters into their own hands and enacted Proposition 13, a constitutional amendment strictly limiting property taxes. CAL. CONST. art. 13A, §§ 1-6 (1978). Despite opposition from almost every government figure, the initiative passed by more than a two to one vote. D. SEARS & J. CITRIN, TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA 188-96 (1985). It began the nationwide “taxpayers’ revolt” that swept through other states and into the federal government in the 1980’s. Id.; Tax Revolt, NAT’L J., Aug. 26, 1978, at 1364.
"Growth control" is the political effort to restrict real estate development within a community. Early forms of growth control measures limited the number of residential units built annually in the community. Other measures ban construction unless the community's infrastructure and community services meet specified standards. Some measures prevent growth by denying utility hookups. Recently proposed measures would limit the community's growth to the state's overall rate of growth.

One recent innovation enacted to prevent real estate development is "traffic-linked growth control." Traffic-linked growth control measures, usually local and usually enacted by initiative, prohibit development until traffic systems and other infrastructure in a particular area meet certain standards. In California, such measures have been enacted in Walnut Creek, San Clemente, Costa Mesa, and San Juan Capistrano. The Walnut Creek and San Clemente measures were held invalid in separate trial court decisions; the Walnut Creek decision has been appealed.

This Comment examines the validity of traffic-linked growth control measures. Part I describes the major features of the measures now in place in California. Part II examines the statutory authority of local governments to enact such measures. Part III analyzes whether such measures can withstand constitutional due process challenges, particularly in

7. In this Comment, "infrastructure" means those local public services that the government usually provides, such as water, sewers, flood control, and roads. "Community services" means police and fire protection, schools, parks, and libraries.
10. Contra Costa County, Cal., The Walnut Creek Traffic Control Initiative (Nov. 5, 1985) (Measure H).
12. Costa Mesa, Cal., The Citizens' Sensible Growth and Traffic Control Initiative (Nov. 8, 1988) (Measure G); see supra note 11.
13. San Juan Capistrano, Cal., The Citizens' Sensible Growth and Traffic Control Initiative (Nov. 8, 1988) (Measure X); see supra note 11.
light of the leading California case on the subject. Part IV examines the vulnerability of such measures to claims of takings of private property without just compensation. Part V offers a set of criteria for courts to apply when judging the validity of such measures and offers some ways in which traffic-linked growth control measures might be able to withstand constitutional scrutiny.

Traffic-linked growth control measures that prohibit construction until the traffic problem is alleviated are vulnerable to invalidation to the extent that they (1) are in effect indefinite construction moratoria; (2) do not represent a reasonable accommodation of the competing interests; and (3) impose injustice and unfairness on landowners and future residents by making them finance the correction of existing traffic problems. The underlying concept—denying use until roads are installed—is unworkable because of the lead time necessary to build roads, the resulting obstacles to obtaining funding for road construction, and the potential aggravation to California's housing shortage.

This Comment recommends a modified version of these traffic-linked growth control measures that prevents real estate development from outpacing the supporting infrastructure while permitting development to occur in an orderly and consistent manner. This approach would condition the issuance of a building permit on payment for the measurable impact that the development will have on traffic. This mechanism would prevent development unless funding for traffic improvements is provided up front, yet it would also prevent an indefinite building moratorium.

I
TRAFFIC-LINKED GROWTH CONTROL MEASURES

Performance-linked growth control originated in Ramapo, New York, and was upheld by the New York Court of Appeals. The Ramapo ordinance prohibited the issuance of more building permits until local educational, sewage, and water facilities met specified standards. This type of zoning was validated in California in Associated Homebuilders of the Greater Eastbay v. City of Livermore. Traffic-linked growth control resembles this earlier type of performance-linked growth control.

17. Ramapo, 30 N.Y.2d at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 143-44.
18. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).
The latest California traffic-linked growth control measures identify roads as a community service that must be provided at specified levels before building development may proceed. Roads, however, differ from other infrastructure and community services in two major respects. First, the effects of traffic are significantly more difficult to internalize to the community than are the other services. Roads are readily used by persons outside the city, preventing the city from controlling the sources of its traffic problems. Second, traffic improvements are frequently more expensive to install than are most other forms of infrastructure and community services.

A. The Walnut Creek Measure

Walnut Creek's Measure H forbids the building of any structures unless the peak hour volume-to-capacity ratio is 0.85 or less along the city's major surface streets before and after construction. Thus, no construction may commence unless Walnut Creek's major surface streets are at 85% or less of capacity during rush hours. Under Measure H, expected traffic volumes are unaffected by ride-sharing, staggered work hours, or similar programs, because the drafters assumed that such programs do not measurably reduce traffic. The measure exempts commercial buildings up to 10,000 square feet, housing projects up to ten units (up to thirty units in the downtown core), senior citizen housing, and single family dwellings on existing lots.

The Contra Costa County Superior Court invalidated Measure H in *Lesher Communications v. City of Walnut Creek*. The court found that Measure H conflicted with Walnut Creek's general plan in violation of state zoning law. An appeal is pending, with a decision continued until Walnut Creek revises its general plan. Walnut Creek has enacted a building moratorium while revising its general plan, precluding construction despite the invalidation of Measure H.

19. Municipal measures face a significant limitation: they do not apply to federal, state, or county highways. For example, Costa Mesa's Measure G does not apply to the San Diego Freeway, which bisects the city, because it is an interstate highway. Nor does the measure apply to Newport Boulevard which, while not a freeway, is a state route. The measure does apply to the arterials in the city not designated as federal, state, or county roads, such as Harbor Boulevard. Committee of Seven Thousand v. Superior Court, 45 Cal. 3d 491, 505-06, 247 Cal. Rptr. 362, 370 (1988) (as to matters of statewide concern, a city remains subject to the applicable state laws regardless of the city's charter; construction of major highways is a statewide concern). Measures enacted at the county level would apply only to county roads. A statewide measure would apply to all highways.

20. Contra Costa County, Cal., The Walnut Creek Traffic Control Initiative, § 2(a).
21. *Id.* § 2(a)(2).
22. *Id.* § 2(b).
24. *Id.* at 6-7.
B. The Costa Mesa Measure

Costa Mesa's Measure G resembles Walnut Creek's Measure H in that it links real estate development to the level of traffic within the city. The precise connection, though, is slightly different. Measure G provides that no development shall be approved unless the "standard level of service" has been "achieved and maintained" for all arterials to which the development contributes measurable traffic. The "standard level of service" means Level C service for all arterial highways and Level D service for major intersections during peak hours on weekdays.

Measure G's key provision, section 3.A, contains some ostensible exceptions to its moratorium on construction until the specified traffic standards are met. Under section 3.A.1.b, a building or grading permit may be issued if the standard level of service of traffic does not meet the established standards in two circumstances. First, the development would be exempt if it would not worsen the traffic problem or would achieve a measurable improvement in the traffic problem. Second, the development would be exempt if it participates in a program to achieve a measurable improvement in the traffic problem. Interestingly, this exception applies only to the issuance of building or grading permits, and not to plans, maps, or zone changes. Therefore, section 3.A.1.b's excep-

27. Level D means all traffic through a traffic light in one cycle. Id. at 1-4 (1985).
28. Costa Mesa, Cal., The Citizens' Sensible Growth and Traffic Control Initiative, § 4.CC. Measure G exempts developments that have no measurable impact on the Standard Level of Service, commercial developments under 10,000 square feet, and developments of four or fewer units on existing lots. Id. § 5.A.
29. Section 3.A.1.b reads:
1. Notwithstanding any provision of Section 3 to the contrary, a grading permit or building permit, whichever is issued first for said Development, may be approved or issued in the following circumstances:
   b) When the existing transportation system is operating at worse than the Standard Level of Service: and
   1) Such approval or issuance requirement that the Development's measurable traffic does not cause the transportation system to operate at conditions worse than the existing conditions and where a measurable improvement is achieved; or
   2) A Comprehensive Planning and Improvement program to achieve a measurable improvement in the existing level of service on the transportation system affected by such Development, which the Development participates in, has been adopted by the County to achieve such Standard Level of Service.
   Id. § 3.A.1.b.
30. Id.
31. Id.
tion is limited only to those developments that already have an approved map or plan. Landowners without approved maps or plans cannot qualify for the exception. Thus, the section's reasoning is circular. To enjoy section 3.A's exception, a landowner without an approved map must first comply with section 3.A., which requires that the development already have an approved map or plan. This nullifies the exception's use.

Measure G is identical to San Clemente's Measure E, which a trial court struck down in Marblehead v. City of San Clemente. After examining the measure's findings and conclusions, the trial court concluded that Measure E required the property owner not only to mitigate the impact of its development but also to improve the existing level of service, if substandard, before being allowed to develop the owner's property. Applying the requirement of Nollan v. California Coastal Commission that the burden imposed on the property owner be directly connected to the benefit received, the court held that Measure E was facially defective because its plain meaning required property owners "to mitigate conditions not only caused by their development [a proper goal] but also to cure the inadequacies of those who developed their property before them." An appeal is pending. Four months later, another trial court invalidated Measure X, also identical to Measure G, in Kaiser Development Co. v. City of San Juan Capistrano using the same reasoning applied in Marblehead.

II

SOURCES OF LOCAL ZONING AUTHORITY

As will be explained below, a growth control measure must fulfill three major requirements. The city must have the authority to enact the measure. The measure must satisfy substantive due process. Finally, the measure must not work a taking of private property without just compensation.
The measures described above may be enacted pursuant to a city's police power. A city or county has the power to legislate only those matters delegated to it by the sovereign state legislature. Most states use enabling statutes to distribute zoning power to the local governments. California, however, relies simply on the home rule power that its constitution confers on local governments: "A county or city may make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws."

Although the home rule power is restricted by those general law limits the legislature may choose to enact, permissible regulations generally encompass everything that may be regulated under the police power. Therefore, conflicts between home rule and the general law rarely arise. Constitutional limits on a city's land use regulation under home rule and the general law are the same as those imposed by police power under the due process and equal protection clauses of the Fifth and Fourteenth Amendments. Specifically, the legislation must be pursuant to a legitimate state interest and rationally related to that interest.

In addition to this due process limit, the California Constitution requires that a local zoning law passed by either the voters or the city
council not conflict with the state zoning laws. For example, each local zoning law a city council passes must comply with state notice and hearing procedures. Failure to do so violates the state's zoning laws and is therefore unconstitutional.

An important provision of the state zoning laws requires that a land use regulation be consistent with the city's general plan. An ordinance that is inconsistent with the city's general plan conflicts with the state zoning laws, making the ordinance unconstitutional in California. The trial court found this to be the case when it struck down Measure H in *Lesher Communications v. City of Walnut Creek*. The court found Measure H a zoning ordinance, not amounting to a general plan amendment, that was inconsistent with Walnut Creek's general plan.

46. CAL. CONST. art. XI, § 7.
48. This procedural requirement does not apply to zoning laws passed by initiative, whereby voters directly enact legislation at the ballot box. Associated Home Builders of the Greater Eastbay v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976); see also Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74, 104-06 (1976). The voters have the power to enact by initiative or referendum the same laws as the state, county, or city legislative body may enact. CAL. CONST. art. II, §§ 8, 9, 11. Initiative zoning ordinances adopted after the effective date of California Evidence Code section 669.5 must meet the same requirements that would apply if adopted by the city council. Building Indus. Ass'n v. City of Camarillo, 41 Cal. 3d 810, 820, 718 P.2d 68, 73-74, 226 Cal. Rptr. 81, 86-87 (1986). Since the legislature did not intend the electorate to undertake the balancing procedure California Government Code section 65863.6 imposes on county and city governing bodies—namely, to balance the effect of each ordinance on local housing needs against public service needs and the availability of fiscal and environmental services—initiative zoning ordinances do not have to meet the requirements of this statute. Id. at 823-34, 718 P.2d at 75-76, 226 Cal. Rptr. at 88-89.

The notice, hearings, and findings requirements imposed on city councils by California Government Code Sections 65800-65912 do not apply to ordinances passed by initiative because procedural due process is satisfied by the initiative being presented to the forum of the electorate:

The proponents and opponents are given all the privileges and rights to express themselves in an open election that a democracy or a republican form of government can afford to its citizens. It is clear that the constitutional right reserved by the people to submit legislative questions to a direct vote cannot be abridged by any procedural requirements.

Dwyer v. City Council of Berkeley, 200 Cal. 505, 516, 253 P. 932 (1927); see also City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976).

Two other requirements do not apply. First, the requirement that a land use measure's effects on regional housing needs must be considered, CAL. GOV'T CODE § 65863.6, is not applicable to measures enacted by initiative. City of Camarillo, 41 Cal. 3d at 823-24, 718 P.2d at 75-76, 226 Cal. Rptr. at 88-89. Second, approval under the California Environmental Quality Act (CEQA), CAL. PUB. RES. CODE §§ 21000-21177 (West 1986 & Supp. 1989), is not required for ordinances passed by initiative. See CAL. ADMIN. CODE, tit. 14, § 15037(b)(4) (1987); Stein v. City of Santa Monica, 110 Cal. App. 3d 458, 168 Cal. Rptr. 34 (1980).

50. An ordinance must be consistent with the general plan because the general plan is the constitution for development of a city, not merely a general guideline. See generally D. CURTIN, CALIFORNIA LAND USE AND PLANNING LAW 7-31 (1988).
52. Id. at 2-4.
While the consistency requirement might make particular measures illegal, it does not invalidate the concept of traffic-linked growth control. According to Lesher, cities that enact traffic-linked growth control measures must either ensure that those measures are consistent with their general plan or concurrently adjust their general plan to accommodate the new measures. To avoid the consequences of Lesher, Walnut Creek need only amend its general plan to accommodate Measure H; indeed, the appellate court has given the city time to do precisely that.\textsuperscript{53} Other cities can enact measures as general plan amendments to avoid the problem.

Land use regulations enacted by initiative—such as traffic-linked growth controls—present special problems.\textsuperscript{54} They are subject to further legislative\textsuperscript{55} and judicial limitations. For example, the initiative measure cannot impair an essential government function.\textsuperscript{56} The initiative may not invade a duty the state imposes solely on the city council or board of supervisors.\textsuperscript{57} The measure cannot affect administrative, as opposed to legislative, matters.\textsuperscript{58} As with the requirement that measures be consistent with the general plan, these limitations could affect particular measures, but would not preclude the concept of traffic-linked growth control.

Although a particular measure may be so flawed that it violates state law, the concept of traffic-linked growth control is not inherently inconsistent with the home rule power or California land use regulations. California’s home rule power is broad enough to encompass such measures. Amending a general plan can prove difficult, but requiring consistency

\textsuperscript{53} Lesher does not conclude that the city has the right to take time to amend its general plan. Lesher Communications v. City of Walnut Creek, No. 282,115 (Contra Costa Co. Super. Ct.), appeal filed No. A-037865 (Cal. Ct. App. 1st Dist., Div. 4, Feb. 26, 1987).
\textsuperscript{54} See supra note 48.
\textsuperscript{55} See CAL. CONST. art. II, § 9(g).
\textsuperscript{56} Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 143-44, 550 P.2d 1001, 1012, 130 Cal. Rptr. 465, 476 (1976) (rent control measure did not sufficiently impair the city’s power to raise tax revenues to carry on municipal government; plaintiffs contended that the rent control ordinance would cause fiscal chaos by impairing the city’s tax base, preventing the city from raising the funds necessary to carry on municipal government).
\textsuperscript{57} Simpson v. Hite, 36 Cal. 2d 125, 131-32, 222 P.2d 225, 229 (1950); see also Committee of Seven Thousand v. Superior Court, 45 Cal. 3d 491, 500-05, 754 P.2d 708, 713-16, 247 Cal. Rptr. 362, 367-70 (1988) (discussing when the legislature delegates authority only to the city council and not to the city’s voters).
\textsuperscript{58} Arnel Dev. Co. v. City of Costa Mesa, 28 Cal. 3d 511, 516 n.6, 620 P.2d 565, 568 n.6, 169 Cal. Rptr. 904, 907 n.6 (1980); Simpson, 36 Cal. 2d at 129, 222 P.2d at 228. A legislative act is the enactment of laws passed by the legislative body which prescribes what the law shall be in future cases arising under it. Niden v. Homan, 32 Cal. App. 2d. 11, 15-16, 89 P.2d 136, 139 (1939). Administrative acts are those acts necessary to carry out legislative policies and purposes already declared by the legislative body. In re McDonough, 27 Cal. App. 2d 155, 158, 80 P.2d 485, 487 (1938). Courts have not resolved the legislative or adjudicative character of administrative land use decisions on a case-by-case basis, but instead have established a general rule that variances, use permits, subdivision maps, and similar proceedings are necessarily adjudicative. Thus, even when such actions involve a substantial area or affect the community as a whole, the courts invariably treat them as adjudicative in nature. Arnel, 28 Cal. 3d at 518 n.8, 620 P.2d at 569 n.8, 169 Cal. Rptr. at 908 n.8.
with the general plan will not prevent the enactment of any traffic-linked
growth control measure in California. Individual measures can be
crafted to comply with the applicable general plan and other state law
requirements. To define the legal limits of a well-drafted traffic-linked
growth measure, one must look beyond general state law to the U.S. and
California Constitutions.

III
DUE PROCESS AND TRAFFIC-LINKED GROWTH CONTROL
MEASURES

The constitutionality of land use planning through zoning was es-
tablished as a valid exercise of the police power in Village of Euclid v.
Ambler Realty Co. and Miller v. Board of Public Works and is author-
ized by the California Constitution. The due process and equal protec-
tion clauses of the United States and California Constitutions are the
chief limitations on the exercise of the police power.

59. The police power is defined as follows:
An authority conferred by the American constitutional system in the Tenth Amend-
ment, U.S. Const. upon the individual states, and, in turn, delegated to local govern-
ments, through which they are enabled to establish a special department of police; adopt
such laws and regulations as tend to prevent the commission of fraud and
crime, and secure generally the comfort, safety, morals, health, and prosperity of its
citizens by preserving the public order, preventing a conflict of rights in the common
intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all the
privileges conferred upon him or her by the general laws.
BLACK'S LAW DICTIONARY 1041 (5th ed. 1979).
60. 272 U.S. 365, 390 (1926).
62. CAL. CONST. art. XI, § 11.
Cal. Rptr. 1, 9-10 (1985) (Mosk, J., dissenting). An important distinction exists between the
government's eminent domain and police powers. See Comment, Testing the Constitutional
Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings
Analysis, 57 WASH. L. REV. 715 (1982). Even the landmark takings cases of the last decade
(1978), and Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), both cite due process cases to
support their definitions of what constitutes a taking. A land use regulation that violates sub-
stantive due process is an invalid exercise of the police power. Nectow v. City of Cambridge,
277 U.S. 183, 187-89 (1928). A regulation that takes private property without just compensa-
tion is an invalid exercise of the eminent domain power. Pennsylvania Coal Co. v. Mahon, 260
U.S. 393, 415 (1922). Each form of governmental excess may exist together or separately. A
regulation may violate the police power yet not take private property. Conversely, a regulation
may be rational yet still work a taking of property. See, e.g., First English Lutheran Evangelical
affects the remedy. A successful due process attack will invalidate the measure, providing
relief to injured non-landowners as well as landowners. It is an open question whether First
English allows for an interim remedy for a due process violation. 107 S. Ct. at 2385. A suc-
cessful takings attack provides damages to injured landowners and may or may not invalidate
the measure. The measure may remain valid even if a taking is found, leaving non-landowners—future residents, for example—without a remedy. However, in most instances when a
measure is held to work a taking, the enacting government repeals the measure, obviating the
need for a remedy.
A. The Due Process Test and Its Standard

On its face, due process analysis of a land use regulation is a straightforward, two-part test. A law must promote a legitimate state interest and must be rationally related to that interest. Thus, a growth control measure violates substantive due process if it is not rationally related to a legitimate state interest. Because traffic control is indisputably a legitimate state interest, the proper focus is on whether curtailing real estate development is rationally related to controlling traffic.

Associated Homebuilders of the Greater Eastbay v. City of Livermore, the leading California case on this matter, defines California's due process test in some detail. Livermore recognized a new dimension of growth control measures that affects the "rational relationship" analysis: a local measure may significantly affect the interests of nonresidents who are not represented in the city's legislative process. An ordinance that may be reasonable from the city's viewpoint may be unreasonable when viewed from a larger perspective. Therefore, the "proper constitutional test is one which inquires whether the ordinance reasonably relates to the welfare of those whom it significantly affects." When a measure has a significant regional effect, it must submit to the regional welfare.

Livermore sets out a detailed three-part test for courts to determine whether a challenged restriction reasonably relates to the regional welfare. First, the court must forecast the probable effect and duration of the restriction. Second, the court must identify the competing interests affected by the restriction. Third, the court must determine whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests.

66. Ex Parte Daniels, 183 Cal. 636, 639, 192 P. 442, 444 (1920) (holding that state traffic laws preempt municipal and local traffic regulations).
67. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976). The case concerned an initiative measure enacted by the City of Livermore that prohibited the issuance of further residential building permits until local educational, sewage disposal, and water supply facilities complied with specified standards. The court held that it could not determine on the pleadings alone if the measure violated due process. Id. at 610, 557 P.2d at 489, 135 Cal. Rptr. at 57.
68. Id. at 607, 557 P.2d at 487, 135 Cal. Rptr. at 55.
69. Id.
70. Id.
71. Id. at 607-08, 557 P.2d at 487-88, 135 Cal. Rptr. at 55-56.
72. Id. at 608-09, 557 P.2d at 488-89, 135 Cal. Rptr. at 56-57.
73. Id. at 608, 557 P.2d at 488, 135 Cal. Rptr. at 56.
74. Id.
75. Id. at 609, 557 P.2d at 488-89, 135 Cal. Rptr. at 56-57.
The Supreme Court has defined the standard of review that embraces each part of the due process test. If it is "fairly debatable" that the restriction is reasonably related to the public welfare, then the restriction is constitutional. This highly deferential standard might lead courts to give way to the judgment of the electorate every time, making initiative measures immune from challenge. The Livermore court recognized this danger and admonished:

But judicial deference is not judicial abdication. The ordinance must have a real and substantial relation to the public welfare. . . . There must be a reasonable basis in fact, not in fancy, to support the legislative determination . . . . Although in many cases it will be 'fairly debatable' that the ordinance reasonably relates to the regional welfare, it cannot be assumed that a land use ordinance can never be invalidated as an enactment in excess of the police power.

Still, the burden of proof is on the party challenging the restriction's constitutionality to present the evidence and document that these conditions have not been met.

A strong policy reason supports this meaningful standard. The initiative process may be a flawed method of balancing competing interests. For example, the two principal competing interests the court identified in land use initiative cases are those of present versus future residents. Only the former have the voice of a direct vote when deciding to enact growth control regulation. The only recourse of future residents is to go to court. Initiative measures treated with judicial abdication in effect deny future residents even this limited legal recourse. Thus, the only way to balance the competing interests is through dependence on the good will of the present residents. Unfortunately, that mechanism is not always reliable.

A "fairly debatable" standard with backbone makes sense for initia-
tive growth control measures for another reason. The procedural due process requirements for land use planning measures do not apply to initiative measures. Consequently, individual landowners have difficulty reaching the electorate to debate a measure. The message from both sides is easily distorted in the intensity of the pre-election media campaigns. Finding sympathetic ears in an electorate sufficiently impassioned about traffic to put the issue to a vote is even more difficult. For these reasons, courts must be prepared to strike down initiative measures more readily than legislative measures that have the benefit of careful deliberation and representation of all of the affected interests. In short, the courts must be wary of the voters' ability to protect the interests of those who do not have a voice at the ballot box.

The California Supreme Court recognized these concerns when it strengthened the standard of review for such measures in Livermore. The court did not offer overt guidance with the expectation that it would never be used. The court recognized that a performance-based growth control measure can violate due process. A measure's rational relationship to the problem it seeks to address is almost always at least "fairly debatable." Less often does a "real and substantial relation" between the measure and its purpose exist. In an appropriate case, a court should be prepared to use the backbone to the "fairly debatable" standard that the Livermore court provided.

B. Application of the Due Process Test to Traffic-Linked Growth Control Measures

Applying the three-part Livermore test to determine whether a challenged restriction reasonably relates to the regional welfare, a court should: (1) forecast the probable effect and duration of the restriction; (2) identify the competing interests affected by the restriction; and (3) determine whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests.

1. The Measure's Effect and Duration

Under Livermore, to determine whether a measure rationally relates to its goal of controlling traffic, a court must first determine the measure's effect and duration. The Livermore court set out three specific inquiries that should be made in determining the effect and duration of

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82. The courts have held that the procedural due process requirements are satisfied by the open debate provided by the electoral process. Livermore, 18 Cal. 3d at 592, 557 P.2d 489, 135 Cal. Rptr. 57; see supra note 48.

83. Livermore, 18 Cal. 3d at 609, 557 P.2d at 489, 135 Cal. Rptr. at 57.

84. See supra notes 76-79 and accompanying text.

85. Public Attitudes on Growth, supra note 80, at 4-6; see supra notes 72-75 and accompanying text.
performance-based moratoria: (1) the extent to which public facilities currently fall short of the specified standards; (2) whether the city or appropriate regional agencies have undertaken to construct needed improvements; and (3) when the improvements are likely to be completed. In general, application of these criteria should lead a court to conclude that a measure that is, in effect, an indefinite moratorium—or in fact aggravates the traffic problem—violates due process.

A court should apply these criteria to traffic-linked growth control measures as follows. First, the court must examine the extent to which facilities currently fall short of the specified standards. This criterion helps the court understand how quickly the moratorium effect of the measure can be lifted, if at all. The longer the duration of the measure's restrictions, the more likely it will be viewed as unreasonable. The duration of the measure's restrictions, in turn, is a function of how far existing conditions fall short of the specified standards. The greater the difference between existing conditions and specified standards, the longer the duration of the restrictions. The measure will be vulnerable when its standards are set so far above existing conditions that little likelihood exists of meeting those standards in the foreseeable future.

If the community is sufficiently concerned about traffic to enact a traffic control measure, a serious traffic problem exists. And if the community has a traffic problem, the authors of such measures are not likely to establish standards that permit traffic to get worse. The levels of service will be set high enough that construction is halted swiftly and until the traffic situation improves. The effect is an immediate building moratorium. Thus, a court must carefully determine the moratorium's probable duration to judge the measure's effect on the affected interests.

When considering the measure's effect, it would be helpful for the court to consider the city's particular circumstances in determining if the standard set is realistic for that city. For example, San Francisco cannot realistically impose traffic level standards better suited to San Clemente. If San Francisco adopted the thirty-five miles-per-hour rush-hour standard of San Clemente's Measure E, the effect would be a permanent building moratorium. Similarly, a small town that is transforming into

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86. Livermore, 18 Cal. 3d at 608, 557 P.2d at 488, 135 Cal. Rptr. at 56.
87. Memorandum from Jerry E. Bennett, Orange County Transportation Planning Manager, to Ken R. Smith, Orange County Transportation Programs Division Manager (May 18, 1987) ("I can categorically say that all freeways will never operate at LOS [Level of Service] 'C' or better in peak periods [in Orange County]. ... With no cash flow, developers could not (even voluntarily) then launch a major road-building program to 'catch up' to the LOS 'C/D' standards. And even if they tried, and somehow got the arterial streets to LOS 'C', the freeways simply could not be improved to that level.") (emphasis in original); Memorandum from Thomas G. Dunne, Walnut Creek City Manager (July 9, 1985) (opining that Measure H's restrictions could be permanent).
88. Orange County, Cal., Measure E, The Citizens' Sensible Growth and Traffic Control Initiative, City of San Clemente, Ordinance 972 (June 7, 1988).
part of an expanding metropolitan region—Walnut Creek, for example—
cannot expect that traffic will be maintained at its previous small-town
level. Even if the traffic level is above capacity in a given city, halting
construction may be unreasonable if the court finds relief of the traffic
problem is unlikely in the foreseeable future. The next two criteria ad-
dress this dimension of the problem.

A court’s second step is to inquire whether the city or appropriate
regional agencies have undertaken to construct the needed improve-
ments. The court should determine whether the measure provides any
kind of funding mechanism for the needed improvements or whether suf-
ficient funding is already available from state or federal sources. A meas-
ure unaccompanied by a means by which its standards can be met may
curb a worsening traffic problem, but does nothing to improve an existing
traffic problem. On the other hand, a measure accompanied by some
method of funding demonstrates the community’s commitment to con-
struction of needed improvements and to eventual relaxation of the
measure’s restrictions. Funding provides a way to alleviate traffic
problems and allow construction to proceed. Thus, a measure accompa-
nied by funding should be more likely to satisfy due process.

California’s chronic shortage of highway funds has forced state, re-
regional, and local governments to rely increasingly on debt financing
through issuing bonds for new roads. The bonds may be secured by
fees exacted from the developments serviced by the new roads as a condi-
tion of being granted permission to build. Generally, a developer
agrees to pay the fees only upon receiving an entitlement to build—no
entitlement, no fees. A traffic-linked growth control measure that does
not grant entitlements to developers until the required traffic standard is
achieved cuts off the availability of these fees and this source of financing.
Without those development entitlement fees, the bonds cannot be se-
cured. The result is that financing cannot be obtained and the highway

89. Livermore, 18 Cal. 3d at 608, 557 P.2d at 488, 135 Cal. Rptr. at 56.
90. See, e.g., J. Kirlin & A. Kirlin, Public Choices—Private Resources: Fi-
nancing Capital Infrastructure for California’s Growth Through Public-Priv-
te Bargaining 5 (1982); California Office of the Legislative Analyst, A Perspective on
91. See, e.g., R. Cowart & S. Kesmocbel, Flexible Bargains for Frozen Regu-
lations: Negotiating Development Agreements in California 28-31 (University of
California, Berkeley, Institute of Urban and Regional Development, Working Paper No. 458)
(use of developer fees to finance transportation improvements in City of Pleasanton); Barneky,
MacRastie, Schoennaur, Simpson, & Winters, Paying for Growth: Community Approaches to
Development Impact Fees, APA J., Winter 1988, at 18-23 (use of developer fees to finance
transportation improvements in San Jose and San Diego).
92. J. Kirlin & A. Kirlin, supra note 90, at 49.
93. Investors are not usually willing to subscribe to an unsecured bond. Furthermore,
even if they are, they will demand premium interest rates. Overly restrictive measures make
bond financing prohibitively expensive because of investor doubts about the city’s ability to
raise funds in the face of a building moratorium. A 13% 30-year bond of $50 million would
is not built. A measure with this effect should be subject to invalidation under the due process "rational relationship" test; such a measure purports to be traffic-fighting, but the measure actually makes highway funding more difficult to obtain.94

Third, the court must determine when the improvements are likely to be completed.95 Application of this criterion distinguishes traffic-linked growth control measures from other performance-linked measures because roads often require more money, more land, and more time to build than other facilities.96 For example, the San Joaquin Hills Expressway in Orange County was first proposed in 1972; it is scheduled for completion in 1992, provided construction is delayed no further.97 Political resolution of the proposal to construct a new arterial to supplement Ygnacio Valley Road in Walnut Creek will not occur soon, delaying the time when new construction may proceed if Measure H is ultimately upheld in court. A measure that requires standards well below existing traffic conditions produces only the dimmest likelihood that the highways needed to bring the traffic system up to standard will be completed within a few years of the measure's enactment, unless improvements are well under way when the measure is passed. A traffic-linked growth control measure that requires alleviation of the traffic problem before permitting more construction could delay construction a decade or more until the necessary highway is built.

Courts should be cognizant of another possible effect of linking growth to traffic. A traffic-linked growth control measure that is effectively an indefinite building moratorium may actually worsen traffic. It operates as a "sprawl ordinance," forcing development further away from urban centers where the traffic is not yet congested. From these distant housing developments, new residents then commute each day on the existing roads to the city that enacted the measure, further aggravat-
ing the city's traffic problem. A measure found to have this effect may lack the rational relationship to the goal of containing traffic congestion demanded by due process.

2. The Competing Interests

At least five groups with competing interests are affected by traffic-linked growth control measures. The first group consists of the current residents who seek to preserve the community's quality of life. They are threatened by too much growth in too little time and want to preserve those features that make their community attractive. A typical case is the small rural town that is overrun by suburban sprawl. Most often, the residents' goal is to stop any further construction.

The second group is the future residents, the outsiders seeking to live in the community. They seek affordable housing in the face of a housing shortage and want a share of the community's benefits. California's ever-increasing population results in a continuous demand for housing, keeping California home prices well above the national average. Because relief from high prices comes from greater supply, the future residents' interest is a larger supply of housing.

The business community and labor interests form the third group. Adequate work and a healthy local business climate to provide jobs and prosper are their main interests. This group includes labor-intensive industries—manufacturing, electronics, and construction—and other labor interests who seek an adequate local labor pool and affordable housing for workers. This group also includes the real estate industry, whose interest is the most profitable use of the land at the most profitable time. In a fast-growing community, the most profitable use means development. Through development, real estate interests seek to meet the demand for housing.

The fourth group consists of residents of adjacent communities threatened with the problems of encroaching growth. Their interest is in not bearing the burdens of rapid growth without enjoying the economic benefits that may accrue to the community enacting the growth control legislation.

98. See, e.g., Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976).
99. Livermore, 18 Cal. 3d at 608-09, 557 P.2d at 488-89, 135 Cal. Rptr. at 56-57.
101. Riverside County is an excellent example of this situation. Expensive housing in neighboring Los Angeles and Orange Counties has helped generate a massive housing boom in Riverside County. See L.A. Times, Oct. 3, 1988, at 3, col. 5. Riverside County is now saddled with the problems of traffic, pollution, and outstripped infrastructure, see id., but Los Angeles
The fifth and final group are those who simply want less traffic. Typically, they are commuters who work in the community but live elsewhere. Their interest is having enough room on the highway to avoid bumper-to-bumper traffic every day.

Courts must recognize each of these interests. Each interest is legitimate, and reasonable people disagree on which should prevail. Furthermore, judicial sensitivity to these interests is necessary because one group, current residents, dominates the decisionmaking on growth control measures at the ballot box.

3. A Growth Control Measure's Accommodation of the Competing Interests

The key requirement for satisfaction of due process is that the growth control measure accommodate the competing interests. The central inquiry is the measure's impact on the surrounding region. Thus, a measure that does not substantially aggravate the problems of growth in neighboring areas is more likely to be a reasonable accommodation of the competing interests.

In Livermore, the California Supreme Court upheld a performance-based moratorium but imposed on local governments the duty to match their planning and regulations to wider regional needs:

[M]unicipalities 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. These considerations impel us to the conclusion that the proper constitutional test is one which inquires whether the ordinance reasonably relates to the welfare of those whom it significantly affects. If its impact is limited to the city boundaries, the inquiry may be limited accordingly; if, as alleged here, the ordinance may strongly influence the supply and distribution of housing for an entire metropolitan region, judicial inquiry must consider the welfare of that region.

By definition, traffic-linked and other growth control measures restrict the availability of housing. Further restrictions on supply and

and Orange Counties still have most of the business and jobs. L.A. Bus. J., Sept. 1988, at 48. Many Riverside County residents commute daily to jobs in Los Angeles and Orange Counties. L.A. Times, Oct. 3, 1988, at 3, col. 5. Riverside County is stuck with the problems of sprawl yet is unable to enjoy the business success that growth brings.

102. Livermore, 18 Cal. 3d at 609, 557 P.2d at 488, 135 Cal. Rptr. at 56 (1976).
103. Id. at 607, 557 P.2d at 487, 135 Cal. Rptr. at 55.
104. Id.
105. Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976); see also CALIFORNIA DEPT OF HOUS. AND COMMUNITY DEV., supra note 4, at 4 ("Academic publications surveyed for this paper, however, consistently agree that growth controls do cause housing price increases, not only in the growth control locality, but in the surrounding localities as well.").
resulting price increases could close the market to those who already have a difficult time finding affordable housing. An overly restrictive traffic-linked measure that stops construction will freeze the supply of housing for several years. A direct relationship exists between the size of the jurisdiction enacting the measure and the impact on housing. The larger the jurisdiction, the greater the effect on the housing supply. If the court finds a significant restriction of the regional supply of housing, then the measure will not represent a reasonable accommodation of the regional interests.

Two features distinguish the measure upheld in Livermore and the recently enacted traffic-linked growth control measures discussed above. These distinctions make traffic-linked growth control measures even more sensitive to due process attacks. First, at the time of the Livermore decision, the city was still somewhat removed from the greater metropolitan San Francisco Bay area, muting the measure's potential regional effects. By contrast, Walnut Creek and Costa Mesa are hubs of their respective counties, adjacent to developed areas of neighboring communities. Any growth control measure in Walnut Creek, for example, will have an impact on the nearby communities of Concord and Pleasant Hill. The Costa Mesa measure will affect Irvine and Santa Ana similarly. The San Clemente measure, on the other hand, will have less of a regional impact because of the city's location on the periphery of Orange County. In short, the court must consider the enacting city's place within the greater regional area.

Second, the Livermore measure did not include traffic among its regulated infrastructure and community services. The difference between traffic and other forms of infrastructure and services—sewers, water, police, education, fire—is that the latter are linked directly to buildings constructed within the city. For example, only those buildings situated inside the city use the sewage system. The city can trace precisely who produces sewage and charge accordingly. If the sewage system is overloaded, the city can halt building construction until sewage capacity is expanded.

Traffic is not so easily internalized. Automobiles flow through a city over the roads, and their drivers may be bound for a building within the city or beyond. A city could halt all construction and traffic could still worsen. This is not an uncommon experience for cities located at major

108. See supra text accompanying notes 20-38.
crossroads such as Walnut Creek. In that city, Ygnacio Valley Road, the main roadway, is projected to carry 45% regional traffic.\textsuperscript{109} In Orange County, 20% of the home-to-work trips originate outside the county.\textsuperscript{110} Thus, traffic can still be a problem in a city that is neither a starting point nor a final destination. Because traffic is only indirectly linked to construction in a city, a traffic-linked growth control measure enacted in a city that is part of a larger urban region will affect the region well beyond the enacting city's borders.

For these same reasons, a traffic-linked growth control measure in some cities may be challenged as an unreasonable accommodation of regional interests. Developers will jump the city limits to build in neighboring areas without such measures, putting more strain on the infrastructure and community services of those neighboring cities. With the measure's restrictions in effect, housing starts will decline or even stop in the city, resulting in higher prices throughout the region. Development fee income will decrease and budgets of county and regional governments will shrink. Such a measure will in effect raise the drawbridge of the city by turning away new residents, putting even more pressure on neighboring cities to provide additional housing.\textsuperscript{111} In some circumstances the measure might even worsen the existing traffic situation. If any of these conditions exist to a significant degree, then a court should invalidate the measure for its adverse impact on the regional welfare.

\section*{C. Conclusions}

The traffic-linked growth control concept is a logical extension of the type of growth control reviewed in \textit{Livermore}. Such measures satisfy due process if a reasonable accommodation of the competing regional interests is achieved.\textsuperscript{112} To understand if a particular measure is a "reasonable accommodation," the court must identify the competing interests and examine the measure's effect and duration.

A traffic-linked growth control measure will satisfy due process if it sets achievable service levels, enables development to proceed, once those levels are met through development fees, and prevents the traffic problem from worsening.\textsuperscript{113} A measure operates as an indefinite moratorium sets service levels too high, thereby providing little opportunity to meet those

\begin{itemize}
\item \textsuperscript{109} Letter from Maria Rivera, Attorney at McCutchen, Doyle, Brown & Enersen, Walnut Creek, Cal., to Steven Eggert (January 11, 1989) (discussing Environmental Impact Report for 1988 Proposed Walnut Creek General Plan) "Since the traffic increases shown in the tables are due to the combination of local and regional development, traffic congestion will increase on city streets even if there is no further development in the city." \textit{Id}.
\item \textsuperscript{110} \textit{SOUTHERN CALIFORNIA ASS'N OF GOVERNMENTS, IMPACT ASSESSMENT: DRAFT BASELINE PROJECT} 9-4 (1986).
\item \textsuperscript{111} See supra note 101 and accompanying text.
\item \textsuperscript{112} See supra note 75 and accompanying text.
\item \textsuperscript{113} See supra notes 87-97 and accompanying text.
\end{itemize}
levels because the city has no financial or physical means or resists efforts to install new roads.

A measure that is, in effect, an indefinite moratorium violates due process because no accommodation is made for those who have an interest in development proceeding. The interests of future residents are not met because housing starts are forbidden. The interests of the landowners, business, or labor communities are not met because of the measure's adverse impact on economic health. A moratorium does not meet the interests of the neighboring communities to which development and its problems retreat.

Even if not an indefinite moratorium, a measure will violate due process to the extent traffic is aggravated, highway financing is impaired, and the improvement of traffic levels is delayed. A court considering such a measure must examine the measure's effects and, if it is not rationally related to its purported goal or does not bear a "real and substantial relation to the public welfare," strike the measure down.

IV
TAKINGS ANALYSIS

A. Taking by Regulation

Even if upheld as a reasonable accommodation of the competing interests, a traffic-linked growth control measure may still be vulnerable to challenge as a taking of private property under the Constitution's just compensation clause. A taking of property is not limited to the physical occupation or appropriation of property; a regulation or nonphysical invasion of one's private property also can be a taking.

A takings claim, however, would not be a challenger's preferred theory. A taking is difficult to establish and its criteria are uncertain. The U.S. Supreme Court has made clear in numerous decisions that it will not rule upon a takings claim until it is absolutely necessary. Most importantly, a takings claim provides relief only to landowners. Future

114. See supra notes 90-94 and accompanying text.
115. "Nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. This provision was made applicable to the states through the fourteenth amendment. Chicago Burlington & Quincy Ry. v. Chicago, 166 U.S. 226, 234-35 (1897).
117. This is evidenced by the Court's numerous cases finding that takings claims were not "ripe" for decision. See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 294-95 (1981) ("[T]he constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary."); see also Pennell v. City of San Jose, 108 S. Ct. 849, 856-57 (1988) (denying a facial challenge to a rent control ordinance linking certain rental increases to a tenant's income); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348-52 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-91 (1985); San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 633 (1981).
residents, anti-traffic groups, and others who do not own property in the
city do not have a remedy through the takings clause, unless the measure
constitutes a facial taking.\textsuperscript{118}

The U.S. Supreme Court has never defined a specific test for identi-
fiying a taking.\textsuperscript{119} A land use regulation results in a taking when it “goes

\textsuperscript{120} too far.”\textsuperscript{120} Takings analysis emphasizes ad hoc factual inquiries into the
challenged regulation’s economic impact on the plaintiff, the character of
the governmental action, and the reasonable necessity of the restriction
to effectuate a substantial public purpose.\textsuperscript{121} Other relevant considera-
tions are the impact of the regulation on the claimant “and, particularly,
the extent to which the regulation has interfered with distinct invest-
ment-backed expectations.”\textsuperscript{122}

The Court makes the distinction between a claim that the mere en-
actment of a measure constitutes a taking (a facial challenge) and a claim
that the particular impact of a measure on a specific piece of property
requires the payment of just compensation (an as applied challenge).\textsuperscript{123}
A regulation is a taking on its face only if mere enactment makes it
“commercially impracticable” to continue doing the business restricted.\textsuperscript{124} The Court has been extremely reluctant to find a taking in a
facial challenge.\textsuperscript{125}

Essentially, a takings claim will not be subject to challenge as a fa-
cial taking unless the measure denies all use to all landowners at all
times. Existing traffic-linked growth measures allow owners to develop
their land under some conditions. Construction may proceed if the traf-
cic level meets specified standards. Commercial buildings under 10,000
square feet and replacement buildings may also be built.\textsuperscript{126} Because

\begin{itemize}
\item \textsuperscript{118} Facial takings are defined \textit{infra} note 123 and accompanying text.
\item \textsuperscript{120} \textit{Pennsylvania Coal}, 260 U.S. at 415. Justice Holmes did not elaborate on what he
meant by “goes too far.”
\item \textsuperscript{121} \textit{Penn Central}, 438 U.S. at 124.
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 494 (1987).
\item \textsuperscript{124} \textit{Pennsylvania Coal}, 260 U.S. at 414-15 (1922). The more common test is whether the
regulation denies the owner “economically viable use” of its land. Agins v. City of Tiburon,
447 U.S. 255, 260 (1980); \textit{see supra} note 109 and accompanying text. The two tests do not
appear to differ substantively.
\item \textsuperscript{125} \textit{See, e.g.}, \textit{Keystone}, 480 U.S. at 494-95.
\item \textsuperscript{126} These exemptions will not, however, prevent a finding that an individual landowner
has been denied “economically viable use” of his land. \textit{See infra} note 128 and accompanying
text. The landowner can build 10,000 square-foot commercial buildings, yet cannot build new
homes unless the traffic standard is met. Permitting a rancher to dot his vacant land with
small shopping “strip centers” does not constitute an economically viable use. Furthermore,
downzoning from residential to agricultural use will not necessarily preserve economically via-
able use of the land. Furey v. City of Sacramento, 24 Cal. 3d 862, 877, 598 P.2d 844, 852, 157
Cal. Rptr. 684, 693 (1979).
\end{itemize}
these exemptions allow some use in some instances, traffic-linked growth control measures are likely to withstand facial challenges.

The U.S. Supreme Court provided more guidance on what constitutes an “as applied” taking in Agins v. City of Tiburon.\(^{127}\) There, the Court stated that a land use regulation, as applied to a particular piece of property, works a taking if the measure (1) does not substantially advance legitimate state interests, or (2) denies an owner economically viable use of his land.\(^{128}\)

Economically viable use of the owner’s land is more difficult to define than the first requirement. Fluctuations in a property’s value caused by government regulation are mere “incidents of ownership,”\(^{129}\) and the Court has upheld “regulations that destroyed or adversely affected recognized real property interests.”\(^{130}\) Diminution in value, standing alone, cannot establish a taking. The takings issue, in this context, “is resolved by focusing on the uses the regulations permit.”\(^{131}\)

Nonetheless, traffic-linked growth control measures may still constitute takings. While in effect, a traffic-linked growth control measure denies all use of land, but only while traffic flow falls short of the performance standards. The proper question, then, is: how long may use of one’s land be delayed before a court will find a taking?

Although the Court recently held in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles that temporary takings can exist and are compensable, it provided no guidance for determining what constitutes an unconstitutional delay.\(^{132}\) The Court limited its holding by specifically refusing to “deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like.”\(^{133}\) California courts have been equally unhelpful. Shortly after First English, the California Court of Appeal held in Guinnane v. City and County of San Francisco\(^ {134}\) that a delay in processing a building ap-

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\(^{127}\) 447 U.S. 255 (1980).

\(^{128}\) Id. at 260 (citing Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)). Although the state interest may be legitimate, a regulation may still work a taking if the regulation does not substantially advance that interest. In Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987), the Coastal Commission had issued a building permit on the condition that the owner grant a public easement across his property. The Court assumed that providing beach access was a legitimate state interest, but found the Coastal Commission’s regulation was not rationally related to that interest. Id. at 3147.


\(^{130}\) Penn Central, 438 U.S. at 125.

\(^{131}\) Id. at 131.

\(^{132}\) 107 S. Ct. 2378 (1987). The Church owned a campground in a canyon in the mountains above Los Angeles. In 1978, a flood destroyed the campground’s buildings. In response, the County adopted an interim ordinance prohibiting any construction in a flood-prone area that included the campground. Id. at 2381.

\(^{133}\) Id. at 2389.

plication of more than one year to study the development's environmental impact did not work a taking.\footnote{135} The court pointed to the language of \textit{Agins}: “[m]ere fluctuations in value during the process of governmental decision making, \textit{absent extraordinary delay}, are ‘incidents of ownership. They cannot be considered as a ‘taking’ in the constitutional sense.’”\footnote{136} No court has defined “extraordinary delay” before or since.

There are, however, some indications as to what kinds of delay are \textit{not} unreasonable. The California legislature apparently views twenty months as a reasonable time. The California Government Code provides that a city may enact a temporary moratorium of up to 20 months that prohibits all construction while the city revises its general plan.\footnote{137} The U.S. Supreme Court held that an eight-year delay in a subdivision map application process did not represent a “ripe” takings claim, although a taking may have occurred.\footnote{138}

Traffic-linked growth control measures are, in effect, construction moratoria, even if their standards are not especially rigorous. Moratoria and other growth control measures based on documented health and safety and general welfare concerns are more likely to withstand constitutional challenges.\footnote{139} Furthermore, properly documented growth control measures can withstand judicial scrutiny by allowing enough eventual development that landowners are not denied economically viable use of their property.\footnote{140}

Absent any clearer guidance, reasonableness seems to be the standard. Long before \textit{First English} and \textit{Guinnane}, a court confronting the issue stated:

Reasonableness, as we have seen, is the yardstick by which the validity of a zoning ordinance is to be measured and reasonableness in this connection is a matter of degree. A temporary restriction upon land use may be . . . a mere inconvenience where the same restriction indefinitely prolonged might possibly metamorphose into oppression.\footnote{141}

Whether a twenty-year delay of use while waiting for a freeway to be built would be reasonable is more difficult to answer.\footnote{142} A traffic-linked

\footnote{135. \textit{Id.} at 870, 241 Cal. Rptr. at 791.}
\footnote{136. \textit{Id.} at 869, 241 Cal. Rptr. at 790 (emphasis added) (quoting \textit{Agins}, 447 U.S. at 263 n.9).}
\footnote{137. \textit{CAL. GOV'T CODE} § 65858 (West 1983 & Supp. 1989). Prior to January 1, 1989, a two-year moratorium was in effect. \textit{Id.}}
\footnote{138. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-97 (1985). The claim is not “ripe” until all possible administrative remedies have been exhausted. \textit{Id.}}
\footnote{140. \textit{Id.}}
\footnote{141. Metro Realty v. County of El Dorado, 222 Cal. App. 2d 508, 516, 35 Cal. Rptr. 480, 485 (1963).}
\footnote{142. To highlight the “last resort” nature of a takings claim, it should be noted that, under current Court rulings, one would have to wait until those twenty years had passed before the
growth control measure is more likely to work a taking if the court finds that it is, in effect, an indefinite construction moratorium with little indication of whether the restrictions will be lifted.\textsuperscript{143} A measure with unrealistically high standards or no funding mechanism, for example, is more likely to be "indefinitely prolonged" and to "metamorphose into oppression."

The exact delay in use that a traffic-linked growth control measure may cause before working a taking is impossible to predict. Requiring a landowner to wait one to three years for the completion of a four-lane undivided highway is probably more reasonable than requiring a landowner to wait a dozen years for the completion of a new freeway. Neither may be reasonable; on the other hand, one or even both may be reasonable. If the road's route is established, environmental approval is secured, financing is obtained, and no major litigation is pending, then the delay is more likely to be found reasonable, even though the probable completion date is still many years away. If substantial doubt exists that the measure's standard can be met within a reasonably definable, foreseeable time period, or if the proposed improvements are not certain to meet those standards, then chances are small that the landowner is being subjected only to a "reasonable delay." A landowner kept waiting for years while a road's completion date is repeatedly set back could very well prove to be the victim of a temporary taking.

**B. Justice and Fairness: Public Benefit versus Private Burden**

A taking may be found where "justice and fairness" require that economic injuries caused by public action be compensated by the government rather than disproportionately concentrated on a few people.\textsuperscript{144} After setting forth its two-part test in \textit{Agins}, the U.S. Supreme Court stated: "The determination that government action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."\textsuperscript{145} "Justice and fairness" is a consideration along with \textit{Agins}' two-part test in the determination of a taking. A traffic-linked growth control measure that places the burden of solving the existing traffic problem on landowners who want to build, while denying them all use of their land, could violate justice and fairness.

Cities often require, and reasonably so, that landowners pay for the
additional infrastructure and community services that their developments demand. To ensure provision of adequate facilities, cities may require that the additional infrastructure be forthcoming before granting land use entitlements and may deny entitlements if no adequate sources of funding for the new infrastructure are secured. This provides funding to cope with additional traffic and represents an equitable allocation of those costs among the new residents and businesses causing the additional traffic. Well-drafted traffic-linked growth control ordinances can ensure that growth does not outpace the development of infrastructure and community services. Such ordinances can achieve this by approving new development only if traffic will not worsen, or the new development pays for the improvements needed to cope with the resulting traffic. Still, linking growth to traffic can only contain the traffic problem; it cannot solve the problem. A traffic-linked growth control measure that goes beyond this containment purpose and attempts to force landowners to pay for the already needed roads (or simply attempts to stop all growth indefinitely) is susceptible to invalidation.

Traffic-linked growth control measures that require the existing traffic problem to be alleviated before permitting construction to resume place the burden of providing the needed roads on individual landowners. The landowners are deprived of all use of their land until the roads are built and the traffic standard is “achieved and maintained.” In such cases, measures unaccompanied by funding mechanisms place pressure on landowners to provide the new funds. A local government is seldom willing or able under such measures to raise the required highway funds. In the face of serious road shortages, voters have regularly denied governments revenues for highways. Even if voters were willing, the ability of California cities to pay for roads other than by development fees is extremely limited by the taxing and spending limits of Propositions 13 and 4. Furthermore, overly restrictive measures could block even a

146. Associated Home Builders of the Greater Eastbay v. City of Walnut Creek, 4 Cal. 3d 633, 639, 484 P.2d 606, 610, 94 Cal. Rptr. 630, 634 (1971).
147. California voters recently rejected a highway funding bond issue, Proposition 74. Secretary of State, Statement of the Vote: June 7, 1988 Primary Election 37 (1988). In 1984, Orange County voters turned down a proposal to impose a one percent county sales tax to fund road building. L.A. Times, June 7, 1984, § I, at 12, col. 3; see also L.A. Times, Nov. 8, 1984, § I, at 20, col. 1.
148. Proposition 13, enacted in California by initiative on June 6, 1978, limits ad valorem taxes on real property to a maximum of one percent of full cash value, provides that changes made in state taxes for the purpose of increasing revenues must be by a two-thirds vote in each house of the Legislature, and permits local governments to impose special taxes beyond the one percent limit only by a two-thirds vote of the electorate. However, local sales taxes are not subject to this restriction. CAL. CONST. art. XIIIA. Proposition 13 was upheld in Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978). Proposition 4, enacted by initiative on November 6, 1979, generally limits state and local government annual spending increases to the cost of living and popula-
cooperating city's efforts to finance the roads with a bond issue.\textsuperscript{149}

In the face of government inaction, landowners must pay for the roads themselves in order to use their land. In this manner, traffic-linked growth control measures effectively coerce landowners into providing the needed roads. An overly restrictive measure becomes, in effect, an exaction.\textsuperscript{150} The result is that landowners, and future residents through purchase prices and rents, pay not only the costs of future traffic, but also the costs of solving the traffic problem caused by the current residents who did not pay for the needed roads. By forcing landowners and future residents to pay for the traffic problem current residents and developments cause, such measures can offend justice and fairness.\textsuperscript{151}

The court in \textit{Marblehead v. City of San Clemente}\textsuperscript{152} applied these principles of justice and fairness and struck down Measure E, a traffic-linked growth control measure. Measure E required not only mitigation of the impact of a property owner's development but also improvement of the existing level of service, if below the standards, before an owner would be allowed to develop the property.\textsuperscript{153} The court utilized the "direct nexus" test articulated in \textit{Nollan v. California Coastal Commission},\textsuperscript{154} which requires a direct connection between the burden imposed by the regulatory condition and the benefit the property owner re-

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\textsuperscript{149} See supra note 93 and accompanying text.


\textsuperscript{151} Proponents argue that the main source of the present traffic problem is the shortage of traffic improvements during the "window period" between the time when adequate infrastructure was provided (presumably before the 1970's, when highway funds were cut back and Proposition 13 was enacted) and the time that development fees were imposed to pay for new roads. Even if this explains the shortage of roads, it does not justify the demand that future residents or a small group of landowners pay for the correction of an existing traffic problem.


\textsuperscript{153} \textit{Marblehead}, No. X-55-11-82, at 3-4.

\textsuperscript{154} 107 S. Ct. 3141 (1987).
Applying this test, the court held that Measure E was facially defective because its plain meaning required property owners "to mitigate conditions not only caused by their development [a proper goal] but also to cure the inadequacies of those who developed their property before them." The court also cited *Liberty v. California Coastal Commission* to support the proposition that requiring the last parcel of land developed to bear the entire expense of all the roads and other facilities that were neglected by prior city councils and property owners would not be proper.

Applying the reasoning of *Nollan* and *Liberty*, future residents should not be forced to pay for the existing traffic problems. This intuitive notion is articulated in *Agins' language* and *Penn Central's "justice and fairness" standard* and is clearly defined in *Nollan's "direct nexus" test*. The cost of repairing existing traffic problems should be borne by prior developments or, more broadly, by the public as a whole. A measure that limits the new residents' burden to that part of the traffic problem they cause will likely be upheld. A traffic-linked growth control measure that requires alleviation of the traffic problem before new developments may proceed, forces new developments to wait indefinitely, and compels landowners to pay to solve existing problems as a condition of use may violate "justice and fairness" — and probably will not survive a constitutional challenge.

### C. Conclusions

Traffic-based growth control measures probably will not amount to facial takings unless they prevent all development. Facial takings are unlikely because the measures usually provide exemptions and because such measures may be lifted by complying with their standards, presenting at least the legal possibility that some development can be approved. Still, such measures may constitute takings as applied to specific property if all use is denied for an unreasonable amount of time.

Traffic-linked growth control measures are in effect moratoria because they forbid development unless the infrastructure meets certain standards. If a measure denies use indefinitely, then it works a taking. To avoid a taking, a measure should set realistic standards, permit construction of buildings that will not have a measurable impact on traffic, and permit construction of other developments so long as those develop-

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155. *Id.* at 3148.
ments pay for their impact on traffic. Such measures may also work tak-
ing if they force the landowners to pay not only for the traffic problems
that their future developments create, but also for solving the traffic
problems caused by past developments.

V

RECOMMENDED SOLUTIONS

Essentially, the traffic-linked growth control measures enacted to
date require sequential development of infrastructure and housing: build
the roads, then build the housing. Sequential development, however,
does not meet the interests of the future residents, landowners, and
neighboring communities to the extent it delays development indefinitely.
Therefore, traffic-linked growth control measures should allow concur-
rent development: building the roads and housing simultaneously. Con-
tributions of development fees to a traffic fund usually indicate
concurrent development. For example, each new development will pay
for a part of a new highway. Measures so drafted permit construction
either when the development will not worsen traffic or will contribute its
full share to the traffic fund. This approach balances the interests by
providing funds for roads yet enabling housing construction and other
development to proceed.

A. Formulating a Sound Traffic-Linked Growth Control Measure

Because traffic-linked growth control measures cannot be presented
rationally as solutions to traffic problems, and because voters have no
right to stop indefinitely all development, the voters’ intentions can be
most reasonably interpreted as a demand that road capacity keep pace
with development. That is, the voters intend to prevent the traffic prob-
lem from becoming any worse.

Consistent with this interpretation, the safest way to construct a
constitutional traffic-linked growth control measure would be to permit a
development to proceed only if it will not worsen traffic or if it pays for
its measurable impact on traffic. Payment could take several forms. The
developer could either pay for the roads needed by its development, or
pay its fair share into a traffic fund. With a traffic fund, several devel-
opments could finance a major road project. Such a formulation permits

162. The exception contained in the Costa Mesa measure can achieve this with two draft-
ing changes. See Costa Mesa, Cal., The Citizens’ Sensible Growth and Traffic Control Initiative, § 3.A.1.b; see supra note 29. The Costa Mesa measure could be brought largely within
this proposed construction simply by amending section 3.A.1.b to also apply to plans, maps,
and zone changes. The effect would be to make this exception available to all developments,
not just vested developments. The over-restrictive requirement that the traffic level “be
achieved and maintained” before granting further development entitlements would be elimi-
a development to proceed when that development will not adversely affect traffic; or, the development may proceed without waiting for the traffic problem to be alleviated. This recommended formulation prevents current landowners from placing the cost of solving existing traffic problems on future landowners.

This recommended formulation also overcomes the financing problem associated with growth moratoria. Development can proceed and the government can collect necessary development fees, assessments, and property taxes. As a result, the financing of road construction may proceed with assurance that the development will be built and the fees collected. Because development and road construction can proceed concurrently, rather than road construction necessarily preceding development, the problem of delayed use is avoided. Developers can pay into a traffic fund and begin to build, rather than wait for the completion of new roads before breaking ground.

Thus, further construction would be conditioned on the development supplying its share of new traffic needs, yet those willing to pay their own way for their traffic impact would be permitted to proceed. In practice, cities must sometimes pool fees from several developments to pay for one major highway. Some developments could be completed before the needed roads are finished. The result would be temporary traffic level increases until the new roads are open. Cities may grant entitlements to secure financing while managing construction start dates to minimize the temporary traffic overload. This technique strikes a reasonable accommodation of the competing interests by ensuring that the necessary development will eventually proceed. This is its advantage over measures demanding that service levels be achieved and maintained before entitlements are granted, which create uncertainty about whether the standards will ever be met and preclude private financing in the event the government fails to fund the needed improvements.

This proposed approach would also satisfy justice and fairness standards. New residents pay for their impact on traffic, but they alone do not pay to solve the existing traffic problem. The burden of solving the existing traffic problem remains on the government to provide new roads. The government can then choose from the several funding sources that may be available, including state or local general revenues, or user fees in the form of tolls, gasoline taxes, or vehicle license fees. The government would then be forced to allocate the costs of new roads as fairly as practicable. Traffic is a problem that is regional and, unlike sewage or water, cannot be internalized. The recommended measure enables local governments to prevent the traffic problem from worsening further, yet directs the voters’ attention to regional and state governments for solutions—entities that can better distribute the burdens and benefits of solving the traffic problem.
B. The Recommended Inquiry

Courts should examine a measure's underlying effect when judging its validity. If the measure is a reasonable approach to containing traffic, through reachable standards or concurrent building and road construction, then the court should find the measure to be a reasonable accommodation of the competing interests and not a taking. If, however, the court finds the measure to be a disguised anti-growth measure with the effect of imposing an indefinite prohibition against development, the court should be more willing to strike it.

A measure that does not permit construction to proceed while steps are taken to provide more roads is likely to be viewed as a disguised anti-growth measure, designed not to be a reasonable accommodation of the competing interests, but an accommodation only of the anti-growth interests. Courts might use the following five criteria to determine whether a measure is a bona fide growth management measure or a disguised anti-growth measure.

First, the court should inquire whether the measure has reasonable, reachable standards. Standards that can be met by the construction of a well-built arterial, for example, are more likely to be reasonable. If the community already has a well-developed arterial system and the standards would not be met even if that system were doubled, then the measure's standards are unlikely to be reasonable. The court should look to the city's particular circumstances to help determine if the standard is realistic for that city. For example, Walnut Creek, the center of a suburban region, cannot realistically impose traffic level standards better suited to a small city such as Stockton.

Second, the court should ask if the measure requires the traffic problem to be alleviated before construction may proceed or if construction may proceed so long as it will not worsen the traffic problem. If the measure's real intent is to manage the traffic problem, then the voters who enacted it should not object to further construction that will not worsen traffic. Considering the lead time necessary to build new roads, a measure forbidding all but minor construction until the traffic problem is alleviated is hardly a reasonable accommodation of the competing interests. Requiring development to wait until major roads are built is even less reasonable in light of the uncertainty whether the new roads, even if built, would alleviate the traffic problem. Development that will not worsen traffic should not run afoul of a measure whose purpose is to manage the problem until the new roads are built.

163. The dynamics of increased sprawl and the resulting increase in traffic figure here. Even if construction is halted in the area affected by the measure, a distinct possibility exists that traffic could nevertheless worsen within that area. See supra notes 86-97 and accompanying text.
Third, the court should determine whether any kind of funding mechanism accompanies the measure. A court may view a measure that forbids growth until traffic reaches levels of service significantly below current levels, but provides no hint of how to pay for the needed roads, as a disguised anti-growth measure. On the other hand, a measure: (1) containing a funding mechanism, (2) accompanied on the ballot by a funding measure, or (3) preceded or followed by a funding measure would better withstand challenge. The strongest indication of a measure's true anti-growth nature is passage without a funding mechanism, combined with the contemporaneous defeat of a funding measure. Such actions communicate to the court that the electorate is not serious about controlling traffic but rather wants to stop growth.

Fourth, the court should look to other indicia of the community's attitude toward providing new roads. For example, a community that has a traffic-linked growth control measure in effect and yet repeatedly refuses to approve highway construction strongly indicates that it is not committed to meeting the measure's standards. The community's paralysis makes for a de facto permanent construction moratorium.

Finally, the court should determine whether the measure demands that future developments pay for existing traffic problems. A measure that is an indefinite moratorium, demanding high levels of service before new developments may proceed without providing funding, may have this effect. A measure that requires new developments to pay for their impact on traffic is reasonable. A measure that forces new residents to pay for problems caused by everyone in the community except those new residents offends justice and fairness.

VI
CONCLUSION

Two types of traffic-linked growth control measures have been enacted to date in California. Both prohibit real estate development in their jurisdictions until traffic reaches acceptable levels. The traffic-linked growth control measure that will best withstand attack will require new developments to pay for their impact on traffic without halting development until the specified traffic levels are achieved and maintained. Traffic-linked growth control measures are containment measures that are able to prevent the traffic problem from becoming worse. These measures alone cannot solve the traffic problem.

While a particular measure may be sufficiently flawed such that it violates state law, the concept of traffic-linked growth control is not inherently inconsistent with California's home rule power or zoning laws. A measure that is, in effect, an indefinite moratorium violates due process because no accommodation is made of those interests that have a stake in
development proceeding. Delaying development for only a reasonable amount of time and not forcing future developments to pay to correct the existing traffic problem is the best way for a traffic-linked growth control measure to avoid the expensive consequences of the takings clause. Determining what is "reasonable" means considering the interests of all groups affected. In borderline cases, courts should look to the measure's underlying intent and effect. The measure is likely to withstand attack if it is a realistic attempt to solve the traffic problem. If the measure is actually an anti-growth measure, without a fair opportunity to meet its performance standards, then the court should invalidate the measure.

The question is how California will grow, not if California will grow. More growth means more traffic. To prevent further deterioration of the situation, new developments must pay their fair share of new roads, which traffic-linked growth control measures can help ensure. But growth will continue, and the need for housing will become more acute. Overly restrictive measures ignore this need and the needs of other competing interests, such as neighboring communities, business, and labor. Such measures cause sprawl and hasten consumption of open space. Worst of all, overly restrictive measures may obstruct the construction of new roads. That hardly represents a rational relationship to the worthy interest of controlling traffic.