April 12, 1988

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL
EVIDENCE CODE SECTION 669.5

QUESTION PRESENTED

At your joint meeting with the Citizens Advisory Committee on Growth and Development on March 23, 1987, you referred to us the question of the impact of Evidence Code section 669.5 on the inclusion of a building cap as an element of San Diego's final growth management plan.

CONCLUSION

Evidence Code section 669.5 has no effect on the constitutional permissibility of growth control/limitation measures using numerical caps. It states that any ordinance (or initiative) containing a numerical cap is presumed to impact the regional supply of residential units and if challenged, the City would have the burden of proving that the ordinance was rationally related to the health, safety and general welfare of the public, thereby affecting the City's defense of an attack on such a growth control measure.

ANALYSIS

Evidence Code section 669.5 creates a presumption that affects the burden of proof as to the non-existence of the presumed fact. Certain specific ordinances limiting permits or development enacted by a city are presumed to have an impact on the supply of residential units available. If the ordinance is challenged, Evidence Code section 669.5 shifts the burden of proof of impact on residential unit supply from the complainant to the City. The statute currently provides:

> . 669.5 Ordinances limiting building permits or development of buildable lots for residential purposes; impact on supply of residential units; actions challenging validity
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> (a) Any ordinance enacted by the governing body of a city, county, or city and county which directly limits, by number, (1) the building permits that may be issued for residential construction or (2) the buildable lots which may be developed for residential purposes, is presumed to

> have an impact on the supply of residential units available in an area which includes territory outside the jurisdiction of such city, county, or city and county.
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> (b) With respect to any action which challenges the validity of such an ordinance, the city, county, or city and county enacting such ordinance shall bear the burden of proof that such ordinance is necessary for the protection of the public health, safety, or welfare of the population of such city, county, or city and county.
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> (c) This section does not apply to ordinances which (1) impose a moratorium, to protect the public health and safety, on residential construction for a specified period of time, if, under the terms of the ordinance, the moratorium will cease when the public health or safety is no longer jeopardized by such construction, or (2) create agricultural preserves under Chapter 7 (commencing with Section 51200) of Part 1 of Division 1 of Title 5 of the Government Code, or (3) restrict the number of buildable parcels by limiting the minimum size of buildable parcels within a zone or by designating lands within a zone for nonresidential uses.
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> (d) This section shall not apply to a voter approved ordinance adopted by referendum or initiative prior to the effective date of this section which (1) requires the city, county, or city and county to establish a population growth limit which represents its fair share of each year's statewide population growth, or (2) which sets a growth rate of no more than the average population growth rate experienced by the state at a whole.

Formerly, the burden of proof rested with the complainant to show a growth control measure did not bear a real and substantial relation to the regional general welfare. Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal.3d 582, 557 P.2d 473, 135 Cal.Rptr. 41, 92 A.L.R. 1038, 7 E.L.R. 20, 155 (1976). Thus, courts were to presume that the City was acting or would act in good faith to satisfy regional housing needs. Id. at 609, 610.

Ultimately, the legislature, out of concern over the regional

impact of growth limitation ordinances, and in an attempt to address the burden of proof problem created by such a broad presumption, enacted Evidence Code . 669.5. C. Burton, "California Legislature Prohibits Exclusionary Zoning, Mandates Fair Share: Inclusionary Housing Programs a Likely Response." 9 San Fernando Valley L. Rev. 19, 23 (1981). The courts have concluded that the decision to shift the burden of proof was a policy decision made by Legislature that was not in and of itself unconstitutional. Lee v. City of Monterey Park, 173 Cal.App.3d 798, 807, 219 Cal.Rptr. 309 (Dist. 2 1985).

Only two appellate cases have considered the effect of Evidence Code section 669.5. In both cases, the precise issue presented was whether the statute applied to growth control measures enacted by initiative. Building Industry Ass'n v. City of Camarillo, 41 Cal.3d 810, 718 P.2d 68, 226 Cal.Rptr. 81 (1986); Lee v. City of Monterey Park, supra. It is interesting to note that in both cases, the courts equated the statutory directive that the city prove that the ordinance is "necessary" for the protection of the public health, safety and general welfare with the traditional requirement that the ordinance be "reasonably related" to the protection of the public health, safety and general welfare. Building Industry Ass'n v. City of Camarillo, supra, 41 Cal.3d at 822; Lee v. City of Monterey Park, supra, 173 Cal.App.3d at 807. The Lee opinion also noted that while the burden of proof had shifted, the constitutional test for determining whether the challenged ordinance reasonably

relates to the regional general welfare remains the same. Thus, the process by which the courts will determine whether a challenged ordinance reasonably relates to the regional welfare is as follows: (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. Lee v. City of Monterey Park, supra, 173 Cal.App.3d at 804.

The court decisions have not acknowledged the fact that the statute creates a rebuttable presumption. It is the existence of the presumption (that the ordinance impacts on regional housing supply) that leads to the shift of the burden of proof. Arguably, the City could present evidence to overcome the presumption and thereby shift the burden back to the complainant to prove that the ordinance does not reasonably relate to the public health, safety and general welfare. To our knowledge, this point has yet to be litigated.

Presently, the legislature has before it Assembly Bill No. 4099, an act to amend Evidence Code section 669.5. Substantively, the proposed amendment adds a clause to the statute addressing the issues of exclusionary and inclusionary zoning and has no effect on the issues discussed here. (See Attachment No. 1 for text of proposed change; Burton at 29-32; and Lee. See also Attachment No. 2 for text of Government Code . 65913.1, the code section referenced in the proposed change.)

Your consideration of this matter should include a reminder that the legislature and the courts have mandated that growth control ordinances must have as their basis an evaluation of not only local needs, but the needs of all potentially affected areas, so as not to put a fence around the city, and ensure that the city absorbs its fair share of new growth. Understanding also that "fair share" is a sliding-scale measure, determined by local, regional, and national factors viewed on a continuum over time. Associated Home Builders at 608.

Two related statutes are Government Code sections 65302.8 and 65863.6. Code section 65302.8 lists the findings which must be included when "any county or city, including a charter city adopts or amends a mandatory general plan element which operates to limit the number of housing units which may be constructed on

an annual basis . . . ." Government Code section 65302.8 (Wests 1983). (See Attachment No. 3 for full text.) Government Code section 65863.6 outlines the requirement of balancing local and regional housing needs against public service needs when adopting an ordinance which has a numerical cap. In addition to the balancing requirement, this section requires inclusion of health, safety, and welfare findings. (See Attachment No. 4 for full text.)

These statutes illustrate the documentation which would be involved under Evidence Code section 669.5 to fulfill the City's burden of proof, in the face of a challenge, should the final growth management plan have numerical caps. Although this is clearly not a prohibitive burden, it could be a considerable one and should be considered when such enactments are proposed.

Respectfully submitted,
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City Attorney

JSG:lc:600.3(x043.1)
Attachments
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