Santa Clara Law Review

Volume 20 | Number 2 Article 1

1-1-1980

Developing the Consistency Doctrine: The Contribution of the California Courts

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DEVELOPING THE CONSISTENCY DOCTRINE: THE CONTRIBUTION OF THE CALIFORNIA COURTS

Joseph F. DiMento*

INTRODUCTION

In a society in which quality of analysis in decisions about the use of resources is highly valued, the potential contribution of the courts to sound environmental management is increasingly discussed.[1] An important role for the judiciary in land-use planning law is to fill out details that neither legislation nor administrative law adequately addresses. Adjudication leads to explication of controversies in the detail necessary to fully understand their complexity. In the area of land-use law particularly, neither the state legislature nor administrative agencies can develop the law to the operational level necessary to resolve certain problems over the use of property. When these land-use controversies develop into litigation, the courts do the fine tuning of the legal doctrines and help us elaborate and understand our system of resource management.

One important area of land use and planning reforms that is emerging from case law interpreting statutory mandates is the consistency doctrine. The doctrine states that governments must engage in land-use planning and that their regulatory and development controls should be based on, or consistent with, that planning. This article analyzes the con-

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1. For analyses of the potential contribution of a court system to resolution of environmental and technical problems, *see* Kantrowitz, *The Science Court Experiment: Criticisms and Responses*, BULL. ATOM. SCIENTISTS 43, April, 1977.

On the arguments for and against a greater role for the courts in environmental management, *see also* DiMento, *Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Direction for Future Research*, 2 DUKE L.J. 409 (1977).

tribution that the California courts have made to the elaboration of the consistency doctrine.[2]

The consistency doctrine promotes a particular nexus between a land-use plan and government regulation of land use, such as zoning and subdivision map approval. It has its roots in the language of the Standard State Zoning Enabling Act,[3] which states that zoning shall be done "in accordance with a comprehensive plan."[4] Under this historical antecedent of the consistency doctrine, violations of the "in accordance with" language were found when 1) only selected areas within a municipality were regulated by zoning; 2) zoning was done by means of an interim ordinance that was passed by legally questionable government procedures; or 3) the zoning ordinance failed to control one or more of the factors that it was intended to regulate, for example, uses or heights. The consistency doctrine, however, ushers in a new relationship between planning and zoning (as well as between planning and other land-use controls). It is by and large the creature of recent legislation, and it places much greater importance on the general plan and the planning process. The initial requirement in a jurisdiction following the doctrine is that the local government develop a general, master, or comprehensive plan. Following the preparation and approval of a plan, a strict consistency doctrine would ordain that regulatory devices, or past or future ordinances not in conformity with the plan, must fail.[5]

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2. In addition to California, other states have recently made important contributions to the case law on the relationship between planning and land-use controls. Among the most active courts on the subject are Florida's. *See* Castellano v. Crouse, 45 F. Supp. 106 (D. Fla. 1976); Dade County v. Yumbo, 348 So. 2d 392 (1977); Dade County Ass'n of Unincorporated Areas, Inc. v. Board of County Comm'rs, 45 Fla. Supp. 193 (1975).

3. U.S. DEP'T OF COMMERCE, THE STANDARD STATE ZONING ENABLING ACT, 1922 (Rev'd ed., 1926).

4. For a summary of legislative treatment of the consistency doctrine and a short history of the ambiguity in meaning of the "in accordance with" language, *see* DiMento, *Improving Development Control through Planning: The Consistency Doctrine*, 5 COLUM. J. ENVT'L L. 1 (1978) [hereinafter referred to as DiMento, *Consistency*].

5. The consistency doctrine has been paid considerable policy and scholarly attention. *See* R. FISHMAN, HOUSING FOR ALL UNDER LAW (1978); N. WILLIAMS, AMERICAN PLANNING LAW (1974); Brooks, *The Law of Plan Implementation in the United States*, 16 URBAN L. ANN. 225 (1979); Bross, *Circling the Squares of Euclidian Zoning: Zoning Predestination and Planning Free Will*, 6 ENVT'L L. 97 (1975); Catalano & DiMento, *Mandating Consistency Between Zoning Ordinances and General Plans: The California Experience*, 8 NAT. RESOURCES L. 455 (1975) [hereinafter cited as Cat-

The Statutory Framework

In California, the consistency requirements are found in several sections of the Government Code.[6] A common name for the consistency laws in California is A.B. 1301, since this was the number of the bill from which most of these statutes were enacted in 1973. Government Code section 65300 provides that every city and county must develop a general plan. The plan must contain the following nine elements: land use, circulation, housing, conservation, open space, seismic safety, noise, scenic highway, and safety. Section 65300.5 mandates that the plan be integrated and internally consistent. Section 65566 requires that acquisition, regulation, and any other actions of the local government related to open space conform to the local open space plan. Under section 65567, building permits, subdivision maps, and zoning ordinances affecting open space must be consistent with the open space plan. Section 65803 exempts charter cities from the consistency statutes unless they adopt these requirements. Section 65860 requires county or city zoning ordinances to be consistent with the general plan of the county or city. Section 65862 sets out the time limitation for holding a public hearing on bringing zoning into consistency with the general plan. Section 65910 requires preparation and adoption of an open space ordinance

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alano & DiMento, *Mandating Consistency*]; DiMento, *Looking Back: Consistency in Response to and Interpretation of the California Consistency Requirement: A.B. 1301*, 2 PEPPERDINE L. REV. 196 (1975); Hagman & DiMento, *The Consistency Requirement in California*, 30 LAND USE & ZONING DIG. 6 (1978); Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 900 (1976); Sullivan & Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement*, 9 URB. L. ANN. 33 (1975); Tarlock, *Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against*, 9 URB. L. ANN. 69 (1965); Comment, *Comprehensive Land Use Plans and the Consistency Requirement*, 2 FLA. ST. U. L. REV. 766 (1974); Comment, *Urban Planning and Land Use Regulation: The Need for Consistency*, 14 WAKE FOREST L. REV. 81 (1978).

The term consistency has also been used to describe the relationship required between federal (and certain state and local) actions in a state's coastal zone and a state's coastal management program. *See* Hershman, *Achieving Federal-State Coordination in Coastal Resources Management*, 16 WM. & MARY L. REV. 747 (1975); Hershman & Folkenroth, *Coastal Zone Management and Inter-governmental Coordination*, 54 OR. L. REV. 13 (1975).

Debates over consistency center around analyses of society's planning and implementation capacity as well as on questions of social and political values. *See* DiMento, *Consistency*, *supra* note 4, at 44-63.

6. CAL. GOV'T CODE §§ 65300, 65300.5, 65566, 65567, 65803, 65860, 65862, 66473, 66474 (West 1966 & Supp. 1978).

consistent with the local open space plan. Sections 66473 and 66474 set forth various requirements for attaining subdivision consistency with general and specific plans. Finally, section 65860(b) provides that citizens may bring suit to enforce consistency of zoning with the general plan.

The Case Law

The California appellate courts in the half decade during which a consistency requirement has been law in California have applied these statutes in a dozen consistency cases.[7] These decisions comprise a significant percentage of all the recent state court analyses of the consistency doctrine throughout the United States. California courts have addressed the definition of consistency,[8] the reach of the consistency requirement (what needs to be consistent with what),[9] procedural aspects of compliance with the consistency requirement (including the findings required at the local level and the scope of judicial review of local determinations),[10] the effect of the consistency requirement on planning blight litigation,[11] and the remedies available should inconsistencies be found.[12] In a general sense, too, the courts throughout these

7. The single California Supreme Court case addressing consistency was Youngblood v. Board of Supervisors, 22 Cal. 3d 644, 586 P.2d 564, 150 Cal. Rptr. 242 (1978). Court of appeal cases reported are: San Diego Gas & Elec. Co. v. City of San Diego, 80 Cal. App. 3d 1026, 146 Cal. Rptr. 103 (1978); Friends of "B" Street v. City of Hayward, 75 Cal. App. 3d 148, 142 Cal. Rptr. 50 (1977); Save El Toro Ass'n v. Days, 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977); Ensign Bickford Realty Corp. v. City Council, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977); Mountain Defense League v. Board of Supervisors, 65 Cal. App. 3d 723, 135 Cal. Rptr. 588 (1977); McMillan v. American Gen. Fin. Corp., 60 Cal. App 3d 175, 131 Cal. Rptr. 462 (1977); Dale v. City of Mountain View, 55 Cal. App. 3d 101, 127 Cal. Rptr. 520 (1976); Hawkins v. County of Marin, 54 Cal. App. 3d 586, 126 Cal. Rptr. 754 (1976); Woodland Hills Residents Ass'n, Inc. v. City Council, 44 Cal. App. 3d 825, 118 Cal. Rptr. 856 (1975). In addition, a case now unpublished discussed at notes 50-55 and accompanying text *infra* is Sierra Club v. County of Alameda, 1 Civ. No. 38554 (Cal. Ct. App. Sept. 22, 1977) (case was reheard and both opinions are unpublished). Another case that is unreported is Chevy Chase Estate Ass'n v. City of Glendale, 2 Civ. No. 52161 (Cal. Ct. App. May 17, 1978). There are also some cases in which the parties did not directly argue the consistency issue, but in which it is raised indirectly by the court. *See, e.g.*, Jones v. People *ex rel.* Dep't of Transp., 22 Cal. 3d 144, 583 P.2d 165, 148 Cal. Rptr. 640 (1978); Orsetti v. City of Fremont, 80 Cal. App. 3d 961, 146 Cal. Rptr. 75 (1978).

8. *See* text accompanying notes 65-71 *infra*.

9. *See* text accompanying notes 16-64 *infra*.

10. *See* text accompanying notes 72-98 *infra*.

11. *See* text accompanying notes 118-29 *infra*.

12. *See* text accompanying notes 102-13 *infra*.

decisions have contributed an understanding of the status and function of planning under a consistency doctrine.[13]

This article reviews the case law under each of these categories, and should provide useful background to the practitioner working in the local government land-use context. In addition, the article aims to present an example of the detail that is required to make operational the legislature's broad-brush statements of the consistency doctrine.

There are good reasons for tracing the California consistency cases. California courts have developed an activist reputation over the years in the areas of environmental and land-use law.[14] The California Supreme Court has written several opinions that are among the most significant nationally, as indicated by scholarly commentary and their use as precedent.[15] Since the California courts are so influential, an analysis of the consistency doctrine in California may give an indication of the limits of change which the doctrine will effect in other jurisdictions. Translation by California courts of the stark statutory language of consistency into directives to local government should be instructive to other states contemplating or initiating reforms in their land planning law. If the California courts limit the impact of the consistency requirements on local government decision making, it is unlikely that other courts in states with less activist judiciaries will read consistency law in a more progressive manner.

Review in this article of existing case law suggests that there have been no drastic changes at the local level, where master plans are typically general in nature, easily amendable, and limited in regulatory effect. Nonetheless, the California courts have made a modest contribution to the enhancement of the planning enterprise by laying the groundwork for an analysis of the adequacy of plans and by spelling out how consistency, although in a weak form, should be implemented and how the judiciary should review local government consistency

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13. *See* text accompanying notes 115-17 *infra*.

14. *See* DiMento *et al., The California Supreme Court's Record in Land Development and Environmental Control Law*, U.C.L.A. L. REV. (forthcoming).

15. Associated Home Builders, Inc. v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976); Livingston Rock & Gravel Co. v. City of Los Angeles, 43 Cal. 2d 121, 272 P.2d 4 (1954); Clemons v. City of Los Angeles, 36 Cal. 2d 95, 222 P.2d 439 (1950); Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949); Miller v. Board of Public Works, 195 Cal. 477, 234 P. 281 (1925); *Ex parte* Hadacheck, 165 Cal. 416, 132 P. 584 (1913), *aff'd*, Hadacheck v. Sebastian, 239 U.S. 394 (1915).

determinations.

THE CALIFORNIA CONSISTENCY DECISIONS

The Initial Determination: What Needs to Be Consistent with What?

The California legislative scheme is silent on several narrow but important initial local government consistency considerations. These are: 1) What is the applicable plan for consistency analysis when a general plan is replaced or amended? 2) What are the implications for considerations of consistency if a general plan is incomplete? 3) Must applications for conditional use permits be evaluated for consistency with general plans? 4) Are private development plans to be subjected to consistency analysis? The courts, however, have been confronted with these issues. What follows is an analysis of the relevant supreme court and appellate opinions.

The applicable general plan. The California Supreme Court in *Youngblood v. Board of Supervisors*[16] addressed the question of which general plan must be analyzed for consistency when a final subdivision map approval is challenged and the municipality has altered its plan since the tentative map was approved.

The case arose when neighbors of a subdivision filed suit against the Board of Supervisors of San Diego County alleging that the Board had abused its discretion in approving a final subdivision map that did not conform to the existing general plan. The case was complicated by the fact that consistency law was entangled with seemingly incompatible California code provisions relating to approval of a final subdivision map once a tentative map has been approved. When the developer in *Youngblood* had submitted his tentative map, the general plan of the county provided for densities of .75 dwelling units per acre. In conformity with this plan, the developer planned buildings of approximately .6 units per acre, and his tentative map was approved. The county later adopted a community plan for the subdivision area which called for a "rural estate" use of the land. Under this designation, the county allowed only one dwelling unit on each two-acre parcel.

When the developer met all the conditions imposed upon

16. 22 Cal. 3d 644, 586 P.2d 556, 150 Cal. Rptr. 242 (1978).

the tentative map, the county proceeded to approve the final subdivision map despite the fact that it was not in conformity with the amended plan. The stage was thus set for allegations of a conflict between the state's Subdivision Map Act,[17] which makes ministerial the approval of a final subdivision map if conditions imposed upon approval of a tentative map are substantially met, and the consistency requirement that subdivision maps conform to the applicable general plan.

The California Supreme Court concluded that the "applicable" plan for consistency consideration means "the general plan in effect when the tentative map was approved."[18] The court based its decision on application of the state Senate's amendment to the subdivision consistency requirement of A.B. 1301, which resolved any conflict between the statutes. When finally passed, this section stated:

> A governing body shall not deny approval of a final subdivision map pursuant to Section 11549.5 [of the California Business and Professions Code] if it has previously approved a tentative map for the proposed subdivison and if it finds that the final map is in substantial compliance with the previously approved tentative map.[19]

The court rejected the narrow interpretation of the amendment argued by plaintiffs: that the new section does not limit the governing body's power to deny approval on the basis of an inconsistency with a general plan.[20] The court read the legislative intent of A.B. 1301 and its amendments to be "that a final map should not be disapproved for failure to comply with requirements, including general plans, inapplicable at the time of approval of the tentative map."[21]

The court's statutory interpretation was clearly compelled by the language of the code. Furthermore, fairness requires this result even absent specific clarifying legislation. As

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17. CAL. GOV'T CODE §§ 66410-66499.37 (West Supp. 1978).

18. 22 Cal. 3d at 656, 586 P.2d at 563, 150 Cal. Rptr. at 249.

19. CAL. BUS. & PROF. CODE § 11549.6 (West 1966). This section was repealed March 1, 1975, but it governed subdivisions for which the tentative map was approved prior to March 1, 1975. The section that replaced it states substantially the same proposition—that a final map shall be disapproved only for failure to meet or perform requirements or conditions that were applicable to the subdivision at the time of approval of the tentative map. CAL. GOV'T CODE § 66473 (West Supp. Pamph. 1966-1978).

20. 22 Cal. 3d at 656, 586 P.2d at 563, 150 Cal. Rptr. at 249.

21. *Id.* at 656 n.11, 586 P.2d at 563 n.11, 150 Cal. Rptr. at 249 n.11.

the court noted, approval of a tentative map is often followed by expenditures by a developer to meet the conditions imposed.[22] These conditions may alter the land in ways that make it inconsistent with alternative uses. "[I]t is only fair," opined the court, to meet the developer's reliance on approval of a final map.[23] Another positive effect of the court's opinion is that it encourages local government to streamline its approval process and discourages development opponents from engaging in spot planning in order to block the subdivision after initial approval. While it may be true that the community's interests are only made obvious upon a specific action, such as approval of a tentative map, reforms to insure adequate consideration of those interests should not be made at the expense of a party who has acted in reliance upon the existing process.

The inadequate general plan. Another issue addressed by the California courts with respect to the initial determination under the consistency doctrine is whether it is possible to make a finding of consistency with a plan when there is no such plan. Historically, courts have not required the existence of a separate planning document or process to meet the "in accordance with" requirement. Courts have also refused to investigate whether an entity offered as a plan is complete or adequate.

Obviously, to the strong consistency advocate there can be no consistency of a land-use device with a nonexistent plan.[24] The implications of this conclusion, however, may vary. First, if this notion is not linked with a set of effective remedies, such as an injunction forbidding a county or city from approving development until a plan is made, the ruling is impotent.[25] Second, the conclusion that there must first be an adequate plan is compromised according to the extent the reviewing courts will accept incomplete plans.

In the California case addressing the inadequate plan issue, *Save El Toro Association v. Days*,[26] the appellate court was unwilling to make any such compromises. The court of

22. *Id.* at 655, 586 P.2d at 562, 150 Cal. Rptr. at 248.

23. *Id.*

24. Nonetheless, there may be instances where such a position is not followed. *See* DiMento, *Consistency*, *supra* note 4, at 56.

25. *See* the discussion of remedies in text accompanying notes 101-13 *infra*.

26. 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977).

appeal found simply that a partial plan would not suffice to meet California's general plan requirement. *Save El Toro* involved a challenge by a citizens' group to the approval of a district improvement project and associated activities. The plaintiffs complained that the actions would restrict use of open space land. When such a challenge is made, it triggers the application of the consistency statute governing use of open space, Government Code section 65567, which provides that a local government body may not approve building permits or subdivision maps unless the proposed action is consistent with a local space plan.[27] The open space plan can either be adopted separately or as an element of the city's or county's general plan. In the *Save El Toro* situation, the city of Morgan Hill had no open space plan, however, and plaintiffs alleged that the various ordinances offered by the defendant city as evidence of a general plan were not the equivalent of such a plan. The material offered by the city as its plan was missing five of the nine general plan elements required by California law.[28] Nor had the city undertaken, as required by the Open Space Lands Act,[29] the inventory of open space resources, which is a prerequisite to adoption of an open space plan.[30]

The court in *Save El Toro* ruled in favor of the challengers, concluding that "obviously," in order for a consistency de-

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27. CAL. GOV'T CODE § 65567 (West Supp. Pamph. 1966-1978). The section provides:

> No building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted, unless the proposed construction, sub-division or ordinance is consistent with the local open space plan.

28. CAL. GOV'T CODE § 65302 (West Supp. Pamph. 1966-1978). The section requires cities and counties to adopt, as parts of the plan, the following elements: land use, circulation, housing, conservation, open space, seismic safety, noise, scenic highway and safety. *See* text accompanying note 6, *supra*.

29. CAL. GOV'T CODE §§ 65560-65570 (West Supp. Pamph. 1966-1978). That act is one of California's most strongly pro-environmental statutes. It requires that a local government inventory its open space resources. These are broadly defined as parcels of land and resources that are essentially unimproved (*Id.* § 65560(b)) and devoted to any of several open space uses—from management for the production of resources (*Id.* § 65560(b) (2)) to provision of scenic outdoor areas (*Id.* § 65560(b)(3)). Once the area is inventoried, the local government must act to preserve open space (*Id.* § 65561(a)) and prevent its premature and unnecessary conversion to urban uses (*Id.* § 65561(b)). This is to be done by preparation of a "local open space plan for the comprehensive and long-range preservation of open space land." (*Id.* § 65563).

30. *Id.* § 65563(b).

termination to be made "there must first be such a plan."[31] As for a remedy, the reviewing court of appeal was equally explicit and succinct: "As the City of Morgan Hill has not adopted a valid open space plan, the city cannot take any action to acquire, regulate or restrict open space land or approve a subdivision map."[32]

There are several implications of the *Save El Toro* decision. One is that the opinion provides a strong incentive for a local entity to engage in planning. Even a local government with a no-growth policy should feel the impact of *Save El Toro,* for not only is development precluded prior to plan adoption, but regulation of open space is similarly prohibited. It would be a rare community that would promote open space preservation through the total absence of regulation and management.

Because open space law is especially strict in California, one cannot generalize from the court's conclusion in *Save El Toro,* however, that where a plan is missing an element there can be no consistency, to a rule that the California courts will take such a strong pro-planning posture in cases involving other missing elements.

Another conclusion that can be drawn from dicta in *Save El Toro* is that variation in the form of a city's or county's plan is acceptable. The general plan, for example, need not be adopted as a single ordinance,[33] although the California legislative intent is that there be internal consistency among the parts of a plan.[34] Nonetheless, the range of tolerance does not include the city's *post hoc* attempts to gather up "a number of ordinances," as in *Save El Toro,* and claim that these comprise a general plan.[35] In this case, Morgan Hill's scheme of regulation was missing the required conservation, seismic safety, noise, scenic highway and safety elements. In addition, the city was not in compliance with the law for failure to carry out the required inventory of open space resources. The opinion thus reinforces California's legislative requirement that plans precede regulation and stands for the proposition that a separate recognizable planning product must be adopted

31. 74 Cal. App. 3d at 70-71, 141 Cal. Rptr. at 286.
32. *Id.* at 74, 141 Cal. Rptr. at 288.
33. *Id.* at 72, 141 Cal. Rptr. at 287.
34. CAL. GOV'T CODE § 65300.5 (West Supp. Pamph. 1966-1978).
35. 74 Cal. App. 3d at 72, 141 Cal. Rptr. at 287.

which, although its form may vary, must contain the elements required by statute. It must be "an integrated . . . statement of policies for the adopting agency."[36] In addition, plans must be based on knowledge of resources and must meet such legislatively imposed goals as "discouraging premature and unnecessary conversion of open-space land to urban uses."[37]

The conditional use permit. Must conditional uses be evaluated for consistency with the general plan? Two California court of appeal decisions have answered emphatically in the negative, describing that evaluation as unnecessary and undesirable.[38] Their reasoning is that adequate guidelines for issuance of conditional use permits are provided in California law and that to require consistency would remove flexibility in zoning administration.

A conditional use permit is a privilege granted by a local governing body to a party to use land in a manner that conforms to a special list of exceptions written into the local zoning code. For example, a conditional use ordinance might permit philanthropic or educational institutions to be located in residential districts. It is within the discretion of the zoning administrator to issue these special permits upon a finding that the use meets the "general welfare" test. Under that test, the use is permitted if it will not be detrimental to the health, safety, morals, comfort, convenience, or welfare of the people living in the neighborhood or to the property or improvements of the area.[39]

In the first case, *Hawkins v. County of Marin*,[40] a religious social service group sponsored a plan for constructing federally subsidized multi-unit housing for the elderly on land owned by an affiliate of the Roman Catholic Church in an area zoned for single-family residences. After an unsuccessful first attempt, the group secured a conditional use permit.[41] Two years after the permit was issued, land-owner neighbors

36. CAL. GOV'T CODE § 63500.5 (West Supp. Pamph. 1966-1978).

37. *Id.* § 65561.

38. Hawkins v. County of Marin, 54 Cal. App. 3d 586, 126 Cal. Rptr. 754 (1976); Sierra Club v. County of Alameda, 1 Civ. No. 38554 (Cal. Ct. App. Sept. 22, 1977) (case was reheard and both opinions are unpublished).

39. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

40. 54 Cal. App. 3d 586, 126 Cal. Rptr. 754 (1976).

41. Subsequent to the first attempt, the county amended its zoning ordinance to include housing for low and moderate income persons among the land uses for which a conditional use permit could be granted.

of the proposed housing development brought suit against the county, contending that the project was impermissible under the property's zoning and if not thus impermissible, then the county's zoning regulations were inconsistent with its general plan. The thrust of the argument was that conditional use permits, as well as zoning ordinances, must be consistent with county general plans.

The court was readily able to dispose of this consistency count by reference to Government Code section 65860[42] and related consistency statutes. The court reasoned,

> Since use permits issued pursuant to Marin County Code . . . must necessarily conform to its requirements, it follows that if the code section is kept consistent with the general plan, use permits issued thereunder will also be consistent therewith. There is no requirement . . . that such permits themselves be reviewed for consistency with the plan under Section 65860.[43]

The court noted further that the consistency requirement applies to zoning ordinances,[44] subdivision maps,[45] and to a degree, projects needing a building permit[46] and that "the failure of Section 65860 to create a parallel requirement for conditional use permits is significant."[47] This omission from the code was sufficient for the court to affirm the summary judgment of the lower court, precluding a consistency review of the conditional use permit.[48]

The second case, *Sierra Club v. County of Alameda*,[49] also upheld a local government's decision to grant a conditional use permit. The case has been reheard by the court of appeal and the opinion is no longer published. Nonetheless, it is some evidence of the California judiciary's thinking on the length of the consistency chain and on the extent to which a plan will be read to restrict local government discretion.

The court in *Sierra Club* offered a "flexibility" rationale

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42. CAL. GOV'T CODE § 65860 (West Supp. Pamph. 1966-1978).
43. 54 Cal. App. 3d at 594, 126 Cal. Rptr. at 760.
44. CAL. GOV'T CODE § 65860 (West Supp. Pamph. 1966-1978).
45. *Id.* §§ 66473.5-66474.
46. *Id.* § 65567.
47. 54 Cal. App. 3d at 595, 126 Cal. Rptr. at 760-61.
48. The court concluded that the general welfare standard was a sufficient guide to the administrator to grant a conditional use permit.
49. 1 Civ. No. 38554 (Cal. Ct. App. Sept. 22, 1977). Since the case went unpublished, quotations extracted from the opinion are not cited to any particular page.

for not subjecting a conditional use permit application to strict consistency scrutiny. The court said that justification for conditional use permits "lies in the growing need for flexibility in zoning administration, and the avoidance of detailed standards worked out in advance. . . ."[50] "Flexibility" in this case meant allowing, within an agricultural district, a development

> consisting of 18 tennis courts, 40 riding horses with stables, corral and trails, a youth camp with shelter buildings including bunkhouses, toilets and cooking and eating accommodations, a health spa with outdoor sulphur and "health" springs and lagoon and pools, swimming and wading pools, and related water supply, sewage, fire fighting, and other facilities . . . "guest villas" and additional accommodations for . . . employees.[51]

The majority felt that the "general welfare" test protected the public adequately and that it was important to give great weight to the local legislative body's reading of its own law. A dissent in *Sierra Club,* however, nicely frames another important issue of consistency assessment where a conditional use permit is involved. The dissenting judge worried that failure to evaluate closely the relationship of a proposed use to the use specified explicitly in the relevant zoning ordinance "would effectively result in amendment of that ordinance in the guise of a conditional use."[52] The dissent rejected the majority's conclusion that conditional uses allowed by a county ordinance are illustrative, not exclusive, and saw danger in allowing discretion in administrative interpretation of terms used in the ordinance. Such discretionary decisions, the judge concluded, could result in a "rezoning of a district" without formal amendment of the zoning ordinance.[53]

If other courts were to follow the reasoning in the *Sierra Club* opinion, the restrictive effect of local plans would be minimal. The opinion sanctions issuing permits for uses that are nowhere described in the list of conditional uses appended to the local zoning ordinance. If other California courts decide to rely on a general welfare test, they will transfer the touch-

50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*

stone of consistency evaluation from a written statement that is accessible to all *(i.e.,* "detailed standards worked out in advance")[54] to the discretion of elected officials. The general welfare test is incompatible with a consistency standard unless a very trivial definition of consistency is accepted. If the courts allow the consistency doctrine to sink to a mere evaluation of the conformity of a proposed project with a government official's understanding of what is best for the community, illuminated, but not compelled, by that community's land-use plans and ordinances, they will reject the very foundation upon which reform in land-use planning is built—the desire to limit discretion in the process of controlling development.[55]

The private development plan. Another aspect of the issue of the reach of consistency arose in *Mountain Defense League v. Board of Supervisors.*[56] In this case, the court of appeal addressed the problem of whether a private development plan (PDP), submitted for approval by a developer, must be evaluated for consistency with a general plan. The opinion indicated, without holding explicitly, that since approval of a PDP was only one of several approvals that a developer must obtain before he begins construction, a consistency determination about the plan itself is not required. The court equated the PDP with a "specific plan." It concluded that, unlike a zoning change or subdivision map, a specific plan does not have to be consistent with the general plan.[57] In *Mountain Defense League,* the court approved the local government's approving the PDP and then amending the general plan to effect consistency.

The decision is peculiar and may have little lasting precedential value. The court vaguely indicated that the consistency requirement did not apply anyway, because "A.B. 1301 did not take effect until after the [trial court's] decision in this case."[58] Thus, it is unclear whether the court would come to the same conclusion if a similar case came up today. For several reasons, a different outcome is predictable. First, the specific plan in California is becoming increasingly used as a

54. *Id.*
55. *See* DiMento, *Consistency, supra* note 4.
56. 65 Cal. App. 3d 723, 135 Cal. Rptr. 588 (1977).
57. *Id.* at 733, 135 Cal. Rptr. at 593.
58. *Id.*

planning tool.[59] While there is confusion as to the exact nature of a specific plan and its legal significance, developers and local governments appear to favor its use. Generally, a specific plan applies to an area smaller than that covered by the general plan. It contains all relevant "regulations, conditions, programs and proposed legislation" necessary for or useful to implementation of the general plan.[60] Second, although submission of a private development plan is an "early step" in the process of gaining governmental approval for development, there is a strong movement toward simplifying governmental processing of requests for permission to build. It makes little sense to avoid the question of consistency when the developer first applies for governmental approval if a determination will be made soon thereafter. Finally, the opinion not only declared that the consistency requirement was inapplicable, but it rejected a requirement of evaluation of the PDP's impact on internal consistency of the general plan. The court found "consistency with the balance of the document" (the general plan) at the time the PDP was approved to be "merely advisory and in no way mandatory."[61] The court treated internal consistency simply as a recommendation by the Council on Intergovernmental Relations. Today internal consistency is a statutory requirement in California. Section 65300.5 of the Government Code states, "The Legislature intends that the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency."[62]

An Early Determination: What Does Consistency Mean?

The impact of the consistency requirement will depend to a significant degree on the legal definition of "consistency" adopted. Tests can vary from one that assesses whether a proposal fits *in general* with the objectives of a plan to one which requires that a project's densities, lot sizes, setbacks, height

59. The real estate industry has turned its attention to use of the specific plan as a means of integrating, early in the process of governmental consideration, varying perspectives on land use. *See* Kinchen, *Specific Plan Is Land Use Tool: Developers, Communities Like the Approach*, Los Angeles Times, Jan. 14, 1979, pt. VIII, at 33, cols. 1-5.

60. CAL. GOV'T CODE §§ 65450.1, 65451-65452 (West Supp. Pamph. 1966-1978).

61. 65 Cal. App. 3d at 734, 135 Cal. Rptr. at 594.

62. CAL. GOV'T CODE § 65300.5 (West Supp. Pamph. 1966-1978).

restrictions, and other features are in accord with a highly detailed comprehensive and long-range plan. The California Supreme Court and an appellate court have added their opinions to the controversy over an acceptable definition in the California context of a fairly detailed general plan, but there has been no authoritative holding enunciating a single test.

The California Supreme Court in *Youngblood v. Board of Supervisors*,[63] hinted that it might in the future adopt a very strict stance in defining the planning-regulation nexus. In that case, the court found that .6 dwelling units per acre in the tentative subdivision map at issue was not in conflict with a plan that allowed densities from 0 to .75 dwelling units per acre and directed that the densities be greater near the coast. Nonetheless, having no need to address the question of consistency with the new general plan promulgated in that case, the court left open the question of whether a subdivision providing for a specified density would be consistent with a plan requiring a minimum lot size, such as the new general plan specified. In a footnote, the court said,

> Santa Fe Company . . . argues that its subdivision is consistent with the new . . . plan because the subdivision provides a density of .6 dwelling units per acre which substantially complies with the .5 dwelling units per acre contemplated by the general plan. The general plan, however, does not speak in terms of density, but of lot size, and appears to require a minimum size of two acres. Because we conclude that the subdivision need only comply with the general plan in effect at the date of the approval of the tentative map, we need not resolve whether it also complies with the new general plan.[64]

One reading of the above reasoning is that the terms used in the general plan will be applied strictly in future cases. It might, therefore, be prudent for a community concerned with control of overall densities to choose its planning language carefully in terms of density, whereas if the objective were to promote a particular life style through the determination of lot size, then the plan should spell this out. The message of *Youngblood* may be that a jurisdiction must express precisely the objectives promoted by its general plan. For example, a

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63. 22 Cal. 3d 644, 586 P.2d 556, 150 Cal. Rptr. 242 (1978).
64. *Id.* at 654 n.5, 586 P.2d at 561 n.5, 150 Cal. Rptr. at 247 n.5.

very different plan would be required if the community aimed to control traffic rather than if its goal were preservation of open space or some other municipal aim achievable through lot size restrictions. The plan of a community whose overall density requirements allowed no development in certain areas (for example, inland areas) and high-rise development in other areas (for example, near the coast) would ultimately look very different from one promoting homogeneous use of large lots.

While *Youngblood* presents the possibility of a strict definition of consistency, it may be that a looser definition will ultimately prevail in California if the courts go the way of the now unpublished *Sierra Club* opinion. *Sierra Club* came the closest of the sample of California appellate court decisions on consistency to offering a general test for evaluating the plan-regulation relationship known as the consistency doctrine. The test utilized was flexible and similar to that expressed in some of the unofficial legislative history of A.B. 1301. The consultant to the committee considering the consistency bill suggested that the relationship promoted was one of *general compatability* between a general plan and zoning ordinances.[65] In *Sierra Club,* the court concluded that the conditional use permit was acceptable because it was *"closely attuned* to the stated policy and goals of the County's Open Space Element."[66] That standard allowed for a finding of consistency between a plan aimed at preserving open space and a development which, from a reading of the court's statement of the facts, was quite commercially oriented and would generate at peak times an occupancy of about 1,300 persons on 145 acres. Furthermore, the *Sierra Club* view of consistency pays considerable deference to the legislative body's interpretation of its own ordinance. The dissent read the majority opinion as allowing the local governing body to grant conditional use permits according to its notion of the general welfare.[67]

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65. *See* Catalano & DiMento, *Mandating Consistency, supra* note 5 at 459.

66. 1 Civ. No. 38554 (Cal. Ct. App. Sept. 22, 1977) (emphasis added).

67. As further evidence that there is pressure to allow the local legislative body to determine its own definition of consistency, a bill introduced into the California Legislature in 1977 would have made the local government's finding of consistency between a general plan and a regulation a rebuttable presumption in favor of the validity of such findings in any litigation arising out of the local government decision. Consistency from this perspective becomes what the city or county government says it is. DiMento, *Consistency, supra* note 4.

In summary, it is not yet clear what definition of consistency the California courts will adopt. Consistency may vary from a strict one-to-one relationship (*i.e.*, if the plan speaks in terms of densities, the regulations must closely reflect those densities) to a general "in accordance with" test (the overall objectives and goals of the plan must not be undermined by the approved development). Various commentators have articulated these choices.[68] It is time for the courts to direct attention to a definition—either taking an activist position and elaborating a test or concluding that the term is too vague to allow reasonable judicial review and thus putting the burden on the state legislature to offer a definition.

Scope of Review of the Local Government Consistency Determination

Concern with findings and the substantial evidence test. Several California cases have addressed the review function of the courts where a consistency decision has been challenged.[69] These cases suggest the following rules: Local government must make findings to support ultimate rulings on consistency but not simply when denying a zoning change. Those findings need not be formal. A substantial evidence test will be employed where the administrative act in question is quasi-judicial—that is, where it determines specific rights under existing law with regard to a specific fact situation. Since consistency matters are central aspects of municipal governance, judicial review should be limited.

The findings issue. The consistency decision that squarely addresses the governing body's need to make findings before approving a development project as to the consistency of the project with the general plan is *Woodland Hills Residents Association, Inc. v. City Council.*[70] The citizens group in *Woodland Hills* challenged, by a petition for a writ

68. *See, e.g.*, Hagman, *Public Control of California Land Development Syllabus*, 20TH ANNUAL SUMMER PROGRAM FOR CALIFORNIA LAWYERS, §2.29, at 22-23 (1974). A more recent opinion by Hagman is found in Hagman & DiMento, *supra* note 5; Mandelker, *supra* note 5; and Tarlock, *supra* note 5.

69. Ensign Bickford Realty Corp. v. City Council, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977); Mountain Defense League v. Board of Supervisors, 65 Cal. App. 3d 723, 135 Cal. Rptr. 588 (1977); McMillan v. American Gen. Fin. Corp., 60 Cal. App. 3d 175, 131 Cal. Rptr. 462 (1977); Woodland Hills Residents Ass'n, Inc. v. City Council, 44 Cal. App. 3d 825, 118 Cal. Rptr. 856 (1975).

70. 44 Cal. App. 3d 825, 118 Cal. Rptr. 856 (1975).

of mandamus, approvals by the local advisory agency, the planning commission, and the city council, of a tentative subdivision map for a residential development on a steep hillside.[71] The Association, arguing that the project was inconsistent with the new plan because its density was too great for the steepness of the hillside, appealed from the action of the advisory agency which had given the initial approval of the tentative tract map. Its appeal was denied.[72] A subsequent appeal to the city council was also denied.[73] The trial court concluded that the denials by the commission and the council constituted a finding by implication that the subdivision and plan were consistent. The court of appeal disagreed, holding that an "express finding that the proposed subdivision tract map was consistent was required . . . in order to support a decision approving the proposed map."[74] The court sent the case back to the city council to make findings, stating that a simple vote by the governing body was not the equivalent of the findings required by the consistency statutes.[75]

Although the leading case on administrative findings in local government environmental and planning matters, *Topanga Association For A Scenic Community v. County of Los Angeles*,[76] had not been decided when the suit in *Woodland Hills* came to trial, the court employed it extensively in its *Woodland Hills* opinion. *Topanga Association* concluded that variance boards "must render findings to support their ultimate ruling" and that a reviewing court must determine whether substantial evidence supports the findings of the administrative record and whether the findings support the board's action because granting or denying a variance is a quasi-judicial act.[77]

The *Topanga Association* court reasoned that findings

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71. At that time, the consistency requirement was found in CAL. BUS. & PROF. CODE §§ 11526(c), 11526.2(c), 11549.5(a) (West 1964) (repealed 1975).

72. A tie vote equalled denial. 44 Cal. App. 3d at 830, 44 Cal. Rptr. at 858.

73. This was also accomplished by a tie vote. *Id.* at 830-31, 44 Cal. Rptr. at 859.

74. *Id.* at 838, 118 Cal. Rptr. at 864.

75. *Id.* Query as to the result after *Youngblood*, notes 16-23 and accompanying text *supra*. The council did make a finding of consistency between a community plan and the zoning plan. The community plan was in existence prior to approval of the district plan. The district plan was approved one month after the real party in interest filed a tentative tract map, and two-and-a-half weeks before the Council made its findings of consistency with the community plan.

76. 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).

77. *Id.* at 512 n.8, 514, 522 P.2d at 15 n.8, 16, 113 Cal. Rptr. at 839 n.8, 840.

are necessary to apprise the reviewing court of the basis for the administrative agency's action and that an agency should be deterred from using casual decision-making procedures that may deny some of the parties an opportunity to present their arguments fully.[78] The court stated:

> By setting forth a reasonable requirement for findings and clarifying the standard of judicial review, we believe we promote the achievement of the intended scheme of land use control. . . . Whereas the adoption of zoning regulations is a legislative function [Gov't Code §65860], the granting of variances is a quasi-judicial, administrative one. . . . If the judiciary were to review grants of variances superficially, administrative boards could subvert this intended decision-making structure.[79]

In a later consistency case addressing the form of findings required of a city council, *McMillan v. American General Finance Corp.*,[80] the court of appeal concluded that substance, not form, of administrative findings is the proper concern of a reviewing court. As long as a record informs the parties and the reviewing court of the agency's theory in reaching its decision, as long as the agency "in truth found those facts which as a matter of law were essential to sustain its . . . [decision]," [81] the opinion said, the form of local government findings will be acceptable. The court graphically described local government dynamics that demand this conclusion:

> Given people's propensity for arriving at identical conclusions for diverse reasons, their inability to foresee all possible contingencies prior to a meeting, and their unceasing ability to quibble over the semantics of substantially identical phrases in spite of time limitations, this procedure would generally seem reasonable.[82]

The opinion further concluded that requiring explicit recording of findings that derive from the noise and confusion preceding development decisions would be unworkable. The procedure in this case, which the court approved, was that the city council make findings prior to having the city attorney

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78. *Id.* at 516, 518, 522 P.2d at 18-19, 113 Cal. Rptr. at 842-43.

79. *Id.* at 517, 522 P.2d at 19, 113 Cal. Rptr. at 842-43.

80. 60 Cal. App. 3d 175, 131 Cal. Rptr. 462 (1977).

81. *Id.* at 184, 131 Cal. Rptr. at 468 (quoting Mercer-Fraser Co. v. Industrial Acc. Comm'n, 40 Cal. 2d 102, 124, 251 P.2d 955, 967 (1953)).

82. 60 Cal. App. 3d at 183 n.8, 131 Cal. Rptr. at 467 n.8.

draft a formal resolution and incorporate by reference a staff report as the body's findings.[83]

The court in *McMillan* also demonstrated an application of the substantial evidence test. It cited several pieces of evidence that supported the finding of consistency.[84] These included official reports and opinions that would clearly stand up favorably to the opposition's evidence of lack of conformity with the general plan. The opposition presented information in a city brochure about proposed use of the landowner's property and testimony by several people that an inconsistency existed.[85] There was enough good supporting evidence so that the decision could not be rejected by a reasonable person—the requirement of the substantial evidence test.[86]

The court in *Mountain Defense League,*[87] considering the county's approval of the private development plan, came to the same conclusions about findings as the courts in *Woodland Hills* and *McMillan.* Essentially, the court decided that the board of supervisors had failed to "bridge the gap" between the raw evidence and its decision; the case went back to the board to make findings. The court noted that while "findings need not be formal and may be included as part of the agency's order,"[88] sufficient information must be presented to apprise a reviewing court of the basis of the government's actions. Raw evidence in the record will not suffice.

In another part of the *Mountain Defense League* opinion, the court decided that consideration of a private development plan falls under a board's quasi-judicial role (whereas consideration of a general plan is a legislative function), and thus

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83. *Id.* at 184, 131 Cal. Rptr. at 468.

84. *Id.* at 186, 131 Cal. Rptr. at 470.

85. *Id.* In Chevy Chase Estate Ass'n v. City of Glendale, 2 Civ. No. 52161 (Cal. Ct. App. May 17, 1978), the court in an unpublished opinion demonstrated how easily the substantial evidence test can be met. The court found "striking deviations" between a proposed subdivision and a local government open space element of a general plan; however, "[i]n a number of respects" the project was compatible with the specific uses and programs of the open space element. The substantial evidence test thus required the court to conclude that filling in vegetation corridors where only 40 percent of the project would remain open space did not do violence to the object of the retention of the area in its natural setting. The court said, in addition, "[A]ny reasonable doubt whether the city's finding of consistency is supported by substantial evidence must be resolved in favor of the finding." *Id.*

86. 60 Cal. App. 3d at 186, 131 Cal. Rptr. at 470.

87. 65 Cal. App. 3d 723, 135 Cal. Rptr. 588 (1977).

88. *Id.* at 731, 135 Cal. Rptr. at 592.

any denial or approval is subject to the substantial evidence test.[89] Since the agency was simultaneously making a legislative decision (amending the general plan) and a quasi-judicial decision (approving the PDP), the court declared that review of the combined decision must meet the more stringent substantial evidence standard rather than the arbitrary and capricious test that governs purely legislative decisions.[90]

Findings are not necessary when denying a zoning change. One kind of land-use decision, aside from promulgation or amendment of a general plan that a California court decided did not require express findings, is a city's *refusal* to rezone a parcel upon the application of a landowner. In *Ensign Bickford Realty Corp. v. City Council,*[91] the city of Livermore had denied an application of a property owner for commerical zoning in an area formerly zoned commercial but recently rezoned for residential use only. The commercial designation was consistent with the city's general plan. The city denied the rezoning because its policy was to locate the type of commercial use that plaintiff contemplated for his property in an area that was zoned especially for such use. The city had, in fact, written to the commercial establishment that planned to use plaintiff's property and urged it to locate in another part of town. Livermore's stated objective was to promote phasing of growth in a particular manner.

The trial court decided for the plaintiff, accepting his argument that the city's motive was invalid—that, in fact the city was trying to eliminate a competitive threat to the part of town where the city council favored development.[92] The lower court found the city's action to be arbitrary and capricious, rather than a valid exercise of the police power, since a zoning decision is supposed to be predicated upon consideration of the general welfare and not on a desire to regulate economic competition.[93] The court also faulted the city for its failure to make findings.

On appeal, the court denied that the city's motive had

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89. *Id.* at 729, 135 Cal. Rptr. at 590.

90. *Id.*

91. 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977).

92. The lower court also found that the city had unconstitutionally discriminated against Bickford and denied him equal protection of the laws, but this was reversed on appeal. *Id.* at 472, 137 Cal. Rptr. 307.

93. *Id.*

any relevance to the zoning decision, stating that the "reasonableness of its action is to be judged on the objective results of the decision"[94] and not on the indirect impact on economic competition. Moreover, the court of appeal said that a city council, in enacting or amending a zoning ordinance, is not required to make express findings of fact as to the public purpose of the ordinance or its relation to the police power, and that this rule extends to the denial of a rezoning request as well. The court explicitly rejected a change in California law that would have adopted the Oregon position that "zoning actions short of comprehensive revision of the zoning ordinance are judicial in character."[95] Since the court found there was a rational basis for the city's decision—that of regulating commerical growth as it related to the needs of residential areas—it held that the city had not acted improperly.

The independent judgment rule. None of the courts reviewing consistency cases has found the independent judgment rule applicable. The independent judgment test, which applies to quasi-judicial agency decisions, is reserved for those situations where the administrative decision substantially affects a fundamental, vested right acquired by the petitioner. When this standard is used, the trial court makes its own independent findings and review on appeal is directed to whether there is substantial evidence to support the court's findings. On the other hand, if the substantial evidence test applies, both the trial and appellate courts are limited in their review to looking at the agency's findings alone to see if these are supported by substantial evidence. In *Mountain Defense League,* the plaintiffs, who were hikers and who enjoyed the out-of-doors on the developer's land, tried to argue that they had a fundamental, vested right to conserve and preserve the open space that was about to be developed. On this basis, they argued that an independent judgment of the local government action should be made by the court because the action affected their open space. They based their argument on California's promotion of open space through its Constitution and statutes. The court refused to apply the independent judgment test, finding that the plaintiffs had acquired no rights to the property.

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94. *Id.* at 478, 137 Cal. Rptr. at 310.
95. *Id.* at 473, 137 Cal. Rptr. at 307.

While the independent judgment test has failed to attract the courts' sympathies thus far, some proponents of the consistency requirement might read the rights created by planning as "fundamental" or "vested," requiring a reviewing court to undertake an independent judgment of a governmental decision which should be guided by a plan. For example, if the general plan were equated quite literally with a local constitution and a one-to-one relationship between the plan and regulation were required, the plan might be seen as affecting rights "of a fundamental nature from the standpoint of . . . economics or . . . effect in human terms and the importance . . . to the individual in the life situation." Economic values are commonly affected by planning decisions, and the term "life situation" as used in California law is readily adaptable to analysis of uses of private property. When planning is increased in status and legal effect, it is not inconceivable that a reviewing court would conclude that fundamental interests are affected by consistency decisions and that strict scrutiny is required. At the present time, however, the California courts have viewed their role vis à vis consistency cases as a limited one.

Remedies

Two California appellate decisions address the issue of the appropriate remedies where courts find local government regulations inconsistent with applicable land-use plans. In both cases the reviewing courts found adequate direction from the consistency statutes and exhibited no inclination to create remedies or alter their availability.

The court in *Save El Toro Association v. Days*[96] was able to find a remedy written into the consistency statutes to take care of the situation where there is an inconsistency between a proposed governmental action and an open space plan. The relevant language provides: "No building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open space plan."[97]

Once the court found that the actions taken by the city of

96. 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977).
97. CAL. GOV'T CODE § 65567 (West Supp. Pamph. 1966-1978).

Morgan Hill did not amount to a plan and that compliance with the state planning law cannot be found if there exists only a "partial plan,"[98] the court's reasoning was simply syllogistic: "As the City . . . has not adopted a valid open space plan the city cannot take any action to acquire, regulate or restrict open space land or approve a subdivision map."[99]

The same court that heard *Save El Toro,* and two of the same three judges, however, could find no strong legislatively created remedies to apply to the situation in *Friends of "B" Street v. City of Hayward.*[100] In that case, the city of Hayward planned to widen certain streets in order to improve circulation. The project would create a number of short-term environmental disruptions, *e.g.,* removal of trees, elimination of parking, and alteration of the residential character of a section of Hayward. Several consistency issues were involved. The citizens group called "Friends of 'B' Street" sought to enjoin the city from proceeding with the project until the city developed a noise element for its general plan, made its circulation element consistent with its plans for affected streets, and modified the project to "conform to the general plan policies on strip development, and the central business district."[101]

The court of appeal agreed with plaintiffs on the consistency count[102] that the real issue was one of available remedies under California planning law. In a footnote the court stated:

> [T]he question "does not involve a determination of appellants' standing to seek relief generally nor does it involve a determination of appellants' standing to seek relief by writ of mandate to compel compliance with the State Planning and Zoning Act." . . . Rather the issue is "whether . . . an injunction against proceeding with a

98. *See* the discussion of *Save El Toro* at text accompanying notes 27-38 *supra.*

99. 74 Cal. App. 3d at 74, 141 Cal. Rptr. at 288. Just as the court looked to the state's strong policy favoring open space when it determined what is an "adequate" plan, the court may have been swayed by that policy in its stringent application of the statutory remedy.

100. 1 Civ. No. 40086 (Cal. Ct. App. Nov. 17, 1977) (rehearing granted) (unpublished opinion).

101. *Id.*

102. *Id.* The suit also involved a CEQA count and a claim for attorney's fees. California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21176 (West 1977 & Supp. 1979).

> street widening project is relief which is available to apellants in order to remedy violations of the State Planning and Zoning Act."[103]

The court's response was that such relief is not available. Rather, a proper remedy was held to be an action to compel adoption of a mandated element that was missing from the city's plan. The court simply could find no indication in California law that the legislature intended to provide for the injunctive remedy, although its opinion does leave open the possibility that the remedy might be available against a general law city. Hayward is a charter city, which as noted above,[104] is only subject to the state consistency laws if it adopts them as its own. The decision seems incompatible with the courts articulated adherence to the position that the general plan is a constitution for further development within a city, and that without that constitution, a city cannot proceed with regulation.[105]

Function and Importance of the Comprehensive Plan

One can discern, in the consistency cases in California, the judicial attitude toward the role of the comprehensive plan in local government decision making. The courts have paid attention to the plan as a guide and at times even as a constitution for controlling development at the local level. Overall, however, the opinions have only nodded at the plan without increasing its action-forcing function.

In *Ensign Bickford Realty Corp. v. City Council*,[106] the court placed more emphasis on the planning process than on the tangible product in California, *i.e.*, the general plan. Upholding the local government's refusal to rezone to bring a zoning into consistency with the plan, the court emphasized the local government's police powers. The court was content to let the city base the decision on the "public interest, conve-

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103. 1 Civ. No. 40086 (Cal. Ct. App. Nov. 17, 1977) (rehearing granted) (unpublished opinon).

104. *See* text accompanying notes 5-7 *supra*.

105. The case awaits further development since it was appealed to the supreme court and sent back to the court of appeal for reconsideration. A new opinion may be forthcoming on what remedies to apply to a charter city that proceeds with development in the face of an inadequate plan.

106. 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977).

nience and general welfare"[107] and not to examine the plan, thus refusing to deviate from what it read as long-standing judicial deference to a legislative determination. This kind of decision diminishes the importance of a general plan. By framing the issue in terms of the general welfare, the court explicitly took the decision out of the shadows of the plan. The court paid attention to the plan only in dicta, recognizing that only when the council moves to "amend the zoning ordinance [is] conformance with the General Plan" required. Where the local government wishes to reject a proposed zoning which would bring the area into conformance with the plan, the consistency requirement is simply not applicable.[108]

The city's conclusions in *Ensign Bickford Realty* and the court's support of them reflect traditional thinking on the function of the plan. These conclusions would not have surprised anyone in the planning profession prior to the time A.B. 1301 took effect. Plaintiffs like Bickford should, however, reasonably be able to rely on the consistency statutes in the wake of passage of A.B. 1301.[109] If one objective of consistency reform is to improve the predictability of development decisions, opinions like *Ensign Bickford Realty* do not promote that goal.

Can planning effect a "taking"? Another aspect of the impact of the consistency doctrine on planning received attention in two California court of appeal opinions where the relationship of the consistency requirement to alleged inverse condemnation was at issue.[110] Requiring that property use be brought into line with a plan may at times result in inverse

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107. *Id.* at 473, 137 Cal. Rptr. at 307.

108. *Id.* Here the only consistency issue argued was a local consistency requirement.

109. The facts show that the planning commission had concluded that the population base was insufficient to support the use Bickford sought; the commission found that Bickford's plans would not serve community objectives and that in fact infrastructure considerations (the lack of sewer capacity) made unlikely the development of a supporting population. *Id.* at 471, 137 Cal. Rptr. at 306. This analysis, however, is at odds with that upon which plaintiffs like Bickford may have reasonably relied, *i.e.*, that A.B. 1301 increased the significance of zoning designations in the general plan. The court's statement of facts reveals that the zoning Bickford required was "at all times" consistent with the general plan until a few months before Bickford requested a commercial use. Then the zoning was made inconsistent through a change to a residential designation. *Id.*

110. Dale v. City of Mountain View, 55 Cal. App. 3d 101, 127 Cal. Rptr. 520 (1976).

condemnation, but what is the effect of creating a plan that calls for a less economically productive or valuable use of someone's property? Have the consistency statutes furthered a landowner's claims that there has been a taking of his property without just compensation?

Government action in planning for a future use of a piece of property or an area in which a parcel is located has often been the subject of litigation; such planning has been said to devalue the property. This action is called "planning blight" and it is argued that it should give rise to compensation.[111] Complainants have sometimes even taken the position that since the plan approximates regulation in jurisdictions that follow the consistency doctrine (and strict regulations can be the basis for inverse condemnation[112]), damages can accrue from the time the plan was adopted.

Prior to the passage of the consistency statutes, the California Supreme Court spoke to the question of whether planning can be the basis for suits in inverse condemnation.[113] Generally, under California law, an action in inverse condemnation will not lie simply if a plan calls for a less valuable use of property than the landowner's preferred or proposed use.[114] When, however, the government has acted to lessen the value of a piece of land just prior to actually condemning it, the California courts have required some compensation.[115]

Since the consistency doctrine became law, the court of appeal addressed inverse condemnation in light of consistency requirements—showing little change in the courts' position. The case involved a charter city, so the decision was not controlled by the state consistency statutes. The case is, however, instructive of more recent thinking about planning blight.

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111. Just compensation must be paid for the taking of private property for public use under federal and state consitutional provisions. The relevant provision in California law is CAL. CONST. art. I, § 19. *See* Hagman, *Compensable Regulation: A Way of Dealing with Wipeouts from Land Use Control*, 54 U. OF DET. J. URB. L. 45 (1976).

112. The nature of regulation that can be the basis of a taking is itself a matter of considerable controversy. In California, under certain circumstances, noncondemnation regulatory actions by government can be treated as a condemnation. *See* DiMento *et. al., supra* note 14.

113. *See* Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).

114. *Id.*

115. Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972); Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969); Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (1958).

In *Dale v. City of Mountain View*,[116] the plaintiffs alleged that an amendment to the city's general plan designed to allow only open space use of their land, and the zoning ordinance that had been *or might be* enacted consistent with the plan, constituted an uncompensated taking.[117] The Dales owned a parcel that had been used for ten years as a golf course under a conditional use permit. Although the parcel was located in an interim agricultural zone, this designation and the contractual relations between the Dales and the city (which are not described in the opinion) pointed to an eventual residential use of the Dales' land. The property in question was surrounded by city owned land that was zoned for multiple family residential use. Thus, the Dales' expectations of a zone change were not unrealistic. Nonetheless, the city denied their application for residential zoning and amended its general plan so that no use other than visual or recreational open space would be allowed.

The appellate court opinion upheld the city's reasoning that the amendment to the plan was simply a recognition of an existing use of the land and denied the Dales relief in inverse condemnation. The court, however, recognized that the value of the plaintiff's land was "diminished to a level of not more than one-sixth of the value of the land it is contiguous to."[118] The court also acknowledged that the property was suited only for eventual residential use by the terms of the agricultural zoning itself and observed that surrounding parcels, including nearby land owned by the city, were allowed a more intensive use than that demanded of the Dales' land. Nonetheless, the court relied on *Selby Realty Co. v. City of San Buenaventura*,[119] one of the leading California cases stating that planning generally does not effect a taking. The *Dale* court quoted the following statement from *Selby Realty Co.*:

> [T]he plan is by its very nature merely tentative and subject to change . . . . If the plan is implemented by the county in the future in such manner as actually to affect

116. 55 Cal. App. 3d 101, 127 Cal. Rptr. 520 (1976). *See also* Agins v. City of Tiburon, 24 Cal. 3d 266, 398 P.2d 25, 157 Cal. Rptr. 372 (1979) *aff'd*, 48 U.S.L.W. 4700 (1980) (pre-condemnation activities in relation to a zoning change).

117. Plaintiffs argued that the action constituted a spot zoning as well. *Id.* at 105, 127 Cal. Rptr. at 521.

118. *Id.* at 106, 127 Cal. Rptr. at 522.

119. 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).

> plaintiff's free use of his property, the validity of the county's action may be challenged at that time.[120]

The court relied on *Selby Realty Co.* at least in part because of its concern over the implications of accepting the Dales' position. The court feared that if it were to allow "judicial declaration as to the validity and potential effect of the plan upon . . . land, the courts of the State would be inundated with futile litigation."[121]

In summary, the *Dale* case adheres to the traditional position in California. Whether under the consistency doctrine, planning will in the future be seen as precondemnation blight (*i.e.*, a taking), remains to be decided.

The consistency requirement and the phasing-in of plans. Finally, on the function of the local plan, the question of phasing of uses proposed in the plan is addressed. *Youngblood*[122] raises the issue of the impact of consistency on the acceptable timetable according to which uses eventually called for in the plan will be provided through regulations. Phasing refers to this timing concern.

In *Youngblood,* the reviewing court found no abuse of discretion in local government's approval of a residential use in an agricultural zone "since [the zone] permitted one acre residential use, and since the county contemplated subsequent replacement of that zone with a more suitable residential zone."[123] It is the second phrase, in the court's reasoning, that hints at its interpretation of the effect of consistency on phasing of uses. The court continued and noted: "The practical

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120. *Id.* at 118, 514 P.2d at 118, 109 Cal. Rptr. at 804.

121. 55 Cal. App. 3d at 109, 127 Cal. Rptr. at 524. Since this was a charter city, the issue of whether a taking could occur as a result of planning in a general law city is still alive, although the differences between the two types of municipal government do not readily indicate on what basis general law cities could be found to effect an unconstitutional taking by planning when charter cities do not. A charter city is one which, by a majority vote of its electors, adopts a charter that serves as the law of the state on municipal affairs and has the effect of state legislative enactments. CAL. CONST. art. XI, §§ 3, 5. General law cities are those which in matters of municipal government are controlled by state law. Other parts of the *Dale* opinion indicate that the court continued to see planning "as leagues away" from condemnation whether the defendant be a charter or a general law city. The court cited favorable language in another California decision that "landowners have no vested rights in existing or anticipated zoning ordinances and are not entitled to reimbursement for losses due to changes in zoning." Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 602, 55 Cal. Rptr. 710, 712 (1967).

122. 22 Cal. 3d 644, 586 P.2d 556, 150 Cal. Rptr. 242 (1978).

123. *Id.* at 653, 586 P.2d at 560, 150 Cal. Rptr. at 246.

realities of the subdivision suggest that it is unlikely that pending such rezoning any of the lot purchasers would devote their property to agricultural uses noxious to a residential subdivision."[124]

The court indicated that consistency can be evaluated by comparing present developmental controls with uses comtemplated in the general plan for some future time, suggesting that it is responding to market realities. But there are alternative readings of the impact of the consistency doctrine in fostering uses called for at some later date in the general plan. One interpretation, for example, would have the regulatory controls allow *uses only according to a chronology which the plan makers direct.* The plan, therefore, plays a phasing *and* control function. The need for intermediate uses including low intensity uses might be fostered by the plan; this goal is undermined by an interpretation that since more intensive uses are inevitable they should be provided for now. Indeed, since there is a general assumption in planning practice that zoning for non-intensive use will prevail in the absence of demand for greater use, the court's view is that any market demand can trigger a movement toward more intensive use. The land development control scheme, then, simply reflects those scenarios that the most development oriented desire. There exist readings on the effect of the consistency doctrine on phasing that are much more sympathetic to a sequential guiding function of the general plan.[125]

Especially if value is put on those intermediate uses that a general plan calls for—in this case, agricultural use, tolerating some residences—the court's selection of land use "realities" is distressing. Contemplated use of much of the land in California and in many states experiencing great demand for residential use may be incompatible with state overall needs even if such use is rationally and slowly phased in. If development pressure is able to short circuit movement to regulations that allow highly intensive uses as soon as some demand is noted, the controlling effect of plans is quite severely undercut.

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124. *Id.*

125. *See* DiMento, *Consistency, supra* note 4, at 56-58.

CONCLUSION

The California courts have made a modest contribution to the consistency doctrine. The doctrine, requiring that government engage in planning and that land use controls, such as zoning, be based on resulting plans, can be read as a major reform in land use law. The legal effect of the doctrine, however, has been greatly restrained by recent judicial interpretations. The courts have viewed the doctrine as a mild societal directive to bolster an older, long-standing doctrine that land use controls must "accord with" a general plan.

The case law reviewed in this article has provided some answers to a series of questions raised by the legislative pronouncement in California that controls shall be consistent with a general plan, and, in particular, with specified elements of a plan. The cases, however, amount to only a limited change in land use law and a restatement that, on many consistency issues, the courts must defer to the local legislative bodies.

Specifically, the California Supreme Court has defined the applicable general plan with which subdivision map approval must be measured for consistency. California appellate opinions have also offered some guidance on the adequacy of plans and on the types of controls which local governments must analyze for consistency. In addition, the courts have laid out two options for the definition of "consistency," refusing, however, to choose either of them. The courts have also refused to expand the function of the judiciary with regard to municipal decisions; they have not seen fit to employ an independent judgment test in reviewing local government consistency determinations. Joining those institutions that are paying their respects to planning, the courts, nevertheless, have not utilized opportunities to enhance measurably the status of planning in California. This posture is in keeping with a significant, if not majority, professional position on the function of plans and planners in the United States.[126]

Despite the reticence of the California courts in interpreting the consistency legislation, statutory language and planning history leave open the opportunity for the courts to read into California law a more forceful role for planning without

126. This position is spelled out in DiMento, *Consistency*, *supra* note 4.

becoming an overly activist judiciary. The courts need to engage in conceptual work to interpret the meaning of the legislature's consistency pronouncements. The alternative is that those pronouncements will quietly be lost among the massive number of California code sections. Commentators, the Attorney General, and additional legislation can interpret this new planning law. However, parts of the elaboration await resolution and analysis of controversies that arise out of the local government planning and zoning decisions that are made every day.

It is not easy to explain this conservative judicial stance in California, especially since the California Supreme Court has led the nation in liberal pronouncements on environmental and development control law in the past. Perhaps the present wave of social and political concern with the economic effect of government action is influencing the judiciary—decreasing its interest in enhancing the prestige of land-use planning, which citizens perceive to be a non-market response to resource management.[127]

Litigation, however, does not necessarily guarantee clarification of the consistency doctrine. The judiciary must first be educated about the planning debate over the wisdom of tying zoning and other land-use controls to planning. Moreover, the judiciary operates in an environment where images of planning as an overly rigid tool for social engineering and control still linger. In addition, a judicial attitude of protection of individual property rights may cause judges to be skeptical about stronger planning requirements. Finally, the courts may continue to defer to local government determinations because of either a traditional understanding that local land-use regulation is a legislative function and presumptively valid or a reflection of the fact that land management decisions have not yet—despite the costs and inconveniences of uncontrolled growth—become of fundamental importance to society.

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127. Official concern over economic impacts of regulation has been manifested nationally and in California. The federal government recently created a Regulatory Analysis and Research Group (RARG), that analyzes and comments on the inflationary implications of regulations proposed and promulgated by federal agencies. A similar group has been suggested for the cabinet level in California, and individual regulatory agencies have initiated their own regulatory reviews in an attempt to reduce alleged constraints on productivity and innovation associated with command and control approaches to resource management and use..