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# Environmentally Sensitive Land Use Regulation In California

JOHN M. WINTERS\*

## I. INTRODUCTION

### A. *From NEPA to CEQA Through AB 1301 and Proposition 20 to Just*

The widespread and growing concern about protecting the natural environment from unnecessary and unreasonable land use is demonstrated by the frequent local and national communications of the news media, the cases discussed in this article, and the four legislative acts upon which this article is based.

At the national level, Congress manifested its environmental concern by passing the National Environmental Policy Act (hereinafter, NEPA).<sup>1</sup> This law requires that all federal agencies use

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1. 42 U.S.C. §§ 4321-4347 (1970).

certain procedures, including an Environmental Impact Statement (EIS), to assure full consideration of environmental factors for all major Federal actions significantly affecting the quality of the human environment.<sup>2</sup>

In California, the Legislature passed the California Environmental Quality Act (hereinafter, CEQA).<sup>3</sup> This act makes an Environmental Impact Report (EIR) necessary whenever the State or a local government is involved in carrying out or approving projects which may have a significant effect on the environment.<sup>4</sup>

NEPA, and to a lesser extent CEQA, have had a great impact on governmental decision making. When various environmental groups realized that the federal agencies were not complying fully with the mandates of NEPA, they successfully sued to enjoin projects until NEPA's requirements were met. Initial cases brought under CEQA, and the California courts' recognition of the similarities between NEPA and CEQA, are strong evidence that California courts will decide that CEQA should have as large an impact on decision making at the state and local levels as NEPA has had on federal decision making<sup>5</sup> and as much effect in regulating private land use as NEPA has had in regulating government actions.

In 1972, the voters of California passed the Coastal Zone Initiative, popularly known as Proposition 20,<sup>6</sup> or the Coastal Zone Initiative, in an attempt to preserve and restore the coastline's natural resources. Created by the initiative were new agencies which were given the power to issue permits as well as the obligation to submit to the legislature long term plans for coastline development.<sup>7</sup> Additionally, the legislature passed new laws popularly known as A.B. 1301,<sup>8</sup> further regulating the development of new subdivisions. Both the initiative and A.B. 1301 include provisions for finding facts about the environment and both provide for denial of permits if certain findings are made.

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2. Discussed *infra*, Sec. II.

3. CAL. PUB. RES. CODE §§ 21000-21174 (West Supp. 1973).

4. Discussed *infra*, Sec. II.

5. Some of these NEPA cases are considered *infra*, Sec. II, as a basis for predicting how California courts will handle similar situations.

6. Coastal Zone Conservation Act of 1972, CAL. PUB. RES. CODE §§ 27000-27650 (West Supp. 1973).

7. Discussed *infra*, Sec. IV.

8. A.B. 1301, Stats. 1971, ch. 1446 amends §§ 11510, 11511, 11526, 11535 and 11540.1 of, and adds §§ 11526.1, 11549.5, and 11549.6 to, the CAL. BUS. & PROF. CODE (West Supp. 1973) and amends § 65850 of, adds §§ 65450.1, 65451 and 65452 to and repeals § 65461 of the CAL. GOV. CODE (West Supp. 1973).

The thesis of this article is that by arguing analogously from NEPA to CEQA to obtain adequate disclosure of adverse environmental effects from proposed land uses and by using the facts thus disclosed in making the requisite findings for Proposition 20 and A.B. 1301, decision makers may be required to deny permits in certain environmentally sensitive areas that are currently under great development pressures.

However, the statutory analysis does not complete this environmentally sensitive land use regulation package. Denial of permits that severely limit or even completely eliminate any economic use of one's property raise the issue of whether the regulation is an unconstitutional use of the police power. The thesis of this article is completed by analysis of several California and non-California cases that arguably make such environmentally sensitive denials of permits constitutionally justified. In particular, a recent case from Wisconsin, *Just v. Marinette County*,<sup>9</sup> reflects increasing judicial willingness to uphold regulations that deprive an owner of almost all economic return from his property where ecological concerns suggest the need for leaving the land in its natural state. While several California cases, when combined, represent almost as strong a position as *Just*, this Wisconsin case completes the environmentally sensitive land use regulation package.<sup>10</sup>

To fully comprehend the possible far-reaching effects of these statutes and cases such as *Just*, an understanding of environmentally sensitive zoning, the participants in the system, and the role of courts in the local decision making process is essential.

### B. Environmentally Sensitive Zoning

Traditional or Euclidian zoning, as sanctioned by the United States Supreme Court in *Village of Euclid v. Ambler Realty Company*,<sup>11</sup> is a system of land use regulation that identifies a limited number of land use categories and spreads them "rationally" over a grid system. The assumption is that residential areas

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9. 56 Wis. 7, 201 N.W.2d 761 (1972).

10. *Just* as well as several other inverse condemnation cases are discussed *infra*, Sec. V.

11. 272 U.S. 365 (1926).

should be separated from commercial sections, both should be separated from industrial areas and so on. Within each of these broad land use categories there may be further refinements by density or other criteria. Moreover, the boundary lines between uses are often planned as buffer zones so that, for example, high density rather than low density residential areas are adjacent to commercial and industrial areas. Specialized uses, such as churches, schools, graveyards and amusement parks, do not fall within the broad categories and are treated individually outside of the grid plan by special use permits. To be deemed valid, the zoning plan must be "comprehensive" and must reflect the theoretically best set of land use interrelationships.<sup>12</sup> This type of zoning is environmentally insensitive since it is designed for a flat plane and does not necessarily consider topography or other physical characteristics.

This article is concerned with modifications to this comprehensive Euclidian zoning by what is termed "environmentally sensitive zoning." This means that, when physical characteristics are present which make the land unusually sensitive from an ecological or environmental point of view, the environmental impact should be considered in the decision on how and even whether the land is to be developed. Examples of environmentally sensitive lands include: flood plains, lagoons, swamps, marsh lands, rocky and sandy beaches, faults with earthquake potential, canyons, mountains, steep slopes, cliffs, vistas, unique flora and fauna as well as wildlife habitats (especially for vanishing species or significant links in the ecocycle) and mineral deposits. In addition, although not strictly environmental, consideration would be given to the preservation of anthropological, historical, or cultural sites which by their very nature are unique. Specifically, the land involved is presently undeveloped or underdeveloped and has peculiar characteristics such that the types of development typically allowed in the past arguably should be precluded in view of the growing understanding of ecological interrelationships.

### *C. The Participants in the Local Decision Making Process*

Concern over the legislation discussed in this article is widespread. Initially the development of procedures caused delays in

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12. Of course, through planned unit developments, floating zones, down-zoning until development takes place, increased use of special use permits, etc., zoning has become much more ad hoc than this analysis suggests. But these other techniques are not inherently environmentally sensitive either.

permit handling; currently the satisfaction of these procedural requirements, more than the actual making of environmentally sensitive decisions, greatly extends the lead time of the applicant. Landowners may find the market is less willing to buy because of these added uncertainties, or prices may be depressed and only those willing and able to take longer term risks can invest in land. The landowner or developer is faced with holding costs, at a time of higher property taxes, rising interest rates, and other rapidly increasing costs. The financing institutions find that the delays have undermined the expected cash flow for short term debts of developers. The trade unions fear loss of employment from delay or a possible permanent decrease in building. Various segments of the population, including Chambers of Commerce, watch for signs that the slowing or stopping of the building boom is affecting other segments of the local economy.

A variety of citizens' groups are arguing for new restrictions upon further development and, in some cases, for no growth at all. These groups may be national or local, and may be experienced or naive in their understanding and ability to manipulate the political and legal processes to their own goals. Some are interested in one project, one area or one environmental "cause." Others appear to have primary concerns that are not environmental in origin, although they advance environmental arguments. The participants are varied—from the neighbor who feels threatened by a proposed development but doesn't know what to do, to the university scientist whose concern arises from his professional interest in his particular discipline.

Hearings on land use decisions have never been placid because of the economic interests involved. Now, however, they are marked by greater controversy and confusion as citizens appear in vocal numbers to register protests and present petitions on environmental issues. Environmental arguments may be advanced at times when the true motive is something else. But in many instances, these persons believe that their arguments fall on deaf ears. They argue that, notwithstanding the environmental protest, the vast majority of projects are eventually undertaken or approved by the government.

One chief concern of those arguing strongly for environmental protection is the belief that the control of private land use de-

velopment is the most important arena if the physical environment is to be maintained and improved. Steps are being taken at the national level to control automobile and energy sources of pollution. State and federal agencies can eventually be made environmentally aware by way of such legislation as NEPA and CEQA. However, environmentalists are less sure of an increase in environmental awareness among the literally hundreds of cities, counties and commissions within California which have the ultimate authority over private land development. This concern is that the thousands of individual decisions, which standing alone are not necessarily significant, will gradually erode the remaining particularly sensitive lands.

Elected officials, who are responsible for enforcing the new legislation, are deluged with new laws and guidelines, while their staffs seek desperately to develop management tools which are responsive to the new rules. On the one hand, elected officials are concerned with expanding the tax base and increasing their sphere of influence; on the other hand, they are concerned with whether adequate municipal services can be supplied.

Despite some interesting and worthwhile studies of how local land use decisions are made,<sup>13</sup> it is difficult to describe definitively how land use/environmental decision makers at the local level are, in fact, influenced by the various legal, political, social, physical and economic arguments with which they are deluged. As to the role of strictly legal arguments, the legislation and case law which purports to govern their behavior is vague, difficult for anyone to understand, and subject to continuing change. These officials are normally not lawyers nor do they have any formal training in the law which applies to their decision making. One could speculate that much of their legal knowledge comes from the unsystematic and segmented application of legal concepts learned piecemeal from private and government attorneys, as well as non-legally trained planning staffs, developers, landowners and citizens groups. This makes it extremely difficult for the decision maker to evaluate the information received, especially in view of the inherent uncertainty about the extent of his legal responsibility.

At the other extreme, one cannot assume that there is any substantial conflict of interest particularly at the overt bribery level. The apparent conflicts reflect the decision maker's cultural, so-

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13. *E.g.*, see MANDELKER, *THE ZONING DILEMMA* (1971); BABCOCK, *THE ZONING GAME* (1969).

cial and economic biases which usually identify him with a particular point of view or with those who advocate a particular cause.<sup>14</sup> Even local office seekers must, in many instances, have reached some level of personal wealth to run for office. If this wealth has not come through development-related endeavours, the values held by such persons are likely to favor the highest economic use rather than the highest environmental use. Planning Commissioners are frequently selected because of their prior expertise in land use development areas and, thus, it is not uncommon to find bankers, architects, engineers, attorneys who represent private landowners, and other persons who tend to identify with landowners and land developers in these positions. This is not to suggest dishonesty in elected officials. Rather, it is to point out that in the absence of any well defined limits on discretionary power, it is not surprising that decisions in some cases are a response to political pressures from developers who themselves, often reflect the identical biases of the decision makers. Unless he is threatened by voter retaliation at the polls, it is only natural for an elected decision maker to follow his own value system in making decisions. A legislative policy to the contrary would not suddenly change this, particularly since there is no formal educational process whereby such a change, its philosophy and implications can be transmitted to those in office. Thus, there is probably a tendency to respond slowly to the new or at least renewed interest in the environment.

This assumes that the various attempts to develop systems or management approaches to solving land use problems have not matured to the point where such approaches could be used even if the decision makers were willing. The complicated process of developing models whereby computers with adequate data and some type of quantification or ranking of the goals and values of the decision makers, may eventually supply a workable system of solving short and long-term land use problems. However, without a realistic method to evaluate long term trade-offs it is questionable whether the legislature and the courts will condone over a long period of time a single purpose goal such as the absolute pro-

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14. In addition, there is the problem of financing political campaigns. Land owners and land developers commonly contribute heavily to local political candidates.



tection of the environment which this article suggests is mandated by present law.

In the absence of a systems management approach or a satisfactory economic analysis, a short term legislative decision that is relatively absolute in requiring preservation of the present natural environment would seem to be the only approach to avoid irretrievable and irreversible losses. The article points out legislation which on its face requires this.

#### D. *The Scope of Judicial Review*

Throughout this article there is a twofold approach to the effect to be given to the mandates under the Coastal Zone Initiative<sup>15</sup> and A.B. 1301.<sup>16</sup> It is assumed that those local decision makers who are made aware of these laws and the cases interpreting them, will follow their legal responsibility as office holders in making land use decisions. At the same time, there is a countervailing thrust that, if decision makers do not fulfill this responsibility, a viable potential exists for lawsuits to force them to do so. Whether the theoretical possibility of judicial control will become a practical reality can only be determined by a test case or cases concerned with whether or not the decision makers involved are, in fact, subject to this type of judicial review. The traditional rule, of course, is that the courts will not interfere with these decisions unless there is a clear showing of abuse of discretion.<sup>17</sup> In other words, the courts will not reverse unless there is no evidence to support the particular decision in question.

The scope of judicial review of discretionary decision making by local governmental entities is an area of great legal uncertainty concerning both the legal rules setting the limits on the extent of review and the decision making behaviour which is being evaluated. In his recent book, *Discretionary Justice*, Kenneth Culp Davis, a leading writer on administrative law,<sup>18</sup> points out that there is no systematic scholarly effort to evaluate qualitatively and quantitatively the extent to which discretionary acts conform to the letter and spirit of the legislative mandate.<sup>19</sup> While he is writing primarily of state and federal agencies other than those involved in land use administration, his observations throughout

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15. *Infra*, Sec. IV.

16. *Infra*, Sec. III.

17. See text accompanying notes 85-101, *infra*.

18. See DAVIS, *ADMINISTRATIVE LAW TREATISE* (1958).

19. DAVIS, *DISCRETIONARY JUSTICE*, at v-vi (1969).

are in many instances relevant to the land use decision making process.

Similarly, the process of local land use decision making has not been empirically studied so that it can be precisely described. The emphasis in legal and social research has concentrated on other legal institutions. Thus, the statements in the article about the characteristics of local decision making are not based upon precise empirical data, although the general picture is undoubtedly accurate.<sup>20</sup>

The question asked by the environmentalist is whether or not it is possible to bring a lawsuit or a series of lawsuits to cause a governmental decision maker to deny totally or modify substantially the proposed development because environmentally sensitive characteristics are being adversely affected or destroyed.

This last statement, of course, suggests that the decision maker may not be giving adequate consideration to environmental issues or may be making poor or even illegal decisions. However, as pointed out above, persons in elected or appointed positions may have a tendency to lean toward the short term economically favorable plan or may be unaware of the implications of the present law. No matter what the reason for the decision, the intent here is not to raise the specter of prolonged and often unnecessary delays as various bodies appeal to the courts. Rather, it is to point out that the law does authorize such environmental suits.<sup>21</sup> Government decision makers obviously have a legal responsibility to conform to the law. Presumably, they do not want to reach decisions which later prove inconsistent with developing case law, so they require assurances that their environmentally sensitive decisions will stand up in court. One suspects, however, that there may be some tendency on the part of government, particularly at the local level, to allow private property owners to use their lands as they wish because of political damage which may result from a lawsuit. If the landowner is successful, he may try

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20. The author has to rely on various isolated contacts throughout the state as well as more substantial observations in the San Diego region. The reader is cautioned, however, that no particular government is being described herein.

21. CAL. PUB. RES. CODE §§ 27424-27426 (West Supp. 1973); CEQA, CAL. PUB. RES. CODE § 21168 (West Supp. 1973).

to recover substantial sums by way of inverse condemnation<sup>22</sup> or have his permit denial reversed resulting in a substantial delay for both sides.<sup>23</sup>

More specific analysis of the scope of judicial review is developed within.<sup>24</sup> Throughout that discussion, generalizations about vital legal distinctions which could make a difference in specific applications of the theories postulated are necessary. The process being reviewed may technically be a legislative one, as for example when the City Council or Board of Supervisors adopts ordinances setting general zoning policy, in which case local government law governs the standard of review.<sup>25</sup> Or, the decision may be made by individual administrators, boards or commissions who come under the aegis of administrative law because they are clearly performing a ministerial task.<sup>26</sup> It is impossible to set out in detail in an article of this length, the narrow and technical differences that may arise because of these variations. One testing the basic theories will have to examine this question further in the particular setting in which the questions arise.

The four enactments being considered all express a firm and clear commitment to the preservation and enhancement of the environment. Each contains language which exactly parallels or is similar in meaning to the wording in the others. This article explores the interrelationships among the four and suggests possible cross-overs among them which would enable courts in certain instances to review not only the procedure used in the decision making process but also to some extent the substantive decision itself.

The first problem is to determine whether the land to be developed is, in fact, environmentally sensitive and to provide a method of providing that information to the decision maker. In California this information is developed for federal projects under NEPA and for local proposals under CEQA.

## II. CEQA AND NEPA

### A. *The Policy Behind the Acts*

The California Environmental Quality Act<sup>27</sup> enunciates a clear

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22. See Sec. V, *infra*, where it is argued that no inverse condemnation should arise when the police power is unconstitutionally used to regulate land use, although the regulation should then be voided.

23. It is perhaps unfair to allude to "sides" in environmental issues. Developers can be environmentally sensitive, but rightly deplore wasted time in administrative delays.

24. See text accompanying notes 121-126, *infra*.

25. See generally, McQUILLAN, MUNICIPAL CORPORATIONS § 10.37 (1949).

26. See DAVIS, ADMINISTRATIVE LAW TREATISE, Chs. 29 & 30 (1958).

27. CAL. PUB. RES. CODE §§ 21000-21174 (West Supp. 1973).

legislative policy that state and local governments must adopt a broad commitment to protecting the environment for both present and future generations in making land use decisions. The objectives are to attain a rational balance between man and his environment, between the use and the preservation of that environment, and between health, safety and beauty on the one hand and productivity on the other.<sup>28</sup>

28. CAL. PUB. RES. CODE § 21000 (West Supp. 1973). The Legislature finds and declares as follows:

(a) The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern.

(b) It is necessary to provide a high-quality environment that at all times is healthful and pleasing to the senses and intellect of man.

(c) There is a need to understand the relationship between the maintenance of high-quality ecological systems and the general welfare of the people of the state, including their enjoyment of the natural resources of the state.

(d) The capacity of the environment is limited, and it is the intent of the Legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being reached.

(e) Every citizen has a responsibility to contribute to the preservation and enhancement of the environment.

(f) The interrelationship of policies and practices in the management of natural resources and waste disposal requires systematic and concerted efforts by public and private interests to enhance environmental quality and to control environmental pollution.

(g) It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage.

(Added by Stats. 1970, Ch. 1433.)

CAL. PUB. RES. CODE § 21001 (West Supp. 1973). The Legislature further finds and declares that it is the policy of the state to:

(a) Develop and maintain a high-quality environment now and in the future, and take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.

(b) Take all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise.

(c) Prevent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities and examples of the major periods of California history.

(d) Ensure that the long-term protection of the environment shall be the guiding criterion in public decisions.

(e) Create and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and eco-

However, the courts in California have not yet had the opportunity to express fully their views as to precisely what this California policy under CEQA means nor what the role of the courts will be in relating the policies to specific decisions.<sup>29</sup> To date there have been only five California appellate court opinions under CEQA, and two were decided prior to substantial amendments to the Act.<sup>30</sup>

The California courts have, however, recognized the parallelism between CEQA<sup>31</sup> and the National Environmental Policy Act of 1969<sup>32</sup> in the famous *Friends of Mammoth* case.<sup>33</sup> This parallelism arises in part because the former was obviously modeled after the latter.<sup>34</sup> Thus, it is appropriate to use federal court decisions under NEPA in "speculating" and even "predicting" what the state courts will do under CEQA.<sup>35</sup>

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conomic requirements of present and future generations.

(f) Require governmental agencies at all levels to develop standards and procedures necessary to protect environmental quality.

(g) Require governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment.

29. An analysis of the history of the first case, and the amendments that it encouraged, as well as an analysis of the many unresolved problems is provided in Senecker, *The Legislative Response to Friends of Mammoth—Developers Chase the Will-o'-The-Wisp*, 48 CAL. STATE BAR J. 126 (1973).

30. The cases decided before the amendments accomplished by A.B. 889, Act of Dec. 5, 1972, ch. 1154 [1972] Cal. Laws (Deering's), are *Friends of Mammoth v. Bd. of Supervisors of Mono County*, 8 Cal. 3d 1 *as modified at* 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972), 4 ERC 1593 *as modified at* 4 ERC 1705 and *Environmental Defense Fund, Inc. v. Coastside County Water Dist.*, 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972), 4 ERC 1573. Post A.B. 889 decisions are: *Desert Environment Conservation Ass'n. v. Pub. Util. Comm.*, — Cal. App. 3d —, 106 Cal. Rptr. 31 (1973); *San Francisco Planning and Urban Renewal Ass'n. v. Cent. Permit Bureau*, — Cal. App. 3d —, 106 Cal. Rptr. 670 (1973); *County of Inyo v. Yorty*, — Cal. App. 3d —, 108 Cal. Rptr. 377 (1973).

31. CAL. PUB. RES. CODE §§ 21000-21174 (West Supp. 1973).

32. 42 U.S.C. §§ 4321-4347 (1970).

33. *Friends of Mammoth v. Bd. of Supervisors of Mono County*, 8 Cal. 3d 1, *as modified at* 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972) 4 ERC 1593 *as modified at* 4 ERC 1705; to the same effect, see *Environmental Defense Fund, Inc. v. Coastside County Water District*, 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972), 4 ERC 1573; *County of Inyo v. Yorty*, — Cal. App. 3d —, 108 Cal. Rptr. 377 (1973).

34. See especially, text accompanying note 64, *infra*, for the parallelism.

35. For precise questions relating to NEPA's affect on the interpretation of CEQA, one should examine the interim federal guidelines as they existed at the time CEQA was adopted. See, 35 FED. REG. 7390, (1970). For NEPA the current final regulations apply. See, 36 FED. REG. 7724 (1972). CEQA itself refers to NEPA and provides that an EIS prepared

Currently, there is a considerable amount of NEPA related litigation.<sup>36</sup> As one would expect, some of this concerns the scope of the Act, such as whether NEPA is applicable to continuing projects,<sup>37</sup> ongoing projects,<sup>38</sup> and phased projects.<sup>39</sup> Following the holdings of the federal courts, an EIR is also required under CEQA for phased projects<sup>40</sup> as well as ongoing projects.<sup>41</sup> A number of cases have dealt with the retroactivity of NEPA<sup>42</sup> and CEQA.<sup>43</sup> These questions will, of course, be resolved with time as long as NEPA and CEQA remain substantially unchanged.

However, assuming that a development project is in the planning stages, or otherwise subject to the reporting process, the first question is whether it will have a significant impact which in turn governs whether an EIR or EIS will be required.

### B. "Significant Impact"

Under CEQA, an environmental impact report must be prepared and considered whenever a project *carried out or approved* by any

under NEPA can be used as part or all of an EIR under CEQA to the extent it conforms to CEQA. CAL. PUB. RES. CODE § 21083.5 (West Supp. 1973).

36. In late 1972 and early 1973, over four opinions per week were being rendered and literally hundreds of opinions have been issued. See, reported decisions in ENVIRONMENTAL LAW REPORTER for that time.

37. See, *Lee v. Resor*, 348 F. Supp. 389 (M.D. Fla. 1972), 4 ERC 1579, which distinguishes continuing projects as having no termination date from ongoing projects which do have such a date. See also, *Sierra Club v. Mason*, 351 F. Supp. 419 (D. Conn. 1972), 4 ERC 1686 (ongoing project).

38. *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n.*, 449 F.2d 1109 (D.C. Cir. 1971), 2 ERC 1779; *Nolop v. Volpe*, 333 F. Supp. 1364 (D.S.D. 1971).

39. See, *Monroe County Conservation Council v. Volpe*, 472 F.2d 693 (2d Cir. 1972), 4 ERC 1886; *Thomas v. Fugate*, 347 F. Supp. 120 (E.D. Va. 1972), 4 ERC 1468.

40. See, GUIDELINES FOR IMPLEMENTATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT OF 1970, Office of the Secretary for Resources (1973), 14 CAL. ADMIN. CODE §§ 15000-15166 hereinafter cited as CEQA GUIDELINES at § 15069.

41. CEQA GUIDELINES § 15070; *County of Inyo v. Yorty*, — Cal. App. 3d —, 108 Cal. Rptr. 377 (1973).

42. E.g., see *Keith v. Volpe*, 352 F. Supp. 1324 (C.D. Cal. 1972), 4 ERC 1350; *Northside Tenants' Rights Coalition v. Volpe*, 346 F. Supp. 244 (E.D. Wis. 1972), 4 ERC 1376.

43. *San Francisco Planning and Urban Renewal Ass'n. v. Cent. Permit Bureau*, — Cal. App. 3d —, 106 Cal. Rptr. 670 (1973).

state or local agency has a "significant effect on the environment."<sup>44</sup> NEPA requires an environmental impact statement for any "major Federal actions significantly affecting the quality of the human environment."<sup>45</sup>

Under the California statute, the effect is deemed significant if any of the following exists:

- (1) A proposed project has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage of long-term, environmental goals;
- (2) The possible effects of the project are individually limited but cumulatively considerable;
- (3) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.<sup>46</sup>

In deciding whether an EIR is to be prepared, the CEQA Guidelines clearly state that one is required if there is likely to be any "substantial body of opinion" that the impact will be adverse.<sup>47</sup> Moreover, the guidelines provide a list of adverse effects which may be "significant" if they exist.<sup>48</sup> However, since the adverse effect must be "substantial" or "major" the decision maker is given wide latitude.<sup>49</sup>

It should be pointed out that the Guidelines provide for categorical exemptions in response to the CEQA mandate to do so.<sup>50</sup> These categorical exemptions<sup>51</sup> are subject to periodic review and ad hoc

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44. CAL. PUB. RES. CODE § 21100 (West Supp. 1973).

45. 42 U.S.C. § 44332 (1972).

46. CAL. PUB. RES. CODE § 21083 (West Supp. 1973).

47. CEQA GUIDELINES § 15081 (a).

48. CEQA GUIDELINES § 15081(c). Some examples of consequences which may have a significant effect on the environment in connection with most projects where they occur, include the following:

- (1) Is in conflict with environmental plans and goals that have been adopted by the community where the project is to be located;
- (2) Has a substantial and demonstrable negative aesthetic effect;
- (3) Substantially affects a rare or endangered species of animal or plant, or habitat of such a species;
- (4) Causes substantial interference with the movement of any resident or migratory fish or wildlife species;
- (5) Breaches any published national, state, or local standards relating to solid waste or litter control;
- (6) Results in a substantial detrimental effect on air or water quality, or on ambient noise levels for adjoining areas;
- (7) Involves the possibility of contaminating a public water supply system or adversely affecting ground water;
- (8) Could cause substantial flooding, erosion or siltation;
- (9) Is subject to major geologic hazards.

49. See also, CEQA GUIDELINES § 15082.

50. CAL. PUB. RES. CODE §§ 21084-21086 (West Supp. 1973).

51. CEQA GUIDELINES §§ 15100-15116.

changes. They also, of course, could be challenged if it appears that they are not within the legislative intent of the Act.<sup>52</sup> Among the exclusions are ministerial decisions.<sup>53</sup> However, classification of a decision as ministerial or discretionary can be challenged as improper. (e.g., a permit for substantial grading is considered ministerial under some local ordinances, yet if it clearly involved a significant impact on the environment, its exclusion might be challenged.)

While California appellate courts have not had the opportunity to determine the scope of court review on the question of significant impact, under NEPA the federal courts have, in fact, reviewed this administrative determination. Some courts in their review adhere to the Administrative Practices Act<sup>54</sup> and will reverse the agency's decision only if it is "arbitrary and capricious."<sup>55</sup> In the 5th Circuit, the "more relaxed rule of reasonableness" is utilized in reassessing the agency's initial determination since "the spirit of the Act would die aborning if a facile, ex parte decision . . . were too well shielded from impartial review."<sup>56</sup> Still other courts will themselves consider a challenged agency decision. In these jurisdictions the terms "major" and "significantly affecting" are construed by the court and then applied to the particular project in question.<sup>57</sup> Thus, instead of reviewing the agency's decision, the courts in the last instance are effectively getting to the merits of that decision. The amount of leeway granted to the agency in making this initial determination depends, of course, on the jurisdiction. But, at least some courts are suggesting that the

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52. *Desert Environment Conservation Ass'n. v. Pub. Util. Comm'n.*, — Cal. App. 3d —, —, 106 Cal. Rptr. 31, 33 (1973).

53. CAL. PUB. RES. CODE § 21080 (West Supp. 1973); CEQA GUIDELINES §§ 15032, 15113.

54. 5 U.S.C. § 706(2)(a) (1970).

55. *Durnford v. Ruckelshaus*, — F. Supp. — (N.D. Cal. 1972), 5 ERC 1007; *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Ore. 1971); *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (D. Me. 1972); *Town of Groton v. Laird*, 353 F. Supp. 344 (D. Conn. 1972), 5 ERC 1217; *Hanley v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), 4 ERC 1785.

56. *Save Our Ten Acres v. Kreger*, 471 F.2d 463, 466 (5th Cir. 1973), 4 ERC 1941, 1943; *Hiram Clarke Civic Club v. Lynn*, — F.2d — (5th Cir. 1973), 5 ERC 1177.

57. *Scherr v. Volpe*, 336 F. Supp. 882 (W.D. Wis. 1971), 3 ERC 1588, *affmd. on alternate holding*, 466 F.2d 1027 (7th Cir. 1972), 4 ERC 1435; *Natural Resources Defense Council, Inc. v. Grant*, 341 F. Supp. 356 (E.D.N.C. 1972), 3 ERC 1883.



agency should have less latitude here than in the subsequent determination of whether or not to proceed with the project at hand.

Once the impact is deemed substantial, the next step in the process is the preparation of an environmental impact statement or report.

### *C. Responsibility for the Preparation of an EIR*

The preparation of the EIR is under the direction of the agency which has the primary responsibility for carrying out the project. In the case of private development, it is the agency which has the principal responsibility for approving the project.<sup>58</sup> This designation, also known as the "lead agency" concept, is based on the assumption that, although many governmental agencies may be interested in a particular project, only one is ultimately responsible for it. For example, the Corps of Engineers may plan to build a flood channel which will affect wildlife, water quality, navigation and perhaps air pollution. If the Corps is doing the building, it would be the lead agency. Other agencies may have a regulatory responsibility, a legislative mandate to cooperate or expertise which is needed in drawing up the EIS. If so, these other agencies must participate in preparing the EIS. In addition, the Corps must seek out the views of interested state and local agencies.<sup>59</sup> The same situation would obtain with a state project such as a state highway. Cooperation with other state and local agencies having jurisdiction by law would be necessary, while those with expertise *may* be consulted.<sup>60</sup> But, again, the highway is essentially the responsibility of the Highway Department which would be the lead agency.

The selection of the agency with the greatest responsibility for approving the project as a whole may, however, be somewhat more complicated. Usually this is the agency with general governmental powers. Where more than one agency qualifies, the one which acts first is designated as the lead agency.<sup>61</sup>

The actual preparation of the EIS or EIR is done by the lead agency's staff, by subcontractors, or even by the permit seeker. However, at least under NEPA, the agency may not utilize a re-

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58. CAL. PUB. RES. CODE § 21067 (West Supp. 1973); CEQA GUIDELINES § 15030.

59. 42 U.S.C. § 4332 (1970).

60. CAL. PUB. RES. CODE § 21104 (West Supp. 1973) (emphasis added).

61. CAL. PUB. RES. CODE § 21165 (West Supp. 1973); CEQA GUIDELINES § 15065.

port prepared *solely* by the party applying for the permit.<sup>62</sup> Under the CEQA Guidelines an approving agency must assure the accuracy and objectivity of any report submitted independently by the permit seeker.<sup>63</sup>

#### D. *The Contents of the EIR and EIS*

As suggested earlier, the interaction between NEPA and CEQA arises because the operational language in both is in many particulars identical. The requirements set out below are taken from CEQA with notations on the differences found in NEPA. Each EIR or EIS must contain a detailed statement of:

- a. The environmental impact of the proposed action.
- b. Any adverse environmental effects which cannot be avoided if the proposal is implemented.
- c. Mitigation measures proposed to minimize the impact (not expressly included in NEPA).
- d. Alternatives to the proposed action.
- e. The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.
- f. Any irreversible environmental changes which would be involved in the proposed action should it be implemented.
- g. The growth inducing impact of the proposed action (not expressly included in NEPA).<sup>64</sup>

Upon its completion, the draft EIR or EIS is available to the appropriate legislature, all interested agencies, citizen groups and other parties.<sup>65</sup> Any comment or criticism leveled at the report is to be incorporated into the report, and answered by the lead agency. The draft document, with the comments and answers

62. *Greene County Planning Bd. v. Fed. Power Comm'n.*, 455 F.2d 412 (1972), 3 ERC 1595, *cert. denied* — U.S. — (1973), 4 ERC 1752.

63. CEQA GUIDELINES § 15085(a).

64. CAL. PUB. RES. CODE § 21100 (West Supp. 1973); 42 U.S.C. § 4332 (1970). Pending legislation, A.B. 1575, would add to § 21100(c) the following: "including, but not limited to, measures to reduce wasteful, inefficient, and unnecessary consumption of energy."

65. 42 U.S.C. § 4332 (1970); CAL. PUB. RES. CODE § 21105 (West Supp. 1973).

becomes the final document which is considered when the decision of whether or not to proceed is made. One federal court has summarized the extent of inclusion necessary to meet the procedural requirements of NEPA as follows:

The 'detailed statement' required by § 102(2)(c) should, at a minimum, contain such information as will alert . . . (interested persons), to all known possible environmental consequences of proposed agency action. Where experts, or concerned public or private organizations, or even ordinary lay citizens, bring to the attention of the responsible agency environmental impacts which they contend will result from the proposed agency action, then the § 102 statement should set forth these contentions and opinions even if the responsible agency finds no merit in them whatsoever. Of course, the § 102 statement can and should also contain the opinion of the responsible agency with respect to all such viewpoints. The record should be complete. Then, if the decision makers choose to ignore such factors, they will be doing so with their eyes wide open.<sup>66</sup>

Courts have noted that "[a]t the very least, NEPA is an environmental full disclosure law."<sup>67</sup> As such, the EIR must be directed in part at the courts so they can do more than simply guess whether or not there has been substantial compliance with NEPA.<sup>68</sup>

However, other federal courts indicate that there is more involved than mere disclosure. These courts seem to be saying that the report cannot simply assume and support the final decision, but must give some indication that it was used in the decision making process. For example, one court responded to the defendant's contentions that delay while preparing an EIS would be costly and hazardous by saying,

If the Act is seen as requiring only full disclosure, it will simply become a minor nuisance for agencies, imposing one more obligation of paperwork, before they can get on with the projects they intend to build . . . .

When defendants ask me to weigh the possibility of increased cost they are assuming that the projects will be built, and that the preparation of an impact statement will have no effect whatever on the decision whether or not to build.<sup>69</sup>

### *E. Judicial Scrutiny of the Adequacy of the EIR and EIS*

The many cases that have arisen under NEPA demonstrate the federal courts' insistence that the EIS adequately establish the scientific data which relate to whatever environmental impact the

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66. *Environmental Defense Fund, Inc. v. Corps of Eng'rs. of the United States Army*, 325 F. Supp. 749, 759 (E.D. Ark. 1971), 2 ERC 1260, 1267.

67. *Id.*

68. *Ely v. Veld*, 451 F.2d 1130 (4th Cir. 1971), 3 ERC 1280.

69. *Comm. to Stop Route 7 v. Volpe*, 346 F. Supp. 731, 738 (D. Conn. 1972), 4 ERC 1329, 1333.

proposed project would have. When presented with expert testimony on an EIS's adequacy, the court may decide directly whether or not the final statement has adequately incorporated and met the objections presented by interested parties with regard to fauna, water quality, geology, history and archeology.<sup>70</sup> Another court considered the reported facts in detail and made findings on the effect of a proposed dam on paddlefish, fauna, woodlands and grasslands, deer, turkey, duck, rabbits, quail, doves and other small game, pine and oak, timber, Canadian geese and significant archeological and paleontological sites.<sup>71</sup> The clear implication is that this court reviewed the evidence and pointed out the specific omissions in the EIS.

It would appear that anyone, either within or without government, has the court guaranteed right to advance factual data on environmental impact which must be included within the report and be considered by the decision maker. (It is, of course, virtually impossible to monitor how much "consideration" has, in fact, been given to the document.) In addition the EIS must include a detailed projection of long term effects, possible alternatives to the proposal and a comparison of the costs and benefits for each stated alternative.<sup>72</sup>

NEPA requires that an agency must—to the fullest extent possible under its other statutory obligations—consider alternatives to its actions which would reduce environmental damage. That principle establishes that consideration of environmental matters must be more than *pro forma* ritual. Clearly, it is pointless to 'consider' environmental costs without also seriously considering action to avoid them. Such a full exercise of substantive discretion is required at every important, appropriate and nonduplicative stage of an agency's proceedings.<sup>73</sup>

One court has even gone so far as to suggest that if, in view of the environmental impacts, the only alternative is to go to Congress or the President with suggestions for change, that alternative must be considered.<sup>74</sup>

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70. *Environmental Defense Fund, Inc. v. Corps of Eng'rs. of the United States Army*, 348 F. Supp. 916 (N.D. Miss. 1972), 4 ERC 1408.

71. *Environmental Defense Fund, Inc. v. Froehlke*, 348 F. Supp. 338 (W.D. Mo. 1972), 4 ERC 1541.

72. *Hanley v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), 4 ERC 1785.

73. *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n.*, 449 F.2d 1109, 1128 (D.C. Cir. 1971), 2 ERC 1779, 1796.

74. *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

When determining whether an environmental impact statement is adequate, the federal courts look for a report which, while not necessarily including every possible fact advanced by anyone no matter how competent, demonstrates on its face a good faith attempt to consider all views that have been advanced.<sup>75</sup> The test which is used in this instance "is one of good faith objectivity rather than subjective impartiality."<sup>76</sup> Another court has stated that "[t]he adequacy of the research should be judged in light of the scope of the proposed program and the extent to which existing knowledge raises the possibility of potential adverse environmental effects."<sup>77</sup>

#### F. *The Role of the Impact Statement*

Neither NEPA and CEQA nor their associated guidelines include any actual statement on the operative effect of an EIR which suggests or finds negative impacts. As is pointed out elsewhere,<sup>78</sup> the Legislature could not have intended that CEQA have no effect and must have contemplated denial or modification of permits under some circumstances. Certainly the courts have interpreted both NEPA and CEQA in this way and given them a substantive role. Dealing with a case brought under NEPA, a federal court clearly took this point of view by saying:

NEPA was intended to effect substantive changes in decision making . . . . The unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill governmental archives.<sup>79</sup>

The California courts are insistent that the EIR be considered in the decision making process. The court in *Friends of Mammoth* says that "[o]bviously if the adverse consequences to the environment can be mitigated, or if feasible alternatives are available, the proposed activity, such as the issuance of a permit, should not be approved."<sup>80</sup>

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75. *E.g.*, see *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n.*, 449 F.2d 1109 (D.C. Cir. 1971), 2 ERC 1779.

76. *Environmental Defense Fund, Inc. v. Corps of Eng'rs. of the United States Army*, 470 F.2d 289, 296 (8th Cir. 1972), 4 ERC 1721, 1724.

77. *Environmental Defense Fund v. Hardin*, 325 F. Supp. 1401, 1403 (D.D.C. 1971), 2 ERC 1425, 1426; *See also*, *Comm. for Nuclear Responsibility v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971), 3 ERC —.

78. Senecker, *The Legislative Response to Friends of Mammoth-Developers Chase The Will-O'-The-Wisp*, 48 CAL. STATE BAR J. 126 (1973).

79. *Environmental Defense Fund v. Corps of Eng'rs. of the United States Army*, 470 F.2d 289, 297 (8th Cir. 1972), 4 ERC 1721, 1725-6.

80. *Friends of Mammoth v. Bd. of Supervisors of Mono County*, 8 Cal. 3d 1 *as modified at* 8 Cal. 3d 247, 263, 502 P.2d 1049, 1059, 104 Cal. Rptr. 761, 771 (1972), 4 ERC 1593, *as modified at* 4 ERC 1705.

Certainly the strong language in *Friends of Mammoth* involves the state courts in review of the EIR process. "The duty of the judiciary . . . is to assure that important environmental purposes, heralded in legislative halls, are not lost or misdirected in the vast hallways of administrative bureaucracy."<sup>81</sup> The requirement that adverse effects on the environment be considered and used in the agency's decision is supported by the specific language within the Acts calling for "major consideration."<sup>82</sup> At the same time, the guidelines describe the EIR as an "Informational Document." This characterization implies that the EIR has a much smaller substantive role than it has been given by the court in its interpretation of the Act. But the guidelines themselves are subject to judicial review to assure conformity to the statutory purpose.<sup>83</sup>

### G. *The Balancing Process*

Not only must there be a full disclosure of all environmental impacts as outlined above, but there also must be a systematic balancing of environmental costs and technical and economic benefits. The court's role here is to assure that the agency has before it complete information in the form of an EIS and that the report is used in the decision making process. This is illustrated in the *Calvert Cliffs'* decision where the court concluded:

. . . NEPA mandates a particular sort of careful and informed decisionmaking process and *creates judicially enforceable duties*. The reviewing courts probably cannot reverse a substantive decision on its merits . . . unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. *But if the decision was reached procedurally without individualized consideration and balancing of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse.*<sup>84</sup>

81. 8 Cal. 3d at 254, 502 P.2d at 1053, 104 Cal. Rptr. at 765 (*emphasis added*).

82. *E.g.*, see, CAL. PUB. RES. CODE §§ 21000(g), 21100 (West Supp. 1973) and 42 U.S.C. § 4332 (1970).

83. Desert Environmental Conservation Ass'n. v. Pub. Util. Comm'n., — Cal. App. 3d —, 106 Cal. Rptr. 31, 33 (1973).

84. *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n.*, 449 F.2d 1109, 1115 (D.C. Cir. 1971), 2 ERC 1779, 1783 (*emphasis added*). In California, pending legislation, A.B. 938, would require an economic impact report which would be used along with the environmental impact report in this balancing process.

## H. Court Review of the Decision to Proceed

When there is a challenge of the agency's determination on whether or not to proceed with the project, the federal courts use differing standards in reviewing this decision. As indicated in the quote above,<sup>85</sup> one test is the traditional one for review of agency decisions, i.e., is the decision supported by the evidence or is it arbitrary and capricious? Some courts state the standard in terms of whether there is substantial evidence in the record to support the decision.<sup>86</sup> Other courts say that the scope of their review is limited to procedural matters only.<sup>87</sup> However, many courts are using the "substantial inquiry test."<sup>88</sup> Here the

[c]ourts are allowed to delve into the decision making process on their own to determine if the agency's decision was arbitrary and capricious when viewed in terms of the data and information set forth in the EIS.<sup>89</sup>

At least one federal court states that it can review "substantive agency decisions on the merits."<sup>90</sup> Such a review includes whether the agency engaged in a good faith consideration of all factors and whether the balancing of these factors was arbitrary.<sup>91</sup> However, all courts seem to agree that they cannot substitute their judgment for that of the agency.<sup>92</sup>

While it can be argued that NEPA and CEQA are less effective than they might have been since substantive review on the merits is limited or even precluded, a growing number of commentators have suggested that such a review by the courts would be entirely inappropriate because of their technical incompetence.<sup>93</sup> But,

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85. See note 84 *supra*.

86. *Pizitz v. Volpe*, — F. Supp. — (M.D. Ala. 1972), 4 ERC 1195.

87. *Jicarilla Apache Tribe v. Morton*, 471 F.2d 1275 (9th Cir. 1973), 4 ERC 1933.

88. *Cape Henry Bird Club v. Laird*, — F. Supp. — (W.D. Va. 1973), 5 ERC 1283; *Sierra Club v. Froehlke*, — F. Supp. — (S.D. Tex. 1973), 5 ERC 1033; *Environmental Defense Fund v. Tennessee Valley Authority*, — F. Supp. — (E.D. Tenn. 1973), 5 ERC 1183.

89. *Cape Henry Bird Club v. Laird*, — F. Supp. — (W.D. Va. 1973), 5 ERC 1283, 1286.

90. *Environmental Defense Fund, Inc. v. Corps of Eng'rs. of the United States Army*, 470 F.2d 289 (8th Cir. 1972), 4 ERC 1721.

91. *Id.* at 300, 4 ERC at 1728.

92. *E.g.*, *Scenic Hudson Preservation Conference v. Federal Power Comm'n.*, 453 F.2d 463 (2d Cir. 1971), 3 ERC 1233, *cert. denied*, — U.S. — (1972), 4 ERC 1750.

93. *E.g.*, see, *Murphy, The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace?*, 72 *COL. L. REV.* 963 (1972); *Note, Evolving Judicial Standards under the National Environmental Policy Act and the Challenge of the Alaska Pipeline*, 81 *YALE L.J.* 1592 (1972); *Cramton and Boyer, Citizen*

one thing which is becoming clear is that under NEPA and CEQA, it is not within the purview of the courts to question the wisdom of the precise decision made by the administrative agency unless there has been abuse of discretion, since "[t]he NEPA creates no substantive rights in citizens to safe, healthful, productive and culturally pleasing surroundings."<sup>94</sup>

### I. *Summary of Court Review of Administrative Processes*

To summarize, under NEPA and CEQA there are three distinct stages at which the agency's decision may be challenged and the courts may be asked to review. The first is the question of whether the proposed project will have a significant impact on the environment.<sup>95</sup> Secondly, the courts will review whether the information included within the EIS is adequate and as part of this they frequently become involved in a very detailed examination of the actual data included and omitted. This reflects a legislative determination that there is a need for full disclosure of the bases supporting administrative decisions. The mandate for full disclosure is a mandate for improved discretionary judgment. The inevitable assumption is that the citizenry, the legislature and, of course, the courts can better check potential abuses of discretion if they have all of the information the agency had before making the decision in question.<sup>96</sup>

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*Suits in the Environmental Field: Peril or Promise?* 2 *ECOLOGY L. Q.* 407 (1972).

94. *Environmental Defense Fund v. Tennessee Valley Authority*, — F. Supp. — (E.D. Tenn. 1972), 4 ERC 1892, 1896 *quoting from*, *Upper Pecos Ass'n. v. Stans*, 452 F.2d 1233, 1236 (10th Cir. 1971), 3 ERC 1418.

95. Here the courts may use a standard of arbitrary and capricious or a test of reasonableness or may rule as a matter of law. See text accompanying notes 54-57 *supra*.

96. It is interesting to note that Professor Davis in his book, *DISCRETIONARY JUSTICE*, at 104-107 (1969), suggests a systematic structure for the exercise of discretion in order to mitigate arbitrariness in administrative decision making. This would include publication by the agency of its policy statements and rules so that outsiders dealing with the agency would have this information. In addition, he advocates that reasoned administrative opinions justifying discretionary determinations be required and that these opinions then be treated as open precedents similar to case law. Ideally, the opinions would have some sort of binding effect to prevent total arbitrariness but would remain flexible so that discretion could be exercised and total rigidity avoided.



Thirdly, the court may review the actual decision for the possibility of abuse of discretion.<sup>97</sup> To date the federal courts have been unwilling to reverse the agency determination unless there is a clear abuse of discretion.<sup>98</sup> In California the scope of judicial review is set out by statute and the court is precluded from exercising independent judgment on the evidence. Rather, the court may only determine whether the act or decision is supported by substantial evidence in light of the whole record.<sup>99</sup> However, it may be that in California, CEQA can be used in conjunction with other environmental legislation to allow court review of the substantive decision in certain instances. The first of these possibilities is the new regulations on subdivisions as imposed by A.B. 1301.<sup>100</sup> The second is the voter initiative passed in November of 1972 which establishes boards to regulate the development of coastal property.<sup>101</sup>

### III. REGULATION OF SUBDIVISIONS PROVIDED BY A.B. 1301

In California there is a more specialized, yet widely used, type of land use regulation-subdivision regulations under the Subdivision Map Act.<sup>102</sup> Since the State Legislature enacted the Subdivision Map Act,<sup>103</sup> the doctrine of preemption applies and local governments are restricted in the control they can exert to that allowed by the Act. Prior to A.B. 1301,<sup>104</sup> the only way a city or county could regulate subdivisions was a denial conditioned on design and improvement changes. When these conditions were met, the subdivider could proceed as far as the Subdivision Map Act

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97. Here some courts will use the substantial evidence standard while others will use the substantial inquiry test. See text accompanying notes 85-92 *supra*.

98. See, *Environmental Defense Fund, Inc. v. Corps of Eng'rs. of the United States Army*, 470 F.2d 289 (8th Cir. 1972), 4 ERC 1721.

99. CAL. PUB. RES. CODE § 21168 (West Supp. 1973), which was added by Assembly Bill 889, Act of Dec. 5, 1972, ch. 1154 (1972) Cal. Laws (Deering's) in response to the question of court review raised by *Friends of Mammoth*. See also, Seneker, *supra* note 78 at 129-130.

100. See Sec. III, *infra*.

101. See Sec. IV, *infra*.

102. CAL. BUS. & PROF. CODE § 11535 (West Supp. 1973), defines a subdivision generally as a parcel of land which is divided into five or more parcels for purpose of sale, lease or financing by any subdivider. The section also limits that definition in a variety of ways. Section 11540.1 makes it possible for a local government to impose these kinds of regulations on a "subdivision" containing less than five parcels, if it so chooses, under certain circumstances.

103. CAL. BUS. & PROF. CODE §§ 11500-11641 (West 1964, West Supp. 1973).

104. See note 8, *supra*.

was concerned, although he, of course, had to comply with other zoning ordinances.<sup>105</sup>

#### A. *Expansion of the Subdivision Map Act*

A.B. 1301 designates additional criteria on which a subdivision must be denied if certain findings are made. Consider the literal wording of the statute:

A governing body of a city or county shall deny approval of a final or tentative subdivision map if it makes any of the following findings:

. . . .

(c) That the site is not physically suited for the type of development.

(d) That the site is not physically suitable for the proposed density of development.

(e) That the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitats.

(f) That the design of the subdivision or the type of improvements is likely to cause serious public health problems.<sup>106</sup>

These criteria are explicit and appear to express a legislative mandate that subdivision proposals are to be denied, not only for the traditional reasons, but also for reasons related to environmental sensitivity. Particularly with an area such as a lagoon, any substantial and permanent development using fill is likely to require one of the stated findings thus precluding any kind of development. However, it is debatable whether or not the findings on environmental or health hazards set forth in sections (e) and (f) have to be made. There is a mandate that the governmental body "shall deny approval";<sup>107</sup> there is no express mandate to make the findings which would support such a denial. One possible literal interpretation of the statute is that "if" the

105. A significant change brought about by A.B. 1301 is that zoning decisions must now conform to the general plan. See, Comment, "Zoning Shall be Consistent with the General Plan"—A Help or a Hindrance to Planning, 10 SAN DIEGO L. REV. 901 (1973).

106. CAL. BUS. & PROF. CODE § 11549.5 (West Supp. 1973).

107. Another source of mandated denial is the open space plan. See, CAL. GOV. CODE § 65567 (West Supp. 1973). Open space plans may include lands for a number of reasons, among them, the land's environmental sensitivity.

agency elects to make findings and such findings are negative, then denial of the proposal follows. Thus, decision makers who are environmentally concerned have a means by which they can mitigate or prevent ecological damage; those who are not so concerned can avoid the issue entirely merely by not making any findings. Needless to say, much of the efficacy of the law could be obviated if, in fact, this interpretation is adopted by the courts.

On the other hand, one can argue that it is more consistent with the overall purpose of A.B. 1301 to construe the statute as mandating that the governmental agency make express findings. If these findings are negative, then denial is also mandated. This interpretation of the statute does not remove much discretionary power from the local decision maker since in the past denial of subdivisions could only be conditional and could only be predicated on a change in design or improvement. Rather this construction of the statute would further assure implementation of the Legislature's intent to prevent irreversible environmental damage.

When findings are made, whether they be mandated or not, there is also the question of whether they need to be in writing. The prevailing notion is that written findings are required in formal hearings to aid possible judicial review.<sup>108</sup> The necessity of written findings in informal hearings is less than clear. However, if the findings from the EIR can be substituted for the findings necessary for A.B. 1301<sup>109</sup> the problem becomes moot, since the court in *Friends of Mammoth*<sup>110</sup> held that findings from the EIR are the equivalent of any required findings of fact. On the other hand, if the EIR cannot be used in conjunction with A.B. 1301, the court, in the absence of express findings, will assume that the findings necessary to support the decision were made.<sup>111</sup>

### B. *The Relationship Between A.B. 1301 and CEQA*

Section II reviewed the status of the law and the interpretation by the courts of the environmental quality acts, NEPA and CEQA. With A.B. 1301 we have another expression of environmental concern in legislation which is applicable to the specialized area of subdivisions. Subdivision approval specifically requires an EIR

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108. See, DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 16.01, 16.02 and 16.05 (1958).

109. This question is discussed in greater detail *infra*.

110. 8 Cal. 3d 1, as modified at 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972), 4 ERC 1593 as modified at 4 ERC 1705.

111. *Broadway, Laguna, Vallejo Ass'n. v. Bd. of Permit Appeals*, 66 Cal. 2d 767, 427 P.2d 810, 59 Cal. Rptr. 146 (1967).

when other criteria are met.<sup>112</sup> Is there a relationship between the two? More specifically, can the findings of the EIR be used as the findings on which a denial under A.B. 1301 is predicated, and if so, what is the specific interrelationship?

It is easy to say that adverse environmental effects presented in the EIR can be substituted for the requirement of "substantial environmental damage" in subsection (e) and that, consequently, denial is mandated.<sup>113</sup> Courts could review the record and reverse when necessary with no need to consider whether or not there has been an abuse of discretion. But there are various reasons why that direct association is to be questioned.

One problem is that there is no reason to think that the word "significant" as it relates to "impact"<sup>114</sup> has a one-to-one relationship to the use of the word "substantial" as it relates to "damage". The former includes both beneficial and detrimental environmental effects at least under NEPA. The CEQA guidelines indicate that only adverse effects are to be considered.<sup>115</sup> However, an EIR is desirable to assure that consideration is given to the best alternative even if all are good. In addition, the decision that an EIR is required is based on the conclusion that there will probably be a significant impact. After the study is done, there may, in fact, be none, or the plan may be modified to avoid them.<sup>116</sup> Just because a project is deemed "significant," thus requiring an EIR,

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112. CAL. PUB. RES. CODE § 21080 (West Supp. 1973).

113. In Secs. (e) and (f) it appears that it is the design of the subdivision rather than the fact of development that mandates denial. Secs. (c) and (d) refer to the unsuitability of this particular site for this particular type of development. Presumably situations can arise where no design is suitable for a site or no design sufficiently mitigates environmental damage to be less than "substantial." There will be no direct prohibition against use of the land, but as successive alternatives are rejected, it will eventually become clear that all proposals will fail. This will give rise to the possibility of inverse condemnation as discussed in the text accompanying Sec. V, *infra*, where it is concluded that such right does not exist.

114. See text accompanying notes 44-57 *supra*.

115. CEQA GUIDELINES § 15081(a).

116. This, of course, ultimately becomes a philosophical problem. There is virtually nothing that can be done which does not affect the environment. And, whether this is "adverse" depends on how one looks at it. Environmentalists may feel that it is "adverse" to destroy coyotes; chicken farmers may term this result "beneficial."

does not necessarily mean that there would be a negative finding requiring denial under this section of A.B. 1301.

The next clause of the same section provides that there shall be a denial if the subdivision "avoidably injures fish or wildlife or their habitat."<sup>117</sup> As was pointed out previously, the environmental impact report must consider alternatives to the proposed project including the possibility of no development. If the development involves injury to fish or wildlife, that fact must be brought out in the EIR and, as we have seen, if such an omission is challenged, the court on review will make sure that it, as well as viable alternatives, are so presented.<sup>118</sup> Once a reasonable alternative is demonstrated, there is the possibility that the injury is avoidable.<sup>119</sup> If the EIR presents these alternatives and it appears that one is "better" in an environmental sense than the proposal being offered as far as the fish and wildlife are concerned, approval of such a subdivision appears to present an irreconcilable conflict—whether or not findings under A.B. 1301 are mandated and whether or not these findings are written. That is, the agency has adopted an EIR which contains superior alternatives for preservation of wildlife; approval of the project in effect indicates that there are no superior alternatives. The possibilities open to the court when presented with such a situation are explored further in the next section.

In addition, if denial is required when injury to wildlife is avoidable, this suggests that the project would be approved if the injury were unavoidable. The use of the disjunctive in this subsection suggests that other kinds of substantial environmental damage must be denied under any circumstances while injury to fish and wildlife is precluded only if it is avoidable. Otherwise, the latter clause would be subsumed under the former and would become meaningless.

The following section of the statute also lends itself to the use of the EIR. This section states that the city or county shall deny approval of a subdivision if it finds that "the design of the subdivision or the type of improvements is likely to cause serious public health problems."<sup>120</sup> CEQA clearly contemplates the

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117. CAL. BUS. & PROF. CODE § 11549.5(e) (West Supp. 1973).

118. See text accompanying notes 70-77 *supra*.

119. Needless to say, an alternative might inflict more injury or the same amount of injury as the particular project being proposed.

120. CAL. BUS. & PROF. CODE § 11549.5(f) (West Supp. 1973). Pending legislation A.B. 21 would require a certificate from the local health officer that all environmental conditions have been met.

consideration of factors such as air pollution, water pollution, waste disposal and flood or earthquake potential within the EIR. That is, if these things pertain to the particular project, they must be considered as part of the environmental document.

Thus, it appears that the use of the findings in the EIR as the findings under A.B. 1301 is not inappropriate. Certainly the information therein is relevant to the type of finding which is to be made under A.B. 1301 although it is doubtful that the two requirements of "substantial" and "significant" are synonymous. However, since "significant" includes both beneficial and adverse impacts at least under NEPA it would seem to be the broader of the two. Thus, although not all "significant" impacts would be "substantial" one could certainly argue that all "substantial" environmental damage would also be "significant" under the requirements of CEQA. If this is true, then for every subdivision, whether the findings are mandated or not, they should be available because of the EIR prepared under CEQA.

### *C. Scope of Judicial Review*

This is being written before A.B. 1301 becomes effective and there is, of course, no judicial guidance as to what may be the scope and nature of judicial review when decisions under this law are challenged. However, since review of agency decisions, quasi-judicial and local legislative decisions are guided by the standard of abuse of discretion, it is assumed that decisions made under A.B. 1301 will be judged in the same manner. If, in fact, the EIR can be substituted for the findings necessary for denial under A.B. 1301 presumably judicial review of these findings would be the same as under CEQA.<sup>121</sup>

But whether or not the EIR is permitted to be an integral part of the decision under A.B. 1301, if it is extant, what is its role in the subdivision approval process? Within the EIR there must be a listing of all adverse environmental effects. The report must describe which adverse factors can be reduced to an insignificant level and explain why the project is being proposed if, in fact, the

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121. Of course, the Calif. courts have not yet considered the scope of review for findings under CEQA and this article suggests that they will follow the federal courts' interpretation of NEPA because of the close similarity between the two acts. See text accompanying notes 31-35 *supra*.

adverse effects cannot be eliminated.<sup>122</sup> It is difficult to see how an application for a subdivision can be approved when negative facts are included in the EIR. Such a decision could only be regarded as an abuse of discretion on the part of the agency considering the proposal. The same conclusion follows when there is consideration given to the impact of the project on fish and wildlife and alternative proposals are contained in the EIR.<sup>123</sup> It would seem that at least in these two instances denial of the project would be required whether or not findings under A.B. 1301 are mandatory and whether or not they are written. It is the irreconcilable conflict between the adoption of the EIR, which contains documentation of adverse, unavoidable injury to the environment, and the subsequent approval of the subdivision which forms the basis for the abuse of discretion, not the presence or absence of "findings."

In addition, as shown by the cases under NEPA, some courts, while adhering to the standard of abuse of discretion, do so expansively.<sup>124</sup> If courts are willing to adopt the same attitude toward subdivision control, and there is no reason to expect that they will not since the general concern of preserving the environment is the same, they may be willing to use the "substantial inquiry" test. Then, if the approval or the denial of a particular subdivision is challenged, the court will look into the decision making procedure, whether or not findings are made and whether or not they are used in the decision making process. If no findings have been made or the findings are deemed inadequate, the court can then enjoin further activity until the findings are made or improved.

Of course, under A.B. 1301 a denial is predicated on "substantial environmental damage" or "serious health problems." Although the court may mandate findings or further findings, it is questionable whether it will undertake consideration of the "seriousness" of the impact. On the other hand, it is difficult to see how the balancing required by NEPA and CEQA<sup>125</sup> can be done without giving some kind of quantitative weight to the adverse effects as

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122. CEQA GUIDELINES § 15143(b).

123. Another reflection of the legislative concern about the environment is another section of A.B. 1301 which requires that tentative maps for remote subdivisions, as defined by CAL. BUS. & PROF. CODE § 11000.5, must be submitted to the office of intergovernmental management for an environmental evaluation. CAL. BUS. & PROF. CODE § 11550.1. The same kinds of considerations would be applicable if a negative environmental impact were found by this office and the subdivisions were approved by another agency.

124. See text accompanying notes 88-92 *supra*.

125. See text accompanying note 84 *supra*.

well as the advantages to be gained. This might provide an index to "seriousness" since, under A.B. 1301, there is arguably no need for a balancing—only for a finding. In addition, there is doubt as to whether "seriousness" can be equated with "substantial" or with "significant." On the other hand, the courts have gotten into the question of cost effectiveness where it is mandated under NEPA, and have insisted that there be a good faith determination as to what the cost benefits are.<sup>126</sup> Thus, they might also require a good faith determination of how serious possible environmental effects might be.

This analysis assumes that there is no "balancing" under A.B. 1301. Actually NEPA and CEQA themselves do not expressly include the balancing requirement. Rather, the federal courts, at least, have inserted the balancing process into the express terms of NEPA. This was the courts' method of assuring some results from the Act, since there is nothing expressed about how the reporting process is to be used in making decisions. But A.B. 1301 unequivocally gives to the environmental assessment a unique and definitive role, and if literally applied leaves no room for a judicial gloss permitting a trade-off of environmental costs for social or economic values through a balancing process. This is but an application of the general principal that legislation which is clear on its face will be accepted literally without looking behind the words to try to find a legislative intent.

Thus, in summary, it appears that whether the findings on which a denial can be based under A.B. 1301 must be made, and whether these findings must be in writing are debatable. However, where an EIR is required because the impact is deemed "significant," denial of the proposed subdivision in some cases may be mandatory. This situation would occur where unavoidable, substantial environmental damage which cannot be mitigated is reported in the EIR, or when alternatives generating less damage than the proposed development to fish and wildlife were included in the EIR. In both of these instances, to grant permission to subdivide would be directly contradictory to the findings under CEQA and would be an abuse of discretion. In addition, the courts

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126. See, Note, *Cost-Benefit Analysis and the National Environmental Policy Act of 1969*, 24 STAN. L. REV. 1092 (1972), and the cases cited therein.



may be willing to apply, as they have in some instances under NEPA, a liberal interpretation of the "abuse of discretion" standard in reviewing these agency decisions. If so, those persons who are concerned about the environment and its preservation will have a more effective way of checking decisions of agency officials whom they feel have been less than sensitive to environmental concerns. On the other hand, the landowner with environmentally sensitive land who is ultimately precluded from any kind of development will seek to recover damages through inverse condemnation or to have the decision set aside. Before getting to that particular question, however, there is another piece of specialized environmental legislation, the Coastal Zone Initiative, which can be related to CEQA and to environmentally sensitive areas.

#### IV. MANDATED PERMIT DENIALS UNDER THE COASTAL ZONE INITIATIVE

##### *A. Policy and the Permit Process of the Coastal Commissions*

On November 7, 1972, the voters of California adopted the Coastal Zone Conservation Act (CZCA), popularly known as the Coastal Zone Initiative or Proposition 20.<sup>127</sup> This Act establishes a State Coastal Zone Conservation Commission (CZCC) and six regional commissions. The initiative provides for the creation of a long range conservation plan in the coastal zone,<sup>128</sup> which is to be submitted to the Legislature in 1976. However, the primary concern in this article is with those portions of the initiative that grant permit issuing powers to the regional commissions and those portions which articulate the policies that are to be reflected in the permit process.

The Coastal Zone Initiative is strongly worded from an environmental point of view. The policy provisions establish the value of the coastal zone as a natural resource that consists of a delicately balanced ecosystem, and state: ". . . it is the policy of the

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127. California Coastal Zone Conservation Act of 1972, CAL. PUB. RES. CODE §§ 27000 *et seq.* (West Supp. 1973).

128. The coastal zone is defined as: ". . . that land and water area of the state of California from the border of the State of Oregon to the border of the Republic of Mexico, extending seaward to the outer limit of the state jurisdiction, including all islands within the jurisdiction of the state, and extending inland to the highest elevation of the nearest coastal mountain range, except that in Los Angeles, Orange, and San Diego Counties, the inland boundary of the coastal zone shall be the highest elevation of the nearest coastal mountain range or five miles from the mean high tide line, whichever is the shorter distance." CAL. PUB. RES. CODE § 27100 (West Supp. 1973).

state to preserve, protect, and, where possible, to restore the resources of the coastal zone for the enjoyment of the current and succeeding generations . . ."<sup>129</sup>

Further indications of the environmental orientation of the Act are found in the sections that establish objectives of the coastal zone conservation plan. Included among the objectives are the restoration of the quality of the coastal zone environment, the maintenance of optimum populations of living organisms, the utilization of sound conservation principles in allocating coastal zone resources and the avoidance of irreversible commitments of coastal zone resources.<sup>130</sup>

As previously mentioned, the initiative establishes a system of interim permit controls to be operative until the coastal zone initiative terminates after the adjournment of the 1976 Legislature. The permit area is that portion of the coastal zone lying between the seaward limit of the jurisdiction of the State and 1,000 yards landward from the mean high tide line, subject to the exclusion of certain land in the San Francisco area.<sup>131</sup> While the ultimate definition of mean high tide line, and thus, the precise location of the landward boundary of the permit area, will undoubtedly be subject to further refinement through Attorney General's opinions and court cases, this issue is not of immediate concern to this article. Rather, the focus here is on those sections of the Coastal Zone Initiative that define the situations in which permits are to be approved or denied within the permit area as it is eventually defined. The key provision for this purpose is the section which states:

No permit shall be issued unless the regional commission has first found both of the following:

- (a) That the development will not have any substantial adverse environmental or ecological effect.
- (b) That the development is consistent with, the findings and declarations set forth in Sections 27001 and with the objectives set forth in Section 27302.

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129. CAL. PUB. RES. CODE § 27001 (West Supp. 1973).

130. CAL. PUB. RES. CODE § 27302 (West Supp. 1973).

131. There is also an extension of the permit area to include a 1,000 foot strip of land surrounding any non-tidal body of water which lies partially within the permit area. Certain stabilized and developed areas are excluded, as well as other limitations not important for our purposes. CAL. PUB. RES. CODE § 27104 (West Supp. 1973).

The applicant shall have the burden of proof on all issues.<sup>132</sup>

The permits referred to are those which pertain to "any development within the permit area."<sup>133</sup> Normally, a majority vote of the regional commission is required for permit approval, but the affirmative vote of two-thirds of the regional commission is required for certain developments<sup>134</sup> including: alterations in any bay, estuary, salt marsh, river mouth, slough or lagoon; developments on any beach or other areas usable for public recreation; any developments which would reduce or impose restrictions upon public access to tidal and submerged lands, beaches and the mean high tide line where there is no beach; development which would substantially interfere with or detract from the line of sight toward the sea from the state highway nearest the coast; or any development which would adversely affect water quality, existing areas of open water free of visible structures, existing and potential commercial fisheries, or agricultural uses of land which are existing on the effective date of this division.<sup>135</sup>

It is important to note that the development for which permits must be obtained is defined in a very comprehensive manner and includes almost any kind of building within the area, with some exceptions for relatively minor improvements or repairs of existing structures.<sup>136</sup> The list of items requiring two-thirds vote of the regional commission demonstrates that the Initiative is directed at environmentally sensitive land use decisions. This is even more dramatically demonstrated by the express provision requiring denial unless certain findings are made.<sup>137</sup>

Permit denial is required upon the finding of adverse environmental consequences, demonstrating that the Initiative reflects many of the identical policies expressed by CEQA. A combination of the strong environmental orientation of the policy and plan provisions, as well as the permit provisions, could support a dramatic use of the Coastal Zone Initiative comparable to the federal use of NEPA and California's initial use of CEQA.<sup>138</sup> The relevant in-

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132. CAL. PUB. RES. CODE § 27402 (West Supp. 1973); *see also*, text accompanying notes 129 and 130 *supra*, discussing CAL. PUB. RES. CODE §§ 27001, 27302 (West Supp. 1973).

133. CAL. PUB. RES. CODE § 27400 (West Supp. 1973). *See also*, CAL. PUB. RES. CODE § 27103 which defines "development".

134. CAL. PUB. RES. CODE §§ 27400, 27401 (West Supp. 1973).

135. CAL. PUB. RES. CODE § 27401 (West Supp. 1973).

136. CAL. PUB. RES. CODE § 27405 (West Supp. 1973).

137. *See*, note 132 *supra*, concerning CAL. PUB. RES. CODE § 27402 (West Supp. 1973).

138. *See*, *Friends of Mammoth v. Bd. of Supervisors of Mono County*, 8

quiry then becomes whether the Coastal Zone Conservation Act alone, or a combination of the Act and CEQA, provide an adequate basis for substantive review of permit approval by courts. The answer depends upon the applicability of CEQA to the Coastal Zone Initiative, as well as a more extensive analysis of the Initiative itself.

*B. CEQA and the Coastal Zone Initiative—A Basis for Judicial Review*

Ascertaining whether CEQA is applicable to the commissions created by the Coastal Zone Initiative is not without difficulty. The initiative power is derived from the Constitution.<sup>139</sup> An initiative is superior to any subsequent legislation in that it can only be changed by initiative unless a provision for legislative change is included.<sup>140</sup> As a matter of fact, the Coastal Zone Initiative provides for legislative change, but only by two-thirds vote of the Legislature, and only to better effectuate the objectives of Sections 27001 and 27302.<sup>141</sup>

Although CEQA had been effective for some time, no reference to it is made in the Initiative. In addition, CEQA was substantially expanded after the electorate had approved the Initiative, thus raising the problem of whether CEQA is "prior" or "subsequent" legislation. If CEQA applies to the Coastal Zone Initiative, does it effect changes in the latter thus requiring a two-thirds vote? One can speculate on the sequence of events giving rise to this confusion. The Legislature passed CEQA which most persons believed applied only to public governmental projects. Thus, the drafters of the Initiative may have omitted any reference to CEQA since the latter would include coastal public development and the former would cover private projects. *Friends of Mammoth* was decided on September 21, 1972 and modified on November 6, 1972

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Cal. 3d 1, as modified at 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972), 4 ERC 1593, as modified at 4 ERC 1705; *County of Inyo v. Yorty*, — Cal. App. 3d —, 108 Cal. Rptr. 377 (1973), and the discussion in Sec. II, *supra*.

139. CAL. CONST., art. 4, § 1.

140. CAL. CONST., art. 4, § 24(c).

141. Coastal Zone Conservation Act of 1972, § 5 quoted at CAL. PUB. RES. CODE § 27000 (West Supp. 1973); see also, text accompanying notes 129 and 130 *supra*, discussing CAL. PUB. RES. CODE §§ 27001, 27302 (West Supp. 1973).

and extended CEQA's applicability to private projects. The next day the Coastal Zone Initiative was approved by the voters.<sup>142</sup> Then, in response to the court's decision in *Friends of Mammoth* the Legislature substantially expanded CEQA. In so doing, it appears that the California Legislature perceived CEQA as applying to the regional commissions since it provided that where a conflict between CEQA and the Initiative arises, the coastal initiative shall control.<sup>143</sup> However, as will be pointed out in more detail later, the guidelines implementing the Initiative make no reference to CEQA nor do they expressly require an EIR.

Whether the courts will decide that CEQA should apply to the Coastal Zone permit procedure is, of course, unknown. However, there are strong reasons to support the thesis that CEQA and its reporting process do apply. First, CEQA is literally made applicable to the coastal commissions. CEQA provides that "(a) . . . boards and commissions shall prepare, or cause to be prepared by contract, and certify the completion of an environmental impact report on any project they . . . approve which may have a significant effect on the environment."<sup>144</sup> The unanswered question is whether this provision of CEQA was prior or subsequent to the Initiative and, thus, whether it applies to this particular commission. If CEQA applies by its own terms, the question becomes whether or not its provisions are consistent or inconsistent with provisions of the Coastal Zone Conservation Act.

The very extensive parallelism of the policies expressed by both statutes lends credence to the assertion that they are consistent. Even though the Coastal Zone Initiative is aimed primarily at the

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142. The determination of legislative intent for an initiative is essentially different than for other legislation. In the latter case, there is a recognized system, including committee reports and legislative hearings, which is relied on by the legislators for detailed and precise interpretation of the sponsor's intent. In contrast, the intent of the drafters of an initiative is not necessarily the intent of those citizens voting on the bill. If there is any external legislative intent to an initiative, it would seem to be the material supplied to all the voters as part of the initiative process. In the case of the Coastal Zone Initiative, these materials, including the analysis of the legislative council, the cost analysis of the legislative analyst, and the arguments for and against the proposition as well as the rebuttals thereto, say nothing one way or the other about the applicability of CEQA. See, Proposed Amendments to Constitution, Propositions and Proposed Laws Together with Arguments, General Election, Tue. Nov. 7, 1972, compiled by George H. Murphy, Legislative Counsel, and distributed by Edmond G. Brown, Jr., Secretary of State.

143. CAL. PUB. RES. CODE § 21174 (West Supp. 1973), added by Stats. 1972, ch. 1154, p. —, § 16, urgency, eff. Dec. 5, 1972.

144. CAL. PUB. RES. CODE § 21100 (West Supp. 1973).

natural resources of the coast,<sup>145</sup> both Acts express a similar concern with the ecological balance, the enjoyment and protection of natural resources, the protection of wildlife, the need for preservation of the environment, the responsibilities to present and future generations, the need to protect public health, safety and welfare, the need for understanding environmental problems, management needs and the necessity of coordination among government agencies.

In addition, both Acts contain provisions requiring a large measure of public input. The Initiative requires public hearings both when permit applications and when the various elements of the coastal conservation plan are considered. While CEQA does not expressly require public hearings, the guidelines require all agencies preparing EIR's to allow for public input in the reporting process.<sup>146</sup> Thus, both Acts express strong environmental concern and attempt to provide for large injections of citizen and expert participation in their decisional processes. However, even though the environmental philosophies of both Acts are similar, each has an essentially different emphasis and, thus, they may be inconsistent. When it comes to implementation of the philosophies, different behavior is mandated under each act. CEQA, as has already been pointed out, is an attempt to provide full disclosure of all significant environmental impacts of proposed projects.<sup>147</sup> A careful balancing of these impacts and weighing of alternatives is required.<sup>148</sup> The coastal commissions, on the other hand, are charged with an affirmative duty to protect the coastal zone from development that would have an adverse environmental or ecological effect on coastal resources. The permit system mandates denial, not discussion, if a significant adverse environmental impact would result.<sup>149</sup>

Thus, when a city agency, for instance, prepares an environmental impact report, it is under an obligation to include all adverse

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145. Compare, CAL. PUB. RES. CODE §§ 27001, 27302 (West Supp. 1973) with CAL. PUB. RES. CODE §§ 21000, 21001 (West Supp. 1973).

146. Compare, CAL. PUB. RES. CODE §§ 27420(b), 27320(b) (West Supp. 1973) with, CEQA GUIDELINES § 15164.

147. See, text accompanying Sec. II, *supra*.

148. See, text accompanying note 84 *supra*.

149. CAL. PUB. RES. CODE § 27402 (West Supp. 1973).

and favorable environmental impacts;<sup>150</sup> and it has a responsibility on the face of the report to articulate a balancing process which shows the tradeoffs. The city is in a position to effectuate a good faith compliance with the environmental impact report process by showing, on the one hand, that there may be adverse impact upon, for example, wildlife or vegetation or some other natural resource, but to say at the same time there is a need for further housing, for jobs, etc. After this balancing, it might be completely appropriate to go ahead and issue the permit.<sup>151</sup> However, the regional commissions have a more limited call, in that, given a showing of adverse effect, they simply must deny the permit. Thus, the balancing aspect of the EIR is not really appropriate to the regional commissions, but certainly the fact finding and reporting part of the EIR process is extremely important to them.

Another distinction can be made here. The Coastal Zone Commission has an environmental responsibility to the natural resources of the coastline as such. However, the environmental impact report responsibility extends to such things as the growth inducing impact of the proposed project.<sup>152</sup> Insofar as the general EIR process deals with the effect of population upon the environment, the Coastal Zone Commission may be less concerned with that particular part of the EIR process. The part that is of concern to the Commission is the part that relates to the sandy beaches, the rocky beaches, the cliffs, the purity of water along the coast, the preservation of wildlife habitat, the preservation of vegetation that is peculiar to the coast, etc. This is a slightly more limited call and would cause the Coastal Zone Commission to be interested in a slightly different EIR.

In addition, there is a distinction in the jurisdictions of the coastal commissions and that of the agencies reporting under CEQA. The commissions cut across land which may be under the immediate regulatory supervision of one or more counties, one or more relatively large cities, and some very small communities. In some communities the EIR process may not be very refined or efficient. The regional commissions, however, are only six in number and each commission has a responsibility for a very long expanse of coastline. From this point of view, the EIR of the commissions should be expected to take into account the impact of a proposed development up and down the coastline, and perhaps

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150. See text accompanying notes 64-69 *supra*.

151. Unless, of course, A.B. 1301 mandates denial. See generally, Sec. III, *supra*.

152. CAL. PUB. RES. CODE § 21100 (a) (West Supp. 1973).

even upon the entire coast of California. The review process at least should have a statewide perspective. This suggests that the environmental interests considered in some locally prepared EIRs might be narrower in scope of environmental interests than those which the regional commissions were designed to protect.

A final problem in arguing that CEQA applies to the coastal commissions is that the preparation of the EIR is charged to a "lead agency." The lead agency is supposed to be the agency with ". . . the principle responsibility for carrying out or approving a project. . . ." <sup>153</sup> The lead agency concept as it is derived under NEPA is based primarily upon the assumption that a variety of governmental agencies is interested in the project, but that only one is actually carrying it out. <sup>154</sup> But in the present situation the decision by a city to approve a zoning change within the jurisdiction of a regional commission, for example, is essentially an independent and complete regulatory responsibility as far as the city is concerned. When the commission is called into the act, it makes an independent judgment about the specific permit which is requested. It is not a question of a single agency carrying out a project, nor is there any really clear way of determining the agency with the principal responsibility.

Of course, one could argue that the regional commissions are the entities which have the stronger responsibility in the environmental area in view of the fact that their role is essentially an environmental protection responsibility. Thus, their powers are solely directed at preserving the environment and in regard to that role and its interrelationship with the EIR process, the commissions are the more significant agency. This argument is even stronger when one realizes that local government agencies already had the power to effectuate many of the policies expressed by the Coastal Initiative. The implication is that the electorate was not fully satisfied with the diversity of results that came from a large number of different governmental entities along the coastline. Thus, by establishing six region-wide commissions and giving them relatively absolute power, it appears that they do have the primary responsibility for approving development which may

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153. CEQA GUIDELINES § 15030.

154. See, text accompanying notes 58-63 *supra*.



have a significant impact upon the environment in the permit area. The inconsistencies outlined above indicate that the lead agency concept in this particular situation may be unworkable and inappropriate.

The philosophical consistency of CEQA and the Coastal Zone Conservation Act, on the one hand, compared with the lack of clearly articulated intent that CEQA apply and other problems discussed above result in an impasse. It is this writer's belief that a court case will be required to resolve the problem of the applicability of CEQA to the coastal commissions. In fact, it appears that as of this writing the question has been finessed by those responsible for the procedural implementation of the Coastal Initiative.<sup>155</sup> Until the question of the applicability of CEQA is answered, a combination of the strong policies of the Initiative and staff reports prepared for the regional commissions represent the basis for judicial review of permit approval. It is to these reports and policies that we now turn in order to ascertain the nature of the information they provide for commission findings and judicial review.

The interim regulations for the regional and state commissions make only one specific reference to environmental impact reports when they ask each permit applicant: "has an environmental impact statement (sic) been prepared for the project? If so, attach a copy to this application. If not, please so indicate."<sup>156</sup> The regulations themselves do not reflect the aura of strong environmental protection that is found in the basic Act. However, they do point out that the regulations are not an attempt to reproduce the definitions and policies of the provisions found in the Act.<sup>157</sup> When the interim regulations and the permit application are reviewed in some detail, it seems that the authors intended to provide a relatively summary reporting procedure which would bear no relationship to CEQA as it is actually supposed to be carried out.

The permit application itself mirrors much of the language of the Coastal Initiative. There are a series of questions apparently designed to ascertain whether the applicant feels his project is a

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155. See, text accompanying notes 160-161 *infra*.

156. Coastal Zone Conservation Commission, Application For Permit, § 6, par. 23.

157. Interim Regulations, California Coastal Zone Conservation Commission and Regional Commissions, chapter 1, art. 1, par. 1 (hereinafter cited as INTERIM REGULATIONS).

majority vote or two-thirds vote project.<sup>158</sup> Another section of the application, reflecting the Act's requirement that the commissioners find that no substantial adverse environmental or ecological effect will result from the development, reproduces the policy sections of the Act and asks the applicant whether his project will be consistent with these requirements.<sup>159</sup>

The Coastal Zone Initiative reporting is accomplished in part by provisions which require that the filed application shall be fairly summarized, presenting the applicant's views and including the staff recommendation.<sup>160</sup> Moreover, communications received from other persons are to be available in the commission offices and are to be distributed to all commission members.<sup>161</sup> If there is a sizable number of similar communications, they need not be reproduced and may be distributed to the commissioners in the form of a list of all persons who have sent similar communications along with the substance of the communications.<sup>162</sup> Certainly this makes available the type of data found within an EIR that would be available from the applicant and from citizens' groups. However, the regulations do not call for contributions from all interested governmental entities nor do they require the kind of staff review or comprehensive inclusion made necessary under CEQA. In short, the permit application and regulations elicit some of the same information that would be contained in an EIR, but they do not carry the same kind of mandate to search out information.

Following public hearings with an opportunity for everyone to be heard, a staff report is to be prepared by the executive director.<sup>163</sup> The regulations governing the staff report are relatively simple and, again, do not carry with them the mandate for a broad inclusion as is found under CEQA. There is a requirement that the executive director recommend whether the regional commis-

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158. Coastal Zone Conservation Commission, Application For Permit, § III. See also, note 135 *supra*, concerning CAL. PUB. RES. CODE § 27401 (West Supp. 1973).

159. Coastal Zone Conservation Commission, Application For Permit, Section V.

160. INTERIM REGULATIONS, Article 7.

161. INTERIM REGULATIONS, § 280.

162. INTERIM REGULATIONS, § 281.

163. INTERIM REGULATIONS, § 310.

sion should approve the project or not.<sup>164</sup> When all is said and done, the regulations provide an alternative system to reporting by the public, the staff, and the applicant. But, they do not begin to provide a basis for the equivalent of an EIR or EIS as discussed earlier. Thus, the staff reports and recommendations, the information produced by the hearings, and presumably any independently produced EIR provides the basis for the commissioners' required findings of fact prior to permit approval. This information in turn represents the central body of information upon which a court would have to rely when engaging in any substantive review of contested permit approvals.

### C. *Judicial Review of Contested Coastal Zone Permits*

The Coastal Zone Initiative created six regional commissions and one state-wide commission with reviewing power over certain regional commission decisions.<sup>165</sup> The state commission may decline to review regional decisions that raise no substantial issues. Otherwise the "appeal" will be a *de novo* public hearing.<sup>166</sup> The regulations set forth some of the matters which may be considered substantial, including whether the project is a majority or two-thirds vote project and whether uniformity of precedent throughout the coastal zone is required or other "appropriate reasons."<sup>167</sup> The nature of issues that are deemed "substantial" will no doubt be refined over time. However, the question of permit approval or denial is certainly substantial, and this decision is central to both the permit process of the Coastal Zone Initiative and the thesis of this article.

The Initiative gives the right of appeal to any person aggrieved by approval of a permit.<sup>168</sup> This section of the Act states: "An applicant, or any person aggrieved *by approval* of a permit by the regional commission may appeal to the commission (emphasis added)," and seems to say that only project approvals can be appealed to the state commission. Such an interpretation creates an obvious equal protection argument on the part of permit seekers and is eliminated by the guidelines which state that an applicant aggrieved by denial or by approval may appeal.<sup>169</sup> The guidelines further provide that any person aggrieved by a decision of

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164. INTERIM REGULATIONS, § 310 (e).

165. CAL. PUB. RES. CODE § 27423 (a) (West Supp. 1973).

166. CAL. PUB. RES. CODE § 27423 (c) (West Supp. 1973).

167. INTERIM REGULATIONS, § 704.

168. CAL. PUB. RES. CODE § 27423 (a) (West Supp. 1973).

169. INTERIM REGULATIONS, § 700.

the regional or state commission shall have a right to judicial review.<sup>170</sup> Thus, the following procedural steps would occur prior to judicial review. First, a regional commission would approve or deny a permit. Following this, any person aggrieved by this grant or denial of permit would appeal to the state commission, and a new public hearing would take place. Only after a decision by the state commission not to reverse the regional commission's grant or denial of a permit, would judicial review follow.

An ancillary question that could be presented for judicial review is whether the project requires a majority or two-thirds vote. Depending upon the make-up of the regional commissions, this question could be crucial. While the Act requires each commissioner to be "exceptionally well qualified" to decide the environmental questions raised by permit applications,<sup>171</sup> the Act in no way requires each commissioner to have a marked pro-environmental viewpoint. The practical result could very well be that regional commissions could be somewhat equally divided between individuals who, though well qualified, have a somewhat pro-development or pro-environmental viewpoint. This would mean that an applicant could be virtually assured of approval if his development were a majority vote project, but substantially less sure of approval if it were a two-thirds vote project.

Thus, the factual question of whether, for instance, a proposed development would reduce the size of a beach or would impose restrictions upon public access to tidal lands<sup>172</sup> would determine the vote required for project approval and, as discussed, could be the most critical factor affecting ultimate project approval. The criteria for determining whether a project is one that requires two-thirds vote are reasonably well-defined and unambiguous.<sup>173</sup> They actually represent quite narrowly defined factual issues such as what is a "beach," or what is a "tideland." These decisions probably can be made at the staff level. However, the Interim Regulations describe them as possible "substantial issues" which can be appealed to the state commission.<sup>174</sup> Because these issues

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170. CAL. PUB. RES. CODE § 27424 (West Supp. 1973).

171. CAL. PUB. RES. CODE § 27220 (West Supp. 1973).

172. See, CAL. PUB. RES. CODE § 27401 (West Supp. 1973), and text accompanying note 135 *supra*.

173. CAL. PUB. RES. CODE § 27401 (West Supp. 1973).

174. INTERIM REGULATIONS, § 704.

are narrowly defined by the Act, and because they involve environmentally sensitive areas, they seem readily susceptible to the type of judicial review suggested here. For example, suppose a staff report on a project recognized a potential decrease in the size of a public beach or substantial public input in the staff report or an EIR disclosed such a diminution, and the regional commission determined the project to be one requiring a majority rather than a two-thirds vote for approval. It would, in the spirit of relaxed review previously noted under NEPA, be relatively easy for a court under CEQA to find an abuse of discretion because of the inconsistency. If there is inconsistency between the information submitted to the commission and the decision made by them, are there situations where denial of a permit is mandated?<sup>175</sup> Assuming that a person aggrieved by project approval appealed to the state commission which upheld the decision made at the regional level, the next step is judicial challenge of the permit approval. The questions presented by such judicial challenge, consistent with the thesis of this article, are whether the regional and state commissions abused their discretion in granting the permit. The precise issues are whether it is an abuse of discretion to find that the proposed project (1) does not have any substantial adverse environmental or ecological effect<sup>176</sup> or (2) is consistent with the findings and declarations of § 27001 and with the objectives of § 27302.<sup>177</sup>

As with judicial review under A.B. 1301, at present the scope of review of commission decisions under the Coastal Initiative is not clear. It has been suggested herein that the combination of CEQA and A.B. 1301 as applied to subdivisions would permit court review on the question of adverse environmental impact which if answered affirmatively would lead to a mandated denial. Thus, if reports, an EIR or any other available information, disclose adverse environmental or ecological effect, or if inconsistencies between the policy sections of CZCA and the proposed development are demonstrated, a court reviewing the project's approval could reverse because the blatant inconsistency is an abuse of discretion.

Judicial involvement under both NEPA and CEQA derives from the strong policy of the Acts, rather than an interpretation of precise definitions as to the courts' role. It was pointed out earlier<sup>178</sup>

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175. See text accompanying notes 122-26 for a similar analysis of A.B. 1301.

176. CAL. PUB. RES. CODE § 27402 (a) (West Supp. 1973).

177. CAL. PUB. RES. CODE § 27402 (b) (West Supp. 1973).

178. See, text accompanying notes 54-57 *supra*.

that the initial determination whether there is adverse environmental impact or not can be reviewed on the precise factual merits. More importantly, we saw that the EIR itself can be reviewed up to a point for factual accuracy. For the same reasons, if an EIR is not used, the staff report should be reviewed by the courts. Arguably an injunction could issue here as well—until an adequate staff report is prepared. The court would not be substituting its decision for that of a technically more able fact finder. Instead, because of the strong policy of the Coastal Initiative, it will be forcing the commission to make findings consistent with the facts and information disclosed by the very processes that were statutorily executed to aid them.

The analysis in this article, up to this point, leads up to the final issue. Assuming that courts do respond strongly in this area, and force denial of environmentally sensitive projects, does this denial interfere with constitutionally protected property rights? In environmentally sensitive areas such as lagoons, rocky or sandy beaches, bluffs and other areas the situation may be such that denial of a particular permit is effectively a denial of any substantial development at all. That leads directly to the question of whether or not the use of the Coastal Zone Initiative or A.B. 1301 to deny a permit, in these circumstances, constitutes inverse condemnation so that compensation must be paid.

#### V. PRIVATE PROPERTY AND THE ENVIRONMENT

Our nation started as a nation of individual freeholders, adhering to a free market and private enterprise acknowledging little governmental control of land use.<sup>179</sup> The history of land use regulation is replete with examples of the courts saying that one is absolutely entitled to make some reasonable economic use of property, and that a regulation that prohibits all use demands either compensation or removal of the regulation. For example, where land is zoned exclusively for industrial purposes for which there is no demand over a long period, and there is a reasonable zoning alternative, the owner's ability to obtain a return on his investment is unconstitutionally curtailed.<sup>180</sup> Where the zoning in an

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179. DELAFONS, *LAND USE CONTROLS IN THE UNITED STATES*, 18, 19 (2nd ed., 1969).

180. *Corthouts v. Newington*, 140 Conn. 284, 99 A.2d 112 (1953).

area is valid, but the general zoning imposes a unique hardship upon a particular parcel, many courts say that the grant of a variance, which conforms to the spirit of the zoning, is constitutionally mandated to assure some reasonable use of the land.<sup>181</sup> Where zoning is changed to leave nonconforming uses on the land, they can only be eliminated by direct payment or by an amortization schedule which gives the landowner a reasonable return on his investment.<sup>182</sup> If an attempt is made to impose exactions or dedications upon subdivisions, which makes it economically unfeasible to develop the land, the exactions are unconstitutional.<sup>183</sup> When a local government attempts to prohibit development in an area mapped for future streets which makes the balance of the parcel economically unusable, the restriction must be removed or it is an unconstitutional taking of private property by forcing a dedication under the guise of regulation.<sup>184</sup> Thus, there is strong historical support for the proposition that a landowner is entitled to use his property in some way which produces a reasonable economic return.

Among the examples cited above, in some instances the regulation is an adjunct of a future taking by governmental entities. Or, the regulation is unnecessarily harsh since an alternative use would allow a greater economic return to the landowner and be compatible with the general purpose of the questioned regulation. These cases fit within the traditional land use values of grid zoning and segregation of uses that have been prevalent since the early part of this century.<sup>185</sup> However, environmentally sensitive land use decisions assume that the existing natural condition of the property should be maintained for environmental reasons per se. The environmental reasons may vary from an objection to the direct destruction of a natural resource by a proposed use to the adverse effects which occur from small incremental changes in a number of parcels in an area which is environmentally sensitive. One house will not destroy a virgin and unique forest. But, a subdivision may, and therefore the first house may have to be prohibited. Or the environmental reason may be that the land in its natural state is part of an ecological cycle which will be disrupted if the one segment is interfered with.

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181. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW, § 106 (1971).

182. *E.g.*, see *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 274 P.2d 34 (1954).

183. HAGMAN, *supra* note 181, § 138.

184. *Id.*, § 150.

185. *See*, note 11 *supra*.

The advocates of environmentally sensitive land use may not want to make this land available to the public for its immediate or even future use. If there is a desire, for instance, for a public park, then compensation is probably warranted under all legal standards.<sup>186</sup> But, in many situations where environmentally sensitive land is involved, there is simply no alternative to leaving it in its natural state if the external adverse effects of intensive land use are to be avoided.

As discussed previously, A.B. 1301 and the Coastal Zone Initiative seemingly grant power to local agencies and commissions to prohibit any change adversely affecting environmentally sensitive lands. The dilemma, then, is to reconcile the very long tradition of police power theory allowing a reasonable use of private property, with grants of power that mandate restrictions upon any substantial change in the natural condition of that private property. A detailed analysis of all the interrelationships between the police power and the power of eminent domain is beyond the scope of this article. As has been pointed out elsewhere, distinctions in theory are made between the power of eminent domain where private property is taken for a public use and the police power where limitations are placed on the use of private property to prevent injury to others.

As mentioned previously the police power when applied to land use regulation is commonly limited in two ways: (1) the restrictions must be reasonably related to the health, safety or general welfare and (2) there must not be a taking accomplished under the guise of regulation. Environmentally sensitive land use regulation probably is reasonable in the police power sense. The legislation discussed previously, the inclusion in the EIR of the reasons for the decision to regulate and the mandate given to deny permits are strong presumptive evidence of that reasonableness.<sup>187</sup>

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186. For a summary of various views that have been advanced see, HAGMAN, *supra* note 181, §§ 180, 181 (1971). See also, Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 148 (1971).

187. A second argument for sustaining permit denial arises under the Coastal Zone Initiative. This permit power lasts only until a general coastline plan is submitted to the Legislature on the 91st day after the final adjournment of the 1976 Regular Session. CAL. PUB. RES. CODE § 27650 (West Supp. 1973). There is precedence in California for moratoria on permit issuance pending adoption of plans which are actively being de-



The resolution of the "taking" question is more complicated since that term appears in the lore of both eminent domain and police power.

The "taking" limitation on the police power, has two possible meanings. One is that the police power cannot be used to accomplish indirectly what is actually the equivalent of a dedication of land for public use. The other is that a landowner has a right to a minimum use of his property including some economic return upon his investment in the land. Where landowners have successfully argued the latter they usually were in situations where the prohibition is an unreasonable regulation because there is an alternative use, being sought by the landowner, which is equally compatible with the purposes of the land use regulation. It is this meaning which applies to environmentally sensitive land use since by definition there is no dedication to public use, but rather a restriction to avoid adverse effects on the natural environment.

However, various attempts to restrict environmentally sensitive land use could fail because a court determines that the particular parcel of land is inappropriate for the restrictions imposed, that is, it is not environmentally sensitive. Although the thesis here is that the restrictions on environmentally sensitive land are reasonable under the police power, no court has so held and the regulations might fail in principle as well. If the regulations are deemed invalid as applied or in principle, the question then becomes one of what remedy is available. Whether the regulation is simply to be voided or payment for deprivation of use value is to be made depends on how inverse condemnation is analyzed in comparison with eminent domain and the exercise of the police power.

The generally accepted meaning of eminent domain is that the state instigates the action in eminent domain, while the landowner brings the action for inverse condemnation when he believes that the state has, in fact, taken his land via eminent do-

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vised. CAL. GOV. CODE § 65858 (West Supp. 1973); *Miller v. Bd. of Pub. Works*, 195 Cal. 477, 234 P. 381 (1925); *Metro Realty v. County of El Dorado*, 222 Cal. App. 2d 508, 35 Cal. Rptr. 480 (1963). While the time interval from the initiating and terminating dates of the Commission's permit power is longer than the statutory time limits, the previous discussion of the role of an initiative suggests it may be superior to the statute. Moreover, the coastline plan is unique in its scope so maximum planning time is required. Finally, the degrading of the coastline by permits causes an irretrievable loss. Even though not expressly a moratorium initiative, the rationale for sustaining permit restrictions during planning applies. The courts should accept denials or restrictions during the planning stage which it would not accept permanently.

main without payment. Both actions involve a permanent physical invasion of the property in question, and are distinguishable only on the basis of who commences the legal action. Some commentators, especially where constitutional language includes both taking *and* damaging as a basis for eminent domain,<sup>188</sup> have questioned whether an unconstitutional regulation might also be the basis for a successful inverse condemnation suit.<sup>189</sup> However, there is little law to that effect, and "damages" can best be explained when applied to the taking of traditional property rights such as access,<sup>190</sup> lateral support,<sup>191</sup> or interference by public facilities with the use of private property.<sup>192</sup>

The cases discussed here<sup>193</sup> demonstrate that in environmental decisions a rationale suggesting that a decrease in the economic value of the land is not a critical consideration is appropriate. Moreover, even where the regulation is deemed constitutionally invalid because it results in a "taking" in the over-regulation sense, the regulation should be declared invalid and issuance of the permit should be mandated or the case should be remanded until the regulation is constitutionally drafted or applied. Certainly this has been the remedy in other situations when zoning has been declared invalid.<sup>194</sup>

In practice, the threat of successful inverse condemnation suits could inhibit the decision maker in achieving the greatest benefit to the public health, safety and welfare. Moreover, the decision maker would be unable to weigh all the costs, including those to taxpayers, before making the decision on whether or not to con-

188. Both terms are used in CAL. CONST. art. 1, § 14.

189. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* 624 (2d ed., 1971); see also, Beuscher, *Some Tentative Notes on The Integration of Police Power and Eminent Domain By the Courts: So-Called Inverse or Reverse Condemnation*, 1968 URBAN L. ANN. 1.

190. NICHOLS ON EMINENT DOMAIN, § 6.32 (3d ed. 1970).

191. *Id.*, at § 6.4441(6).

192. See, text accompanying notes 185 and 186 *supra*.

193. Particularly relevant are those in notes 208 and 209 as well as cases effecting great economic loss such as *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), (\$800,000 vs. \$60,000 as zoned); *Lockard v. City of Los Angeles*, 33 Cal. 2d 453, 202 P.2d 38 (1949) (worth four times more if rezoned).

194. *E.g.*, see, *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, 327 P.2d 10 (1958), and the cases discussed in HAGMAN, *supra* note 181, § 119 (1971).

demn. Finally, this type of municipal regulation usually is discretionary and thus the governmental body<sup>195</sup> and the individual decision maker<sup>196</sup> are both immune from tort liability. These immunities are designed to assure freedom of action in exercising legislative discretion and to place the primary responsibility for political decision upon the political processes.<sup>197</sup> Inverse condemnation liability would undermine this freedom whereas, court ordered granting of permits would not.

Moreover, no California case has been found where inverse condemnation arises solely out of a regulation of private use. Rather the taking occurs directly or indirectly from traditional public uses under the aegis of government. The classic cases in this regard include the successful inverse condemnation cases involving airports where there are restrictive height limitations to facilitate flying. Thus, the airplanes can be characterized as physically invading the landowner's airspace and there is more involved than mere regulation of land use.<sup>198</sup> Even where the cause of action is successfully couched in terms of nuisance or negligence, it is the manner of airport operation rather than land regulation which results in liability.<sup>199</sup>

Two additional cases help further to establish the California position vis-à-vis the relationship between eminent domain and the police power. In the first case, *Klopping v. City of Whittier*,<sup>200</sup> the action was one for inverse condemnation. The plaintiff had been notified of a proposed condemnation of his land and condemnation was in fact commenced. When the proposed assessment scheme to finance the acquisition was challenged by another plaintiff, the City of Whittier decided to abandon the condemnation proceedings, while giving notice that it would eventually sue again. The commencement of the original action caused plaintiffs an alleged loss of rents. Their theory was that the procedure used by the City was an unreasonable taking of the rental value and, thus, was properly the subject of inverse condemnation.

The California Supreme Court reversed the dismissal of one

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195. CAL. GOV. CODE § 818.2 (West 1966).

196. CAL. GOV. CODE § 821 (West Supp. 1973).

197. See, Law Revision Commission Comment to West's Ann. Cal. Gov. Code § 818.2 (West 1966); VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY, § 1.14 (C.E.B. 1964).

198. Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969).

199. Nestle v. City of Santa Monica, 6 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972).

200. 8 Cal. 2d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

plaintiff's action and remanded for a trial on the merits. The court held that the plaintiff or

condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value.<sup>201</sup>

This was clearly a case where the inverse condemnation occurred in connection with the city's plan to physically take the plaintiff's land and, thus, is not a regulation case, but a pre-condemnation case. The plaintiff that still owned the land at the time of the later completed condemnation action was denied recovery because his losses were to be recovered in that action.

The Court of Appeals opinion in the second case, *Selby Realty Co. v. City of San Buenaventura*,<sup>202</sup> has been vacated and a hearing granted,<sup>203</sup> but the implications for this article are sufficiently great to explore the issues it poses further. *Selby* was an action by a landowner for inverse condemnation, declaratory relief, damages and mandate which the trial court dismissed and *Selby Realty* appealed. The plaintiff had applied for a building permit to put a fifty-four unit apartment building on a 4.63 acre parcel which was part of a larger tract of 120 acres owned by the plaintiff both within and without the City. Because the planned unit development failed to provide for the extension of a street through the property, as mapped on the City's General Plan, the Planning Commission disapproved the project. The Court of Appeals noted that dedication of the street under the Subdivision Map Act was not in issue because the street in question was designed primarily to serve the general citizenry and not this particular development.<sup>204</sup> The Court pointed out that there was more than simply an announced intention to condemn as in *Klopping*, but an actual denial of a permit within the future street area

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201. *Id.* at 52, 500 P.2d at 1355, 104 Cal. Rptr. at 11.

202. 28 Cal. App. 3d 624, 104 Cal. Rptr. 866 (1972).

203. Although the opinion is a nullity in a technical sense, widespread interest justifies giving the issues it poses some consideration pending final disposition.

204. *Selby Realty, Inc. v. City of San Buenaventura*, 28 Cal. App. 3d 624, 104 Cal. Rptr. 866 (1972).

so that the denial was an effective taking of the right to use the property.

The classic legal theory for subdivision regulations as such is that forced dedications are constitutional where the subdivision creates the need for the dedication.<sup>205</sup> Moreover, the California case which permitted forced dedication absent a subdivision also involved a situation where the land use itself, at least in part, created the need for the dedication of land to widen the street since it would generate substantial truck traffic.<sup>206</sup> These cases each involve occupation by the public of the dedicated land in question and thus raise issues of taking by eminent domain rather than by regulation.

*Klopping* raises only an indirect, uncertain threat to the possibilities proposed in this article.<sup>207</sup> At most, it suggests that if a local agency or commission in applying A.B. 1301 or the Coastal Zone Initiative were to delay unreasonably in condemning or deciding on a permit, there might be liability for interim losses. If denial of a permit were eventually reversed and there were negligence in the original denial, interim losses might be recoverable. It in no way suggests, however, that the full value of the land as reduced by regulation is to be awarded in an action for inverse condemnation. If the result in *Selby* is sustained, it may be an extension of *Klopping* to a wide variety of situations where planning for a future physical invasion produces present economic detriment and results in present damages. But, even that result would occur only if a permit were specifically denied because of the plan for future condemnation for public use.

However, it should be reemphasized that in both *Klopping* and *Selby*, the damages are attributable to the fact that the public is eventually going to use the land. Thus, these two cases reflect the more traditional analysis, previously cited in examples, where there was an actual or prospective physical invasion of private property, rather than an over-zealous use of the police power. These cases arguably are not at all related to environmentally sensitive use of the police power, since even though the economic

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205. *Ayres v. City Council of City of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1 (1949).

206. *Southern Pacific Co. v. City of Los Angeles*, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1966).

207. The court in *Klopping* says that its conclusion is supported by CAL. CODE CIV. PRO. § 1243.1 (West 1972) which states that if a governmental entity decides by resolution or ordinance to acquire property by eminent domain and fails to initiate proceedings within six months, the landowner may bring suit.

consequences may be the same, the goal of protecting other property or general public rights from the adverse external impacts of the prohibited users is quite different. It is important, then, to turn to several other cases where the courts have reacted favorably to environmentally sensitive regulations which make it, in practice, impossible for a landowner to use his property in any economic way.

The first of these cases is *Consolidated Rock Products Co. v. City of Los Angeles*.<sup>208</sup> In that case, the land under consideration was 340 acres situated in a flood plain with a surface of rock, sand and gravel to a depth of approximately forty feet. The land was in the shape of a natural amphitheatre and was surrounded by a canyon, a national forest, a dam, hills, and high cliffs. As a practical matter, the only use that could be made of the land was for extraction of rock and gravel. The soil was unsuitable for other uses, there was a continuing flood problem, and the trial court found that any other use would be impossible. Moreover, the land was situated next to and below a residential development which the trial court found had a national reputation as a haven for sufferers from respiratory ailments and was inhabited by persons who found that area particularly desirable for that reason. The trial court further determined that use of the land for substantial rock, sand or gravel extraction would greatly interfere with the reputation of the area and the use presently being made by sufferers of respiratory ailments.

The Supreme Court held that the trial court had properly concluded that the landowner had no right to use his property as he had requested, even though denial of that use effectively deprived the landowner of *any* use of his property. Of course, it is possible to analyze *Consolidated Rock* as a very traditional case involving the abatement of a nuisance through use of the police power. However, the case can also be explained within the framework of environmentally sensitive land use regulation which results in the preservation of a natural environmental setting. The case is of great interest to this article because the court was sensitive to the air pollution problem that applied to the area, and because the court sustained a regulation even though it left the landowner with no economic use for his property.

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208. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962).

Another California case, *Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission*,<sup>200</sup> is of significance both because it is a case involving an environmentally sensitive area and because it arises under an act which established the San Francisco Bay Conservation and Development Commission (BCDC),<sup>210</sup> after which the Coastal Initiative was modeled.<sup>211</sup> The action sought review of BCDC's denial of a fill permit on plaintiff's land which was submerged at high tide by waters of the San Francisco Bay. Plaintiff's sole purpose in acquiring the land was to deposit fill from a construction project. The adjoining parcels were either filled or in the process of being filled, and plaintiff's land was non-navigable at high tide. There was a dispute between the plaintiff and BCDC as to whether any use could be made of the land other than that contemplated by the plaintiff. The plaintiff claimed that filling was the sole possible use, while the BCDC argued alternatives existed such as dredging or partial filling for some water related use.

While the opinion is directed primarily at questions of procedure and legislative interpretation, it finally discussed the question of whether or not the regulation constituted a taking demanding compensation, as plaintiff argued. Relying partly on *Consolidated Rock* and partly on another leading and strongly worded case supportive of the police power,<sup>212</sup> the court rather summarily supported the legislative determination of the regulation's wisdom and necessity. The court noted, as is so common in this type of case, that if the reasonableness of the regulation is debatable, the legislative determination will not be voided. The court displayed an understanding and recognition of the environmental sensitivity of land use decisions in the Bay area when it said:

. . . that the bay is the most valuable single natural resource of the entire region and changes in one part of the bay may also affect all other parts; that the present uncoordinated, haphazard manner in which the bay is being filled threatens the bay itself and is therefore inimical to the welfare of both present and future residents of the bay area; and that a regional approach is necessary to protect the public interest in the bay.<sup>213</sup>

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209. 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970), noted at 8 SAN DIEGO L. REV. 695 (1971).

210. CAL. GOV. CODE § 66600 *et seq.* (West Supp. 1972).

211. See, Baum & Jackson, *Regional Planning; the Coastal Zone Initiative Analyzed in Light of the B.C.D.C. Experience*, 47 CAL. STATE BAR J. 427 (1972).

212. See, *Miller v. Bd. of Pub. Works*, 195 Cal. 477, 234 P. 381 (1928).

213. *Candlestick Prop. Inc. v. San Francisco Bay C. & D. Comm'n*, 11 Cal. App. 3d 557, 571, 89 Cal. Rptr. 897, 905 (1970), 2 ERC 1075, 1081.

The court went on to suggest that the limitation, at least in part, was temporary since the BCDC had not yet fulfilled its mandate to plan development in the Bay Area.<sup>214</sup>

*Candlestick Properties* is very significant as it relates to the thesis of this article. The court's willingness to allow severe restrictions on land use through the police power to effectuate the environmental goals with which the BCDC was charged, again illustrates that the question of taking of private property involves more than simply whether or not the regulation causes a severe decrease in economic value.

Perhaps the most noteworthy aspect of the case is that it arose from legislation that is very analogous to the Coastal Zone Initiative, and thus, may represent a preview of decisions that could arise under the situations herein described. A synthesis of the holdings of *Candlestick Properties* and *Consolidated Rock* presents authority combining the strongly worded environmental goals of legislatively created agencies (BCDC) with severe restraints on the use of property in an environmentally insensitive manner even if that means that the landowner is severely limited in developing the economic potential of his land.

One must go outside California to find a single case that prohibits development of environmentally sensitive lands even though economic use of the private property is almost completely eliminated. A recent Wisconsin case, *Just v. Marinette County*,<sup>215</sup> will undoubtedly become one of the leading cases in the country concerning the interrelationship between environmental law and tra-

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214. It is interesting to note that some of the cases advanced by plaintiff in support of his argument that the permit denial constituted a taking were cases distinguished by the court as being flood plain zoning cases which arguably appropriated private property for open space. California now supports the concept of flood plain zoning and this may very well have minimized the impact of this language in *Candlestick Properties*. Flood plain zoning is, in a sense, environmentally sensitive, as it tends to require an owner to leave his property in its natural condition. Of course, it should be pointed out that the goal of flood plain zoning is not to preserve open space, but is primarily aimed at protecting persons and property from flood danger and, thus, fits more easily within traditional concepts of the police power. See, *Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972); see also Comment, *Flood Plain Zoning in California—Open Space by Another Name: Policy and Practicality*, 10 SAN DIEGO L. REV. 381 (1973).

215. 56 Wis. 2d 7, 201 N.W.2d 761 (1972), 4 ERC 1841.



ditional land use. Wisconsin has long been a leader in the protection of various kinds of water related natural resources and the regulation in question was adopted pursuant to the State's Water Resources Law,<sup>216</sup> designed to protect wetland resources. The statute so defined wetlands to include the property of the complaining landowner. The land had no navigable waters, but included areas of standing water and aquatic and non-aquatic plants. In order to make the land usable, the landowner had commenced to fill the property without obtaining the required permit. The regulation in question allowed uses that involved non-residential and non-permanent buildings, such as the harvesting of wild crops, placement of utility poles, hunting and fishing, hiking, bridle paths and similar non-intensive recreational uses. The court recognized that "[t]he real issue is whether the conservancy district provisions and the wetlands-filling restrictions are unconstitutional because they amount to a constructive taking of the Justs' land without compensation."<sup>217</sup> However, it became clear that the court's restating of the issues would place the case in a context which is unique to legal analysis. The court said:

To state the issue in more meaningful terms, it is a conflict between the public interest in stopping the despoilation of the natural resources, which our citizens until recently had taken as inevitable and for granted, and an owner's asserted right to use his property as he wishes. The protection of public rights may be accomplished by the exercise of the police power unless the damage to the property owner is too great and amounts to a confiscation. The securing or taking of a benefit not presently enjoyed by the public for its use is obtained by the government through its power of eminent domain. The distinction between the exercise of the police power and condemnation has been said to be a matter of degree of damage to the property owner. In the valid exercise of the police power reasonably restricting use of property, the damage suffered by the owner is said to be incidental. However, where the restriction is so great the landowner ought not to bear such a burden for the public good, the restriction has been held to be a constructive taking even though the actual use or forbidden use has not been transferred to the government so as to be a taking in a traditional sense.<sup>218</sup>

While this portion of the opinion clearly reflects a high degree of sensitivity toward the problem of protecting natural resources, it would seem to lead one to the conclusion that if the property has very little profitable use because of the regulation, there would be, in fact, a taking. However, the court went on from that point to equivocate, by acknowledging a difference between the

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216. Wis. Stat. Ann. §§ 59.971, 144.26 (Supp. 1973).

217. *Just v. Marinette County*, 56 Wis. 2d at —, 201 N.W.2d at 767, 4 ERC at 1843.

218. *Id.* at —, 201 N.W.2d at 767, 4 ERC at 1843-44.

creation of a public benefit and the prevention of a public harm by saying the latter is the proper function of the police power and the former is the function of eminent domain thus requiring compensation. The court recognized that, "[i]n the instant case we have a restriction on the use of a citizens' property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizens' property."<sup>219</sup>

The court was careful to point out the interrelationship between the wetlands, the swamps, the natural environment of the shore lands, the purity of water and natural resources such as navigation, fishing and scenic beauty. It recognized that the formerly unfavorable view of swamps and wetlands changed with the greater awareness of the vital role in nature between the various elements within an ecological system. The court made a subtle, but very important distinction when it said that the filling of wetlands, not otherwise commercially usable, is not in and of itself an existing use which is prevented, but rather such filling is the preparation of the land for some non-indigenous use. The court said that the plaintiffs have over-emphasized their right to change the land from commercially valueless land to something which is usable for commercial purposes. The court noted that the argument about the taking of value lies in the value that would exist if the plaintiffs were allowed to fill and not in the value as it presently then existed.<sup>220</sup> The statement from the case that will undoubtedly become a classic is:

An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think that it is not an unreasonable exercise of the police power to prevent harm to public rights by limiting the use of private property to its natural uses.<sup>221</sup>

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219. *Id.*

220. In upholding the regulation, the court cited numerous cases to the contrary, particularly in the Northeast. See, *State v. Johnson*, 265 A.2d 711 (Me. 1970) and *MacGibbon v. Bd. of Appeals of Duxbury*, 356 Mass. 635, 255 N.E.2d 347 (1970), concerning wetland zoning. See also, *Dooley v. Town Planning and Zoning Comm'n.*, 151 Conn. 304, 197 A.2d 770 (1964), and *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 40 N.J. 539, 193 A.2d 232 (1963) concerning flood plain zoning and flood detention basins.

221. *Just v. Marinette County*, 56 Wis. 2d at —, 201 N.W.2d at 768, 4 ERC at 1844. It is interesting to note that the natural use of land concept

*Just* also makes brief and not strongly analytical references to the public trust doctrine as it relates to navigable waters.<sup>222</sup> This article will not explore the potential for using that doctrine in conjunction with coastal zone lands or the subdivision regulations, insofar as they pertain to the coastline. Undoubtedly, efforts will be made to try to establish that land which was historically within the mean high tide line, or which would affect natural resources within the mean high tide line, should be protectable under a public trust doctrine which may serve to substantially restrict the uses which can be made by private owners of that land.<sup>223</sup>

While *Just* is the strongest environmentally oriented case to date, other than those arising under NEPA and CEQA, there are two additional cases that are noteworthy for their strong environmental sensitivity to land use regulations. The first is *Golden v. Planning Board of the Town of Ramapo*.<sup>224</sup> *Ramapo* dealt with the problem of the non-availability of community services. The court upheld the municipality's zoning that incorporated the phasing of growth over an eighteen year period. The justification for this phased growth was that various municipal services could not be conveniently and practically provided by the city unless such a phasing plan were implemented. The city had performed an extensive study and made long range plans for capital expansion in phases. The ordinance in question did provide that if the land developer supplied the necessary sewers, drainage facilities, public parks, public schools, roads and fire houses, development could in fact proceed ahead of the phasing plan. The implication of *Ramapo's* phased growth, in the context of this article, is that courts are becoming aware of the problems accompanying growth and development. Reasonable plans for orderly growth and minimal environmental damage are at the heart of both the Coastal Initiative and A.B. 1301.

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raised in *Just* could very well be traced to the historical case of *Rylands v. Fletcher*, 1868, L.R. 3 H.L. 330, and the distinctions therein whereby one who made an unnatural use of his land was deemed to be liable to third persons for any harm which that caused. Of course, in that case the unnatural use may very well have been an incompatibility or abnormality of use within the area rather than the use of land in a way other than that for which it was fit in its natural state. The debate has raged without resolution and could conceivably be raised again at this time.

222. 56 Wis. 2d at —, 201 N.W.2d at 768, 4 ERC at 1844.

223. See, Sax, *The Public Trust Doctrine on Natural Resource Law; Effective Judicial Intervention*, 68 MICH. L. REV. 471 at 524-544 (1970). See also, Note, *California's Tideland Trust: Shoring It Up*, 22 HASTINGS L.J. 759 (1971).

224. 30 N.Y.S.2d 359, 285 N.E.2d 291 (1972).

Another recent case, *Steel Hill Development v. San Bornton*,<sup>225</sup> illustrates a receptive judicial attitude to environmentally sensitive land use regulations. Here, the landowner had originally proposed a cluster development on land which at that time was zoned for three-quarter acre lots. The town, however, rezoned the land into three and six acre minimum lots, and placed the land into four conservation and agricultural zones. The Court of Appeals, cautioning against attempts directed solely at curtailing growth, was willing to sustain the three and six acre minimum lot zoning. The court did recognize that the effect of the decision would be to decrease considerably the value of the property, but pointed out that the land was not rendered valueless, and thus, did not accept the property owners' taking argument. The court, however, did recognize the environmental sensitivity of the area when it said:

The District Court found that, as the San Bornton Planning Board had itself determined, topography and soil conditions posed severe problems of pollution, improper sewage disposal, poor drainage and erosion to largescale developments of the Steel Hill tract, justifying imposition of the three-acre minimum lot size requirement in accordance with the public health. We have carefully read the conflicting trial testimony of the various experts who expressed an opinion on these matters and cannot say that the court's finding is clearly erroneous.<sup>226</sup>

The series of cases discussed in this section shows that any prohibition against development, or any other kind of denial of a permit will be carefully scrutinized to see if it is aimed at a legitimate legislative purpose. If the restriction is one limited in time, it will be sustainable for purposes of permitting more orderly growth and the phasing of development until municipal type services are acquired, as was illustrated in *Ramapo*. Environmentally sensitive goals arising from problems of sewage disposal and air pollution can be attained by large lot zoning, as illustrated in *Steel Hill*. However, if there are unavoidable adverse environmental consequences when the land is used in the only economically feasible way, as in *Consolidated Rock* or as suggested by the record in *Candlestick Park*, California courts appear willing to uphold regulations which prevent landowners from changing the natural con-

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225. 469 F.2d 959 (1st Cir. 1972), 4 ERC 1746.

226. *Id.* at 960, 4 ERC at 1747.

dition of their property. It is not much of an extension of these cases to suggest that California would accept the *Just* rationale and conclude that if an area in its natural state is environmentally sensitive—if it interrelates with other natural resources that are clearly within the public domain such as the beaches, the ocean resources, the navigable waters and so on—then, too, the restriction can be such that the land may produce little if any economic return. It should not be forgotten that the language of the California cases involving CEQA, *Friends of Mammoth*, the *Coastside Water District* and other cases suggest that California courts are indeed sympathetic to environmental needs.

## VI. WILL THIS PACKAGE WORK?

The theme of this article, centers around an admittedly fragile package involving a number of untested legal arguments that are in some instances speculative. First, California courts must be willing to accept a somewhat rigorous interpretation of CEQA similar to that given NEPA by the federal courts. Early indications, as evidenced by *Friends of Mammoth*, *Coastside County Water District*, and *County of Inyo*, suggest such a rigorous interpretation is, in fact, materializing.

The first step is to assure that the approving agency does not avoid its responsibilities by making a negative declaration and not preparing an EIR. Then, once an environmental impact report has been prepared by an agency, the means would be available to insure that the content of the EIR accurately reflects any adverse impact which may in fact occur. Assuming the EIR establishes adverse impact in the case of subdivisions under A.B. 1301, or once a combination of staff reports, evidence from public hearings and, if applicable, an EIR, demonstrate substantial adverse environmental effect under the Coastal Initiative, the next step is to insure conformity between these findings and those required by A.B. 1301 and the Initiative.

At this point, the respective bodies responsible under each of these legislative mandates must prohibit the proposed use and perhaps any use in the environmentally sensitive area. The extension of *Consolidated Rock* and *Candlestick Properties*, or acceptance of the rationale of *Just*, completes this fragile package. This last step serves to justify the restraint upon the use of environmentally sensitive property, and relieves local agencies from the problems of law suits seeking either to reverse decisions or to gain compensation due to alleged inverse condemnation. Much

emphasis is placed upon the question of compensation. This is because it is assumed that the amount of environmentally sensitive land in the coastal zone and other areas of the state, while a small percentage of total state land, is such that if compensation were required, it would be financially impossible to carry out the purpose of the legislation discussed here.

The next question is whether or not it is politically likely that this package can, in fact, be followed by decision makers without the need for lawsuits. It is this author's estimate that the likelihood of all existing political entities throughout the state following the route suggested by this article without either lawsuits, or at least threatened lawsuits, is unlikely. Of course, there is no available empirical data indicating whether decision makers are in fact willing to take the risk of making decisions against a landowner without the prodding of a threatened lawsuit commenced by parties philosophically aligned with strong environmental policy. This is especially true when there is a very substantial likelihood that the landowner himself will sue. This poses the attendant risk that the local governmental body may lose the suit and be forced to pay an inverse condemnation award, or to reverse its original decision. The suspicion here is that some decision makers are unwilling to take that political risk; others may articulate a belief that the restriction will be illegal as an unconstitutional regulation of private property to avoid taking the risk; still others may actually believe such action constitutes a taking. The question then is whether there are other actors within the system who can force these results if local decision makers are in fact, reluctant to impose the restrictions that are statutorily mandated.

The first person, or group of persons, who might be able to accomplish this result are government attorneys who directly advise the various decision making bodies. This group includes County Counsel, the City Attorney or the Attorney General in his advisory capacity with the coastal commission. This writer suspects that it may be difficult for the government attorney, even if convinced of the validity of these arguments, to follow through. It must be pointed out that these attorneys are essentially working with and for the local agencies and commissions they advise. The government attorney may be subject to the same kinds of political restraints as the decision makers themselves, for a lost lawsuit

runs the risk of lost votes if the attorney is elected, or jeopardized credibility if he is appointed. It is natural to expect that in most instances the government attorney will reflect the same views or will attempt to support the views of the individuals who comprise the agencies. Advocacy of a strong environmental position against a particular development or project in the face of an agency more inclined than not to grant permits might jeopardize the attorney's position with the legislative body or with the voters, depending on whether he is appointed or elected.

There are other substantial problems that a government attorney faces if he wants to follow through with this package. The entire process here is a complicated one, and it suggests that the government attorney will need to start working with an individual project and follow it through step by step to assure that the impact statement is made, that it accurately reflects the facts, etc. It is unlikely that a government attorney will have the time or resources to stick with a single project from its inception throughout the various decisional processes. Moreover, his relationship to planning processes may be such that he provides advice only at the final stages of a particular planning process. Perhaps of most importance, however, is the fact that the developer who is thus restrained inevitably has an economic interest in the matter that will justify large expenditures for attorney's fees. In fact, an individual developer may retain, for one project, a staff of attorneys larger in size than the city's entire legal staff. In a small city there may only be one part-time government attorney, and he may be pitted against a staff of attorneys which can spend its full-time on a particular problem. These are rather overwhelming odds, and it would not be surprising if this package simply is not put together or is fragmented. While the government attorney may give advice consistent with the theme of this article as to the individual parts, sooner or later some portion of it may break down.

Recent legislation suggests that the Attorney General, not in his advisory capacity to the coastal zone commission, but in his more general state-wide function, has the capability of following the route herein suggested. Article 8 of the Government Code entitled Environmental Actions,<sup>227</sup> grants power to the Attorney General to intervene in any judicial or administrative proceeding in which facts are alleged concerning adverse environmental effects which could affect the public generally.<sup>228</sup> The findings and

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227. CAL. GOV. CODE §§ 12600-12612 (West Supp. 1973), added by Stats. 1971, ch. 1518, p. 2994, § 3.

228. CAL. GOV. CODE § 12606 (West Supp. 1973).

declarations of this Act, in part, establish a state policy to conserve and protect California's natural resources.<sup>229</sup> Similarly, a recently enacted section of the Code of Civil Procedure requires that a party seeking relief from pollution or adverse environmental effects which could affect the public generally furnish a copy of the pleadings to the Attorney General.<sup>230</sup>

Thus, the Attorney General's office now has the authority to deal with environmental problems<sup>231</sup> in such a way that if the office or members of the staff become convinced that the rationale of this article is sound, and if they can obtain the authority to proceed, they could follow a particularly sensitive project step by step through the process. They could, thus, become aware of events in a particular community or within the jurisdiction of one of the regional coastal commissions with potential environmental effect, such as filling a lagoon. With their knowledge of these potential harms to sensitive areas, they will not be subject to the resource limitations of individual representatives of the Attorney General acting in an advisory capacity, or the limitations of other government attorneys. The Attorney General can then proceed step by step to follow particularly sensitive developments through the decision process, and ultimately establish the test case on the question of whether or not the package fits together well.

Other groups that can test this package are environmentally oriented citizen groups, either local or more broadly based city-wide, state-wide or nation-wide groups. Some of these groups, particularly the ones with a state or nation-wide membership, in fact, have the resources to carry through with a well researched test case or cases. These broader based organizations such as the Sierra Club or the Environmental Defense Fund have spent much of their efforts dealing with NEPA. However, they certainly have the potential to become involved in the private development decision making process, especially when it is recognized that an individual suit directly affecting only a small parcel of property can greatly affect land use decisions throughout the state.

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229. CAL. GOV. CODE § 12600 (West Supp. 1973).

230. CAL. CODE OF CIVIL PRO. § 389.6 (West Supp. 1973), added by Stats. 1971, ch. 1518, p. 2993, § 1.

231. The Attorney General's Office has acted under this authority as a participant in Friends of Mammoth, Coastside County Water District, and Desert Environmental Conservation Association.



Having suggested a strong, environmentally sensitive package that arguably limits the broad discretion of local land use decision makers is not to say that the result of this package would necessarily be correct from an environmental policy point of view. Perhaps no person or small group of persons is capable of saying what ought to be the relationship between land use and the public interest in the environment and what ought to be the limits upon regulation which are imposed by the constitutional importance of the concept of private property. There is certainly a need for more careful considerations of the reverberations, economic and otherwise, resulting from following an avenue such as the one suggested. Although local decision makers at times do not reflect such policies, there is no room for doubting that both A.B. 1301 and the Coastal Zone Initiative reflect a legislative and popular desire that some natural resources be protected absolutely, and that some adverse environmental impacts be avoided completely. Apparently effectuating this policy is seen as the only way in which to provide for the long-range protection of the environment, and the fullest utilization of the State's natural resources. This environmentally sensitive package involving NEPA to CEQA, through A.B. 1301 and the Coastal Zone Initiative, by way of *Just*, if tested step by step in the courts, would permit a clear cut and precise review of the land use decision process and provide a clear understanding of the limits of environmental protection in California. The package is fragile, but the costs of rejecting it are arguably high.