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CALIFORNIA'S HOUSING ELEMENT GUIDELINES AND THE HOUSING CRISIS

California and the rest of the nation are currently in the throes of a housing crisis of staggering proportion. There is a serious shortage of housing available to the poor,¹ and existing housing is rapidly escalating in price.² The immediate causes³ of this crisis are the failure of the private sector⁴ and the federal government⁵ to make sufficient capital available for the develop-

1. As of July, 1978, 1,925,000 lower income California households were paying more than 25% of their income for housing, and over the next five years 1,450,000 units (290,000/yr.) must be built to meet existing and projected needs. Moreover, 425,000 households currently live in over-crowded conditions (5% of all households) and 350,000 housing units need to be replaced (4% of all units). Cal. State Dept. of Housing and Community Development, 1979 update to the California Statewide Housing Plan of 1977, 73-77 (Oct. 5, 1979) [hereinafter cited as Housing Plan Update].

2. The cost of purchasing a home is increasing phenomenally. As of September, 1978, the average price of a home in California was \$72,745 while the median income of California's households was only \$16,500. Cal. Housing Task Force, Major Housing Legislation of 1979 - Recommendations to the Governor and Legislature 2 (Feb., 1979) [hereinafter cited as Housing Task Force Report]. It is generally accepted that a family cannot afford a home that sells for more than three times its annual income. Thus a family of median income cannot afford a home costing more than \$49,500, and hence the average California family can no longer afford the average home. And the situation is getting worse. By September, 1979, the average price of homes sold in the San Francisco Bay Area was rising at a rate of \$1000 per week. S.F. Chronicle-Examiner, Sept. 30, 1979 at 1, col. 4.

3. The underlying causes can likely be found in the socio-economic structure of advanced industrial society and are beyond the scope of this article. See generally C. HARTMAN, HOUSING AND SOCIAL POLICY (1975); J. FRIED, HOUSING CRISIS U.S.A. (1971).

4. By its own admission the private sector is unable to build housing affordable to the poor because it is no longer financially feasible to build housing affordable to the low income family without subsidization by the government. *Hearings of the Assembly Committee on Housing and Community Development, Interim Hearing on Property Taxation (CACA 55-Mori) and Housing Program Incentives: Financing and Authority (Preprint AB 4-Mori) (Oct. 30, 1979) (testimony of Don Collin, of the California Building Industry Association).*

Additionally, the legislative findings of the Zenovich-Moscone-Chacon Housing and Home Finance Act indicate that "[p]rivate enterprise and investment . . . is not disposed to provide, nor can it economically achieve, the needed construction of decent, safe and sanitary housing at rentals which persons and families of low and moderate income can afford" CAL. HEALTH & SAFETY CODE § 50003 (Deering 1978).

5. The federal government, though capable of building affordable housing, is unwill-

ment and preservation of affordable housing,⁶ and the failure of the state and local governments to plan and legislate for adequate housing in the face of burgeoning urbanization.⁷

For years, local governments have been given unbridled discretion by the courts and legislatures in the area of land use zoning and planning.⁸ Not surprisingly, in exercising this prerogative, individual communities through uncoordinated planning and development actions have failed to consider the regional effects of their decisions.⁹ The result has been "urban sprawl" and its attendant problems — environmental destruction, blighted neighborhoods, racial and economic segregation, and an inadequate supply of decent, affordable housing.¹⁰ In recent years, the concept of "controlled growth" planning has emerged to check uncontrolled development.¹¹ But while this policy has been somewhat effective in slowing urban sprawl, the need for low-income housing has continued to be ignored. Indeed, it is not uncommon for a community to zone to exclude low-income housing development under the guise of responsible growth control.¹²

Recently, the discretion of local government has been curtailed in some states. In California, Government Code sections 65300¹³ and 65302¹⁴ require all cities and counties to have a gen-

ing to do so. Housing-Senate conferees recently voted to cut funds for new construction of subsidized housing. The number of units authorized for 1980 was reduced to 265,000 down from 327,000 in fiscal 1979 and over 400,000 in fiscal 1978. *S.F. Chronicle*, Sept. 21, 1979, at 14, col. 1. Thus, in the last two years the commitment of the federal government to low income housing construction has been diminished by almost 50%.

6. See ABA Adv. Comm. On Housing and Urban Growth—Housing For All Under Law 415 (1978) [hereinafter cited as *Housing For All*]. See also J. FRIED, *supra* note 3 and CAL. HEALTH & SAFETY CODE §§ 50002 & 50003 (Deering 1978).

7. *Housing For All*, *supra* note 6, at 11-15 and 39-49.

8. See text accompanying notes 48-55 *infra*.

9. Communities have primarily been concerned with advancing parochial interests—minimizing the provision of expensive services by limiting residential development, and emphasizing, instead, tax producing commercial development. See note 76 *infra* and accompanying text. Moreover, in the post-Proposition 13 era localities will be even less likely to favor residential development since they will be less able to afford to provide services. California Office of Planning and Research, *New Housing: Paying Its Way?* 2-3 (May, 1979).

10. *Housing For All*, *supra* note 6, at 4-11.

11. See note 46 *infra* and accompanying text.

12. See note 47 *infra* and accompanying text.

13. CAL. GOV'T. CODE § 65300 (Deering 1979). This section reads:

Each planning agency shall prepare and the legislative body of

eral plan which contains nine elements, one of which is the housing element.¹⁵ Through its housing element, a community must make adequate provision for the current and future housing needs of its "fair share" of the low income population of the region.¹⁶ Once adopted, the general plan is binding on the local entity¹⁷ and all legislative actions taken by the entity, including

each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning.

14. *Id.* § 65302 (Deering 1979). For text in part, see note 19 *infra*.

15. *Id.*, subsection (c). For text, see note 16 *infra*.

16. Section 65302(c) provides:

The general plan shall consist of a statement of development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals. The plan shall include the following elements:

. . . .

(c) A housing element, to be developed pursuant to regulations established under Section 41134 of the Health and Safety Code, consisting of standards and plans for the improvement of housing and for provision of adequate sites for housing. This element of the plan shall make adequate provision for the housing needs of all economic segments of the community.

See 25 CAL. ADMIN. CODE § 6418 (Deering 1977) provides in part:

[T]he housing element also must be responsive to the housing needs of a fair share of those households who do not live in the locality, but whose housing opportunities are affected by the planning decisions of the locality.

See also Id. § 6438 (Deering 1977).

17. *See* O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 782-83, 42 Cal. Rptr. 283, 288 (1965). In discussing the effect of the local general plan the court concludes:

That the plan is, in short, a constitution for all future development within the city Any zoning ordinance adopted in the future would surely be interpreted in part by its fidelity to the general plan as well as by the standards of due process True, it is couched in general terms, but there are many specifics, and once adopted it becomes very effective Any subdivision or other development would necessarily be considered in its relation to the general plan, and such consideration practically by itself would be a sufficient legislative guide to the exercise of such discretions.

Id. *See also* CAL. GOV'T CODE § 65300.5 (Deering 1979) which provides that the general plan constitutes a "statement of policies for the adopting agency" (emphasis added); 25 CAL. ADMIN. CODE § 6414 (Deering 1977) which states:

As the major local housing strategy document, the local housing element is intended to provide citizens and public officials with an understanding of the housing needs of the community, and to set forth an integrated set of policies and programs aimed at the attainment of defined goals. In so doing, the

zoning enactments, must be consistent with it.¹⁸

Pursuant to section 65302(c), the California Department of Housing and Community Development (HCD) has developed administrative guidelines¹⁹ governing the preparation of local housing elements. The purpose of the guidelines "is to make specific the general legislative mandate" and to "establish the criteria against which local compliance . . . is to be measured."²⁰ Whether these guidelines are binding on local governments or merely advisory in nature is currently a matter of much dispute.²¹ The resolution of this question is important because ef-

housing element will serve not only as a programmatic expression of a local commitment to act, but will also provide guidance and direction to local governmental decision-making in all matters relating to housing. . . .

Id.

18. CAL. GOV'T CODE § 65860 (Deering 1979) requires that zoning ordinances of a general law city be consistent with its general plan, and CAL. GOV'T. CODE §§ 66499.37 and 66473.5 (Deering 1979) require that subdivision maps of general law and charter cities also must be consistent with the local general plan.

Whether ministerial actions such as the granting of building permits pursuant to a zoning ordinance must also be consistent with the general plan has not yet received attention by the courts or the legislature. Conceivably, the issuance of a building permit could be inconsistent with a general plan where the zoning ordinance under which it was issued is not. For example, zoning land for industrial development would not be inconsistent with a general plan's housing element, provided that land was also zoned for housing sufficient to meet the housing needs generated by any new industrial development. However, the issuance of a permit to build a factory on the industrially zoned land would be inconsistent with the housing element *unless* it could be shown that enough housing was or would be available for new residents attracted by the employment generated. Otherwise, one purpose of the general plan—to insure that there is adequate housing for all—would be contravened. Zoning enough land for housing does not guarantee it will be built. Just as zoning for industry requires complimentary zoning for housing, actual industrial development should not be permitted until actual development of sufficient housing is assured.

19. 25 CAL. ADMIN. CODE §§ 6400-6499 (Deering 1977).

20. *Id.* 6406 (Deering 1977).

21. Local entities, apprehensive that substantial time and expense will be required to comply with the guidelines, argue such guidelines are advisory, while HCD contends that mandatory compliance was intended by the Legislature so as to insure that the housing element requirement would be adequately implemented throughout the state. See League of California Cities, Legislative Bulletin, Oct. 1, 1979. The bulletin informs its member cities that HCD has asserted that the guidelines are binding and urges cities to advance various legal theories that they are in fact only advisory. Those arguments are considered in depth in the latter part of this article. In response, HCD has circulated a memorandum to all cities refuting the arguments of the League. Cal. State Dept. of Housing and Community Development, Memorandum to All Mayors, City Managers and City Attorneys, November 5, 1979.

In view of the dispute, language was included in the proposed 1979-80 State Budget which prohibited HCD from expending any funds to promote the guidelines as binding,

fective enforcement of the mandate of section 65302(c) is precluded without a clear and specific standard to which a locality can be held.

The principal purpose of this Comment is to resolve this important question and place it in perspective by examining the housing crisis and focusing attention on government—the role it plays in the creation and exacerbation of the crisis, and the recent attempts by state legislative and judicial bodies to deal with the crisis by requiring regional planning.²²

I. THE HOUSING CRISIS

Decent and affordable housing is a basic necessity of life. Housing is more than shelter; its location and availability determine access to education, employment, and services.²³ Its cost directly affects the financial resources a household can devote to providing for such other necessities as food, clothing, and health care.²⁴ A crisis in housing affects many aspects of society, and must be viewed in this context if its impact is to be adequately assessed.

The role played by government in perpetuating the present crisis is substantial. The construction of housing lags behind the growing need²⁵ due to increased costs, unavailability of capital,

to participate in any litigation involving local housing elements, or to approve or disapprove of local housing elements. Supplemental Report of The Committee of Conference On The Budget Bill, Fiscal 1979-80, Item 150(6). That HCD is permitted by HEALTH & SAFETY CODE § 50459 to review local housing elements for compliance with the guidelines was not addressed by the Conference Committee. Hence, Governor Brown when approving HCD's budget allocation (Item 150) stated "I am directing the department to continue to review housing demands for adequacy under the 1977 Guidelines and to take all appropriate actions to enforce the housing elements." Governor's Message to the Legislature on the Budget Act, 1979 Cal. Stats. c. 259, p. 3.

22. An adequate discussion of the impact which comprehensive regional planning has had and can have on community development and the supply of low income housing is, unfortunately, beyond the scope of this article. Such a review is essential to fully understand the necessity for mandatory local planning which provides for low income housing. The reader is therefore urged to examine closely a work which has already become a classic in this area, published by the ABA Adv. Comm. On Housing and Urban Growth—Housing For All, *supra* note 6. The Commission has wrought the most thorough overview and analysis to date of planning law and its relation to the housing situation in the United States. Moreover, it has developed a bold, impressive and comprehensive statement of policy and advocates its active implementation by legislative and judicial bodies alike.

23. *Id.* at 41; C. HARTMAN, *supra* note 3, at 1-5.

24. Housing For All, *supra* note 6.

25. Only 228,000 units are forecast to be constructed in 1979. Housing Plan Update,

exclusionary zoning and poor planning. The costs of land,²⁶ money,²⁷ development,²⁸ and finished housing have increased enormously in the last decade, outstripping inflation.²⁹ The increase in land costs can primarily be attributed to increased demand³⁰ compounded by zoning practices of local governments which restrict the supply of land available for residential use.³¹ The cost of money is controlled almost exclusively by the federal government through the regulatory powers of the Federal Reserve Board.³² Increases in the cost of construction are generally due to inflation and the regulatory maze through which developers are forced to wade by state and local government.³³

Unavailability of adequate capital to finance low and moderate income housing development is in a large part due to the inertia of federal and state government and the refusal or reluc-

supra note 1, at 74. This is 62,000 units short of the projected need. *Id.* at 73. Moreover, few of these units will be affordable to low income families.

26. The cost of land rose 61.6% between 1970 and 1974 nationwide. *ECONOMIC NEWS NOTES*, May 1975, at 11. In California land development costs now constitute 25% of costs of residential housing while in 1949 they constituted only 11% of such costs. Housing Task Force Report, *supra* note 2, at 19.

27. Nationwide, financing charges increased 14.8% between 1970 and 1974. *ECONOMIC NEWS NOTES*, May 1975, at 11. While financing costs constituted only 5% of the costs of residential development in 1949 in California, by 1977 this figure had more than doubled and was 10.8%. Housing Task Force Report, *supra* note 2, at 19. Increases in this cost of housing development are destined to continue as a result of the Federal Reserve Board's recent action raising the discount rate (the interest rate it charges banks which borrow money from it).

28. From 1970 to 1974 construction costs (labor, materials and energy) increased between 81% and 103% depending upon geographic region. *ECONOMIC NEWS NOTES*, May 1975, at 11. It should be noted, however, that the portion of housing costs attributable to labor dropped from 33% to 18% from 1955 to 1975. C. HARTMAN, *supra* note 3, at 17.

29. *See* note 2 *supra*.

30. Housing Task Force Report, *supra* note 2, at 20. An extremely large portion of Californians are currently reaching the age at which persons normally consider purchasing a home.

31. Urban Land Institute and Gruen, Gruen & Associates, *Effects of Regulation On Housing Costs: Two Case Studies* 8 (1977).

32. Housing Task Force Report, *supra* note 2, at 20; note 27 *supra*.

33. Though originally intended to insure the construction of aesthetically pleasing dwellings and to protect the environment, government regulations pertaining to the building process have become excessive. Building codes mandate excessive safety requirements, the administrative process has become cumbersome, and subdivision regulations often require the developer to provide facilities that have in the past been the responsibility of municipalities. S. SIEDEL, *HOUSING COSTS & GOVERNMENT REGULATIONS: CONFRONTING THE REGULATORY MAZE* 305-308 (1978). *See also* M. BROOKS, *HOUSING EQUITY AND ENVIRONMENTAL PROTECTION: THE NEEDLESS CONFLICT* 30-32 (1976).

tance of private lenders to provide financing. Although Congress long ago declared a national goal to provide a decent affordable home for everyone,³⁴ the actual commitment of funds has been woefully inadequate.³⁵ After specifying a low and moderate-income housing production goal in 1968 of six million units in ten years,³⁶ the federal government failed to follow through with an adequate financial commitment.³⁷ Until the California Housing Finance Agency (CHFA) was formed in 1975 there was virtually no state government effort in California aimed at providing financing for low and moderate income housing development.³⁸ Despite the determination by the California Legislature that housing is of vital statewide importance,³⁹ the State's expenditures in this area were paltry in comparison to the other areas of government expenditures.⁴⁰ Local government efforts have been

34. The Housing Act of 1949, 42 U.S.C. 1446 (1976) states:

The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require . . . the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family

35. See National Advisory Commission on Civil Disorders Report 259-60 (1968) (the Kerner Report). See also note 5 *supra*.

36. Housing and Urban Development Act of 1968, § 1601, 42 U.S.C. § 1441(a) (1976).

37. The Section 235 and 236 programs had produced only 655,923 units by 1973 at which time the Nixon administration placed a moratorium on their use. The Department of Housing and Urban Development's disinterest in implementing subsequent replacement programs in combination with the moratorium precluded the meeting of the 1968 goals. Housing For All, *supra* note 6, at 21. Indeed, federal housing benefits have been unequally distributed in favor of middle and upper income families. *Id.* at 72. The monetary value of tax benefits afforded homeowners is several times the value of subsidies provided for low and moderate income housing, *id.*, and The Federal Housing Administration (FHA) mortgage guarantee programs and Federal Highway Program are aimed at aiding the middle class, not the poor. Taber, *Providing Low and Moderate Income Housing in the Suburbs*, 3 PEPPERDINE L. REV. 514, 515 (1976).

38. In 1975 the California Housing Finance Agency (CHFA) was created by the Zenovich-Moscone-Chacon Housing and Home Finance Act, CAL. HEALTH & SAFETY CODE §§ 50900-51375 (DEERING 1978), to provide financing for low and moderate income housing production by making direct and indirect below market rate loans to developers.

39. In 1975, the Legislature adopted the national housing goal, *i.e.*, to provide a decent living environment for every Californian. CAL. HEALTH & SAFETY CODE § 41002 added by 1975 Cal. Stats. 1st Ex.Sess. ch. 1, § 7, p. 3860, repealed by 1977 Cal. Stats. c. 610 § 1, reenacted by 1977 Cal. Stats. c. 610, § 2 as § 50002.

40. Of the total State Budget Expenditures for the 1978-79 fiscal year only .07% went towards housing and community development. This contrasts to 37.4% that went towards education, 16% towards social services and 12% to health services. Housing Task Force Report, *supra* note 2, at 15.

slight⁴¹ and often hamstrung by Article 34 of the California Constitution which requires a local referendum before public agencies can finance low-income rental housing.⁴² Private lenders have been increasingly reluctant to make loans for apartment construction or loans in low income neighborhoods.⁴³

Zoning by municipalities to exclude or severely limit residential development (especially low-income housing) has restricted housing opportunities in the suburbs for lower income and minority persons.⁴⁴ These exclusionary land use practices impact more heavily on low income persons because, for the most part, they do not already reside in developing suburban communities.⁴⁵ The adverse effects of limiting suburban residential growth are compounded by commercial and industrial development which generates increased housing demand by the influx

41. This is due to lack of ability as well as lack of concern. Art. 16 § 18 of the California Constitution requires two-thirds voter approval for a local entity to issue general obligation bonds that exceed in value the amount of revenue the entity provides in one year. CAL. CONST. Art. 16, § 18 (West Supp. 1979).

42. CAL. CONST. Art. 34, § 1 (Deering 1974). Efforts of local governments to provide funding, though restricted, are not completely precluded as indicated by the programs initiated by the City of Los Angeles, which has created a municipal Housing Finance Agency to raise capital for low income housing production similar to the CHFA discussed in note 38 *supra*. See D. BRYANT, J. SOLOWAY & C. CHIU, CALIFORNIA AND FEDERAL LOWER INCOME HOUSING LAWS 4-23 and Chapters 4-6 generally (1978) [hereinafter cited as Low Income Housing Laws].

43. See Low Income Housing Laws, *supra* note 42, at 10-15 through 15-41. See also Werner, Frej and Madway, *Redlining and Disinvestment: Causes, Consequences and Proposed Remedies*, 10 CLEARINGHOUSE REVIEW 7 (Oct. 1976 Supp.). Moreover, the amount of funds private lenders have available for loans is shrinking dramatically due to the increased cost of money to banks attributable to the rise in the interest charged on money-market certificates which are tied to the Treasury bill rate. As of this writing three California Savings & Loans Associations had halted new home loans. S.F. Chronicle, Oct. 25, 1979, at 1, col. 5. In addition, lenders are concerned that the incomes of tenants are not sufficient to pay the rents that would have to be charged to support the mortgage and operation costs of a newly constructed building. Between 1972 and 1977 real wages increased an average of 1.2% per year while the Consumer Price Index increased an average of 7.7% per year. DOLLARS AND SENSE READER 16-17 (1978) (calculations by author). Thus with the costs of housing development increasing at a rate greater than inflation and the wages of tenants increasing at a rate less than inflation, the number of tenants who can manage the rents that would need to be charged is shrinking.

44. Housing For All, *supra* note 6, at 72. See also Low Income Housing Laws, *supra* note 42, at Chapter 3 for a comprehensive overview of the forms of and legal basis for exclusionary zoning. There are basically five methods: 1) minimum lot size requirements, 2) maximum density limits, 3) refusal to rezone for higher density or smaller lot sizes, 4) controlled growth rate (tied to the availability of services and utilities) and 5) not permitting any growth.

45. Housing For All, *supra* note 6, at 72.

of people attracted to new jobs.⁴⁶ In many desirable urban areas, such as San Francisco, “gentrification”—the process of the affluent moving back to the city, purchasing and upgrading inner city housing, and thereby displacing the urban poor—has become widespread.⁴⁷

Until recently, the federal government, state governments, and the courts have absolved themselves of any responsibility for requiring consideration of the needs of the poor in local land-use planning. Historically, it has been the policy of these bodies to defer to local zoning and planning decisions.⁴⁸ In 1922, the U.S. Department of Commerce issued the Standard State Zoning Enabling Act (SZEAE)⁴⁹ and encouraged all states to enact legislation permitting municipalities to engage in zoning.⁵⁰ Today, over 40 states retain the basic provisions of the SZEAE.⁵¹

In 1926, the United States Supreme Court sustained the constitutionality of zoning in *Village of Euclid v. Ambler Realty Co.*⁵² The Court afforded local zoning enactments a presumption of validity⁵³ that remains the rule in most jurisdictions.⁵⁴ This presumption is virtually conclusive since a showing of any purpose reasonably related to the general welfare is sufficient to uphold such ordinances.⁵⁵ Since *Euclid*, despite acknowledgement of the importance of housing,⁵⁶ the federal and all but a few

46. California’s population is currently increasing at the rate of 200,000 per year primarily because of the promise of employment. Housing Task Force Report, *supra* note 2, at 9. Much of the impetus for this growth has its origins in the commercial activity generated by substantial federal expenditures in the growth areas. Without federal urban renewal and highway programs, urban sprawl and its attendant failure to include low and moderate income housing would not have occurred nearly so rapidly. Housing For All, *supra* note 6, at 16-17.

47. San Francisco Chronicle, Sept. 1, 1979 at 1, col. 1; 4, col. 1; and 5, col. 1.

48. See Housing For All, *supra* note 6, at 51-54, and Low Income Housing Laws, *supra* note 42, at Chapter 3.

49. Standard State Zoning Enabling Act (U.S. Dept. of Commerce, rev. ed. 1926).

50. Housing for All, *supra* note 6, at 42.

51. *Id.* at 43.

52. 272 U.S. 365 (1926).

53. The court held that the validity of local zoning ordinances is presumed unless a showing is made “that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare” *Id.* at 395.

54. Housing For All, *supra* note 6, at 42.

55. *Id.*

56. Several Supreme Court decisions have treated housing as an important interest. See *Hunter v. Erickson*, 393 U.S. 385, 391 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S.

state courts have steadfastly refused to sustain due process and equal protection challenges to zoning laws by low-income persons who contend that such laws deprive them of equal access to decent, affordable housing.⁵⁷ The experience in California has been similar.⁵⁸ Low and moderate income persons are seen by municipalities as undesirable; providing for their housing needs is considered a distasteful expense that should be the responsibility of "other" communities.⁵⁹

As a result of the increased demand and restricted supply, the price of *existing* housing has increased markedly.⁶⁰ Rent

409, 441 (1968); *Reitman v. Mulkey*, 387 U.S. 369, 376-77 (1967); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *Buchanan v. Warley*, 245 U.S. 60, 74 (1917).

57. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-70 (1977) (showing of de facto segregation insufficient to shift presumption of validity); *Warth v. Seldin*, 422 U.S. 508 (1975) (held that non-resident low-income persons do not have standing to challenge an exclusionary zoning practice unless a showing is made they are harmed specifically); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (ordinance that limited to two the number of unrelated persons that could occupy a single family home upheld); *Lindsay v. Normet*, 405 U.S. 56, 73-74 (1972) (found that housing is not a fundamental interest); *James v. Valtierra*, 402 U.S. 137, 141-42 (1971) (in upholding Article 34 of the California Constitution, the Court found local government discrimination against low income housing constitutional); *Construction Ind. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897, 907-08 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) (ordinance limiting growth upheld); *Ybarra v. Town of Los Altos Hills*, 503 F.2d 250, 253-54 (9th Cir. 1974) (found that a local land-use ordinance enacted with the intent to bar low income housing was not a denial of equal protection or due process); and *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 383, 285 N.E.2d 291, 304, 334 N.Y.S.2d 138, 156 (1972) (ordinance limiting growth upheld).

But see Moore v. East Cleveland, 431 U.S. 494, 498-99 (1977) (ordinance prohibiting certain persons from cohabiting invalidated); *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1212-13 (8th Cir. 1972) and *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108, 112-14 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (where low income persons were afforded standing to sue to set aside land use restrictions impeding specific federally subsidized housing developments).

58. See *Miller v. Board of Public Works*, 195 Cal. 477, 482-83, 234 P. 381 (1925) (zoning ordinances entitled to presumption of validity). See also *Hamer v. Town of Ross*, 59 Cal. 2d 776, 382 P.2d 375, 31 Cal. Rptr. 335 (1963); *Consolidated Rock Products v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962); and *Lockard v. City of Los Angeles*, 33 Cal. 2d 453, 202 P.2d 38 (1949).

59. Indeed this was recognized as long ago as 1924 by the lower court in *Euclid*: "In the last analysis the purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis the result to be accomplished is to classify the population and segregate them according to their income and situation in life." *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924). See also *Housing For All*, *supra* note 6, at 52-57, and n. 267.

60. The vacancy rate throughout the state is well below the 5% considered by HUD to constitute a housing emergency. Housing Task Force Report, *supra* note 2, at 13.

gouging,⁶¹ real estate speculation,⁶² and the conversion of apartments to condominiums⁶³ have proliferated. Moreover, rental property owners in California are highly organized and able to increase rents by informal agreement regardless of demand.⁶⁴ By contrast, the real values of wages and welfare benefits have declined dramatically, failing to keep pace with inflation and leaving a substantial portion of the population less able to pay for housing and other necessities.⁶⁵ Up against powerful and highly organized special interests—apartment owners, the real estate industry, and the financial community—tenants and lower income homeowners have understandably not fared well since they have acted sporadically and without coordination in lobbying government.⁶⁶

61. Between 1970 and 1976 rents increased 67.7% (Cal. State Dep't of Housing and Community Development, California Statewide Housing Plan of 1977, App. C, at 48) while the Consumer Price Index increased only 56% (DOLLARS AND SENSE READER, *supra* note 43, at 16-17). Although this may not appear to be such a great disparity at first glance, it must be understood that only about half of the cost of owning rental property is variable and thereby subject to the effects of inflation—the other half represents the mortgage payment which remains constant. California Housing Action Information Network, Consumer Price Index (CPI) Rent Increases: Are They Such A Good Deal? 2 (March 31, 1979). Thus a more accurate indicator of the increase in the cost of owning rental property is *half* of the CPI, or in this case, 28%. This cost analysis, it should be noted, does not take into account other economic benefits which flow from the ownership of rental property such as tax shelters and appreciation of the property.

62. See generally Note, *Curbing Real Estate Speculation in California*, 8 GOLDEN GATE U. L. REV. 317,317 (1978).

63. Since 1976 the number of units which were proposed for conversion and received state approval has more than doubled each year. J. Soloway, *Condos, Co-ops, and Conversions: A Guide on Rental Conversions for Local Officials* 3, Cal. Office of Planning and Research (Nov. 1979). In San Francisco, 75% of the tenants in converted apartments do not buy their units when they are converted to condominiums, largely because they can't afford them since it costs more to purchase a converted unit than to rent. *Id.* at 7.

64. R. Appelbaum and J. Gilderbloom, *Why Rents Rise: A Reconsideration*, 4 (August 1979) (memo to U.S. Dept. of Housing and Urban Devp. (HUD) from Univ. Cal. at Santa Barbara, Sociology Dept.).

65. While rents increased 28.6%, median household income only increased 63.4% between 1970 and 1977. California Statewide Housing Plan, *supra* note 61, at App. C. 48-49.

66. The apartment owners and real estate industry have no less than three well financed statewide organizations: the California Apartment Owners Association, the California Board of Realtors and the California Housing Council (CHC). Conversely tenants and low income homeowners have only one statewide organization advancing their interests: the California Housing Action and Information Network (CHAIN). Moreover, CHAIN was only recently formed (1977) and because its members are primarily low-income it cannot match resources with the landlord organizations.

II. DEVELOPMENT OF REGIONAL PLANNING

A. HISTORY AND BACKGROUND

State courts have taken the lead in developing case law requiring local governments to provide for the low and moderate income housing needs of a region. The landmark decision of the New Jersey Supreme Court, *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*⁶⁷ recognized a regional concept of the "general welfare".⁶⁸ In striking down Mount Laurel's zoning ordinance limiting housing density as violative of state substantive due process and equal protection guarantees, the Court stated that developing municipalities must

affirmatively . . . plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries.⁶⁹

Moreover, the court dispensed with the strict presumption of validity afforded local zoning ordinances since *Euclid*. Once the challenging party makes a facial showing that the community has not made "adequate provision to afford the opportunity for low and moderate income housing" the burden of persuasion shifts to the local government.⁷⁰

Following this lead, the California Supreme Court, in *Associated Home Builders of the Greater East Bay, Inc., v. City of Livermore*,⁷¹ expanded the definition of the general welfare to include the welfare of the region. The Court stated that

[if] a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact

67. 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

68. 336 A.2d at 727-28.

69. 336 A.2d at 728. This position was tempered somewhat by the court in *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1977). The court held that a developing community must only make available the "least cost" housing rather than actual low-income housing because of the non-availability of federal funds, 371 A.2d at 1207.

70. 336 A.2d at 728.

71. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

not only upon the welfare of the enacting community, but upon the welfare of the surrounding region.⁷²

But although *Mount Laurel* was cited with approval, the holding of the New Jersey Supreme Court with respect to the burden of proof was not adopted.⁷³ Thus, in California, a facial showing that the community has not provided adequate housing opportunities is not sufficient to invalidate a local development decision. The challenging party retains the burden of proof throughout the suit, and the standard for determining validity has not been clearly defined by the Court.⁷⁴ Therefore, it remains unclear whether the *Livermore* decision can be utilized to require communities to provide housing for low and moderate income families of their region.

Likewise, other state courts have followed the *Mount Laurel* decision and have adopted a regional perspective of the general welfare.⁷⁵ Moreover, the trend towards local planning has received uncompromising support from a prestigious advisory body, the American Bar Association's Advisory Commission on Housing and Urban Growth. The commission has adopted the following policy:

The 'general welfare', as a basic state constitutional principle and the predicate for local police power regulations, should be understood as being regional in context, and as including the fundamentally important state interest that the housing needs of all income groups of the state be promoted and enhanced.⁷⁶

Indeed, the commission finds the opportunity for decent, affordable housing to be a fundamental value and advocates judicial intervention on behalf of low-income persons who are adversely

72. 18 Cal. 3d at 601, 557 P.2d at 483, 135 Cal. Rptr. at 51.

73. 18 Cal. 3d at 608, 557 P.2d at 488, 135 Cal. Rptr. at 56.

74. Though the court set forth a three-part test for determining whether a local land use practice is valid, it could not apply the test because no facts were presented as to the regional impact of Livermore's moratorium on housing construction. 18 Cal. 3d at 608-610, 557 P.2d at 488-89, 135 Cal. Rptr. at 56-57.

75. See *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975); *In re Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970); and *Bd. of Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959).

76. *Housing For All*, *supra* note 6, at 123.

affected by local land use decisions.⁷⁷ Furthermore, the commission determined that "housing planning should be mandated by state statutes as an essential element of a community's comprehensive plan. It involves planning for all economic segments of a community, particularly low-and moderate-income households."⁷⁸

During the *Euclid* era, comprehensive planning was subordinate to zoning in the eyes of the federal government.⁷⁹ With the passage of the Housing Act of 1954,⁸⁰ however, Congress began to actively promote regional planning.⁸¹ Since that time Congress has required local governments to engage in comprehensive planning which considers housing as a prerequisite to receiving monies under several federal programs.⁸²

In California,⁸³ every county was required and every city

77. *Id.* at 210-11.

78. *Id.* at 479.

79. It was not until six years after the promulgation of the SZEA that the Department of Commerce issued the Standard Planning Enabling Act (SPEA) (U.S. Dept. of Commerce, 1925). The Act permitted local governments to engage in planning but provided that planning decisions were merely advisory to the local legislative body.

80. 40 U.S.C. § 460 (1954).

81. The Act created the "Section 701" Comprehensive Planning Assistance Program under which funds are made available to local governments wishing to engage in regional comprehensive planning. 40 U.S.C. § 461 (1954).

82. OMB Circular A-95 (U.S. Office of Management and Budget Circular A-95 (rev. 1977)) promulgated pursuant to the Cooperation Act of 1958 (42 U.S.C. 4201-4244 (1968)) requires that all applications for federal grants be reviewed by a state, regional or metropolitan planning agency. The Housing and Urban Development Act of 1968 amended the Section 701 program to require preparation of a housing element before a local entity could become eligible for assistance. Pub. L. No. 90-448, 82 Stat. 476, 528 (codified at 40 U.S.C. § 461(c)(1) (1970)). The Housing and Community Development Act of 1974 requires communities receiving federal Community Development Block Grant funds to develop Housing Assistance Plans (HAP's) that assess the housing needs of the low-income persons residing or "expected to reside" in the community. Pub. L. No. 93-383, 88 Stat. 633 (codified at 42 U.S.C. 5304 (a) (4)(A)(1976)).

83. Several other jurisdictions also mandate comprehensive planning by local governments. See ALASKA STAT. §§ 39.33.020, 29.33.085-.090 (Supp. 1978); DEL. CODE ANN. tit. 9, §§ 6807a, 6904; D.C. CODE §§ 1-1002(a)(4)(d), 5-414 (Supp. 1978); HAWAII REV. STAT. § 225-21; IDAHO CODE ANN. §§ 67-6508, 67-6511 (Supp. 1978); *Ind. Ann. Stat. Code* § 18-7-7-31 (1974); VA. CODE ANN. §§ 15.1-427-46 (Supp. 1978). Besides California, Florida, Kentucky and Nebraska require that local zoning practices be consistent with local comprehensive plans. See Florida Local Government Comprehensive Planning Act of 1975, ch. 75-257 §§ 4(4), 4(5) (1975); KY. REV. STAT. ANN. § 100.201 (1974); NEB. REV. STAT. ch. 23-114.03 (1970) and § 19-901 (Supp. 1978). Minnesota requires all local governments within the Minneapolis-St. Paul metropolitan area to adopt a local plan which contains a housing element. MINN. STAT. H. F. 1530 ch. 127 (1976) *amending* MINN.

was permitted to have a planning commission as early as 1929.⁸⁴ However, the actual development of a county local plan was not required until 1947.⁸⁵ Development of a comprehensive general plan that considered housing became mandatory in 1965 under Government Code section 65300.⁸⁶ Each plan was to be comprised of specific elements enumerated in Government Code section 65302.⁸⁷ Subsection (c) of section 65302 was enacted in 1967, adding the housing element to the list of mandatory elements.⁸⁸ In 1969, Health and Safety Code section 37041 was added⁸⁹ which directed the then State Commission of Housing and Community Development (HCD) to develop "guidelines" for the preparation of housing elements by local entities. HCD then promulgated the original Housing Element Guidelines in 1971.⁹⁰

As of 1972, the housing element was the only mandatory element of the general plan that was required to be developed pursuant to state regulations or guidelines. However, in that year, Government Code section 34211.1⁹¹ was enacted, requiring the State Council on Intergovernmental Relations (CIR) to adopt guidelines for the preparation of the other elements. This section expressly provided that the housing element guidelines were to be the responsibility of HCD and that the guidelines adopted by CIR were to be "advisory" for local governments.⁹² In 1975, Health and Safety Code section 37041 was re-enacted as section 41134,⁹³ and amended to expand the mandate given

STAT. § 462.355 (1974) and MINN. STAT. §§ 473.121 and 473.175 (Supp. 1978). Wyoming and Oregon require local plans to be consistent with state plan. See WYO. COMP. STAT. ANN. § 9-856(a) (Supp. 1978); ORE. REV. STAT. § 197.010 *et seq.*

But see American Law Institute Model Land Development Code (1976) Art. 3 which provides that local planning is not mandatory. The ABA Commission on Housing and Urban Growth has specifically disapproved this characteristic of the ALI code, however. *Housing For All*, *supra* note 6, at 385.

84. California enacted planning enabling legislation in 1927 (1927 Cal. Stats. ch. 384 § 4) and in 1929 permitted each city and required each county to establish a planning commission. 1929 Cal. Stat. ch. 838 § 2.

85. 1947 Cal. Stats. ch. 807, §§ 10, 35.

86. Cal. Gov't Code § 65300 (Deering 1979) For text, *see* note 13 *supra*.

87. Government Code § 65302 (Deering 1979). This section currently requires nine elements: land use, circulation, housing, conservation, open space, seismic safety, noise, scenic highway, and safety.

88. 1967 Cal. Stats. ch. 1657, § 4 and ch. 1658, § 4.

89. 1970 Cal. Stats. ch. 1553, § 4.

90. Letter from Norvene Foster, note 94 *infra*.

91. 1972 Cal. Stats. ch. 902, § 1.

92. *Id.*

93. 1975 Cal. Stats. 1st Ex. Sess., ch. 1, § 7. *See* notes 126 and 127 *infra*.

HCD. In addition to developing guidelines, HCD was permitted to review local housing elements for conformity with the guidelines.

In 1976, HCD re-promulgated the 1971 guidelines in accordance with the State Administrative Procedures Act in an attempt to insure their binding effect.⁹⁴ A year later, on November 17, 1977, HCD adopted certain revisions in response to comments and criticism elicited during extensive public review of the regulations.⁹⁵ The new guidelines prescribe specific criteria for the development of comprehensive local housing elements which provide for the housing needs of the region.⁹⁶ Thus, in a little over ten years California has progressed from an absence of statutory law to a comprehensive series of laws, mandating regional planning for housing that makes adequate provision for the needs of all.

B. THE SIGNIFICANCE OF CALIFORNIA'S HOUSING ELEMENT GUIDELINES

State mandated planning for the regional welfare cannot be effective unless thorough and comprehensive planning documents are developed and implemented by *all* local governments.⁹⁷ Responsible planning by one community will be for naught if other communities in the same region continue to permit haphazard development and fail to plan for adequate housing. Moreover, inadequate planning by a portion of a regions' governments not only frustrates the goal of regional planning, but also shifts the social and economic costs of responsible planning to the complying locales, serving as a disincentive to further compliance. Thus, a superficial description of a community's future development, labeled "General Plan," should not be allowed to stand if sensible region-wide planning is to be achieved. Therein lies the significance of California's Housing Element Guidelines. Specific considerations, procedures and goals must be *prescribed* by state government.⁹⁸

94. Letter from Norvene Foster, Deputy Director of HCD, to State Senator Bill Greene (April 10, 1979); 25 CAL. ADMIN CODE §§ 6400-6480 (1977).

95. Letter from Norvene Foster, *supra* note 94.

96. 25 CAL. ADMIN CODE § 6418 (1977). For text, *see* note 19 *supra*.

97. Housing For All, *supra* note 6, at 479.

98. The ABA Commission wrote: "State statutes, in mandating housing plans, should specify process and procedural considerations as well as goals to be achieved and

The guidelines set forth very specific requirements for assessing regional housing needs,⁹⁹ developing housing goals,¹⁰⁰ and preparing and pursuing a course of action towards meeting both the needs and the goals.¹⁰¹ The guidelines require, among other things, that each community make a diligent good faith effort to provide decent housing for its "fair share" of the low income population of the region.¹⁰² Hence, the guidelines, if binding, insure that all communities will develop uniform and comprehensive housing elements by establishing criteria against which compliance with the State mandate can be measured.

Failure to develop a housing element in compliance with the guidelines would subject a locality to a lawsuit on two grounds. First, the housing element itself could be challenged as inadequate.¹⁰³ Second, any zoning enactment or subdivision map approval could be challenged as being inconsistent with the local general plan in that consistency is impossible *per se* if there is no adequate housing element to begin with.¹⁰⁴ If a locality *has* developed an adequate housing element, failure to act in accordance with it would also subject the entity to suit.¹⁰⁵

The success of such suits would likely turn on whether workable criteria existed against which the locality's actions could be measured. In this regard, binding Housing Element Guidelines would provide a clear, easily measurable standard.¹⁰⁶

obligations to the attained (*e.g.*, quantified regional and local housing needs)." *Id.* at 479-80.

99. 25 CAL. ADMIN. CODE § 6438-48 (1977).

100. *Id.* § 6450(a) (1977).

101. *Id.* § 6460 (1977).

102. *Id.* § 6418 (1977). For text, *see* note 19 *supra*.

103. Mandamus is an appropriate action to compel adoption of a legally sufficient housing element. 58 Op. Cal. Atty. Gen. 21 (1975).

104. *See* note 18 *supra*. A local zoning ordinance or subdivision map cannot be consistent with a general plan if the general plan is inadequate. *Save El Torro Ass'n. v. Days*, 74 Cal. App. 3d 64, 73, 141 Cal. Rptr. 282, 287 (1977). Consequently, injunctive relief prohibiting a local government from amending zoning ordinances or approving subdivision maps is proper when a general plan is shown to be inadequate. *See People v. County of Mendocino*, Sup. Ct. No. 40633 (Dec. 19, 1978).

105. *See* note 17 *supra* and accompanying text. *See generally*, Low Income Housing Laws, *supra* note 42, at 2-15-2-17.

106. It should be remembered that although the court in *Livermore* (*see* text accompanying notes 71-74 *supra*) required local governments to plan for the regional housing needs, the burden of proof is with the challenger of the local government's actions and the standard of proof is as yet unclear. *See* note 97 *supra* and accompanying text.

Binding guidelines thus would represent a significant step forward by California in its efforts to deal with the housing crisis.

III. THE HOUSING ELEMENT GUIDELINES

A. NATURE OF THE CONTROVERSY

Because of the increasing size and complexity of society and government, the rule against delegating legislative power has yielded to the necessity of delegating discretionary power to specialized administrative bodies.¹⁰⁷ The legislature may enact a broad statutory rule and delegate the duty of specifically applying the statute within the framework of a definite standard.¹⁰⁸ Thus, while delegation of absolute authority is not proper, a delegating statute which establishes ascertainable standards to guide administrative agencies is valid.¹⁰⁹ An administrative regulation is therefore invalid only if it definitely exceeds the scope of the enabling statute or appears to be palpably arbitrary.¹¹⁰

Rulemaking by the administrative body is the permissible means to promote legislative purpose and to carry the statute into effect.¹¹¹ In California, "a regulation adopted by a state administrative agency pursuant to a delegation of rulemaking authority by the legislature has the force and effect of a statute."¹¹² If administrative regulations are to have binding effect, the Administrative Procedures Act¹¹³ (APA) requires they be adopted in accordance with procedures which afford due process protections to the public.¹¹⁴ In this regard, the state Attorney General has determined that regulations adopted pursuant to the APA procedures are ordinarily intended to be binding.¹¹⁵

With respect to the Housing Element Guidelines, no one

107. See 5 WITKIN SUMMARY OF CALIFORNIA LAW § 91 (8th ed. 1974).

108. *Holloway v. Purcell*, 35 Cal. 2d 220, 226-27, 217 P.2d 665, 672 *cert. denied*, 340 U.S. 883 (1950).

109. *Wotton v. Bush*, 41 Cal. 2d 460, 468, 261 P.2d 256, 260 (1953).

110. *Bright v. Los Angeles Unified School Dist.*, 18 Cal. 3d 450, 459, 464, 556 P.2d 1090, 1095, 1099 134 Cal. Rptr. 639, 644, 648 (1976); 20 Op. Cal. Att'y. Gen. 120, 122 (1952).

111. 41 Cal. 2d at 469, 261 P.2d at 261.

112. *Agricultural Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 401, 546 P.2d 687, 693, 128 Cal. Rptr. 183, 189 (1976).

113. CAL. GOV'T. CODE §§ 11371-11445 (West 1966).

114. See *Id.* §§ 11371, 11373-74, 11420, 11423-25 (West 1966).

115. 28 Op. Cal. Att'y. Gen. 227, 233 (1956).

contends that they were not adopted in accordance with the APA.¹¹⁶ Indeed, they were required by statute to be adopted in accordance with the APA.¹¹⁷ The guidelines therefore *may* be binding. The question then becomes whether or not the Legislature *intended* them to be binding. California courts have final authority in the interpretation of California statutes,¹¹⁸ and in questions of first impression “clues of legislative intent from legislative history and within the statutory scheme of which the legislation to be interpreted is a part” are controlling.¹¹⁹ It is established “that the objective sought to be achieved as well as the evil sought to be prevented is of prime consideration” in the interpretation of a statute.¹²⁰ The courts will also give great weight to the interpretation of a statute by an administrative regulation when some uncertainty appears.¹²¹ Unless “clearly erroneous,” the regulation “is a significant factor to be considered”¹²² and “freighted with a strong presumption of regularity.”¹²³ Indeed, the courts will defer to the administrative agency’s expertise “in the absence of an arbitrary and capricious decision.”¹²⁴

Government Code section 65302(c) requires that housing elements of local governments “be developed pursuant to regulations established under section 41134 of the Health and Safety Code.”¹²⁵ Health and Safety Code section 41134 (renumbered 50459)¹²⁶ pertains to the duties of HCD, and it provides that HCD shall adopt these regulations and do so pursuant to the

116. See generally “California Statewide Housing Plan And Housing Elements,” *Joint Hearings of the Assembly Committee on Housing and Community Development and the Senate Committee on Local Government* (July 25, 1977).

117. *Id.*

118. See 5 WITKIN, SUMMARY OF CALIFORNIA LAW § 61 (8th ed. 1974).

119. *Lewis v. Ryan*, 64 Cal. App. 3d 330, 333, 134 Cal. Rptr. 355, 357 (1976).

120. 41 Cal. 2d at 467, 261 P.2d at 260, quoting *Rock Creek Water Dist. v. County of Calaveras*, 29 Cal. 2d 7, 9, 172 P.2d 863, 865 (1946).

121. See *Bank of Alameda County v. McColgan*, 69 Cal. App. 2d 464, 470, 159 P.2d 31, 34 (1945).

122. *Mudd v. McColgan*, 30 Cal. 2d 463, 470, 183 P.2d 10, 14 (1947).

123. *Ralphs Grocery Co. v. Reimel*, 69 Cal. 2d 172, 175, 444 P.2d 79, 82, 70 Cal. Rptr. 407, 410 (1968). See also *Agricultural Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 411, 546 P.2d 687, 699, 128 Cal. Rptr. 183, 195 (1976).

124. *Pitts v. Perluss*, 58 Cal. 2d 824, 832, 377 P.2d 83, 88, 27 Cal. Rptr. 19, 24 (1962). See also *Agricultural Labor Relations Bd. v. Superior Court*, 16 Cal. 3d at 411-12.

125. CAL. GOV'T CODE § 65302(c) (Deering 1979). (For text see note 16 *supra*.)

126. Added by 1975 Cal. Stats. 1st Ex. Sess., ch. 1, § 7; repealed by 1977, Cal. Stats. ch. 610, § 1; reenacted by 1977 Cal. Stats., ch. 610, § 2 (codified as CAL. HEALTH & SAFETY CODE § 50459 (Deering 1979)).

Administrative Procedures Act.¹²⁷ Because regulations required to be adopted pursuant to the APA are generally intended to be binding,¹²⁸ these two statutes appear to provide adequate enabling legislation for the promulgation of binding regulations by HCD. However, Government Code section 65040.2 (formerly section 34211.1) also affects the development of the Housing Element Guidelines. Section 65040.2 pertains to the duties of the Office of Planning and Research (OPR, formerly CIR) and requires that OPR develop and adopt guidelines for the preparation of all nine mandatory elements of the general plan.¹²⁹ While

127. Section 50459 provides that:

The department shall adopt guidelines for the preparation of housing elements required by section 65302 of the Government Code. The guidelines initially adopted shall conform as nearly as possible to the guidelines adopted by the commission June 17, 1971, and shall be adopted in accordance with the provisions of Chapter 4.5 (commencing with section 11371) of Part 1 of Division 3 of Title 2 of the Government Code. After consultation with the State Office of Planning and Research, the department may, from time to time, revise such guidelines. The department may review local housing elements for conformity with the requirements of section 65302 of the Government Code and guidelines adopted pursuant thereto, and report its findings. The department may, in connection with any loan or grant application submitted to the agency, require submission to it for review of any local housing element and any local housing assistance plan adopted pursuant to provisions of the Housing and Community Development Act of 1974.

128. See notes 111-115 *supra* and accompanying text.

129. Section 65040.2 provides:

In connection with its responsibilities under subdivision (1) of Section 65040, the office shall develop and adopt guidelines for the preparation and content of the mandatory elements required in city and county general plans by Article 5 (commencing with section 65300) of Chapter 3 of Title 7. All guidelines heretofore adopted by the Council on Intergovernmental Relations pursuant to former section 34211.1 shall remain in effect as the guidelines of the office and shall be fully enforceable unless and until readopted, amended, or repealed by the office. *For purposes of this section, the guidelines prepared pursuant to section 41134 of the Health and Safety Code shall be the guidelines for the housing element required by section 65302.*

In the event that additional elements are hereafter required in city and county general plans by Article 5 (commencing with section 65300) of Chapter 3 of Title 7, the office shall adopt guidelines with respect to such elements within six months of the effective date of legislation requiring such additional elements.

The office may request from each state department and

the statute recognizes that for its purposes the regulations prepared by HCD "shall be the guidelines for the housing element," it goes on to state that "(t)he guidelines shall be advisory to each city and county" without distinguishing between the guidelines developed by HCD and those developed by OPR and without clarifying the meaning of "advisory."¹³⁰

Proponents of the position that the housing element guidelines are advisory argue that section 65040.2 should be read 1) to apply to all guidelines of the nine mandatory elements of the general plan and 2) to indicate that such guidelines are advisory rather than binding on local governments.¹³¹ They contend that the statute draws no distinction between the guidelines of the housing element and those of the other elements when stating that "(t)he guidelines shall be advisory."¹³² Further, they argue that if the legislature had intended to except the Housing Guidelines from the statement's implications it would have clearly done so.¹³³ At first glance this position appears persuasive, but a closer reading of the statutes within the context of the legislative history, statutory scheme, and statutory objectives reveals otherwise.

B. THE STATUTORY SCHEME AND OBJECTIVE

The promulgation of the Housing Element Guidelines is covered by Health and Safety Code section 50459 which deals exclusively with the housing element and HCD. This section is a part of Division 31 of the Health and Safety Code (the Housing and Home Finance Act) which is concerned solely with housing.¹³⁴ Section 65040.2, however, is located in Chapter 1.5 of Division 1 which defines the powers and duties of OPR, not

agency, as it deems appropriate, and such department or agency shall provide technical assistance in readopting, amending or repealing the guidelines.

The guidelines shall be advisory to each city and county in order to provide assistance in preparing and maintaining their respective general plans.

The office shall provide for regular review and revision of the guidelines established pursuant to this section.

Id. (emphasis added).

130. *Id.*

131. See 139 Cal. Leg. Counsel Op. 9894 (1977).

132. *Id.*

133. *Id.*

134. CAL. HEALTH & SAFETY CODE §§ 50000-51900 (Deering 1978).

HCD.¹³⁵ Except for the third paragraph, each paragraph of the statute expressly refers to those guidelines adopted by OPR and thus does not even impliedly govern the Housing Element Guidelines.

Although Health and Safety Code section 50459 provides that HCD adopt "guidelines" while Government Code section 65302 requires housing elements to be developed pursuant to "regulations," the change in terms does not appear to be significant. These two statutes, read together, mandate that housing elements be developed pursuant to regulations adopted in accordance with the APA, and permit HCD to review housing elements of regional plans for conformity with those regulations.¹³⁶ The requirement that the guidelines be adopted pursuant to APA procedures indicates that the guidelines were viewed by the legislature as binding regulations.¹³⁷ That HCD is permitted to review the elements for conformity with the guidelines is further indication of their binding nature. If the guidelines need not be followed, review for compliance with them becomes nothing more than a data-gathering exercise.

It is also prescribed that section 50459 must be liberally construed to effectuate the purposes of the Housing and Home Finance Act.¹³⁸ The purposes of the Act are, *inter alia*, to direct the public sector to cooperate in early attainment of the goal of providing a decent home for every Californian,¹³⁹ and to encourage the availability of adequate housing for persons of low income.¹⁴⁰ Binding guidelines would better effectuate these purposes because the guidelines set very high standards for localities to follow when planning for low income housing¹⁴¹—standards that are likely to be ignored unless they are enforceable.

135. *Id.* §§ 65025-65049 (Deering 1979).

136. For the text of these sections see notes 16 and 127 *supra*.

137. See note 115 *supra* and accompanying text.

138. CAL. HEALTH & SAFETY CODE § 50004 (Deering 1978), which reads in relevant part:

The Legislature finds and declares that it is . . . a public purpose to encourage the availability of adequate housing and home finance for persons and families of low or moderate income Therefore, this division shall be liberally construed to effect its purpose.

139. *Id.* § 50002 (Deering 1978).

140. *Id.* § 50004 (Deering 1978).

141. See notes 99-102 *supra* and accompanying text.

On its face, the purpose of Government Code section 65302 (c) is to make specific, with respect to housing, the requirement of section 65300¹⁴² that all localities must have general plan. Both of these sections and section 65040.2 are part of Division 1 of Title Seven of the Government Code entitled "Planning and Zoning."¹⁴³ The purpose of this Division of the Government Code is to ensure that local governments "should be guided by an effective planning process, including the local general plan" and "should proceed within a framework of officially approved statewide goals and policies."¹⁴⁴ Thus, sections 65302(c) and 65040.2, despite their disharmony are intended to implement the same overall statutory objectives.

Statutes on the same subject matter must be harmonized if possible, even if they are passed at different times and one treats the subject more specifically than the other.¹⁴⁵ Section 65040.2 should therefore be harmonized with sections 65302(c) and 50459. Construing the objectives of the various statutes together, the combined statutory purpose with respect to housing is clearly to require all communities to engage in planning, within a uniform statewide framework, in order to adequately provide housing for all. Sections 65302(c), 50459, and 65040.2 must therefore be viewed in the strong light of these important objectives.¹⁴⁶

In this respect there is much evidence that advisory guidelines cannot be effective in eliciting local compliance with the general plan requirement or cooperation in achieving the state housing goal. A report issued by the State Attorney General documents the fact that the Housing Element Guidelines, which have been treated as advisory by local governments, have been ineffective in achieving local compliance with the housing element requirements.¹⁴⁷ Moreover, it is unreasonable to expect

142. CAL. GOV'T CODE § 65300 (Deering 1979); *id.* § 65302 (Deering 1979). For the text of these statutes see notes 13 and 16 *supra*.

143. CAL. GOV'T CODE §§ 65000-65999 (Deering 1979).

144. *Id.* § 65030.1 (Deering 1979).

145. *Natural Resources Defense Council, Inc. v. Arcata National Corp.*, 59 Cal. App. 3d 959, 965, 131 Cal. Rptr. 172, 175 (1965); *Jenkins Co. v. Los Angeles County*, 178 Cal. App. 2d 378, 383, 2 Cal. Rptr. 852, 855 (1960).

146. *See Wotton v. Bush*, 41 Cal. 2d at 467, 261 P.2d at 260 (1953).

147. *See Attorney General's Report On Low And Moderate Income Housing* 28 (Jan. 1976). The Attorney General stated:

adequate comprehensive planning by each and every community in the state without the existence of regulations enforceable against the recalcitrant entities. Yet, the regional nature of the housing crisis demands just such universal participation and compliance.

It should also be noted that when a word is susceptible to two different meanings it is generally construed in conformity with the general purpose of the statute.¹⁴⁸ Construing the term "guidelines" in conformity with the general purpose of sections 65302(c) and 50459 would seem to require it be taken to mean mandatory regulations rather than advisory regulations.

Reasonable effectuation of the purpose of the legislature in this instance is more likely to be attained under binding rather than advisory guidelines. This fact must be given prime consideration in interpretation of the subject statutes.¹⁴⁹ The statutory scheme and objective indicate that section 65040.2 does not apply to the Housing Element Guidelines and that the guidelines were intended to establish binding criteria against which local compliance with the housing element requirement can be measured.

C. LEGISLATIVE HISTORY

When subsection (c) of Government Code section 65302, requiring that a housing element be included in all local general plans, was adopted in 1967, it did not provide that the content of the housing element be developed "pursuant to regulations" as it does today, and it directed that the housing element need only "*endeavor* to make adequate provision for the housing

Despite the clear mandatory language in the Planning and Zoning Law, cities and counties in California have been lax in adopting and implementing adequate housing elements and in utilizing the full range of their municipal powers to meet the housing needs of low and moderate income families. As many as 35% of the cities and 20% of the counties have yet to adopt a housing element even though the law has required their adoption since 1969. Many of the adopted elements consist of only vaguely concluded goals and have virtually no implementation components or strategies.

Id.

148. *Moyer v. Work. Comp. Appeals Bd.*, 10 Cal. 3d 222, 232, 514 P.2d 1224, 1230, 110 Cal. Rptr. 144, 150 (1973).

149. *See* 41 Cal. 2d at 467.

needs of all economic segments of the community.”¹⁵⁰

Later, in 1970, Health and Safety Code section 37041 was enacted, authorizing the Commission of Housing and Community Development (HCD) to develop guidelines for the preparation of housing elements.¹⁵¹ These two enabling statutes were subsequently linked in 1971 when section 65302(c) was amended to require the housing element “to be developed pursuant to regulations established under section 37041 of the Health and Safety Code.”¹⁵² Also in 1971, the legislature considerably strengthened the housing element requirement in two respects. First, the words “endeavor to,” which limited the mandate of section 65302(c) that a community’s housing element “make adequate provision for the housing needs of all economic segments of the community,” were deleted.¹⁵³ Thus, cities and counties were required to at least *propose* a plan that would actually fulfill those needs. Adequate planning was thereby mandated regardless of the probability of its implementation. Second, the requirement that the housing element be developed by localities “pursuant to regulations” established under then section 37041,¹⁵⁴ that is, pursuant to regulations adopted by HCD was added. Hence, although section 37041 directed HCD to establish “guidelines”, the later enactment, Government Code section 65302(c), deemed those guidelines to be “regulations”. Thus, HCD was given the primary responsibility for adopting housing element regulations.

Still later, in 1972, Government Code section 34211.1,¹⁵⁵ the predecessor to section 65040.2, was enacted requiring that the predecessor to OPR (CIR) adopt guidelines for the preparation of all the mandatory elements of the general plan and providing that those guidelines were advisory.¹⁵⁶ As in section 65040.2, CIR

150. 1967 Cal. Stats., ch. 1658, § 4 (emphasis added). Subsection (c) provided that the general plan include: “A housing element consisting of standards and plans for the improvement of housing and for provision of adequate sites for housing. This element of the plan shall endeavor to make adequate provision for the housing needs of all economic segments of the community.” For the present wording see note 16 *supra*.

151. 1970 Cal. Stats. ch. 1553, § 4.

152. 1971 Cal. Stats. ch. 149, § 1.

153. 1971 Cal. Stats. c. 1803 § 1.5.

154. *Id.*

155. 1972 Cal. Stats., ch. 902, § 1, amended 1973-74 Cal. Stats., ch. 120, § 1.

156. Section 34211.1 reads as follows:

In connection with its responsibilities under Section 34211,

was not authorized to adopt the Housing Element Guidelines, the statute stating that "guidelines prepared pursuant to section 37041 of the Health and Safety Code shall be the guidelines for the housing element."¹⁵⁷ Moreover, section 34211.1 did not designate the Housing Element Guidelines as advisory. Section 34211.1 consisted of four paragraphs.¹⁵⁸ The first sets forth CIR's duty to adopt guidelines for the preparation of all the elements of the general plan *except* the housing element. The third paragraph, in reference to the first, read as follows:

Upon adopting the guidelines, the council (CIR) shall transmit copies thereof to every city and county. *Such Guidelines* shall be advisory to each city and county in order to provide assistance in preparing and maintaining their respective general plans.¹⁵⁹

It is clear from this wording and structure that the guidelines intended to be "advisory" are only "[s]uch guidelines" adopted

the council shall develop and adopt guidelines for the preparation and content of the mandatory elements required in city and county general plans by Article 5 (commencing with Section 65300) of Chapter 3 of Title 7. Such guidelines shall take into account different geographic, demographic and other relevant characteristics among the various cities and counties. The guidelines shall be adopted as soon as possible, and in any event shall be adopted within six months of the effective date of this section. *For purposes of this section the guidelines prepared pursuant to Section 37041 of the Health and Safety Code shall be the guidelines for the housing element required by Section 65302.* In the event that additional elements are hereafter required in city and county general plans by Article 5 (commencing with Section 65300) of Chapter 3 of Title 7, the council shall adopt guidelines with respect to such elements within six months of the effective date of legislation requiring such additional elements.

The council may request from each state department and agency, as it deems appropriate, and such department or agency shall provide, technical assistance in preparing the guidelines. *Upon adopting the guidelines*, the council shall transmit copies thereof to every city and county. *Such guidelines shall be advisory* to each city and county in order to provide assistance in preparing and maintaining their respective general plans. The council shall provide for regular review and revision of the guidelines established pursuant to this section.

(Emphasis added.) 1972 Cal. Stats., ch. 902, § 1, amended 1973-74 Cal. Stats., ch. 120, § 1.

157. *Id.*

158. *Id.*

159. *Id.*

by CIR. The Housing Element Guidelines, though, were to be adopted by HCD, not CIR, and therefore were not controlled by this language. Section 65040.2 constitutes the recodification of section 34211.1 necessitated in 1975 when the CIR was dissolved and its duties transferred to OPR,¹⁶⁰ and does not represent a substantive revision warranting rejection of the intent indicated by the former language.¹⁶¹

“Regulations” or “Guidelines”?

The language in Government Code section 65302(c) requiring housing elements to be developed “pursuant to regulations” was adopted after the enactment of Health and Safety Code section 37041, which mandated HCD to develop “guidelines” to implement a predecessor to section 65302(c).¹⁶² The use of the relatively stronger word in the later enactment indicates an intention to make it clear that the guidelines should be viewed as binding regulations.¹⁶³

The force of this argument is tempered by the fact that when section 37041 was recodified as section 41134 in 1975 the term “guidelines” was retained.¹⁶⁴ However, all other revisions of sections 65302(c) or 41134 have strengthened the housing element requirement¹⁶⁵, indicating the retention of “guidelines” in section 41134 (and later section 50459) does not signify an intent to weaken the effect of the guidelines. In 1971, the force of section 65302(c) was strengthened by deletion of the words “endeavor to” which had qualified the mandate of the section that a local government’s housing element “make adequate provision for the housing needs of all economic segments of the community.”¹⁶⁶ Furthermore, although “guidelines” was retained when section 37041 was recodified as section 41134, the requirement that the guidelines be adopted in accordance with the APA was

160. 1975 Cal. Stats. ch. 641, §§ 1-3.

161. Change in phraseology of a code section will not be construed to change its meaning unless the language is materially altered and thereby *clearly* indicates a change. *In re Trombley*, 31 Cal. 2d 801, 806, 193 P.2d 734, 738 (1948).

162. 1971 Cal. Stats. ch. 149, § 1; 1970 Cal. Stats., ch. 1553, § 4. *See also* appendix.

163. *See* 55 Op. Cal. Att’y Gen. 380 (1972) which came to this conclusion.

164. 1975 Cal. Stats. 1st Ex. Sess., ch. 1, § 7. “Guidelines” was also retained when section 41134 was renumbered 50459. *See* notes 126 and 127 *supra*.

165. *See* appendix.

166. 1971 Cal. Stats., ch. 1803, § 1.

added.¹⁶⁷ This recodification also authorized HCD to review local housing elements for conformity with the guidelines.¹⁶⁸ Between 1971 and 1975 then, the Legislature changed the housing element statutes to 1) mandate localities to plan for all housing needs where previously they only needed to “endeavor to” plan, 2) mandate that HCD adhere to the APA when adopting guidelines where previously no procedures were prescribed, and 3) permit HCD to review housing elements for compliance with the guidelines.

Thus despite the retention of the term “guidelines”, the housing element requirement and the review powers of HCD have been strengthened over the years. This general trend towards strengthening the housing element requirements tends to support the position that the guidelines were intended to be binding regulations.

Statements of Sponsoring Legislators

The statement of a sponsor of proposed legislation is relevant to the interpretation of that legislation after passage to the extent that it evidences the understanding of the legislature and not the sponsor’s personal views.¹⁶⁹ The late George Moscone, author of SB 1499 which added to section 65302(c) the requirement that housing elements be “developed pursuant to regulations,”¹⁷⁰ stated in a letter, which accompanied the bill to former Governor Reagan’s desk, that the intent of the legislation was to “require that cities and counties in developing the housing elements in the general plan follow the guidelines which were developed at the request of the Legislature following public hearings throughout the state.”¹⁷¹ Because the letter was attached to the actual legislation, it is reasonable to conclude that it was intended to clarify the position of the legislature for the Governor and thereby assist him in deciding whether to sign the bill. Accordingly, it must be given some weight in determining whether the guidelines were intended by the legislature to be binding.

167. 1975 Cal. Stats., 1st Ex. Sess., ch. 1, § 7.

168. 1970 Cal. Stats., ch. 1553, § 4.

169. *In re Marriage of Bouquet*, 16 Cal. 3d 583, 589, 546 P.2d 1371, 1373, 128 Cal. Rptr. 427, 430 (1976).

170. 1971 Cal. Stats., ch. 1803, § 1.

171. Letter from then State Senator Moscone to Governor Reagan concerning SB 1499 (1971).

Unpassed Bills of Later Legislative Sessions

“Unpassed bills of later legislative sessions” are of “little value” in determining¹⁷² the intent of the legislature with regard to the original enactment unless “the full context of circumstances in which the Legislature failed to enact any” (bill) is clearly indicative of original intent.¹⁷³ The totality of circumstances considered in making this determination can include pre-enactment history, legislative committee reports, and action actually taken by the legislature in the year the legislation failed.¹⁷⁴

HCD asserts that the death in committee of AB 389¹⁷⁵ in the 1977-78 legislative session, which would have declared the guidelines “advisory only”, lends further support to the position that the guidelines are mandatory.¹⁷⁶ Then HCD director, Arnold Sternberg, had pointed out to the Joint Hearing of the Assembly Committee on Housing and Community Development and the Senate Committee on Local Government that HCD viewed the guidelines as mandatory.¹⁷⁷ AB 389 was one of a package of 12 bills introduced in the 1977-78 legislative session to weaken low and moderate income housing-development laws.¹⁷⁸ There was, though, no affirmative action that year by the legislature with respect to the housing element requirement. This lack of action together with the absence of a committee report and the somewhat confusing pre-enactment history described above, presents a set of circumstances that renders AB 389’s death an unclear indication of the legislature’s original intent with respect to the nature of the guidelines.

172. *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 263 Cal. App. 2d 41, 57-58, 69 Cal. Rptr. 480, 492 (1968).

173. *Seibert v. Sears, Roebuck and Co.*, 45 Cal. App. 3d 1, 19, 120 Cal. Rptr. 233, 247 (1975).

174. *Id.*

175. Assembly Bill 389 (Ellis), 1st Sess., 1977-78 leg. term.

176. See Memorandum of Points and Authorities and Amicus Curiae In Support of Plaintiffs by California Dept. of Housing and Community Development, at 19, *Sherman v. Bd. of Supervisors of Orange County*, Civ. Case No. 29-20-62, (Super. Ct., County of Orange, Dec. 14, 1978).

177. “California Statewide Housing Plan And Housing Elements,” *supra* note 116, at 55.

178. See Note, *California Lower Income Housing Policy: At Legislative And Judicial Crossroads*, 29 HASTINGS L.J. 793, 802-03 (1978).

D. JUDICIAL INTERPRETATION

To date there are no published opinions that consider whether the Housing Element Guidelines are binding or advisory. There are, though, two unpublished appellate decisions which took up the matter and found the guidelines advisory.¹⁷⁹ However, one has been discredited, the other is inapposite and neither have precedential value.¹⁸⁰

In *Leonard v. City of El Cerrito*¹⁸¹ the court concluded that the 1971 housing element guidelines established under Health and Safety Code section 37041 were not entitled to binding effect. The Attorney General petitioned for rehearing or, in the alternative, modification of the opinion, pointing out that the 1971 guidelines had not been adopted in accordance with the Administrative Procedures Act, but that the new guidelines were to be adopted pursuant to the APA and thus were intended to be binding.¹⁸² The Attorney General argued:

The Legislature has . . . expressly required that the new guidelines be adopted pursuant to the rule making provision of the California Administrative Procedure Act. We believe this express requirement was intended to insure that the department's guidelines be adopted as binding regulations of general application.¹⁸³

179. Two other cases in which the mandatory/advisory question was an issue were eventually settled. They both involved a local government being sued for allegedly failing to make adequate provision for the housing needs of the low and moderate-income persons of the region; in both, as one cause of action, non-compliance with the Housing Element Guidelines was alleged; and in both cases the local governments settled with their challengers by agreeing to make certain commitments to providing low and moderate-income housing opportunities. See *Sherman v. Bd. of Supervisors of Orange County*, Civ. Case No. 29-20-62, Superior Court, County of Orange (1978); *Fair Housing Coalition of Orange County v. City of Irvine*, Civ. No. 225824 (Orange County Superior Court, filed Mar. 7, 1975) and discussion of the case in Note, *California Lower Income Housing Policy: At Legislative and Judicial Crossroads*, 29 HASTINGS L.J. 793, 800-03 (March 1978), and *Low Income Housing Laws*, *supra* note 42, at 2-16.

180. CAL. RULES OF CT., Rule 977, which provides:

An opinion of a Court of Appeal . . . that is not published in the Official Reports shall not be cited by a court or by a party in any other action or proceeding except where the opinion is relevant under the doctrines of the law of the case, *res judicata* or collateral estoppel

181. No. 1 Civil 34762 (1st App. Dist. Cal., Oct. 31, 1975).

182. See *Amicus Curiae*, State of California Brief In Support of Petition For Rehearing, Or, In The Alternative, Petition For Modification Of The Opinion, *Id.*

183. *Id.*

In response to this petition the court decertified the opinion and vacated the order directing the decision be published.¹⁸⁴

*Save Jutland Canyon Committee v. Planning Commission of San Diego*¹⁸⁵ addressed the question of whether the 1971 guidelines, even though “not enacted according to the rule making procedure of the Administrative Procedures Act. . . . should be controlling authority in determining the adequacy of local housing elements.”¹⁸⁶ The court answered this in the negative but did not reach the question of whether the guidelines would be binding if adopted pursuant to the APA. However, the opinion cautions that its holding might have been mooted by statutory changes in 1975. Health and Safety Code section 41134 was enacted that year, requiring that Housing Element Guidelines be adopted in accordance with the APA.¹⁸⁷ And, in fact, the guidelines developed pursuant to the APA went into effect in 1977.¹⁸⁸

The judicial determinations as to the effect of the guidelines promulgated pursuant to the California Environmental Quality Act¹⁸⁹ (CEQA) also lend support to the position that the Housing Element Guidelines are binding. The analogy is warranted by the similarity between the CEQA enabling legislation and that of the housing element. Public Resources Code section 21083 requires the Office of Planning and Research to prepare and the Resources Agency to adopt “guidelines” to implement the Act.¹⁹⁰ These guidelines, like the Housing Element Guidelines, must be adopted in accordance with the notice and hearing requirements of the Administrative Procedures Act.¹⁹¹ Like the Housing Element Guidelines they were promulgated by the

184. *Id.*, rehearing denied and publication order vacated (Nov. 26, 1975).

185. No. 4 Civil 14780 (4th App. Dist. Cal., Jan. 5, 1977).

186. *Id.*

187. See notes 126-127 *supra* and accompanying text.

188. 25 CAL. ADMIN. CODE §§ 6400-6480 (1977); see notes 94 and 95 *supra* and accompanying text.

189. CAL. PUB. RES. CODE §§ 21000-21176 (Deering 1976).

190. *Id.* § 21083 (Deering 1976).

191. *Id.* Section 21083 reads in part: “the Resources Agency shall . . . adopt such guidelines pursuant to Chap. 4.5 (commencing with Section 11371) of Part 1, Division 3, Title 2 of the Government Code” These sections are otherwise known as the Administrative Procedure Act., CAL. GOV'T CODE § 11370 (West 1966). See note 127 *supra* and accompanying text and compare the similar language of the Housing Element Guideline's enabling statute, CAL. HEALTH & SAFETY CODE § 50459.

designated administrative agency and codified in the California Administrative Code.¹⁹² At least twice, the courts have considered the effects of the CEQA Guidelines and in so doing have treated them as binding.¹⁹³ Whether they might be merely advisory was never a question. It would seem that similar treatment should be afforded the Housing Element Guidelines.

E. ADMINISTRATIVE PRESUMPTION

When afforded the strong presumption of regularity that administrative regulations generally receive, the Housing Element Guidelines themselves provide support for the position that they are binding.¹⁹⁴ Section 6400 of the California Administrative Code provides that the Housing Element Guidelines "are binding on all counties, cities and counties, and cities including charter cities."¹⁹⁵ And section 6406 states that "local housing elements are to be developed pursuant to these regulations."¹⁹⁶

Of course, HCD's adoption of a regulation designating the guidelines as binding does not automatically make them so. It is not contended that these administrative sections are evidence of legislative intent but only that they create a legal presumption.¹⁹⁷ HCD has construed the guidelines to be binding; they must therefore be presumed binding until legislative intent to the contrary is evidenced. There is little evidence that the legislature intended advisory guidelines.

192. 14 CAL. ADMIN. CODE §§ 15000-15203 (Deering 1978).

193. *See* *No. Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 80, 529 P.2d 66, 74, 118 Cal. Rptr. 34, 42 (1974) and *Plan of Arcadia, Inc. v. City Council of Arcadia*, 42 Cal. App. 3d 712, 723-24, 117 Cal. Rptr. 96, 102-03 (1974).

194. *See* notes 121-124 *supra* and accompanying text.

195. 25 CAL. ADMIN. CODE § 6400 (Deering 1979). In reference to the Housing Element Guidelines this section also states:

The regulations contained herein are prescribed by the Department of Housing and Community Development, pursuant to authority granted in Health and Safety Code Section 50459 and Government Code Section 65302(c) and are to be followed in the preparation of local housing elements required by Government Code Section 65302(c)

196. 25 CAL. ADMIN. CODE § 6406 (Deering 1979).

197. *Ralphs Grocery Co. v. Reimel*, 69 Cal. 2d 172, 175, 444 P.2d 79, 82, 70 Cal. Rptr. 407, 410 (1968). *See* note 123 *supra* and accompanying text.

CONCLUSION

The foregoing analysis indicates that the California Legislature, being sincerely committed to mandating planning for the housing needs of the poor, intended the Housing Element Guidelines to be binding. Government Code section 65302(c) requires that each governmental unit develop a housing element pursuant to regulations and, by reference to Health and Safety Code section 50459, delegates to HCD the duty to promulgate the regulations. Section 50459, in turn, directs HCD to adopt guidelines pursuant to the Administrative Procedures Act—a process generally reserved for the adoption of binding regulations. This section also permits HCD to review local housing elements for conformity with the guidelines—a duty that is meaningful only if the guidelines are binding.

Although Government Code section 65040.2 creates some facial uncertainty as to the legislature's intent, it governs OPR, not HCD, and was enacted to provide OPR with the power to develop guidelines for other elements of the general plan, expressly excepting the housing element. In fact, the legislative history of section 65040.2 dispels even this facial uncertainty. Moreover, the legislature has continually strengthened the housing element requirement over the years, at no time indicating that it perceived the guidelines as advisory. Indeed, the requirement has been strengthened to such an extent that advisory guidelines could not facilitate its successful implementation.

In the face of this interpretation, the judiciary has refused to issue a precedential opinion holding the guidelines to be advisory. Indeed, the analogous CEQA guidelines have been treated as binding by the courts. Furthermore, the guidelines must be presumed valid and thereby create the presumption that they are binding regulations. There is little evidence to rebut this presumption.

The Housing Element Guidelines should therefore be viewed as binding regulations. Whether local governments or the courts will concur in this view is still in question. In the words of the ABA Commission on Housing and Urban Growth: "Whether we as a nation are up to the planning and land management

challenge that the heightened awareness of a more responsible generation has forced upon us must be left for history to decide."¹⁹⁸

Michael Rawson

198. *Housing For All*, *supra* note 6, at 479.

1980]

HOUSING ELEMENT GUIDELINES

763

APPENDIX

Year	65302(c)	50459 (former 37041 & 41134)	65040.2 (former 34211.1)
1967	General plan must contain a housing element that "endeavors to make adequate provision for" local housing needs.		
1970		HCD directed to develop "guidelines" for the preparation of local housing elements. (37041)	
1971	1) "endeavors to" deleted, 2) housing element required to be adopted "pursuant to regulations" developed by HCD per 37041		
1972			CIR directed to develop "guidelines" for the preparation of the <i>other</i> elements of the general plan. Guidelines developed by CIR deemed "advisory" (34211.1)
1975		1) HCD required to adhere to the APA in developing guidelines, 2) HCD directed to review local housing elements for conformity with the guidelines. (41134)	OPR succeeds CIR. Responsibility to develop guidelines unchanged. (65040.2)
1977		41134 renumbered 50459.	

