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# Summary of the Hearing on California Jobs and Future

Senate Committee on Housing and Urban Affairs

CALIFORNIA LEGISLATURE

# SENATE COMMITTEE ON HOUSING AND URBAN AFFAIRS

SENATOR MIKE THOMPSON, CHAIRMAN

**Staff Report**

**Summary of the Hearing on**

# CALIFORNIA JOBS AND FUTURE



July 29, 1992
State Capitol
Sacramento, California

CALIFORNIA LEGISLATURE

# SENATE COMMITTEE ON

# HOUSING AND URBAN AFFAIRS

Staff Report

**A summary of the informational hearing to review the recommendations of the report on California Jobs and Future prepared by the Council on California Competitiveness relating to:**

- **Comprehensive Plan**
- **California environmental Quality Act**
- **Land Use Court**
- **Impact Fees and Exactions**

July 29, 1992
State Capitol
Sacramento, California

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## I. Introduction

On July 29, 1992, the Senate Committee on Housing and Urban Affairs held a hearing to review the land use recommendations of the report on California Jobs and the Future prepared by the Council on California Competitiveness relating to:

1. creating a local comprehensive plan;
2. revising the California Environmental Quality Act (CEQA):
3. establishing a State land use court; and
4. limiting development fees and exactions.

The Council on California Competitiveness was formed on December 18, 1991 by Governor Pete Wilson and charged with finding ways "...to remove barriers to creating jobs and increasing state revenues in California." The main finding of the report is that while California has a "job hemorrhage" resulting from the recession and defense and aerospace cutback, the major problem is a "self inflicted," "...nightmarish obstacle course for business, job and revenue growth." In a supplementary document prepared by the Task Force on Regulatory Streamlining, the Council calls for "regulatory streamlining" to eliminate these obstacle.

In his opening statement, Senator Thompson noted that California's population increased over 6 million persons in the 1980's and is expected to grow by another 6 million by the year 2000. As this unparalleled growth continues, the Legislature is faced with how to efficiently and effectively deal with an array of issues such as infrastructure.

The Chairman further indicated that the purpose of the hearing is to provide a public forum for discussing the Council's land use recommendations and related issues as a means for evaluating existing legislation and assessing the need for additional legislation.

Chairman Thompson's objective is to make a contribution to this ongoing debate about how to devise a balanced planning and development strategy that will provide the housing and jobs needed by our growing population and still preserve the unique natural resources of California.

This staff report summarizes the major points and recommendations of the witnesses. It further contains the Background Paper and Agenda for the hearing. The written statements by witnesses and other materials submitted to the Committee are contained as appendices to this report.

## II. Summary of Testimony

### A. Ward Connerly, Member, Council on California Competitiveness

Mr. Connerly, who is both a Council member as well as the chairman of the Regulatory Streamlining Subcommittee, indicated that the pro-business bias of the Council's recommendations was intentional. In order to produce jobs and revenue, business needs development rules designed to accommodate growth. Instead, current regulatory practices result in dollars being expended on processing rather than development. Government imposes barriers and then makes builders and developers pay to overcome the barriers through fees.

He cited the need for regulatory streamlining which would include:

1) a development process with clear, concise, reasonable regulations that result in a greater degree of certainty;
2) a clear set of State land use policies updated every 5 years.
3) an efficient planning system which can be accomplished though a Comprehensive Plan and a Master Environmental Report;
4) reforms in CEQA which will eliminate the current abuse, eliminate analysis not based on environmental factors, eliminate costly data gathering and shorten the process;
5) a fair process for resolving the land use disputes which would include creation of a land use court;
6) a five year capital outlay program; and
7) elimination of fees based on social needs which should not be the responsibility of builders and developers.

### B. Richard Lyons, Legislative Advocate, California Building Industry Association.

Mr. Lyons indicated that the U.S. housing industry has lead the economy out of seven national recessions. While the State needs over 300,000 housing starts annually, it is estimated that there will be only 104,000 housing starts in 1992. There is a need to clear the "blockages" from the development system which will enable the housing industry to lead the economy out of this recession and function at its maximum.

Lyons asserted the need for:

1) an infrastructure financing system such as a statewide infrastructure bank or regional fiscal authority;

2) a planning and approval system which provides certainty, i.e., if a project is consistent with the plan it should be automatically approved;

3) a comprehensive capital outlay plan; and

4) a State Land Use Court

**C. Don Collins, General Counsel, California Building Industry Association**

Mr. Collins addressed the fee discussion issues raised in the Background Paper. When fees are paid is critical. To minimize the payment of interest by the builder, they should be paid near the point of sale. The problem is how to provide security to local government that they will be paid.

He also indicated need to change existing Government Code Section 66001 to improve its fairness. The specific facilities or services to be funded must be identified. The basis for the fee should be the need at the time they are imposed; not something occurring later. Linkage should be limited to real conditions caused by the project. No conditions should be placed on property not under the control of the developer.

**D. Ernest Silva, Legislative Representative, League of California Cities**

Mr. Silva pointed out the current economic downturn can be attributed to a number of problems not associated with local governments' approval process such as base closures, the saving and loan bailout and consecutive natural disasters. He further indicated that existing law now requires a "comprehensive long-term General Plan" based on the concept that land use decisions are made for the public benefit. If those public policies are to be changed, additional planning and work should be required.

Citing a recent report, he indicated that cities with active growth management programs not only have the most aggressive affordable housing plans and polices, but they also produce as many units as those with no restrictions at all.

In regard to CEQA reform, the cities support more up front analysis but do not know where the money will come from to pay for these activities. Also a number of existing statutes and regulations do what the Ueberroth report suggests in eliminating full-blown CEQA analysis for each project, such as tiering which has recently been upheld by the courts.

**E. Dave Fleming, Mayor, City of Vacaville**

Mr. Fleming stated that Vacaville has been doubling n size every ten years and that a new General Plan has been adopted about every 20 years. He further indicated that h city is a bedroom community for which property tax revenue alone can not support the services needed for expansion. cited figures showing that if they build 920 units per ye for ten years, it will result in a $1.8 million deficit. If they do not build, at the end of the ten years they will have a $1.8 million surplus. Therefore, new development mus pay its own way.

**F. DeAnn Baker, California State Association of Counties**

While indicating that a local comprehensive plan might be a good idea, Ms. Baker expressed concerns regarding the cost of creating such plans. She cited, as an example, an estimated $1.5 million cost for a general plan update and an accompanying EIR in Nevada County. With 526 local jurisdictions, the statewide cost of such an effort would be very large.

She also expressed reservations about the State Land Use Court as opening up a morass for litigation on projects. Furthermore, prohibiting linkage fees and inclusionary zoning would damage the tools available to local government to provide affordable housing to their communities.

Ms. Baker questioned the ability of local governments to implement the report's recommendations in light of the current fiscal conditions of the counties.

**G. Rob Mendiola, President, California County Planning Directors Association and Planning Director, San Benito County**

Calling for a balanced view of land use planning, Mr. Mendiola asserted that if the report had asked for successes, they would outnumber the failures and create a different impression.

A Master EIR with a greater level of detail and specificity would be very expensive to create and maintain. Where will local jurisdiction find the support for such an effort? In regard to EIRs, a shortened review period is not realistic. It takes 6 months for the public to become aware and involved. A system which involves the public earlier, such as a scopeing process, would be helpful and might avoid later delays. Adding social and economic assessment provides a new opportunity for challenge.

Mr. Mendiola would prefer a planning system that sets performance standards rather than prescriptive processes.

**H. Barbara Kautz, American Planning Association and Community Development Director, City of San Mateo**

Ms. Kautz urged the committee to pursue the concept of better, detailed, comprehensive planning, coupled with less project-by-project review.

She called for comprehensive planning which should occur at the state level through consistent state plans; at the regional level, by requiring regional agencies to consolidate their planning; and at the local level, by requiring more detailed plans consistent with the state and regional policies.

Indicating dissatisfaction with the current CEQA process, Ms. Kautz said that the American Planning Association was preparing detailed recommendations for changes to CEQA. She felt several of the report's conclusions relating to CEQA were not accurate.

The American Planning association also supports a State Land Use Court as long as it protects the rights of the public and builders and landowners equally. The Association also supports alternative dispute resolution including mediation and possibly boards of appeal.

In regard to fees, the State has not planned for or funded the infrastructure needs to accommodate California's growth. If the State would provide funds, the local governments would gladly rescind their fees.

**I. John White, Legislative Advocate, Sierra Club**

Mr. White expressed concern that the report's recommendations lacked balance and context. Several factors, such as labor costs and taxes, are equally or more important than land use decisions in determining business location.

He indicated a desire for certainty as well; certainty for resource protection. There is a need for strong State development and conservation policies. While he supports the comprehensive planning approach, he does not wish to totally give up project review. There is a need to expedite judicial review, but the State Land Use Court is not an appropriate remedy for that problem.

Mr. White indicated support for a majority vote on local bond issues.

**J. Jim Moose, Legal Adviser, Planning and Conservation League**

Calling for a "lean, mean regulatory machine that protects the environment," Mr. Moose had the following suggestions:

1) The attempt to "frontload" the planning and CEQA process will result in a costly detailed planning process which may not be cost effective and for which there is no financial source.
2) A comprehensive update of the CEQA guidelines by the Office of Planning and Research will provide guidance on how to use existing devices to avoid redundant review.
3) The proposal to require all EIRs to be completed within 6 months is unrealistic. A better approach is to use a carrot such as a financial bonus for timely completion of EIRs.
4) CEQA can be modified by raising the standards for "infill projects" which would mesh with efforts to develop at greater density thus conserving land with high habitat value.
5) Spurious litigation could be lessened by narrowing the definition of project to eliminate review of projects which have no foreseeable effects on the physical environment.
6) Creation of a State Land Use Court and efforts to limit citizen's access to the courts could result in a number of problems.

**K. Bart Doyle, Attorney at Law, Brobeck, Phlenger, Harrison**

Mr. Doyle indicated that the current legal system does not work well on matters relating to land use. The judges tend to be prosecutors who have had no experience in land use law. There is an institutional bias toward the public agency. The builder/developer knows he or she will be back before the local jurisdiction with another project.

There are other dispute resolution processes such as a State Appeals Court, mediation and arbitration. Mediation works best when there is a peer relationship which does not exist between jurisdictions and developers. Arbitration between two private parties is workable but often results in "split the difference" solutions which may not be appropriate.

There is a need for a uniform body of law and an enforcement mechanism. Whatever the system, there should be an appeal to the State Supreme Court.

**L. Michael Zischke, Attorney at Law, McCutchen, Doyle Brown & Enersen**

Mr. Zischke had several suggestions regarding the CEQA process:

1) The CEQA guidelines are now 6 to 7 years out of date. The Legislature should provide more specific directions on how they should be revised.

2) Shortening the CEQA process by 6 months is unworkable for many projects such as large capital projects and general plan EIRs. The time requirements should be matched to the degree of analysis.

3) It is probably not possible to limit citizen and group participation in the CEQA process without jeopardizing due process rights but subsequent review could be streamlined by amending CEQA to limit judicial remedies when issues are raised which should have been raised at the Master EIR level.

4) Socioeconomic impact analysis will be counter-productive.

5) Further guidance is needed on when an EIR shall be recirculated and how cumulative impacts should be analyzed.

**M. Marcus Brown, California Rural Legal Assistance Foundation**

Mr. Brown indicated that he and his clients were not included as part of the Council's inquiry. He has participated with a group of organizations which evolved from the Growth Management Consensus Project which supports SB 929(Presley) relating to growth management, ACA 6(O'Connell) relating to a majority vote for school construction bonds and a bond bill for State programs designed to stimulate economic development, environmental conservation, jobs and housing.

He further asserted the need for a comprehensive planning system which includes a subsidy source for affordable housing, a performance standard based on housing unit production, mixed income housing and urban limit lines.

Citing the need for investment in California infrastructure and housing, Mr. Brown opposed any prohibition against linkage fees or transfer of housing set aside funds and support for inclusionary zoning.

**N. Eileen Reynolds, Legislative Advocate, California Association of Realtors**

Stating that California's housing affordability problems play a major role in deterring businesses from locating here, Ms. Reynolds indicated that the California Association of Realtors supports a State growth management strategy, a local comprehensive plan and a master EIR.

She also indicated support for reforming CEQA and establishing a special land use court.

Ms. Reynolds also voiced support for incentives and/or sanctions to encourage meeting housing needs. In addition, she indicated that costs of a growth management system should not be borne solely by homebuyers nor persons who buy and sell property through transfer taxes or fees.

APPENDIX A

# California Legislature



## Senate Committee on Housing and Urban Affairs

MIKE THOMPSON
CHAIRMAN

STATE CAPITOL, ROOM 2205
SACRAMENTO, CALIFORNIA 95814
(916) 445-8740

## AGENDA

**July 29, 1992**
**State Capitol, Room 2040**

Informational Hearing: A review of the recommendations of the report on **California Jobs and Future** prepared by the Council on California Competitiveness relating to:

- Comprehensive Plan
- California Environmental Quality Act
- Land Use Court
- Impact Fees and Exactions

## WITNESSES

1. Ward Connerly, Member
   Council on California Competitiveness

2. Don Collin, General Counsel
   California Building Industry Association

   Richard Lyon, Legislative Advocate
   California Building Industry Association

3. Ernie Silva, Legislative Advocate
   League of California Cities

   Dave Flemming, Mayor
   City Vacaville

4. DeAnn Baker, Legislative Advocate
   California State Association of Counties

   Rob Mendiola, Planning Director
   San Benito County

5. Barbara Kautz, American Planning Association
   Community Development Director
   City of San Mateo

6. Dave Booher, Consultant
   California Council on Environmental and Economic Balance

7. Michael Zischke, Attorney at Law
   McCutchen, Doyle, Brown & Enersen

8. John White, Legislative Advocate
   Sierra Club

9. Jim Moose, Legal Adviser
   Planning and Conservation League

10. Bart Doyle, Attorney at Law
    Brobeck, Phleger, Harrison

11. Marcus Brown, California Rural Legal Assistance Foundation

12. Eileen Reynolds, Legislative Advocate
    California Association of Realtors

13. Other witnesses

**STATEMENT**

**BY SENATOR MIKE THOMPSON**

**JULY 28, 1992**

CALIFORNIA'S POPULATION INCREASED BY OVER 6 MILLION PERSONS IN THE 1980'S AND IS EXPECTED TO GROW BY ANOTHER 6 MILLION BY THE YEAR 2000. AS THIS UNPARALLELED GROWTH CONTINUES, WE ARE FACED WITH HOW TO EFFICIENTLY AND EFFECTIVELY DEAL WITH ISSUES SUCH AS INFRASTRUCTURE FINANCING, RESOURCE PRESERVATION, DEVELOPMENT PRIORITIES, ECONOMIC DEVELOPMENT, HOUSING AVAILABILITY AND AFFORDABILITY, AND MATTERS OF SOCIAL EQUITY AFFECTING OUR DIVERSE CITIZENRY.

IN APRIL OF THIS YEAR, THE COUNCIL ON CALIFORNIA COMPETITIVENESS ISSUED A REPORT ENTITLED **CALIFORNIA'S JOBS AND FUTURE**. THE REPORT FINDS THAT WHILE CALIFORNIA IS SUFFERING A "JOB HEMORRHAGE" FROM THE RECESSION AND AEROSPACE CUTBACKS, THE MAJOR PROBLEM IS A "SELF INFLICTED," "...NIGHTMARISH OBSTACLE COURSE FOR BUSINESS, JOB AND REVENUE GROWTH." THE REPORT RECOMMENDS "REGULATORY STREAMLINING" TO REDUCE THE BARRIERS TO GROWTH AND DEVELOPMENT.

AT THIS INFORMATIONAL HEARING WE WILL REVIEW THE COUNCIL'S LAND USE RECOMMENDATIONS RELATING TO:

1. CREATING A LOCAL COMPREHENSIVE PLAN;

2. REVISING THE CALIFORNIA ENVIRONMENTAL QUALITY ACT;

3. ESTABLISHING A STATE LAND USE COURT; AND

4. LIMITING DEVELOPMENT FEES AND EXACTIONS.

SEVERAL OF THE COUNCIL'S RECOMMENDATIONS BUILD UPON THE PRECEDING WORK OF OTHER ENTITIES AND INDIVIDUALS WORKING IN THE SAME AREAS. SOME OF THEM ARE INCLUDED IN CURRENT LEGISLATION.

TESTIMONY WILL BE GIVEN BY A COUNCIL MEMBER WHO ASSISTED IN THE PREPARATION OF THE REPORT, BUILDER/DEVELOPER REPRESENTATIVES, LOCAL GOVERNMENT REPRESENTATIVES, ENVIRONMENTAL ORGANIZATIONS AND LOW AND MODERATE INCOME HOUSING ADVOCATES.

SOME OF THESE ORGANIZATIONS HAVE BEEN WORKING TOGETHER FOR MANY MONTHS TO DEVISE A BALANCED PLANNING AND DEVELOPMENT STRATEGY. OTHERS REMAIN MUCH AT ODDS OVER MANY OF THESE ISSUES.

THE PURPOSE OF THIS HEARING IS TO PROVIDE A PUBLIC FORUM FOR DISCUSSING THESE RECOMMENDATIONS AND RELATED ISSUES AS A MEANS FOR EVALUATING EXISTING LEGISLATION AND ASSESSING THE NEED FOR ADDITIONAL LEGISLATIVE ACTION.

MY HOPE IS THAT WE CAN MAKE A CONTRIBUTION TO THIS ONGOING DEBATE ABOUT HOW TO DEVISE A BALANCED PLANNING AND DEVELOPMENT STRATEGY THAT WILL PROVIDE THE HOUSING AND JOBS NEEDED BY OUR GROWING POPULATION AND STILL PRESERVE THE UNIQUE NATURAL RESOURCES OF CALIFORNIA.

APPENDIX C

SENATE COMMITTEE ON HOUSING AND URBAN AFFAIRS

MIKE THOMPSON, CHAIRMAN

# BACKGROUND PAPER

## FOR THE INFORMATIONAL HEARING TO REVIEW THE RECOMMENDATIONS OF THE REPORT ON CALIFORNIA'S JOBS AND FUTURE PREPARED BY THE COUNCIL ON CALIFORNIA COMPETITIVENESS

## RELATING TO:

- COMPREHENSIVE PLAN
- CALIFORNIA ENVIRONMENTAL QUALITY ACT
- STATE LAND USE COURT
- FEES AND EXACTIONS

**July 29, 1992**
**Room 2040, State Capitol**
**Sacramento, California**

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# I. SUMMARY

The Council on California Competitiveness was formed on December 18, 1991 by Governor Pete Wilson and charged with finding ways "...to remove the barriers to creating jobs and increasing state revenues in California." The Council issued its report on April 23, 1992 entitled California's Jobs and Future. The main finding of the report is that while California has a "job hemorrhage" resulting from the recession and defense and aerospace cutbacks, the major problem is a "self inflicted," "... nightmarish obstacle course for business, job and revenue growth." In a supplemental document prepared by the Task Force on Regulatory Streamlining, the Council calls for "regulatory streamlining" to eliminate these obstacles.

To address the problems identified in the report, the Council makes a number of recommendations ranging from such diverse subject matter as workers' compensation to education and training. Among the recommendations relating to land use are four subjects which have a direct impact upon the provision of housing and other development:

1. **Comprehensive Plan.** Require local governments to develop a Comprehensive Plan and a Master Environmental Impact Report (EIR) to guide local development and allow projects to proceed which are consistent with the Comprehensive Plan and Master EIR.

2. **California Environmental Quality Act (CEQA).** Revise CEQA to eliminate redundant environmental reviews, shorten the review process to six months and permit development projects which comply with a Master EIR to receive a focused review on matters not addressed in the Master EIR.

3. **Land Use Court.** Establish a State Land Use Court to appeal all disputes among private parties, local governments and third parties involving decisions by local governments to deny or approve development projects.

4. **Fees and Exactions.** Permit local majority vote General Obligation Bonds to fund infrastructure, require fee payment upon project completion and limit authority to charge "linkage fees."

Several of these recommendations build upon the preceding work of other entities and individuals working in the same areas. Some of these recommendations are included in current legislation.

The purpose of this hearing is to provide a public forum for discussing these recommendations and related issues as a means for evaluating existing legislation and assessing the need for additional legislative action.

This Background Paper provides an analysis of the existing law and related issues, a summary of the Council's findings and recommendations, a brief description of current legislation and an outline of related policy issues.

## II. STATE PLANNING, GROWTH MANAGEMENT AND LOCAL PLANNING

### A. BACKGROUND

California's population increased by over 6 million persons in the 1980's and it is expected to increase by another 6 million by the year 2000. As unparalleled growth continues, California decision makers face the question of how to effectively and efficiently deal with issues such as infrastructure financing, resource preservation, development priorities, economic development, housing affordability and social equity. As the California Planning Roundtable asked at a panel discussion it sponsored on growth management in the Fall of 1991, "How can we manage growth more efficiently to meet our long-term goals and retain our quality of life into the next century?"

The planning process which has evolved in California over the past three decades includes a number of diverse requirements for both state and local government, many of which are uncoordinated and unrelated to each other. Regional government has also developed a number of roles and responsibilities, although not as clearly defined and recognized as the other two levels of government.

In spite of the number of planning tools available to the various levels of government, the reality is that development decisions often occur on a piecemeal, project-by-project basis. The need for better and more comprehensive planning to balance California's competing goals and objectives has never been so critical.

#### 1. State Planning and Growth Management

At the state level, the Legislature adopted policy in 1976 declaring that "decisions involving the future growth of the state, most of which are made and will continue to be made at the local level, should be guided by an effective planning process, including the local general plan..." These "decisions should proceed within the framework of officially approved statewide goals and policies directed to land use, population growth and distribution, development, open space, resource preservation and utilization, air and water quality, and other related physical, social and economic development factors...." "Land use decisions should be made with full knowledge of their economic and fiscal implications, giving consideration to short-term costs and benefits, and their relationship to long-term environmental impact as well as long-term costs and benefit" (Gov. C. Sec. 65025 et seq.).

#### Office of Planning and Research

Established through legislation in 1970, the Office of Planning and Research was created within the Governor's Office as the comprehensive state planning agency. In 1976 it was delegated the responsibility for developing state land use policies, coordinating planning of all state agencies, and assisting and monitoring local and regional planning. The Legislature declared its intent as state policy "to assure orderly planning for specific functions such as water development, transportation, natural resources, economic development

and human resources by units of state government which exercise management responsibility for these functions." It further declared, as part of the state planning process, "that state functional plans proceed from common assumptions and forecasts of statewide growth and development...."

**State Environmental Goals and Policy**

The Legislature directed the Governor to prepare a State Environmental Goals and Policy Report which was to be revised and updated every four years. The report was intended to articulate the State's policies on growth, development and environmental quality; to recommend specific State, local and private actions needed to carry out these policies; and to serve as the basis for the preparation and evaluation of the State's functional plans (such as housing, transportation, air and water quality) and for locating major projects such as highways, water projects and university facilities (Gov. C. Sec. 65041 et seq.). The first report was prepared in 1973, but not approved by Governor Reagan. It was updated as An Urban Strategy for California and endorsed by Governor Jerry Brown in 1978. There has been no update since then.

According to the Office of Planning and Research, more than 50 state plans have been prepared to guide California's growth and development. These plans cover a wide range of subject areas, from air quality to drug and alcohol abuse, to emergency services, to housing. There has been little, if any, effort to coordinate these plans as they are developed, and there is no adopted state master plan with which individual state plans must be consistent.

**Statewide Housing Plan**

In 1977 the Department of Housing and Community Development was required to prepare a statewide housing plan which was to be updated biennially. The plan was to provide a comprehensive description of housing conditions throughout the state and a review of needs for the future, including an identification of problems facing the state and recommendations for addressing them (Health & SC Sec. 50450 et seq.). Although the original statute required a review of consistency with other state plans by the State Office of Planning and Research and adoption by the Legislature, those requirements were deleted in 1979 and 1985. Entitled 101 Steps to Better Housing, the first plan was published in 1982; it was not updated until 1987 and then again in 1990. The plan was never adopted by the Legislature.

**2. Local Planning**

**General Plan**

Every city and county in the State is required to prepare and adopt a comprehensive, long-term general plan for the physical development of the jurisdiction and any land outside its boundaries which bears relation to its planning. The general plan must consist of a statement of development policies and include the following seven

mandatory elements: Land Use; Circulation; Housing; Conservation; Open Space; Noise; and Safety (Gov. C. Sec. 65300 et seq.).

In addition, all the elements of a general plan are required to be internally consistent and compatible. Once the general plan has been adopted, the local planning agency may amend any element of the general plan up to four times per year. The housing element must be updated every five years; all other elements of the general plan need only be updated as necessary to reflect changed circumstances.

There is no single state agency responsible for review and approval of local general plans. The Office of Planning and Research is required to prepare advisory guidelines for the preparation and content of the mandatory elements. Cities and counties must file a report annually with the Office of Planning and Research indicating the degree to which their approved general plan complies with these guidelines (Gov. C. Sec. 65040.5). The housing element is the only mandatory element which requires a state agency, the Department of Housing and Community Development, to review the draft and adopted element and provide written findings as to whether the element substantially complies with the requirements of state law (Gov. C. Sec. 65585).

**Specific Plans**

After the city or county has adopted a general plan it may prepare specific plans for the systematic implementation of the general plan for all or part of the areas it covers. The specific plan must include a text and diagrams which specify in detail various information, including the uses of land, major components of transportation and public facilities, standards and criteria by which development will proceed, and a program of implementation measures. No local public works project may be approved, nor tentative map or parcel map approved, nor zoning ordinance adopted or amended within an area covered by a specific plan, unless it is consistent with the adopted specific plan (Gov. C. Sec. 65450).

**Capital Outlay Plans**

Existing local planning law does not require adoption of a capital improvement program as part of the general plan. However, once a general plan has been adopted, any governmental body, commission or board, whose functions include planning or construction of major public works, is required to submit to the local agency a list of proposed public works for the coming fiscal year, which must be reviewed for conformity with the general plan. Special districts, school districts and joint powers agencies that construct or maintain public facilities may prepare a five-year capital improvement program. Although required to be consistent with the general plan and specific plan, the district or local agency may overrule a finding of inconsistency and carry out its capital improvement program (Gov. C. Sec. 65400 et seq.).

**Subdivision Map Act**

State law known as the Subdivision Map Act governs the division of land for the purpose of sale, lease or financing. With certain exceptions, before land is subdivided into five or more parcels, a tentative map of the subdivision must be approved by the city, and a final map based on a survey of the land must be filed with the county recorder. The local jurisdiction regulates and controls the design and improvement of the subdivision. As conditions to map approval, a city may require dedication of land, payment of in-lieu fees and the construction of public improvements reasonably required for the promotion of health, safety and welfare. (Gov. C. Sec. 66410 et seq.).

Processing of a subdivision depends on the local ordinance; however, there are specific statutory requirements for approving and disapproving a map, including a finding of consistency or inconsistency with the general plan and specific plan. A tentative map may be approved with conditions in effect at the time the application is deemed complete, which are necessary to ensure consistency with or implementation of the general plan or specific plan.

**Regional Planning**

Existing state law establishes a number of regional agencies with specific and sometimes overlapping areas of responsibility. Local agency formation commissions (LAFCOs), air pollution control districts, regional water quality control boards and regional transportation planning agencies are examples of these state mandated regional bodies. Councils of governments may also be formed through joint powers agreements and operate in most urban and some rural areas of the state.

B. **SUMMARY OF THE COUNCIL'S FINDINGS (pages 34 and 35)**

1. Development decisions occur all too often on a project-by-project basis. Consequently, the balance between the public goals of development and environmental protection, complicated by the public debate about growth limitations, are addressed only in the context of a specific construction project.

2. California needs a growth-management system that reconciles and balances the state's competing needs. State government must clearly identify statewide objectives and require regional and local agencies to conduct their activities in concert with those objectives.

3. A sound growth-management system should provide environmental protection standards, require local governments to zone buildable land for housing, establish clear and objective standards for permit approval, require the preparation of local capital improvement plans, set statutory standards to limit antigrowth moratoria, and establish state limits on and guidelines for local development impact fees.

4. Other states have found that comprehensive state planning can reduce red tape, provide greater predictability for resource protection and for development, and increase efficiency in permit processing.

5. The land development approval process in California is a time-consuming maze. A developer must interact with literally dozens of agencies and prevail in many public hearings before citizen advisory councils, planning and other commissions, and local elected city councils and boards of supervisors and other similar bodies. Issues are rehashed in agency after agency, jurisdiction after jurisdiction.

6. There has been little attempt, at any level of government, to reconcile the process by which public policy objectives of environmental quality, economic development, and other social needs are handled in a timely and efficient fashion.

## C. SUMMARY OF THE COUNCIL'S RECOMMENDATIONS (Pages 34 and 36)

### State planning and growth management

1. Require the Governor to lead the development of a strategic plan which includes the top five priorities for the citizens of California which, with the legislature, ensures that such priorities are implemented by government agencies and self-regulating, independent agencies throughout the state.

2. Require the Governor to develop and annually update a master plan that coordinates and streamlines the current state plans.

3. Create an oversight body analogous to the federal system's Office of Management and Budget to coordinate the policy and budgetary decisions being made by state government.

4. Adopt a growth management strategy for California that establishes clear state policies, goals, and objectives; focuses all land-use decision making in the hands of local government; and holds local governments accountable for conducting their activities in accordance with state objectives.

5. Provide funding and support to the Governor's Office of Planning and Research as the primary state planning body.

6. Make the State Clearinghouse perform its intended role as a lead agency and coordinating body for state review of documents that require comment or approval by various state agencies.

### Local Planning

1. Reinforce and strengthen the General Plan as the central tool for planning and rename it the "Comprehensive Plan". Require cities and counties to prepare Comprehensive and Specific Plans.

2. Require that the Comprehensive Plan clearly address state and regional goals.

3. Grant local jurisdictions maximum flexibility in meeting state goals through the Comprehensive Plan.

4. Require a master EIR on the Comprehensive Plan and make the Plan the primary vehicle for environmental assessment and mitigation.

5. Require that all facilities and agencies within the jurisdiction of the state, including state facilities, school districts, and other special district, be subject to each jurisdiction's Comprehensive Plan.

6. Require that each Comprehensive Plan be prepared and adopted in coordination with adjoining jurisdictions to the maximum extent possible.

7. Require the Comprehensive Plan and Specific Plans to provide far more detail for development and resource protection than is now required.

8. Require that each Comprehensive Plan provide sufficient development capacity to accommodate the anticipated growth in the jurisdiction.

9. Upon a finding that the project is consistent with the Comprehensive Plan and Specific Plans, require that the project be deemed approved.

10. Allow projects consistent with the Comprehensive Plan and Specific Plans to proceed.

## D. CURRENT LEGISLATION

1. AB 3 (Brown) creates a State Growth Management Commission to review the plans of state agencies and regional agencies for consistency with the State Conservation and Development Plan, which it would prepare. Establishes seven regional development and infrastructure agencies to cover the state, replacing various existing regional agencies. Requires each agency to prepare, adopt, and maintain a regional strategy, consistent with the state plan, to contain elements relating to economic development, air quality, water quality, transportation, housing, urban form and regional capital infrastructure.

2. AB 76 (Farr) creates a Governor's Office of Research and eliminates the Office of Planning and Research (OPR). Establishes the Planning Agency which would assume the duties of OPR and prepare a comprehensive state planning report for the Governor to transmit to the Legislature. The agency would be assisted by a State Planning Advisory Council. Requires every city or county, or regional planning agency to file an annual report with the Planning Agency indicating the degree to which its approved general plan complies with certain guidelines, the comprehensive general plan, and the State Planning Report. Creates the Department of Environmental and Plan Review which would be required to review and coordinate environmental documents, regional plans, and local general plans to ensure conformance with the State Planning Report.

3. SB 161 (Thompson) requires each county to amend its open space plan by January 1, 1995 to minimize conflicts between urba space, open space and agricultural uses. Requires counties whi have adopted an agricultural, watershed and open space protection ar , and cities within those counties, to establish a land use designati n system. Prohibits LAFCOs from approving reorganization propos s to convert open space to other uses in approved agriculture, wate shed and open space protection areas unless specified findings are made.

4. SB 434 (Bergeson) requires the Governor, with the assistance of OPR, to prepare a California Growth Management Strategy that would contain policies on growth management, giving priority to policies that implement goals of sustaining economic development and protecting environmental quality. Eliminates regional planning districts and permits cities and counties to form regional fiscal authorities to implement planning and development on a regional basis. The authorities would have powers to acquire, construct, and finance regional facilities such as roadways, parks, schools, etc. Requires local agencies to prepare a 5-year capital program of all proposed local public works projects. Requires cities and counties to update their comprehensive plans every 5 years. Requires public agencies to approve projects that are consistent with a comprehensive plan and the California Growth Management Strategy. Establishes a State Land Use Court to review final public agency decisions on land use, comprehensive plans, redevelopment, organization and reorganization of local agencies, development projects and other issues. Requires the Secretary of the Resources Agency to certify and adopt amendments to CEQA that revise the environmental review process to shorten the process and eliminate redundant review.

4. SB 797 (Morgan) creates a San Francisco Bay Area Regional Commission to succeed three existing regional agencies. Requires a countywide planning association in each Bay area county to assist the commission in developing the regional strategy for the Bay area relating to regulatory and procedural reforms, achieving certain federal and state standards, promoting compact development within criteria and procedures for urban growth boundaries, sufficient housing, coordinating certain planning activities, and adequate infrastructure.

5. SB 929 (Presley) requires the Department of Finance to prepare and submit annually to the Legislature a multiyear capital outlay master plan as a supplement to the Governor's Budget. Prohibits local agency formation commissions from modifying a sphere of influence not consistent with specified land use goals and policies, comprehensive regional strategies, and land use tiers established in local capital facilities plans. Creates the California Public Improvements Authority and authorizes the authority to issue bonds to finance public improvements. Requires regional agencies to propose an interim regional strategy and the countywide agencies in each county to propose coordinated economic development and growth management programs. Requires local agencies to prepare and to annually revise capital improvement programs addressing facility needs.

## E. POLICY ISSUES

Comprehensive planning and growth management have been the focus of attention by the Legislature, academicians, and private sector interests in several major efforts during the past five years. The California State University Growth Management Consensus Project, with participants from most groups affected by the impacts of growth, met for a period of eight months during 1991 in an effort to negotiate state-level policies regarding growth management. Although the group failed to achieve total consensus on the issue, it was able to identify 23 key areas of emerging agreement.

Governor Pete Wilson appointed an Interagency Council on Growth Management comprised of heads of Cabinet-level state agencies and key state departments to provide recommendations on the appropriate state role in addressing growth and growth management issues. The Council released four publications last year, including Local and Regional Perspectives on Growth Management, a Local Government Growth Management Survey, Models of Regional Government and Other States Growth Management. Its recommendations were to be presented to the Governor by January 1, 1992, but as yet this has not occurred.

The California Legislature has also considered a number of major growth management initiatives during the 1989-90 and 1991-92 Sessions. Although nothing was approved during the 1989-90 Session, there are the six previously mentioned active bills currently under consideration this year as the Session comes to a close at the end of August.

In evaluating these and other proposals, the following issues should be considered:

1. **Top Down or Bottom Up Planning?** What should the State's role be in developing a growth management strategy? Should there be statewide goals and policies that establish a framework for local and regional governments' goals and policies relating to growth?

2. **Coordination of State Plans.** Should there be a central state agency responsible for ensuring coordination and consistency of state plans? If so, where should it be located?

3. **Need for Regional Governance.** What role should regional government play? Should regional government be permissive or mandatory? How should it be structured? How can existing regional agencies be coordinated? Should new agencies replace them? What powers should they be given?

4. **Preserve Home Rule and Local Control.** Can local planning processes be modified to provide for consistency with a state growth management strategy while still preserving a locality's ability to control its future growth?

5. **Stick vs. Carrot?** Are performance incentives enough or do we also need to create sanctions for noncompliance? What kinds of incentives are needed to encourage implementation of a state or regional growth management strategy?

6. **Need for Fiscal Restructuring.** How can we provide the resources necessary for meaningful implementation of a growth management strategy?

7. **General Plan vs. Comprehensive Plan.** Are they significantly different? If so, how?

8. **Special Consideration for Housing.** Should a housing element, or similar component, continue to be a required part of a local plan and should there be state review of the housing element?

## III. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

### A. BACKGROUND

The Legislature enacted the California Environmental Quality Act (CEQA) in 1970. CEQA was developed primarily as a means to force public agency decision makers to document and consider the environmental implications of their actions. Since its enactment, the environmental review process has also become a means by which the public interacts with decision makers in developing policies affecting the environment.

Following is a brief summary of the purpose and application of CEQA and the EIR process.

#### 1. Basic purposes of the CEQA

The basic purposes of CEQA are to:

a. Inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities.

b. Identify ways that environmental damage can be avoided or significantly reduced.

c. Prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible.

d. Disclose to the public the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects are involved (Cal. Code Regs., tit. 14, Sec. 15002).

#### 2. Application of CEQA

CEQA applies to governmental action. This action may involve:

a. Activities directly undertaken by a governmental agency.

b. Activities financed in whole or in part by a governmental agency, or

c. Private activities which require approval from a governmental agency.

### 3. Category of Projects

CEQA review applies to all projects for which discretionary governmental approval is required and which may have significant effects on the environment. There are certain projects that are exempt. Projects are basically classified in three categories as follows:

a. Exempt. A project can be excused from further CEQA review if it can be seen with certainty that it will not have a significant effect on the environment. Also, there are certain projects that are expressly exempt from CEQA compliance.

b. Negative Declaration. A negative declaration is filed after the public agency undertakes an "initial study" and determines that there will not be a significant environmental impact. The agency can forego further CEQA compliance. In addition, a city may attach conditions to a negative declaration for the purpose of mitigating potential environmental effects.

c. Environmental Impact Report (EIR). An EIR is required by the public agency if the project is one which may have a significant effect on the environment.

### 4. EIR Process

The EIR process starts with the decision to prepare an EIR (see Attachment I). This decision will be made either during preliminary review or at the conclusion of an initial study. The following is a basic outline of the process:

a. Determination of Scope of EIR. Immediately after deciding that an environmental impact report is required for a project, the lead agency must send to each responsible agency a notice of preparation stating that an environmental impact report will be prepared. This notice is also sent to every federal agency involved in approving or funding the project and to each trustee agency responsible for natural resources affected by the project.

Within 30 days after receiving the notice of preparation, each responsible agency shall provide the lead agency with specific detail about the scope and content of the environmental information related to the responsible agency's area of statutory responsibility which must be included in the draft EIR. The response at a minimum shall identify: (a) the significant environmental issues and reasonable alternatives and mitigation measures which the responsible agency will need to have explored in the draft EIR; and (b) whether the agency will be a responsible agency or trustee agency for the project.

b. Preparing the Draft EIR. The draft EIR is prepared directly by or under contract to the lead agency.

c. Notice of Completion. As soon as the draft EIR is completed, a notice of completion must be filed with the Office of Planning and Research (OPR).

d. Public Review of Draft EIR. The lead agency must provide public notice of the availability of a draft EIR at the same time as it sends a notice of completion to OPR. Notice must be given to all organizations and individuals who have previously requested such notice.

In order to provide sufficient time for public review, review periods for draft EIRs should not be less than 30 days nor longer than 90 days from the date of the notice except in unusual situations. The review period for draft EIRs for which a state agency is the lead agency or a responsible agency shall be at least 45 days unless a shorter period is approved by the State Clearinghouse.

Public hearings may be conducted on the environmental documents, either in separate proceeding or in conjunction with other proceedings of the public agency. Public hearings are encouraged, but not required as an element of the CEQA process.

e. Evaluation of and Response to Comments. The lead agency must evaluate comments on environmental issues received from persons who reviewed the draft EIR and prepare a written response. The responses to comments may take the form of a revision to the draft EIR or may be a separate section in the final EIR.

f. Preparation of Final EIR. The lead agency must prepare a final EIR before approving the project. The lead agency may provide an opportunity for review of the final EIR by the public or by commenting agencies before approving the project. The review of the final EIR should focus on the responses to comments on the draft EIR.

g. Certification of Final EIR. The lead agency must certify that the final EIR has been completed in compliance with CEQA; and was presented to the decision making body of the lead agency and that the decision making body reviewed and considered the information contained in the final EIR prior to approving the project.

With private projects, the lead agency must complete and certify the final EIR within one year after the date when the lead agency accepted the application as complete. Lead agency procedures may provide that the one-year time limit may be extended once for a period of not more than 90 days upon consent of the lead agency and the applicant.

h. Notice of Determination. The lead agency must file a notice of determination following each project approval for which an EIR was considered.

B. SUMMARY OF THE COUNCIL'S FINDINGS (page 37)

1. CEQA is cumbersome, costly, and often abused. Groups use lawsuits to stall projects. Multiple overlapping agencies administer CEQA and its related laws. There are no limitations on the number or type of reviews that a local jurisdiction can require, even if the project is completely within the parameters of the General Plan.

2. There is no single clearly defined procedure for the current planning process, which creates excessive cost and a high level of unpredictability in resource management. It is not uncommon for a project to be forced to perform multiple EIRs in an attempt to obtain approvals, which is very costly.

C. SUMMARY OF THE COUNCIL'S RECOMMENDATIONS (page 38 and 39).

1. Require a Master EIR on the Comprehensive Plan and make the Comprehensive Plan the primary vehicle for environmental assessment and mitigation.

2. Revise the CEQA Guidelines to eliminate redundant environmental review and to reflect environmental policies and performance standards that are more consistent with the intended objectives of CEQA. For example, limit the number of project alternatives and eliminate the "no project" alternative. In addition, reduce the number of factors that trigger preparation of an EIR.

3. Amend the CEQA guidelines to shorten the environmental review process to six months, with one 30-day extension, and prohibit waivers of the time periods. Include in the Guidelines a strong policy statement opposing the practice of denying approval because review has not been completed on a timely basis.

4. Allow projects that comply with an already reviewed EIR to receive focused environmental review, which would include only those issues not addressed by the Master EIR (new information not known at Plan adoption, issues not addressed in the Master EIR, subsequent changes in projects, etc.).

5. Provide maximum opportunity for public participation in the preparation and adoption of the Comprehensive Plan and the Master EIR, limit interest group review of specific projects which are consistent with the Comprehensive Plan and the Master EIR and adopt procedures to govern legal challenges, the award of attorneys fees, and similar considerations.

6. Require EIRs to contain a socioeconomic impact analysis that compares the total social impact mitigation measures with the social benefits to be derived. Require the local legislative body to weigh other societal benefits, such as affordable housing and job production, when deciding the extent of the mitigation measures to be required.

7. Insert the word "economically" in front of the words "feasible alternatives" wherever they occur in the Guidelines.

8. Revise Appendix G of the Guidelines, which lists examples of consequences that will normally have a significant effects on the environment, to diminish the negative bias against accommodating California's population growth (see Attachment II). Revise the guidelines to require consideration of California's growing population and the need to provide housing and jobs to serve it.

**D. CURRENT LEGISLATION:**

1. AB 1258 (Polanco) requires the California Environmental Protection Agency to study the State's permitting process, in consultation with designated governmental agencies and other affected entities, and report to the Legislature by September 30, 1993, on specified matters relating to the efficiency of the process and whether it impedes achievement of deadlines for compliance with air quality goals.

2. AB 1408 (Lempert) requires environmental information to include information regarding potential cumulative impacts. The bill also requires OPR to provide to the lead agency certain information regarding cumulative impacts of a proposed project, and would require the office to prepare and adopt, as specified, a manual to assist lead agencies to identify and quantify cumulative impacts.

3. AB 1821 (Ferguson) allows a project applicant to submit a draft EIR to the public agency.

4. AB 3078 (Sher) requires a new EIR to be prepared when substantial new information shows environmental effects more significant than described in a prior EIR.

5. SB 1596 (Maddy) creates the Office of Permit Oversight in the California Environmental Protection Agency to intercede, in specified cases, in the processing by state and local agencies of applications for environmental permits. Requires an environmental permitting agency to approve or disapprove an environmental permit within 3 or 9 months. Requires these agencies to adopt regulations establishing procedures for the expedited review of environmental permits.

## E. POLICY ISSUES

1. **Environmental Tool or Project Impediment?** Does the existing CEQA process provide a useful environmental tool to decision makers or act as an impediment to development projects?

2. **CEQA Objectives.** Would the implementation of the report's recommendations still enable CEQA to be used to accomplish its stated objectives?

3. **Shorten EIR Review.** If the environmental review process is shortened to six months, will that be sufficient time for larger, more complex projects?

4. **Eliminate redundant reviews.** Can the same environmental safeguards be ensured with the elimination of multiple reviews?

5. **Socioeconomic Impact and Economically Feasible Alternatives.** Will the analysis of socioeconomic impact and economic feasible alternatives expedite or impede the CEQA process?

6. **Significant Effect.** How can the need for housing and greater density be balanced against significant environmental effect of substantial growth or concentration of population?

## IV. STATE LAND USE COURT

### A. BACKGROUND

Several states have established adjudicatory bodies to review local land use and development decisions. Some have established courts, appellant bodies or adjudicatory processes to resolve development disputes. Some have jurisdictions which are limited to the development of low and moderate income housing. Others have jurisdictions which include all land use and development issues. All share the common purpose of resolving conflicts in a fair and equitable fashion and encouraging low and moderate income housing development.

The Constitution of California vests the judicial power of the State in the Supreme Court, courts of appeal, superior courts, municipal courts and justice courts (Cal. Const., Art. VI.). No provision is made in the Constitution or statute for the creation of a State Land Use Court.

The following states have created various institutions to adjudicate or appeal land use disputes:

1. Florida. In 1972 Florida enacted law to establish the Florida Land Use and Adjudicatory Commission. State involvement in the land use and planning process is limited to 1) geographic areas of critical concern and 2) developments of significant regional impacts. A State Administrative Commission establishes policy. The State Planning Department decides if a project has significant regional impact. If so, a developer must apply to the local government, the regional planning agency and the state planning agency. Final approval is left to the local government. The developer can appeal a decision to the Florida Land Use and Adjudicatory Commission.

2. Massachusetts. The Massachusetts Housing Appeals Law deals only with low and moderate income housing. A public or nonprofit or limited dividend sponsor of subsidized housing may apply to a local zoning appeals board for a comprehensive permit by-passing cities and counties. It may appeal an adverse decision to the State Housing Appeals Commission. Communities with more than 10% of the housing stock in affordable low to moderate income housing are exempt from the process.

3. Oregon. In 1979 Oregon created the Land Use Conservation and Development Commission to establish statewide policy and the Land Use Appeals Board to hear appeals. Subject to higher judicial review of its decisions, the Land Use Appeals Board is granted exclusive jurisdiction to review any land use decisions. The scope includes all land use and planning processes.

4. Connecticut. Connecticut enacted law in 1989 to establish a state affordable housing land use appeals procedure. In those towns not meeting their fair-share housing requirements, the developers of projects receiving certain types of financial assistance or setting aside 20% affordable units may appeal adverse planning and zoning decisions to a Superior Court for an expedited review.

5. Rhode Island. In 1991, Rhode Island enacted law to establish a State Housing Appeals Board. The law permits developers proposing to build certain low or moderate income housing to submit a single application to a Zoning Appeals Board for a special exception to build such housing in lieu of separate applications to local boards. If the project is denied or unfeasible conditions are attached, the developer may appeal to the the State Housing Appeals Board.

## B. SUMMARY OF THE COUNCIL'S FINDINGS (page 39)

1. Agencies refuse to follow existing law and administrative procedures, which has created many problems with the existing land-use permitting system. Laws created for the purpose of streamlining the permitting process are often ignored.

2. There is a land-use litigation explosion in California. The legal system fails to resolve land-use disputes expeditiously, encourages frivolous claims, and greatly adds to the cost of housing. Land-use cases are regularly delayed because higher priority is given to criminal cases, and they are often heard by judges who have no special expertise in land use, construction, or environmental law. The current judicial structure is unable to render consistent and timely decisions.

## C. SUMMARY OF THE COUNCIL'S RECOMMENDATIONS (page 39 and 40)

The Council on California Competitiveness recommends the establishment of a State Land Use Court to decide all project level disputes between private parties, local governments and third parties. The primary function of the court would be to give due recourse to the builders and landowners who have been denied project approvals after proceeding with development proposals consistent with a local government's comprehensive plan. This court would have sole initial jurisdiction to resolve disputes involving project approvals and denials. The jurisdiction of the court would be in determining whether a denied project was consistent with the Comprehensive Plan and Master EIR.

The State Land Use Court would have the following jurisdiction:

1. Disputes arising from project level actions of government agencies.

2. Challenges to the sufficiency of the environmental review process including both substance and procedure.

3. The failure of local agencies to act within adopted time schedules.

4. The appropriateness of fees imposed by a jurisdiction.

5. Interjurisdictional disputes between public agencies involving land use plans and decisions.

The State Land Use Court would have the following remedies:

1. Compel the issuance of a permit.

2. Sustain the local agency action denying the issuance of a permit.

3. Award damages and attorney's fees where appropriate.

4. Certify a plan as being consistent with growth policies.

5. Require an inconsistent plan to be revised.

6. Order the reduction or elimination of fee which is determined to be inconsistent with law.

## D. CURRENT LEGISLATION

Provisions of SB 434 (Bergeson) establish a State Land Use Court consisting of a presiding judge and four additional judges to be elected for six year terms. Within 60 days of a public agency's final decision, any interested person or affected agency may bring action to appeal:

1. An approval or denial of a development project.

2. A CEQA decision.

3. Failure to meet time limits.

4. Fees

5. Adequacy of a comprehensive plan.

6. Consistency of a comprehensive plan with a growth management.

7. Validity of local government change or reorganization.

8. Redevelopment agency plan amendments.

The measure further specifies timelines for court action. It further creates a special fund into which a fee levied on building permits is deposited to support court operations.

## E. POLICY ISSUES

**1. Special Adjudicatory Process.** Is a special adjudicatory process needed to resolve planning, land use and development disputes in California?

**2. What Type?** Assuming some type of adjudicatory process is needed to resolve such conflicts, should this process consist of court, an appeals body or some type of conflict resolution process such as mediation or arbitration.

**3. Scope of responsibility.** If it is to be a court or an appeals body, what should be the scope of responsibility. Should it have responsibility for all planning, land use and development issues or only matters relating to housing.

**4. Remedies.** If it is to be a court or an appeals body, what are the appropriate remedies which it can exercise?

**5. Composition.** What should be the composition of the court or appeals body. How large must it be to handle the workload of the State?

**6. Support.** How should this body be supported?

## V. FEES AND EXACTIONS

### A. BACKGROUND:

Many localities rely upon a variety of development fees and exactions to finance local activities. Fees are essentially a payment. Exactions can be a payment, dedication, contribution or condition attached to a development. These fees take the form of processing fees to pay for the actual costs of planning and permit review. Other fees and exactions, sometimes referred to as "impact fees", require payment or land contributions for construction of certain kind of facilities impacted by new development such as parks or schools. Yet other fees or exactions, sometimes referred to as "linkage fees", require payment for local needs such as low income housing linked to commercial development. The aggregate total of these various fees is claimed to have an adverse impact upon the pricing and affordability of housing.

Existing law and interpretation of case law authorizes local governments to impose fees and exactions for several diverse purposes:

1. **Police Power.** Under the umbrella of police power, local governments rely upon general plan or specific plan to impose fee and dedication requirements. Since all land use approvals must be consistent with the goals, policies and objectives of general plans, conditions can be imposed to achieve these objectives.

2. **Fees and Exaction Standards.** Existing law provides that when a city imposes any fee or exaction as a condition of approval of a proposed project, such fees or exactions shall not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is levied. In addition, there must be a reasonable relationship between the need for a public facility and the type of development project on which the fee is imposed. This "reasonable relationship is referred to as the "nexus" requirement (Gov. C. Sec. 66000 et seq.).

3. **Subdivision Map Act.** Fees and dedications may be imposed for several purposes generally relating to design and improvements including park land, school, reservations, street dedications, transit dedications, drainage and sanitary facilities, bridges and major thoroughfares, ground water recharge, grading and erosion control, public access and offsite improvements (Gov. C. Sec 66410 et seq).

4. **CEQA.** If an EIR identifies negative impacts, a local government may impose conditions to mitigate those impacts using provisions of the Subdivision Map Act which authorize a local government to deny subdivisions whose design or improvements are likely to cause substantial environmental damage (Gov. C. Sec 66474(e)).

5. **Building Permits.** Payment of fees or dedications can be imposed as a condition of issuing building permits provided that authority for doing so is contained in a local ordinance.

**Time of Payment**

Existing law requires the payment of fees for the construction of public improvements or fees on a residential development on date of final inspection or when the certificate of occupancy is issued, whichever is first. Local government may require the fees to be paid earlier: a) if account has been established and a construction schedule adopted; or b) the fees are to pay the local government for expenditure previously made. This law is repealed January 1, 1993 (Gov. C. Sec. 66007).

**Linkage Fees**

Linkage fees have been the most controversial of the various exactions imposed upon development. Initially, linkage fees were imposed upon commercial developments to finance low income housing. Other uses under consideration include funding of public art and provision of child care facilities. In 1980, San Francisco initiated a linkage program requiring downtown office developers to contribute to or build housing for low and moderate income households. The city maintained that a nexus existed between the construction of large office buildings and the demand to provide lower income housing for the potential employees. Several other localities, both within and outside the State, have initiated similar linkage fees.

The most recent legal test of the linkage fee concept relates to a housing trust fund initiated in 1989 in Sacramento to finance low income housing and funded by a fee on nonresidential development that generates jobs. Commercial builders filed suit arguing that the fee was an unfair burden insufficiently related to the commercial development. The U.S. Court of Appeals found that the fee charged to the commercial developers bore "a rational relationship to a public costs closely associated with such development." The US Supreme Court refused to hear the case.

**Price Impact**

Research indicates that development fees and exactions are capitalized into the price of new housing to the maximum extent possible. The increase in the price of housing exacerbates the affordability problem. The strength of the demand for housing in the jurisdiction that levies the fee, and surrounding jurisdictions, determines how much of the amount can be passed on to the buyer. If there is little price competition, fewer buyers will look elsewhere for substitute housing and the developer can increase housing prices to off-set the development fee.

There is some evidence that, in the short run, existing homeowners may experience a windfall gain in value by benefiting from the increased cost of homes on which the fees or dedications have been imposed. In the long run, developers will try to pass the cost of development fees back to the landowner by paying less for land. In regard to commercial developments, developers again attempt to capitalize the fees or exactions. However, they may be unable to pass on these costs to either the former land owner or tenants. Tenants are very sensitive to rent increases and, often, have the mobility to move to alternate locations.

## B. SUMMARY OF THE COUNCIL'S FINDINGS (pages 41-43)

1. Fees and exactions are imposed on commercial and residential projects in most states throughout the country. However, nowhere are impact fees as onerous as they are in California. Since the passage of Proposition 13, local government has financed much of its infrastructure and services for its citizens through the use of fees and exactions imposed on new projects.

2. The practice of transferring the financial responsibility for general community services and facilities to the applicants for building permits is commonplace throughout California. Public officials recognize that residents continue to demand the same level of services and facilities but are unwilling to pay for them. General Fund bond issues that require a two-thirds vote are often vetoed by a minority of the public. Accordingly, those proposing to build or expand a structure are expected to pay for such facilities as parks, schools, fire stations, public infrastructure, libraries, childcare facilities, public art objects, community centers, and low-cost housing.

In the end, the costs of these facilities needed by the whole community are borne by only the users of the new project. This is unfair, and it cripples new building and job growth.

3. Existing law requires local agencies to justify the fees and exactions that are imposed on projects and to establish a "reasonable nexus. This requirement is frequently ignored.

4. The typical jurisdiction imposes a variety of fees on new projects that can reach $40,000 per dwelling unit. In the city of Santa Clarita Valley, fees on a 1650-square-foot house total more than $34,000.

5. The Corona-Norco Unified School District is currently requiring $15,000 per unit, or approximately $9.40 per square foot in school fees alone. In Milpitas, although the unified school district has a number of empty schools, it extracted more than $1 million in school fees from on housing project.

6. Cities and counties have also adopted additional exactions such as mandatory inclusionary housing programs and housing trust funds. These programs require that residential and commercial projects provide solutions to the community's lower-income housing problems as a quid pro quo for project approval. These techniques are little more than a private subsidy for what should be public obligations borne by society as a whole.

7. In San Francisco, as much as 15 percent of the cost of a four-story, 100,000-square-foot office building could be attributed to fees.

8. All these fees must be paid upon issuance of the permit to build. However, the impacts that the fees are meant to mitigate will not arise, if ever, until the building is completed and occupied. The party paying the fees cannot hope to obtain the revenue to reimburse these fees until the building is completed and occupied. This delay places the cost of funds totally on the project, and, in the end, taxes the consumer.

C. **SUMMARY OF THE COUNCIL'S RECOMMENDATIONS (page 43)**

1. Provide for the payment of development fees at the final inspection, or the date on which the certificate of occupancy is issued, which ever occurs first. Narrowly constrain the circumstances under which fees could be collected earlier.

2. Reduce the voting requirement from 2/3 to a majority for passage of general obligation bonds.

3. Restrict local ability to impose affordable housing "linkage" fees on commercial projects and to impose mandatory inclusionary housing programs for lower income housing on projects as a condition of approval.

4. Form a Governance Commission to restructure the sources and use of funds at all levels of government.

D. **CURRENT LEGISLATION**

1. AB 1262 (Chacon) repeals the sunset on provisions of law restricting payment of fees until final inspection or occupancy of residential projects and makes technical changes in the law relating to the adoption of development moratoria.

2. AB 2945 (Brulte) requires a court to order a local agency to refund housing developer fees to everyone who paid them when the court finds the fee was invalid as enacted upon specified conditions being met.

3. AB 2953 (Ferguson) requires local government to mail specified notice regarding a public meeting during which the allocation and expenditure of developer fees revenues will be made public and reviewed to any interested party at least 15 days prior to the meeting.

4. ACA 6 (O'Connell) authorizes a local majority vote on general obligation bond issues to finance school facilities.

5. ACA 44 (Farr) authorizes a local majority vote on general obligation bond issues to finance public facilities consistent with a capital improvement program defined by the Legislature.

6. SB 434 (Bergeson) applies existing fee provisions to all development projects, rather than just residential projects, and deletes the sunset. It further prohibits requiring development fees to be used for residential construction or to operate social programs not directly related to a project. It further prohibits imposing specified fees which exceed the reasonable cost for which the fee is charged unless the excess fee amount is approved by a 2/3 vote of the electorate.

## E. POLICY ISSUES

**1. Who should pay?** If development fees and exactions were to be reduced or eliminated, what other local revenue sources could be made available?

**2. Who does pay?** Who bears the cost of fees and exactions: the developer/builder, the landowner, or the purchaser/tenant?

**3. When should they pay?** Does requiring payment at the time of project completion impose hardships upon local governments?

**4. Fairness and Equity.** What changes could be made to existing law to improve the development fee process from that standpoint of fairness and equity?

**5. G. O. Bond Issues.** Should local governments be permitted to pass general obligation bonds for specified purposes with a majority vote?

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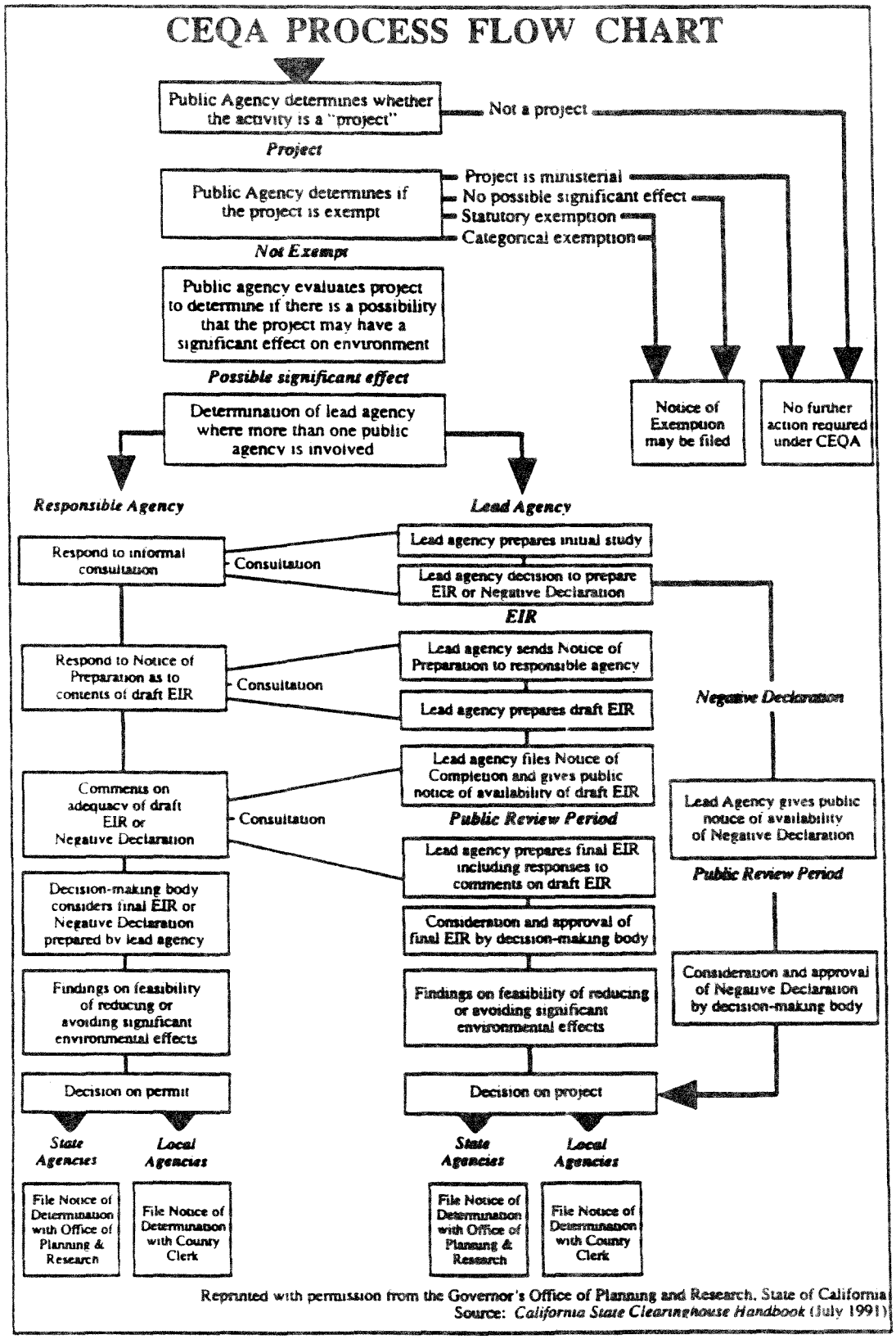
ATTACHMENT I

Appendix I – CEQA Flow Chart 245

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Source: *California State Clearinghouse Handbook* (July 1991)

NOTE: This flow chart is intended to illustrate the EIR process contemplated by the CEQA Guidelines. In

ATTACHMENT II

# Appendix G

## Significant Effects

A project will normally have a significant effect on the environment if it will:

(a) Conflict with adopted environmental plans and goals of the community where it is located;

(b) Have a substantial, demonstrable negative aesthetic effect;

(c) Substantially affect a rare or endangered species of animal or plant or the habitat of the species;

(d) Interfere substantially with the movement of any resident or migratory fish or wildlife species;

(e) Breach published national, state, or local standards relating to solid waste or litter control;

(f) Substantially degrade water quality;

(g) Contaminate a public water supply;

(h) Substantially degrade or deplete ground water resources;

(i) Interfere substantially with ground water recharge;

(j) Disrupt or adversely affect a prehistoric or historic archaeological site or a property of historic or cultural significance to a community or ethnic or social group; or a paleontological site except as a part of a scientific study;

(k) Induce substantial growth or concentration of population;

(l) Cause an increase in traffic which is substantial in relation to the existing traffic load and capacity of the street system;

(m) Displace a large number of people;

(n) Encourage activities which result in the use of large amounts of fuel, water, or energy;

(o) Use fuel, water, or energy in a wasteful manner;

(p) Increase substantially the ambient noise levels for adjoining areas;

(q) Cause substantial flooding, erosion or siltation;

(r) Expose people or structures to major geologic hazards;

(s) Extend a sewer trunk line with capacity to serve new development;

(t) Substantially diminish habitat for fish, wildlife or plants;

(u) Disrupt or divide the physical arrangement of an established community;

(v) Create a potential public health hazard or involve the use, production or disposal of materials which pose a hazard to people or animal or plant populations in the area affected;

(w) Conflict with established recreational, educational, religious or scientific uses of the area;

(x) Violate any ambient air quality standard, contribute substantially to an existing or projected air quality violation, or expose sensitive receptors to substantial pollutant concentration.

(y) Convert prime agricultural land to non-agricultural use or impair the agricultural productivity of prime agricultural land.

(z) Interfere with emergency response plans or emergency evacuation plans.

APPENDIX D

TESTIMONY - **California Council on Competitiveness, Land Use Recommendations**

ERNEST SILVA
Legislative Representative
League of California Cities

August, 1992

Good morning, I'm Ernest Silva with the League of California Cities. I am a Legislative Representative responsible for housing and land use issues. I want to thank you for inviting us to address you this morning, and I want to compliment Krist Lane of your staff on the background paper that he prepared. It raises a lot of important issues and I think it does a really good job of summarizing some of the existing problems and of listing concerns addressed in California's Jobs and Future. I want to very quickly go through 3 of the topics and then hand off to Mayor Flemming from the City of Vacaville. I will talk briefly about comprehensive planning; briefly about CEQA; and briefly about proposals for a land use court.

I want to start out by picking up on something that the Senators have already mentioned. There are a number of problems in California that have led to the economic downturn that we have, that I think are separate and apart from the local government approval process. I think one of the theses in California's Jobs and Future, and some of the discussion we've had here at the Capitol on a number of fronts, assumes that it's local governments' planning process that has brought the economy to its knees. I don't think that any of us seriously agree with that. A number of problems that affect us nationally have had a major impact here in California. The savings and loan bailout is a good example. Base closures is another good example. As you may be aware, nearly half, 17 of the 35 bases that are slated to be closed in the next 3 years are located in the State of California. That results in a tremendous impact to our economy separate and apart from anything that we in local government would be able to do. In addition, another thing that is far out of our hands are the number of natural disasters that have stricken California over the last few years.

I want to talk briefly about comprehensive planning. One of the proposals in the Uberroth Commission Report calls for renaming the General Plans to Comprehensive Plans. I don't know that a name change is something the Legislature should spend a lot of time focusing on. As you know California, nearly 40 years ago, adopted a Comprehensive Planning process. We called it a General Plan. Government Code Section 65300 refers to the "comprehensive long-term General Plan" that we adopt. California has long stood as a model of comprehensive planning.

I think one of the goals of this idea of a "comprehensive plan" is to instill certainty into the development process. The General Plan was adopted initially to ensure what we, as planners, called "rationality" into the decision making process, and the rationality/certainty concepts are essentially the same idea. The idea is that when land use decisions are made, they're made for the benefit of the public as a whole. When an individual wishes to change

those decisions, made for the benefit of the public as a whole, there is an additional process that that individual has to go through to convince the elected decision makers and the public as a whole, that that change in the long-term planning is a good idea. The idea is that if you want to rezone or you want to change a General Plan designation for a project; it ought to take some additional work. It ought to take some additional convincing. It ought to take some additional planning. The quickest way to achieve certainty in the development approval process, is to purchase land that is already zoned and designated for a project. That is how you get certainty, that is how you get rationality in the land use process.

We, here at the Legislature, as well as the Council on California Competitiveness, spend a lot of time with anecdotal evidence -- somebody suffers a bad decision, somebody has a problem or claims to have had a problem. What we ought to focus on if we're going to revamp the approval making process, is not as much on anecdotal evidence as on statistical data.

Recently there was a publication from the Lincoln Institute of Land Policy that looked at regional growth, regional land use restrictions, local land use restrictions, that Madelyn Glickfeld and Ned Levine from the University of California, Los Angeles, put together. The Lincoln Institute is a conservative think-tank that deals with land policy located in Cambridge.

One of the things that I wanted to point out that came from this recent study, and its statistical analysis, was that one of the misconceptions that we have is that the more growth management and the more local controls that are placed on land development, the worse we do at producing affordable housing. One of the points of the Regional Growth Local Reaction report is that cities with active growth management programs not only have the most aggressive affordable housing plans and policies, but they also produce as many units as those with no restrictions at all. This is counter-intuitive to the anecdotal evidence that we hear over and over again.

Another point that I wanted to make dealing more with numbers than with anecdotes is that the League is in the process of doing a survey on density bonus law. The density bonus law was one of those legislative proposals that was intended to increase the amount of housing that was produced by giving the developer a greater number of units without having to go through a long and detailed process. What we found is that statewide 73.3 percent of cities have an active, density bonus program; but just 7.4 percent of residential development projects actually try to utilize that density bonus program.

I want to talk briefly now about CEQA. There are a number of proposals for redoing the California Environmental Quality Act. A number of proposals focus on "upfront" analysis. We have, from the city perspective, two concerns with upfront analysis. We think that if it can work it's a great idea because it saves us time, saves us money, and allows development to occur that again, is planned, is rational, and has utilized the public as a whole for influence or input. The concern that we have when you start moving CEQA planning "upfront" and trying to do away with project specifics analysis, is money. The problem is how can you plan, and how can you analyze at the level of detail necessary to make

intelligent, unit by unit, store by store decisions if there isn't the funding that you get from project specific analysis? Basically, if you're trying to do 10 acres of planning, you are going to have a better analysis, a more detailed analysis, than if you're trying to do 1,000 or 10,000 acres. When you're talking about, upfront CEQA analysis, there is a real concern over how you get to that level of detail that is necessary to make intelligent decisions.

The last point on CEQA is that there are a number of existing statutes and existing regulations trying to do what the Uberroth Commission Report suggests. That is, to eliminate doing fullblown CEQA analysis each and every time somebody comes in for a building permit. Public Resources Code Section 21166 addresses the reliance of previous CEQA documents as do Public Resources Section 21081.7, 21083.3, and Government Code Section 65457. There are a number of CEQA guideline sections as well[1]. They are all intended to allow reliance on a previous document. If you do a document that analyzes the environmental impacts, on a general plan basis, or a specific plan basis, we're able to incorporate that analysis and focus on any additional impacts of a specific subdivision. That's existing law and it has been for a number of years and it was when the Competitiveness Council reviewed CEQA. The problem has been that there is a concern by local government because there hasn't been any case law in support of these provisions. The case law encourages us to err on the side of more CEQA rather than reliance on previous CEQA. Recently we finally had our first tiering victory in Solano County. It was the Rio Vista Farm Bureau Center v. County of Solano case. That was a case where an EIR was prepared for a hazardous waste management plan and someone tried to force more specific analysis without a specific project. The court upheld the tiering concept.

The last issue that I want to talk about is the land use court. The land use court has essentially two components. One is going to protect us, local government, from them - "them" being environmental groups that are tying us up in courts. The second part is that "they", the developers, are going to attack us.

We have a concern, obviously, over making it too easy for the developers to attack. Which means, we have a concern over replacing permit decisions from the local government legislative body with a court's power to adjudicate legislative actions. The basic concern with the land use court proposal in the Uberroth Commission, is that we don't know exactly what it entails. It's going to require a number of additional details, some are going to be good and some are going to be bad. One is a constitutional amendment in order to clarify what the jurisdiction of this court is, as has been pointed out in the briefing paper. Because our concern is that if not approached properly it will happen that the only people who are going to use this court are going to be developers looking to sue cities. The NIMBY groups that are looking to slow down the approval process, unless they're forced into the court by limiting their standing elsewhere, will go through the existing network because their idea is to slow things down not to reach agreement, and that's one of our main concerns.

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[1] Title 14, Cal. Code of Regs., sections 15153, 15162, 15163, 15180, 15181, 15182, and 15183.

I wish to thank you for your attention to my remarks. I would like to introduce David Fleming, Mayor of Vacaville, a City which is respected for its broad efforts to produce housing.

L:\leg\ms\testimony

CSAC California State Association of Counties

August 19, 1992

The Honorable Mike Thompson
Chairperson, Senate Housing and Urban Affairs Committee
State Capitol, Room 2205
Sacramento, California 95814

Dear Senator Thompson:

The California State Association of Counties (CSAC) would like to respond to your request for written comments of our testimony presented before the Committee's hearing on the California Council on Competitiveness' report *California's Jobs and Future.* CSAC would like to commend you, the Committee and staff for your interest and excellent analysis provided in the background paper on the report. We would also like to extend our appreciation for inviting CSAC to participate in the informational hearing.

We understand that the Council was faced with a difficult task, however, CSAC has many policy and fiscal concerns with recommendations contained within the report. The concerns that follow relate to the areas of local planning, fees and exactions imposed by local governments (including housing linkage fees and inclusionary zoning), the establishment and responsibilities of the State Land Use Court, and the revisions to the California Environmental Quality Act (CEQA). In light of the State's and counties' current budgetary constraints, the following comments focus on the fiscal implications of the report's recommendations.

The local comprehensive plan recommended by the report may be a good idea, along with the requirement for a master environmental impact report (EIR), however, this would require a major fiscal commitment from local government and the state. CSAC understands that the cost of a general plan update and accompanying EIR for a county such as Nevada is $1.5 million. The report calls for a new comprehensive local plan and master EIR. Considering there are 526 local jurisdictions, the Nevada County example provides an indication of the fiscal commitment that will be necessary.

The State Land Use Court recommended in the report would not only be a significant departure from local control on land use decisions, but local governments envision the establishment of such a land use court as opening up a morass for litigation on projects, whether it be from the opponents or proponents of a proposed project.

Further, at a time when local governments are struggling to provide affordable housing, this report recommends prohibition of the imposition of housing "linkage" fees and inclusionary zoning, two of the tools utilized by local governments to generate revenue and to provide affordable housing within their communities.

The report recognizes local governments' constraints to fund infrastructure and provide services since the passage of Proposition 13, along with the further dependence on fees and charges. However, rather than suggesting solutions to this fiscal dilemma, the report suggests limiting and examining further restraints to the imposition of fees for development. How does this resolve the problem of infrastructure needed prior to or concurrent with development and the ability to provide services?

Currently, many counties are faced with 85 percent of their budget being dedicated to health, welfare and justice services. In addition, entitlement programs are also driving the state budget. CSAC questions the ability of local governments to comply with many of the recommendations in the report in light of the current fiscal condition of counties, particularly after the effects of this budget.

We hope that you find these comments useful for inclusion in your summary report.

Sincerely,

DeAnn L. Baker

DeAnn L. Baker
Associate Legislative Representative

APPENDIX F

SENATE COMMITTEE ON HOUSING AND URBAN AFFAIRS

HEARING ON RECOMMENDATIONS OF THE COUNCIL ON CALIFORNIA COMPETITIVENESS

TESTIMONY OF BARBARA KAUTZ, VICE PRESIDENT, LEGISLATION/POLICY
CALIFORNIA CHAPTER, AMERICAN PLANNING ASSOCIATION

My name is Barbara Kautz, and I am representing the California Chapter of the American Planning Association. Cal Chapter represents nearly 5,000 professional planners in California, and we are the people who write the comprehensive plans, implement the California Environmental Quality Act, and sometimes recommend fees and exactions. We are very interested in working with the Legislature and Governor to create workable laws that will both improve the quality of life in California and promote the economic growth of the State.

Like the Council on California Competitiveness, we are frustrated with the bureaucratic and legalistic maze often created by California planning law. We too chafe at the needs for multiple approvals, redundant reviews, unnecessary expenditures. Perhaps a greater frustration, however, is the evidence that all of this process has had little effect on maintaining the quality of life in California. In the 1980s, as planning laws became more complex, air quality declined, schools became overcrowded, housing grew less affordable, and traffic congestion became worse. Clearly the present system is not working for planners, developers, environmentalists, or ordinary citizens.

As a response to these problems, your staff has highlighted four solutions proposed by the Council on Competitiveness. I'll summarize our positions on the four key points.

**Comprehensive Plan.** We have strongly supported the concept of detailed planning in advance as a substitute for project by-project review. This should occur at the state level, through preparation of consistent state plans; at the regional level, by requiring regional agencies to consolidate their planning; and at the local level, by requiring more detailed plans consistent with the state and regional policies. Projects consistent with the local plans and development standards should be approved, and those inconsistent should be denied. It should not be easy to change these plans.

We believe that this concept will both improve the quality of planning for California's growth and cut red tape for projects consistent with local plans. What is the cost? Reduced flexibility. The present system permits developers to request approvals in areas not shown for development, and also permits local agencies to turn down projects in areas designated for development. Will both sides have the courage to give up some prerogatives? Real change will require such tradeoffs.

We recognize that this concept will initially require a major increase in planning costs -- at a time when California does not have the funds for these long-term investments. If all the money

now spent on project-level planning and environmental review could be channeled into long-range planning, there would be more than adequate funds. Despite the costs, we believe that the benefits to both business and the public require that these changes be pursued.

**California Environmental Quality Act.** We share the Council's frustration with CEQA as now defined by statute, guidelines, and case law. CEQA can be manipulated, and can result in lengthy, costly reviews which seem unjustified by the project and extent of environmental impact.

However, we believe that several of the Council's conclusions about CEQA are not accurate. Many seem to relate to unusually controversial projects, rather than to the usual project subject to CEQA. For instance, there <u>are</u> limitations on the number of CEQA reviews a local jurisdiction can require, and multiple EIRs on the same project are <u>not</u> common.

In the next year, we will be preparing detailed recommendations for changes to CEQA. In general, our position is that detailed CEQA reviews of projects can be reduced or even eliminated if communities first prepare detailed comprehensive plans as the Council has recommended. However, it is not possible to shorten the environmental review process to six months if CEQA is to be retained in any form that requires EIRs. Requiring analysis of socioeconomic impacts and economic feasibility will merely add to

the cost and litigation risk of the CEQA process. Instead consideration of economic, social, and environmental factors should occur as part of the preparation of the comprehensive plan.

**State Land Use Court.** We support alternative dispute resolution, including mediation and possibly boards of appeal. We also support the idea of a judiciary experienced in the intricacies of land use law. However, as the Court is envisioned by the Council, it would exist to protect the rights only of builders and landowners rather than the public generally; it could overturn project denials but not project approvals. We could not support this as an equitable means to resolve land use disputes in California. (The land use court as envisioned in Senator Bergeson's SB 434 corrects this problem.)

**Fees and Exactions.** We share the Council's frustration with the lack of public funds for infrastructure and support its recommendation to reduce the voting requirement to a majority for general obligation bonds. Our position is that the state should provide sufficient revenues for long-range funding of infrastructure and public services, and should authorize new funding sources for those purposes. However, in the absence of new funding, we cannot support the proposed restrictions on local fees and exactions.

We also believe that many of the Council's conclusions regarding

local fees are not accurate. It is not common to transfer the financial responsibility for general community services to applicants for building permits, nor is the requirement to show a reasonable nexus for fees "frequently ignored." For at least the past 24 years, the state has not planned for or funded the infrastructure needed to accommodate California's growth. Local government has turned to the only source available to it. If the state would provide the funds, local governments would gladly rescind their fees.

Conclusion. We urge the Committee to pursue the concept of better, detailed, comprehensive planning, coupled with less project-by-project review, as the strategy that is most likely to maintain the quality of life in California while cutting red tape. As professional planners, we are eager to lend our expertise to the crafting of a new planning structure in California. We look forward to working with your staff on these issues.

AMERICAN PLANNING ASSOCIATION
California Chapter

# Action Agenda for the 1990s: A New Approach to Growth Management and Regional Planning

Revised June 1991

## THE NEED FOR ACTION

California is expected to grow by more than 10 million people by the year 2020, yet little has been done to plan for and provide services to accommodate that growth. As noted in a recent study by the Assembly Office of Research, "Public infrastructure has been strained to the breaking point, environmental quality has been severely compromised, and many of the state's citizens have had to suffer deficient public services. Explosive increases in the state's population projected through the end of the century threaten to destroy the qualities that brought us all to California."

Local control of land use has been a fundamental tenet of California planning. While the California Chapter of American Planning Association (CCAPA) represents professional planners from many public agencies and private companies, the majority of our members work for local government. Despite our strong support for local control, CCAPA believes that the way the state, regional, and local governments plan and allocate resources must fundamentally change if the state and its citizens are to attain the benefits of potential economic and population growth. In particular, local plans must be consistent with statewide and regional land use goals. Such consistency may be difficult to achieve politically and will require leadership and a spirit of compromise and persistence on the part of elected and appointed officials, business leaders, and community organizations.

## PROCESS FOR ACTION AGENDA DEVELOPMENT

At its 1989 retreat, the CCAPA board recognized that, to best serve its membership, CCAPA needed to become a major player in the development of growth management and regional planning policy. The first draft of the Action Agenda was adopted by the board in summer 1990. The first draft was widely circulated and discussed extensively among CCAPA's members before and after adoption. This latest revision, adopted by the CCAPA board on June 1, 1991, integrates two additional efforts to achieve consensus on major policy issues in California's planning community.

1333 36th Street • Sacramento, CA 95816 • (916) 736-2434

## CCAPA Regional Governance Committee Recommendations

First, a Regional Governance Committee, composed of delegates from each of CCAPA's eight sections, met twice in winter 1991 to develop implementation details on California's new planning structure.

### Goals of Action Agenda

The committee recommended that the institutional framework for planning in California be changed to resolve appropriate substantive physical development issues on a regional scale. These issues include distribution of population and housing, distribution of land uses involving commerce and economic development, provision of regional infrastructure, and protection of environmental resources.

The goals of restructuring California's planning framework are to:

- provide adequate affordable housing,
- enhance California's economic development,
- provide adequate infrastructure,
- protect the environment and provide adequate open space, and
- provide a good quality of life for present and future generations.

The committee recognized that California faces additional major planning challenges in the areas of social programs (health and welfare), crime, and education. The committee recommended, however, that CCAPA address these issues in another forum and focus the Action Agenda on resolution of physical development issues.

### Obstacles to Achieving Goals

The committee identified the following major obstacles to achieving these goals:

- lack of sufficient local government financing;
- lack of state leadership and coordination; and
- lack of mechanisms for effective regional planning, caused by the lack of a constituency for effective regional planning and by a proliferation of single-purpose agencies and special districts with overlapping and conflicting boundaries.

## Criteria for Successful Institutional Structure

What would a successful institutional framework for California planning look like? The committee recommended the following criteria:

- Implementable, workable plans would be developed that solve substantive problems.
- There would be ready public access to decision makers.
- Local and state financing problems would be solved.
- The state would establish clear priorities and direction.

## Growth Policy Consensus Project

A second major refinement of CCAPA's initial Action Agenda grew from the Growth Policy Consensus Project sponsored by Sacramento State University. In spring 1991 the project's Local Government Caucus discussed a new local general plan revision process.

The process under discussion complements CCAPA's Action Agenda and provides additional details on a new approach to making local planning effective. It also emphasizes the need to achieve greater certainty and efficiency in the development project review process.

## Contents of Revised Action Agenda

The revised draft Action Agenda contains seven sections following this introductory material:

- a statement of the Action Agenda's five essential principles,
- recommendations for state planning,
- recommendations for regional planning,
- recommendations for local planning,
- recommendations for public financing,
- recommendations for conflict resolution, and
- CCAPA's steps to implement the Action Agenda.

## FIVE ESSENTIAL PRINCIPLES OF THE ACTION AGENDA FOR THE 1990s

1. **The state should plan for matters of statewide importance.**

2. **Regional agencies should plan for matters of regional importance, and regional plans should be consistent with the state plan.**

3. **Local governments should plan for matters of local importance, and local plans should be consistent with regional plans.**

4. **New sources of revenue should be provided to implement new planning programs.**

5. **Alternative dispute resolution procedures should be established.**

## STATE PLANNING

Need for Action. During the last decade of rapid population and economic expansion, neither the Legislature nor the Governor has taken a leadership role in growth management. No comprehensive state development policy exists. State efforts to adopt programs in various policy areas (housing, water, transportation) have been single purpose and disjointed. Policies of different state agencies often conflict. Meanwhile, problems caused by growth remain unsolved.

Clearly, dramatic changes in the way California manages growth are necessary to maintain a high quality of life for all Californians.

Goal: State goals and policies that establish a framework for managing growth, including goals and policies for protecting the environment, providing infrastructure, and generating adequate financial resources

Recommended Actions

The Legislature should enact, and the Governor should sign and implement, legislation to make the following changes to the state planning function:

### New State Planning Policies

- State Goals and Policies. The state should develop state goals and policies that are based on the ability of local areas and regions to accommodate growth, are internally consistent, identify priorities, and balance conservation and development. The state goals and policies should be updated every 5 years.

- Priorities for Development. The state should establish clear statewide priorities for areas to be developed and preserved.

- Areas of Statewide Critical Concern. The state should identify areas of statewide critical concern subject to state regulation.

- State Infrastructure Plans. The state should require all state infrastructure agencies to have reviewable plans with a logical and coordinated set of regional boundaries.

### New State Planning Procedures

- State Planning Agency. The state should establish a state planning agency in the Executive Branch that is not the Governor's research office to implement new state planning programs and provide technical assistance to local and regional agencies.

- State Consistency. The state should require all state agency planning, development, funding, and permit decisions to be consistent with state goals and policies, and should establish a procedure for consistency review by the state planning agency.

- Regional and Local Consistency. The state should require all regional plans and local general plans to be consistent with state goals and policies, and should establish a procedure for regional plan consistency review by the state planning agency.

- Conflict Resolution. The state should develop mandatory alternative dispute resolution procedures for resolving conflicts among state, regional, and local agencies.

- State Permits. The state should require state permits to be reviewed and issued at regional or district offices.

## REGIONAL PLANNING

Need for Action. Most urban areas of the state include a myriad of cities, counties, special districts, and other agencies, yet local plans are not required to be consistent with one another. Problems of regional significance, such as those pertaining to transportation, air and water quality, waste disposal, and the location of jobs and housing, are often exacerbated by local governments making decisions in isolation.

California is too big and diverse for the state to directly review local plans, but existing regional planning structures have not worked. Special-purpose regional agencies deal only with a single issue, such as air quality. Counties have inadequate resources and powers to act as regional planning bodies. Councils of government are voluntary and do not have the authority to enforce their decisions.

Goal: Effective regional planning through multipurpose regional agencies to plan for issues of regional significance

### Recommended Actions

The Legislature should enact, and the Governor should sign and implement, legislation to make the following changes to the regional planning function:

## New Regional Planning Policies

- New Regional Plans. The state should require new regional plans to be prepared and to be updated every 5 years. The new regional plans should implement state goals and policies, act as a bridge between state and local governments, develop regional consensus, provide solutions to key regional problems, ensure that local decisions are consistent with state and regional goals and policies, accommodate projected regional growth without exceeding the capacities of local areas to accommodate growth, and serve as the regional cumulative impact analysis for California Environmental Quality Act (CEQA) documents.

- Regional Plan Contents. The new regional plans should include regional goals and policies, urban growth boundaries (near-term growth areas, long-term growth areas, preservation areas), level of service standards, provisions for regional infrastructure and its financing, siting standards for locally undesirable land uses of regional significance, and provisions for environmental management (including air quality, water quality, waste management, environmentally sensitive areas, and open space).

- Plan Integration. The state should consolidate the new regional plans with all state-mandated regional and subregional plans, including the general plan, congestion management plan, and integrated waste management plan.

## New Regional Planning Procedures

- New Regional Planning Agencies. The state should establish a process for creating regional planning agencies to prepare the new regional plans.

- Consolidation of Existing Agencies. The state should require consolidation of the planning functions of single-purpose regional agencies while retaining, at least initially these agencies' separate permit authority. At a minimum, regional planning agencies should assume planning functions of regional air quality and transportation agencies, councils of governments, and local agency formation commissions (LAFCOs). Ideally, the planning functions of solid waste boards, BCDC, the California Coastal Commission, and regional open space agencies should also be consolidated within the regional planning agencies. Regional planning for water quality and water supply should be consolidated as well, but this consolidation could require major changes in state and federal law.

- Local Consistency. The regional planning agency should review the following for *consistency* with the regional plan: local general plans, special district plans, LAFCO sphere of influence plans, and their amendments. Local agencies should continue to self-certify the *adequacy* of their plans and should submit an annual planning report to the regional planning agency.

- Authority of New Regional Planning Agencies. The regional planning agency, in addition to conducting consistency reviews, should have the authority to conduct mandatory conflict resolution among local agencies, resolve issues regarding regional tax-base sharing, allocate regional infrastructure funds, and raise revenue for regional infrastructure and planning.

- Conflict Resolution. The regional planning agency should be given the authority for mandatory local-local and local-regional conflict resolution.

- Review of Development Projects. The regional planning agency should have no authority to review development projects that are already consistent with local and regional plans.

- Regional Boundaries. Each region should have a major role in determining regional boundaries, but the state should make final decisions about regional boundaries. Regions should be large enough to encompass regional problems, but not too large to be ungovernable. Regional planning boundaries should be defined statewide, but implementation of regional planning in urban areas should be the first priority. Regional planning boundaries should be flexible and changeable when required by changing circumstances.

- Subregions. Regions should include voluntary subregions to reflect communities of interest large enough to justify a separate planning effort. Subregional plans should be subordinate to and consistent with regional plans. The state should also encourage joint powers agencies to accomplish these goals.

- Regional Planning Agency Governing Body. The state should ensure that the regional planning agency's governing body has adequate representation for residents and reasonable access to decision makers. CCAPA has no formal position on the precise composition of the governing body. The state should allow varying regional structures but should certify that the structure meets certain minimum requirements.

- Sanctions. Loss of state funds should be the main sanction for regional agencies not in compliance with state planning requirements.

## LOCAL PLANNING

Need for Action. General plans prepared by cities and counties must be comprehensive and internally consistent under the present state planning law. However, local plans are not required to be coordinated with those of neighboring jurisdictions, consistent with regional and state goals, or related to infrastructure capacity. Many special districts providing critical services do not prepare long-range plans.

Local plans often are not substantive or detailed enough to provide much certainity in the development project review process. Consequently, significant planning and environmental review resources are directed toward a piecemeal, project-level approach to planning.

Goal: Local general plans that are coordinated with each other, consistent with regional and state goals and policies, based on the capacity of public services, and serve as the basis for development project approval.

Recommended Actions

The Legislature should enact, and the Governor should sign and implement, legislation to make the following changes to the local planning function:

## New Local Planning Policies

- New Local General Plans. The state should require new local general plans to be prepared and to be updated every 5 years. The new local general plans should be consistent with state goals and policies and the regional plan, and they should include the policies of other state-mandated local plans (e.g., congestion management plan, integrated waste management plan). Standards in the plan should measure project consistency with state goals and policies and the regional and local plan, including concurrence of infrastructure and development, and siting of locally undesirable land uses of regional significance.

- Local Plan Contents. The new local plans should include the following topics: resource management, natural hazards, land use, housing, public facilities and services, and public finance. Contents and organization should be based on relevance to state goals and policies, the regional plan, and local conditions, not on the current system of mandatory elements.

- Special District and LAFCO Plans. The state should require that all special districts and LAFCOs prepare plans consistent with regional plans and applicable local plans, using the same timeframes as the regional and local plans.

## New Local Planning Procedures

- Review of Development Projects. The new comprehensive plan, after being found to be consistent with state goals and policies and the regional plan, should serve as the basis for development project approval. Projects should be reviewed for consistency with the local plan using an abbreviated project review and CEQA process subject to third-party challenge. Projects consistent with the local plan should be approved, and projects inconsistent with the plan should be denied. Proposals for amendments to local plans should be subject to regional review and the full CEQA process.

- Monitoring of Plan Implementation. The state should develop mechanisms to ensure that local planning policies and standards (e.g., for affordable housing) are implemented.

- Sanctions. Loss of state funds should be the main sanction for local agencies not in compliance with regional planning requirements.

## PUBLIC FINANCE

Need for Action. Inadequate financial resources, especially since the passage of Proposition 13 in 1978, have caused localities to plan and zone for uses that will maximize revenues, regardless of impacts on neighboring jurisdictions, the environment, traffic, or housing needs. Funding for projects to provide transportation, housing, sewers, water service, open space protection, and public facilities is inadequate now, and the resulting problems will multiply as the state continues to grow at a rate of 700,000 people per year.

Goal: New sources of revenue that will be adequate to provide the public services and facilities needed to support California's planned growth and to maintain the quality of life in the state

Recommended Actions

- The state should provide adequate funds for required state, regional, and local planning, and for the implementation of those plans. Options include a property transfer tax and a sales tax not tied to point of sale.

- The state should prepare a plan for public services and facilities needed to support the planned growth in the state.

- The state should provide sufficient sources of revenue for long-range funding of infrastructure and public services.

- The state should authorize new regional funding sources to support the implementation of adopted regional plans.

- The state should authorize additional local funding sources to finance local needs.

## CONFLICT RESOLUTION

Need for Action. The litigation process is an expensive, inefficient, and ineffective way to resolve planning-related disputes between government agencies and project applicants and between different government agencies. Other states have established mandatory alternative conflict resolution techniques as an alternative to planning-related litigation. The state should study these and other models and, as an alternative to litigation, develop more reasonable, reliable, and accessible dispute resolution techniques.

Goal: Effective alternative planning and land use dispute resolution techniques that keep parties out of court, resulting in binding decisions

Recommended Actions:

- Alternative Conflict Resolution Techniques. The state should encourage alternative conflict resolution techniques as an alternative to litigation. Disputes that should be

addressed include those between project applicants and local government, inter-governmental dispute, and disputes concerning CEQA compliance.

- Boards of Appeals. To resolve disputes over regional decisions, the state should consider establishing regional appeal boards distinct from regional planning agencies. To resolve disputes over state decisions, the state should consider establishing a state board of appeals.

- Mediation. The state should consider mandatory mediation as a method to resolve planning and land use disputes.

## CCAPA'S COMMITMENT TO IMPLEMENTATION

The California Chapter of the American Planning Association, representing the planning community and professional planners throughout the state, will commit its resources to aggressively advancing the Action Agenda for the 1990s at the state and local levels. Actions to be taken include:

### Legislative Advocacy

CCAPA's Sacramento office will focus on legislation that advances the Action Agenda, and CCAPA members will assist with drafting new legislation as required. CCAPA members will actively participate on task forces and committees focusing on the state's growth problems.

### Public Relations

CCAPA will present the Action Agenda and related legislation to appointed and elected officials, legislators, and candidates, and will request comments. CCAPA will seek to obtain media coverage on the Action Agenda.

### Informational Workshops

CCAPA will conduct public workshops on the Action Agenda topics at the local and statewide level, will invite appointed and elected officials to speak, and will provide publicity to the local media.

### Project Support

CCAPA will support actions at the regional and local level that are consistent with the Action Agenda. CCAPA will monitor local activities to identify opportunities to implement the Action Agenda.

### Speakers Bureau

CCAPA will provide knowledgeable speakers to present the Action Agenda and comment on related matters at meetings of interested organizations.

For further information about the Action Agenda, please contact:

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June 29, 1992

The Honorable Senator Marian Bergeson
Room 3063
State Capitol
Sacramento, CA 95814

Dear Senator Bergeson:

The California Chapter of the American Planning Association has reviewed the June 3 amended version of SB 434. CCAPA in the past has endorsed many of the same provisions now contained in SB 434 which would strengthen the local comprehensive planning process, require a state growth management strategy, allow cities and counties to form regional fiscal authorities, and require all local agencies to prepare 5-year capital programs consistent with city and county capital programs. CCAPA appreciates your leadership in these areas.

We also support in concept the state land use court, although we are concerned with the appointment process and wide powers the court would have in SB 434. We suggest other options for alternative dispute resolution be carefully studied and compared before settling on the judicial state land use court concept. In addition, the SB 434 requirement for mandatory approval of projects consistent with the local comprehensive plan should be combined with a requirement that the project meet more detailed development criteria. This change will ensure that the local agency reviews unique project and environmental issues which a simple review for consistency with the broad plan cannot catch.

The latest amendments to SB 434, however, include two provisions which CCAPA must oppose:

1. CCAPA opposes the provision in SB 434 which would make major changes to the California Environmental Quality Act (CEQA) through the amendment of the CEQA Guidelines rather than statute. The CEQA Guidelines are completely out of date and do not reflect the last decade of CEQA case law and statutory amendments. New changes to the Guidelines cannot be made without creating massive confusion unless the Guidelines are comprehensively overhauled first, a major undertaking in itself. CCAPA specifically opposes a reduction in the CEQA review timelines from one year to six months, an impossible task for large or complicated projects. CCAPA also opposes the two statutory amendments to CEQA contained in SB 434 because they are too vague and would make it even harder to prepare legally defensible findings under CEQA.

Instead of these spot amendments to CEQA, CCAPA would suggest an impartial study of CEQA's effectiveness and problems, soliciting the views and recommendations of all groups knowledgeable about CEQA, and completing a comprehensive review and revision of the act.

2. CCAPA opposes the elimination of the ability of local agencies to impose fees or charges for public improvements or facilities for all development until final inspection or issuance of the certificate of occupancy. This new SB 434 amendment eliminates an existing section of the law which allows such early collection of fees if:

   - the fees or charges will be collected for public improvements or facilities for which an account has been established and funds appropriated, and

   - the local agency has adopted a proposed construction schedule or plan which includes the public improvements or facilities prior to final inspection or issuance of the certificate of occupancy.

   This section of the existing law is designed to allow local agencies to begin construction of capital facilities prior to or concurrently with the project to ensure that the infrastructure is in place to serve the project when it is completed. The elimination of this exemption would prevent a city or county from collecting fees used to provide a road to the project, for example, until after the owners are ready to move into the project. This situation simply does not make sense. As long as the local agency has a capital facilities program and a schedule for completing such facilities, it should be able to collect the fees prior to completion of the project.

CCAPA understands that it is difficult to achieve consensus on such controversial matters as growth management and development controls. However, CCAPA supports a consensus-based approach to these issues to ensure that all parties concerned are involved in the solution. CCAPA would be pleased to offer any technical support you might need in this effort.

Sincerely,

Albert I. Herson, AICP
CCAPA President

AIH:ss

cc: Members of the Assembly Local Government Committee

APPENDIX G

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**SUMMARY OF COMMENTS OF JAMES G. MOOSE IN RESPONSE TO RECOMMENDATIONS OF THE COUNCIL ON CALIFORNIA COMPETITIVENESS**

**Senate Committee on Housing and Urban Affairs**

1. There is merit in the general desire to streamline the planning and environmental review processes to reduce needless costs currently being borne by business. At the same time, though, there is reason to be skeptical about many of the recommendations of the Council on California Competitiveness.

2. The attempt to "frontload" the planning and CEQA processes by preparing detailed "Comprehensive Plans" and "Master EIRs" will likely create the following practical difficulties:

   a. Assigning detailed planning designations for all the land within a large jurisdiction will entail great efforts and great expense.

   b. Currently, local government have no obvious source of revenue to finance such an exercise.

   c. In many instances, the agency's effort and expense may prove in retrospect not to have been cost-effective, since changing market conditions, even just a few years after completion of such plans, will cause landowners to seek plan amendments.

   d. As a practical matter, the development of site-specific environmental information for all land within a large jurisdiction will be prohibitively expensive and time-consuming.

   e. As a result, some kind of project-specific environmental review will be a necessity, unless the State wants to turn back the clock to the days when decisions on proje[illegible] were made without the benefit of detailed site-speci[illegible] information.

3. A comprehe[illegible]e update of the CEQA Guidelines will allow the Governor's [illegible]ice of Planning and Research to provide guidance as to how agencies can use existing devices to avoid redundant review, including the following: incorporation by reference, tiering, use of an EIR from an earlier project, staged EIRs, program EIRs, and master environmental assessments. Many agencies currently do not use these mechanisms because the Guidelines do not clearly spell out just how they should be used.

4. The Council's proposal to require all environmental review to be completed within six months is unrealistic. "Automatic approval" of projects for which deadlines are missed presents constitutional problems, in that the owners of land adjacent to project sites may be denied their "right to be heard" before projects are "deemed approved." In addition, automatic approval unfairly penalizes innocent third parties and the environment for the agency's failure to act promptly.

5. A better approach would be to use a "carrot" rather than a "stick" to prompt agencies to process projects more quickly. One potential mechanism is to require applicants to provide agencies a financial bonus for the timely completion of permit processing. Such an expense typically is less than the costs of holding onto land (with carrying costs) during an extended period of environmental review.

6. CEQA can be modified to eliminate any perceived bias against accommodating a growing population by raising the standard for preparing environmental impact reports for "infill" projects meeting specific criteria (consistency with the general plan, lack of impacts on habitat, etc.). Such a policy would dovetail with a growth management strategy favoring the "densification" of existing urban areas in order to avoid the development of raw land with high habitat values.

7. Any attempt to severely limit citizens' access to the court system in order to enforce CEQA would produce a "cure" worse than the "disease" at which it is aimed. In recent years, the Supreme Court and Court of Appeal have begun to deal harshly with lawsuits filed solely for purposes of delay, blackmail, or economic advantage.

8. Much spurious litigation could be avoided by narrowing the definition of "project," which is the operative term under CEQA. (All "projects" are subject to CEQA.) Currently, the concept is invoked to force environmental review of decisions with no reasonably foreseeable effects on the physical environment.

9. If not done properly, the creation of a state land use court may create a number of problems. A court composed of judges elected statewide could become very political, and seats would be won by expensive campaigns that would favor candidates sympathetic to development interests. The Ueberroth proposal would take a traditionally legislative function--the decision whether projects are "consistent" with general plans--away from elected officials. Unless decisions of a land use court are appealable to the California Supreme Court, the land use court could develop doctrines at odds with those of the highest tribunal in this State.

10. A better means to ensure that judges will be knowledgeable about the land use issues they face would be to require the Superior Courts in the major metropolitan areas to assign a group of judges, perhaps on a rotating basis, to handle nothing but land use cases.

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# COMMENTS OF JAMES G. MOOSE IN RESPONSE TO RECOMMENDATIONS OF THE COUNCIL ON CALIFORNIA COMPETITIVENESS

**Senate Committee on Housing and Urban Affairs**

July 29, 1992

## INTRODUCTION

My partners and I are land use and environmental attorneys whose practice involves a great deal of litigation and advice-giving on compliance with the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.). We have represented, or are current representing, a broad variety of clients, including the following: environmental organizations such as the Planning and Conservation League, the Sierra Club, Defenders of Wildlife, and Californians Against Waste; government entities such as Butte County, Kings County, Solano County, Shasta County, Fresno County, Sausalito, Folsom, Hollister, Tiburon, Salinas, Pittsburg, Chula Vista, and Chico; private applicants such as MacMillan Bloedel, Riverwest Developments, and AKT Developments; and private individuals determined to require government agencies to comply with land use and environmental laws. In CEQA litigation, we have represented petitioners (plaintiffs), respondents (defendants), and real parties in interest (private

applicants). Michael Remy, Tina Thomas, and I are also the authors of *Guide to the Environmental Quality Act*, which is published annually by Solano Press Books.

In short, we are keenly interested in the application and evolution of CEQA, and believe we have valuable insights gained by our representation of (i) interests that litigate to force compliance with the statute, (ii) agencies charged with compliance with the statute, and (iii) private sector applicants who must pay for the costs of compliance with the statute. Unlike many of the commentators who will submit comments to the Committee, we have seen CEQA compliance from a variety of different perspectives. In other words, we do not identify solely with one point of view, as is the case, for example, with many land use attorneys who represent only developers.

We strongly believe that California's environment must be protected--not only for its own sake and that of our children, but also for the sake of preserving ecosystems. At the same time, though, we do not favor cumbersome regulations that serve no obvious purpose and that force private entities to spend large amounts of money without any clear resulting environmental benefits. Like the Council on California Competitiveness, we generally favor an approach that seeks to achieve environmental protection without undue economic costs.

We have been invited to submit these comments by the Planning and Conservation League ("PCL"), with which our firm has a close association. (All three of my partners are either PCL officers or

members of the PCL Board of Directors.) I should emphasize, though, that PCL as an organization has never formally endorsed the ideas that make up the substance of these comments. I must also emphasize that my comments do not necessarily reflect the views of any of the clients listed above. The thoughts set forth below are solely my own. I offer them to the Committee in the hope that they will be of value to you in your deliberations on the so-called "Ueberroth Report" and its recommendations regarding potential modifications to CEQA and related land use and environmental laws.

**IS CEQA A BURDEN ON CALIFORNIA BUSINESS?**

No one can deny that CEQA imposes some costs on businesses that require land use entitlements as a precondition of commencing or expanding their operations in California. Similarly, no one can deny that environmental regulations generally impose such a burden. The more important question is whether the costs associated with CEQA are acceptable in light of the public benefits associated with comprehensive environmental review. My answer to the latter question is yes, although, as I describe in more detail below, I do believe that there are many ways in which agencies can render CEQA compliance less expensive and burdensome without sacrificing meaningful public participation and environmental protection.

My primary concerns about the recommendations of the Council on California Competitiveness are that, if adopted verbatim by the Legislature, they would (i) "throw out much of the good along with the bad," (ii) create numerous practical, political, and legal problems, and (iii) lead to diminished participatory democracy and

environmental protection. I applaud the Council's desires to generally improve the business climate in our State and to lower the amount of overhead that goes into the production of housing. I simply believe that many of the recommendations go too far in the direction of accommodating business--at the expense of sound land use and environmental planning, at least in my judgment.

*Although I favor some limited changes to the CEQA statute, I believe that most of the improvements required in CEQA can be made through a comprehensive update of the "CEQA Guidelines."* Any such update, though, should be preceded by detailed discussions amongst attorneys or other representatives of the various participants in California environmental and land use decisionmaking: government agencies, building industry representatives, private industry, environmental organizations, and housing advocates.

Two attempts to comprehensively amend CEQA during the current legislative session (Senator Bergeson's SB 434 and Assemblywoman Allen's AB 3076) have failed so far because, as I see it, the authors did not attempt to build a consensus (including the environmental community) before seeking passage of their legislation. I would strongly urge the Wilson Administration to seek the counsel of environmental interests before attempting a comprehensive update of the Guidelines. My partners and I have had many conversations with personnel in the Governor's Office of Planning and Research ("OPR"). We are hopeful that we will be consulted by such persons as they embark on their planned comprehensive update of the Guidelines in the near future.

## COMPREHENSIVE PLANS/MASTER EIRs

From a theoretical standpoint, there may be some merit to the Competitiveness Council's suggestion that "Comprehensive Plans" with great amounts of detail should be substituted for "General Plans" that are relatively vague. Along with a "Master EIR," Comprehensive Plans would provide certainty as to the uses allowed throughout a jurisdiction, and would allow applicants to dispense with some or all original environmental analysis for individual projects consistent with the Plan. Individual projects could be approved at lesser expense. In practice, however, I am extremely skeptical that such an approach would work effectively. Moreover, I fear that "frontloading" the planning process would lead to less environmental protection.

First of all, the relative low quality of general plans and general plan EIRs in recent years reflects the obvious fiscal reality that public agencies simply do not have a great deal of money to spend in preparing such documents. Unfortunately, agencies have tended to "go lightly" on their own planning documents and EIRs and then later require "deep pocket" applicants to prepare regional analysis in project-specific EIRs. Unlike the public agencies, which could only recoup the costs through tax increases or the diversion of revenue from other activities, private interests, at least in theory, can pass on the costs of environmental review to the consumers who ultimately buy or use their land. Any serious attempt to "frontload" the planning and environmental review processes must be accompanied by a creative

strategy for finding public money to pay for the regional analysis that the private sector wants to use (or incorporate) into project-specific EIRs.

Some professionals who prepare general plans are already frustrated by the trend towards requiring that such plans attempt to anticipate future land uses with great particularity. Although some of their colleagues disagree, such persons emphasize that general plans are supposed to be general; that is, the plans should anticipate a range of uses (signified by a broad planning category such as "commercial"), with details to be worked out later when specific plans, zoning categories, and individual projects (tentative subdivision maps or use permit applications) are actually proposed. These planning professionals are likely to argue against the wisdom of insisting on more detail in general ("comprehensive") plans as a matter of statutory law.

More importantly, though, as more detail is demanded of a general (or "comprehensive") plan, more on-site environmental analysis will be required in the accompanying Master EIR. Thus, as general (or comprehensive) plans begin to resemble compilations of detailed subdivision maps, there will be a resulting increased need to conduct jurisdiction-wide on-site surveys for wetlands, vernal pools, endangered or threatened animals and plants, archaeological and cultural resources, and the like. At some point, the enormity of the information-gathering and analytical tasks will render the exercise prohibitively expensive, especially in large jurisdictions (e.g., Los Angeles and San Bernardino Counties). As a practical

matter, it will be physically and fiscally impossible to generate meaningful site-specific information on a countywide basis or on a citywide basis in large cities. Unless some kind of project-specific environmental analysis is required, decisionmakers and the public will simply have to be satisfied with less environmental information than is currently generated today.

I suspect that the Competitiveness Council's response to my concern would be that we simply do not need all of the information currently generated for planning decisions. Although I would agree that we do not necessarily need all of the *paper* that is currently generated, I strongly believe that we should not turn back the clock to the days when projects were approved without detailed information about the physical characteristics of property to be developed and the specific environmental effects associated with specific project proposals.

EIRs currently contain detailed information about cultural resources, plant and animal life, and similar issues because the public and decisionmakers, as well as the professionals who prepare EIRs (e.g., botanists, biologists, archaeologists, etc.), believe that such information is required before intelligent, informed planning decisions can be made. Nothing in statutory law or the CEQA Guidelines demands the level of detail now commonly seen in EIRs; rather, that amount of detail reflects what the public, elected officials, and competent professionals deem to be the minimally acceptable in California in 1992. I urge the Committee

not to mandate that decisions on individual development projects be made without meaningful on-site and project-specific information.

I also question the long-term utility of extremely detailed comprehensive plans. By their very nature, general plans are subject to change in reaction to evolving market conditions. Although members of the public frequently express frustration about general plan amendments, such amendments occur in reaction to changing perceptions about what kinds of development is economically feasible in light of market demand. Land use diagrams are frequently changed when agencies and landowners realize that land uses that appeared to be a "sure bet" when a Plan was adopted become irrelevant in light of changing market realities.

An example of how drastically markets (or the perceptions of markets) can change involves the City of Sacramento's North Natomas Community Plan. In 1986, when the City Council decided to urbanize that agricultural area, large areas were planned for "manufacturing and research and development." Sacramento was to become another Silicon Valley. Like many cities in the mid 1980s, Sacramento saw the computer industry as a relatively "clean" source of economic growth. No one in Sacramento in 1992 seriously believes that a huge flux of high tech companies will come into the State Capital in the foreseeable future.

If Sacramento had prepared a "Comprehensive Plan" for the North Natomas area in 1986, that document would be of little value today. Any landowner seeking entitlements within the area would be seeking general plan amendments--a testament to the fact that even

the most sophisticated planners cannot reliably anticipate market conditions even a few years into the future.

Despite my skepticism about the Council's recommendations, I am not unsympathetic to the need to streamline the environmental review process and to relieve small project proponents of the economic burden of preparing huge EIRs. My proposed solution is to urge OPR to comprehensively update the CEQA Guidelines in order to provide much needed guidance as to how agencies can use *existing* mechanisms without fear of doing it wrong--and thus getting sued and losing. Many agencies now demand applicants to "start from scratch," despite the existence of these mechanisms, simply because the law is so unclear as to what is required to ensure full legal compliance.

The Guidelines already contain a number of devices intended to avoid redundant environmental review: "incorporation by reference," "tiering," "use of an EIR from an earlier project," "staged EIRs," "program EIRs," and "master environmental assessments," to name only a few. (See CEQA Guidelines, §§ 15150, 15152, 15153, 15167, 15168, 15169, 15385; see also Pub. Resources Code, §§ 21093, 21094.) The problem is that the Guidelines do not currently provide clear guidance as to how to use these devices, and there is a lack of case law as well. A recent case indicates that, where individual projects are consistent with a governing plan, little or no new environmental review will be required except as to issues that have not been specifically addressed earlier. (Sierra Club v. County of Sonoma (May 28, 1992) 92 Daily Journal D.A.R 7195.) This

judicial decision provides hope that clear principles for avoiding redundant analysis indeed can be fashioned from the unclear statutory and Guidelines provisions.

When such mechanisms are clearly defined, and the means of using them properly are laid out clearly, project applicants truly will be able to avoid "reinventing the wheel." Regional cumulative impact analysis can be incorporated by reference; previously-prepared documents can be cited; and new analysis will be limited to what is truly unique to the project proposal at hand. In my judgment, the limited costs of generating such new information is a cost of doing business that we in California can reasonably expect our entrepreneurs to bear. The only real alternative is to require or allow project approval in the absence of the kind of analysis that is now seen as minimally necessarily to informed decisions.

## FORCING AGENCY DECISIONS IN AN EXPEDITED TIME FRAME

The Permit Streamlining Act ("PSA") (Gov. Code, § 65920 et seq.) currently provides that "development projects" [1] shall be

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[1]/ Significantly, the term "development project," as used in PSA, does not apply to proposed agency actions that are legislative or quasi-legislative in character, such as requests for general plan amendments and zoning changes. Nor does the term embrace agency actions that are ministerial in nature. Rather, the statute applies only to requests for quasi-adjudicatory actions such as approvals of tentative subdivision maps, use permits, and variances. Agencies therefore are under no time pressure to respond to proposals for legislative actions, even when such requests are presented within multi-part applications that also include requests for quasi-adjudicatory actions. (Gov. Code, § 65928; Landi v. County of Monterey (1983) 139 Cal.App.3d 934 [189 Cal.Rptr. 55]; Meridian Ocean Systems, Inc. v. California State

approved within specified time periods or the projects will be deemed approved by operation of law, subject to certain qualifications discussed below. (Gov. Code, § 65950.) [2] The Competitiveness Council seems intent both on shortening the applicable deadlines and eliminating the possibility that they can be extended. In addition, the Council would eliminate the chance the projects can be denied as a means of avoiding "automatic approval."

In my judgment, the whole concept of "automatic approval" is fraught with constitutional problems that may be insoluble. PSA, in short, is a poor foundation on which to build still more policies. The Council's recommendations would only exacerbate a statutory scheme that is already a constitutional and practical quagmire. As discussed below, however, there may be a reasonable alternative means for forcing--or at least encouraging--agencies to act more quickly in deciding on projects.

Government Code section 65950 is the heart of PSA. It provides that, for any development project for which an EIR is required, agency action must be taken either approving or denying

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Lands Commission (1990) 222 Cal.App.3d 153, 167 [271 Cal.Rptr. 445]; and Land Waste Management v. Contra Costa County (1990) 222 Cal.App.3d 950 [271 Cal.Rptr. 900].)

[2]/ PSA time requirements apply to all applications for development projects filed with cities, counties, and all other local and state public agencies, except the California Energy Commission in its function of siting certain power plant facilities. The act does not apply, though, to "administrative appeals within a state or local agency or to a state or local agency." (Gov. Code, § 65922; see also Ciani v. San Diego Trust and Savings Bank (1991) 233 Cal.App.3d 1604, 1612-1618 [285 Cal.Rptr. 699].)

the project within a year after the application has been "received and accepted as complete." Government Code section 65957 allows a single 90-day extension with the applicant's consent. Section 65950 also provides that, for projects for which a negative declaration will suffice, or which are exempt from CEQA review altogether, agency action must occur within six months, "unless the project proponent requests an extension of the time limit." The statute does not expressly limit how long such an extension can be.

Government Code section 65956 provides that automatic approval can occur "only if the public notice required by law has occurred." This requirement was added in 1987 after the Court of Appeal for the Second District issued Palmer v. Ojai (1986) 178 Cal.App.3d 280 [223 Cal.Rptr. 542], which held that automatic approval could occur even if property owners adjacent to the project sites in question had been given no opportunity to voice their concerns at a public hearing.

Although the 1987 amendments, authored by Assemblyman Sher, seemed at the time to go beyond the call of constitutional duty (in light of Palmer), more recent cases suggest that PSA, even in its amended form, may still contain constitutional problems.

In Selinger v. City Council (1989) 216 Cal.App.3d 259, 271-274 [264 Cal.Rptr. 499], the Court of Appeal for the Fourth District rejected the Second District's decision in Palmer and concluded that the absence of a public hearing deprived property owners adjacent to the project area of their constitutional right to be heard.

The Selinger court relied primarily on Horn v. County of Ventura (1979) 24 Cal.3d 605 [156 Cal.Rptr. 718], in which the California Supreme Court held that a tentative subdivision map could not be approved automatically under the Subdivision Map Act without a public hearing, because such a result deprived adjacent property owners of their federal procedural due process "right to be heard."

In Horn, the Court held that the minimal notice requirements of CEQA [3] did not adequately protect the constitutional rights of property owners who would be "substantially affected" by the approval of a proposed tentative subdivision map. [4] As a result, the Court set aside the respondent agency's approval of the map, and ordered that improved notice be given.

In so holding, the Court emphasized that affected landowners should have been given the opportunity to be heard at a "meaningful hearing" prior to agency action on the project. (24 Cal.3d at 618

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[3]/ In Horn, the defendant county's CEQA notice procedures required only the posting of notices in various locations and the mailing of notice to persons who had specifically requested such notice. From a constitutional standpoint, such notice was not "reasonably calculated to afford affected persons the realistic opportunity to protect their interests," although it may have been adequate "to encourage the generalized public participation in the environmental decision making contemplated by CEQA." (24 Cal.3d at 617-618 [156 Cal.Rptr. 718].)

[4]/ In Horn, the plaintiff adjacent landowner urged that his property would be "substantially affected" by the proposed subdivision because it would "substantially interfere with his use of the only access from his parcel to the public streets, and [would] increase both traffic congestion and air pollution." The Court held that, "[f]rom a pleading standpoint, plaintiff has thus adequately described a deprivation sufficiently 'substantial' to require procedural due process protection." (24 Cal.3d at 615 [156 Cal.Rptr. 718].)

[156 Cal.Rptr. 718].) In support of the principle that a "predeprivation hearing" be "meaningful," the Court cited two landmark procedural due process cases: Beaudreau v. Superior Court (1975) 14 Cal.3d 448, 458 [121 Cal.Rptr. 585]; and Bell v. Burson (1981) 402 U.S. 535, 541 [91 S.Ct. 1586].) Although neither case involved land use decisionmaking, both cases articulate standards that necessarily apply in that context.

In Beaudreau, the California Supreme Court quoted the United States Supreme Court's statement in Bell that "'[i]t is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision . . . does not meet this standard.'" (14 Cal.3d at 458 [121 Cal.Rptr. 585].) In another federal case, Armstrong v. Manzo (1965) 380 U.S. 545, 552 [85 S.Ct. 1187], the Supreme Court emphasized that the "opportunity to be heard" must be granted "at a meaningful time and in a meaningful manner."

Applying the logic of Horn to the facts of its own case, the Fourth District in Selinger concluded the constitutional rights of third parties affected by a project would be violated if they had no opportunity to be heard at a public hearing. In other words, section 65956, being only a *statute*, had to give way to *constitutional* due process requirements. (216 Cal.App.3d at 272-274 [264 Cal.Rptr. 499].)

Selinger interpreted section 65956 before it was amended in 1987, and thus did not directly address the question of whether those amendments cured the identified constitutional problem.

Although the Court stated, in dicta, that "[t]he recent amendments to the Permit Streamlining Act . . . resolve the constitutional issue for all current applications," the Court may have mistakenly interpreted subdivision (b) as requiring both notice and a *public hearing*, rather than simply notice that automatic approval could occur within 60 days. (216 Cal.App.3d at 265, fn. 3, 274, fn. 8 [264 Cal.Rptr. 499].)

Probably the most important PSA case issued to date, and the only extant published case directly addressing the 1987 amendments, is Ciani v. San Diego Trust and Savings Bank (1991) 233 Cal.App.3d 1604 [285 Cal.Rptr. 699]. [5] Citing the interests of affected third parties, the opinion holds that automatic approvals under the Act remain subject to whatever administrative appellate procedures would normally apply to projects directly approved or denied by an agency decisionmaking body.

Ciani involved a coastal development permit granted by the City of San Diego acting as the California Coastal Commission's "delegated local agency" for administering local coastal permits under the California Coastal Act. (See Pub. Resources Code, § 30600.5.) Under Public Resources Code section 30603 (of the Coastal Act), the City's decisions on such permits were normally appealable to the Commission. In holding that even automatic approvals remained subject to such appeals, the Court cited the

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[5]/ The losing party in Ciani filed a petition for review with the California Supreme Court. The petition was denied. The State's highest court therefore is aware of the holding in Ciani, and declined either to reverse it or "depublish" the opinion.

interests of "third party contestants" in language that would seem to apply in other contexts, such as local proceedings in which planning commission approvals or denials are appealable to a city council or board of supervisors. (233 Cal.App.3d at 1615 [285 Cal.Rptr. 699].) The Court's reasoning emphasized the rights of affected third parties, implicitly echoing the due process concerns addressed in Selinger:

> "Where the permit is obtained by the 'deemed approved' mechanism of the Streamlining Act, the parties in opposition are effectively prevented from presenting a case. If a provision for appeal is appropriate following the hearing and appearance procedures which attend the typical method of permit grant, it would seem even more necessary when considered in light of a 'deemed approved' permit. If appellate rights were considered extinguished as the result of the City's inaction, the City could by such inaction deprive third party contestants of all opportunity to object at a public hearing. We cannot believe this to have been the intent of the Streamlining Act."
>
> (233 Cal.App.3d at 1615 [285 Cal.Rptr. 699].)

As many attorneys for developers have noted, an "automatic approval" that can be appealed (and thus denied) is of little value. Any other kind of automatic approval may be unconstitutional, however.

As noted above, Selinger appears to have incorrectly assumed that in 1987 "the Legislature amended section 65956 to include a requirement of notice to the public and a *hearing*." (216 Cal.App.3d at 265, fn. 3 [264 Cal.Rptr. 259] (emphasis added).) Thus, to the extent that the term "public notice required by law" in section 65956, subdivision (b), can be understood to require

only notice, but not a hearing, such an interpretation would be unconstitutional according to Selinger. [6]

In light of the reasoning in Horn and Selinger, the question of whether an agency has issued the "public notice required by law" is inseparable from the question of whether the hearing for which the notice was given actually provided affected property owners' a "meaningful" opportunity "to be heard." If no such linkage is made, then an interpretation of PSA by which "automatic approval" could occur as long as mere notice by an agency, without a meaningful hearing, has been given, would clearly be unconstitutional. In other words, simple "notice" by itself cannot protect the procedural due process rights of affected landowners, who have a right "to be heard." The notice must relate to a hearing, and the hearing must occur "at a meaningful time and in a meaningful manner," and must address every "element essential to the decision" at hand. (Armstrong, supra, 380 U.S. at 552 [85 S.Ct. 1187]; Beaudreau, supra, 14 Cal.3d at 458 [121 Cal.Rptr. 585]; Bell, supra, 402 U.S. at 542 [91 S.Ct. 1586]; see also Horn, supra, 24 Cal.3d at 618 [156 Cal.Rptr. 718].)

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[6]/ Unless it was just a misreading of the words of the statute, the Selinger court's reading of the 1987 amendments undoubtedly reflects the principle that "remedial" amendments (i.e., those attempting to cure a perceived defect in the original statute), "must be liberally construed so as to effectuate [their] object and purpose, and to suppress the mischief at which [they were] directed." (California State Restaurant Association v. Whitlow (1976) 58 Cal.App.3d 340, 347 [129 Cal.Rptr. 824]; see also City of San Jose v. Forsythe (1968) 261 Cal.App.2d 114, 117 [67 Cal.Rptr. 754] and Lande v. Jurisich (1943) 59 Cal.App.2d 613, 616-617 [139 P.2d 657].)

It is unclear whether a hearing held prior to completion of an EIR or negative declaration can be constitutionally "meaningful." Arguably, such a hearing does not occur at a "meaningful time," and cannot address all "element[s] essential to the [lead agency's] decision." In situations in which automatic approval is a realistic possibility, affected landowners should be made aware of that very danger so that they "can be heard" on the question of how such a draconian result can be avoided. In the absence of a public hearing held after this possibility becomes public knowledge, automatic approval based on "public notice required by law" issued for previous hearings is constitutionally problematic.

In other words, anything short of a hearing on the merits of a project may not be constitutionally meaningful. An affected landowner's "right to be heard" may be meaningless unless he or she is addressing decisionmakers who have the power to act on what is said. [7] That power, of course, must include the power to deny a project--even if more than six months or a year has passed since the application was "deemed complete."

The Competitiveness Council's suggestions would create even more constitutional problems than are already present in PSA. By attempting to increase the number of occasions in which automatic approval can occur, the Council's suggestions would only make PSA more problematic.

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[7]/ By analogy, a defendant who can only argue his case after he has been convicted of a crime has hardly been accorded due process.

Another major problem with PSA in its current form is the possibility of automatic approval before agencies complete their environmental documents and without agencies being able to impose reasonable, feasible mitigation measures. A concrete example of the dire consequences of such occurrences is evident from the facts of a case entitled, Patterson v. City of Sausalito (1 Civil No. A053074), currently on appeal before the Court of Appeal for the First District in San Francisco.

The project in question would involve the construction of residential units on a steep hillside uphill from U.S. Highway 101, at the edge of the Golden Gate National Recreation Area.

In that case, the Superior Court held that a developer's project was "deemed approved" in precisely the form originally proposed by the applicant, despite the fact that a completed EIR showed that it would cause numerous significant environmental effects, including the following:

(1) the very real possibility of a landslide on United States Highway 101, which, according to Caltrans, could lead to loss of life it if occurs during peak commute hours;

(2) loss of habitat of a federally-listed endangered species (the Mission Blue Butterfly);

(3) potentially insoluble sewage disposal problems, since the project area is not served by sewers and is not well suited for conventional septic systems;

(4) potential for hillside erosion from storm water runoff;

(5) the risk of fire danger for new residents due to the lack of adequate water for fire protection services; and

(6) visual impacts within the GGNRA.

Without exception, these impacts could have been diminished or avoided if the Superior Court had allowed the City of Sausalito to impose mitigation measures. The trial court reasoned, though, that the project "deemed approved" was the precise project initially sought by the applicant. It is not hard to imagine other scenarios with even more absurd results.

From a policy standpoint, the Legislature should consider whether the *environment* and *innocent third persons* should be made to pay the price for an agency's slowness in processing an application. In the Sausalito example, the environmental impacts could even lead to the death of innocent commuters.

Another major problem with PSA is what to do when applicants and agency staff disagree as to whether proposed projects are consistent or inconsistent with applicable general plans or zoning and subdivision requirements. Sometimes reasonable minds differ as to whether projects require legislative actions (e.g., amendments to such plans, zoning ordinances, or subdivision ordinances); and applicants give themselves the benefit of the doubt by assuming that their proposals are consistent. Staff may disagree; but unless and until agency decisionmakers have the chance to resolve this conflict, the debate remains unresolved. Where projects are approved automatically prior to such resolution, they can include features inconsistent with governing local ordinances.

In my judgment, the problems with PSA are so severe and fundamental that the Legislature should abandon the concept of automatic approval entirely. The Ueberroth proposal would take the

opposite approach by increasing the use of automatic approval as a means of intimidating agencies into acting more quickly on projects.

As an alternative to automatic approvals, my partners and I have developed a proposal that eliminates the current "stick" embodied in PSA (automatic approval as a penalty for agency inaction) and replaces it with a "carrot" (rewarding the agency for timely action).

Specifically, we propose that both lead agencies and responsible agencies be allowed to collect "review fees" from developers if--and only if--they complete their review within specified time periods. (For projects requiring EIRs, lead agencies must act within one year of accepting applications as complete (Gov. Code, § 65950); responsible agencies relying on EIRs must act within 180 days (Gov. Code, § 65952).)

Currently, the Department of Fish and Game collects fees for reviewing EIRs and negative declarations. (Fish & Game Code, § 711.4.) This system could be extended to responsible agencies (such as air districts and regional water quality control boards); but the receipt of money would occur only if the review was completed in a timely fashion. Our hope would be that the affected agencies would become dependent on the resulting revenue stream, so that agency officials would pressure recalcitrant staff to move more quickly, or be blamed for lost revenues. Similarly, lead agencies could receive as a bonus for timely action an amount equal to five percent (or perhaps more) of the cost of EIR preparation.

In our experience representing project applicants, the payment of additional fees and even a five percent bonus from developers would be a small price to pay for prompt action because the carrying costs for land are so much more expensive. We believe that most developers would gladly pay such costs in exchange for prompt action on their projects.

Moreover, the proposed fees would provide a de facto private funding mechanism that may avoid the need, in these troubling fiscal times, to eventually add new public expenditures to help public agencies satisfy their regulatory duties.

## MODIFYING CEQA TO "DIMINISH THE BIAS AGAINST ACCOMMODATING CALIFORNIA'S POPULATION GROWTH"

In my view, the Competitiveness Council makes a fair point in suggesting that CEQA can be invoked to frustrate *any* kind of development, even where it is needed to accommodate the State's growing population. Rather than amending Appendix G to the CEQA Guidelines, however, my partners and I have another idea: we would encourage "infill" development projects that meet certain criteria by effectively raising the standards for the preparation of EIRs in certain circumstances. New housing and other development could thereby be channelled into existing urban areas, at the same time relieving pressures on habitat lands on the periphery of existing urban areas.

We suggest that, in "infill areas" meeting specified statutory criteria, the standard of review of agency decisions whether or not to prepare EIRs be modified to effectively raise the threshold for

EIR preparation. Currently, an EIR is required whenever the administrative record contains any substantial evidence supporting a "fair argument" that a project may cause significant effects on the environment. (Friends of "B" Street v. City of Hayward (1980) 106 Cal.App.3d 988, 1000-1003 [232 Cal.Rptr. 514].) [8] In practice, this standard of review has created a "low threshold" for EIR preparation. (No Oil, Inc. v. City of Los Angeles (1975) 13 Cal.3d 68, 84 [118 Cal.Rptr. 34].)

Case law has created an exception to this standard of review in situations in which a proposed project is located within a redevelopment area. Where the project is consistent with or furthers a redevelopment plan, the decision whether to prepare an EIR will be reviewed under the traditional deferent "substantial evidence" standard of review. (Long Beach Savings & Loan Association v. Long Beach Redevelopment Agency (1986) 188 Cal.App.3d 249, 264-266 [232 Cal.Rptr. 772]; Environmental Law Fund v. City of Watsonville (1981) 124 Cal.App.3d 711, 714-715 [177 Cal.Rptr. 542]; see also CEQA Guidelines, § 15180; Pub. Resources Code, § 21090.)

In recent Superior Court litigation, we successfully invoked these authorities to persuade the court to uphold the State's approval of a lease by which state employees would occupy space in

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[8]/ This standard does not apply where the question at hand is whether *modifications* to a previously approved project requires the preparation of a "subsequent EIR" or "supplement to an EIR." (Bowman v. City of Petaluma (1986) 185 Cal.App.3d 1065 [230 Cal.Rptr. 413]; Pub. Resources Code, § 21166; CEQA Guidelines, §§ 15162, 15163.)

a private building located within a redevelopment area. The court was very receptive to arguments that, because of the public policy favoring the elimination of blight, the Legislature and Resources Agency reasonably waived the fair argument standard in order to encourage capital to flow into blighted areas.

Currently, infill projects are frequently thwarted by efforts of parochial neighborhood groups anxious to protect what they see as their "quality of life." Such persons are virtually opposed per se to increased densities, even if, from a regional standpoint, infill and urban densification help to direct growth into the core of metropolitan areas rather than outlying areas. By decreasing the odds that such persons can force EIRs on specified projects, infill development will become more attractive to investors. With the "fair argument" standard still in place on the metropolitan periphery, the combination of carrot and stick could help create economic momentum for infill.

Statutory criteria for what constitutes qualifying "infill development" must be carefully crafted. Some factors could include the following:

- the area in question is already urbanized, and therefore has very little or no habitat value (i.e., the land is not "raw" and is not located on the metropolitan periphery);
- development of the site would produce net regional air quality benefits or at least would create less cumulative degradation than would occur compared with development in outlying metropolitan areas;
- the project in question is consistent with the applicable general plan, specific plan (if any), and zoning designations;

- the project can be adequately served by existing infrastructure, or by improvements funded by the project; and

- the impacts of the project (i.e., traffic, generation of air pollutants, etc.) do not exceed specified numerical thresholds.

Such an approach would dovetail with an overall statewide growth management strategy that would likely be acceptable to the broader environmental community. New development would be channelled into existing urban areas, while the State's most important environmental resources (e.g., endangered species habitat) could be preserved. Population growth and the new development required for business expansion could be accommodated.

## LIMITING ACCESS TO THE COURTS AS A MEANS OF ENFORCING CEQA REQUIREMENTS

The Council's Report contains unclear statements that can be construed as a suggestion that the Legislature should limit the opportunities of environmental organizations and others to seek judicial review of agency actions for noncompliance with CEQA. On page 38 of the Report, the Council suggests that the Legislature

> "limit interest group review of specific projects which are consistent with the Comprehensive Plan and the Master EIR and adopt procedures to govern legal challenges, the award of attorneys fees, and similar considerations."

I do not know what this suggestion really means. To the extent that is can be understood to recommend drastic limitations on the right to judicial review, I would strongly recommend that the Committee proceed very judiciously and carefully before taking any action.

I do not favor any statutory limitation on judicial review of CEQA decisions, but I do agree with the Council that CEQA litigation is sometimes abused in California. It is important to note, though, that, according to recent studies, the percentage of projects litigated is relatively small. Lawsuits attacking large "high profile" projects creates the impression that the amount of litigation is greater than it really is.

Unlike the Council, I would emphasize that abuse of the court system is not limited to citizens organizations. Rather, much of the abuse is caused by the business community itself, or at least some elements of that community. The case law includes a number of opinions in which an apparently frustrated judiciary has rejected CEQA claims filed by economic interests using the court system in order to impose costs on, or delay the projects of, competitors. [9]

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[9]/ For example, in Centinela Hospital v. City of Inglewood (1990) 225 Cal.App.3d 1586 [275 Cal.Rptr. 901], the Court rejected a demand for an environmental impact report ("EIR") for a proposed small psychiatric facility. The lawsuit was filed by a corporation operating a nearby existing hospital, which apparently would lose business if the new facility were built. Similarly, in No Slo Transit, Inc. v. City of Long Beach (1987) 197 Cal.App.3d 241 [242 Cal.Rptr. 760], a business association had challenged an EIR on numerous grounds, none of which proved successful. The petitioners' main gripe with the respondent agency's decision to choose a rail transit corridor was the fact that the construction of new transit facilities would disrupt their businesses for a period of up to four years. (197 Cal.App.3d at 254 [242 Cal.Rptr. 760].) More recently, in Mann v. Community Redevelopment Agency (1991) 233 Cal.App.3d 1143, 1148, fn. 2 [285 Cal.Rptr. 9], the Court of Appeal, in rejecting an EIR challenge, quoted a Superior Court decision characterizing the petitioner as "a disappointed developer . . . cloaking himself in the . . . environmental concerns under CEQA" in order to improve his bargaining position in other litigation. In Cathay Mortuary, Inc. v. San Francisco Planning Commission (1989) 207 Cal.App.3d 275, 278 [254 Cal.Rptr. 778], the same Court rejected an attempt to require an EIR for a project that would replace a Chinese mortuary with an urban park.

(Labor unions have also filed a number of CEQA lawsuits solely for the apparent intention of forcing the operators of new industrial facilities to agree to accept "union shops.")

Another source of what I regard as an abuse of CEQA is the filing of litigation by apparently well-meaning citizens groups in order to pursue social and economic agendas unrelated to environmental protection. [10] Such organizations are filing CEQA actions because of their perception that such litigation can thwart or at least stall government decisions with which the petitioners do agree. Like the lawsuits filed by economic interests, such litigation gives CEQA actions generally "a bad name." Such lawsuits seldom, if ever, result in enhanced environmental protection, because the petitioners rarely have such a goal in mind in filing their suits.

A third source of the "abuse" of CEQA [11] is the abundant litigation filed by parochial citizens groups trying to force EIRs or invalidate EIRs for minor projects that would cause relatively

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The Court was struck by the irony of the mortuary operator's invocation of CEQA as a means of trying to thwart development of a *park*: "[i]t is paradoxical that real parties should attack the selection of their site on environmental grounds"; "[t]he proposed park would bring many obvious environmental benefits."

[10]/ In Citizen Action to Serve All Students v. Thornley (1990) 222 Cal.App.3d 748, 759 [272 Cal.Rptr. 83], the Court of Appeal rejected an attempt to force an EIR on a high school closure. The Court stated that "[t]he decision to close a popular high school is a decision of educational policy with political and social overtones"; "[i]t is only secondarily a decision that might impact the environment within the meaning of CEQA."

[11]/ I use quotation marks in using the word "abuse" in this context because such cases really do involve "environmental" concerns, although they may be relatively trivial.

trivial impacts in the petitioners' "backyards." [12] Taken together, these three classes of cases have prompted what my partners and I interpret as a judicial backlash against CEQA suits in which petitioners' motives are questionable. [13]

Although the third class of cases at least arguably involve bona fide concerns about the "environment" (even if the concerns are trivial), this class of cases is a particular source of frustration to my partners and me. Our sense is that the "not in

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[12]/ See, e.g., Benton v. Board of Supervisors (1991) 226 Cal.App.3d 1467 [277 Cal.Rptr. 481] (court rejects demand for EIR for modified winery project; petitioner expressed concerns only about the noise and traffic from the project); Uhler v. City of Encinitas (1991) 227 Cal.App.3d 795 [278 Cal.Rptr. 157] (court rejects a demand for an EIR for a traffic plan involving the construction of a traffic barrier and changes in the flow of traffic on a handful of streets); Leonoff v. Monterey County Board of Supervisors (1990) 222 Cal.App.3d 1337 [272 Cal.Rptr. 372] (court rejects demand for EIR for proposed 1.74-acre construction yard); Lucas Valley Homeowners Association v. County of Marin (1991) 233 Cal.App.3d 130 [284 Cal.Rptr. 427] (court rejects demand for EIR for use permit allowing the conversion of a large single family home into a neighborhood synagogue); and Association for Protection of Environmental Values in Ukiah v. City of Ukiah (1991) 2 Cal.App.4th 720 [2 Cal.Rptr.2d 488] (neighbors unsuccessfully attempt to force an EIR for the construction of a single family home in an otherwise fully developed subdivision).

[13]/ Whether the accusations are fair or not, in a number of recent opinions the Supreme Court and Court of Appeal have directly accused petitioners of filing CEQA suits solely, or at least primarily, as a means of delaying implementation of projects approved with broad political support. (See Citizens of Goleta Valley v. Board of Supervisors ("Goleta II") (1990) 52 Cal.3d 553, 576 [276 Cal.Rptr. 410] (Supreme Court chides petitioners for trying to "subvert" CEQA into "an instrument for the oppression and delay of social, economic, or recreational development and enhancement"); and Long Beach Savings & Loan Association v. Long Beach Redevelopment Agency (1986) 188 Cal.App.3d 249, 263 [232 Cal.Rptr. 772] (court expressed apparent anger at project opponents' attempts to force seemingly unending circulation and recirculation of documents as a means of delaying project approval and implementation as long as possible).)

my backyard" (or "NIMBY") mentality of many citizens groups is having the unintended effect of undermining environmentally sound planning efforts to slow the spread of urban and suburban sprawl. In our view, as I suggested above, the only realistic way to absorb the State's growing population while protecting sensitive habitat lands surrounding metropolitan areas is to promote "infill development" and the "densification" of existing urban areas. Containing sprawl, moreover, not only saves habitat lands from destruction; it also reduces the growth in "vehicles miles traveled" ("VMT") associated with ever longer commute trips from urban fringe to urban core, and thus helps in efforts to improve California's horrible air quality.

We have represented a number of developers who have tried to gain approval of "infill" projects only to be opposed, or even sued, by neighborhood groups claiming the moral and environmental high ground. Although such groups complain about traffic and noise impacts in their immediate neighborhoods, they fail to grasp that the net effect of their opposition to infill projects is to encourage developers to speculate on raw land (i.e., wildlife habitat) outside existing urbanized areas. Because there are no litigious citizens groups in undeveloped areas, development is more likely to be approved in such areas without drawing protracted political opposition and litigation.

Where my partners and I may differ from the Council on California Competitiveness is our recognition that much CEQA litigation (or the fear of it) results in improved agency

decisionmaking, better analysis, and increased environmental protection. Many Court of Appeal decisions in recent years have required agencies to conduct high-quality environmental analysis; have underscored the need for agencies to be intellectually honest with their constituents in balancing competing economic and environmental values; and have required agencies to seriously consider mitigation measures or project alternatives that would avoid or lessen significant effects on the environment. [14] The net effect of such cases is to improve the quality of environmental decisionmaking. We fear that the Ueberroth recommendations, if enacted into law by the Legislature, might weaken CEQA's contribution in this regard.

Unfortunately, all too many agencies and applicants are persuaded to comply with CEQA solely from a fear of potential

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[14]/ See, e.g., Kings County Farm Bureau, supra, 221 Cal.App.3d 692 [270 Cal.Rptr. 650] (court sets aside EIR for proposed coal-fired powerplant that would cause severe air pollution); Meridian Ocean Systems, Inc. v. California State Lands Commission (1990) 222 Cal.App.3d 153 [271 Cal.Rptr. 445] (EIR required to address impacts on fisheries and other ocean aquatic life affected by underwater seismic testing); Mountain Lion Coalition v. California Fish and Game Commission (1989) 214 Cal.App.3d 1043 [263 Cal.Rptr. 104] (court orders recirculation of environmental document that failed to properly address cumulative impacts of proposal to commence sport hunting of mountain lions); McQueen v. Board of Directors of the Midpeninsula Regional Open Space District (1988) 202 Cal.App.3d 1136 [249 Cal.Rptr. 439] (court rejects use of categorical exemptions for open space district's purchase and use of property contaminated with hazardous wastes); Sundstrom v. County of Mendocino (1988) 202 Cal.App.3d 296 [248 Cal.Rptr. 352] (court sets aside negative declaration where respondent agency failed to adequately mitigate problems with sludge disposal and hydrology in fragile coastal area); and Citizens for Quality Growth v. City of Mount Shasta (1988) 198 Cal.App.3d 433 [243 Cal.Rptr. 727] (court sets aside EIR and findings for project that would damage or destroy wetlands).

litigation. Just as businesses and citizens groups often abuse the judiciary by filing lawsuits without any real legal merit, so too do project applicants and some agencies sometimes reveal their lack of real commitment to abide by "the law" when doing so costs money or is inconvenient. In the latter instance, "abuse" of the legal system takes the form of simply ignoring clear legal requirements unless forced to do so by court order. [15] If CEQA requirements were substantially relaxed, the almost certain result would be the approval of projects with needless environmental consequences that could have been mitigated or avoided through the expenditure of modest sums of money or by the acceptance of modestly diminished profit margins.

In sum, CEQA is abused--by economic interests, as well as by social activists and NIMBY groups. In our judgment, the sector of society that shoulders the least blame for such abuse are the "mainstream" environmental organizations that are able to keep the "big picture" in mind while demanding their statutory right to see that government and the private sector live up to applicable legal requirements. Any attempt to "reform" CEQA--especially by limiting its application or limiting access to the courts--should be carefully crafted to reduce the undeniable abuse that is occurring

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[15]/ Another distressing example of this phenomenon is the refusal of many local agencies and applicants to allow land use initiatives and referenda to come to the ballot. Many developers invoke absurd technical legal theories (reflexively accepted by compliant agency decisionmakers) to prevent land use issues from coming to a popular vote. As a result, citizens interested in asserting their reserved constitutional power of initiative and referendum have to engage in expensive litigation--if they can afford it--before they can exercise that power.

currently without at the same time reducing the few existing incentives that agencies and private interests have to comply with both the letter and the spirit of the law.

Recent case law demonstrates a judicial recognition of the problem of spurious CEQA litigation that may obviate the need for legislative action--which would create a danger of creating a "cure" that is worse than "the disease." As noted earlier, the increasingly conservative California Supreme Court recently emphasized that CEQA litigation must not be used as "an instrument for the oppression and delay of social, economic, or recreational development and enhancement." (Goleta II, 52 Cal.3d at 576 [276 Cal.Rptr. 410].) This language is an apparent invitation for lower courts to examine the *motives* of petitioners in filing CEQA actions, and an indication that hyper-technical procedural arguments should not be a basis for stopping projects dead in their tracks. As the Superior Courts and Courts of Appeal fully grasp the Supreme Court's instruction, more judges will exercise their discretion to deny attorneys' fees requests to petitioners in cases that are technically meritorious but reflect impure motives. (See Code of Civ. Proc., § 1021.5.) Once word gets out amongst attorneys for petitioners that fees cannot be obtained as easily as they have in the past, would-be petitioners contemplating the filing of cases solely to cause delay may find that they simply cannot obtain skilled lawyers to take up their causes.

Similarly, in fashioning relief in cases with technical legal merit but no environmental justification, lower courts in the

future are likely to let projects proceed while agencies do "clean-up" work to "cure" procedural or technical problems identified by the courts. Existing law does not require courts to order agencies to "start from scratch" after a finding that they have violated CEQA. (See Pub. Resources Code, § 21168.9, subd. (a)(3).) There is case authority, moreover, for allowing agencies or applicants to occupy or use facilities that were the subject of inadequate EIRs even while adequate documents are being prepared. (Laurel Heights Improvement Association v. Regents of the University of California (1988) 47 Cal.3d 376, 423-425 [253 Cal.Rptr. 426]; and City of Santee v. County of San Diego (1989) 214 Cal.App.3d 1438, 1455-1457 [263 Cal.Rptr. 340].)

**REDEFINITION OF "PROJECT" UNDER CEQA**

Recently, much dubious CEQA litigation has attempted to force environmental review of activities that traditionally have not been thought to be subject to CEQA, but which technically could seem to fall under the very broad definition of "project." [16]

The current definition of project (Pub. Resources Code, § 21065), particularly as refined in the CEQA Guidelines (CEQA Guidelines, § 15378), is so open-ended that virtually any nontrivial discretionary agency decision can arguably be

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[16]/ All "projects" for which an agency contemplates an "approval" are subject to CEQA unless they are exempted by statute or the "categorical exemptions" adopted by the Resources Agency. (CEQA Guidelines, §§ 15061, 15260-15277, 15300-15329, 15352, 15378; Stand Tall on Principles v. Shasta Union High School District (1991) 235 Cal.App.3d 772, 781, 782 [--- Cal.Rptr. ---].)

characterized as coming within the definition. (A government action need only have the "potential" for resulting, "directly or *ultimately*," in a physical change in the environment.) [17]

We propose that the definition of "project" be narrowed in order to curb the growing phenomenon by which persons or organizations with little or no real concern for the environment file CEQA lawsuits solely in order to thwart policies that have traditionally been thought to involve only economic and social (not environmental) considerations.

Specifically, the definition could be amended to make clear that discretionary agency actions only qualify as "projects" where they will cause direct physical impacts or *reasonably foreseeable* indirect physical impacts. New language should be carefully crafted, however, to ensure that, at the time of characterizing an agency action, the existence, but not necessarily the *extent*, of physical effects be foreseeable. Thus, virtually all "paper" land use planning decisions (whether made by LAFCOs or local agencies) would qualify as projects, since such actions will necessarily, if indirectly, culminate in physical effects--even if initial studies or EIRs might be necessary to determine the extent of such effects. In contrast, economic or social decisions might culminate in physical effects; but the existence of such effects is generally purely speculative at the time of approval. The alleged physical

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[17]/ There are some interpretive materials that assert that the definition of "project" is so broad as to include virtually all "ordinances," regardless of what they address. (See Rosenthal v. Board of Supervisors (1975) 44 Cal.App.3d 815, 823 [119 Cal.Rptr. 282]; and 60 Ops.Cal.Atty.Gen. 335 (1977).)

effects, then, are not "reasonably foreseeable," even if they are theoretically possible.

Recent (ongoing) litigation in which I have been involved has clarified these distinctions in my mind. I represent the City of Berkeley Rent Stabilization Board, which has been sued by the City of Berkeley on the theory that recent Rent Board ordinances allowing court-mandated rent increases are "projects." The City has built its case on two theories: first, that "homelessness and displacement" caused by increased rents qualify as "environmental effects"; and second, that tenant displacement will *indirectly* create increased demand for new public housing, which would directly affect land. Fortunately, the Alameda County Superior Court has rejected these theories; but its decision may be appealed--it is too early to tell.

Our firm agreed to take the case because of our perception that Berkeley social activists were using CEQA as a means to achieve social and economic policies unrelated to "the environment" as that concept is commonly understood. We feared that their approach, if successful, could contribute to the growing feeling in many quarters that CEQA is "out of control."

Our proposed amendments, we believe, would thwart similar efforts in the future, while leaving in place a definition of "project" that requires CEQA review for agency actions that really do affect "the environment."

As part of this proposed amendment, we also suggest that OPR or some similar entity be required to function as an administrative

tribunal that could hear appeals of agency determinations that proposed actions do not qualify as projects. Since such decisions typically are made with no environmental review whatever, the appellate body should conduct a de novo hearing at which opponents could present evidence of alleged foreseeable indirect physical effects. Decisions of the appellate administrative body could be appealed to a Superior Court; but in practice, reviewing courts would be likely to be deferent.

Such a process should provide for prompt resolution of differences of opinions, while giving agencies incentives not to define "project" more narrowly than the new statutory definition would require.

**A STATE LAND USE COURT**

Within our firm, we have had many animated discussions about the merits of creating a state land use court. We can see both potential merit and potential danger in such a proposal. The Council's proposed state land use court, unfortunately (from my perspective), seems intended primarily to be a place to which unhappy developers could take their grievances.

Such a court would have final say as to whether proposed projects would be consistent with Comprehensive Plans, a function that has previously been understood to involve quasi-legislative determinations best left to elected officials. (See Environmental Council of Sacramento v. Board of Supervisors (1982) 135 Cal.App.3d 428, 439-440 [185 Cal.Rptr. 363]; and No Oil, Inc. v. City of Los Angeles ("No Oil II") (1987) 196 Cal.App.3d 223, 242-243 [242

Cal.Rptr. 37].) The Council's plan, then, would represent a shift of power from elected officials to the judiciary--something that runs contrary to prevailing conservative legal theories of "judicial self-restraint" and the primacy of majority rule. The Council seems fundamentally uncomfortable with letting elected officials interpret their own Comprehensive Plans, as though the representatives of the public cannot be trusted with issues affecting perceived property "rights."

To the extent that the Ueberroth vision of a land use court might mirror Senator Bergeson's proposal in SB 434, my partners and I would soundly reject the proposal. That bill would create a court whose members must be subject to *statewide elections*--a prospect that calls to mind multi-million dollar statewide elections in which would-be judges would run 30-second television advertisements to persuade lay voters of their superior knowledge of "the law." That proposal seems designed to favor would-be jurists who would strongly favor development interests, which could contribute the vast sums of money to pay for the creation and broadcast of commercials about the need for "jobs, jobs, jobs." It seems extremely unlikely that attorneys or even sitting judges with any environmental sympathies could compete under such a system. The resulting court might turn out to be little more than a rubber stamp for development interests.

We might b re receptive to a state court if its composition would be certa o be balanced and would be certain to include only attorneys and legal scholars of the highest intellectual and

moral caliber. One way of achieving such results would be to appoint lawyers or judges with varied backgrounds (i.e., from practices representing primarily development interests, agencies, or environmental organizations) and to require that such persons meet ascertainable standards of scholarship, ethical conduct, and professionalism.

The Ueberroth Report, at least as I read it, is unclear as to whether the newly created court would answer to the California Supreme Court, or whether it would be a law unto itself. My impression is that the Council intended the latter. If the Supreme Court were to lose all jurisdiction over such matters, the creation of a land use court would perhaps be the most far-reaching change ever in the California judiciary. In my view, the Legislature should be extremely circumspect before initiating any such step. The land use court would inevitably deal with many constitutional issues, particularly with respect to whether government regulations have effected a "taking" of property without just compensation. Putting such questions into the hands of a tribunal whose only oversight comes from the United States Supreme Court--which denies the vast majority of petitions for certiorari--would be a very, very significant change from current arrangements. There is the potential, under such a system, that the rulings of the land use court will diverge from those of the California Supreme Court, with no state judicial body able to reconcile inconsistencies.

An alternative to a new land use court would be to enact a statute requiring the Superior Courts in the major metropolitan

areas to assign a certain number of judges, perhaps on a rotating basis, to handle nothing but land use cases. Such judges would soon learn to become experts in CEQA and related laws, but would still be under the general control of the Superior Courts. Their decisions, of course, would be appealable to the Court of Appeal and the Supreme Court. Such an approach would avoid the need for constitutional amendments to create a new court, and would eliminate the danger that a the new tribunal would create case law inconsistent with that of the California Supreme Court.

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APPENDIX H

# COMMENTS ON THE UEBERROTH COMMISSION'S CEQA RECOMMENDATIONS

Michael H. Zischke

McCutchen, Doyle, Brown & Enersen
Walnut Creek

For the Senate Committee on Housing and Urban Affairs
Informational Hearing on the Recommendations of
the Report on California's Jobs and Future
Prepared by the Council on California Competitiveness

July 29, 1992
Room 4203, State Capitol
Sacramento, California

# COMMENTS ON THE UEBERROTH COMMISSION'S CEQA RECOMMENDATIONS

Michael H. Zischke

The following is an outline of my comments on the Commission recommendations regarding the California Environmental Quality Act. I have also included some comments on problems in CEQA practice not discussed by the Commission.

## I. COMMENTS ON THE COMMISSION RECOMMENDATIONS

### A. Use Master EIRs on Comprehensive Plans.

**Recommendation:** "Require a Master EIR on the Comprehensive Plan and make the Comprehensive Plan the primary vehicle for environmental assessment and mitigation."

Comments:

1) The CEQA recommendation - use more Master EIRs - does not need to be tied to a new Comprehensive Plan requirement.

2) "Front ending" the CEQA process makes sense.

3) Broad brush analyses such as cumulative impacts and growth-inducing impacts should be done at the planning EIR stage, not the project-specific EIR stage.

4) Requiring new Comprehensive Plans may be burdensome. Most local governments do not meet state mandated housing goals now, according to HCD.

5) From a litigation standpoint, requiring consistency with more and more state planning standards gives project opponents more opportunities to take aim at local approvals.

B. Revise the CEQA Guidelines To Streamline the Process and Set Performance Standards.

**Recommendation:** "Revise the CEQA Guidelines to eliminate redundant environmental review and to reflect environmental policies and performance standards that are more consistent with the intended objectives of CEQA. For example, limit the number of project alternatives and eliminate the "no project" alternative. In addition, reduce the number of factors that trigger preparation of an EIR."

**Comments:**

1) CEQA Guidelines are now 6-7 years out of date, defeating their purpose in providing guidance to public agencies. OPR needs to get the funds and the directive to publish new Guidelines.

2) The Legislature should provide more specific direction as to how the Guidelines should be revised.

3) The idea of performance standards for CEQA compliance is excellent. The Legislature should ask OPR to adopt performance standards, and the Legislature should pass "safe harbor" amendments specifying that public agencies complying with the performance standards are entitled to a conclusive presumption of CEQA compliance.

4) The number of project alternatives is one important area where the Legislature should provide certainty, either through amending CEQA or providing directives to be implemented in the Guidelines.

5) For most housing projects, there is little reason to analyze more than three (3) alternatives. Typically, a lower density alternative is the most important analysis. Analyzing alternate sites for private projects adds nothing but speculation to EIRs.

6) "No project" alternative analysis usually is unimportant, but is also harmless. Typically, this section of an EIR consists of the self-evident statements that the project impacts will not occur if the project is not approved. Sometimes this section is used to demonstrate the adverse impacts of not approving the project (for example, developer would not dedicate parkland available to other city residents).

7) Draft text of a performance standard approach to the CEQA Guidelines - as could be included in CEQA amendments - is attached.

C. Shorten the CEQA Process to Six Months.

**Recommendation:** "Amend the CEQA guidelines to shorten the environmental review process to six months, with one 30-day extension, and prohibit waivers of the time periods. Include in the Guidelines a strong policy statement opposing the practice of denying approval because review has not been completed on a timely basis."

**Comments:**

1) This is unworkable for many projects, especially large capital projects, general plan EIRs, and the like.

2) This goal could be workable when EIRs are done on more "minor" projects.

3) CEQA's current time limits have absolutely no teeth, and are violated at will. For public agencies, there is simply no penalty for failing to meet the deadlines. Whatever protection was once offered by the Permit Streamlining Act has been virtually eliminated, as the courts have largely gotten that Act.

4) A more realistic change may be to make the time limits enforceable, with coordinating amendments to CEQA and the Permit Streamlining Act.

5) CEQA should also be amended to specify that the required level of detail and study for an EIR must be consistent with what is practical during the specified time period. It would be unfair to both public agencies and private developers to impose a six-month time limit and yet require EIRs to be absolutely "picture perfect" in order to be legally adequate. Some court decisions require a level of analysis and study that probably cannot be done in a year.

D. Focussed Review of Projects Consistent with Earlier EIRs.

**Recommendation:** "Allow projects that comply with an already reviewed EIR to receive focussed environmental review, which would include only those issues not addressed by the Master EIR (new information not known at Plan adoption, issues not addressed in the Master EIR, subsequent changes in projects, etc.)."

**Comments:**

1) Need to provide a clear standard for determining what is meant by "complies with" or "is consistent with" the prior EIR.

2) Specify that the broad, program EIR is the proper place to include analysis of broad, regional impacts. Thus, cumulative impacts and growth-inducing impacts should be analyzed in the program EIR, and should not be included in the follow-up document.

3) If a scoping process is used to determine the exact focus of a follow-up CEQA document, it would be helpful to give agencies the option of having a publicly noticed scoping process, in return for which the results of the scoping would be binding.

E. Promote Public Participation at the Master EIR Stage and Limit Later Review.

**Recommendation:** "Provide maximum opportunity for public participation in the preparation and adoption of the Comprehensive Plan and the Master EIR, limit interest group review of specific projects which are consistent with the Comprehensive Plan and the Master EIR and adopt procedures to govern legal challenges, the award of attorneys fees, and similar considerations."

**Comments:**

1) It probably is not possible to limit "interest group review" without jeopardizing the due process rights of neighbors and the public to notice and hearing on projects.

2) However, subsequent review can be streamlined if CEQA is amended to limit the judicial remedies available to project opponents when they raise issues that should have been raised at the Master EIR stage.

3) One way to streamline project-specific processing and preserve some public review would be to establish a binding scoping process when the scope of the subsequent environmental document is determined.

F. Require Socioeconomic Impact Analysis.

**Recommendation:** "Require EIRs to contain a socio-economic impact analysis that compares the total social impact [of] mitigation measures with the social benefits to be derived. Require the local legislative body to weigh other societal benefits, such as affordable housing and job production, when deciding the extent of the mitigation measures to be required."

**Comments:**

1) The first suggestion will be counter-productive. Adding more analysis to EIRs will make the documents longer, and more vulnerable to legal attack.

2) Excessive mitigation measures can be a problem. Better place to address this would be amending CEQA section 21004, which now specifies that CEQA does not increase an agency's power to mitigate impact. In other words, agencies can use their statutory and police powers to do environmental good (subject to all the limits on those powers), but CEQA does not now expand agency's substantive powers.

3) The question of whether mitigation measures "go too far" really relates to the Government Code and other limits on fees and exactions.

G. Add "Economically" to the Definition of Feasible.

**Recommendation:** "Insert the word 'economically' in front of the words 'feasible' wherever they occur in the Guidelines."

**Comments:**

1) This is a bad idea. Agencies should be free to determine that mitigation measures or project alternatives are infeasible on grounds other than economics.

2) Currently, courts uphold agencies when they make infeasibility determinations on the basis of policies. For example, an agency can say that certain mitigation measures are not feasible because they will limit the agency's ability to provide housing. A city could say that measures are not feasible because they will make it more difficult to comply with general plan goals for promoting housing.

3) For a recent example, see Sierra Club v. City of Gilroy, 222 Cal. App. 3d 30 (1990) (alternatives to housing project rejected as infeasible due to need for additional quality housing, environmental impacts of alternatives, and contribution of project to open space preservation).

H. Diminish CEQA's Bias Against Accommodating Population Growth.

**Recommendation:** "Revise Appendix G of the Guidelines, which lists examples of consequences that will normally have significant effect on the environment, diminish the negative bias against accommodating California's population growth. Revise the Guidelines to require consideration of California's growing population and the need to provide housing and the jobs to serve it. The existing section that purports to accomplish this objective is ineffectual."

**Comments:**

1) The "ineffectual code" section referenced here is probably CEQA section 21085, stating that public agencies may not reduce the number of proposed housing units as a mitigation measure whenever another feasible measure provides a comparable level of mitigation.

2) It may be more effective in promoting housing to focus on the master plan EIR, and eliminate subsequent review of projects.

3) Appendix G of the Guidelines sets forth a long list of consequences that normally lead to significant effects in the environment, and thus require preparation of an EIR rather than a negative declaration. The listed items are very generally stated (for example "substantial, demonstrable negative aesthetic effect"). Often, they simply restate the general "significant" standard by using the word "substantial". Streamlining this appendix, and requiring more specificity, would require more certainty in the process.

## II. COMMENTS ON OTHER ASPECTS OF CEQA THAT AFFECT HOUSING

### A. EIR Recirculation.

1) The legislature should consider the requirement in CEQA section 21092.1 that EIR's be recirculated for additional review when there is "significant new information". This has become a primary tactic of project opponents seeking to obtain political advantage by delaying projects, and claims for recirculation have expanded far beyond what was presumably anticipated when the legislature codified the decision in Sutter Sensible Planning, Inc. v. The Board of Supervisors, 122 CA3d 813, 1981.

2) In fact, section 21092.1 was based on a State Bar Report suggesting that the term "significant new information" required clarification, but that clarification was never added.

3) There should be some specific limit upon what constitutes "significant new information" requiring recirculation, as the standard now is vague and subject to abuse. Also, any proposal for reform should specify whether or not the time required for recirculation is an exception to the CEQA time limits.

4) As a result of the uncertainty regarding the standard, groups opposing project approvals can use EIR comments and recirculation issues to trap public agencies in a quagmire. Opposition groups can prepare voluminous comments and draft EIRs. If the agency then responds fully and adequately to the comments, groups claim recirculation is required, because of supporting studies or the sheer bulk of comments and responses. If the agency minimizes responses, then opposition groups challenge the responses as inadequate for failing to deal with all the issues raised.

5) Given the situation, the only safe response for a public agency is to recirculate the EIR, substantial delays in the project time table and substantial increases in processing costs. CEQA was originally intended to be a "one time around the block" process. In practice, because of the recirculation requirement, this is changing.

6) An appellate decision regarding the University of California illustrates this problem. In reviewing a new EIR for the University's laboratories at Laurel Heights in San Francisco, the court required recirculation even though the responses to comments on the EIR did not show any new or increased significant impacts in the environment. Laurel Heights Improvement Association of San Francisco v. Regents of the University of California (First

Appellate District, unpublished decision dated June 3, 1992) (petition for review before the California Supreme Court pending).

**B.** **Provide Some Guidance For Analyzing Cumulative Impacts.**

1) CEQA specifies cumulative impacts of a project must be discussed in an EIR if they are significant. The Guidelines allow agencies to do this using a "list of projects" approach or "summary of projections" approach, either one of which is designed to determine whether or not impacts of a particular project become significant when they are combined with other planned or projected development.

2) Both methods are legally vulnerable. A list of projects often can be attacked as under inclusive, or a summary of projections may be attacked as outdated.

3) A 1990 decision makes an agency's task in analyzing cumulative impacts even more difficult. Kings County Farm Bureau v. The City of Hanford, 221 CA3d 692 (1990).

4) Even though CEQA states that cumulative impacts need to be analyzed only when they are significant, the Hanford court required the EIR to justify the scope of its cumulative impacts analysis (even when there was expert testimony in the records supporting that analysis). This in effect requires a "mini" cumulative impact study to justify the cumulative impacts analysis included in the EIR. This is the type of decision that is inconsistent with doing an EIR within a year.

5) This is one area where some performance standard, clearly setting forth the way in which agency should perform cumulative impact analysis, and the types of projects which trigger this requirement, would be helpful. One approach

would be to require cumulative impact and gross inducing impact analysis only in general plan and general plan amendment EIRs, where it seems logical to consider such "bigger picture" concerns..

C. **Consider a Safe Harbor Approach Throughout The Guidelines.**

1) Beyond the Ueberroth Commission proposals, more can be done to reduce the uncertainty and litigation risk facing local governments and developers. Legislature should consider adopting a "safe harbor" approach, and directing the office of planning and research to promulgate new CEQA Guidelines in accordance with this approach.

2) Under this approach, the State would set certain general requirements in the CEQA statute. Then the CEQA Guidelines would specify what course of action would be deemed to comply with the statutory standard. Agencies which comply with the standard would be entitled to the benefit of a presumption - perhaps a conclusive presumption - that they have complied with CEQA.

3) This could dramatically reduce the amount of CEQA litigation.

4) Even more importantly, this would dramatically reduce the litigation paranoia which often results in agency planners "overdoing" their EIRs in an attempt to bullet-proof against any possible legal attack.

## ATTACHMENTS

A. Article prepared for the Los Angeles Daily Journal regarding the Ueberroth Commission recommendations.

B. Draft text for a "safe harbor" approach.

C. Biography of Michael H. Zischke

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ATTACHMENT A

# EVALUATING THE UEBERROTH COMMISSION'S PROPOSALS ON LAND USE

By

Daniel J. Curtin, Jr.
Michael P. Durkee
and
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In its recent report on the California economy and competitiveness, the Ueberroth Commission suggests several important proposals to streamline land use and regulatory permit processes. Under the heading of "regulatory streamlining" the report focuses on changes in planning law, the California Environmental Quality Act, and impact fees. The report is a first step in developing more concrete proposals for regulatory reform, and the Governor and the Legislature will be considering these and other proposals this year and next. The changes would be significant, so attorneys should follow these proposals as they are considered by the Legislature and the Governor.

The Commission (formally the Council on California Competitiveness) entitled its report "California's Jobs and Future." It was charged with evaluating California's problems of growing unemployment, growing population, and the expanding gap between state revenues and services needs. The Commission studied several areas where problems seemed to impede the State's economic development and progress, including worker's compensation, litigation costs, and regulatory reform. This article evaluates the CEQA and land use proposals presented in the Commission's report on regulatory reform.

## Commission Proposals

The report cites a litany of complaints, primarily from cities and counties, about the difficulty of approving public projects because of CEQA litigation, delay tactics, and a lack of cooperation from state permitting agencies. With the express aim of making existing regulations more efficient, the Commission suggests numerous reforms. In summary, these are:

1. Adopt a statewide growth management strategy and require local government compliance.

2. Require local governments to adopt "Comprehensive Plans" (a strengthened General Plan) with a master EIR and more detailed provisions for development and resource protection.

3. Give local government flexibility in meeting state goals through the Comprehensive Plan, but require plans to address state and regional goals.



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4. Require Comprehensive Plans to include an infrastructure plan, and to include sufficient development capacity to accommodate anticipated growth.

5. "Front-end" the CEQA process by focusing on the comprehensive plan EIR, and reducing subsequent review of projects consistent with the plan.

6. Shorten the CEQA process to six months, with one 30 day extension, and no waivers allowed. Include a policy against denying projects because review could not be completed within the allowed time limits.

7. Require EIRs to contain a socioeconomic impact analysis comparing the cost of mitigation measures with their benefits. Require local agencies to weigh matters such as affordable housing and job production when deciding the extent of environmental mitigation to be required, and emphasize economic feasibility of EIR alternatives.

8. Establish a statewide land use court.

9. Prohibit payment of impact fees until the physical impact of the project occurs (final inspection or certificate of occupancy). Restrict housing linkage fees on commercial projects and restrict mandatory inclusionary housing.

Comments on the Proposals.

The proposals are an excellent start; many of them would help avoid the extreme examples of processing costs and delays. These extreme examples (million-dollar plus EIRs, months and years of project hearings, etc.) are more and more common, emphasizing processing requirements far more than the ultimate merits of a land use decision. In considering these proposals, however, the Legislature and the Governor should remember that new legislation often creates unintended side effects; they should also consider some additional reforms. Here is a list of preliminary comments:

Growth Management Goals. Statewide growth management goals probably would be broad and generally worded. Query whether it is possible to allow local flexibility in implementing broad, general goals without rendering the goals essentially meaningless. Also, will local governments be free to determine the level of anticipated growth? If not, who will make this determination?

New Comprehensive Plan. The process of adopting and evaluating new General Plans and keeping them up to date is already unwieldy for many cities and counties. Many jurisdictions already fail to comply with state requirements

for housing elements. For example, the Department of Housing and Community Development reported in 1992 that 80 percent of California's cities and counties failed to adopt legally adequate housing elements for their General Plans. Requiring more detail and compliance with new statewide goals may render the new Comprehensive Plan vulnerable to more legal attacks. This problem might be avoided if several provisions are added. These might include (1) establishing a grace period for implementing the new requirements; (2) including provisions to protect cities and counties if they substantially comply with state goals in adopting the plans; and (3) including some policy direction or other provisions to help protect such plans from routine challenge.

CEQA Review. The proposal to require more CEQA review at the plan stage and limit later review should streamline individual project approvals, but the Commission's proposals could do more to cure the uncertainty and risk of CEQA litigation.

For example, the proposal to "front end" the CEQA process by combining EIR review with the comprehensive plan, begs the question of what happens if a subsequent project approval also requires an amendment to the comprehensive plan. Since no plan can accurately second guess the market demands and changing plans over 10 to 20 years, requests for such amendments are inevitable. A recent case exacerbates this situation by holding that some master plan amendments may require a new EIR, instead of allowing the public agency to determine that the already-prepared program EIR was sufficient to evaluate the change in the plan, as well as the initial plan. Sierra Club v. County of Sonoma, 92 Daily Journal D.A.R. 7195 (May 28, 1992).

Also, CEQA's current time limits have no teeth. Whether or not the process is reduced to six months, the time limits should be real and enforceable. However, CEQA should also be amended to specify that the required level of detail and study must be consistent with what is feasible during the specified time period. It would be unfair to both local governments and developers to impose a six-month time limit and yet require legally adequate EIRs to be absolutely "picture perfect."

The proposals to include socioeconomic analysis in EIRs and require more economic balancing are troublesome, however. Although these proposals aim to balance environmental review with economic goals, by adding new procedural requirements, they would make the process more complicated and could provide more targets for project opponents. Also, one of the few clear principles in CEQA practice is that CEQA does not

attempt to reach the merits of agency decisions, and local agencies are already free to reject mitigation measures and project alternatives when they conflict with jobs and housing goals. If the Legislature wants to reform local practice regarding fees in California, it should amend the Government Code provisions on development fees (e.g. Government Code § 66000 et seq.) rather than the California Environmental Quality Act.

In addition, the Commission (or the Legislature) should consider the requirement that EIRs be recirculated for additional review when there is "significant new information" (Public Resources Code § 21092.1). This is a primary tactic of project opponents seeking to obtain political advantage by delaying projects, and claims for recirculation have expanded far beyond what was presumably anticipated when the Legislature codified the decision in Sutter Sensible Planning, Inc. v. Board of Supervisors, 122 Cal. App. 3d 813 (1981). In fact, section 21092.1 was based on a State Bar report suggesting that the term "significant new information" required clarification, but that clarification was never added. There should be some specific limit upon what constitutes "significant new information" requiring recirculation, as the standard now is vague and subject to abuse. Also, any proposal for reform should specify whether or not the time required for recirculation is an exception to the CEQA time limit.

State Land Use Court. Establishing a state land use court would provide more certainty and more uniformity in land use jurisprudence. However, this proposal may work a hardship on rural areas, where current land use practice differs significantly from the urban norm. Also, most superior and appellate courts tend to defer to local agency decisions (with some limits), thus injecting a little more certainty into the process; it is not clear that a state court would create more or less certainty for local governments and project applicants.

Consider a "Safe Harbor" Approach. Beyond these proposals, more can be done to reduce the uncertainty and litigation risk facing local governments and developers. The best means of doing this might be to adopt a "safe harbor" approach in implementing CEQA. Under this approach, the state would set certain general requirements by statute, as it does now. Then, implementing regulations (the CEQA Guidelines) would specify that a certain course of action shall be deemed to comply with the statutory standard. The point is to try to borrow the safe harbor concept from the tax lawyers (but to implement it with a far shorter set of regulations!).

For example, the CEQA Guidelines could specify that an EIR alternatives analysis will be deemed sufficient if the EIR analyzes two alternatives to the project in addition to no project, and contains a brief summary of the alternatives' impacts. The point is to create a haven against uncertainty: an EIR considering only one alternative would not necessarily be invalid; however, the safe harbor would offer real protection. With careful thought, similar standards could be developed for all the other hot points of CEQA litigation (breadth of the project description, cumulative impacts analysis, etc.).

The Ueberroth Commission correctly identified an important problem: we are spending too much time and money worshipping at the altar of process. Most of the time and money that goes into EIRs and processing is aimed at avoiding litigation on technical points, not increasing public disclosure or environmental protection. Clearly, in a time of budget shortages, it serves the public interest to give local government more certainty in complying with state laws. The existing proposals deserve careful scrutiny and refinement, and the Governor and the Legislature should consider legislation based on a refined version of the proposals.

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ATTACHMENT B

Section 21006 is added to the Public Resources Code, to read:

"21006. The Legislature further finds and declares that it is the policy of the state that:

" (a) Public agencies must eliminate redundant environmental review which exceeds the requirements of this division, to avoid unnecessary processing costs and delays.

" (b) In determining the proper range of project alternatives to be analyzed in an environmental impact report, public agencies should analyze only a reasonable range of alternatives to a project. In most situations, it will be sufficient to analyze two or three alternatives to the proposed project.

" (c) The analysis of environmental impacts in an EIR provides a sufficient basis for comparing a proposed project to a decision not carry out or approve the proposed project. Accordingly, public agencies should not analyze a "no project" alternative as part of the reasonable range of alternatives to a project.

" (d) The number of factors that may trigger the preparation of an environmental impact report instead of a negative declaration, as listed in the current version of Appendix G of the State CEQA Guidelines, contains a negative bias against accommodating California's population growth. This negative bias should be eliminated in the next revision of the Guidelines, and the number of factors that trigger the preparation of an environmental impact report should be limited.

" (e) When most aspects of a proposed project are analyzed in an existing certified environmental impact report, any additional environmental review for that proposed project allowed pursuant to section 21166 of this Division shall be focussed to consider only those issues not previously addressed by the existing environmental impact report.

" (f) Environmental impact reports should be recirculated pursuant to Section 21092.1 of this

Division only when the significant new information added to the report requires major revision of the report as a whole. The environmental review process is designed to elicit additional information in response to public and agency comments, so environmental impact reports should not be recirculated in most cases when new or clarifying information or additional studies are added in response to public and agency review and comments on such a report.

" (g) To the maximum extent possible, the CEQA Guidelines should be amended to provide additional certainty to the public and to public agencies regarding the scope of environmental review. The Guidelines should include performance standards for preparation of environmental review documents pursuant to this division. These performance standards should specify in general terms the appropriate means of preparing various portions of the environmental documents, including required analyses of cumulative impacts, growth-inducing impacts, and alternatives to proposed projects.

" (h) Public agencies in some situations may depart from the performance standards to be established in the State CEQA Guidelines. Once the performance standards are established, public agencies may conduct or require additional environmental analyses, or a lesser degree of environmental review, only if such additional or lesser requirements are reasonable and consistent with the time limits set forth in the Division for preparation of environmental documents. Public agencies should limit such departures from the performance standards to projects presenting special issues or impacts meriting such additional or lesser requirements, and should not adopt a general rule or practice of departing from the performance standards.

" (i) In reviewing public agency decisions regarding the proper means of compliance with this Division with respect to any particular project, including decisions on such matters as the scope of negative declarations and environmental impact reports, the proper methodology for evaluating particular environmental impacts, and the range of alternatives to be considered, courts should uphold the public agency's decision if there is substantial evidence in the record supporting the decision. If a public agency decision regarding compliance with any

aspect of this Division substantially complies with a performance standard set forth in the State CEQA Guidelines, it shall be conclusively presumed that the agency has complied with the requirements of this Division which are implemented through the particular standard in question.

" (j) In reviewing public agency decisions regarding the proper means of compliance with this Division with respect to any particular project, courts must consider the time limits set forth in this Division for various activities. Reviewing courts should not interpret the requirements of this Division in a manner which requires a level of study or analysis that cannot be completed within the time frames set forth in this Division."

" (k) In considering proposed projects pursuant to this Division, public agencies shall not deny projects on the basis that they wish to obtain additional information which cannot be obtained within the time limits set forth in this Division, or on the basis that the agency is unable to complete the environmental review of the project within the time limits set forth in this Division."

"Section 21087.4 is added to the Public Resources Code, to read:

"The Office of Planning and Research shall, by December 31 of the first full calendar year following enactment of this provision, recommend to the Secretary of the Resources Agency proposed changes or amendments to the State CEQA Guidelines to implement that goals and policies set forth in section 21006 of this Division."

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ATTACHMENT C

BIOGRAPHY OF MICHAEL H. ZISCHKE

Michael H. Zischke is counsel with the Walnut Creek office of McCutchen, Doyle, Brown & Enersen, practicing land use and environmental law. He received his undergraduate degree from Dartmouth College in 1977, and his law degree from the University of California at Berkeley (Boalt Hall) in 1982. He has practiced in the San Francisco Bay Area since 1982. Mr. Zischke has co-authored several publications on land use law, including Land Use Initiatives and Referenda in California, published by Solano Press in 1990, which he co-authored with three other attorneys. He has lectured on CEQA and other land use issues to such groups as the Association of Bay Area Governments, UC Extension Campuses at Berkeley, Santa Barbara and Irvine, California Continuing Education of the Bar courses, the State Bar of California annual meeting, and various attorney and industry groups.

Mr. Zischke has written a detailed attorneys' manual on CEQA practice for California Continuing Education of the Bar (CEB). This book, which was co-authored with Stephen L. Kostka of McCutchen's Walnut Creek office, is currently undergoing editing at CEB, and is scheduled for publication in 1993.

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APPENDIX I

# TESTIMONY
of
Eileen Reynolds, Legislative Advocate

CALIFORNIA ASSOCIATION OF REALTORS®

SENATE COMMITTEE ON HOUSING AND URBAN AFFAIRS

INFORMATIONAL HEARING ON EXCERPTS FROM CALIFORNIA'S JOBS AND FUTURE, PREPARED BY THE COUNCIL ON CALIFORNIA COMPETITIVENESS

Wednesday, July 29, 1992
Sacramento

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Chairman Thompson, members of the Senate Committee on Housing and Urban Affairs, my name is Eileen Reynolds. I am a legislative advocate representing the CALIFORNIA ASSOCIATION OF REALTORS® (C.A.R.), a professional trade organization of 130,000 members statewide. I concentrate on growth management, land use and environmental issues for the Association. Thank you for the opportunity to share C.A.R.'s viewpoint on the important issues before you today.

## INTRODUCTION

We believe California's housing affordability problems play a major role in deterring businesses from locating here, and inspiring California businesses to go elsewhere. Our interest in the state's competitiveness lies primarily in the availability and affordability of housing for the state's growing population. The topics you have identified from the Council's report, if implemented in conjunction with a comprehensive growth management program, could improve the "quality of life" in California, by preserving significant natural resources, protecting private property rights and providing for the production of adequate housing for the state's growing population.

## STATE PLANNING, GROWTH MANAGEMENT AND LOCAL PLANNING

We support the Council's recommendation that a growth management strategy for the state be adopted. We believe the state should adopt internally consistent and coordinated goals and policies to guide growth-related decisions. This would result in local governments achieving consistent policy objectives, because it would establish a common vision for the future.

No new layer of government bureaucracy should be created to achieve growth management goals and policies. Local governments should be encouraged to coordinate their efforts on a subregional or regional basis. Common state-level goals and policies, combined with incentives and/or sanctions encouraging local

government compliance and coordination, should eliminate the need for a state-mandated regional government entity.

## COMPREHENSIVE PLAN

Land use permitting authority should remain at the local level, and local plans should continue to serve as the guiding documents for communities. We support the Council's recommendation that the general planning process should be reinforced and strengthened. There is definitely room for improvement in the state's general plan law. Changing the plan's name to the "comprehensive plan" and revisiting its contents would be a step in the right direction.

We believe local plans should be internally consistent, as required by existing law, and we also believe the plans of adjacent local governments should be consistent with one another. Local plans should also be consistent with the state goals and policies. To achieve consistency on so many levels, we recognize a conflict resolution process of some type will be necessary.

C.A.R. supports the concept of a master environmental impact report (MEIR), which would occur at the local plan level rather than on a project-by-project basis. This way, a proposed project that is consistent with the local plan and its MEIR could be deemed approved without further environmental review, unless, of course, there were unusual circumstances, such as the discovery of toxics.

Housing should continue to be addressed through the local plan, whether it is a "general" plan or a "comprehensive" plan. We believe housing needs should continue to be allocated throughout a region, and incentives and/or sanctions should be used by the state to encourage communities to do their fair share to meet the regional housing need. For example, if local governments are meeting their fair share, they should be eligible for special state funding and programs. Those local governments that do not make a valid effort to meet their fair share should be penalized through denial of such funds and programs.

## CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The land use permitting and environmental review processes in California have become unnecessarily lengthy, complex and inefficient. C.A.R. supports, in concept, reforms to the California Environmental Quality Act (CEQA) that would streamline the environmental review process, and decrease the occurrence of costly development delays and litigation. CEQA has become a tool for people who promote "no growth" to challenge almost any project, without really providing enhanced environmental quality in the state.

C.A.R. supports the Council's recommendation that CEQA should be reformed. We believe a Master Environmental Impact Report should be done at the local plan level (see above). The timeframes for processing and approval of Environmental

Impact Reports (EIRs) should be shortened, the "no project" alternative in CEQA should be eliminated, and consideration of only economically viable alternatives to a project should be required.

## STATE LAND USE COURT

C.A.R. looks favorably upon the concept of establishing a special land use court to expedite project-level disputes. There is a need for more efficient processing of project-level disputes between project proponents, local governments and third parties. The land use court could also handle disputes over environmental review. By allowing a special court to hear only certain land use and environmental disputes, it is believed that the litigation process, where necessary, would be expedited. Individuals experienced in land use and environmental law should sit on the special court, and close scrutiny should be given to the selection of the members to ensure a balance.

## FEES AND EXACTIONS

Many of the state's growth-related problems (i.e. air and water pollution, traffic congestion, etc...) result from a significant under-investment in physical infrastructure. A renewed public commitment to capital investment is needed to carry the state into an economically and environmentally healthy future.

New home buyers are increasingly footing the bill for "quality of life" expenses that are being assessed in the form of fees and exactions on developers. C.A.R. believes the costs associated with growth management and improving the state should not be borne solely by the people who buy new homes; nor should only those people who buy and sell property bear the burden through transfer taxes or fees.

C.A.R. has long held that one of the more equitable ways to finance items for the common good is through general obligation (g.o.) bond financing. There should be increased emphasis on the adoption of state-level "quality of life" bonds, and the passage of local g.o. bonds should be aggressively pursued. The Association currently "favors" legislation to allow local school g.o. bonds to pass by a simple majority vote.