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Resolving Land Use Disputes: Mediation, Arbitration and Litigation

Senate Select Committee on Planning for California's Growth

Senate Committee on Local Government

RESOLVING LAND USE DISPUTES: MEDIATION, ARBITRATION AND LITIGATION

A SUMMARY REPORT FROM THE JOINT INTERIM HEARING OF THE SENATE SELECT COMMITTEE ON PLANNING FOR CALIFORNIA'S GROWTH AND THE SENATE COMMITTEE ON LOCAL GOVERNMENT

November 6, 1992
State Capitol
Sacramento, California

California Legislature

Senate Committee on Local Government

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TABLE OF CONTENTS

Page

WHITE PAGES

Introduction 1
Staff Findings 1
The Witnesses 2
The Chairman's Introductory Remarks 3
An Introduction To Dispute Resolution 3
Mediation As An Alternative 5
Advice From Experience Litigators 6
Reactions And Applications 7
Closing Observations 11

BLUE PAGES

Staff Briefing Paper
APPENDIX A: Excerpt from SB 434
APPENDIX B: Excerpt from AB 3

YELLOW PAGES

Testimony of Susan Sherry 28
Testimony of Judith Inness 40
Testimony of J. Wayne Dernetz 76
Testimony of Susan Quinn 92
Testimony of D. Barton Doyle 104
Testimony of Margaret Moore Sohagi 115
Testimony of Honorable James T. Ford 121
Documents from the Wilson Administration 126
Testimony of Joseph M. Schilling 127
Testimony of William Graber 160
Testimony of Ernest Silva 168
Testimony of Nona Edelen 171
Testimony of Sarah Foster 177

RESOLVING LAND USE DISPUTES:

MEDIATION, ARBITRATION, AND LITIGATION

On Friday, November 6, the Senate Select Committee on Planning for California's Growth and the Senate Local Government Committee held a joint interim hearing to explore alternative ways to resolve land use disputes.

Seven state senators heard advice from university researchers, attorneys, lobbyists, and landowners. Their day-long conversations covered a wide range of land use topics, including litigation, public works finance, ballot box planning, and the need for clear statewide policies.

The Senators who participated in the hearing were:

Senator Marian Bergeson, Chairman (#*)
Senator Ruben S. Ayala, Vice-Chair (*)
Senator William A. Craven (*)
Senator Wadie Deddeh (#)
Senator Frank Hill (*)
Senator Robert Presley (#)
Senator Newton R. Russell (*)

= Select Committee on Planning for California's Growth
* = Local Government Committee

The joint hearing, held in Room 112 of the State Capitol, began just after 9:30 a.m. and finished at 3:35 p.m.

This summary report contains the Committee staff's explanations of what happened at the hearing (the **white** pages), reprints the briefing paper that the staff wrote for the Committee (the **blue** pages), and reproduces the written materials that the witnesses and others submitted (the **yellow** pages).

STAFF FINDINGS

Any attempt to distill an entire afternoon's discussion and dialogue into a few findings glosses over important details. But after carefully reviewing the oral testimony and written presentations, the Committee's staff identified eight key findings:

- There is widespread dissatifaction with current land use litigation, both processes and results.

- In some California communities and in other states, mediation has proven to be an effective and less expensive alternative to litigation.

- Legislators expressed substantial interest in promoting land use mediation with new state laws.
- Mediation could be part of an overall, statewide growth management program, or a separate effort.
- If mediation is to be part of a statewide growth management effort, the Legislature must set clear statutory policies to guide the participants.
- Some groups support the concept of a new State Land Use Court, including builders and some litigators.
- Other groups are skeptical, even hostile, to the idea of a State Land Use Court, including cities, counties, environmentalists, property rights advocates, and the Wilson Administration.
- Growth management legislation is probable in 1993 and the bills may contain alternative dispute resolution methods.

THE WITNESSES

Seventeen people spoke at the Committees' hearing; a dozen submitted written comments which appear in the **yellow** pages.

Susan Sherry, Executive Director*
California Center for Public Dispute Resolution
A Joint Program of CSU-Sacramento & McGeorge Law School

Professor Judith Innes*
Department of City and Regional Planning, UC Berkeley

J. Wayne Dernetz*
Higgs, Fletcher & Mack

Susan Quinn, Environmental Mediation Program Director*
City of San Diego/University of San Diego Law School

D. Barton Doyle*
Brobeck, Phleger & Harrison

Margaret Moore Sohagi*
Freilich, Stone, Leitner & Carlisle

Honorable James T. Ford, Sacramento Superior Court*
Judicial Council of California

Carol Whiteside, Assistant Secretary
The Resources Agency

Joseph M. Schilling, Deputy City Attorney*
City of San Diego

Bill Graber, Owner*
Georgiana Ranch

Richard Lyon, Legislative Advocate
California Building Industry Association

David Booher, Legislative Advocate
Calif. Council for Environmental and Economic Balance

John White, Legislative Advocate
Sierra Club

Bob Ryan, Supervising Deputy County Counsel, Sacramento
California State Association of Counties (CSAC)

Ernest Silva, Legislative Advocate*
League of California Cities

Nona E. Edelen, Legislative Representative*
Southern California Association of Governments

Sarah Foster*
Californians for Self-Government

THE CHAIRMAN'S INTRODUCTORY REMARKS

Senator Bergeson opened the hearing by observing that her Committees had spent the last five years exploring the topic of growth management. She had learned that land use decisions are essentially social choices that involve values: private property rights, community needs, and a sense of the public good. Conflicting values require public officials to make tough choices. But all too often, land use disputes turn into lawsuits.

Saying that "we have too much land use litigation because there are few other ways to resolve conflicts," **Senator Bergeson** explained that she called the interim hearing to investigate alternative ways to solve those problems. Specifically, she asked, "what should the Legislature do about land use disputes?"

AN INTRODUCTION TO DISPUTE RESOLUTION

Susan Sherry, Executive Director of the California Center For Public Dispute Resolution, was the Committee's first witness. She advised the legislators to listen for five elements in the other speakers' testimony:

- Developing an "integrated system" of resolving disputes, not just focusing on one method.
- Creating a continuum of methods to resolve disputes, picking the methods appropriate to different types of disputes.
- Identifying major categories of land use disputes.
- Finding criteria for designing a system.
- Dispute resolution can be within either the current land use framework, or within the context of future land use planning and growth management reform.

As Sherry explained the collaborative processes involved in alternative methods, **Senator Craven** sounded a skeptical note, saying that few land use disputes ever end so "mellifluously" as Sherry's "Little-Mary-Sunshine example." She acknowledged that alternative methods were "not a panacea" but we still "need to get mediation earlier in the process" to avoid lawsuits. **Senator Bergeson** agreed that there has been a "flood of litigation" and that we need to "find a way to bridge" competing interests.

When **Senator Russell** challenged Sherry to apply mediation to an example of conflict over hillside development in his home community, she referred him to the eight questions listed in Attachment 3 of her hand-out. "If you don't get 'yes' answers to five to seven of those questions, then forget it. It ain't gonna work!" Sherry claimed. Further, finding the right people to negotiate with is a challenge, Sherry conceded after **Senator Ayala** asked her what constitutes a "legitimate spokesman."

Responding to **Senator Bergeson's** question about the desirability of a State Land Use Court, Sherry said that her Center has no view on the Ueberroth Commission's recommendation. She admitted that there is a range of opinion on the topic, but noted that nearly all observers fret at the lack of clear statewide growth management policies.

Senator Deddeh asked Sherry to explain why it takes local officials so long to act on a standard 400-unit subdivision. "World War II was won in 3½ years. How long does it take to get a damn permit? It's outrageous!" Deddeh exclaimed. Later he added, "We've made it virtually impossible for our children to buy a home in California. I wish I had the power to take that away from local governments." Senator Deddeh said that a developer should know the fate of a project within 90 days.

MEDIATION AS AN ALTERNATIVE

The Committee had invited a panel of three witnesses to explain how mediation could resolve land use disputes: UC Berkeley Professor **Judith Innes; Wayne Dernetz**, a private attorney from San Diego; and **Susan Quinn** who directs San Diego's Environmental Mediation Program.

"Some aspects of land use disputes are inevitable," explained **Professor Innes,** "but many needlessly waste limited resources." Other states are working to prevent conflicts before they arise. Answering **Senator Russell's** question, Innes said that it's very early in those other states' experiences to say what works and what doesn't. But California needs to identify dispute resolution processes that fit with our own special needs.

Regarding Oregon, Professor Innes responded to Senator Bergeson's inquiry by explaining that urban limit lines are not a solution when the density of development within the line is too low. In Vermont, officials are still trying to build confidence in public planning, "edging into it slowly." In that state, the "most useful incentive" for local planning is requiring state agencies to comply with local plans.

Florida became politically tangled over urban limit lines which New Jersey avoided by relying on growth "centers," even in rural areas. The "completely collaborative" process in New Jersey uses face-to-face meetings to resolve conflicts. Their "cross-acceptance" negotiations reduced 550 disputes to about 25 problems. Florida shifted from top-down regulatory compliance to mediation under the leadership of the state's Secretary of the Department of Community Affairs. Stakeholders need "forums and arenas" that provide opportunities to agree on what the problems really are. When forums and arenas exist, Innes concluded, "you don't need courts as much."

As **Wayne Dernetz** began his presentation, **Senator Bergeson** observed that local officials in San Diego have gone further than most other metropolitan areas with growth management issues. Dernetz explained that he drafted SANDAG's growth management conflict resolution procedures to avoid a repetition of the expensive court battles over a proposed trash-to-energy incinerator in San Marcos. Three years of litigation wasted public money while a "Trash Summit" ironed out a compromise within weeks with the help of a mediator.

Dernetz suggested a thoughtful "tweaking" of state law to promote more opportunities for mediation. For example, the Brown Act is an impediment to mediation. The Legislature should create an additional exception to the open meeting law that will allow local officials to meet in closed session to give advice to their mediator. Dernetz opposes the notion of

secret government, but the Brown Act presently impedes thoughtful mediation. **Senator Russell** and Dernetz explored the proposed Brown Act amendment at some length. **Senator Craven** later observed that this amendment could drive the media "berserk." Dernetz then concluded by summarizing his three recommendations:

- Legislation encouraging mediation.
- Narrowly exempting mediation from the Brown Act.
- State sponsorship of two mediation centers.

Backed by considerable practical experience in mediating disputes, **Susan Quinn** explained the difference between mediation and arbitration. The benefits of mediation over litigation are very clear when it comes to code enforcement. A mediated case takes just one-fifth the time needed for a litigated case and costs about $1,000 instead of $10,000. Because the parties can go into mediation in about three weeks (instead of waiting for a turn on the court calendar), compliance and implementation occurs sooner.

Senator Bergeson and Quinn talked about a mediation case regarding a redevelopment project which involved a developer, neighbors, and the staff of five different city departments. Mediation saved the landowner at least six months, Quinn claimed. Her advice is: do it early, clear up confusion, get all of the players to the table. The result is that mediation is an effective consensus building process that avoids polarization because there is still time to be flexible.

ADVICE FROM EXPERIENCED LITIGATORS

The Committee's second panel was composed of three experienced litigators: **Bart Doyle** who represents builders and property owners, **Margaret Sohagi** who often defends public agencies, and Sacramento County Superior Court **Judge James Ford** who spoke on behalf of the Judicial Council.

Judicial deference to local elected officials and the lack of state oversight on local land use decisions means that state statutes are not being enforced, argued **Bart Doyle**. The checks and balances that exist at the federal and state levels do not exist for cities and counties. Doyle, therefore, endorsed the concept of a State Land Use Court, especially as proposed by Senator Bergeson's Senate Bill 434.

When **Senator Bergeson** asked Doyle if a State Land Use Court would dilute the opportunities for mediation, he replied that they fit different types of disputes, but a new Court would be good for "adherence to rules." Doyle also endorsed the uniform 30-day statute of limitations in SB 434, but noted that the bill was silent on the issue of initiatives and referenda. Doyle said that, like other "specialized courts," a new State Land Use Court would quickly gain the needed ex-

pertise, winnow down the initial number of cases, manage its docket, and learn from administrative agencies. In many metropolitan counties, specialized departments of the Superior Court have emerged de facto over time. Doyle concluded by arguing that financing the new Land Use Court is a problem. His written testimony provides the details.

Although she represents public agencies against developers, **Margaret Sohagi** does not support land use litigation because it removes land use decisions from elected officials and from public review. Sohagi recommended that any new growth management statute contain concise definitions of key phrases to avoid confusion. She agreed with Doyle's recommendation of a uniform, 30-day statute of limitations. In general, she tells her public agency clients to set aside money for "preventative medicine" to fix their land use ordinances now and avoid future litigation. Sohagi encourages mediation at many levels of land use disputes. Regarding a State Land Use Court, Sohagi said, "I think it's a good idea" because having judges who understand land use would save time and money.

Judge Ford presented the Judicial Council's written testimony and then added his own observations. "Developers in many respects are being treated badly," said Judge Ford who then added that "Environmental laws are being treated badly." The essential dispute over land use decisions is "political, not legal" and the courts should not rule on what are essentially executive or legislative questions. Local elected officials should "shoulder those burdens" and use the discretion that CEQA affords them. If they do, then the courts have no role. But instead, local officials pretend as if there are no environmental impacts and then find themselves in court.

Conceding to **Senator Russell** that trial court judges "do have the authority to compel mandatory settlement conferences," Judge Ford expressed renewed interest in mediation for land use cases. Based on what he had already learned at the Committee's hearing, Judge Ford said that he was convinced that the Sacramento Superior Court ought to adopt a local court rule to require mandatory settlement conferences in land use and CEQA cases. Similarly, the Judicial Council or the Legislature could adopt this rule "in a heartbeat" and that would help.

REACTIONS AND APPLICATIONS

Following the Committees' lunch break, **Senators Bergeson, Ayala,** and **Presley** returned to listen as 10 witnesses reacted to the proposals for alternative dispute resolution.

The Wilson Administration sent **Carol Whiteside,** the Resources Agency's Assistant Secretary for Intergovernmental Programs, who noted that "conflict is part of the political process --- it's probably unavoidable." She gave the legislators copies

of Conflict Resolution Mechanisms in Growth Management, a December 1991 report which she co-authored for the Governor's Interagency Council on Growth Management. Whiteside the offered five recommendations:

1. Clearly stated policies head off land use problems.
2. Local agencies should confer with each other.
3. "Uniquely situated," the Governor's Office of Planning and Research is the "appropriate place" to resolve intergovernmental land use disputes.
4. Public officials need incentives for collaboration.
5. Amend state law to "minimize court action" before creating a new State Land Use Court.

Whiteside advised the members to approach a new Court with "some amount of caution." But added that "we'd like to work with you on this." Responding to **Senator Presley's** question, Whiteside explained that the Administration's growth management study was complete and she was "very hopeful" that Governor Wilson would soon release it.

A self-described "reformed litigator," **Joe Schilling** is a Deputy City Attorney in San Diego were he has had "great success" in demonstrating the effectiveness of mediation to local officials. It may sound "Pollyanna-ish," Schilling conceded, but it works. San Diego began using mediation to settle code enforcement problems in 1989, but City officials are now expanding their involvement to cover the entire development process, including a current effort involving a historic preservation district. He described these efforts in an article in the Fall 1992 issue of CEB's Land Use Forum. In response to a question from Senator Bergeson, Schilling agreed with earlier witnesses on the importance of "funneling" disputes to the appropriate mechanism. He added that officials must "choose the right arrow out of your quiver."

Using the Court Characteristics chart from his written presentation, Schilling described the "Land and Environment Court" in Sydney, New South Wales as the best model to emulate. The Australian court has jurisdiction over both development and enforcement issues. An "assessor" (similar to an administrative law judge) hears the case, with Court judges hearing any appeals.

Bill Graber is unlike the other witnesses; neither a lobbyist nor an attorney. Graber operates Georgiana Ranch in Hemet (Riverside County) where he worked on growth management issues. Explaining his recent experience in Southeast Asia and its lack of lawsuits, Graber told the Senators, "You need to listen to these people who are talking about mediation." Mediation helps groups focus on "quality control," he said.

Because the Western Riverside Council of Governments drafted its policies without much public participation, "it will do nothing for growth management," Graber contended. Fearful of

surrendering power, local officials "won't buy into mediation." "We have to remove the local elected official from this loop we call statewide growth management, otherwise it'll never work," he said.

CBIA lobbyist **Richard Lyon** told the Committee members that in a perfect world, builders would stay out of court but that "this is not a perfect world." Nevertheless, the goal should be the early resolution of problems. Policy disputes, code enforcement, and disputes over fees all lend themselves to mediation. Issues involving CEQA documents should go to a new State Land Use Court which is why his organization supported Senator Bergeson's SB 434. Lyon favored a new Court for three reasons:

- Complex issues require expert knowledge.
- Current courts are costly and produce inconsistencies.
- There is no effective oversight of local decisions.

The CBIA is preparing a legislative proposal for 1993.

CCEEB lobbyist **David Booher** listed four problems facing legislators as they grapple with growth management problems:

- The current adversarial process of settling land use disputes is "beset by gridlock ... but these are not [just] process issues."

- "No one has a stake in this adversarial process" which may have once worked, but no longer.

- How local officials solve these issues is a state interest. "The state has a role to play, but the state has been absent."

- Infrastructure finance is critical to cope with California's continuing population growth. Growth without infrastructure leads to a decline in the quality of life.

According to Booher, the real question for the Legislature is whether California can afford the cost of not acting. Although CCEEB has an initial positive reaction to the idea of a State Land Use Court, "we don't think it'll solve the problem" and other solutions are still needed. "Keep in mind that the current legal system has a built-in bias to say 'no' to development."

Prefacing his comments by saying that individual Sierra Club chapters may not support his testimony, **John White** strongly opposed a State Land Use Court as being too costly, ignoring other issues, and ignoring other methods of resolving disputes. But if the Legislature substitutes statewide policies for case-by-case litigation, then the state's policies must be clear.

"It matters where the lever is," White insisted. Early mediation works, but sometimes you have to wait until the parties are exhausted and want to mediate. White went on to cite the recent negotiations involving Sacramento's North Natomas plan. Although the developers' concessions were unprecedented, some environmentalists still wanted to sue. Answering a question from **Senator Bergeson** about the need for permit reforms, White retorted that "the best defense against CEQA litigation is to follow CEQA's process."

Based on his experience representing Sacramento County, **Robert Ryan** claimed that "developers seem to be getting what they want." The County's massive revision of its general plan is the result of cooperation among many different groups but that "the process isnt' there to make everyone completely happy." Although he is not happy with a two-year wait for appeals court decisions, Ryan agreed with Judge Ford that the Sacramento Superior Court judges are speedy and well-versed in land use issues. While he likes the idea of a shorter statute of limitations, Ryan was not sure if a State Land Use Court will speed the answers.

Cities too support reducing the exposure to litigation, reported the League's **Ernie Silva.** City elected officials are not opposed to development. Silva agreed with Judge Ford that land use and development issues are political problems and not legal problems. "When people lose a political decision, they try to convert it to a legal issue," he claimed. This gives rise to what Silva facetiously called the "ADF Rule," which means that "'any damn fool' can sue." The simplest way to reduce litigation is to change the rules on who has standing to sue. Silva then referred the Senators to his written testimony for more specific reform ideas.

Senator Bergeson and Silva then explored mediation issues. Silva strongly recommended keeping conflict resolution as close as possible to the disputants themselves. In this he disagreed with Carol Whiteside who had recommended letting OPR resolve conflicts. Silva then acknowledged that the League is "somewhat nervous" about a State Land Use Court and listed eight reasons:

- Too costly.
- Too small.
- Too many cases.
- "We don't want to pay for it."
- Waste judicial resources.
- Can be a developer court.
- Can approve projects.
- Short decision deadlines.

According to Silva, creating a State Land Use Court may be an admission of legislative failure because it means that the law is too complex even for judges to handle.

Because local elected officials were not available to come to Sacramento from Southern California, SCAG's **Nona Edelen** submitted written material on their behalf. Edelen emphasized

that SCAG can be a forum for convening disputing local agencies that want to find consensus.

Speaking on behalf of Californians for Self Governance and the Center for Contemporary Studies, **Sarah Foster** said that she had a number of objections to a State Land Use Court. In particular, she was not sure if the new Court would help landowners avoid the "regulatory Verdun" of regulatory takings. The solution, according to Foster, is to reduce the need for litigation and the best way to do that is to cut down on regulations.

CLOSING OBSERVATIONS

After the last witness presented her testimony, **Senator Bergeson** closed the joint hearing with a brief summary statement. After thanking the other legislators and the witnesses, the Chairman noted that she and Senator Presley would probably reintroduce growth management bills when the Legislature reconvenes in 1993. Action by Governor Wilson was also possible.

The Senator then concluded that any growth management program must include better ways to resolve disputes. She may change her thinking about a State Land Use Court to create better opportunities for mediation before litigation.

The hearing ended at 3:35 p.m.

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TABLE OF CONTENTS

Page

Resolving Land Use Disputes 1

Recent Legislative Proposals 1

SB 434: State Land Use Court 2

AB 3: Mediation and Arbitration 4

The Wilson Administration's Views 5

APPENDIX A: Excerpt from SB 434 6

APPENDIX B: Excerpt from AB 3 12

RESOLVING LAND USE DISPUTES

MEDIATION, ARBITRATION, AND LITIGATION

Land use decisions are essentially social choices that involve values: private property rights, community needs, and a sense of the public good. Conflicting values require public officials to make tough choices. Too often, it seems, land use disputes turn into lawsuits.

Land use disputes often result in litigation because there are few other ways to resolve conflicts. These lawsuits enter the judicial system through the Superior Courts and it may take years to receive a final appellate decision from a District Court of Appeal or the California Supreme Court. One criticism of the current process is that Superior Court judges with general legal knowledge and experience must make complicated decisions about complex land use planning and development issues.

For the last five years, the **Senate Select Committee on Planning for California's Growth** and the **Senate Local Government Committee** have explored the topic of growth management. At every hearing the Senators heard complaints about the causes and costs of litigation.

Senator Marian Bergeson, Chairman of both Committees, has called a joint interim hearing on **Friday, November 6, 1992,** to explore the issue of resolving land use disputes. In particular, Senator Bergeson wants the Committees to look at what recent growth management proposals have recommended:

- Opportunities for mediating land use disputes.
- The creation of a State Land Use Court.

RECENT LEGISLATIVE PROPOSALS

Four comprehensive, statewide bills focused the Legislature's attention on growth management issues during its 1991-92 session. A fifth comprehensive bill applied only to the San Francisco Bay Area. None of these measures reached Governor Wilson's desk.

Senate Bill 434 (Bergeson) would have created a statewide growth management program with voluntary Regional Fiscal Authorities and improved local comprehensive plans. SB 434 incorporated the land use recommendations from the Council on California Competitiveness, including the creation of a State Land Use Court. Senator Bergeson's bill failed in the Assembly Local Government Committee on a 3-2 vote in August 1992.

Senate Bill 797 (Morgan) would have consolidated the Association of Bay Area Governments, the Metropolitan Transportation Commission, and the Bay Area Air Quality Management District into a new Bay Area Regional Commission that must prepare a regional growth management strategy. The Senate refused to concur in the Assembly's amendments to Senator Morgan's bill on a 16-20 vote.

Senate Bill 929 (Presley) would have created the California Public Improvements Act with a California Public Improvements Authority to fund state and regional infrastructure, based on a new State Conservation and Development Strategy. Although SB 929 did not set out specific procedures, the bill required the new regional and countywide planning to include conflict resolution procedures. Assembly Floor amendments "gutted" Senator Presley's SB 929 and converted it into a school finance measure authored by Senator Hart. Governor Wilson vetoed that version of SB 929.

Assembly Bill 3 (Brown) would have created a State Growth Management Commission and seven Regional Development and Infrastructure Agencies. AB 3 also created a formal procedure for resolving interagency conflicts over growth management decisions, emphasizing mediation and arbitration. AB 3 died in the Senate Local Government Committee because Speaker Brown never asked for a hearing on his bill.

Assembly Bill 76 (Farr) would have created a State Planning Advisory Commission and a State Planning Agency with specialized departments to prepare and implement a new State Planning Report. One of the proposed Agency's new departments was a State Department of Mediation and Conflict Resolution. AB 76 died in the Senate Local Government Committee because Assemblyman Farr never asked for a hearing on his bill.

SB 434: STATE LAND USE COURT

Senate Bill 434 was Senator Bergeson's comprehensive statewide growth management bill for 1991-92. She amended her SB 434 in June 1992 to incorporate the land use recommendations of the Council on California Competitiveness. Governor Pete Wilson appointed this panel (also called the "Ueberroth Commission") to look at barriers to economic development. The group's April 1992 final report, California's Jobs and Future, recommended that the Legislature:

> **Establish a state-level land-use court to decide all project-level disputes between project proponents, local governments, and third-parties.**

The proposal. Although unsuccessful, SB 434 would have created a five-member State Land Use Court as a new part of the state's judicial branch. The text of this proposal appears in **APPENDIX A.** The Governor would have appointed the initial members of the Court who would then stand for election to six-year terms. The existing Commission on Judicial Appointments would have confirmed that candidates have "proven ability" in land use planning and development.

The proposed new Court had original jurisdiction over:

- o Local development project decisions.
- o The California Environmental Quality Act.
- o The deadlines in the Permit Streamlining Act.
- o Developer fees.
- o Comprehensive and specific plans.
- o OPR's planning consistency findings.
- o LAFCO decisions under the Cortese-Knox Act.
- o Redevelopment plans.

If created, the State Land Use Court could:

- o Order a public agency to issue a permit.
- o Uphold a public agency's permit denial
- o Require damage payments if agencies miss deadlines.
- o Determine if a comprehensive plan is consistent with the California Growth Management Strategy.
- o Determine if developer fees are proper.

If a lawsuit affected a city or county whose comprehensive plan was not consistent with the Strategy, the State Land Use Court's decision would be final. If the project was in a city or county that had a consistent plan, then the Court's decision could be appealed to the District Court of Appeal.

SB 434 paid for the new State Land Use Court by requiring cities and counties to levy surcharges on local building permits, much as they already do for the State Strong Motion Instrumentation Program. After retaining up to 5% of the fees to cover their administrative costs, local officials would send the revenues to a new State Land Use Court Fund.

The State Land Use Court could not have become operative until the voters amended the California Constitution.

Other interest. Senator Bergeson was not the only legislator intrigued by the possible creation of a new State Land Use Court. Senator Mike Thompson convened an informational hearing of his Senate Housing and Urban Affairs on July 29, 1992 to review the Ueberroth Commission's recommendations.

The Housing Committee's background staff report noted that some states have already created alternative ways of settling land use disputes. Florida, Massachusetts, Oregon, Connecti-

cut, and Rhode Island have all shifted certain land use or housing disputes away from the traditional judicial process.

Witnesses at the November 5 hearing can explain these experiences in more detail.

AB 3: MEDIATION AND ARBITRATION

Although Assembly Bill 3 urged public officials to make "consensual" decisions, Speaker Brown's measure recognized that conflicts would occur over growth management and other land use issues. In response, AB 3 would have created conflict resolution procedures which the bill intended would:

- o Place the disputing parties on an equal footing.
- o Result in prompt and binding resolutions.
- o Be consistent with the bill's own policies.

The text of this proposal appears in **APPENDIX B.**

The proposal. Focusing exclusively on inter-agency conflicts, AB 3 allows its new dispute resolution procedure to be triggered by a city council, county board of supervisors, special district board, one of the new subregional authorities, one of the new Regional Development and Infrastructure Agencies, a regional agency, or the new State Growth Management Commission.

After notifying the disputing parties, a "relevant agency" would call the affected agencies together to clarify the exact nature of the dispute. When local agencies conflict, the relevant agency would be the subregional authority; the Regional Development and Infrastructure Agency would be the relevant agency for conflicts between other regional governments or between local and regional agencies. The State Growth Management Commission would handle conflicts among and between the Regional Development and Infrastructure Agencies and other regional agencies.

The Governor's Office of Planning and Research would "facilitate" the selection of a neutral third party to recommend mediation or binding arbitration to resolve the dispute. The appropriate relevant agency would then stage the conflict resolution process, involving the disputing parties and the neutral third party.

AB 3 gave the parties 60 days to resolve their dispute. The agreement would be final with any follow-up actions the responsibility of the relevant agency.

If the parties did not reach an agreement within 60 days, the neutral third party must determine an appropriate resolution of the conflict, following the statewide growth management policies set by the bill. A disappointed public agency could

appeal the third party's decision to the State Growth Management Commission which must respond within 30 days. The State Commission's decision would be final.

THE WILSON ADMINISTRATION'S VIEWS

Last February the Wilson Administration released its own recommendations on resolving growth management disputes. Called Conflict Resolution Mechanisms in Growth Management, the December 1991 report conceded that "with the best of intentions, honest disputes will arise in the course of people working together."

The report's principal authors were Carol Whiteside, Assistant Secretary for Intergovernmental Relations at the Resources Agency and Terry Rivasplata, the principal planner for the Governor's Office of Planning and Research (OPR). Governor Wilson's Interagency Council on Growth Management and OPR jointly released the study.

After reviewing other states' conflict resolution models (Florida, Georgia, Oregon, Vermont, New Jersey, and Washington), the report also looked at what Contra Costa and San Diego Counties have tried. The study also went on to describe the work of the Growth Management Consensus Project.

The proposal. The Administration's study proposed seven steps:

1. Enact clear state goals, objectives, and standards to guide regional and local planning and decisions.

2. Require regional agencies to consult other regional agencies and local governments before adopting plans.

3. Designate the Governor's Office of Planning and Research to consider state/regional, regional/regional, and regional/local planning conflicts. OPR would have 120 days to produce a binding determination.

4. Reduce conflicts between neighboring local governments by using a "cross acceptance" process similar to the one in New Jersey.

5. Set fixed deadlines for these negotiations.

6. Develop state incentives and disincentives to encourage other governments to comply with state policies.

7. Create a new procedure for adjudicating land use decisions without court action; possibilities include arbitration or streamlined administrative procedures.

APPENDIX A
EXCERPT FROM SENATE BILL 434 (BERGESON)
AS AMENDED JULY 3, 1992
PROVISIONS CREATING A STATE LAND USE COURT

CHAPTER 5.5. THE STATE LAND USE COURT

Article 1. Declarations of Policy and Intent

70300. The Legislature finds and declares that conflicts over land use policies and the decisions which implement them harm the competitiveness of California's economy and impair the economic effectiveness of the state's residents, landowners, interest groups, and public agencies. Prolonged disputes fail to protect natural resources, promote environmental quality, or encourage housing affordability.

70301. The Legislature further finds and declares that a lawsuit challenging a decision of a city or county has a chilling effect on the confidence with which property owners and public agencies can proceed with development projects. Lawsuits that attempt to attack, review, set aside, void, or annul a decision of a city or county can prevent the completion of needed development projects even though the projects have received required governmental approvals.

70302. Although initiating suits in the superior courts is the traditional method of resolving land use conflicts, it is the intent of the Legislature in enacting this chapter to create a separate new state land use court to resolve land use planning and development disputes.

Article 2. Creation and Membership

70310. (a) The Stand Land Use Court is a court of record which consists of a presiding judge and four judges. The Governor shall designate the presiding judge.

(b) Except as provided in subdivision (c), judges of the court shall be elected at large at general elections at the same time and places as the Governor. Terms of the judges of the court are six years, beginning the Monday after January 1 following their election. A vacancy shall be filled by election to a full term at the next general election after the January 1 following the vacancy, but the Governor shall appoint a person to fill the vacancy temporarily until the elected judge's term begins.

(c) The Governor shall appoint the first five judges of the court. The presiding judge shall serve an initial term of six years. Two of the judges shall serve an initial term of four years and the other two judges shall serve an initial term of two years. The terms of these judges shall be determined by lot.

(d) No person shall be appointed or elected to the court unless the Commission on Judicial Appointments confirms that the person has a demonstrated interest and proven ability in land use planning and development, including, but not limited to, training and experience in natural resource protection and conservation, economic competitiveness and vitality, development patterns, housing supply and affordability, mobility, and public infrastructure.

70312. Judges of the court shall receive the same compensation and expenses as judges of the superior court.

70313. Each judge of the court shall have one vote. An affirmative vote by a majority of the membership of the court or an affirmative vote by a majority of the membership of a panel of the court shall be required to make decisions.

Article 3. General Provisions

70320. As used in this chapter:

(a) "Affected agency" means any public agency with jurisdiction over, whose territory includes, or is directly or indirectly affected by a land use decision.

(b) "Court" means the State Land Use Court.

(c) "Development project" means a development project defined pursuant to Section 65928.

(d) "Interested person" means any person, firm, association, organization, partnership, business, trust, corporation, or company with a direct or indirect concern for the outcome of a land use decision.

(e) "Local agency" means any public agency other than a state agency, including, but not limited to, a county, city and county, city, school district, community college district, special district, authority, redevelopment agency, local agency formation commission, joint powers authority, or any other political subdivision of the state.

(f) "Public agency" means any state agency or local agency.

(g) "State agency" means any agency, board, or commission of state government.

70321. Subject to the rules of the Judicial Council, the presiding judge shall distribute the business of the court among the judges, appoint panels, and prescribe the order of business.

70322. The court shall appoint a clerk who shall serve at its pleasure. With the approval of a majority of the

judges of the court, the clerk shall appoint deputy clerks, librarians, secretaries, and other employees. The court shall determine the duties and, subject to subdivision (b) of Section 19825, fix and pay the compensation of these officers.

70323. The court may employ expert witnesses, referees, monitors, masters, or other third-party assistants that the presiding judge determines to be necessary for the efficient and successful operation of the court.

70324. The clerk shall maintain the records of the court. Pursuant to the provisions for the destruction of records for the superior courts in Article 1 (commencing with Section 69502) of Chapter 5, the clerk may destroy any records of the court.

Article 4. Jurisdiction, Proceedings, and Remedies

70330. (a) Within 60 days of a public agency's final decision, any interested person and any affected agency may bring an action in the court to review any of the following:

(1) The approval or denial by a local agency of any development project.

(2) Any act or decision of a public agency made pursuant to the California Environmental Quality Act, Division 13 (commencing with Section 21000) of the Public Resources Code.

(3) The failure of a public agency to meet the time limits specified in Chapter 4.5 (commencing with Section 65920) of Division 1 of Title 7, or the Subdivision Map Act, Division 2 (commencing with Section 66410) of Title 7.

(4) Fees determined pursuant to Chapter 5 (commencing with Section 66000) of Division 1 of Title 7.

(5) The adequacy of a comprehensive plan or specific plan adopted pursuant to Chapter 3 (commencing with Section 65300) of Division 1 of Title 7.

(6) The consistency of a comprehensive plan with the California Growth Management Strategy, as determined by the Director of the Office of Planning and Research pursuant to Section 65404.

(7) The validity of any change or organization or reorganization or any other decision made pursuant to the Cortese-Knox Local Government Reorganization Act, Division 3 (commencing with Section 56000).

(8) The adoption or amendment of a redevelopment plan pursuant to the Community Redevelopment Law, Part 1 (commencing with Section 33000) of Division 24 of the Health

and Safety Code.

(b) Upon the expiration of the time limit provided for in this section, all persons and agencies are barred from any further action or proceeding.

(c) The application to the court shall be in the form and contain the information specified by the court.

70331. (a) Within 30 days of the filing of an action, the court shall notify the parties whether the court will take jurisdiction over the action.

(b) If the court does not accept jurisdiction over the action, the plaintiff may appeal the court's decision to the Court of Appeal in whose district the project is located.

(c) If the court accepts jurisdiction over the action, the presiding judge shall assign the action to a judge, a panel of the judges, or to the full court.

(d) Within 30 days of receiving an assignment pursuant to subdivision (c), the judge, the panel, or the full court, as the case may be, shall hold a public hearing on the action. The hearing may be continued, from time to time, not to exceed 14 days. Within 30 days after the close of the hearing, the judge, the panel, or the full court, as the case may be, shall issue a written decision and order, pursuant to Section 70332.

70332. Acting in the name of the court, a judge, a panel, or the full court, as the case may be, may do any or all of of the following:

(a) Compel a public agency to issue a permit or other entitlement for use for a development project.

(b) Sustain the decision of a public agency denying the issuance of a permit or other entitlement for use for a development project.

(c) Determine that a local agency failed to meet the time limits specified in Chapter 4.5 (commencing with Section 65920) of Division 1 of Title 7 or the Subdivision Map Act, Division 2 (commencing with Section 66410) of Title 7, and require one or more interested persons or public agencies to pay damages and reasonable legal fees.

(d) Determine that a comprehensive plan or a specific plan is consistent with the California Growth Management Strategy approved pursuant to Article 5 (commencing with Section 65041) of Chapter 1.5 of Division 1 of Title 7.

(e) Determine that a comprehensive plan or a specific plan is not consistent with the California Growth Management

Strategy approved pursuant to Article 5 (commencing with Section 65041) of Chapter 1.5 of Division 1 of Title 7, and require that the city or county revise the plan.

(f) Determine that a fee was not properly imposed pursuant to Chapter 5 (commencing with Section 66000) of Division 1 of Title 7, and order its reduction or elimination.

70333. (a) For a development project in a city or county where the comprehensive plan has not been determined to be consistent, or has been determined to be not consistent, with the California Growth Management Strategy approved pursuant to Article 5 (commencing with Section 65041) of Chapter 1.5 of Division 1 of Title 7, the decision of the court shall be final.

(b) For a development project in a city or county where the comprehensive plan has been determined to be consistent with the California Growth Management Strategy approved pursuant to Article 5 (commencing with Section 65041) of Chapter 1.5 of Division 1 of Title 7, the decision of the court may be appealed to the Court of Appeal in whose district the city or county is located.

Article 5. State Land Use Court Fund and Fees

70340. Except as provided in subdivision (c) of Section 70341, all fees collected pursuant to this article shall be deposited in the State Treasury in the State Land Use Court Fund, which fund is hereby created, to be used exclusively for the purposes of this chapter. All moneys in that fund are continuously appropriated to the court for the purposes of this chapter.

70341. (a) All counties and cities shall collect a fee from each applicant for a building permit. Each fee shall be equal to a specific amount of the proposed building construction for which the building permit is issued as determined by the local building officials. The fee amount shall be assessed in the following way:

(1) Group R occupancies, as defined in the 1985 Uniform Building Code and adopted in Part 2 (commencing with Section 2-101) of Title 24 of the California Administrative Code, one to three stories in height, except hotels and motels, shall be assessed at the rate of five dollars ($5) per one hundred thousand dollars ($100,000), with appropriate fractions thereof.

(2) All other buildings shall be assessed at the rate of ten dollars and fifty cents ($10.50) per one hundred thousand dollars ($100,000), with appropriate fractions thereof.

(3) The fee shall be the amount assessed under paragraph (1) or (2), depending on building type, or twenty-five cents ($0.25), whichever is the higher.

(b) As used in this article, "building" means any structure built for the support, shelter, or enclosure of persons, animals, chattels, or property of any kind.

(c) Prior to depositing the revenues from the fees required by this section in the State Land Use Court Fund, a city or county may retain an amount equal to the actual administrative costs of collecting and transmitting those fees, not to exceed 5 percent of the total amount it collects.

Article 6. Operative Date

70350. This chapter shall not become operative unless and until Senate Constitutional Amendment ____ is adopted by the voters at a statewide election and takes effect.

APPENDIX B
EXCERPT FROM ASSEMBLY BILL 3 (BROWN)
AS AMENDED SEPTEMBER 13, 1991
PROVISIONS CREATING A CONFLICT RESOLUTION PROCEDURE

CHAPTER 12. CONFLICT RESOLUTION

62610. It is the intent of the Legislature that decisions made by public agencies pursuant to this title be made in as consensual a manner as possible. However, the Legislature recognizes that conflicts will occur over decisions that are made. In these conflicts, it is the intent of the Legislature that parties in dispute use conflict resolution procedures defined in this chapter that do the following:

(a) Place disputing parties on an equal footing.

(b) Result in prompt resolution of the dispute.

(c) Are binding.

(d) Are consistent with the growth management policies provided in Chapter 1 (commencing with Section 62000).

62611. The conflict resolution procedure shall be initiated by any of the following:

(a) The governing body of a local agency.

(b) A subregional authority.

(c) The governing body of a Regional Development and Infrastructure Agency or other regional body.

(d) The State Growth Management Commission.

62611.1. Notice of the initiation of the conflict resolution procedure shall be sent to the relevant agency no more than 10 days after a decision has been made which is under dispute. Neither disputed decisions nor actions that would make the disputed decision moot shall be implemented or taken until the conflict has been resolved pursuant to this chapter. For purposes of this chapter, "relevant agency" is defined as any of the following:

(a) The subregional authority in conflicts between two or more local agencies within the subregion.

(b) The regional development and infrastructure agency in conflicts among other regional agencies; other regional agencies and subregional authorities or local agencies; subregional authorities; and subregional authorities and local agencies.

(c) The State Growth Management Commission in conflicts among regional development and infrastructure agencies; regional development and infrastructure agencies and other regional agencies or subregional authorities; and the State Growth Management Commission and regional development and infrastructure agencies or other regional agencies.

62612. As soon as possible, but no more than 15 days from the date the relevant agency receives a notice to initiate the conflict resolution procedure, the relevant agency shall meet with the agencies in conflict for the purpose of interviewing them regarding the nature and scope of the conflict and to request all necessary information. All such information requested by the relevant agency shall be provided to them within 10 days following such a request.

62613. The Office of Planning and Research shall facilitate the selection of a neutral third-party to recommend an appropriate binding facilitation and negotiation model to be used in resolving the dispute that may include, but not be limited to, either of the following:

(a) Mediation.

(b) Arbitration.

62614. The relevant agency, serving as a resource to the agencies in conflict, and the neutral third-party shall convene the conflict resolution conference using the model agreed to by the agencies in conflict. The conference should generally consist of the following elements:

(a) Introduction of the agencies in conflict.

(b) Opening statement by the agencies in conflict.

(c) Exchange for the purposes of developing an understanding of each agency's issues and interests.

(d) Development of options.

(e) Draft and execute agreement.

62615. The agreement shall be implemented by the agencies. Followup of the agreement shall be the responsibility of the relevant agency to ensure implementation.

62616. The conflict resolution procedure described in Sections 62611 to 62615, inclusive, shall be accomplished as soon as possible, but no more than 60 days, after the relevant agency has received a notice to initiate the conflict resolution procedure.

62617. The relevant agency shall be responsible for the following:

(a) Recording the proceedings of the conflict resolution conference.

(b) Maintaining such records as necessary pursuant to this chapter or to minimize similar conflicts.

62618. If no agreements is reached pursuant to the conflict resolution procedure defined in this chapter, the neutral third-party shall determine the most appropriate resolution of the conflict consistent with the growth management policies provided in Chapter 1 (commencing with Section 62000). The determinations shall be made no more than 10 days after the end of the conflict resolution conference. If, within 10 days of a determination, no appeals are made to challenge such a determination, the determination shall be implemented as provided in Section 62615.

62619. Appeals of determinations made pursuant to Section 62618 shall be made to the relevant agency except for instances in which the State Growth Management Commission is a party to the conflict. Decisions on appeals shall be made within 30 days of receipt of the appeal. The decisions shall either uphold a determination made pursuant to Section 62618 or provide an alternative resolution to the conflict which shall be made on the basis of the record of the conflict resolution conference and consistent with the growth management policies provided in Chapter 1 (commencing with Section 62000). Decisions on appeal shall be final and shall be implemented as provided in Section 62615.

CALIFORNIA CENTER
FOR
PUBLIC DISPUTE RESOLUTION

A Joint Program of
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MCGEORGE SCHOOL OF LAW,
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Outline of Testimony Before

Legislative Joint Interim Hearing
Senate Select Committee on Planning for California's Growth
Senate Committee on Local Government
November 6, 1992

Resolving Land Use Disputes: Mediation, Arbitration, and Litigation

California Center for Public Dispute Resolution
Susan Sherry, Executive Director

I. Purpose of Testimony

- o Introduce Dispute Resolution Concepts and Systems
- o Suggest a Discussion Framework
- o Highlight Collaborative Methods

II. Suggested Discussion Framework: Five Elements

A. Develop Integrated System, rather than one method of resolving disputes.

B. Dispute Resolution Continuum (See Attachment 1.)

- o Conflict Prevention; Negotiation; Facilitation; Mediation; Arbitration (non-binding; binding); Administrative Decision; Judicial Decision; Legislative Decision

- o Moving Along the Continuum
  - -- Collaborative vs Adversarial Processes (win/win vs win/lose)
  - -- Lower costs to higher costs
  - -- Decision-making by involved parties vs third party decision-making
  - -- Use of other alternative dispute resolution methods in context of court action (mediated court settlement, mini-trial, early neutral evaluation, court-ordered arbitration)

o Goal of System: A certain percentage of disputes will be resolved at each prior point on the continuum.

o Key Terms

Collaborative Dispute Resolution: Parties affected by a dispute come together to examine their interests, create options that will be mutually acceptable, and work out a solution. Collaborative dispute resolution is voluntary, informal, typically consensual, and acts as a supplement (not replacement) to existing procedures. The primary collaborative processes are negotiation, facilitation, and mediation.

Negotiation: Parties to a dispute voluntarily meet to discuss areas of contention. Disputant work to resolve issues by themselves, without the assistance of a third party neutral.

Mediation: Voluntary negotiation with the help of a neutral third party. The mediator helps disputants cooperatively generate solutions to meet their respective concerns. A mediator does not take sides, make decisions, or impose settlement terms. Agreements typically reached by consensus.

Arbitration: A process that involves the submission of a dispute to a neutral third party who renders a decision after hearing arguments and reviewing evidence. It is most widely used for commercial and labor management disagreements and for civil court cases. Usually, the parties jointly select the arbitrator. Arbitrations can be non-binding or binding. Arbitration is generally conducted pursuant to a pre-existing contract. Arbitration may not be useful for land use disputes.

C. Major Categories of Land Use Disputes *

o Challenges to project approvals/ denials
o Challenges to the sufficiency of the environmental review process

o Challenges to plan consistency and compliance

o Other
  -- Permit Streamlining Act Deadlines
  -- Developer Fees
  -- Annexations
  -- Redevelopment Plans

D. Criteria for Designing System *

- o Prompt resolution of dispute
- o Limiting costs for all disputants and government costs for maintaining system
- o Avoid court involvement, particularly litigation
- o Assure due process
- o Maximum use of beginning and mid points of continuum
- o Producing durable resolutions (resolutions that stick)
- o Resolutions that conform to state goals and policies

E. Clarity on Basic Assumptions for Discussion Purposes *

Either:

- o Dispute resolution within current land use planning framework

OR

- o Dispute resolution within context of future land use planning and growth management reform.

III. Collaborative Processes

A. On a systems level, these processes supplement conventional administrative, judicial and legislative decision-making -- not replace them. Agreements most often take the form of a recommendation to a decision-making body.

B. Drawbacks of Traditional Approaches

- o Do not provide for direct participation by the affected parties in face-to-face negotiations. A third party decision-maker respond to evidence presented. Conventional approaches result in a win - lose decisions.

- o Polarizes position as disputants typically entrench deeper into initial positions.

- o Often is not designed to address the main interests of the parties or assess what trade-offs disputants would be willing to make. The conflict under dispute is often a surrogate for the real issue.

- o Strain parties relations, making future disputes more likely.

C. Examples of Dispute Resolution Systems

o Multiple Options for Initiating Collaborative Resolutions (See Attachment 2.)

o California Special Education Dispute Resolution: Since 1989, the mediation and hearing functions mandated by federal and state law for resolving special education disputes in California between parents and school districts have been consolidated at McGeorge School of Law under contract with the California Department of Education. For the period of July 1, 1990 through July 30, 1992, 993 cases required intervention to achieve resolution. Of these. 851 were fully resolved by mediation. The other 142 cases were resolved by due process hearings. Thus mediation resolved 86% of these disputes. Only 14% required due process hearings. The cost of a successful mediation was 13% the cost of an administrative hearing.

o San Diego Environmental Mediation Program: The Program resides within the City Attorney's Office, with program staff employed by the University of San Diego Law School. Many of the mediations address municipal code violations. The Program is successfully resolving over 100 cases per year, and has helped reduce the City Attorney's office case load by 25%. As of March, 1992, the Program had achieved written agreements in over 95% of the mediations held. Compliance can usually be achieved in half the time required for litigation.

o City of Berkeley Zoning Adjustment Board: A mediator from the Berkeley Dispute Resolution Services attends the public hearings before the Zoning Adjustment Board and evaluates whether a particular contested application might be amenable to mediation. If parties agree to mediate, a time is set and the decision on the application is postponed pending the results of the mediation. The program has been in place for eight years with a high success rate.

o Other States: There are dozens of success stories regarding successful land use mediations. Seven states have "state offices of mediation" that assist state and local government implement alternative dispute resolution systems (Florida, Hawaii, Massachusetts, Minnesota, New Jersey, Ohio, and Oregon.)

D. Mediation Not a Panacea/ Cautions *

o A number of disputes are not appropriate for mediation. Need routine dispute screening. (See Attachment 3.)
o Concern that mediation could be used to delay projects or decisions. Establish deadlines to prevent abuses. (Deadlines could be waived if involved parties consented.)
o Perception or reality of mediation as a "back-room" deal.
o Sometimes difficult to identify and include all potential parties who might be affected by a mediated decision. Persons not included in process not bound by agreement settlement.

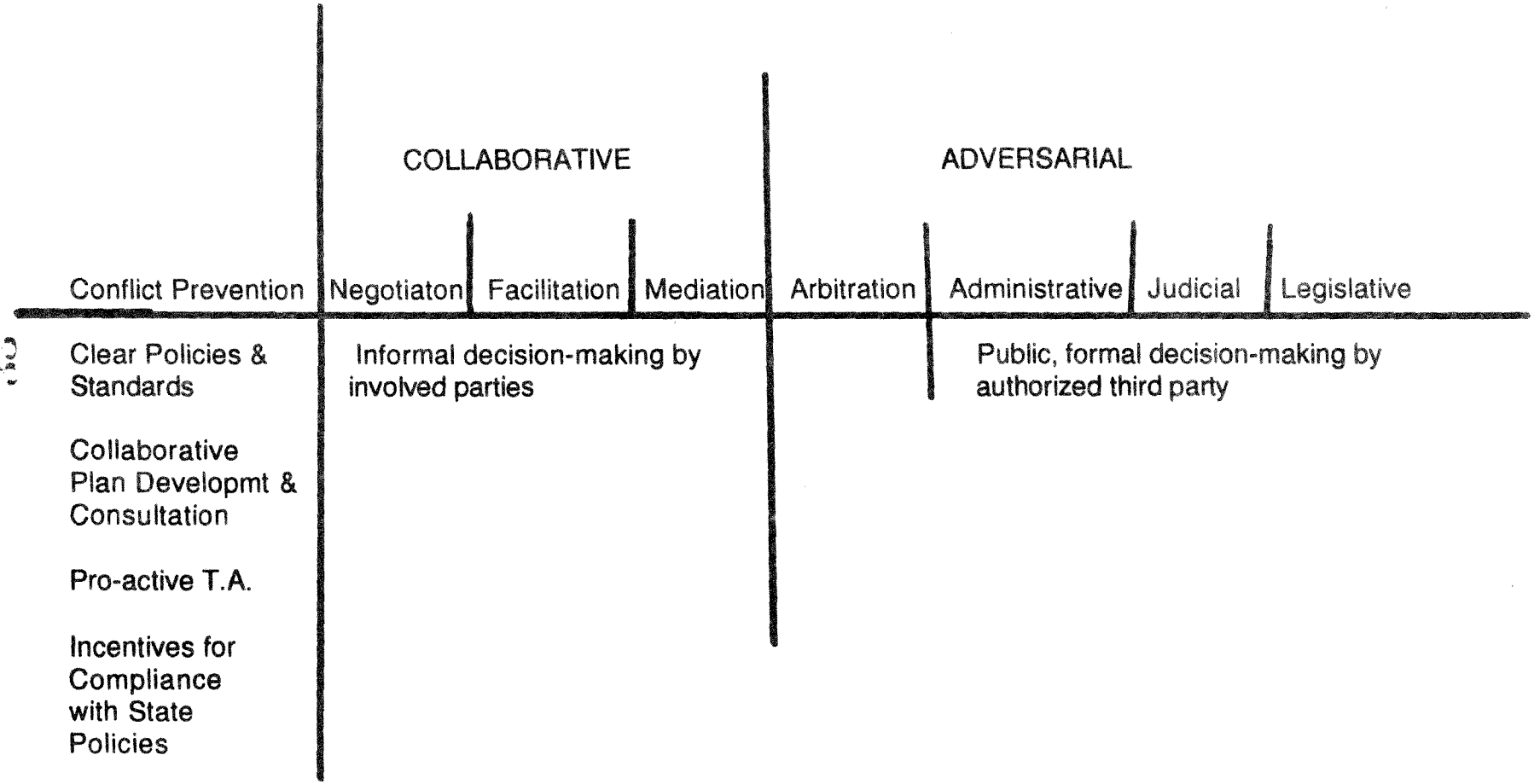
E. Mediation: Other Comments *

o Widespread support for selected use of mediation as method to resolve land use disputes. Pilot programs suggested.
o Need to evaluate need for "infrastructure" to support use of mediation in land use disputes (training; resource and information to local decision-makers.)
o Although mediation is voluntary, could require parties to convene to explore possibility of mediation.

* Reflect conversations with small sample of knowledgeable persons concerned with resolving land use disputes (environmentalists; developers, public agencies, housing advocates, academics).

Dispute Resolution Continuum

LAND USE DISPUTES

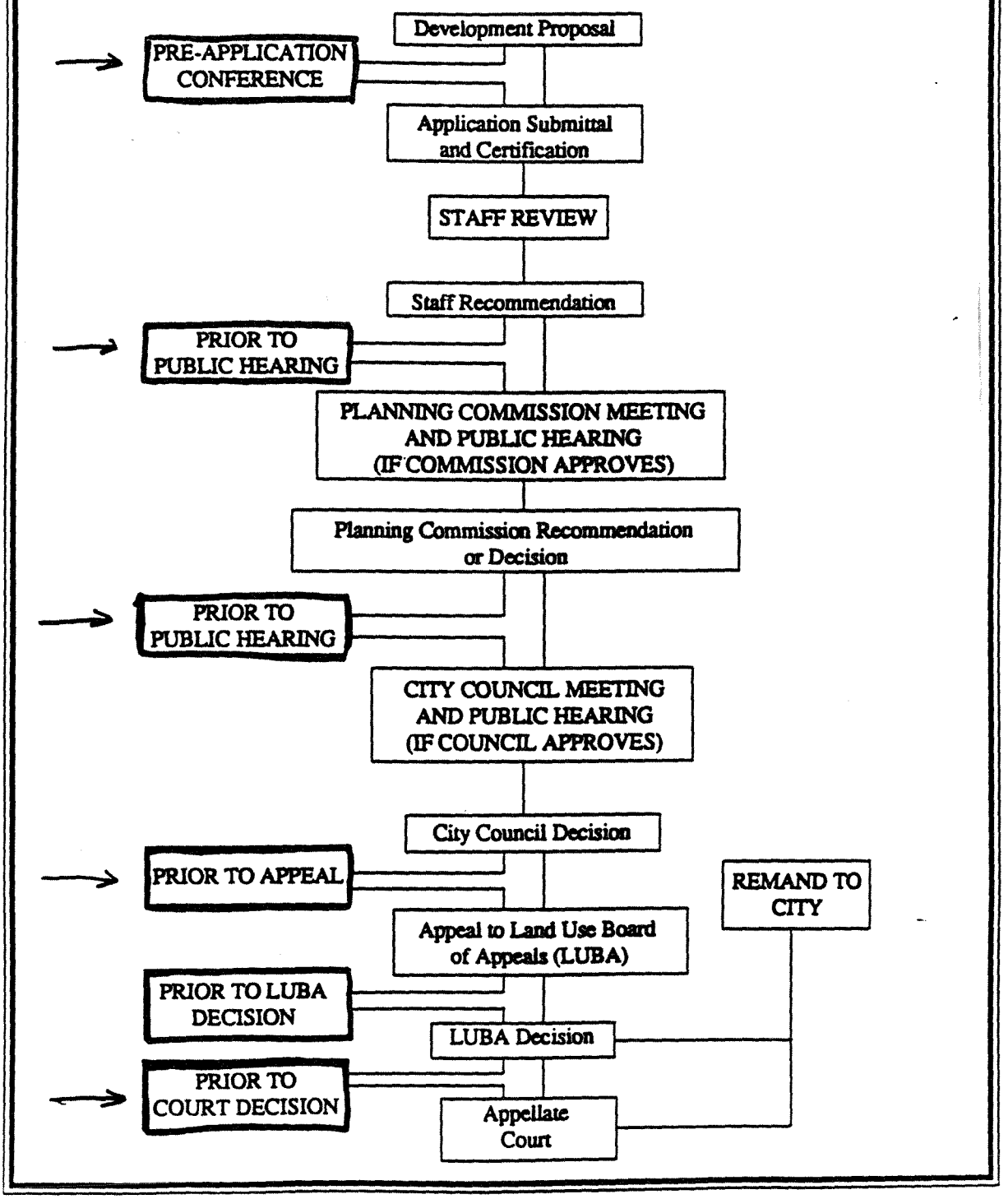


California Center for Public Dispute Resolution
A joint program of
California State University, Sacramento
McGeorge School of Law, University of the Pacific

ATTACHMENT 1

Taken from: Dispute Resolution: A Handbook for Land Use Planners and Resource Managers. Oregon Department of Land Conservation and Development, 1990.

Figure 7. Options for Initiating Collaborative Dispute Resolution During the Land Use Decision-Making Process



ATTACHMENT 2

TECHNIQUES FOR EVALUATING A DISPUTE: WILL A COLLABORATIVE PROCESS WORK?

Eight questions can help determine whether a dispute is conducive to resolution using collaborative approaches:

1. Can the issues in dispute be easily defined?
2. Is the dispute over issues other than defining constitutional rights or society's values?
3. Are there enough, diverse issues to provide opportunities for negotiated trade-offs?
4. Are the parties readily identifiable?
5. Does each party have a legitimate spokesperson?
6. Is there a relative balance of power between the parties (i.e., no party is in a position to dictate the result)?
7. Is there a likelihood of continuing relations between the parties?
8. Is there a realistic time deadline?

If the answer to most of these questions is yes, there is a good chance that the dispute can be resolved effectively using collaborative dispute resolution processes.

Taken from: Dispute Resolution: A Handbook for Land Use Planners and Resource Managers. Oregon Department of Land Conservation and Development, 1990.

ATTACHMENT 3

EXAMPLES OF CALIFORNIA LOCAL GOVERNMENT'S USE OF MEDIATION

San Diego Environmental Mediation Program

The San Diego Environmental Mediation Program provides mediation and group facilitation services for the City of San Diego. The Mediation Program originated in November of 1988 as the dispute resolution portion of an "Environmental Court" pilot project funded by the City of San Diego and the University of San Diego School of Law.

The Mediation Program currently resides within the City Attorney's Office, although the Program staff themselves are University of San Diego Law School employees. Mediators are selected from a list of community volunteer mediators compiled by the Program. Many of the mediations conducted by the Program address municipal code violations, including noise, fire, zoning, building and environmental disputes. In these mediations, participants are representatives from a variety of city departments and private or commercial property owners. Other mediations involve participants from community groups concerned with proposed land use recommendations or policies.

The Program successfully resolves over one hundred cases per year, and has helped reduce the City Attorney's office caseload by 25%. As of March 1992, the Program had achieved written agreements in over 95% of the mediations held. Using the mediation process, compliance can usually be achieved in half the time required for litigation, and both the City Attorney's office and other city departments realize significant savings in personnel time by mediating code violations rather than prosecuting these violations in court.

Berkeley Dispute Resolution Services

The Berkeley Dispute Resolution Services (DRS) contracts with the City of Berkeley to mediate disputes when applications to the Berkeley Zoning Adjustment Board are contested. A mediator from the Berkeley DRS attends the public hearings before the Zoning Adjustment Board and evaluates whether a particular contested application might be amenable to mediation based on the public comments. For those applications identified as candidates for mediation, the Zoning Board will take a recess from the hearing to allow the parties to meet and discuss the potential for mediation. If parties agree to mediate, a time is set for mediation and the decision on the application will be postponed pending the results of the mediation. If the parties reach a mediated agreement, this agreement is forwarded to the Zoning Adjustment Board. Although the Board retains the authority to either accept or reject the agreement, generally the agreements are viewed favorably by the Board in making their decision.

Most mediations take one session, with sessions lasting around two and one-half hours. More complex mediations may require multiple sessions. Generally, anyone commenting on the project in dispute may be included in the mediation. The program has been in place for eight years, and very few cases which are mediated before the Zoning Adjustment Board decision are appealed to the City Council.

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California State University, Sacramento and
McGeorge School of Law, University of the Pacific

PRINCIPALS

SUSAN SHERRY
Center's Executive Director
California State University, Sacramento

Susan Sherry served as mediator for the legislatively-initiated Growth Management Consensus Project, the broadest California assemblage ever convened on the subject. She currently serves as mediator for 25 diverse organizations collaborating on state legislation regarding environmental & economic recovery. She has policy expertise in land use, environmental, health, social welfare, and local government issues.

EDWIN VILLMOARE
Center's Director of Programs/General Counsel
McGeorge School of Law

Edwin Villmoare, an expert in administration adjudication, trains and supervises nine mediators who resolve over 500 disputes annually under contract with the California Department of Education. He has mediated disputes in education, public housing siting, job discrimination, and community resource allocation. He also has taught mediation to such groups as architects, engineers, and contractors.

KATHLEEN CHOVAN
Center Mediator/Attorney
McGeorge School of Law

Kathleen Chovan is a specialist in environmental law, with an emphasis on hazardous waste management under federal and California law and enforcement of the federal Superfund program. She has assisted both private and public clients comply with a variety of environmental laws. She is trained in mediation, negotiation, community relations, and facilitation.

SENIOR ASSOCIATES

SUSAN CARPENTER
Mediator/Author
Riverside, California

Susan Carpenter, a nationally renown mediator and trainer, has 20 years of experience resolving complex public disputes at the local, state, and national levels. She has mediated disputes on such issues as waste disposal, airport expansion, national park expansion, oil & gas exploration, wilderness designation, and water allocation. She was a Visiting Fellow at the Program on Negotiation at the Harvard Law School.

DONALD CARPER
Mediator/Professor
School of Business Administration
California State University, Sacramento

Donald Carper, an attorney and expert in conflict management and negotiation, has mediated and arbitrated real estate, contract, insurance claim, and government agency disputes. For the past six years, he has trained mediators and arbitrators for the American Arbitration Association. He conducts workshops for the California Department of Transportation in resource management and negotiation.

KATHLEEN KELLY
Mediator/Professor
McGeorge School of Law

Kathleen Kelly has mediated hundreds of disputes on such matters as class action discrimination lawsuits, the legality of polygraph examinations, housing issues and bilingual education. She has conducted intensive mediation training for California Deputy Labor Commissioners on wage and hour claims. She is a founding Board member of the Sacramento Mediation Center.

BETSY WATSON
Mediator/Professor
Center for Resolution of Environmental Disputes, Humboldt State University

Betsy Watson is Acting Director of the Center for Resolution of Environmental Disputes, created by the California Legislature in 1991. She is trained in mediation, negotiation, and facilitation of public discussions. She is currently mediating timber harvest plan and water rights disputes in California's North Coast area.

ADDRESSING LAND USE CONFLICTS IN THE FRAMEWORK OF GROWTH MANAGEMENT

TESTIMONY TO THE SENATE COMMITTEE ON LOCAL GOVERNMENT

Hearing on Resolving Land Use Disputes: Mediation, Arbitration, Litigation
November 6, 1992

Judith Innes, Professor
Department of City and Regional Planning
University of California, Berkeley

Conflicts over the use of land are many and they are increasing. Some are inevitable, but many needlessly waste limited resources in both the public and private sectors. Moreover litigation may resolve issues between two parties, but produce solutions that are less than optimal for the larger community.

I have been asked to talk to you today about growth management systems that have been adopted in other states, emphasizing how these systems manage land use conflict. The important point is that these states are finding ways to prevent much of the conflict by creating forums and arenas where common land use goals and strategies can be agreed to by key players at an early planning stage, rather than waiting for differences to be resolved in court. Eight states[1] have already adopted systems for coordinating the actions of the many players who influence the patterns of growth and uses of land and for achieving important state objective such as economic development and environmental protection. These systems are designed in a variety of ways, but each represents the recognition that not only local governments, but also state and regional agencies, and various interests, including both business and enivironmental groups, have an interest in land use decisions. They recognize that the players all need each others' agreement to achieve their own objectives. Litigation is all too often the only answer for those who oppose land use decisions and project proposals.

State growth management programs therefore set up various arrangements for coordination and resolution of differences. (See the attached papers, "Implementing State Growth Management Systems" and "Group Processes and the Social Construction of Growth Management" and the three typologies on Coordination Through Consensus Building for an overview of the features of these systems.) Florida for example has established a top-down

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[1] The states are Oregon, Florida, Vermont, Washington, Georgia, Maine, Rhode Island, and New Jersey. Several additional states are actively discussing comparable legislation.

system where the state Department of Community Affairs administers a system of detailed regulations to assure that city and county plans are in compliance with state goals and policies. DCA has stringent sanctions it can apply, such as witholding basic state funds to noncompliant cities. To help make this process work DCA set up negotiating sessions between agency staff and local officials and managed to resolve most of the differences and produce "compliance agreements" between state and localities. In the few cases where the differences could not be resolved, the locality or some other intervenor took the issue to Administrative Hearings. But these proceedings were costly and time consuming. The process left out the key interest groups, who turned then to the courts, or to the legislature to amend the laws. The whole process has made local governments angry because they feel they have little choice. Moreover because they made agreements under duress it is unclear they will implement them. A newly appointed Secretary of DCA has now turned to the Growth Management Conflict Resolution Consortium, established some years earlier by Florida law, to assist in developing more inclusive and less adversarial processes of mediation among the state, localities and other interests.

A second very different example is the case of Vermont, which set up a permissive or laissez faire model of growth management designed to be enforced through quasi-judicial decision making. In Vermont local governments are permitted, but not required, to make land use plans and they are given incentives to make their plans consistent with state goals and regional plans. They may submit these plans for approval to regional planning commissions and, if plans are approved as consistent, the locality can challenge state agency plans which are not consistent with their own. They can play a bigger role in the decision making of district environmental boards which implement a state development permitting system. Liberal rules of standing allow citizens and interest groups to challenge the decisions of regional commissions, and these challenges go to a newly created Council of Regional Commissions at the state level. This council first sends the parties to a mediating committee they establish, and if no agreement is reached, the Council will hear the case in a full fledged hearing. The Council's decisions can be appealed to the State Supreme Court.

At the present time few disputes of any significance have been addressed this way, as local plans are still in process and many communities have not submitted them for regional approval. It seems likely that conflicts will erupt at the stage of implementing these plans because there has not always been an arena for many potential conflicts to be resolved between localities or between localities and the interests. Several programs sponsored by the state, however, have provided training in mediation and consensus building to regional planning staff, who have, in a number of cases, successfully resolved potential disputes at the regional level before they emerged in litigation.

A third model is represented by New Jersey's cross-acceptance process. This is a collaborative, consensus building approach. A State Planning Commission, made up of stakeholders and players in growth, including cabinet secretaries along with representatives of environmental, local government and business interests, is empowered to make a state development and redevelopment plan designating areas for preservation and development and

setting state policies for these areas. They are to seek "cross-acceptance" of the plan with localities, with the counties acting as mediating agencies. No requirements are included for local participation or changes in local plans. Nonetheless this process has brought all the localities in the state to the negotiating table. It has resulted after 5 years in unanimous adoption of the state plan by the commission and support for the plan by virtually all the major interests, except real estate and some builders.

This process, which was built on hundreds of small group processes of discussion involving at least 50,000 citizens intensively over time, resolved hundreds of major disputes over the policies for inner cities, agricultural lands and the development of suburban areas. The process was assisted by the state Center for Public Dispute Resolution and by the services of professional mediators, who trained the participants in constructive methods of communicating, interacting and identifying common ground. The incentive for local participation was, most of all, the opportunity to be at the table with the state agency officials of agencies such as the Departments of Transportation and Environmental Protection and to be heard often for the first time before major decisions were made. The incentive for localities to adapt their plans to the state plan is that their own plans may not be implementable if state agencies policies on provision of infrastructure or resource protection differ from their own. At the current time the state agencies are examining their own regulations and policies for revision in the light of the new state plan, which the cabinet secretaries have themselves agreed to.

The result of this long term effort at statewide consensus building has been a new vision for the state that is widely shared among previously conflictual participants in the land use game. While undoubtedly conflicts will arise during the implementation of the plan, hundreds of conflicts have already been identified and resolved to the satisfaction of key players.

These are but three examples of how new administrative arrangements, systems of sanctions and incentives, and formal conflict resolution mechanisms can be established to coordinate the actions of players in land use and to develop agreement on policies and practices. Georgia's bottom-up system is yet another approach which begins with localities developing plans and requires them to mediate conflicts between local plans and ultimately will build a state plan based on these local plans. Each of the models involves a combination of state, regional and local responsibility and communication, and an effort to create statewide objectives and policies that can be followed throughout the state.

One of the most significant findings of my own research in these other states is that whatever the system, group processes have been invented to do a number of the key tasks, even where the groups have not been identified in the legislation. Florida for example not only set up the compliance negotiations, but also established a Governors Task Force on Urban Growth involving representatives of key interests in the state, to help resolve the question of what is sprawl and what are suitable policies to prevent it. A Joint legislative committee on growth management was established to oversee and review the implementation

of the legislation over time and recommend changes. In Vermont a Governor's task force spent many months in intensive discussions around the state to identify the growth issues that motivated their growth management legislation. An implementation committee of state agency heads set policy and guidelines for state agencies to prepare plans on land-use related issues. These groups were often relatively successful at solving problems that could not otherwise be addressed. In an number of instances where no group process was established, the program failed in key ways.

There are many reasons that these consensus-building stakeholder groups are needed in growth management and land use policy issues. There are many values and interests in growth that the stakeholders represent. Moreover the task of establishing effective growth management policy is very difficult. It requires a great deal of knowledge of specific communities and environments and of how policies will play out across a state. It requires moreover the assent and cooperation of many important actors. Group processes, especially those that aim toward consensus building and seeking common ground rather than adversarial procedures, can go a long way toward establishing a framework of accepted policies that all will support.

It is useful to think of two primary functions for these group processes. The first is to provide forums where the participants can develop shared meanings and shared views of the issues. The Governor's Task Forces in both Florida and Vermont served this function. The State Planning Commission in New Jersey spent much of its time working through the policy ideas jointly with the other participants. The second function is to provide arenas where the participants can face one another directly and fight out their differences. Florida's compliance agreement process and its current mediation efforts provide such arenas. The second stage "negotiation phase" of cross acceptance in New Jersey provided just such an opportunity for local governments to negotiate their differences with the state commission.

Not all issues will be resolved in such forums and arenas. Courts of some kind are also ultimately necessary to resolve those remaining disputes. They are also necessary at times to evaluate the legitimacy of unusual agreements that are reached through the group processes. Florida's administrative hearing procedure and Vermont's Council of Regional Commissions provide examples of such courts. But experience shows so far that, while it may be important to create such appeals processes, effective consensus building at early stages may mean they will be little used.

Group Processes and the Social Construction of Growth Management

Florida, Vermont, and New Jersey

Judith Eleanor Innes

Consensual groups are playing a growing role in planning. This article looks at the group processes that have played key roles in state growth management programs in Florida, Vermont, and New Jersey. The groups have been involved in problem framing, policy development, policy oversight and review, negotiations among competing interests, and developing procedures for accomplishing complex new tasks. The group processes have succeeded in developing shared meaning, coordinating among agencies and levels of government, and often in reaching consensus among players. But they have been only partially successful, at this stage. The next challenge is to redesign planning and decision making institutions to incorporate group processes in a way that makes effective use of what they accomplish.

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Consensual group processes are playing a growing role in planning practice. Nowhere is this trend more evident than in the seven states that since 1985 have instituted statewide growth management programs.[1] These programs entail strategies to coordinate and redirect the actions of the many players whose decisions affect the location, patterns, and types of development. The programs seek to create statewide patterns of growth that will limit infrastructure costs, provide for economic development and housing, protect natural resources, and improve the quality of community life. The processes and institutional arrangements range from centralized bureaucracy to laissez faire approaches. Nonetheless, in all the states, governors, state agencies, regional commissions, and legislatures have created group processes, typically after passage of the legislation, to handle many of the key tasks. Where no groups are formed to do certain tasks or where groups are poorly designed, the implementation of growth management has been hindered.

This article contends that the design and implementation of growth management demand carefully constructed group processes to build socially many of the policies. Because growth management is so complex and involves so many actors, actions, and places, no one set of experts can design a successful program nor can any state impose an effective program from the top down. Instead, groups, including experts, citizens, and high level officials, go through a process of mutual learning to create a shared conception of the intent of growth management and to agree on specific ways to implement it. The groups learn by doing and by discussing. They apply policy concepts and principles to actual problems and places. They create workable strategies, principles, and procedures.[2]

The paper reports on three states—Florida, Vermont, and New Jersey—each of which has passed legislation mandating a distinct set of institutions for managing growth. The paper looks at how and why group processes were invented to implement the legislation, at the tasks these groups did, and at the results. It offers explanations from the literature for why group processes could be expected to be important for growth management, and it develops a typology of the tasks for which group process seems particularly needed. The growth management programs provide a natural experiment and offer an unusual opportunity to compare the effectiveness of different strategies for the same purposes. (See Table 1 for an outline of the basic growth management program strategies and Table 2 for specific group processes and their tasks.)

Consensual Group Process

This article contends that for groups to develop workable and widely supported policies and programs certain conditions must be met.[3] The groups must incorporate the key stakeholders—representatives of the interests that will be affected by the decisions—and those who can make the program successful. The groups must know that their tasks are important and that the agreements

TABLE 1: Growth management strategies of three states

Program feature	Florida	Vermont	New Jersey
Overall approach	Top down bureaucratic	Laissez faire, quasi-judicial	Collaborative, consensus-building
State role	State goals and plan. State agency (DCA) writes and enforces implementing rules.	State goals. No implementing agency or commission. Council of Regional Commissions (CORC) reviews plans and has quasi-judicial role.	State Planning Commission (SPC) prepares draft state plan for cross-acceptance.
Consistency requirement	Local and regional plans must be consistent with state goals and plan.	Local planning is voluntary. Consistency of local plans with state goals decided by regional commissions. CORC decides if regional plans are consistent with state goals.	No consistency requirement for local planning. Counties act as mediators between SPC and localities in negotiations over state plan. No regional plans.
Coordination of infrastructure with development	Adequate infrastructure must be available concurrent with development.	State agency plans must be consistent with state goals and with approved local plans.	State plan to be used as guide to state investment decisions.
Sanctions and incentives	DCA can withhold local funding from noncompliant localities.	Localities with approved plans can challenge state agency plans.	Participation in cross-acceptance gives the localities a voice in the state plan. Local plans in conflict with state plan may not be implementable.
Appeals procedures	Administrative Hearing Board decides on challenges to DCA decisions.	CORC hears appeals of regional commission decisions, challenges to state agency plans. Assists in mediation. Supreme Court is final arbiter.	No appeal process above the SPC. Legislature and governor decide whether to implement the state plan.

they reach will matter. Moreover, the group process must be conducted in a way that assures that, to the extent possible, all members have an equal voice, even if they do not have equal power outside the group. Thus, those managing the process must assure that all members have access to essential information and that they follow rules of discussion that acknowledge all views, preventing a single voice from dominating. Finally the groups should include experts to help bridge the gap between technical and everyday knowledge. Typically these groups require training and professional facilitation, because most members are unaccustomed to such rules of interaction and many have been in adversarial relationships with one another.

Consensual group process involves informal, exploratory discussion designed to assure that stakeholders learn about each other's unarticulated interests and perspectives. Participants seek common ground and collaborate on solutions. These groups can result in both individual and group learning and can change attitudes and commitments. The groups can be most productive when they challenge accepted views and reformulate problems in ways that allow consensual outcomes or creative new directions for action.[4]

Planning and Group Process

The traditional land use planning process has sometimes involved consensual groups. John Friedmann (1987) identifies "social learning" as one of the major styles of planning. For example, planning commissions in small communities may include citizens and such stakeholders as developers and environmentalists, along with planners, in informal, consensus-seeking discussion. Today, however, legal requirements typically force public bodies into formal, step-wise procedures, with announced meetings, strictly followed agendas, and standardized decision criteria (Rudel 1989). Accordingly, in recent years, ad hoc task forces and advisory committees, freer from such restraints, have been the most likely to operate in exploratory, consensus-building ways.

Consensual group process is being discovered in many areas of planning theory and practice. Strategic management and strategic planning in business (Rowe et al. 1989) and in government rely on such groups for envisioning the future, identifying strategic issues, and solving problems (Bryson 1988). Ozawa (1990) reports on how consensual groups have helped to integrate science and policy. Others have documented their use in dispute resolution (Amy 1987; Rabinovitz 1989) and community goal setting (Bryson and Einsweiler 1988). The Joint ACSP-AESOP International Conference of U.S. and European planning schools in 1991 listed sixteen papers under the category, "negotiation, mediation, and group process." However, no one has yet systematically identified the variety of planning purposes for which group process is particularly well suited.

TABLE 2: Group processes in growth management in three states

State	Group process	Tasks
Florida	Negotiation between DCA staff and local officials	Reaching a compliance agreement on a local plan.
	Governor's Task Force on Urban Growth	Defining the problem of sprawl and proposing policies to alleviate it.
	Joint Legislative Committee on Growth Management	Oversight and review of all growth management legislation and its implementation. Proposing revisions.
Vermont	Governor's Task Force on Vermont's Future	Identification of a need for growth management.
	Working groups of agency heads and of state agency staff	Creation of principles and practices for the preparation of state agency plans.
	Working groups of stakeholders, potential producers, and users	Design of a statewide geographic information system.
	Legislatively appointed task force of supporters and opponents to review Act 200	Consider need for additional amendments.
New Jersey	State Planning Commission (SPC) made up of interests, citizens, and agency heads	Multiple. Policy and plan development, oversight and review, build and maintain consensus, propose implementation.
	SPC and localities, with counties as mediators	Cross-acceptance of the state plan through negotiation. Development of interim and final plans.
	Advisory committees to SPC, made up of stakeholders, agency staff, and experts	Policy and plan review and development by topic area, such as housing, infrastructure, or agriculture.

The State Programs

The growth management legislation in all seven states was backed by wide public consensus and by development and environmental interests. These states typically had experienced rapid growth; visible increases in traffic; problems with air and water quality; and conflict among developers, environmentalists, and local governments. These stakeholders decided that they preferred rules of the game to endless controversy, and they agreed in principle to try to achieve a consensual set of goals.

The legislation in each state established a framework of goals, organizations, and procedures, leaving the development of specific, workable policies and implementation procedures to emerge from the next steps. While there are many variations among the state programs, the most common features are:

- Ten to twelve broad state goals;
- Requirements for important players—local governments and state agencies in particular—to make plans consistent with state goals;
- Review and comment procedures by the various players on each other's plans;
- Incentives and financial assistance for local planning;
- The development and application of a few common policies and standards across the state;
- Some provision for conflict resolution;
- The development of statewide geographic information systems (GIS) to identify the location and extent of various land uses, environmentally fragile areas, and other categories (Innes forthcoming).

These innovative programs are broad and multipurpose, rather than focused on one resource, one issue, or a limited set of areas. Moreover they call for the *sharing* of power among levels of government, unlike an earlier generation of state land regulation,[5] which preempted local control over certain land use decisions. The objective is to link local governments' land use planning and regulation with state agencies' infrastructure investments and environmental regulations.

Why Group Processes Are Important for Growth Management

Some arguments in the literature anticipate the reliance of growth management programs on group processes. These programs, for one thing, require the most challenging form of coordination. Thompson (1967) contends that in the easiest case, when tasks are repetitive, the technology known, and the environment predictable, coordination can be accomplished through the standardization of all parts and inputs. If a task involves sequential interdependence—the output of one part of the system is input to the next—participants can coordinate by making plans that are mutually consistent, as the legislation requires in most growth management programs. If, however, the outputs of one activity are inputs to another and *vice versa*—for example, highways generate development and development generates highway demand—this most challenging form of coordination involves reciprocal interdependence. In this case—the dominant one in growth—coordination requires mutual adjustment. Face-to-face group discussions are essential to accomplish such adjustment efficiently.[6]

Growth management is also a case of planning under uncertainty, as discussed by Christensen (1985). She ar-

gues that when there are multiple goals, as in growth management with its broad purposes and many players, planning requires bargaining or mediation. When the means for accomplishing goals are also uncertain, as research on the implementation of growth control techniques suggests is the case (Landis 1992), then adaptive approaches are needed to facilitate learning by doing. When both goals and means are uncertain, as they are in growth management, charismatic leadership or a social learning strategy is needed. Only when society knows how to do a task and agrees on a single objective is top-down regulation appropriate (de Neufville and Christensen 1980).

The literature on successful innovation also anticipates the importance of group process to growth management, which is an innovation in the practices and norms of government. Rogers (1983), in his review of hundreds of innovations in a wide range of organizations, concludes that three of the critical factors in the successful adoption of an innovation are compatibility with values and understandings of the players, observability of the benefits, and comprehensibility. Successful adoption requires adapting the innovation to the context and needs of the users and it requires creating a shared meaning and purpose for the innovation (Eveland et al. 1977). For such tasks, group process is both an efficient and effective strategy.

Finally growth management presents a particularly challenging task of linking knowledge and action. It requires many kinds of knowledge—from facts and predictions about growth patterns and relationships among activities to knowledge of the interests and values of players and practical understandings of how things work. The knowledge must, moreover, change the behavior of the players. The standard approach relies on experts using formal analyses and "objective" research methods to provide information for decision makers.[7] But this information poorly predicts the effect of a policy in specific contexts and communities and does not provide the "how to" knowledge of what works in practice.

Moreover, the issues at stake—property rights, land use control, quality of life—have symbolic meanings, linked to deeply held values, which growth management appears to threaten. Similar stories, told in at least two states, suggest how deep these emotions are. A story circulated in Vermont that a citizen repeatedly testified at hearings that "Act 200 scares me to death." Then one day at the podium he died. This widely discussed story might have related just an unfortunate coincidence, but the New Jersey plan was also blamed, in a letter to the director of state planning, for the deaths of two of its opponents. The persistence of this myth and its circulation in different states demonstrates that more than technical knowledge is required to mobilize collective action and to overcome shared emotional attachments to existing practices.

Consensual groups and social learning are grounded in a different view of knowledge than the positivist underpinning of the standard approach to informing policymaking. This phenomenological view, implicit in the work of consensual groups, contends that everyday knowledge (including knowledge of stories or myths) rather than expertise is a starting point for inquiry. The task of knowing in this view is making sense of issues rather than trying to distill out principles. Context is important. Learning is inductive rather than deductive, and facts are regarded as socially constructed in a community rather than purely objective.[8] This kind of knowledge has the purposes of understanding and practical action.

Research Approach

The research involved field and telephone interviews, conducted in 1988, 1989, and 1990. In each of the three states the researchers interviewed in-depth between fifteen and twenty-five people with key roles in the growth management program. The interviews focused on the progress and evolution of the programs and on how and why decisions were made. The purpose was to get an accurate account of events and their logic, and to compare and assess the effectiveness of the institutional designs. The inquiry revealed that group processes had an unanticipated importance. Accordingly, the research also noted the membership, focus, and products of the important groups. Informants included state, regional, and local staff, agency heads, citizen commissioners, elected officials, and leaders of environmental and other organized interest groups. The research also reviewed program documents, including guidelines, minutes of meetings, plans, and findings of administrative hearings. In New Jersey the author attended key meetings and observed processes firsthand.

Florida: Modifying a Top-Down Strategy

Florida's growth management program, passed in 1985, gives ample power to the state Department of Community Affairs (DCA) to assure that local plans conform to state goals. All local plans go to DCA, along with comments from state and regional agencies. DCA either approves the plans or makes objections in writing. Originally, the locality either had to change its plan to meet DCA requirements or take the issue to the state Administrative Board. The legislation did not set up any group processes, not even a commission to elaborate policy or develop implementation procedures. Instead DCA prepared detailed rules for assessing local plan compliance and developed a large matrix for staff to use in checking plans.

Negotiating Compliance Agreements

The DCA began by disapproving nearly one-half the local plans, and it seemed likely that many localities would come back a second time with unsatisfactory plans. When it became obvious that the procedure for resolving differences was slow and inflexible, DCA invented "compliance agreements," which involved DCA staff and

officials from noncompliant localities in meeting face-to-face to negotiate plan revisions. As of May 1990 this group process was successful insofar as it produced agreements in all but three of the over one hundred disputed plans.

Longer term success, however, is more questionable, because the compliance agreement negotiating groups are neither consensual nor stakeholder based. Local officials are under pressure to settle to avoid losing substantial state funding. They contend bitterly that DCA "gets what it wants." DCA staff agree. They see the negotiations as an efficient procedure for showing the localities that they "mean business." They do not regard the meetings as a way to give localities a greater voice. Moreover, key stakeholders such as environmental groups, developers, and farming groups are not included. Environmentalists have already challenged at least one plan in administrative hearing. DCA can only require plan compliance and not control plan implementation or specific development decisions. Conformance in the implementation phase depends on local watchdogs and on the acquiescence of the localities and the development community. Failure to achieve consensus among these players will be important in that phase.

Oversight and Review

As a result of the growing legislative responsibilities for oversight and revision of the growth management law along with a variety of growth-related laws, the legislature created the Joint Select Committee on Growth Management. The group has become knowledgeable as it monitors experience, discusses issues, hears from lobbyists and experts, and tries to achieve consensus. Staff play a strong role as participants. Committee meetings operate consensually to a considerable degree. For example, when an amendment is proposed, the chair goes around the room asking lobbyists and committee members, "Are you on or off?"

This committee has created partial consensus on various growth management measures, but its effect on legislation has been limited. It is not a true stakeholder group. Instead of participating, some key interests go directly to the legislature to present what one respondent called "piranha strikes," often in direct opposition to the committee. In addition, this committee, as a legislative body, is not linked into the administrative decision making structure. The committee's positions sometimes conflict with DCA's, which is a powerful agency with its own legislative influence. Moreover, the committee does not have the power to report out legislation. For all these reasons, the reforms it recommends are not necessarily adopted.

The Meaning of Sprawl

Though one of the principal reasons for growth management in Florida was sprawling development and its consequences, neither the law nor the regulations made that issue central. The principal regulatory concept is "concurrency," which means that no plan or development order can be approved unless the locality shows that adequate services and infrastructure will be provided simultaneously with the impacts of development. The legislature intended that this provision would prevent further traffic congestion and degradation in air and water quality, while accommodating growth. When Governor Martinez refused to support new taxes to fund infrastructure, however, the concurrency requirement became a limit on growth. Moreover, it encouraged developers to build sprawling subdivisions at low density in rural areas, where septic systems would be sufficient and unused road capacity existed.[9]

The DCA began to use the act's provision against sprawl to demand that some localities change their zoning densities from one unit per acre to five units per acre, and in others to one unit to 40 acres or even one unit to 160 acres. DCA disapproved plans that overzoned by providing more land for development than needed for predicted growth, and they objected to single-use zoning in many areas. The rulings not only aroused opposition from local officials and developers, they also caused confusion and discredited DCA. One respondent said that anticipating DCA was like "shooting at a moving target." Another said, "Sprawl is like pornography, hard to define." Many contended that antisprawl policy should depend on the area's context—whether the area is urban, suburban, or rural. The difficulty was a "one-size-fits-all law." Finally one county took DCA to the Administrative Board, which heard expert testimony on the meanings of sprawl and the reasons for discouraging it. The board's ruling provided the state with the clearest definition of sprawl to that point.[10]

Defining and stopping sprawl became so central an issue that in 1988 the governor appointed the Task Force on Urban Growth. The members of this group included high-level stakeholders and experts on growth, including developers, business representatives, environmental leaders, professors, elected city and state officials, state cabinet secretaries, and the head of the American Planning Association state chapter. After thirteen months, the task force released its report (Florida 1989), which contends that sprawl not only damages the environment, causes traffic congestion, and uses state resources inefficiently, but also results in the loss of a sense of community and identity. The report recommends mapping the state into "urban service areas" and "urban expansion areas" and reorganizing state and local agencies to prepare regional transportation strategies.

The group defined a shared and not previously obvious set of meanings for sprawl and its consequences, based not only on the members' experiences, but also on social and economic research. The group challenged the assumptions, purposes, and strategies of the growth management legislation in a way that would have been inappropriate for DCA. Despite the group's diversity, the members avoided a minority report. Unfortunately no obvious process existed to transform these ideas into action and, in any case, key players, such as local government and state agencies, were not represented.

Vermont: Incentives in a Laissez-Faire Model

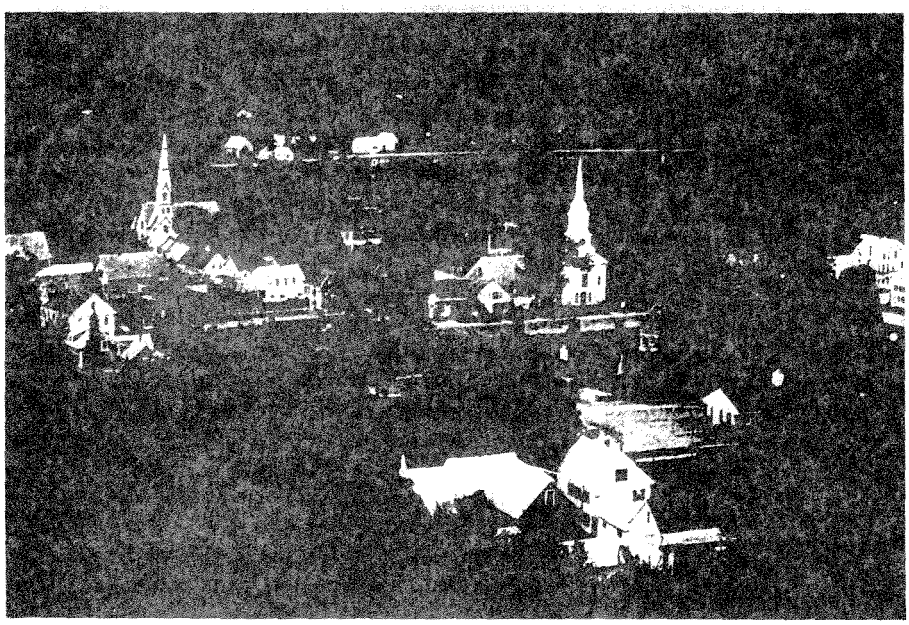
Vermont's Act 200, passed in 1988, relies on a decentralized approach, with quasi-judicial proceedings deciding on plan consistency. Liberal rules of standing allow a wide range of interested parties to initiate proceedings challenging plan approvals or disapprovals. The law establishes neither an oversight commission nor a state regulatory bureaucracy. It requires both regional commissions and state agencies with land use–related responsibility to prepare plans consistent with state goals. Local planning and land regulation are optional. The act originally established thirty-two goals against which the regional planning commissions should evaluate local plans. The legislation permitted plans inconsistent with state goals, but allocated new funds and special rights in the state development permitting process (Act 250) to localities with approved plans. Such localities can also challenge state agency plans that do not conform to their own. The one group process set up by the legislation is that of the Council of Regional Commissions (CORC), made up primarily of local and regional representatives and a few other stakeholder representatives. CORC mediates or adjudicates disputes over local plan consistency with Act 200 and disputes between localities and state agencies. It also reviews regional plans and state agency plans and forwards its comments to the legislature.[11]

The Battle over the Meaning of Act 200

Despite the permissiveness of Act 200, its implementation has been controversial. While the problem rests partly with Vermont's politically divided population, Vermont's leadership failed to achieve a widely shared meaning for the act. The consideration of the growth issue at the state level began with the Governor's Task Force on Vermont's Future. Members included stakeholders from industry, universities, farming, ski operations, the state land trust, the cabinet, the legislature, and the League of Cities. They operated in an exploratory, learning mode. They met for many months and held twenty-three hearings and focus groups with citizens and interest groups around the state. The task force report was largely a set of stories about the problems Vermonters face from uncontrolled growth. It was a call for action to protect the economy, environment, and quality of life (Vermont 1988). The effort put growth management on the public agenda, but it did not set policy direction. The legislature put together Act 200 shortly thereafter, but without the aid of a special group process.

Within a year the consensus that seemed to be behind the law turned to antagonism and mistrust. The controversy began in the tiny upstate village of Sheffield. The town leaders decided to bring their protest against the act statewide. Calling themselves Citizens for Property Rights, they argued that Act 200 amounted to oppressive state control of local government, and protested the regional commissions' right to approve local plans. They feared the act would damage the economy, argued that planning and zoning were confiscation of property, and worried that the process would give environmentalists too much control.

This was a battle over symbols. Far from instituting state control, the act left local planning optional. Towns with approved plans would have access to new resources and new power to challenge state agency plans. Through the earlier Act 250, state-appointed boards could deny



Peter Owens photo

South Royalton, in central Vermont, shows the traditional pattern of compact settlement with a mix of commercial, residential, and institutional uses organized around a public common, and a clear delineation between the built-up core and surrounding rural landscape.

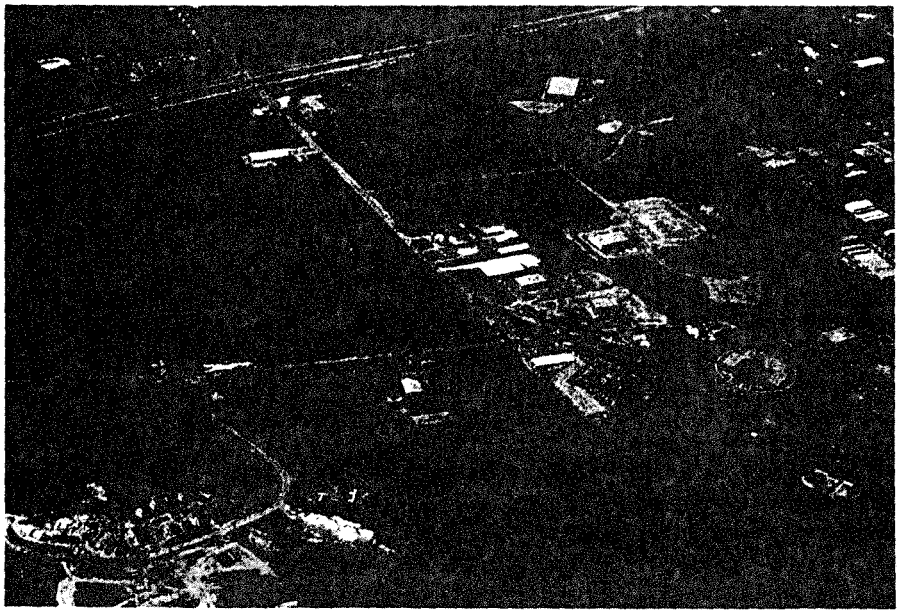
permits to projects over ten units or ten acres and to virtually any project in towns *without* plans when the boards determine that there will be environmental damage. Towns with plans, therefore, have *more* control over their own development than without them. Finally, rather than stopping growth, Act 200 gave the state a high rating as an investment risk in the banking community.

Though the founders of the revolt were from a rural, blue-collar, economically depressed community, they found remarkable support in communities under growth pressure and among professionals and environmentalists. Posters went up in Vermont villages saying, "Act 200 is a bad law." The broad-based public interest group of business and environmental leaders formed to support the act abruptly fell apart. On town meeting day in 1989 nearly one-half the towns voted not to participate in Act 200.

Although most town officials regarded the vote as merely advisory and continued to develop local plans, the state legislature regarded the vote as a sign of discontent. By June it had reduced the act's goals from thirty-two to twelve. The new goals were more general and less enforceable. The legislature also made the approval of local plans by regional commissions optional for several more years and increased the rights of localities without approved plans.

Why did so many Vermonters oppose a law that corresponded to their values and interests? Why did community leaders mostly support it, while other citizens opposed it? The answer seems to be that the act had no well understood public meaning. Observers told of leading citizens who opposed the law, but could not articulate their reasons and knew little about its provisions. Members of Citizens for Property Rights were able to endow Act 200 with the problems associated with a then unpopular education law, although there were no real parallels.[12] Further, the idea of planning was new to many Vermonters, and they often had little notion of what its practical benefits might be. Moreover, because the permitting process of Act 250 had effectively modified the most unsound development proposals, there were few vivid symbols of failure to plan. Further, no one on the governor's task force represented the constituency later represented by Citizens for Property Rights. Finally no group, neither a commission, legislative committee, nor task force, existed during implementation to address the questions that arose.[13]

After amending Act 200, the legislature, hoping to forestall further conflict, established a working committee of representatives of opposing views, including members of Citizens for Property Rights. The legislature assigned the committee the vague task of considering the need for further amendments. The committee, however, brought together emotionally opposed perspectives without group facilitation. One observer said some members appeared uninterested in even discussing the law. The majority concluded that it was too soon to amend the law again (Vermont 1990), while the minority said, "Act 200 has become a tangible surrogate for the intrusion of state government into our personal life and that of our community" and urged repeal. The differences in views and the fact that the minority continued to adhere to the old symbolism suggest that the group learned little and that the process left deeply held beliefs untouched.



Peter Owens photo

Rapidly growing Taft's Corner, Vermont, shows how the scattered, single-use, auto-dependent pattern of development wastes land, increases traffic congestion, and violates the strong historical distinction between town and countryside.

Working Groups

Though group processes have not succeeded in developing shared meaning for Act 200, groups have been more successful in developing ways to accomplish complex new tasks. The most important example has been in the design of state agency plans. State agencies had not previously prepared plans, much less considered the land use implications of their actions. They did not know what it would mean to apply the state goals to their own practices, nor what form a useful plan would take. In Florida, many state agency plans, developed without group process, had to be returned for revision.

In Vermont, however, a committee of several state agency heads guided the process, with the assistance of a staff-level working group, representing the nineteen agencies required to prepare plans. The group defined in operational terms key concepts like "projects that affect land use," reviewed agency programs affecting land use, clarified the implications of state goals, and worked through such issues as the proper agency response to mutually conflicting goals. The groups abruptly disbanded, however, with a new governor, but succeeded in completing plans, apparently in more acceptable form than in Florida.[14]

Act 200 also set up group processes to design a statewide GIS, which was to use data from many agencies and provide a common database for all players at the state, regional, and local levels. Building a GIS is a complex technical and managerial task (Innes and Simpson 1991) that requires negotiation among participants and agreement on common standards. Working groups in Vermont at state and regional levels have engaged technicians and managers, as well as citizens, business people, and planners in this task. Pilot programs allowed users to learn and develop applications and informed state level technicians about practical issues.[15]

New Jersey: Cross-Acceptance and Collaborative Planning

New Jersey's program is unique in that it is fundamentally based on consensual group process. The process has identified and resolved many of the issues that remain problematic in other states.[16] The first significant group was the one that wrote the legislation. The governor had agreed informally to support a consensus bill providing for state planning. Accordingly a self-selected and influential group of key stakeholders representing business, environmental concerns, and local government interest groups, after months of discussion, prepared the basic legislation that became law.

The most important group involved in New Jersey's growth management program is the State Planning Commission (SPC). Its members are drawn from the state cabinet, municipal and county governments, and the public, including environmentalists, business interests, Republicans, and Democrats. The Office of State Planning (OSP), in the Department of Treasury, staffs the commission. The SPC's task has been to prepare, adopt, and revise regularly a state plan to carry out such objectives as preventing sprawl, promoting development and redevelopment, and protecting environmental resources. The law requires the SPC to define areas for growth, limited growth, agriculture, and other categories. New Jersey's most creative contribution to the growth management tool kit is, however, the concept of cross-acceptance. The legislation requires that agreement on the state plan be *negotiated* with the counties and municipalities.

While this program, like the other states' programs, aims for consistency among state and local plans, it seeks to achieve this without sanctions or a plan approval process. Participation by localities in cross-acceptance is voluntary. All New Jersey municipalities had master plans and land use regulations prior to the law, and they are not required to alter these. Cross-acceptance stresses collaboration, bringing localities together at the county level to prepare a report, rather than requiring separate local responses. Incentives for local participation and adjustment of plans and zoning are substantial. Localities depend heavily on state decisions on infrastructure and environmental regulation. Local property taxes are already high; localities are often too small to deal with major facilities needs; and few regional bodies facilitate communication or cost sharing among the communities. Though local leaders remain skeptical about the ultimate influence of the state plan on state investment decisions, they have concluded it is better to be at the negotiating table than not. Moreover, if the state makes a decision on whether to invest in infrastructure in a particular area, it is in the locality's interest to adapt its own plans to reflect that reality. While localities also had a potential interest in preparing consistent plans in Vermont because they could then challenge state agency plans that did not conform to their own, no process comparable to cross-acceptance informed or convinced community leaders that they might influence the state if they got plan approval.[17]

Although the SPC cannot force the governor, the state agencies, or the legislature to implement the plan, its membership includes key cabinet officials, who, in assenting to the plan, implicate their agencies. Writers of the legislation believe that if the plan is prepared with "full participation of state, county, and local governments as well as other public and private sector interests," it will be carried out. A governor is unlikely to challenge a well-constructed agreement developed among the many constituencies.

State Planning in Practice

The SPC produced first the preliminary plan—a three-volume document of policies, criteria, and standards (New Jersey 1988). The plan included a tier map, which divided the state into seven categories of existing land uses, including "redeveloping cities and suburbs," "suburbanizing areas," "exurban reserves," and "agricultural

areas." The plan included statewide and tier-specific policies on such topics as population densities, housing, and capital facilities.

This plan was controversial. The map relegated some communities to little or no development. Some interest groups and communities challenged the plan's density standards. Some business interests contended the plan would destroy the economy and demanded an economic impact statement. Business leaders and developers feared having to channel their activities into troubled older cities instead of affluent suburbs. Farming interests said it would unfairly take away property rights.

The SPC set up a three-phase cross-acceptance process. In phase one municipalities compared the preliminary plan to their own plans, conditions, and projections, and counties prepared reports incorporating the municipalities' findings, identifying points of agreement and disagreement with the state plan. OSP summarized and organized these into carefully framed issues for discussion. Phase two involved negotiations between a subcommittee of the SPC and representatives of the municipalities in each county. These negotiations transformed the vast majority of differences into agreements through the reframing of issues, clarification, modification of the plan, and even major changes that later became part of the interim plan (New Jersey 1991). The third phase—issue resolution—addressed the remaining disagreements before the preparation of the final plan.

Throughout cross-acceptance another set of group processes also operated. SPC set up advisory committees, each to review the plan from one perspective, such as urban, suburban, or rural policy; agriculture; regional design; housing; or infrastructure needs. Members included knowledgeable and interested parties in state and federal agencies, environmental groups, academics, business, and farming. Their reports have played key roles in the revision of the plan.

The philosophy of consensual groups permeated the New Jersey planning process. The SPC, having decided that its seventeen-member commission was unwieldy, divided into smaller working subcommittees to handle policy development. These subcommittees worked through issues, sometimes in day-long retreats. They operated in an open way, usually including members of the public in their discussions. Typically their recommendations became SPC policy.

The SPC staff gave careful attention to the design and management of groups. The state provides training in mediation and group process to state and county staff and to citizen participants. Staff selected members of certain advisory committees to represent a "microcosm of the larger public debate" in the hope of "building creatively on tensions" among the various interests. In the groups, staff work to create communication among all parties. They listen, learn, respond to participants, and build trust. They facilitate meetings, provide information, clarify communication, reframe issues, record discussions and agreements, and prepare position papers on request. In one meeting, for example, the director frequently articulated and reframed his interpretation of the meaning of group members' statements until all parties were satisfied that they understood one another.

The philosophy of SPC is summed up in a report of one of the advisory committees:

> Wise decision makers know that consensus fares better than edict where there is limited or no authority to enforce. In New Jersey jurisdictional arrangements there is . . . minimal authority for regional growth management. . . . Thus is born the imperative for collaboration. . . . Collaboration involves equality, mutual respect, and full representation to be effective. All levels of government, the private and nonprofit sectors, and citizens and interest groups ought to deal as equal partners. Full representation also includes a wide array of professional assistance, beyond planners, landscape architects, engineers, and lawyers (New Jersey Planning Commission 1990, 24).

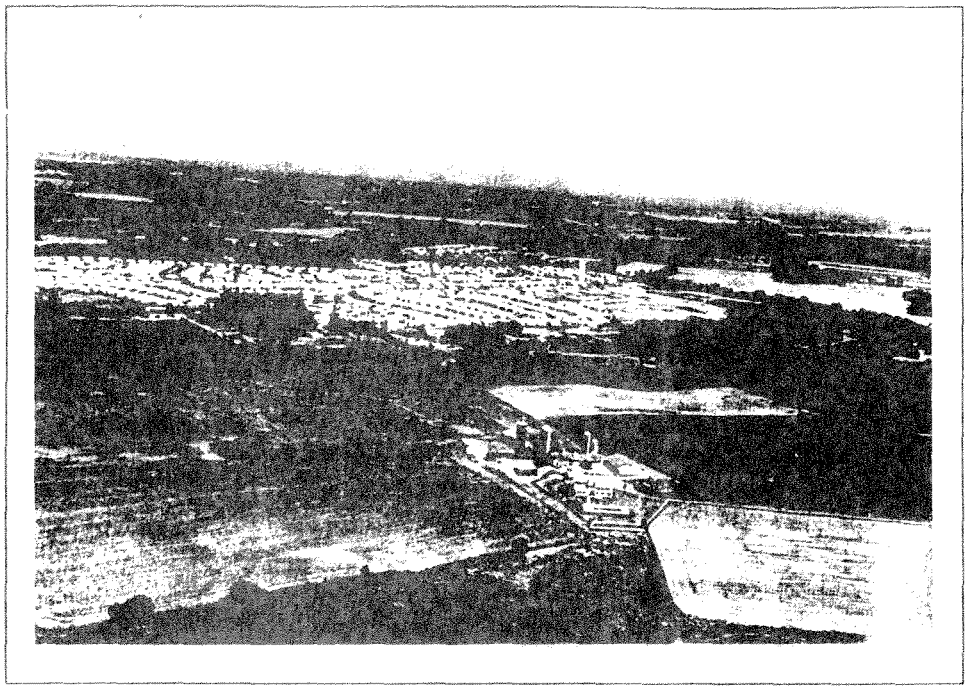
Content of Group Discussions

In the cross-acceptance process, groups across the state raised similar concerns. Many were the same issues that worried Vermonters and led cities to challenge DCA rulings in Florida. The municipalities and counties were concerned about criteria for land allocation, for example, to agriculture or exurban reserves. How would the criteria actually apply in various contexts? Should they depend on the type and viability of the agriculture? What if an island of office development already existed in the center of an agricultural area? Groups discussed standards, both to understand the theory behind such ideas as "carrying capacity" and to explore the implications of applying standards in different contexts. For example, which is more appropriate in reserve areas: three- to five-acre lots or cluster zoning?

Groups commonly questioned the meaning of concepts and challenged the language in the plan. When is a suburb really "built out?" Were the tiers tantamount to zoning? If so, were they intrusions on home rule? City representatives objected that the "municipal distress index" would harm their image. Many discussions entailed efforts to give meaning to such elusive ideas as "rural character."

Counties and municipalities were concerned that the plan did not spell out implementation procedures and hesitated to agree to the plan without knowing the specific costs and effects. They had contradictory fears about both rigidity and ambiguity. The cross-acceptance process allowed them to address these questions by talking them through, developing trust, and compromising.

Simultaneously the advisory committees were involving players new to planning, who were learning about the issues and about each other's concerns and, in the process, developing new ideas. City representatives learned that the state plan was not simply concerned



This single-family, low-density, single-use residential subdivision, planted amid farms in rural southern New Jersey, has no services and is miles removed from any. Source: New Jersey Department of Agriculture.

with growth at the fringe. The rural policy committee outlined criteria for determining densities in rural areas. The regional design committee proposed making "communities of place" focal points for settlement, rather than the tiers, and outlined a hierarchy of such communities, including urban centers, corridor centers, towns, villages, and hamlets, each with its characteristic size, density, jobs, and other activities.

In the negotiation phase, SPC staff, in consultation with county officials, identified not only the issues of disagreement, but the interests of the participants. The focus on interests rather than positions permitted the "getting to yes" model of negotiation (Fisher and Ury 1981). The discussion forced the SPC to clarify its policies and develop more specific implementation strategies. Sometimes talking through the problem revealed that there was less disagreement than participants originally thought, and that a minor change would resolve the issue. Sometimes reframing the problem eliminated the conflict.

Evidence of Success

The SPC unanimously adopted the state plan on June 12, 1992. This action was eloquent testimony to the success of their consensual group model of planning. Even the secretary of agriculture supported the plan on behalf of his constituency, which was the last major holdout.[18] All municipalities and counties had participated in cross-acceptance. Even the coastal areas chose to participate though they were exempt from the legislation because they were already governed by a regional regulatory authority. In further testimony to the success of the process, supporters of the state plan prevented passage of a bill to require legislative approval before the plan could take effect. The executive director of the New Jersey State League of Municipalities testified against the bill, saying the plan was a "remarkable achievement," and, as put together through cross-acceptance, was more representative of the will of the people than it would be if adopted by the legislature.

Cross-acceptance systematically reduced hundreds of disagreements to a small handful. The huge controversy that erupted with the publication of the preliminary plan subsided after a year or two. By June 1992, only some builders and realtors remained as vocal opponents, with virtually all other interests backing the plan. Although recession and budget cuts will hit OSP as they will most state activities in New Jersey, the state agencies and local governments have already begun to review and revise their own plans in the light of the state plan. The state plan has already had an impact. The state budget and the governor will play key roles in the next stages.

Results of the Process

Cross-acceptance has resulted in significant changes in the state plan. SPC eliminated the term "tiers" and changed the plan to emphasize communities of place as the focus for new development. Group discussions revealed the difficulty of labeling cities as "distressed" and of distinguishing between exurban reserve and agriculture areas. The final plan resolved these ambiguities by outlining a smaller number of planning areas and dropping the distress index. This plan adds statewide policies for agriculture, redevelopment, and overall growth patterns. Standards and guidelines will be in an advisory manual rather than in the plan.

Cross-acceptance has engaged tens of thousands of

New Jerseyans,[19] who have learned about each other's interests and perceptions, as well as about the problems of growth and tools of planning. The participants include citizens and professionals in public and private sectors, leaders of the business and environmental communities, and elected officials. These people have been directly and intensively involved at various levels of government, through formal and informal committees and task forces. The average citizen, however, has not yet participated extensively. Public hearings and meetings are mainly attended by professional staff of various organizations.

The process has created an alliance of key players and leaders who speak for the plan. Many of these players, because they were part of the negotiations, now have a stake in the plan's implementation. State agency heads and directors of organizations like the League of Municipalities can help assure that the plan is backed by action, either because they are influential or because they are decision makers.

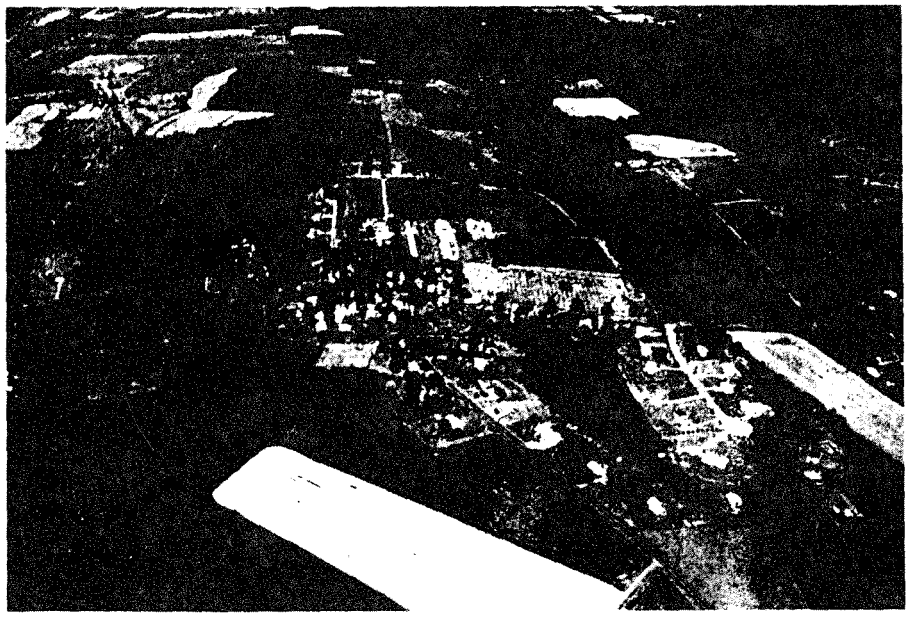
Group process, if it empowers and engages the participants, has its own dynamic. Members come to care about finding a solution that meets each other's concerns. They put creative energy into the invention of new strategies that may run counter to their original assumptions. Group process can be a way of allowing participants to consider the unthinkable and to support dramatic departures from conventional practice.

Len Leiberman, former head of New Jersey's Chamber of Commerce, in his farewell speech on leaving the SPC in May 1990, said:

> I think [the plan] will come to be understood as revolutionary in the creative sense. We are moving to a new way of defining the boundary line at the core of representative government, the line between freedom for every individual and the needs of society and between the public and the private interest. . . . I originally came loaded with prejudices. Government was bad and we should beat up on them so they can let brilliant people in the private sector do what they do. For me learning how good public servants can be was the most transforming experience.

The Roles of Group Process in Growth Management

The comparison of the growth management programs in the three states suggests that a well-designed group process can be an effective way to accomplish key tasks. By the same token the lack of a group process or a poorly designed one can hinder implementation. For example, while New Jersey was bringing many interests into the plan revision process, Vermont's citizens were in rebellion. Many of the problems DCA had in implementing Florida's antisprawl policy were anticipated by New Jersey's cross-acceptance process. While the Florida legislature recognized a need for a group to provide policy oversight, the legislative committee did not include key players, who accordingly felt free to challenge its recommendations. And Vermont's committee to review Act 200 produced no useful conclusions, apparently because no one managed the group process to achieve constructive discussion.



Michael Neuman photo

Compare the traditional crossroads village in rural Hunterdon County, New Jersey — its central area stores, clustered residences, and distinct edge — with the new cul-de-sac at the lower right using nearly as much land as the entire village.

All the group processes discussed here have played a role in the social construction of the growth management program in each state. All have involved group learning, mutual adjustment, and the development of shared meaning. All have relied on multiple perspectives and knowledge of the contexts in which policies are to be applied. In particular, these group processes have been useful for at least six different tasks:

- Groups helped frame the problem and place the issues on the public agenda. The Governor's Task Force in Vermont played this role, but comparable commissions have done so in other states and regions.[20]
- Groups have been important in writing legislation that has been widely supported, as in New Jersey.[21]
- Group processes have been important in policy development or in turning general policies into more specific strategies, as did the New Jersey SPC. This includes the development of criteria and standards, as well as of implementation strategies.
- Groups have been important for oversight and review of the law as it begins to be more precisely formulated and applied. New Jersey's SPC did this. Florida created a legislative group. Vermont seems to have suffered without such a group.
- Groups have negotiated differences among conflicting interests as they did in Florida's compliance agreements and New Jersey's cross-acceptance.
- Groups have also worked out how to accomplish complex new tasks, as they did in preparing state agency plans in Vermont.

The group processes, however, have been only qualified successes, moving the programs forward somewhat, resolving some disputes, working through some tasks, identifying some new ideas, and achieving some degree of consensus. But the products of the groups have not necessarily been used, nor have their agreements necessarily been shared by the wider public. In some cases the groups failed to include key stakeholders, who later sabotaged the effort. In other cases the lack of group facilitation prevented the participants from working constructively on their differences. In some cases the groups did not operate long enough. In many cases the groups and their findings are not well linked to the institutionalized procedures and political processes by which decisions are actually made. If group processes are to accomplish the tasks for which they are best suited, the careful design and management of the groups is but one step. The next task for planners will be to design new planning and decision making institutions in which such groups can play an integral part.

AUTHOR'S NOTE

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NOTES

1. These states are Florida, New Jersey, Maine, Vermont, Rhode Island, Georgia, and Washington.
2. The term "social construction" is taken from Berger and Luckmann (1966). They contend that reality is something a society constructs through an interpretive social process, which combines both subjective and objective ways of knowing. Reality is what is understood to be real in a community. As the unifying concept of this article, "social construction" provides a way of understanding why the activities of these group processes have become central to the creation of these new strategies for the management of growth.
3. This model of group process draws on literature particularly in the fields of management, psychology, and education. See, for example, Marshall and Peters (1985) for a clearly defined approach. The model also meets the stipulations by Habermas (1981) for communicative action or discussion designed to achieved critical or emancipatory knowledge.
4. Groups typically undergo single-loop learning, in which they develop a new way of solving a problem. In some cases members may individually and as a group reexamine their assumptions and objectives in a process known as double-loop learning, which can result in both changes in individual commitments and in creative new ways of seeing and doing. This corresponds roughly to the concept of transformation that can occur in communicative action.
5. These include Vermont's Act 250, which requires state permits for developments meeting certain criteria of size and potential environmental impact, and Florida's Land Management Act, which regulates "developments of regional impact" and "areas of critical concern," as well as a host of other legislation enacted in the early 1970s (Popper 1981; Healy and Rosenberg 1979).
6. Mutual adjustment also occurs in well-functioning markets, but cases of public goods provision, such as directing growth in the most collectively desirable way, are not handled adequately through markets.
7. This model is outlined in more detail in Innes (1990), which contends that the standard approach to information use is grounded in the positivist/scientific view of knowledge and is a step-wise procedure, in which citizens and policymakers establish goals and frame problems; professionals and experts gather and assess information, searching out facts and principles in a value neutral way; and policymakers choose on the basis of the information. While this pattern seldom reflects actual practice, it has been the predominant model offered in planning education for linking knowledge and action.

8. Bernstein (1976) provides a good overview comparing these two epistemological perspectives.
9. See Audirac et al. (1990) and Neuman (1991) for a debate that suggests the centrality and ambiguity of the sprawl question.
10. *Department of Community Affairs v. Charlotte County and the City of Punta Gorda*, Case No. 89-0810GM, State of Florida, Division of Administrative Hearings. The Administrative Board also entailed a type of group process in its consideration of the issues.
11. As of June 1992, CORC had reviewed and commented on draft agency plans and several noncontroversial regional plans. CORC had taken only a few minor actions on controversies over local plans. It is too soon to evaluate CORC's role in developing shared meaning for Act 200 or in dispute resolution.
12. This process of attaching myths to policies has been described in de Neufville and Barton (1987).
13. CORC presumably will play this role, but only after localities develop plans and disputes have worked their way up to the commission.
14. In the revisions of these draft plans in 1992, the governor's office sponsored focus groups made up of interest group representatives to give the agencies feedback. Agencies learned and made changes as a result.
15. The state has drastically cut the budget for this program, so its future is somewhat in doubt.
16. See Neuman (1992) for further discussion of the role of groups.
17. As of June 1992, fifty to sixty communities had prepared plans, but not sought approval.
18. SPC, after extensive discussions, finally incorporated a policy to protect landowners' equity as much as possible. This, along with a proposal for equity insurance, satisfied most farming interests.
19. SPC staff estimated at least 50,000 people were involved in meetings, discussions, and hearings in the development of the interim plan.
20. Bayvision 2020, for example, in the Bay Area of California spent a year understanding the issues of regional planning and successfully placed these in the public eye.
21. Georgia used a year-long, carefully facilitated group process to develop its legislation.

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2

Implementing State Growth Management in the United States

Strategies for Coordination

JUDITH ELEANOR INNES

At the heart of growth management is the task of coordination. The pace and location of growth are affected by the building of infrastructure, land and environmental regulation, and the actions of individuals and businesses. Therefore, whether the objective is to protect natural resources, provide for efficient land development patterns, or promote economic development, the actions of many agencies, levels of government, and private actors must be coordinated. Between 1985 and 1990, seven states in different parts of the United States[1] reached this conclusion and established statewide growth management programs that are, more than anything else, strategies for coordination. In many other states, comparable legislation is under consideration.

The problem is that we have no good models in practice or in the literature to show us effective ways to accomplish such a complex coordination task. There are so many actors, each with differing roles, objectives, powers, and perceptions. There is such a wide variety of environments and local communities with their own special dynamics. And

AUTHOR'S NOTE: This research was supported by the Lincoln Institute of Land Policy and partially conducted while the author was a Fellow at the institute.

the coordination has to take place in many dimensions: vertically, among the levels of government with responsibility for protecting and managing particular resources or providing certain facilities; horizontally, among the agencies and actors whose decisions jointly affect a spatial area or region; and over time, so that development and needed services grow simultaneously.

We do have the assessments of the much less ambitious efforts at intergovernmental coordination of the late 1960s and early 1970s,[2] but these offer models more of failure than of success. It is only recently that a few researchers have begun to offer new perspectives on this problem in the context of today's substantially different conditions.[3] In the past, federal funding and top-down program design provided the sanctions, incentives, and procedures for coordination. But today we operate with scarcer financial resources, with greater dependence on local initiative, and with state responsibility for primary funding of major projects.

Accordingly, the states are experimenting, watching each other, and learning as they go. Designers of growth management programs have neither explicitly identified the essential tools and strategies for coordination nor articulated how to package them successfully. Indeed, they have many other concerns as they try to prepare legislation that can be supported by the numerous interests involved in growth issues. The institutional arrangements and processes that can permit or enforce coordination seem at times to be afterthoughts, only partially developed. One state includes certain coordination techniques; another state includes others. Some of the most important approaches are being invented during the implementation process. Most of what has been written thus far on these programs either focuses on comparisons of legislative provisions across the states, rather than looking at actual implementation, or discusses the unique problems and strategies of individual states.

This chapter outlines and compares basic implementation arrangements in six of the seven new state programs[4] and focuses particularly on coordination. The states now either are in the stage of plan making or are still elaborating their procedures for planning; therefore the chapter focuses on processes and not outcomes. It looks at legislative provisions as well as formal and informal activities and practices that are emerging. The chapter will identify tools and strategies for coordination and discuss the preliminary evidence of success or failure.

Innovation in State Growth Management

These state growth management programs collectively represent a significant innovation not only in land use planning and regulation but also in intergovernmental relations. First, they reflect a public recognition that many functions of government, from water quality control to transportation, play out and interact on the land. They establish the principle that *both* state and local governments and many public agencies share an interest in *all* the uses of land across the state. In this respect, these programs go well beyond the environmental regulation of the "quiet revolution" in the early 1970s[5] or of the American Law Institute's 1975 *Model Land Development Code*. Programs of that period, like Vermont's Act 250 or coastal zone management, address only selected areas considered to have environmental qualities or development impacts of unusual significance. The strategy of that period was to separate responsibilities for land use and regulations among levels of government by issue or scale. These new programs, in contrast, address many issues simultaneously and make no such a priori distinctions about where responsibility lies.

The new state growth management programs are also innovative in the institutions, processes, and procedures that they are creating. These are neither centralized nor decentralized systems, neither top-down command-and-control nor bottom-up laissez-faire approaches. Instead, they are mixed systems of shared power and joint deliberation. These systems also incorporate in a significant way a wider scope of players than any comparable effort of the past. They include state agencies, local governments, regional bodies, and often representation from private sector interests. Perhaps the most significant departure from past practices is their growing reliance on various forms of interactive group processes at all stages of the development and implementation of plans, policies, and regulatory standards. These groups are not simply the advisory task forces that often play an external, superficial, or adjunct role in decision making; instead, they are integral to the problem formulation or problem-solving processes on which policy and program are built.

Research Strategy

The research for this chapter, conducted in 1988, 1989, and 1990, primarily involved field interviews in Vermont, Florida, New Jersey, Maine, and Rhode Island as well as telephone interviews with individuals in those states and in Georgia.[6] In each state, between 10 and 25 people were interviewed who were playing key roles in the design and implementation of the program, including state, regional, and local professional staff, agency heads, citizen commissioners, elected officials, and leaders of environmental and other organized interest groups. Program documents were examined in detail, including legislation and proposed legislation, guidelines, minutes of meetings, plans, and findings of administrative hearings. In New Jersey, key meetings were also attended.

Similarities Among the State Programs

In broad outlines, the state programs, enacted with wide public support, show a remarkable degree of similarity, considering the real differences in the type of development and environmental issues among these states. Some are fast growing, while others' growth is modest. Some are mostly rural while others are largely urbanized. Florida has 12 million people; Vermont, barely half a million. Florida is primarily concerned about sprawl and traffic, while Vermont's focus is on the traditional rural landscape.

Differences in the local political cultures are considerable as well. Vermont, for example, has a strong cadre of local political activists with views ranging from the radical utopian and socialist left to the conservative and individualistic property-owning right. Florida, with its vast number of in-migrants, appears less politically active at the local level, as does New Jersey. There are also differences in which institutions are effective in the various states. For example, the New Jersey governor has strong powers over all agencies, whereas in Florida the governor is weaker than the legislature and has several independently elected cabinet members. In some of the states, local planning is the norm, while in others the growth management law provides the first major incentive for localities to prepare plans or institute land regulation.

The similarities therefore that we do find in the programs as they evolve seem likely to reflect structures or processes that transcend these differences. There has been, of course, much borrowing of ideas among the states, particularly from Oregon's Land Conservation and Development Program of 1972.[7] These new growth management programs, however, tend to be much more permissive and experimental than the

state land use programs of 1970s, which relied on strong incentives and sanctions and focused on land use regulation.

Most of the six state programs incorporate at least the following seven principal features. (See the Appendix for detail in comparing the states.)

State Goals

In all the states examined here, except Georgia, the growth management program is framed by a set of broad state goals, usually 10 to 15 adopted by the legislature. These goals are remarkably similar across the states and include both environmental and economic development objectives as well as goals for public infrastructure and affordable housing. Other goals may be specifically directed to issues prominent in the state, such as coastal protection or transportation. These programs have the wide support and participation that they do because they attempt to balance goals rather than simply focus on environmental protection, as did much of the earlier legislation.

Local Planning and Land Use Control

All the programs involve measures to improve the quality and increase the prevalence of local and regional planning as well as to encourage, if not require, consistency of these plans with the broad state goals. None directly preempts local control of planning. All states offer grants and/or technical assistance for planning. Most require local planning and zoning and subdivision control consistent with the plan and with state goals. States are empowered to impose a variety of sanctions on communities that do not prepare such plans, such as withholding of grant funds. They also offer incentives for local cooperation, such as permitting localities to levy impact fees on developers, making them eligible for new grants, or giving them special standing in disputes with agencies or developers.

State Agency Planning

In most of the states, state agencies also are expected to act consistently with state goals. Most commonly, states require agencies with land use-related responsibilities to submit either plans or reports showing how their activities are or will be consistent with state goals. In New Jersey, a state plan maps categories of urban, suburban, and rural lands; identifies centers and other "communities of place;" establishes state-

wide policies for development and redevelopment, along with an infrastructure needs assessment. In Vermont, state agencies must prepare plans showing how their actions will affect land use and growth, and these must be consistent with approved local plans as well as with state goals. Other states have weaker mechanisms for assuring consistent action by state agencies, such as review and comment by the state implementing agency of other agencies' plans, with consistency to be enforced by the legislature. This remains the least developed part of most legislation and, many respondents believe, the most important for growth management success.

Regional Role

Most of the states have a modest role for regional bodies as part of the growth management program. There are often regional planning commissions with elected or appointed members from the localities. Some prepare regional plans that must be consistent with state goals. Typically, the regional body is also the checkpoint in the process of submitting proposals for approval. It compares local plans with regional plans and makes comments to the agency that is deciding on plan consistency. In most states, the regional bodies provide technical assistance and data to localities. This is most significant in states where there are small localities with little of their own professional expertise. In some states, the regional body is also designated to mediate conflicts among localities, although as yet there is little such mediation in practice. Only in Vermont was the regional body assigned to approve local plans, but that power was controversial and its implementation delayed in 1990 in response to popular objections. Nowhere thus far have regional bodies taken a strong directive role challenging local governments in the interest of coordinating public and private action for regional benefit.[8]

Information Systems

The less populous states have enacted requirements for statewide, compatible, multipurpose geographic information systems (GIS) to support growth management. These systems typically incorporate data on both natural resources and on human systems such as land use, population, and infrastructure on a common computer-readable base map. The GIS data base will ultimately available to a wide variety of participants in the growth management process and, if successfully developed, will

aid coordination by standardizing the information that participants are using. Even in the most advanced states, however, these systems are several years away from fulfilling this ideal. In the two states with large populations, Florida and New Jersey, no common multipurpose GIS with wide access for users has been established to support growth management at the state level.

Conflict Resolution

In each state, there is some arbiter of conflicts that arise during implementation of the law. In Vermont, the Council of Regional Commissions (CORC) made up of regional commission members—mostly local officials—was created to decide disputes among agencies, governments, and interested parties, with appeal to the state supreme court. In Florida, the state Department of Community Affairs (DCA) has decision authority, with appeal to the Administrative Board. In some states, a council made up of agency heads or a citizen commission has some supervisory role over the process and decisions.

In addition, new techniques for informal, interactive conflict resolution are beginning to have a modest role or even be required in some states. Some states are training state and regional staff and interest group representatives in mediation and negotiation. Georgia's localities must be willing to participate in mediation when they have conflicts with other localities for their local plans to be officially "qualified." In Florida, the legislature established the Growth Management Conflict Resolution Consortium for research, training, and interventions, although, after five years, they have had no role in the review of local plans. In several states, including Oregon, recent amendments to the legislation or new practices encourage mediation strategies. Clearly, mediation is a popular idea. It remains to be seen whether it will become a popular practice.

Coordination Strategies

Within these common design features, we can distinguish several strategies for coordination. Most states explicitly require that all players should use the state goals and objectives in preparing their own plans. Georgia, however, does not, relying instead on dispute resolution and mutual adjustment as the primary coordination technique. Most programs include both some strategies for mutual adjustment and requirement for conformity of goals. But states typically rely on review

and comment procedures for mutual adjustment rather than on face-to-face conflict resolution.

Another coordinative strategy is the requirement for formal planning at all levels and in all agencies. This ensures that some common language is spoken among the agencies and that common processes and objectives are used. It tends to give professional planners a larger relative role and, because of their training, to reduce variation in standards and procedures.

The requirement for a GIS has the potential for coordinative effects even before the system is complete. The effort to design the system, if open and participatory, will cause the agencies and communities to develop a common language in which to communicate.[9] Later, the use of the data will reduce the variation in activities that is caused by different knowledge or assumptions about actual conditions.

These strategies create conditions in which coordination may occur, but they are insufficient in themselves to force coordination. Common goals, even if they are adopted, are too broad and generic to give guidance in detail to local actions. Too often, when applied to the variety of local problems, the goals are in conflict with one another. The use of planning professionals and common information increases the likelihood that there will be proponents of coordination throughout the system and helps communication between agencies and players. These strategies do not, however, address the players' differences in power, perceptions, and objectives.

Differences Among State Programs

Coordination Strategies

Several distinctive models for overall coordination are emerging: the top-down model, the bottom-up approach, the adjudicatory, and the collaborative/evolutionary. These distinctive models, it should be noted, are being modified in practice as each state moves to a more mixed system. Florida's program is designed largely as a top-down and bureaucratically controlled system, while Georgia's is almost entirely conceived as a bottom-up plan development, beginning with localities. While Florida's state plan is a long list of policies produced by the legislature, Georgia's is intended to be the result of conflict resolution among the players. Vermont relies on a litigation approach. The only

Vermont agency with decision authority other than the legislature or the supreme court is the Council of Regional Commissions, which adjudicates disputes brought before it. New Jersey's "cross-acceptance" approach is explicitly collaborative rather than top-down or bottom-up. The participants are brought together in a variety of ways to negotiate policies and regulatory principles. While the state commission has authority to prepare and adopt the plan, in practice, it has taken its mandate to "negotiate cross-acceptance" as a principle for all its activities.

Oversight

Institutions with oversight and policymaking authority vary according to these coordinative models. These institutions are particularly important because in all states major revisions have been made in the policy, the law, or the overall strategy since the legislation was first adopted. These changes have tested the adequacy of the institutions as legitimate and effective decision-making bodies. In New Jersey, the state planning commission plays an important policymaking role, but in other states a state agency takes most initiatives, and the state commission, if any, is more of a formal ratifying body. New Jersey's state legislature is entirely out of the policymaking process, while in Florida a legislative committee maintains oversight of implementation and proposes detailed annual revisions to the law.

Sanctions and Incentives

Tools to ensure cooperation also vary across states. Some states use heavy sanctions on local governments while others are quite permissive, encouraging consistent local planning mainly by offering incentives. Vermont takes an incentive-based approach, making planning optional, but gives communities with approved plans standing to challenge state agency plans and accords authority to such plans in the Act 250 state permitting process for development. New Jersey engages local governments voluntarily in negotiating processes, offering the incentive that their preferences may then be expressed in the final state plan. Local governments in New Jersey do not have to change their own plans to accord with the state plan, although in practice they are likely eventually to do so. Florida's DCA, on the other hand, takes a strong sanctions approach. It can withhold funds and retroactively withdraw revenue sharing money from noncompliant governments. In Rhode Island, the state itself can prepare a local plan if the community fails to do so.

There are also wide variations in the capability to assure compliance of state agencies. Vermont's law has the most direct controlling mechanisms, while, in New Jersey, state agency cooperation depends on the fact that a state plan is prepared and adopted by state agency heads themselves and on the hope that the governor will rely on the plan.

Information Systems

Some states are making a greater effort than others to integrate the development and design of the GIS into the policy process by engaging many participants from the beginning. Vermont's implementation effort is particularly sophisticated, engaging individuals from the state to the local level, including private citizens, in the design of applications. Interagency working groups involve private users and other experts in the design and management process. In Florida, on the other hand, GIS has little relation to the growth management program—it is left solely to state agency technical staff whose concern is simply communication among agencies' data bases. Other states' efforts fit somewhere between these two extremes.

Standards

Finally, coordination is also accomplished through the development of specific standards to which all participants adhere. There is considerable variation in the use of these tools. If well designed, they can obviate the need for constant mutual adjustment among participants over every issue. These standards might include, for example, the number of housing units per acre for sewer systems to be required, or they might identify zoning that is to be considered compatible with agriculture.

Based on debates and problems encountered thus far in implementation, one type of standard that seems likely to have considerable use in some states is a version of urban limit lines. This concept might be broader and include the designation of certain areas for intensities or types of land use. This approach, not unlike traditional zoning, helps coordinate actions in a spatial area. For each category or area, one set of uses is permitted and one set of infrastructure policies is followed by

all. New Jersey used this approach as the first step in its state plan. It divided the state into seven categories of existing land use and established criteria for defining the areas as well as the policies for them. This strategy has helped to bring players to the cross-acceptance table for discussions because area definitions and policies will have important consequences. In Florida, where no such lines were originally established, efforts to implement growth management are leading in a similar direction. "One size fits all" policies against sprawl originally applied by the DCA did not work well. What was perceived as sprawl in a rural area was perceived quite differently in an urban area and the same pattern had different effects in each area.

A second type of standard that is getting much attention is Florida's concurrency requirement. This is a method of coordinating actions of many participants, not only over spatial areas but also over time. It is similar to what is more often referred to as an adequate public facilities ordinance. The concurrency requirement says that development cannot be permitted unless there is commitment and funding of services for the development, including transportation, water systems, and parks. While the logic of the requirement may appear impeccable, experience in Florida is suggesting that it has many unforseen consequences. For example, particularly if the state is unwilling to finance new infrastructure, as Florida has been, the requirement can encourage sprawl in rural areas where infrastructure is underused. Moreover, requiring adequate levels of service on highways can discourage the development of public transit. And the decision about what level of service is adequate turns out to be highly value laden and controversial, and opinions vary widely across the state.

Moving Toward Interactive Group Processes

Looking across these programs, one trend is particularly distinctive. Interactive processes are increasingly being used or invented to address difficult issues, and they are demonstrating considerable success.[10] In Florida, after the first stage of local plan making, the DCA established the practice of negotiating "compliance agreements" over local plans rather than relying on review and comment and then taking the differences to formal administrative board hearings. After originally disagreeing with half of the plans submitted as of May 1990, the DCA

reached compliance agreements with all but three localities. Also in Florida, when the system of bureaucratic rules was failing to provide adequate and publicly acceptable guidance on the nature and prevention of sprawl, the governor appointed a widely representative task force to define the issues. This group explored the meaning and implications of sprawl and sprawl prevention strategies in a document that suggests major changes in Florida's overall growth management program.

New Jersey's collaborative strategy defused enormous controversy at the outset over the plan map of the state. The process was to focus attention on policies for each area in a generally constructive way. This approach has been enhanced by the use of task forces made up of experts and representatives of key interests and agencies to develop many elements of the interim plan. The public acceptability of the plan today is a tremendous contrast to the public outcry when the first draft was revealed.

A number of other examples of the potential effectiveness of working groups stand out. In Vermont, a collaborative interagency group headed by several agency chiefs worked through with the state agencies the difficult task of setting the standards and practices for the state agency plans. By contrast, in Florida, first draft state agency plans were prepared solely by the agencies and were generally considered unsatisfactory. In addition, interagency and user working groups are making progress on the design and access issues for GIS in several states.

Conclusions

While it remains to be seen which of the coordination techniques work best, evidence thus far is that face-to-face discussions, negotiations, and other group processes that bring the participants together to define and resolve issues are very effective. The coordination task in growth management requires mutual learning and adjustment among the participants. The complexity of the issues, problems, and interests and the variability among contexts within a state mean simple top-down rules will not work. Plans and regulations developed from the top by experts often do not work in practice as predicted, even when there is powerful central state agency control and the ability to force players to cooperate. Many sorts of knowledge are needed to design workable programs, including both specialized expertise and the everyday knowledge

of those who operate in the world where decisions affecting growth are made.

The lesson is that, if growth management programs are to be successful, they must be evolutionary and adaptive. They cannot be expected to be fully designed at the outset. Policies and regulatory concepts will have to be developed interactively. This reality is borne out in the experience of all the states, which have modified their programs considerably since their original passage. Successful growth management is most likely if it provides ways for the participants to learn by doing and relies on this learning to build the implementation process.

Appendix: State Growth Management Programs' Procedures and Processes[11]

FLORIDA

Date of Principal Legislation

1985: Local Government Comprehensive Planning and Land Development Regulation Act

State Role

The Department of Community Affairs (DCA) sets procedural rules, criteria, and standards for local planning; reviews and approves local plans for consistency with state law; negotiates compliance agreements with localities; and represents the state at the Administrative Board when local plan implementation is challenged.

State Plan/Goals

The State Comprehensive Plan was passed in 1985 with 26 goals and hundreds of policies across the full range of state concerns.

State Agency Plans/Reports

All agencies prepare biennial plans consistent with the state plan and with each other.

Regional Role

Regional Planning Councils (RPCs) prepare regional plans, review developments of regional impact, work with local governments to prepare their plans, and review and comment to the DCA on local plans' consistency with regional plans.

Local Role

There is mandatory planning for all cities and counties consistent with the state plan, regional plans, and plans of adjacent localities. Local plans must include capital improvements element, concurrency management plan, and coastal management element. Implementation is also mandatory, including zoning, and subdivision control. Development orders are subject to demonstration of concurrency of infrastructure.

Information Systems

The Growth Management Data Network Coordinating Council is made up of representatives of state agencies and develops standard data definitions, formats, and software for communication and data transfer. There is no direct relation to the 1985 act. There is no statewide GIS, although state agencies and larger counties are building individual GISs to implement concurrency.

Conflict Resolution

Administrative hearings can be held to resolve conflict between DCA and a local government. The DCA, instead, negotiates compliance agreements in most cases. Mediation is optional on request of both parties but has not been used. The Growth Management Conflict Resolution Consortium was established by the legislature in 1984 to assist in growth management process but has no role thus far in plan review. RPCs are designated to mediate local-local conflicts but seldom do so.

Coordination Mechanisms

State agency, regional, and local plans are required to be consistent with the State Comprehensive Plan and DCA standards and procedures; concurrency of impacts of development with six types of public facilities is required in plans and before development orders. Local plans include intergovernmental coordination element. The RPC comments on local plan consistency with regional plan. The DCA reviews and evaluates all comments of plans. There is no local review of neighboring localities' plans and there are no direct methods for mutual adjustment among plans. Governor's review coordinates state agency plans.

Related Legislation

The Land Management Act of 1972 regulates developments of regional impact and protects areas of critical concern; the state Comprehensive Planning Act of 1972 requires state and regional planning; and the Water Resources Act of 1972 created water districts with planning, management, and permitting powers. The Land Conservation Act of 1972 provides $4 billion for an environmentally sensitive lands fund in the next decade. There are also the Local Government Comprehensive Planning Act of 1975 and the State Comprehensive Plan of 1985.

GEORGIA

Date of Principal Legislation

1989: Georgia Planning Act

State Role

The Governor's Development Council, made up of state agency heads, coordinates, supervises, and reviews planning by state agencies and creates procedures for communication and preparing a statewide plan. The Department of Community Affairs (DCA), in consultation with local government and the business community, develops standards and procedures for local and regional planning and implementation, certifies local governments as "qualified," provides planning grants and services to local governments, may withhold grants from nonqualified governments, and reviews and comments on regional plans. The Board of Community Affairs (BCA), made up of local elected officials and knowledgeable citizens, assists the governor in developing a comprehensive state plan based on qualified local plans, regional plans, and state agency plans.

Implementation Issues

The Policy Task Force, representing many stakeholders, aided by teams of mainly expert participants, has developed guidelines for developments of regional impact, regional impact review, and mediation adopted by the BCA.

State Plan/Goals

With no plan or substantive goals in the legislation, there is bottom-up state planning process, with the BCA preparing a plan (see above).

State Agency Plans/Reports

None is directly required by the legislation.

Regional Role

Regional development centers (RDCs) have been established, with the BCA defining boundaries. Legislative ratification is required. RDCs make regional plans. The DCA reviews and comments. The RDC board includes chief elected official of each county and municipality; provides planning and technical assistance; reviews, comments on, and recommends local plans; prepares regional plan, taking account of local plans. Regional review for state grants is required.

Local Role

A "qualified" local government is required to make comprehensive plans and capital improvements plans, have consistent land use regulations, participate in state data base network, and participate in good faith in conflict resolution/mediation. Local government must be qualified to be eligible for economic development funds and other funding.

Information Systems

Integrated data base and network are maintained by the DCA; participation is required from state agencies, local governments, and RDCs. Data are to be in accessible form and made available to local governments, RDC, state agencies, and the private sector.

Conflict Resolution

The DCA mediates conflict between RDCs or local governments on request or at own discretion. The DCA may require review of local or regional plans with regional impact. The RDC provides a forum for local governments to present views on other local plans and determines whether conflicts exist and ways to resolve them.

Coordination Mechanisms

All plans must be consistent with local plans. There is mediation of interjurisdictional conflict and a common data base.

Related Legislation

Construction of Reservoirs was legislated in 1989. Solid Waste Management Act of 1990 requires mediation and techniques similar to those of the planning act.

MAINE

Date of Principal Legislation

1988: Comprehensive Planning and Land Use Regulation Act

State Role

1988 Law established The Office of Comprehensive Land Use Planning (OCP) in the Department of Economic and Community Development (DECD) to set priorities; provide financial and technical assistance to localities, including planning grants and legal defense grants; coordinate information for localities; develop growth management certification program; review local plans and implementation strategies and plans of regional councils for consistency with state goals and guidelines; and certify local growth management programs. The Planning Advisory Council (PAC) appointed by the governor included representatives of different interests and perspectives and advised the OCP on rules, guidelines, and implementation. It was influential in advising the governor and legislature on a range of issues. 1991 budget cuts eliminated OCP and PAC, but most functions are continuing in DECD.

State Plan/Goals

There are 10 broad goals in the 1988 act relating to growth, housing, natural environment, public service, and facilities.

State Agency Plans/Reports

All agencies (12) with authority pertinent to the goals are to submit biennial reports showing how they have addressed the goals in their activities.

Regional Role

Regional councils assess regional needs and resources, develop and adopt regional policies, assist municipalities in developing and implementing growth management programs, and review local plans for consistency with regional policies.

Local Role

A locality must adopt a growth management program consistent with state goals and guidelines, which includes a comprehensive plan, a capital investment plan, a regional coordination plan to manage shared resources, and an implementation strategy. A locality may request "voluntary certification" if the plan

State Agency Plans/Reports

None is directly required by the legislation.

Regional Role

Regional development centers (RDCs) have been established, with the BCA defining boundaries. Legislative ratification is required. RDCs make regional plans. The DCA reviews and comments. The RDC board includes chief elected official of each county and municipality; provides planning and technical assistance; reviews, comments on, and recommends local plans; prepares regional plan, taking account of local plans. Regional review for state grants is required.

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meets standards and has implementation, including land use regulation. Certification provides eligibility for financial and technical assistance for enforcement and legal defense of growth management programs, funding for open space, and multipurpose community development block grants and permits the locality to levy impact fees.

Information Systems

The OCP was to provide natural resource and other planning data to municipalities, using available sources where possible, and obtain and coordinate data from existing agencies. The statewide GIS located in the Department of Conservation is to be used for growth management. A Steering committee was appointed by the governor in 1989. Regional councils are to develop data bases and work with local governments.

Conflict Resolution

No formal mechanisms are required by law. The DECD reviews comments on local plans from agencies and localities for consistency with one another and with the law and makes judgments. Law establishes local boards of zoning appeals.

Coordination Mechanisms

Local and regional plans must be consistent with state goals. Local plans must be consistent with regional policy. Localities create regional coordination plan. Joint planning among localities is permitted. Coordination may occur informally among localities through technical assistance by the regional staff during local program development. There is a common data base.

Regulated Legislation

The Land Use Regulation Act of 1971 established a commission for unincorporated areas. Mandatory shoreline zoning was legislated in 1972 and a Coastal Zone Management Program in 1978.

NEW JERSEY

Date of Principal Legislation

1986: The New Jersey State Planning Act

State Role

The State Planning Commission (SPC), appointed by the governor, is made up of state agency heads and local governments and has public members of both parties. The SPC prepares and *adopts* state plan and identifies areas for growth, limited growth, agriculture, and conservation and sets policies for these areas, including policies for public investment. It also prepares an infrastructure needs assessment and negotiates cross-acceptance of plan with counties and municipalities. The Office of State Planning (OSP) in the Department of Treasury is staff to SPC.

State Plan/Goals

There are eight goals, including promoting growth and development, protecting the environment, revitalizing the state's urban areas, and providing affordable housing and adequate public facilities at reasonable cost. The plan divides the state into several categories of areas reflecting existing conditions and desired patterns of settlement and outlines policies for each. Standards are advisory only. The plan is for coordination, investment, and growth management. The plan has preliminary, interim, and final versions after negotiations, public hearings, and informational meetings as part of the multiyear cross-acceptance process. A commission in the Office of Management and Budget prepares a capital improvement plan consistent with the state plan.

State Agency Plans/Reports

None is required from agencies, but key agency heads are members of the SPC. Governor may use plan as a guide to where and when public investment will be provided. Agencies will probably use state plan to revise their plans.

Regional Role

Counties are designated mediating bodies for cross-acceptance between state and municipalities. They provide technical assistance to local governments, coordinate the responses of local governments to the state plan, and prepare a report to the SPC. Large areas including Pinelands, coastal areas, and Hackensack Meadowlands are governed by regional land use bodies. Costal areas voluntarily participated in cross-acceptance.

Local Role

Local governments participate in cross-acceptance and respond to plan map designations and proposed state policies. There is no requirement for local plan consistency with state goals. Local governments may permit development that

meets standards and has implementation, including land use regulation. Certification provides eligibility for financial and technical assistance for enforcement and legal defense of growth management programs, funding for open space, and multipurpose community development block grants and permits the locality to levy impact fees.

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Local Role

Local governments participate in cross-acceptance and respond to plan map designations and proposed state policies. There is no requirement for local plan consistency with state goals. Local governments may permit development that

is inconsistent with state policies and risk that facilities or needed permits will not be provided. Requirements for local planning and for zoning and subdivision control antedated the act.

Information Systems

A working committee has been formed to prepare a statewide multipurpose GIS housed in the Department of Enviromental Protection (DEP). The OSP compiles estimates and forecasts for population, employment, and housing and land needs. Computer mapping occurs in the OSP. There is currently no direct link between GIS in DEP and OSP.

Conflict Resolution

The commission is required to *negotiate* "cross-acceptance." This is the process of comparison and identification of differences and agreements among the entities about the plan. Plan map designations and definitions have been the focus for discussion, along with policies and standards. The SPC tries to get voluntary acceptance of the plan through mutual adjustment. Counties are intermediaries among local governments and between local governments and the SPC. The state Center for Dispute Resolution coordinates negotiation and mediation training for state and county staff, commissioners, and private participants.

Coordination Mechanisms

Cross-acceptance and the use of plan map and statewide policies, agencies and governments such as encouraging centers, by will coordinate actions affecting location and types of development and infrastructure. Coordination between adjacent localities may occur through county technical assistance. Coordination of state agency actions may result from agency membership in the SPC but will ultimately depend on the governor directing agencies to carry out the plan, or on judicial decisions accepting plan.

Related Legislation

The Fair Housing Act of 1985 requires a state plan.

RHODE ISLAND

Date of Principal Legislation

1988: Comprehensive Planning and Land Use Regulation

State Role

The Division of Planning (DP), in the Department of Administration, develops standards to assist local governments in comprehensive planning, supervises planning grants program, offers technical assistance to localities, reviews local plans and others' comments, and approves plans, if consistent with state goals in the Planning Act, with the State Guide Plan, and with all other state policies and if standards and procedures have been met. The DP prepares the local plan if the municipality fails to do so. The State Planning Council (SPC) adopts strategic plans and the State Guide Plan, coordinates planning and development activities of state agencies, reviews work programs of statewide planning program, and adopts implementing rules. It has an advisory committee of 15, including department heads, state and local legislators, president of the league of cities and towns, and citizens. They review the guide plan and advise the SPC. DP provides staff to the SPC.

State Plan/Goals

There are 10 broad goals relating to growth, housing, environment, and to coordination, consistency, data availability, and public involvement. The State Guide Plan is developed by the DP and adopted by the SPC.

State Agency Plans/Reports

Seventeen departments and agencies with relevant authority submit reports showing how they have incorporated the findings, intent, and goals of the act into their activities. These are distributed to cities and towns and used in local plan review. Plans and projects of state agencies must conform to approved local plans.

Regional Role

There is none.

Local Role

To be approved, local comprehensive plans must conform to standards and procedures, have consistent land use regulation, and be consistent with state goals and policies. Failure to adopt a conforming plan means the state will develop the local plan.

Information Systems

The DP makes available to municipalities statewide data for comprehensive plans. Local data are provided by local governments. The multipurpose statewide GIS is based at the University of Rhode Island and is cooperatively

is inconsistent with state policies and risk that facilities or needed permits will not be provided. Requirements for local planning and for zoning and subdivision control antedated the act.

Information Systems

A working committee has been formed to prepare a statewide multipurpose GIS housed in the Department of Enviromental Protection (DEP). The OSP compiles estimates and forecasts for population, employment, and housing and land needs. Computer mapping occurs in the OSP. There is currently no direct link between GIS in DEP and OSP.

Conflict Resolution

The commission is required to *negotiate* "cross-acceptance." This is the process of comparison and identification of differences and agreements among the entities about the plan. Plan map designations and definitions have been the focus for discussion, along with policies and standards. The SPC tries to get voluntary acceptance of the plan through mutual adjustment. Counties are intermediaries among local governments and between local governments and the SPC. The state Center for Dispute Resolution coordinates negotiation and mediation training for state and county staff, commissioners, and private participants.

Coordination Mechanisms

Cross-acceptance and the use of plan map and statewide policies, agencies and governments such as encouraging centers, by will coordinate actions affecting location and types of development and infrastructure. Coordination between adjacent localities may occur through county technical assistance. Coordination of state agency actions may result from agency membership in the SPC but will ultimately depend on the governor directing agencies to carry out the plan, or on judicial decisions accepting plan.

Related Legislation

The Fair Housing Act of 1985 requires a state plan.

RHODE ISLAND

Date of Principal Legislation

1988: Comprehensive Planning and Land Use Regulation

State Role

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The DP makes available to municipalities statewide data for comprehensive plans. Local data are provided by local governments. The multipurpose statewide GIS is based at the University of Rhode Island and is cooperatively

developed by the university and interested agencies, including the DP. The DP has terminals and its own GIS coordinator. Access to data is allowed to agencies, municipalities, and the public.

Conflict Resolution

A municipality may appeal to the Comprehensive Plan Appeals Board, consisting of local elected or appointed officials, on findings of fact. The SPC can approve a state agency program that does not conform to an approved local plan if, after a public hearing, the agency demonstrates conformity with the intent of the act, the need for the project, and conformity with the State Guide Plan.

Coordination Mechanisms

Joint planning and regulation are permitted as is cost sharing across municipalities. Consistency of local plans with state goals and with State Guide Plan and with comprehensive plans of adjacent municipalities is required. The DP decides on consistency. Some coordination may occur through the state technical and planning assistance function. State agency consistency with the local plan and with state goals and the State Guide Plan is required. The courts may enforce consistency.

Related Legislation

Coastal Zone Management was legislated in 1971 and Local Conservation Commissions in 1980.

VERMONT

Date of Principal Legislation

Act 200, **1988:** "To encourage Consistent Local, Regional and State Agency Planning" Amended 1990

State Role

The Department of Community Affairs (DCA) gives out planning assistance grants, judges plans for conformity with affordable housing goals, informally works with other agencies to assist in implementing the law but has no direct authority. The legislature assesses state agency plan consistency with state goals on advice of the Council of Regional Commissions (CORC) and other agencies

and governments. The CORC mediates conflicts and hears disputes over plan consistency.

State Plans/Goals

There are 12 broad goals (down from 32 in the original legislation) covering economy, housing, and environment.

State Agency Plans/Reports

All state agencies (19) with responsibilities pertinent to land use prepare biennial plans for public presentation, showing how their actions will be consistent with state goals. Agency plans must be consistent with approved local plans. An implementation committee of five major agency heads prepared criteria and principles for state agency plans. An implementation working group based in the Governor's Office of Policy Research created detailed practices.

Regional Role

Regional Planning Commissions (RPC), made up of representatives of towns, prepare a regional plan consistent with local plans and state goals, provide staff and technical assistance to towns, prepare planning guidelines, determine local eligibility for planning grants, and approve local plans.

Local Role

Local plans are optional but may be submitted to RPC for approval as consistent with state goals, procedures, and standards. All local governments are eligible for planning grants if making progress toward a plan. For approval, an implementation plan is required but zoning and subdivision control are not necessarily required. Localities can veto regional plan.

Information Systems

1988 Law says the governor's office prepares the comprehensive strategy for the development and use of data, including setting standards, applications, and priorities; management issues; the private sector role; financing; costs and benefits; financing; and ways to make data available to local government. All state agency data must be in compatible form. The state provides assistance to local governments or RPCs with compatible hardware and software and funds pilot application projects. The GIS office is located in the state Agency of Administration. A 15-member advisory board representing state and local agencies, planning commissions, and legislatures as well as the university, private industry, and citizens guides GIS development, holds public meetings, and

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conduct conferences. In 1992 GIS management moved to the University at Vermont.

Conflict Resolution

A Council of Regional Commissions (CORC; with representatives of each RPC, three state agency heads, and two public members appointed by the governor) is the appeals board for conflicts between any of the regional commissions, local governments, towns, and state agencies. CORCs will not resolve disputes unless informal resolution of issues has been fully explored. CORCs provide mediators for disputes between regions and local governments or between RPCs and state agencies. A three-member CORC panel reviews the local plan after disputed approval decision by RPC, if requested by individuals, groups, or agencies with standing. The RPC is to act as mediator between localities. Mediation training of regional staff is provided by RPCs jointly with the DCA. Interregional commissions can be established to settle interregional disputes. CORC decisions may be appealed to the state supreme court.

Coordination Mechanisms

All plans must be consistent with state goals. Agencies must coordinate plans with other agencies, RPCs, and towns. The CORC reviews state agency plans for consistency with state goals, sends evaluations to the governor and the legislature, and reviews proposed regional plans. Coordination at the state level depends on legislative and executive action based on the recommendations. RPC staff informally coordinate local plans through technical assistance function. There is a common statewide GIS.

Related Legislation

Act 250 (1970), the Land Use and Development Act, established a state-level Environmental Board and eight district commissions to issue permits and regulate development for subdivisions of 10 or more lots, developments over 10 acres in all areas, and developments over 1 acre in localities without zoning.

Notes

1. These states are Florida, New Jersey, Vermont, Maine, Rhode Island, Georgia, and Washington.

2. This includes, for example, Sundquist and Davis (1969) and Pressman and Wildavsky (1973), the work of the Advisory Commission on Intergovernmental Relations in Washington, DC, and a few books on the difficulties of intergovernmental coordination efforts. Several works assessed the state efforts at land use control, which were also to some degree efforts at intergovernmental coordination. These include Healey and Rosenberg (1976) and Popper (1981).

3. These include most notably Gage and Mandell (1990) and Chisholm (1989) as well as a few studies of particular regional planning efforts.

4. The most recent growth management program, in the state of Washington, is not included.

5. Bosselman and Callies (1971) described much of this phenomenon.

6. All interviews were conducted by the author in person or over the telephone, except those in Florida, which were done, primarily in person, by John Watts.

7. The other inclusive state land use planning program of that earlier period, in Hawaii, has been little used as a model. Florida and Vermont had programs involving regulation of critical areas and large-scale development.

8. It should be noted that the Pinelands and the Hackensack Meadowlands are both under the jurisdiction of regional land use agencies with comprehensive land use powers, but neither is included directly in the state growth management program.

9. The process by which this coordination of goals and language occurs is outlined in Innes (1988).

10. These processes are described in more detail in Innes (in press).

11. This chart was prepared based on mid-1990 information. Additional research in June 1992 permitted partial update of sections on New Jersey, Vermont. Rhode Island, and Maine.

References

Bosselman, F., & Callies, D. (1971). *The quiet revolution in land use control.* Washington, DC: Government Printing Office.

Chisholm, D. (1989). *Coordination without hierarchy: Informal structures in multi-organizational systems.* Berkeley: University of California Press.

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Presentation before the

THE SENATE COMMITTEE ON LOCAL GOVERNMENT

and

THE SENATE SELECT COMMITTEE ON PLANNING FOR CALIFORNIA'S GROWTH

of the

CALIFORNIA LEGISLATURE

in joint interim hearing on

November 6, 1992

* * *

by

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I. INTRODUCTION

Thank you for inviting me to present my views on the uses of mediation and alternative dispute resolution (ADR) among local governments in disputes arising from land use issues and growth management programs. I am honored by your invitation, and grateful for this opportunity.

My qualifications include the insights and practical experience gained from a career in local government management extending from 1964 to 1989, including having served as a city manager in three cities, as municipal treasurer and finance director in two others, and as a county administrative staff representative to a local agency formation commission. I have a B.A. in Economics and an M.A. in Public Administration, both from U.C., Berkeley. I received a J.D. from California Western School of Law in San Diego in May, 1991, and was admitted to the California State Bar in December of that year. Currently, I practice in the field of municipal law and public finance with the San Diego law firm of Higgs, Fletcher and Mack. I am now the Assistant City Attorney for the City of Vista, in San Diego County.

While in law school, and afterward, I received training in mediation, focusing on large scale mediation processes associated with public policy issues. I have researched the subject widely and wrote a paper on public policy mediation. I have advised the San Diego Association of Governments (SANDAG) on the development of their present mediation policy and, along with some colleagues, I am currently conducting training programs in mediation for local government officials for SANDAG.

II. WHY MEDIATION SHOULD BE ENCOURAGED AMONG LOCAL GOVERNMENTS

Mediation can be used and applied readily and cost-efficiently to the resolution of impasses and stalemates on a wide variety of disputes involving public policy issues. Mediation is equally appropriate to resolving disputes between different local government units, such as cities and counties; between a local government and a regional or state agency; and between a local government and private parties, such as a major business, a developer, or a group of citizen advocates.

There are a number of significant advantages to be gained by encouraging the use of mediation in particular, among other methods of ADR, as the preferred method for resolving the kinds of disputes referred to above, when an impasse or stalemate has been reached. A considerable amount of empirical data, gathered mainly from other states and also from our limited experiences in San Diego, is now available and demonstrates that such advantages are real and can easily be obtained. The benefits we can expect to realize from the widespread use of mediation techniques by local governments in California are the following.

- The amount of time and resources required for resolving disputes that have reached an apparent impasse will be greatly reduced.
- The overall quality, effectiveness, and level of satisfaction in the decisions reached in dispute resolution efforts will be improved.
- The degree of creativity in finding new approaches toward solving intractable problems will be enhanced.

- The level of commitment by the disputing parties to the solutions generated will be strengthened and the amount of enforcement effort required to implement those solutions will be reduced.

- Over time, the relationships among the parties who have been cast as traditional adversaries in a competitive process, can be expected to improve. A higher level of trust and attitude of cooperativeness among these parties should result.

The concept of mediation is not new. Mediation, sponsored by the federal government, has long been associated with the resolution of labor disputes under the Taft-Hartley Act. The process of mediation is used among diplomats in the search for solutions to international disputes. In an informal way, each of us at one time or another may have experienced mediation when the assistance of a neutral third party was sought to help resolve a dispute.

During the past twenty or so years, beginning with efforts at Harvard University in Cambridge, the techniques and processes of mediation have been studied, catalogued and researched. This effort has produced a set of theories as to why mediation is so effective in resolving seemingly insoluble disputes, and how mediation can lead to the benefits referred to above. The effort has also defined the process, so that the methods, skills and qualities of an effective mediator can be studied and learned.

More recently, the scope of this research has expanded into the application of mediation in disputes involving local and regional governments over issues of public policy, particularly in the areas of growth management, economic development, and environmental preservation. Several states have established centers for mediation of public policy issues to assist state agencies and local governments

in the application of mediation processes for public dispute resolution.

III. HOW MEDIATION HELPS RESOLVE LAND USE (AND OTHER) DISPUTES

A. The Traditional Process For Land Use Decision Making Does Not Encourage Dispute Resolution

The traditional process off public review of land development begins with the land owner or developer preparing a plan for development. The plan usually seeks to maximize the potential for the land. The plan may be prepared according to the standards and requirements for development published by the local government. Next, the developer presents the plan at a public hearing conducted by the local agency and, for the first time, may encounter opposition either from the local agency officials, or from vocal members of the public, or both.

The problem is that the public hearing procedure and the formal proceedings required under present law are not designed or intended to promote resolution of disputes. Rather, the procedure is designed to meet the needs of due process and to allow interested parties the opportunity to be heard on the actions about to be taken by their government representatives.

The formal public hearing is not a good forum in which to try to resolve disputes. Usually, there is too little time available. The interested parties, having had advance notice, but little or no opportunity to communicate with the proponent, by the time of the public hearing have developed hard, fast positions in opposition to the proposal which they present as forcefully as possible in the

little time allotted. The decision making process is by majority vote of the reviewing body on the project as submitted, up or down. The actual parties to the dispute are not the ones who make the final decision, and the parties generally have little or no opportunity to negotiate directly with one another. The decision arrived at most often is a mere compromise imposed by the reviewing authority. It is not difficult to see why this process generates so much animosity from the parties involved and usually leaves one or all parties dissatisfied.

B. **How Mediation Works**

Mediation is not proposed as a substitute for the hearing process. Rather, as a supplementary proceeding to be used as and when disputes arise that are not amenable to resolution through the traditional process. An agreement reached in mediation can and should be brought back for approval by the public authority.

Mediation is a flexible process that allows all parties to a dispute to participate in the search for a solution. The parties control the process, and the nature of the agreement reached. Large, complex issues can be dissembled, broken down into manageable size. Time can be allotted according to the difficulty of the topic. Experts may be utilized to help explain technically difficult issues, answer questions. Tentative agreement can be sought first on basic concerns, and parties can then work toward building on these smaller agreements. The resulting agreement is not imposed by a neutral board voting the whole scheme up or down, as in the hearing process, but by the parties themselves crafting an agreement according to their

respective interests and priorities.

C. **Mediation is a Resource Efficient Process**

Mediation does not restrict the number of participants, but may involve all those who believe they have a stake in the outcome, either directly or by representation. Parties who might otherwise be excluded from participation at a hearing can be brought directly into the process. Communication among such parties is direct, and not dependent upon intermediaries.

Mediation also encourages more effective use of time. The parties determine how much time is needed, and available, to resolve issues. The parties also determine what information is relevant to the issues. In mediation, the process is managed in flexible and adaptive manner according to the needs of participants.

The neutral, third party mediator facilitates and helps to open blocked channels of communication. The mediator may suggest new avenues for the parties to explore in searching for creative solutions, or may undertake "reality checks" in an effort to get one party or another unstuck.

D. **Mediation Encourages Creative Problem Solving**

An important objective in mediation is to help the parties to recognize and define their underlying interests; and to negotiate for these interests rather than defending preconceived positions. This approach encourages the search for "win-win" alternatives. Creativity is enhanced. Solutions emerge from those closest to the problem, rather than being imposed by some "higher authority".

E. Mediation Helps Build Trust and Commitment

Because the parties are expected to work out their own solutions, mediation encourages the development of trust among the participants. The parties share a sense of "ownership" of the solutions developed. Solutions are not imposed on the "losing party", in fact when mediation works effectively, there are no "losers". The process encourages collaboration among the parties, instead of efforts to "overpower" the other party. Consequently, enforcement of the agreement is rarely a concern. Mediated solutions help the parties build a pattern of success and set the stage for further collaborative efforts in future disputes.

IV. WHEN TO USE MEDIATION IN GROWTH MANAGEMENT

The degree of success achieved in a State or Regional Growth Management Plan will depend heavily upon the ability of local governments to resolve many disputes in an efficient and effective manner. As the primary instruments for implementing growth management strategies, local governments will be called upon initially to amend their own local General Plans to conform with the Statewide and regional goals and priorities; then to implement the projects and programs either through their own development efforts, or by the review and approval of private efforts. In both of these capacities, mediation can play a major role in providing local governments an improved method with which to the disputes that inevitably will arise.

The San Diego Association of Governments has adopted a policy encouraging the use of mediation as a primary means for resolving

disputes between local agencies in the preparation and implementation of the regional growth management plan. The plan relies upon a self certification process in which individual cities and the county must conform their general plans to the regional growth management strategies. It is anticipated that disputes will arise between neighboring jurisdictions over provisions of their respective self-certified plans. Mediation is seen as a preferred means for addressing these disputes early in the process. The expectation is that mediation will enable the parties to find better solutions, more quickly, and develop improved relationships in the process.

IV. PRESENT BARRIERS TO THE APPLICATION OF THE MEDIATION PROCESS IN PUBLIC POLICY DISPUTES

If mediation is so effective in resolving disputes, why isn't the process used more often? There are three obstacles impeding greater reliance by public officials on the use of mediation in resolving land use and public policy disputes.

A. Informational Barriers

The most important barrier is simply the lack of awareness and knowledge among local public officials about the process and its application in the broader dispute resolution context. Experiences in the SANDAG effort and the City of San Diego program have shown that when mediation is first proposed, most local public officials, and people in general, are unfamiliar with the process. Mediation is often confused with the different process of arbitration, or is believed effective only in the traditional context of labor disputes.

Even after the process of mediation has been explained, there

often is a secondary hesitation over the real, but incorrect, fear that submitting to mediation relinquishes control by the parties over the outcome of the dispute, as does occur in arbitration. There is the further, perhaps an inherent, hesitancy in each of us to let go of long-held feelings of distrust of those we see as "adversaries", and a reluctance to show a willingness to negotiate our disputes for fear of being seen as "weak" by our adversary or, worse yet, by our constituency.

B. **Structural Barriers**

There are also perceived legal impediments to using mediation in public policy disputes. Recently, a city attorney stated that mediation could not be used by a City Council "because of the Brown Act"[1]. I pointed out that the Brown Act does not prevent members of a governing body from participating in mediation in an open meeting, nor does the Brown Act prevent a governing board from designating representatives to a closed mediation process. Many of my colleagues today are concerned about the implications of using mediation in local government disputes for fear of violating the Brown Act, or of due process requirements. Without express statutory authorization, these concerns are not easily dismissed.

C. **Lack of Resource Availability**

Thirdly, the opportunities and advantages for using Mediation, as an alternative means for resolving disputes, has just recently entered the mainstream consciousness. Corporate America is just beginning to

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[1] The California Open Meeting Law", Government Code Section 54950, et seq.

find the process to be an effective and efficient preferred alternative to actual or threatened litigation. Today, many large law firms are scrambling to get on the band wagon in offering "mediation services", along with the more traditional line of litigation specialties.

The publication of two seminal works[2] on the methods and benefits of using mediation in resolving public policy disputes within the last five years attests to the recency in which any attention has been given to this newly emerging field. I heartily recommend these publications to you for a more in depth review of the mediation process and its applications in public policy disputes.

The use of mediation in public policy disputes has not yet reached wide spread awareness among local officials, nor has there yet developed a market for finding and obtaining skilled, qualified mediators. At present there are no standards established for determining who may be qualified to serve in the capacity of a mediator.

There are now many individuals from various backgrounds who are "entering the market" and offering their services. There is a risk that not all of these individuals are sufficiently qualified or knowledgeable to undertake the specialized tasks associated with the mediation process. The California Judicial Council is considering

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[2] The two publications referred to are: Breaking The Impasse, Cruikshank and Susskind, Basic Books, 1987; and Managing Public Disputes: A Practical Guide to Handling Conflicts, Josey-Bass, 1988. For an introductory publication designed for local elected officials, see also Resolving Municipal Disputes, David Stiebel, Association of Bay Area Governments, 1992.

whether to establish a "certification process". There is an urgent need for low cost, effective assistance in educating local government officials about mediation, and in providing referrals of qualified mediators.

V. RECOMMENDATIONS AND CONCLUSION

The widespread and proper application of mediation processes for resolving land use and public policy dispute, over time, will have significant and beneficial impacts. These impacts will foster economic development and growth management by speeding up the decisional processes of local governments when impasses and stalemates occur; by improving the quality of the decisions reached; by achieving more effective public involvement; by improving public understanding of need for both balanced economic growth and growth management; and by generating stronger commitment to governmental processes, programs and policies.

The Legislature can tap into the potential of mediation, as applied to land use disputes and growtth management, by promoting and supporting the widespread application and use of mediation among local governments. Specific steps for you to consider are the following.

1. Include ADR and Mediation as an element of a comprehensive legislative program for economic growth and environmental protection.

A comprehensive legislative program for balanced economic growth and environmental program should at least include the following four basic elements:

a. The adoption of clear, cohesive, quantifiable goals and priorities for balanced economic growth and environmental

protection, down to the regional level.

b. A mandate upon local and regional government to develop strategies and programs to implement the goals and objectives.

c. A dependable program of financial assistance and revenue sharing incentives for those local governments in need that can demonstrate progress toward achieving the goals and objectives.

d. Statutory authorization for a permissive dispute resolution process that relies upon mediation as a first step to be taken when a dispute reaches an apparent impasse, and may also include a streamlined adjudicatory process as the next and last step prior to Appellate Court Review.

Mediation should not be made mandatory. Public agencies should not be required to submit to mediation against their will. The process is too easily sabotaged under compulsory mediation. An important criteria for effective mediation is that the parties voluntarily agree to mediation, even if reluctantly so.

However, it should be required that a reluctant public agency at least consider mediation in an exploratory meeting with a third party neutral mediator when mediation is called for by another public agency. The mediation literature is replete with anecdotal evidence that a skilled mediator can often convince an initially reluctant party to agree to mediation. This is sometimes referred to as the "convening" role of the mediator. Once involved in mediation, most reluctant parties find that the process works favorably. Many experienced mediators can relate how the most reluctant parties often become the strongest advocates for mediation.

The statutory scheme for mediation should include the provision that when a public agency finds an impasse has been reached in a dispute with another public agency and issues a request to mediate,

before any further action can be taken, the other party must consult with a mediator, whether chosen or appointed, in an exploratory evaluation of the dispute. If the party remains unwilling to mediate, the mediator may then be asked to issue a report to that effect, including any relevant observations if not otherwise privileged, and the aggrieved party may proceed with any subsequent actions or remedies that may be available.

2. Establish State Sponsored Centers For Public Policy and Land Use Alternative Dispute Resolution

To fill the urgent need for education and information among local officials regarding the methods of alternative dispute resolution and the mediation of public policy and land use disputes, resource centers should be established in both the northern and southern areas of the State to gather and disseminate such information. These centers also could serve to identify and maintain panels of mediators qualified and experienced in the field, and to make referrals of the names of such individuals to local officials upon request. In addition, these centers could sponsor or coordinate much needed research in the field of dispute resolution techniques applying to public policy and land use.

Similar centers have been established in other states to the benefit of local governments and the public generally. The experience in these states has been favorable. This approach would be cost effective and would find wide spread use and benefit in many areas involving economic, political, environmental and social conflicts in California.

3. Amend The Brown Act To Provide A Closed Session Exception For Mediation Caucus

Generally, the California Open Meeting Law, commonly known as the "Ralph M. Brown Act", requires that all meetings of local agency governing boards must be conducted in public. There are three exceptions permitted when local agency governing boards may meet in closed session. These exceptions allow closed meetings for the purpose of receiving advice or giving direction in pending or threatened litigation, for giving direction to representatives regarding employee salary, benefits and working conditions under current negotiation, and for giving direction or receiving advice concerning property acquisitions.

A fourth exception should now be added to the Brown Act that will allow the governing board of a local public agency, when it is party to a mediation proceeding, the opportunity to meet in closed session for the purpose of holding a caucus with the mediator, or to instruct the representatives of the board on the course of the mediation.

Providing an opportunity for a governing board to meet in closed session with its representatives on the course of a mediation proceeding is necessary for the same reasons as for the current exceptions. These are to permit the board to hear from its representatives concerning the positions of the other parties and to freely discuss alternative responses or proposals without risk of jeopardizing or compromising the position of the public agency, and to maintain a level playing field.

The proposed exception would not defeat the purpose of the Brown Act by depriving the public of its right to know of actions taken by

its representatives if it were subject to the same safeguards that now attach to the current exceptions. That is, any actions to approve an agreement resulting from mediation would have to be taken at a regular open meeting.

The provisopm that a governing board may meet in closed session with a mediator for the purpose of holding a caucus is essential to enable a mediator to provide effective services. Mediators often meet separately in caucus or closed sessions with each of the parties for various reasons. Such reasons include the need to explore a new approach toward settlement with one of the parties, if the mediator has reason to believe the approach may be fruitful; determining if there are some undisclosed factors affecting the negotiations; or, to undertake a "reality check" with a recalcitrant party. These services cannot be provided effectively in open meeting in the view of the other parties.

Each of the above recommendations involve little or no cost to the State and can be implemented quickly upon passage of the necessary legislation. I urge the Committees to consider these recommendations. Again, I would like to express appreciation to the Committees for the opportunity to present my views, and for your attention.

JOINT INTERIM

HEARING

SENATE SELECT COMMITTEE ON PLANNING FOR CALIFORNIA'S GROWTH
SENATE COMMITTEE ON LOCAL GOVERNMENT

RESOLVING LAND USE DISPUTES:

MEDIATION, ARBITRATION, AND LITIGATION

9:00 a.m. to 4:30 p.m.
Friday, November 6, 1992
State Capitol, Room 112

Testimony of
Susan Quinn
Director of the
Environmental Mediation Program
1010 Second Avenue, Suite 300
San Diego, CA 92101
(619) 533-3874

ABOUT THE SPEAKER...

SUSAN QUINN, Director of the Environmental Mediation Program, San Diego. Ms. Quinn is a mediator, attorney and adjunct professor at the University of San Diego School of Law. She developed the Environmental Mediation Program from its inception in 1989 and continues to administer the Program. She also provides trainings in mediation, negotiation and communication skills. She has presented programs for the National League of Cities and the Society of Professionals in Dispute Resolution.

ENVIRONMENTAL MEDIATION PROGRAM

1010 Second Avenue • Suite 300 • San Diego, CA 92101 • 619/533-3874

November 1992

INTRODUCTION TO MEDIATION

Mediation is an informal dispute resolution process in which a neutral trained mediator (or team of mediators) assists parties reach a resolution to a given dispute which is mutually acceptable. The role of the mediator is to clarify issues and understanding so that the parties are able to agree on a resolution of their issues. Unlike a judge or arbitrator, the mediator does not impose a decision on the parties. Instead, the mediator facilitates dialogue among the parties which is conducive to settling the dispute outside of the courtroom setting.

BACKGROUND OF THE ENVIRONMENTAL MEDIATION PROGRAM

In November of 1988 the City of San Diego entered into an agreement with the University of San Diego School of Law for the development and demonstration of a dispute resolution program and the creation of an "Environmental Court" within the Municipal Court system to hear certain municipal land use cases. The project also included the collection of data and evaluation of the code enforcement policies and procedures of the Building Inspection Department, Planning Department (primarily Zoning Investigations) and City Attorney's Code Enforcement Unit. The project team published its results in January 1990 and presented them to the City Council in April 1990. The Environmental Mediation Program was founded as the dispute resolution demonstration component of the Environmental Court Project.

During fiscal year 1990 the Program was jointly funded by the City and the University of San Diego School of Law as part of the Environmental Court Project. For the last three years the funding was derived from a variety of general and special fund sources. For fiscal year 1993 the Environmental Mediation Program budget is $133,850.

The Environmental Mediation Program has proved successful beyond all expectations and continues to provide an excellent and cost effective tool for achieving voluntary compliance.

RESULTS

The success of the EMP continues to remain high. Since August of 1989 the Program has achieved written agreements in over 95% of the mediations held. The compliance ratio is equally successful. To date the program has mediated or conciliated over 400 cases with a compliance rate of almost 75%. The City Attorney's Code Enforcement Unit prosecutes most of those cases where mediation is unsuccessful.

COST SAVINGS

A. Savings to City Departments

The department staff time to prepare a case for mediation averages two hours, a small fraction of the time required by departments to prepare a case for litigation. Mediation requires one and occasionally two staff to be present for a two hour process. If a case is taken to court the investigator will on average be required to make two half-day court appearances. In complex cases several investigators and/or supervisors would be required to appear. On average, mediation requires one-fifth the staff time as litigation. This results in substantial cost savings to departments.

B. Savings to City

Prior to the establishment of the Environmental Mediation Program, the City Attorney's Code Enforcement Unit prosecuted a large number of cases now resolved through mediation. The average cost of prosecuting a code enforcement case is estimated at $10,000. The average cost of mediating a case is estimated at $1000. (These figures include departmental, litigation and mediation staff time). The Program is successfully resolving over a hundred cases per year. The cost savings to the City are impressive! Since its inception EMP has assisted in a 25% caseload reduction for the City Attorney's Code Enforcement Unit. That unit is now able to focus its energies on more complex cases with serious health and safety hazards and cases with uncooperative property owners where litigation is clearly the appropriate remedy.

TIME TO COMPLIANCE

Compliance can usually be achieved through the mediation process in half the time required by litigation. A mediation is usually held within three weeks of a case being received by the Environmental Mediation Program. Most written agreements reached in mediation require compliance within sixty to ninety days. Because the parties have participated in the decision making process (as opposed to an order forced upon them by a judge or arbitrator) compliance is much higher and faster than traditional forms of dispute resolution. For instance, once a litigation case is filed in the court it will generally take from three to six months before the trial is held. After judgment is rendered it is likely to be another thirty to sixty days before compliance is achieved, if ever.

BETTER DEPARTMENT AND CITY RELATIONSHIP WITH CITIZENS

Perhaps the most far reaching benefit of the mediation process is one that cannot be quantified. The results of post mediation interviews with over two hundred participants shows a dramatic improvement in their attitude toward the City and the Departments after mediation.

A. High Level of Property Owner Satisfaction

Property owners have stated in these interviews that they find the Department representatives to be "very helpful" and "very willing to help work out the situation". Participants also mentioned appreciating the "information exchange", that all the options were "laid out" in the mediation and expressed relief "that people were cooperative not hostile". One party mentioned how important it was to "get consistent help from the Housing Department. It made compliance much easier when we knew what needed to be done." Another party said "I felt helpless and frustrated before the mediation. But this is a great process! It takes two people to cooperate. [The city representative] was very helpful and we both wanted to work out an agreement."

Feedback from participants in Noise mediations, which involve

neighborhood participation, is particularly illuminating of the benefits of the mediation process. "I was furious before the mediation. I went in with my claws out. I have seen a tremendous change in my own attitude and my neighbors'." The mediation was "extraordinarily profitable....I was amazed at the process! I am now on very good speaking terms with my neighbors. I had to silently admire the work you people do." "A remarkable change has occurred" in the neighborhood.

B. Volunteer Mediators

The City image is further improved by using volunteers from the community and legal interns from various law schools to conduct mediations. An overwhelming majority of the participants interviewed felt "very satisfied" with the mediation process and many of them addressed the neutrality issue directly. They appreciated the mediators' "neutrality" and the "chance to speak and be heard". They mentioned it was particularly helpful to have "someone in the middle ground to see my side and help me solve problems" and "important to have neutrality in the City". "The mediators helped bring us together and clarified what each side felt needed to be done". Many commented that mediation was "better than going to court" and they were "glad everything is settled".

TRAINING WITH COMMUNITY VOLUNTEERS

A. Zoning Volunteers

The Environmental Mediation Program staff has worked closely with the Planning Department to provide training in communication skills for "Zoning Volunteers". Zoning volunteers are individuals from the community who have volunteered to assist the zoning department by investigating and attempting to resolve minor code violations in their neighborhoods. A half-day training in effective communication and dispute prevention techniques has been developed based on mediation techniques. Two trainings have been held with over 40 zoning volunteers participating.

B. City Height's Code Enforcement Volunteers

The Environmental Mediation Program has also collaborated with the City Heights Community Development Corporation (CDC) in training volunteers who are interested in enhancing their community environment. The Program's Director and Assistant Director facilitated communication and cultural sensitivity workshops for these volunteers. Half-day training programs were held which emphasized code enforcement issues and focused on gaining voluntary compliance in the neighborhoods.

CONCLUSION

The heart of the mediation process is its emphasis on communication and understanding among parties in a dispute. Even in the code enforcement area, one of the primary advantages of mediation is the opportunity to be heard by a neutral third party who assists the parties in overcoming communication obstacles. Investigators resolve approximately 90-95% of San Diego's code enforcement cases in the field. That leaves only 5-10% of the cases which require aid from an outside source.

The code enforcement experience of the Program has revealed that noncompliance is usually the result of a breakdown in communication between the City and a property owner. Often a property owner needs an opportunity to vent some of his or her frustration about the bureaucracy or the law; frequently the City representative needs to explain the rationale behind the law and offer alternative means of compliance. This exchange of information and frustration occurs most effectively with the assistance of a neutral mediator.

The success of the Environmental Mediation Program has led to an expansion of the Program into other areas of conflict encountered by municipal government. Program staff have used mediation techniques to: resolve inter-departmental issues; facilitate public meetings on proposed ordinances or ordinance revisions; foster better relationships within neighborhoods; and develop consensus among groups directly impacted by proposed land-use policies. The potential in municipal government for a process that improves communication and understanding appears limitless.

The City of San Diego has recognized the many benefits offered by the Environmental Mediation Program. The staff at the Program invites you to inquire about the possibilities of using mediation in your particular situation.

The following is a list of City departments/divisions which use the Environmental Mediation Program's services:

Planning	Zoning Investigations
Building	Housing Inspection
Litter	Fire
Property	Police
Noise Abatement	Transportation Demand Management
Traffic	Engineering & Development

ENVIRONMENTAL MEDIATION PROGRAM

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130

OUTLINE OF COMPLIANCE MEDIATION PROCESS

I. MEDIATION PROCESS

A. Introduction

Describe mediation and role of mediator

B. Story telling

Each party (property owner and city representative) has opportunity to describe the situation from their perspective without interruption

C. Exchange and Negotiation

Opportunity for parties to understand other's perspective and other party's needs

Vent anger or feelings of persecution

Explain why law exists and why property needs to come into compliance

Clarify what exactly needs to be done and alternatives

Reach an agreement that is satisfactory to both parties

D. Draft final agreement

E. Sign typed agreement

II. ROLE OF DEPARTMENT REPRESENTATIVE

A. Must be able to make decision regarding:

1) How property owner can COMPLY and what substantial compliance will be

2) WHEN specific tasks need to be done - allow "reasonable" time

B. Explain why the law exists

C. Offer suggestions and options of alternative ways in which property can be brought into compliance

D. Distance themselves from past events and seek compliance not punishment

E. Be willing to offer something to the other party - maybe to be a contact person, schedule inspection at owner's convenience, send owner information, be willing to grant extensions of time if they have made efforts toward compliance

F. Maintain confidentiality of complainant

G. Monitor compliance after mediation

III. ROLE OF MEDIATOR

A. Maintain control of process

B. Keep meeting balanced and focused

C. Help parties clarify their needs and possible solutions

D. Assist parties draft agreement that is CLEAR and SPECIFIC

Code Enforcement

Mediation Can Make A Difference

"In more than 90 percent of the cases, the parties walk away with a written agreement. Plus, we're getting more than 70 percent compliance."

In addition to notices, demand letters and the traditional day in court, The City of San Diego, California is using another tool for gaining compliance in code enforcement disputes.

It's mediation — and apparently, it's working.

"We bring in the alleged violator, a representative from the appropriate department, and a mediator. In more than 90 percent of the cases, the parties walk away with a written agreement. Plus, we're getting more than 70 percent compliance," said Dispute Resolution Coordinator Susan Quinn.

The mediation efforts are part of the Environmental Court Project, a pilot program jointly funded by the City and the University of San Diego Law School. Quinn, legal interns, professors and others serve as mediators.

"It's an opportunity to work conflicts out — an intermediate step to keep disputes from having to go to the city attorney's office for prosecution. Most of the cases come from zoning and deal with problems such as inoperable vehicles in someone's front yard. We have had some neighborhood situations and housing violations involving tenants and landlords," Quinn said, noting that mediations began in September 1989 and about 60 had been completed by the end of the year.

"It's been very successful. Using a systematic approach, we wanted to tackle cases that weren't eminent health and safety issues. We wanted to explore mediation with neighbor-to-neighbor disputes or personality-type disputes between an inspector and a violator. Mediation in these types of cases allows us to channel our energies to more large-scale or significant cases," said Joe Schilling, supervising attorney for the City Attorney's code enforcement unit.

Michael Shames, an executive director of a utility consumer group who serves as the director of the Environmental Court Project, pointed out another benefit of mediation.

"Disputes can be settled — to the satisfaction of both parties — in a matter or weeks or months, compared to the one-and-a-half to two years needed for the current court system," he said.

"Everyone walks away feeling good after a session."

"It's amazing how flexible departments and violators can be. Many times, an individual just doesn't understand what needs to be done or how to go about it. With mediation, the City department representative can serve almost as a resource," Shames added.

According to Shames, the mediation program has helped to "stop the growth" of a 2,600 zoning case backlog. Perhaps it's also given a "human side" to city government.

"It gives the property owner a place to tell their side of the story, which often they feel is never heard. They can open up and tell things that they didn't want to tell the investigator. The City then can take that into consideration, yet still get compliance," said senior planner Ty Rogers, who works in the neighborhood service division of the planning department's zoning investigation section.

"The investigator isn't present; usually a planner in zoning serves as our representative. Usually, we're able to get what the investigator tried to get. Sometimes, it's a matter of 15 days being given to comply when the person needed 30. We had one individual with health problems, but we didn't know that when we were knocking on his door and sending him notices of violations. Mediation is another way of showing government cares and can respond — once we understand the situation," Rogers said.

"Most of the time, we're just working out a time frame for getting compliance. But if we do have to go to court, the fact that we tried to mediate is a plus for us," he added.

Who decides when mediation will be used? According to Schilling, weekly meetings are held to discuss cases, with representatives from zoning and the city attorney's office working as a team to determine when mediation gets a green light.

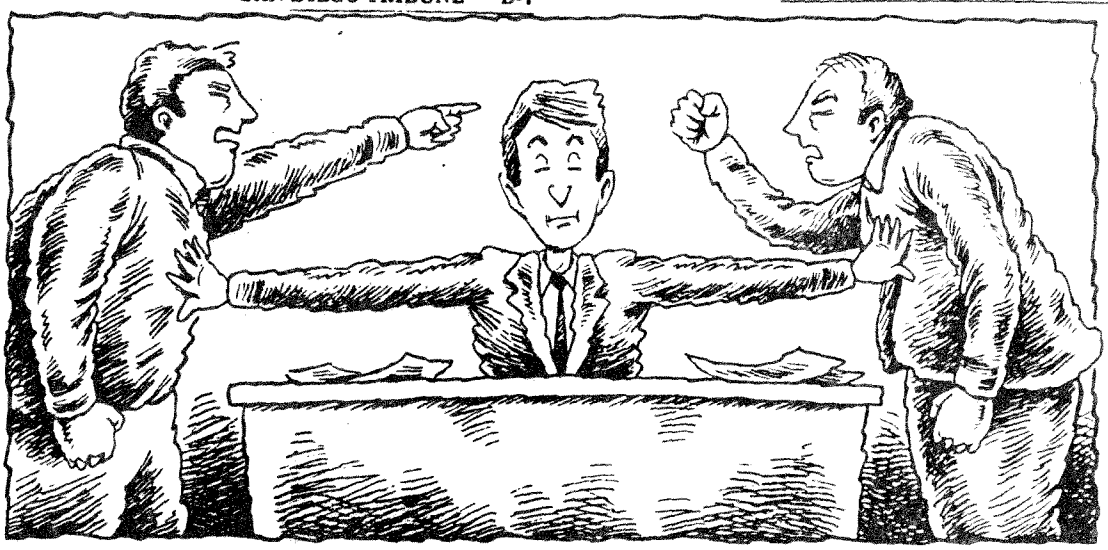
"Traditionally, the city attorney's office is contacted only when legal advice is needed. But zoning enforcement is a legal area and it's important to bring the city attorney's office into cases. The ultimate goal is to get compliance. And with mediation, we're often able to do that effectively — saving time and money for the City and taxpayers," Schilling said.

"It's like an old fashioned neighborhood approach — let's just sit down and talk to each other. Everyone walks away feeling good after a session," he added.

For more information on this City of San Diego program, write to 1010 Second Ave., Suite 300, San Diego, CA 92101 or call 619-533-3072.

SAN DIEGO TRIBUNE B-7 Wednesday, April 4, 1990

Volunteers help solve city disputes



Joseph Shoopack

By **HERB FREDMAN**

SAN DIEGO

Nothing shatters neighborhood harmony faster than donnybrooks over building, zoning and other land-use infractions. Violations also spur the process of community decay.

So, an impressive San Diego pilot program, the Dispute Resolution Office (DRO), is worth cheering. The simple, low-cost process settles many municipal code offenses.

They range from junked cars, old refrigerators and other eyesores on property to garages illegally converted to living units. Complaints are common about noise, businesses operating in residential areas, or unsafe plumbing, heating and electrical installations. Scofflaws ignore code requirements to build fences, sheds and other structures.

Trained volunteer DRO mediators use "bureaucracy with a human face" to reach accord on often bitter, long-drawn-out arguments. Mediators don't make decisions. They are conciliators, skilled at using conflict-resolution techniques to obtain agreement among contending parties.

Susan Quinn, a trained mediator and attorney, directs DRO. More than 100 wrangles, many highly emotional, have been handled since the innovative project began last September. Many more are scheduled for mediation. The parties sign written agreements in more than 90 percent of the cases. Most end with property owners complying with city ordinances.

DRO, along with an intensive 18-month study of San Diego municipal code enforcement, is financed jointly through June by the city and University of San Diego Law School. Continuing the program another year will cost $90,000. Much can be covered by a civil penalty fund collected from violators and from special Building Inspection Department funds. The City Council plans a hearing on the program soon, and should provide the small remaining expense.

Zoning, housing and building-code violations are an urgent problem. If allowed to fester, they can tear down a community. San Diego's state and municipal code ordinances fill 2,000 pages. It's easy to put new regulations on the books to protect health and safety, but enforcement is a difficult, often thankless chore.

Communities are getting less homogeneous. Infractions pit neighbor against neighbor. Offenses often persist despite warnings. They breed disrespect for municipal laws and threaten public well-being.

Residents are quick to file complaints with council members and city bureaus. Council staffs respond with a blizzard of "route slips" to the city manager and other departments. No single unit handles all these problems. The stack of unsettled offenses includes thousands of cases.

If violations require court action, they often take years for the city attorney's understaffed code enforcement unit to resolve. A fragmented, overburdened system allows many cases to fall through the cracks.

No large jurisdiction can do without complex code ordinances. Yet, if the city tries for complete compliance, an army of bureaucrats — inspectors, clerks, prosecutors and judges — would be needed, along with many more jail cells. Costs would bankrupt the city.

An economical approach, using DRO, brings alleged violators together with trained mediators and city representatives in a neutral setting. To avoid confrontation, complainants are never present or identified.

Mediation on average takes about two months. Alternatively, gaining compliance through letters, citations, demand notices and court proceedings can take years. Officials despair of ever settling a huge backlog of cases, some dating back five years or longer.

A typical dispute resolution case involved property owner Alex Gonzalez (not his real name). His rental units near downtown San Diego have been nothing but headaches. The latest trouble was a notice that a tenant, Ed Johnson, was violating zoning ordinances. He filled much of the yard with rusting autos and other junk.

Gonzalez was invited to meet with a mediator and zoning officials. With no interruption, he was allowed to express his frustration with Johnson, his anger because some "busybody" neighbor had complained, and his dislike of a city inspector he considered officious.

A zoning supervisor was sympathetic but firm that property owners ultimately are responsible. He did not reveal who complained. He explained why ordinances are necessary, and offered to meet at the property a week later with Gonzalez and Johnson.

They would notify the tenant that he must remove the litter in two weeks. If Johnson doesn't comply, Gonzalez must start eviction proceedings against him and see that the debris is removed. If Gonzalez shows good faith in carrying out the agreement, he will get reasonable extra time to comply.

Definite dates are set for each step. Gonzalez signed the written agreement. He left the session mollified by the city representative's attitude and the efforts of the skilled mediator. Quick settlement of code infractions gives enforcement public credibility.

Many city dispute resolution volunteers are trained law students, who receive credit for their work. Others are civic-minded men and women who undergo rigorous three-day training and commit to working at least 12 hours a month for a year.

Community Mediation of San Diego provides much of the training as well as volunteer mediators for DRO. The non-profit organization has a roster of more than 200 mediators and a long waiting list of applicants.

No matter where they live, most San Diegans are touchy about their neighborhoods. Abandoned machinery or cars on residential lots get their dander up. They fume when owners put an illegal third unit on a lot zoned for two. Unsightly fences or shacks erected without building permits, or residents who party all night with loud music ruin community good feeling.

San Diego is maturing while continuing to grow. Code enforcement is the only way the city can forestall more crumbling of its urban environment and deteriorating, crime-ridden neighborhoods.

Using volunteer facilitators and discussing difficulties builds willingness to compromise. It soothes irate residents and reaches satisfying solutions to annoying disputes. It's an important stimulus to greater sense of community. □

Herb Fredman is a writer and former reporter who has lived in San Diego since 1948.

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PRESENTATION TO

SENATE SELECT COMMITTEE OF PLANNING FOR CALIFORNIA'S GROWTH

SENATE COMMITTEE ON LOCAL GOVERNMENT

JOINT INTERIM HEARING
"RESOLVING LAND USE DISPUTES"

D. Barton Doyle, Esq.
Brobeck, Phleger & Harrison
Los Angeles

November 6, 1992

My task today is to define the problems of relying on the existing judicial system to enforce the various planning land use and related environmental review requirements of California law. Having defined that problem, I will discuss in detail one possible remedy, the establishment of a state Land Use Court, which was recommended by the Ueberroth Commission and embodied in Senator Bergeson's bill, S.B. 434, which was introduced in the last legislative session.

I.

STATEMENT OF THE PROBLEM

A. Inadequate Case Law.

The California Supreme Court in recent years has been overwhelmed by its case load. It spends a majority of its time handling capital punishment cases and takes very few land use or related environmental cases. Typically we will see no more than three or four cases of direct relevance to the planning and development process in any given year. The Court has made increasing reliance on the depublication process which has eliminated a number of good decisions which offered useful guidance to both public agencies and project applicants. The problem with the extensive use of depublication is that we do not get a good body of case law which individual project applicants can use in challenging the more arbitrary practices of local governments. It is difficult enough to get agencies to respond to reasonable requests when you have law on your side. It is even more difficult when we don't get the benefit of previous litigation, directly on point, which cannot be cited as precedent.

Another issue which affects the quality of judicial decision making is the training and selection of judges. In recent years, including most of the decade of the 1980s, attitudes

towards gun control, capital punishment and other issues were often the criteria used to select judges. Judges tend to disproportionately be chosen from trial lawyers, particularly prosecutors, who have general litigation backgrounds that serve them well for most purposes, but typically have little direct experience in municipal, planning, or environmental law.

The third problem is that the planning law in California has become so complex over the last 10-15 years. A variety of procedural requirements cut across the substantive requirements in planning law. There are continual problems ascertaining the scope of a local agency's authority for different types of acts, i.e., the distinctions drawn between ministerial and discretionary, or between legislative and administrative, that make consistent application of general plan, zoning and subdivision law extremely difficult. Again, because of the recruitment pattern and the lack of training that the judges receive once they are appointed to the bench, these subjects are poorly understood. Typically you will find no more than one or two judges in a given Superior Court with a good grasp of these problems and expertise in land use and planning law. Such talent becomes even rarer as you move up through the appellate courts.

Finally, there is the longstanding judicial policy of deferring to legislative bodies, including local legislative bodies, which are presumed to be acting according to law and proper procedure. Another way of stating this problem is that the burden of proof always rests on the challenger, the project applicant that has been wronged and is seeking to overturn a denial or compel a favorable decision from the local government body. The courts have particularly deferred in the area of impact fees, in essence adopting a "close enough for government work" standard, and refusing to examine the assumptions or the

calculations behind the impact fee and other types of development exactions which are increasingly being imposed by local government.

B. Cost Associated With Project Delay.

It is difficult for a project applicant to go to court in many instances even if he has a good case, based upon the law and the facts of the dispute, because he will incur a delay of a year or two years or more before the dispute is settled. The bottom line is that you may have a legitimate cause of action but you are effectively precluded from pursuing it in court simply because you have to borrow the money to carry the project until your rights have been finally determined.

C. Need For Effective Oversight.

More than 200 years ago, Alexander Hamilton wrote in Federalist Papers, No. 15, that:

> It is essential to the idea of a law that it be attended with a sanction . . . If there be no penalty annexed to disobedience, the resolution or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendations.

These constraints on litigation, especially the costs associated with going to court, effectively insulate localities from oversight by the courts. Unlike at the federal or state level, the current system of Local Home Rule in California does not provide for a system of checks and balances. In the vast majority of local jurisdictions there is no independent executive and there are no courts directly supervising the exercise of legislative discretion by the City Councils and Boards of Supervisors. The knowledge that an action of the Council or Board will not be challenged contributes to the tendency to ignore the formal requirements of planning law.

All of the various growth management proposals developed in the past two years focused on the development of state mandates or state standards that were to be enforced against localities. A prime example is the regional housing needs assessment process, with the requirement to amend the housing elements of general plans to provide for production of housing for all income categories on a five year planning cycle. There are numerous other examples, such as the requirement imposed on local governments to adopt density bonus ordinances to facilitate the production of affordable housing, which are largely ignored by local governments. Because of the lack of an enforcement mechanism or any kind of judicial oversight, any talk of a series of mandates is premature. It doesn't matter what mandates you legislate because under Home Rule the cities and counties are, as a practical matter, free to ignore them.

II.

ANALYSIS OF S.B. 434

A. Speed and Certainty

The most important provision in the bill was the proposal to allow any interested person or affected agency to apply to the Land Use Court for relief within 60 days of a public agency's final decision. The Court would in turn have 30 days to determine whether to accept jurisdiction. If it chooses not to, the plaintiff may appeal directly to the District Court of Appeal, which will independently evaluate whether to hear the case. If the Land Use Court accepts jurisdiction, it then assigns the matter to a judge, a panel or the entire Court. A hearing would then be held within 30 days of assignment of the matter. A final order and written decision would be issued within 30 days after the close of the hearing.

This approach is calculated to restore accountability over local government actions, but it creates a number of inconsistencies with existing law which must be addressed for such a system to work. The first and most obvious problem is what to do about the current crazy quilt of statutes of limitations for bringing suits. Some examples, which are by no means exhaustive of the problem, include:

Government Code § 65009(c):	120 days to challenge the adoption of a general plan, specific plan or zoning.
Government Code § 66475.4(c):	90 days to challenge the approval, denial or validity of subdivision conditions.
Government Code § 65860(b):	90 days to challenge consistency of zoning with the general plan.
Government Code § 66020(c):	180 days from date of imposition to challenge impact fees on new development.
Government Code § 66022:	120 days from enactment or amendment to facially challenge ordinance enacting or amending fees or service charges.

The California Environmental Quality Act (CEQA) contains a wide range of statutes of limitations which are set forth in Public Resources Code § 21167. The statutory period to challenge a determination that a project is exempt from CEQA is generally 35 days, but the period to challenge the validity of an EIR or negative declaration is 30 days. In most cases,

the period is extended to 180 days if the required public notice of the agency's action is not properly filed and posted.

Another issue not addressed in the bill, which goes to issues of both the statute of limitations and the scope of the Court's jurisdiction, is the impact on initiative and referendum law. Elections Code § 4051 provides for a referendum on local legislative acts if 10 percent of the registered voters sign and file a petition within 30 days of the effective date of the ordinance. This statutory provision applies to general law jurisdictions. Charter cities may have different time frames. Is the "final decision" of the local agency the approval by the legislative body, or the vote on the initiative or referendum which enacts direct legislation or repeals a legislative body's previous action?

This latter concern is not academic. The initiative process has been used frequently during the past 15 years to control growth and stop individual projects. Many of the major land use entitlements, including generally both zoning and general plans, are considered legislative acts subject to the initiative process.

B. Establishment of Coherent Legal Precedents

Probably the best models for specialized costs are the special jurisdiction Federal Courts such as the Tax Court and Court of Claims. These types of courts establish expertise on the matters that come before them and as a result are able to cut through to the fundamental issues in the dispute more readily. General policies would emerge from the Land Use Court, including the types of cases the judges felt were most important, as well as guidance on the proper balance between the interests of project applicants and those of local governments. The enormous range of types of disputes would be winnowed out over time.

C. Special Jurisdiction Qualifications

Litigating a land use case in Superior Court or the Court of Appeal is often a crapshoot. A plaintiff can only hope that he will get a judge or a panel that knows something about the subject and can perceive the validity of the arguments as they are presented.

As proposed, S.B. 434 would require that the Commission on Judicial Appointment confirm that any judge appointed or elected to the Land Use Court demonstrate "interest and proven ability in land use planning and development." This approach, although it does not propose specific minimum criteria (an alternative legislative approach), directly addresses the expertise problem with the existing judiciary.

Lawyers, especially judges, are supposed to be the last of the great generalists. But the profession has become increasingly specialized, and the larger local court systems have judges and commissioners which focus on narrow classes of disputes, including probate matters, traffic violations, juvenile offenses, etc.

Proposals to transfer jurisdiction over land use and planing disputes from existing courts to other bodies are not new or unique to California States with functioning appeals boards, commissions, special accelerated appeal procedures, or other mechanisms include Connecticut, Florida, Hawaii, Massachusetts, Oregon and Rhode Island.

D. Budgetary Issues

Clearly the issue of how the court is to be funded is an important one given the general budgetary constraints that the state faces. S.B. 434 addresses this problem by proposing to assess fees to pay for the operation of the Land Use Court based upon the value

of the building permits at a rate of $5.00 per $100,000 in permit valuation for residential structures and $10.50 per $100,000 for all other structures. Cities and counties would be authorized to retain 5 percent of the money collected as an administrative fee. –

To determine whether this would produce enough money to fund the operations of the Land Use Court, it is necessary to look at actual numbers. Attached is a schedule of total construction permit valuations in the State of California for the years 1975 to 1991, including a 1992 end of year forecast, which was prepared by the Construction Industry Research Board. It is current as of August 3, 1992.

Based upon the proposed formula, residential and non-residential construction combined (but excluding highways, bridges, etc.) would have yielded $3,005,100 in calendar year 1989, the peak for these types of construction. In 1992, at a relatively low end of the cycle, the combined total should be in the area of about $1,600,000.

It is important to note that these numbers include the value of tenant improvements and the remodeling or rehabilitation of existing buildings in addition to new construction. The question arises as to whether these types of permits which are not tied to a discretionary approval and do not require any change in land use should be taxed in this manner. If such permits are excluded (in bad economic times they may constitute as much as 50 percent of the total permit valuation) then the fees on new construction would have to be set significantly higher.

An obvious additional source of revenue is to charge filing fees for all cases, the universal practice in the existing courts. For example, just this year the fee for filing a notice of appeal in a civil case in a Court of Appeal was raised from $200 to $250 by the

enactment of A.B. 3692. Another piece of legislation, A.B. 1344 raised filing fees for Municipal and Superior Courts, effective September 25, 1992. The fee for filing a civil complaint in Superior Court, such as a writ of mandate or administrative mandamus action challenging the decision of a local agency to deny a project approval, now costs $182. The answering party pays the same fee. So do other parties that intervene.

It would be very realistic to factor in average filing fees of $500 to $750 per lawsuit, which could be used to fund the operations of the Land Use Court, either alone or in combination with the permit fees discussed previously.

The debate over the feasibility of the Land Use Court has not reached the level of what its operating overhead and budget would be. Until assumptions are made about the Court's day-to-day costs and the volume of disputes it will hear, it will be difficult to design a specific revenue source.

TABLE 1-A
STATE OF CALIFORNIA
SUMMARY OF CONSTRUCTION TRENDS AND FORECASTS
(DOLLAR AMOUNTS IN BILLIONS, STATED IN CONSTANT 1991 DOLLARS)
1975-1992

	NEW HOUSING UNITS IN 1,000s			<----------TOTAL CONSTRUCTION IN $BILLIONS (ADJUSTED FOR INFLATION)*---------->										
				RESIDENTIAL			NONRESIDENTIAL			HEAVY CONSTRUCTION				
YEAR	SINGLE-FAMILY	MULTI-FAMILY	TOTAL UNITS	NEW BLDGS	ALTER/ ADDITS	TOTAL RESID.	NEW BLDGS	ALTER/ ADDITS	TOTAL NONRES	STREETS/ HWYS/BRG	OTHER NONBLDG	TOTAL HEAVY	TOTAL CONSTR.	CONSTRUCTION EMPLOYMENT
1975**	89.8	41.9	131.7	$ 9.71	$1.30	$11.01	$ 5.89	$1.73	$ 7.62	$1.07	$1.97	$3.04	$21.67	285,900
1976**	140.0	81.1	221.1	$16.31	$1.49	$17.80	$ 5.96	$1.84	$ 7.80	$0.84	$2.48	$3.32	$28.92	301,300
1977**	174.9	95.9	270.8	$19.19	$1.70	$20.89	$ 7.59	$2.07	$ 9.66	$1.07	$1.84	$2.91	$33.46	350,400
1978**	143.1	101.6	244.7	$17.14	$1.70	$18.84	$ 8.66	$2.27	$10.93	$1.07	$2.69	$3.76	$33.53	401,900
1979**	127.5	82.5	210.0	$15.42	$1.78	$17.20	$ 9.48	$2.48	$11.96	$0.97	$2.74	$3.71	$32.87	448,700
1980	86.7	58.3	145.0	$11.53	$1.83	$13.36	$ 8.52	$2.57	$11.09	$0.96	$2.47	$3.43	$27.88	428,300
1981	60.3	44.3	104.6	$ 8.61	$1.72	$10.33	$ 9.50	$2.91	$12.41	$0.80	$3.08	$3.88	$26.62	407,500
1982	51.2	34.5	85.7	$ 6.66	$1.66	$ 8.32	$ 8.82	$2.81	$11.63	$0.86	$2.08	$2.94	$22.89	349,000
1983	102.5	70.1	172.6	$13.08	$1.93	$15.01	$ 9.25	$3.42	$12.67	$1.05	$2.23	$3.28	$30.96	369,300
1984	112.8	112.0	224.8	$16.01	$2.09	$18.10	$11.26	$3.38	$14.64	$0.97	$1.98	$2.95	$35.69	445,200
1985	114.2	158.1	272.3	$18.60	$1.96	$20.56	$11.88	$3.94	$15.82	$1.19	$3.41	$4.60	$40.98	496,200
1986	146.6	168.0	314.6	$23.63	$2.19	$25.82	$11.54	$3.90	$15.44	$1.57	$3.07	$4.64	$45.90	531,000
1987	136.1	117.0	253.1	$22.16	$2.42	$24.58	$10.37	$4.13	$14.50	$1.51	$2.87	$4.38	$43.46	574,600
1988	162.2	93.4	255.6	$25.93	$2.70	$28.63	$10.96	$4.36	$15.32	$1.68	$3.81	$5.49	$49.44	603,300
1989	162.6	75.1	237.7	$26.44	$3.17	$29.61	$ 9.96	$4.56	$14.52	$1.73	$3.34	$5.07	$49.20	648,100
1990	103.8	60.5	164.3	$17.67	$3.26	$20.93	$ 8.66	$4.31	$12.97	$1.46	$3.39	$4.85	$38.75	650,400
1991	73.8	32.1	105.9	$12.01	$3.05	$15.06	$ 5.55	$4.07	$ 9.62	$2.38(R)	$3.81	$6.19(R)	$30.87	550,700
1992 (FORECAST)	80.0	24.0	104.0	$12.23	$3.01	$15.24	$ 4.38	$3.80	$ 8.18	$2.22	$3.87	$6.09	$29.51	516,000
% CHANGE: ***														
1988-89	+ 0.3%	-19.6%	- 7.0%	+ 2.0%	+17.4%	+ 3.4%	- 9.1%	+4.6%	- 5.2%	+ 2.8%	-12.3%	- 7.6%	- 0.5%	+ 7.4%
1989-90	-36.2%	-19.4%	-30.9%	-33.2%	+ 2.8%	-29.3%	-13.1%	-5.5%	-10.7%	-15.2%	+ 1.3%	- 4.3%	-21.2%	+ 0.4%
1990-91	-28.9%	-46.9%	-35.5%	-32.0%	- 6.4%	-28.0%	-35.9%	-5.6%	-25.8%	+62.8%	+12.5%	+27.7%	-20.3%	- 15.3%
1991-92	+ 8.4%	-25.2%	- 1.8%	+ 1.8%	- 1.3%	+ 1.2%	-21.1%	-6.6%	-15.0%	- 6.8%	+ 1.3%	- 1.8%	- 4.4%	- 6.3%

*Dollar series are adjusted for inflation and stated in 1991 dollars. Residential and nonresidential building are stated in dollar volumes of building permits issued for private building projects. Heavy (nonbuilding) construction is stated in dollar volume of contract awards.
**Dollar amounts prior to 1980 are adjusted to reflect current definitions of alterations and additions. Prior to 1980, permits for alterations and additions of $100,000 or more were included with new buildings.
***Because of rounding, percent changes may not compute using the rounded totals shown.
(R) REVISION. The inflation factor for street and highway construction for 1991 is lowered effective this report. Since 1991 is the base year, this lowers the dollar value for each year in the series.

SOURCES: Housing units and unadjusted residential and nonresidential building from U.S. Department of Commerce, Bureau of Census, Construction Industry Research Board, and, prior to 1987, Security Pacific National Bank. Unadjusted heavy construction data from Dodge/DRI, Dodge Local Construction Potentials and other sources. Construction employment, 1975 thru 1991, from California Employment Development Department. Inflation and other adjustments, and forecasts are from Construction Industry Research Board.

CONSTRUCTION INDUSTRY RESEARCH BOARD (Revised August 3, 1992.)

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TESTIMONY

by MARGARET MOORE SOHAGI

RESOLVING LAND USE DISPUTES: MEDIATION, ARBITRATION AND LITIGATION

JOINT INTERIM HEARING

of

SENATE SELECT COMMITTEE ON PLANNING FOR CALIFORNIA'S GROWTH SENATE COMMITTEE ON LOCAL GOVERNMENT

Friday, November 6, 1992
State Capitol, Room 112

I. *OVERVIEW*

The United States is one of the most litigious societies in the world. Not only do we sue our neighbors with regularity, as a nation we spend billions of dollars a year litigating and create a backlog in the courts that rivals rush hour on the I-5 freeway.

In the case of land use and environmental disputes, lawsuits have proliferated to the point of assigning acronyms. These are SLAPP suits (Strategic Lawsuits Against Public Participation) and anti-SLAPP suits, NIMBY (Not In My Backyard) suits and Anti-NIMBY suits, just to name a few.

There are high costs to pay for litigating public disputes. A typical land use dispute filed against local government can take five (5) years to get to trial and cost over two million dollars in attorneys' fees to defend. (In City budget terms, this is roughly equivalent to hiring eight (8) additional policemen per year for five (5) years.) For a project applicant a lawsuit may also result in project delays and loss of financing. Litigation is equally costly to concerned citizens who spend endless hours organizing their opposition and raising funds.

There is another, perhaps less obvious cost. Resorting to the courts to decide complex land use and environmental issues removes the final decisionmaking authority from local government. This amounts to a direct admission that public decisionmaking in its traditional elaborate form has failed. Instead of decisions being made by elected officials with participation of all affected and interested persons, a single (usually appointed) judge will make policy decisions that should be subject to public scrutiny.

II. *WHERE WE ARE NOW: LITIGATION*

Land use litigation today may involve any of the following parties:

A. Jurisdiction v. Jurisdiction.

B. Citizens/Developer v. Jurisdiction.

C. Jurisdictions/Citizens v. Regional, State and Federal Agencies.

D. Developer v. Citizen (Strategic Lawsuits Against Public Participation "SLAPP" and anti-SLAPP suits).

III. *LAND USE CHALLENGES*

Land use challenges often contain causes of actions relating to the following:

A. Takings/police power (Fifth Amendment).

B. Equal protection and substantive due process violations.

C. General plan adequacy/consistency.

D. Compliance with the California Environmental Quality Act ("CEQA").

E. Affordable housing/discrimination.

F. Subdivision Map Act violations.

G. Procedural due process violations.

IV. *REMEDIES*

The types of remedies sought typically include any of the following:

A. Monetary damages — usually pled as "highest and best" use of the property "taken" or "lost sale".

B. Permit approval or denial.

C. Invalidation of the challenged legislation (*i.e.*, general plan amendment or zoning).

D. Invalidation of the environmental documentation.

V. *PROCEDURAL POSTURE*

Land use litigation can take various procedural forms. Frequently challenges to a governmental body's decision is brought on as a Writ of Mandamus (Code of Civil Procedure §§ 1085 or 1094.5). Some administrative challenges are limited to a review of the administrative record, thereby eliminating expensive and time-consuming discovery. Other challenges may involve a full evidentiary trial

with the full compliment of discovery, including depositions of expert witnesses. Certain factual issues, particularly damages, can be heard by a jury.

VI. *THE PITFALLS OF LAND USE LITIGATION*

A. Lack of Predictability.

The primary problem with land use litigation is its unpredictability. As long as each party thinks they may prevail, litigation appears worthwhile.

The U.S. Supreme court has enshrined the lack of predictability in its decisions on Fifth Amendment takings challenges (still the major land use challenge). The Court frames the takings test as an 'ad-hoc factual inquiry'. Any challenge which is evaluated on a case-by-case basis naturally reduces the likelihood of predictability. Few juries or judges will weigh the facts alike.

B. The Expense.

Commentators agree litigation is expensive. The taxpayers' money is currently being spent defending land use decisions. There are other budget items deserving attention including monies needed for capital improvements and public service.

Again, the less clarity in the case law, the more expensive the litigation. The most recent example is the takings decision by the U.S. Supreme Court last session: *Lucas v. South Carolina Coastal Council* (1992) ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798.

The *Lucas* decision leaves many unanswered questions. Developers and landowners are threatening public agencies with "*Lucas*-type" challenges daily. This trend will continue until the law is clarified.

Needless to say, litigation is also time-consuming. The courts are overburdened with criminal cases alone. Recently enacted Delay Reduction Programs help but cannot cure the problem. With delay comes greater expense for all parties.

VII. WHAT CAN BE DONE (SHORT OF GREATER PREDICTABILITY FROM THE COURTS)?

A. Encourage administrative takings procedures at the local level.

B. Shorten the statute of limitations on land use decisions. (See for example, CEQA, (30 - 180 days statute of limitations).

C. Require mediation of disputes *prior* to filing a lawsuit.

D. Mediation.

As planners and attorneys, we must take responsibility for resolving land use disputes efficiently and equitably. To this end, mediation is a realistic alternative.

Mediation is a voluntary process in which a neutral third party assists disputants in reaching a mutually acceptable agreement. Any agreement reached is by the parties, not the mediator. Mediation is *not* arbitration. Arbitration is a process (either a voluntary binding process or a compulsory nonbinding process) where a hearing is held before a third party. In arbitration, the third party makes the ultimate decision.

There are distinct advantages to mediating public disputes[1]:

- Mediation which occurs prior to the public hearing process "smokes out" false arguments and narrows the issues in dispute. This allows decision makers to focus on the true issues. When false issues are removed, public meetings tend to take considerably less time — a side-benefit not to be overlooked.

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[1] No method is without its pitfalls. Before embarking on mediation, consider,

1. Open meeting laws — (Ralph M. Brown Act, Government Code §§ 54950 *et seq.*);
2. Enabling authority;
3. Non-delegation of decision making authority; and
4. Permit Streamlining Act (Government Code § 65920 *et seq.*, Public Resources Code §§ 21080.1)

- The traditional public hearing process polarizes positions. Parties are afforded only one of two options: "for" or "against" a project or policy. As the debate rages, parties typically adhere with greater vehemence to their initial position. In mediation, all interested parties (the "stakeholders") present their viewpoint and concerns in a neutral setting. Contrary positions can be questioned. Compromise and tradeoffs are possible.

- Mediation allows the disputants themselves to tailor an agreeable solution. If the parties involved do not have formal decisionmaking authority, their consensus takes the form of a recommendation. The likelihood of approval by a decisionmaking body is much higher when all of the stakeholders are in agreement.

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STATEMENT OF HONORABLE JAMES T. FORD, JUDGE OF THE SACRAMENTO SUPERIOR COURT, BEFORE THE SENATE COMMITTEE ON LOCAL GOVERNMENT INTERIM HEARING ON LAND USE DISPUTES NOVEMBER 6, 1992

I AM APPEARING TODAY ON BEHALF OF THE JUDICIAL COUNCIL TO ASSIST THE COMMITTEE IN REACHING A MORE THOROUGH UNDERSTANDING OF THE ROLE WHICH CAN BE TAKEN BY THE JUDICIAL BRANCH OF GOVERNMENT IN FACILITATING SOUND LAND USE DECISIONS.

IN APPROACHING THIS ISSUE, I HAVE IN MIND THE SUMMARY OF THE MAJOR STATE LAND USE PROBLEMS OUTLINED IN THE REPORT OF THE COUNCIL ON CALIFORNIA COMPETITIVENESS, ALSO KNOWN AS THE UEBERROTH REPORT:

A. POOR MANAGEMENT OF GROWTH, AND INABILITY TO RECONCILE COMPETING LAND DEVELOPMENT NEEDS.

B. LACK OF A CONCISE PROCESS FOR LOCAL PLANNING.

C. REDUNDANT ENVIRONMENTAL QUALITY STUDIES AND REPORTS.

D. REFUSAL BY AGENCIES TO FOLLOW EXISTING LAW, AND RULES WHICH ENCOURAGE FRIVOLOUS LITIGATION.

E. UNREASONABLE DEVELOPER FEES.

MOST OF THE FOREGOING PROBLEM AREAS ARE PRIMARILY RELATED TO POLICY MAKING, OR "LEGISLATIVE" ISSUES. ACCORDINGLY, THEY WOULD NOT BE IMPROVED BY THE CREATION OF ANY NEW ADJUDICATION SCHEME. IN THIS CONNECTION, IT IS IMPORTANT TO RECOGNIZE THE DISTINCTION BETWEEN THE EXECUTIVE, LEGISLATIVE AND JUDICIAL FUNCTIONS OF GOVERNMENT: COURTS' RULE ON FACTUAL DISPUTES AND INTERPRET THE LAW; THEY SHOULD NOT BE EXPECTED TO PERFORM EXECUTIVE FUNCTIONS, SUCH AS ISSUING PERMITS, NOR SHOULD THEY ENGAGE IN LEGISLATIVE POLICY MAKING.

WHEN WE OBSERVE THE LAND USE BOARDS AND COMMISSIONS ESTABLISHED IN FLORIDA, OREGON, RHODE ISLAND, AND OTHER STATES, WE NOTE THAT THEY PERFORM EXECUTIVE AND LEGISLATIVE FUNCTIONS. THESE OTHER JURISDICTIONS HAVE EMPLOYED ADMINISTRATIVE AGENCIES, NOT COURTS, TO ADDRESS THEIR MAJOR LAND USE PROBLEMS, AND CALIFORNIA WOULD DO WELL TO CONSIDER THEIR EXAMPLE IN ADDRESSING THE MAJOR DEVELOPMENTAL ISSUES OUTLINED IN THE UEBERROTH REPORT.

ESTABLISHMENT OF A LAND USE COURT IN CALIFORNIA WOULD BE AN UNNECESSARILY DRASTIC REACTION TO THE NARROWER RANGE OF PROBLEMS CITED IN THE UEBERROTH REPORT CONCERNING CHALLENGES TO DECISIONS OF CITY AND COUNTY PLANNING AGENCIES. FURTHER, THE EXISTENCE OF A SEPARATE GROUP OF JUDGES HEARING SUCH CASES WOULD BE A CONTINUING ENCUMBRANCE FOR THE JUDICIAL BRANCH.

WE RECOMMEND THAT INSTEAD OF CREATING A NEW JUDICIAL ENTITY TO HEAR SUCH MATTERS, ATTENTION BE GIVEN TO KEEPING THESE CASES OUT OF LITIGATION. IN OTHER PARTS OF THE COUNTRY, IT APPEARS THAT CONTROVERSIES OVER DEVELOPMENT ISSUES HAVE BEEN RESOLVED MOST EXPEDITIOUSLY BY PUBLIC POLICY DIALOGUE AND NEGOTIATED INVESTMENT STRATEGY MEDIATIONS WHICH PREVENT THESE CASES FROM REACHING THE COURTS. THE SUCCESS OF MEDIATION IS FREQUENTLY DEPENDENT ON ACCESS TO THE COURTS IF ANY OF THE PARTIES HAVE A TENDENCY TO BE UNREASONABLE, BUT RESORT TO THE COURTS SHOULD NOT BE ENCOURAGED.

TO THE EXTENT THAT A SMALL NUMBER OF PLANNING AND LAND USE DECISIONS MUST RECEIVE JUDICIAL ATTENTION, A SEPARATE PANEL OF JUDGES SUCH AS A LAND USE COURT WOULD BE UNLIKELY TO REACH DECISIONS MORE QUICKLY THAN COURTS DO TODAY. MOST OF THE ISSUES IN ZONING CASES AND OTHER LAND USE MATTERS ARE NOW EXPEDITIOUSLY RESOLVED ON THE COURT'S LAW AND MOTION OR SHORT CAUSE CALENDAR. FOR THIS REASON, LITIGATION TIME IN SUCH CASES IS NOT ATTRIBUTABLE TO CROWDED CALENDARS OR SHORTAGES OF JUDGES; LITIGATION TIME IS PRIMARILY DEVOTED TO RESEARCH AND OTHER PREPARATION EFFORTS BY THE PARTIES' ATTORNEYS. THIS DELAY, TO THE EXTENT IS EXISTS AT ANY SIGNIFICANT LEVEL, IS UNLIKELY TO BE REDUCED BY THE CREATION OF A NEW JUDICIAL FORUM, SUCH AS A LAND USE COURT.

AT A TIME WHEN WE SHOULD BE ESPECIALLY CAREFUL ABOUT INCREASING PUBLIC COSTS, IT IS IMPORTANT TO POINT OUT THAT A SPECIALTY COURT IS NOT THE MOST COST EFFECTIVE WAY TO IMPROVE THE QUALITY OF LAND USE PLANNING. IF A SEPARATE COURT WITH LIMITED SUBJECT MATTER JURISDICTION WERE TO BE CREATED, IT WOULD UNDOUBTEDLY DEVELOP ITS OWN SPECIAL RULES OF PRACTICE AND A COSTLY DEDICATED STAFF. IT WOULD ALSO INCUR THE COSTS OF TRAVEL TO VARIOUS PARTS OF THE STATE TO HEAR CASES.

SEPARATE COURTS NOT ONLY INCREASE COSTS. A LAND USE COURT WOULD FRAGMENT THE JURISDICTION OF THE SUPERIOR COURT WHICH NOW SERVES AS CALIFORNIA'S COURT OF GENERAL JURISDICTION. THE THRUST OF MODERN COURT ADMINISTRATION HAS BEEN TO AVOID SUCH FRAGMENTATION, TO CONSOLIDATE COURTS AND TO ADOPT COMMON PRACTICES AND PROCEDURES WHICH PERMIT EFFICIENT, FLEXIBLE USE OF JUDICIAL STAFF AND FACILITIES. FOR THESE REASONS THE JUDICIAL COUNCIL HAS CONSISTENTLY OPPOSED SPECIALIZED COURTS.

EXPERIENCE HAS DEMONSTRATED THAT COURTS OF GENERAL JURISDICTION BEST MEET THE CHANGING DEMANDS OF LITIGANTS AS CASE VOLUMES RISE AND FALL WITHIN SPECIFIC AREAS OF THE LAW. AT PRESENT, THE COURTS IN EACH COUNTY CREATE SEPARATE DEPARTMENTS OR CALENDARS WITHIN EXISTING STRUCTURES TO DEAL WITH SUBJECT AREAS SUCH AS EVICTIONS, FAMILY LAW, SMALL CLAIMS, PROBATE, AND OTHER SPECIALIZED MATTERS. THE DEMANDS FOR HEARINGS IN SUCH SPECIALIZED PROCEEDINGS CHANGE OVER TIME. UNDER LOCAL RULES,

SUCH SPECIALIZATION PERMITS THE JUDICIAL STAFF AND COURT FACILITIES TO SERVE CHANGING NEEDS WITHOUT BEING BURDENED BY INFLEXIBLE MANDATES. WE URGE THAT LAND USE LITIGATION DEMANDS BE MET CREATIVELY, AND WITHIN ESTABLISHED JURISDICTIONAL STRUCTURES OF THE COURTS.

TO SUMMARIZE, ANY SHORTCOMINGS IN CURRENT PROCEDURES COULD BE REMEDIED MOST ECONOMICALLY THROUGH INCREASED USE OF MEDIATION, OR POSSIBLY BY CREATING A PROFESSIONAL BODY FOR ADMINISTRATIVE REVIEW OF LAND USE APPEALS. SUCH APPROACHES WOULD CORRECT THE PROBLEMS CITED IN THE UEBERROTH REPORT WITHOUT CREATING NEW DIFFICULTIES FOR THE JUDICIAL BRANCH OF GOVERNMENT.

FOR THE ABOVE REASONS, THE JUDICIAL COUNCIL IS OPPOSED TO CREATION OF A LAND USE COURT WHICH WOULD INCREASE COSTS AND REDUCE JUDICIAL EFFICIENCY. I WOULD BE PLEASED TO DISCUSS THESE ISSUES FURTHER AT THE COMMITTEE'S CONVENIENCE AND TO ASSIST YOU IN WORKING TOWARD A MUTUALLY SATISFACTORY SOLUTION TO THE PROBLEMS CITED IN THE UEBERROTH REPORT.

434/SB91/15

CONFLICT RESOLUTION MECHANISMS *in* GROWTH MANAGEMENT

Governor's Interagency Council on Growth Management

Governor's Office of Planning and Research

Governor's Interagency Council on Growth Management

December 1991

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The Resources Agency

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Governor's Office of Planning and Research

JOINT INTERIM

HEARING

SENATE SELECT COMMITTEE ON PLANNING FOR CALIFORNIA'S GROWTH
SENATE COMMITTEE ON LOCAL GOVERNMENT

RESOLVING LAND USE DISPUTES:

MEDIATION, ARBITRATION, AND LITIGATION

9:00 a.m. to 4:30 p.m.
Friday, November 6, 1992
State Capitol, Room 112

Testimony of
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INTRODUCTION

Comprehensive view point that encompasses all three dispute resolution mechanisms in the land use field:

--Mediation
--Land Use Litigation
--Environmental Courts

Mediation

- Program Administrator for the City of San Diego's Environmental Mediation Program

- Advisory Board Member for the San Diego Community Mediation Centers (1984-1988)

- Trained Mediator

- Member of the International Association of Public Participation Practitioners (IAP3) (First Annual Conference this past September in Portland)

Land Use Litigation

- Supervise a 15 person unit for the City Attorney of San Diego that specializes in the criminal, civil and administrative enforcement of land use ordinances and statutes (1984 to present)

- Conducted numerous court hearings and administrative proceedings that involved land use violations, e.g., conditional use permits, operation of businesses in residential zones, overcrowding and density, substandard housing (slumlords) and neighborhood crack houses

- Drafted ordinances that created local administrative procedures to gain compliance with zoning, building and fire codes

- Rewrote provisions of the Government Code section 38773.1 to streamline administrative procedures for the abatement of public nuisances (AB 3150-Frazee, Chapter 965, Statutes of 1990)

Environmental Courts

- Program Administrator for the City of San Diego's Environmental Court Project (1988-1990); 18 month contract with the University of San Diego Law School to study the feasibility of creating an environmental court in San Diego and establish the use of mediation to resolve land use disputes

- Participant at the Bi-National Conference, Innovations in State and Local Government, at the University of Woolongong, Australia (1988); sponsored by the Ford Foundation and Kennedy School of Government at Harvard

- National Institution of Municipal Lawyers (NIMLO) Annual Conference, Seattle, Washington (1989); presented paper entitled "Environmental Courts--the American and Aussie Experience" (a copy is attached for your information as Exhibit 1)

OBSERVATIONS REGARDING RECENT LEGISLATION

1. Consensus that the existing system is ineffective.

2. AB 434 and AB 3 both proposed new substantive laws regarding growth management and regional entities as well as the creation of new dispute resolution mechanisms (mediation and arbitration in AB 3 and the State Land Court in AB 434).

3. Each legislative proposal incorporated notions of administrative review and proceedings as alternatives to the traditional judicial system.

4. Emphasis was limited to the development process and related issues (i.e., regional growth management and conflicting regulations as barriers to development) in the land use field and did not include the implementation and enforcement aspects.

THEMES AND RECOMMENDATIONS

Prevention

- Encourage the use of mediation and public facilitation in the development process and in other aspects of the land use arena (i.e., CEQA) **before** disputes and conflicts arise.

- Modify the way land use decisions are made at the state and local levels with a shift to consensus building and public facilitation.

- Design a pilot project which uses mediation and public facilitation as a means to prevent the escalation of land use disputes.

Comprehensive Approach

- View land use issues from a comprehensive perspective that includes not only the development process at the beginning of the land use cycle but also the issues of implementation and enforcement.

> Most municipalities have enacted a myriad of zoning, planning, fire and building ordinances to address some of these complex social problems and dilapidated physical conditions in our urban environment. However, elected officials often confuse mere enactment of state and local land use regulations with consistent implementation and enforcement, the key to their effectiveness.

"Code Enforcement: Curbing the Deterioration of Our Urban Environment," C.E.B. Land Use Forum, Fall Edition, 1992, Page 352 (a copy of this article is attached for your information as Exhibit 2).

- Design a pilot project that includes a comprehensive strategy for resolving land use disputes using a combination of the following dispute resolution methods:

  --Mediation
  --Administrative Review
  --Judicial Action and Appellate Review of Administrative Decisions in a Specialized Land and Environment Court

Streamline Existing Land Use Procedures

- Identify existing state and local land use procedures that are ineffective and superfluous.

- Modify or remove these procedures and substitute appropriate alternative dispute resolution methods (mediation, administrative review) in conjunction with a specialized environmental court.

Partnership with Local Government and the Judiciary

- Develop pilot projects and legislative proposals that encourage partnerships with local government and the judiciary.

- Tap the innovative experience of local government in the land use field by designing a system that fosters problem solving and conflict resolution at the local level.

SHORT TERM SUGGESTIONS

1. Focus on designing a "Comprehensive Dispute Resolution Pilot Project" that incorporates mediation, administrative review, judicial action and appellate review.

2. Use the existing judicial structure in designing the "Comprehensive Dispute Resolution Pilot Project."

3. Use existing resources (i.e., the Center for Public Dispute Resolution) to coordinate a consensus project that focuses on designing this "Comprehensive Dispute Resolution Pilot Project."

COURT CHARACTERISTICS

	DEVELOPMENT				ENFORCEMENT			
	SPECIAL LEGISLATION	TYPE	DEVELOPMENT JURISDICTION	APPELLATE REVIEW	ENVIRONMENT PUBLIC/NUISANCE	HOUSING LANDLORD/TENANT	CRIM	CIVIL
AUSTRALIA	Y	ADMIN/ JUDICIAL	Y	Y	Y	—	Y	Y
OREGON	Y	ADMIN	Y	Y	—	—	—	—
INDIANAPOLIS	Y	JUDICIAL	—	—	Y	—	Y	Y
RIVERSIDE, CA MEMPHIS, TN	—	JUDICIAL	—	—	Y	—	Y	—
CLEVELAND	Y	JUDICIAL	—	—	Y	Y	Y	Y
AB 434	Y	JUDICIAL	Y	Y	—	—	—	Y

ENVIRONMENTAL COURTS - THE AMERICAN AND AUSSIE EXPERIENCE

1989 NIMLO Annual Conference
National Institute of Municipal Lawyers
Seattle, Washington
October 9, 1989

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Deputy City Attorney
Code Enforcement Unit
City of San Diego

EXHIBIT 1

Acknowledgements

The author would like to express his thanks to Michael Shames and Judith Crowley, Attorneys at Law, for their research and analysis as part of San Diego's Environmental Court Project Team and to Judge Jester of Indianapolis and Judge Potter of Memphis for their continued support in helping us establish yet another successful environmental court. A special thank you is in order for Solicitor Mary Lynne Taylor who guided me through the maze called the Land and Environment Court and to Assessor Graham Andrews for his professional expertise and comments - "G'day".

Everyday municipal governments across the country enact local regulations as part of their police powers to protect the public's health and safety from neighborhood nuisances. These ordinances apply to a wide range of activities - building permits, fire codes, business licenses, zoning, etc.

Despite these efforts, very few municipalities conscientiously consider the practical implications of enforcing such a myriad of local regulations. While local governments spend a large portion of their time setting policy and enacting legislation, comparatively little attention is devoted to enforcement of local laws and regulations. In many respects, however, the enforcement plan can be more important than the ordinance itself.

Courts are one of the most critical components to an effective code enforcement system. When the case involves a defiant violator or imminent health and safety violations, court is often the only realistic alternative. This is not to suggest that all code enforcement cases should result in a criminal or civil complaint. Most municipalities obtain voluntary compliance in the large majority of code enforcement cases or pursue various administrative remedies. Yet, the threat of court is often the best insurance policy for the field inspector to use in obtaining compliance. This threat must not be idle, otherwise the clever violator will continue to manipulate the bureaucratic system to prolong the violations.

Despite the apparent necessity of going to court, the municipal attorney still confronts several obstacles when filing code enforcement cases. One problem is lack of time and resources. Some municipal attorneys do not have sufficient staff to perform their advisory duties for the city council and aggressively pursue violators through the judicial system. Another difficulty is code enforcement violations are not a judicial priority. Many judges do not fully understand the detrimental impact that these continuous violations have upon a neighborhood. Nor do these judges recognize the comprehensive relationship code enforcement violations have with crime and disorder. See Wilson and Kelling, Broken Windows, The Atlantic Monthly, at 29-38 (March 1982). Although these cases involve public nuisances, many judges do not consider code enforcement cases as serious as typical criminal acts.

Some courts have become more responsive to code enforcement cases by creating specialized departments with limited jurisdiction. This centralization of land-use violations streamlines the processing of cases and increases judicial consistency. The scope of jurisdiction and how the court operates varies from city to city depending upon local priorities and politics. Specialized land-use courts have also been successfully implemented in Australia-Land and Environment Court of New South Wales.

This article compares the general characteristics of both models (American and Australian) and analyzes their impact. Based upon this preliminary analysis, the City of San Diego and the University of San Diego Law School have recently embarked upon a joint, pilot project to study the feasibility of implementing such a specialized "environmental court" in San Diego. A brief overview of the San Diego project is discussed at the end of this article.

CHARACTERISTICS OF THE AMERICAN MODEL

The San Diego Project Team has identified approximately 15 courts with some type of specialized land-use jurisdiction. These courts can be divided into two (2) general categories: (1) Environmental or Municipal Law Courts; and (2) Housing Courts. The exact scope of these courts often depends upon the priorities of the community. Where dilapidated housing is a major problem, the courts have consolidated code enforcement cases with the primary jurisdiction of landlord-tenant cases. Other municipalities have broadened jurisdiction to include a wide range of municipal offenses: littering, illegal dumping, building code violations, etc. In order to formalize the court's jurisdiction, some cities successfully sought amendments to the appropriate state statutes while others merely consolidated existing authority via changes in local court rules and procedures. Since there are quite a few courts, this article will provide an overview of a select few.

Environmental Courts
Indianapolis and Memphis

Court History and Performance-Indianapolis

The Indianapolis Environmental Court was created in 1978 as the brainchild of Judge David Jester. He has presided over the court since its inception. The Court was primarily a response to the crush of housing violation cases that were draining judicial resources. Since 1985, the Environmental Court has handled approximately 4,500 cases per year. Over half of the cases involve substandard housing matters: sewage leaks; lack of adequate heat; plumbing or electrical hazards; trash and debris; and other health related violations. Another twenty percent of the cases pertain to land use violations such as building code, demolition and zoning problems. The remaining thirty percent of the Court's caseload include permit and licensing, barking dogs and other minor municipal code violations.

Prior to the beginning of the Environmental Court, code enforcement cases were distributed among twenty-two different departments where they were considered of minor importance to most judges. In 1978 the Court handled approximately 700 cases per year. Over the decade the number of cases increased by 650% or 4,500 cases per year, yet the number of staff and judges has not increased.

Not only has this Court conserved judicial resources, but the Court appears to have served as an important policy tool. Judge Jester reports that this Court has led the city's efforts to

renovate neighbors through a public - private partnership program. He also reports that morale of city inspectors has dramatically improved due to the consistency and importance of the Court's treatment of their cases.

Court Operation

The Court is an independent division of the Indiana state courts in Indianapolis. All documents are filed directly with the Environmental Court's room clerk. No private litigation is permitted - only city departments may bring a case in the Court.

The Court employs a resource specialist to seek available community resources in order to bring the property into compliance. This person is considered an independent neutral party whose objective is to work with the court and violator to achieve compliance. The specialist's involvement begins when the case is filed with the court. He conducts a "resource work-up" for the defendant explaining what is needed to correct the violations and lists various community resources available to help the defendant. The requirements are formalized with a court order. The order also states that the defendant must cooperate with the specialist.

The municipal attorney for the city arrives to the Court early. Pretrial negotiations are conducted for about one hour each day prior to the trial schedule. Only an average of five cases go to trial. Judge Jester has found that approximately sixty percent of the last minute settlements achieve compliance within the agreed parameters. The remaining forty percent

generally comply, but need more time. The informality of the system is partially attributable to the fact that most of the defendants appear in prop per, i.e. they are not represented by counsel. The court sessions are generally informal, akin to a small claims court proceedings.

The Court is also aided by the fact that more than half of the complaints are civil cases - Judge Jester estimates about 60%. He has found civil cases more effective for gaining compliance. The final order includes setting a review hearing at which time compliance must be achieved.

Judge Jester explains that the Court's main goal is to obtain compliance. The role of an Environmental Court judge is to approach problems very pragmatically; generally, there are no easy solutions and punishment is rarely justifiable. He emphasizes the need to appreciate that most of the cases are rooted in ignorance. Either the violators are not aware of their responsibility or do not know how to cure the defect. Common sense and expertise are emphasized as the key requisites to making this Environmental Court work.

Court History and Operation - Memphis, Tennessee

The Environmental Court in Memphis has been operating since November 1982. Prior to that, code enforcement cases were heard on a random basis by any available Municipal Court Judge. They would typically be continued on a month to month basis while the "more important" cases would be heard, i.e. criminal charges.

Memphis had the same problems that have been encountered in San Diego as in other cities. Code enforcement efforts had credibility, morale, and public image problems. The separate docket gives credibility to the city's code enforcement plan. This special court has been a great morale booster for the inspectors and departments involved.

Court Operation

Unlike the Indianapolis court, the Memphis court is not solely dedicated to hearing code enforcement cases. It sets aside one or two days per week to hear only code enforcement cases with no additional judicial resources. On other days, the Court hears traditional cases. Still, the judge is able to become educated and familiar with the codes and develops an expertise in municipal law.

The city prosecutor's office screens cases that would be appropriate for the Environmental Court. Cases are civil in nature. The Court hears approximately 500 - 1,000 charges (not cases) in one afternoon. The Court might hear approximately 20 to 25 actual cases in an afternoon. Some cases, however, may be continuing violations. Judge Potter reports that only a small percentage are continued or dismissed. The caseload is increasing as the housing stock ages and the agencies become more aggressive in their enforcement.

There is presently no mediation or hearing before a case gets to Court. The Court relies heavily on the inspector working with the violator to bring the property into compliance. Merely being

forced to come into court acts as an added incentive to correct the violations in most cases.

Judge Potter explains that environmental court judges must be innovative when implementing solutions to these problems. Much can be accomplished by assessing fines and costs, as well as establishing a time frame of compliance as part of an official court proceeding. In one case, Judge Potter's visit to the site prompted immediate compliance.

Comments

"I am constantly speaking to other cities about the benefits of this court." Judge Potter further explains that environmental courts can be created with minimal costs. They actually expedite the workload by being well equipped to handle cases quickly, efficiently, as well as equitably. He describes it as a win-win situation. Politically there is no down side to setting up these specialized courts.

Like its sister court in Indianapolis, the Memphis court has surpassed the expectations of the city and the judicial system in effectiveness. Long lasting solutions to neighborhood nuisances and urban decay are now more feasible with the resources of this specialized court. These courts have enhanced both cities' overall code enforcement efforts. According to Judge Potter, increased effectiveness has spurred other cities, such as, Chattanooga, Knoxville and Nashville, to investigate or establish environmental courts.

Housing Courts - Cleveland

Urban housing courts appear to be the most prevalent form of specialized land-use courts. Some of these courts have been in existence for over 20 years. Since these departments already heard landlord-tenant issues, it appeared logical to expand jurisdiction to code enforcement issues as they related to substandard buildings. The Cleveland Housing Court provides a good model to study, not only because of its well documented success in the courtroom, but also for its coordination with other elements of Cleveland's housing code enforcement efforts.

As part of Cleveland's attempt to revitalize its dilapidated housing stock the Cleveland Housing Court began hearing cases in 1980. The court's jurisdiction includes code enforcement violations involving substandard buildings and living conditions (sanitation, health and safety code, building and fire codes, etc.) and civil litigation between landlords and tenants (evictions, rental deposits, etc.). The court also has equitable authority to issue injunctive relief. New state statutes were enacted to create the Housing Court and its procedures. Cleveland's Housing Court, similar to the Environmental Court in Indianapolis, employs a housing specialist to assist and advise tenants and owners financially unable to comply with the codes.

A more comprehensive evaluation of the Cleveland Housing Court was recently published by Professor W. Dennis Keating of Cleveland State University. See Keating, Judicial Approaches to Urban Housing Problems: A Study of the Cleveland Housing Court,

19 Urban Lawyer 2 (Spring 1987). Professor Keating concludes that housing courts can play a vital role in the resolution of urban housing problems, but confront some issue which are beyond the court's capabilities to resolve. As mentioned earlier by both Judge Jester and Judge Potter, these courts must be flexible in approaching those code enforcement cases where the violator does not have sufficient financial capability to comply. Professor Keating concludes, "Imposing severe penalties through fines to poor owners and landlords is unlikely to achieve the primary goal of improving housing quality." Consequently, Cleveland and Indianapolis both employ specialists to help the violator obtain funds or other community resources to correct the violations. Cleveland did institute two housing rehabilitation subsidy programs for lower income owners. Unfortunately, these programs were funded entirely from Community Development Block Grants (CDBG) which have been dramatically cut by the federal government in the past 8 years.

Despite these limitations, the Housing Court in Cleveland has improved the processing of code enforcement cases through the judicial system. According to Professor Keating's evaluation of the court's performance from 1984-1985, more than twice as many code enforcement cases are now processed compared to 1979 when the centralized court system did not exist. The Court's processing time has also decreased. This is partially attributable to the appointment of a single judge which gave the Court more stability. During the first few years of operation,

new judges were assigned about once a year. Professor Keating also acknowledged the relationship between the Housing Court's effectiveness and the resources available to Cleveland's Division of Housing and the Municipal Prosecutor's Office. The Court's overall effectiveness as measured by its caseload is directly attributable to the level of activity in these two offices. As the number of inspectors decreased, the Court's caseload leveled off. Given this relationship, both entities have tried to reorganize procedures to give priority to the filing of cases in the Housing Court.

Just like Indianapolis and Memphis, the Cleveland Housing Court has increased community awareness and involvement with code enforcement cases. In 1986 Cleveland's Housing Division initiated a neighborhood code enforcement partnership which enlists citizen to help identify minor code enforcement problems. This permits the building inspectors to concentrate their attention on the more serious properties and allows the neighbors to participate in the overall improvement of their community. Given reductions in city staff, this participation by neighbors assists the Court and the city in continuing to give code enforcement cases a high priority.

AUSTRALIAN MODEL - LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

The Land and Environment Court of New South Wales combines the administrative functions of American planning commissions with the judicial responsibilities of a specialized land-use

court. This model is more comprehensive in its scope and application than the American courts discussed above. The key distinction involves the Court's administrative review of development conditions imposed by a municipality. If a developer disagrees with the conditions, an appeal can be filed with the Land and Environment Court. Here in the United States most developers would request review by an administrative entity such as a planning commission.

Jurisdiction

In 1979 the parliament of New South Wales established this new administrative/judicial tribunal as part of an exhaustive reorganization of its environmental statutes. Not all land-use and environmental laws are within the ambit of the Land and Environment Court; some significant omissions exist. The court's jurisdiction can be divided into five basic categories:

Class One: Under Section 97 of the Environmental Planning and Assessment Act of 1979, the Court hears planning and development appeals regarding conditions imposed by municipal councils and refusals or delays in approving such development.

Class Two: These administrative appeals generally pertain to building applications pursuant to the Local Government Act. If the developer's building permit application is denied by the local council or the developer does not agree with the conditions attached to the approval, an appeal may be filed with the Court. After 40 days, the developer can appeal on grounds of delay if the local council has not acted on the application.

Class Three: These administrative proceedings involve issues of compensation, rating and valuation. Here the Court determines the nature of the estate or interest of the claimant and awards the appropriate compensation.

Class Four: This is the Court's traditional civil jurisdiction to determine the legal rights and duties with respect to property and issue orders, injunctions and other equitable relief to restrain violations of the law. This jurisdiction, however, is limited in scope and applies only to the class of cases listed in section 20 of the Environmental Planning Act.

Class Five: These cases involve the Court's criminal jurisdiction. There are very few actions brought under the Court's Class Five jurisdiction since Class Four actions are considered more effective under provincial law.

Administrative Authority

The Court's administrative review authority is conducted by "Assessors." They are not lawyers, but judicial officers of the Court with extensive experience in planning, local government law, engineering, architecture, building construction or other land-use related fields. The Court presently has 9 Assessors appointed for terms not to exceed 7 years. They conduct quasi-judicial hearings involving the first three classes of the Court's jurisdiction. Thus, they perform many of the same functions of our planning commissions, but hear the cases using a judicial format instead of legislative.

The Assessors perform a variety of tasks. First, they preside over preliminary conferences between the parties. These conferences are requested by the parties. If they reach an acceptable agreement the Assessor renders a decision encompassing this agreement as long as the terms are within the Court's authority. If the parties fail to agree, the matter is referred to the Court without any references to the conference proceedings - they are essentially sealed by the Assessor.

Second, the Assessors may sit with the judges in hearing a Class One, Two or Three appeal. While they can assist and advise the Court, the Assessors are not permitted to adjudicate any issues in this situation.

Third, the Chief Justice may assign a Class One, Two or Three matter for the Assessors to arbitrate. Here they perform the same role as the judges. The decision of the Assessor is deemed to be a decision of the Court. Two or more Assessors perform this function and can refer any questions of law to the Chief Judge for a legal determination.

The hearings regarding appeals of the Court's Class One, Two or Three jurisdiction is different from traditional court proceedings. The rules of evidence do not apply. They are conducted with as little formality as possible. The Court essentially conducts a de novo hearing and can reach any decision within the authority of the local governmental body below.

As a general rule neighbors cannot file an appeal on their own, but can join the case as a type of amicus party. Thus,

citizen participation is not excluded by the Australian system. While attorneys are not required, the developer may be represented by a solicitor instead of a barrister at the Assessor's hearing depending upon the type and complexity of the case. The evidence is presented in much the same format as traditional court hearings except for the lack of formal rules of evidence. The developer would start by presenting his/her case to the Assessor and the town planner would respond. The more relaxed proceedings allow the Assessor to openly question all witnesses and state his or her own opinion about the direction of the case before a final ruling is issued. Appeals from matters determined by the Assessor are before the judges of the Land and Environment Court on questions of law only. If the party disagrees with the Land and Environment Court's ruling on the legal issues, a discretionary petition must be filed with the Court of Appeals. No appeallate review exists as a matter of right.

Judicial Authority

The Land and Environmental Court Act essentially divested the Supreme Court (trial court) of its jurisdiction with respect to Class Four and Five matters and conferred it exclusively to the Land and Environmental Court. Only judges may exercise Class Four and Class Five jurisdiction.

Class Four is the Court's civil enforcement jurisdiction. Here the Court is usually enforcing a public law against a property owner in violation of the applicable statutes. Class

Five jurisdiction is the Court's criminal enforcement authority. This usually involves major environmental protection prosecutions under environmental statutes like the Clean Air Act, Clean Waters Act, Hazardous Chemicals Act, etc.

Most municipalities prefer to file for injunctive relief under Class Four where they can obtain an order to correct the violation. The Court has the power to sequester, fine and/or imprison for contempt. When a council brings a Class Five criminal action (i.e., against a property owner's illegal business in a residential zone), the Court can only impose fines and jail to persuade the owner to comply, but the violation could theoretically continue.

The proceedings in Class Four and Class Five are essentially conducted in the same manner as traditional courtroom proceedings in the Supreme Court (trial court). The appropriate rules of the Supreme Court are adopted by the Land and Environment Court.

Effectiveness

According to Chief Justice J.S. Cripps, the work of the Land and Environment Court is disposed of much more quickly than other divisions of the Supreme Court (trial court). The Land and Environment Court has developed its own "Fast Track" system for disposing of minor appeals. These appeals represent approximately 20% of the Court's appeals in Class One and Class Two matters. Justice Cripps estimates the average time for disposal of these "Fast Track" cases is approximately 4 weeks from institution of the proceedings to publication of judgment.

The remaining 80% of the planning appeals (Class One) and building appeals (Class Two) are handled between 10 and 14 weeks on the average. Justice Cripps has observed, however, a slight increase in the average disposal time in Class Four civil actions from about 3 to 5 months. This is due to the increasing caseload in Class Four matters where the Court exercises its judicial review authority. Justice Cripps attributes the speedy disposition of cases to the " . . . size and independence of the Court, and the cooperation of the legal and planning profession." Since the court is comparatively small it can experiment with new procedures like the "Fast Track" system. "In larger courts, such as the Supreme Court and the District Court, to change procedures it [sic] is like trying to turn the Queen Mary!"

SAN DIEGO PROJECT

The City of San Diego and the University of San Diego School of Law have started a joint pilot project to study the feasibility of implementing an Environmental Court and Dispute Resolution system for the processing of code enforcement cases.

The project consists of 2 components. Both components are interrelated to improving the overall success and effectiveness of the city's code enforcement system. The Dispute Resolution component is designed to resolve secondary code violations where no health and safety hazards are present. The city's ability to effectively remove these secondary violations from the City Attorney's caseload and thus, the court's docket, enhances the credibility of the city's entire code enforcement efforts in the

eyes of the public and judiciary. Thus, the court's are left to handle the more egregious violations and defiant violators. The second components seek to develop a more uniform and consistent processing of cases within the San Diego Municipal Court.

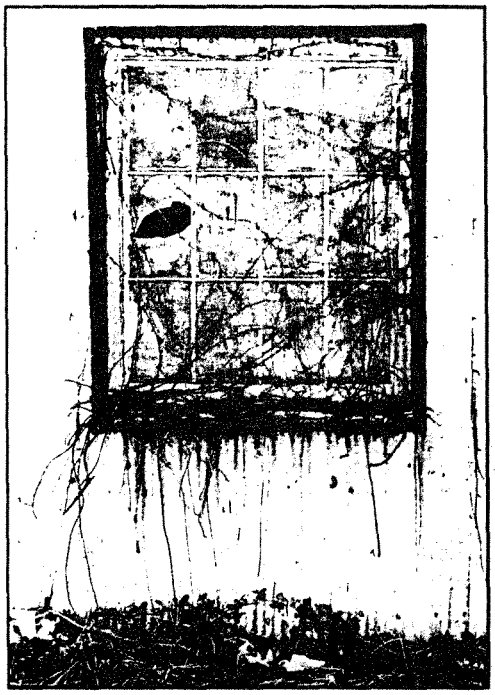
During the past 9 months, the project team has researched applicable California law, compiled case statistics and developed possible guidelines for the implementation of the Court and Dispute Resolution system. They not only interviewed front line inspectors, deputy directors and community activists with some exposure to code enforcement, but also searched for successful programs that other municipalities have used to improve their code enforcement efforts. The project team is currently concentrating its efforts on studying the processing of code enforcement cases in the Municipal Court. Their goal is to make final recommendations for the establishment of the Environmental Court by the end of June 1990.

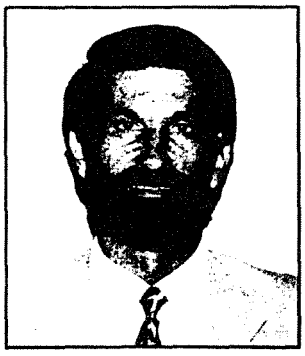
CONCLUSION

Environmental Courts play a vital role in any successful code enforcement effort. They assist in the protection and preservation of our urban environment from further deterioration, disorder and crime. This is not to suggest that the judicial system can "solve" all of our municipal woes. Only with a collective effort which enlists active participation from the judiciary can a municipality ever hope to control the vicious cycle of the Broken Window.

CODE ENFORCEMENT:

Curbing the Deterioration of Our Urban Environment





Joseph M. Schilling

Joseph M. Schilling is a Deputy City Attorney for the City of San Diego. He supervises a 17-person unit specializing in the criminal prosecution and civil enforcement of zoning and other land use regulations. The unit also includes San Diego's Drug Abatement Response Team (DART) and the Environmental Mediation Program. During the past six years Mr. Schilling has taught seminars and presented papers on a variety of land use and urban environmental issues before such organizations as the National League of Cities, National Institute of Municipal Law Officers (NIMLO), and the League of California Cities. He is currently working on a code enforcement book to be released by Solano Press in early 1993. Mr. Schilling received his J.D. from the University of California, Hastings College of the Law.

A comprehensive code enforcement system that includes conscientious drafting and implementation as well as active enforcement of municipal and state land use regulations can help control the constant deterioration of our urban environment. The urban environment comprises the physical and social fabric of our cities—the people, and the places where we live, work, and play.

Our cities consist of diverse communities and neighborhoods, each with their own varied code enforcement issues of relative seriousness. Illegal signs may be the worst problem in one part of the city while dilapidated buildings with rats and vermin devastate another. Our urban environment also reflects the complex social problems of our era: drug abuse, gangs, graffiti, AIDS, and the homeless. Code enforcement can be particularly helpful in stabilizing transition neighborhoods: older communities once the suburbs of the 1930s that today verge on becoming part of the deteriorated urban core.

Over the years, members of the bench and bar have treated code enforcement cases as either mere technical violations of minor regulations—overheight fences, inoperable vehicles, excessive storage, etc. Yet, minor violations allowed to continue will fester. They can rapidly develop into imminent threats to the public's health and safety, such as abandoned buildings and substandard apartments.

Neglected property that is allowed to remain in such a condition is a signal to the community that no one cares. Writing in *The Atlantic Monthly* (Mar. 1982), Professor James Q. Wilson and George L. Kelling, Fellow at the Kennedy School of Government, describe the "Theory of the Broken Window," asserting that "social psychologists and police officers tend to agree that if a window in a building is broken *and is left unrepaired,* all the rest of the windows will soon be broken." They go on to suggest that disorder and crime are inextricably linked with the physical environment at the community level. As these authors explained in a more recent article, "Making Neighborhoods Safe" (*The Atlantic Monthly* (Feb. 1989)):

> [A] lot of serious crime is adventitious, not the result of inexorable social forces or personal failings. A rash of burglaries may occur because drug users have found a back alley or an abandoned building in which to hang out. In their spare time, and in order to get money to buy drugs, they steal from their neighbors. If the back alleys are cleaned up and the abandoned buildings torn down, the drug users will go away. They may even use fewer drugs, because they will have difficulty finding convenient dealers and soft burglary targets.

This relationship between crime and the physical environment is one of the leading justifications for an aggressive code enforcement program. It is not the isolated case that is significant, but the cumulative effect of numerous properties that tends to create an urban environment conducive to disorder.

Most municipalities have enacted a myriad of zoning, planning, fire, and building ordinances to address some of these complex social problems and dilapidated physical conditions in our urban environment. However, elected officials often confuse mere enactment of state and local land use regulations with consistent implementation and enforcement, the key to their effectiveness.

This issue of the Forum presents two very different illustrations of code enforcement issues. The articles emphasize, by way of practical experience, code enforcement's role in combatting the deterioration of our urban environment. In the first (p 353), I provide an orientation to the practical foundations of a comprehensive code enforcement program as illustrated by an analysis of enforcement issues surrounding conditional use permits (CUPs). In the second article (p 358), Jayne Williams, Joyce Hicks, and Charles Vose explain Oakland's BEAT Health Program and how it uses a combination of law enforcement and code enforcement expertise to dilute the lethal formula of drugs and dilapidated/abandoned properties.

Because those of us in public practice have our own perspective, these articles should aid the private practitioner's understanding of the municipal attorney's diverse roles in these code enforcement areas.

RESOURCES

General Reading:

9A *McQuillin on Municipal Corporations* §§27.01–27.74, Chicago: Clark Boardman Callaghan (3d ed 1986).

Industry or Government Publications/ Studies/Position Papers

Ahlbrandt, Professor Roger S., "Flexible Code Enforcement: A Key Ingredient in Neighborhood Preservation Programming," Washington, D.C.: National Association of Housing & Redevelopment Officials (1976).

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_____, "Drug Abatement—Civilizing Drug Dealers," Washington, D.C.: National Institute of Municipal Law Officers Mid-Year Conference (1988).

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Joseph M. Schilling

CODE ENFORCEMENT

Strategies for Implementing and Enforcing Conditional Use Permits

Most land use professionals spend an inordinate amount of their time and energy developing land use projects, policies, and ordinances. For example, they spend countless hours at public hearings before planning commissioners, zoning administrators, and other public officials debating the merits of a particular zoning ordinance. These activities occupy both public sector (planners, city managers, council staff, and municipal attorneys) and private practitioners and consultants advocating site-specific development projects.

Municipal attorneys traditionally devote their time to researching and writing ordinances and advisory memorandums. Implementation and enforcement are often left for other city or county departments, which are given little guidance or legal support. What happens if a property owner does not comply with the municipal zoning regulations or building code? Enforcement efforts can be significantly hampered if the municipal attorney does not identify enforcement and implementation issues at the outset. A comprehensive approach focusing on both code development and enforcement can ensure that ordinances and regulations are legally enforceable and that they will in fact achieve their intended goals.

This article illustrates the basic tenets of code enforcement by analyzing a common code enforcement situation: failure to obtain or abide by the terms of a conditional use permit (CUP). As an alternative to traditional zoning, municipalities often use CUPs to regulate land uses that, "although desirable in limited numbers, could have a detrimental effect on the community in large number." *Van Sicklen v Browne* (1971) 15 CA3d 122, 126, 92 CR 786, 788. Many CUPs involve complex social issues, *e.g.*, AIDS hospices, residential care facilities, large-scale family day care centers, and work furlough or other private detention facilities. Thus, CUP cases often create difficult enforcement problems inasmuch as they are tied to larger social issues.

This article provides practical guidance on how municipal attorneys and other land use professionals can identify implementation and enforcement issues at an early stage so that those issues can be addressed when the permit is drafted and issued. The article also examines the relative advantages of remedies available for enforcement.

IMPLEMENTATION AND ENFORCEMENT START WITH DRAFTING

The municipal attorney must ensure that the CUP authorizing ordinance is drafted with *enforceable* terms. (This duty applies to both general law and charter municipalities. See generally Govt C §65850 and *Metzenbaum v City of Carmel-by-the-Sea* (1965) 234 CA2d 62, 44 CR 75, which support the authority of general law cities to enact local zoning ordinances that permit the issuance of CUPs in accordance with specific criteria.) Is the language of the local ordinance specific? If the ordinance is vague, a court could invalidate it on the basis that it is an impermissible delegation of legislative authority. See generally *Stoddard v Edelman* (1970) 4 CA3d 544, 548, 84 CR 443, 444; see also *Hunter v City of Whittier* (1989) 209 CA3d 588, 597, 257 CR 559, 565 (court invalidated CUP ordinance on basis of vagueness as mandated by FCC regulations governing satellite antennas). Is the ordinance clear enough that a municipal court judge, commissioner, or administrative hearing officer can properly apply it to achieve a reasonable result? To ensure enforceability, the municipal attorney should review the ordinance and departmental policies. Do they provide the authority and procedures to monitor compliance with conditions, gain access to private property for inspections, enforce certain conditions, and revoke the CUP if necessary?

These same issues arise with the terms of the permit itself. Like other discretionary land use permits, CUPs run with the land. *County of Imperial v McDougal* (1977) 19 C3d 505, 510, 138 CR 472, 475. Ask yourself whether a new property owner, not a party to the previous negotiations or public hearings, can fully understand his or her obligations by merely reading the permit at the county recorder's office? If not, such ambiguities will come back to haunt any future enforcement efforts. Some municipal attorneys have echoed the well used bureaucratic slogan, "That's not my job, the planner should draft the permit." Whatever arrangements the attorney may have with the planning department, it is still incumbent on a lawyer to review and evaluate the terms and conditions of a CUP with enforcement in mind.

When drafting a CUP, attorneys should consider the following:

- Are key terms defined? Definitions are particularly helpful when the use is somewhat unusual or complex (*e.g.*, a hazardous waste or residential care facility).
- Does the condition impose a permissive ("may") or a mandatory ("shall") duty on the permittee?
- Are all time frames clear? All relevant times and dates should be specific whether they involve hours of operation or duration of the permit.
- Are enforcement options stated? Although the CUP ordinance may list the consequences of any violation by the permittee, nothing prevents the drafter from stating the enforcement options in the permit.

- Does the permit identify the responsible party? Complex business operations may involve different agents beyond the permit applicant. A general clause should make it clear that all agents of the applicants are bound by its terms. Such agents should be identified if feasible.
- Does the permit state that it runs with the land? Do not forget to include even the well-accepted legal principles, *e.g.*, that a CUP binds successors in interest.
- Does the permit make it clear that the applicant is bound to comply with applicable local ordinances and state law? Avoid potential estoppel arguments when the permittee erroneously assumes that issuance of a CUP automatically includes other approvals (*e.g.*, building permits). This is especially critical when the use may be heavily regulated by another part of the municipal code or by state law (*e.g.*, hazardous materials).

The private practitioner who represents a CUP applicant must also pose the same questions. Just like their public counterparts, private attorneys usually concentrate on negotiations and presentations to obtain the CUP. Once they overcome the hurdles put up by neighborhood "NIMBYs" and provincial council members, clients are often left alone to operate under the terms of the permit. If the conditions are ambiguous or unworkable, the client's next call might request representation at an administrative hearing to revoke the permit or a court hearing for a preliminary injunction.

Workable Conditions

Both municipal and private attorneys should pay close attention to the *practicality* of the CUP's conditions. A case in point occurred several years ago in San Diego where four CUPs were issued for senior citizen housing. The terms required the owners to rent only to tenants over the age of 62. In exchange for this duty, the owners received a bonus density and a relaxation of strict parking requirements. On its surface everything appeared fine. The projects, however, were located in neighborhoods with crime rates four times higher than the city average. Several years later, the CUPs became code enforcement cases because the owners could not attract enough seniors to live in the crime-infested complexes so they rented to tenants under 62. If the planner, municipal attorney, and private practitioner had carefully considered the practicality of the age condition in this neighborhood, the city might have avoided this situation.

It is always difficult to predict whether the CUP conditions imposed at the time of issuance will be effective years later. This is particularly relevant for businesses that, without modifications of the original CUP, expand their use, *e.g.*, a business adjacent to a residential neighborhood that increases its operating hours or the number of deliveries. A good example is a traditional gas station that evolves into a 24-hour mini-market.

One technique that might prevent CUP violations from becoming code enforcement cases is to require the permit holder to make periodic reports that allow the city to monitor compliance with the terms of the permit. This condition is especially helpful for those uses that are subject to continued neighborhood scrutiny.

Alternatively, conditions imposed on the operation of a use might become unreasonable or highly restrictive years later based on changed circumstances. A case in point is a CUP for a tennis club that prohibited the construction of lighted courts in order to avoid intruding on the adjacent homes. Someone with foresight, however, had planted trees and shrubs in the early 1960s which, 30 years later, screened the lights. Therefore, the club constructed the lights without seeking a modification of the CUP.

The municipal attorney should not forget to have planners and code enforcement compliance officers review the permit *before* it is approved. Their insight and experience in the field can help to ensure that conditions included in the permit are both practical and workable.

Reporting Conditions

One technique that might prevent CUP violations from becoming code enforcement cases is to require the permit holder to make periodic reports that allow the city to monitor compliance with the terms of the permit. This condition is especially helpful for those uses that are subject to continued neighborhood scrutiny. For example, the CUP could require the operators of residential care facilities to file an annual report with the planning department. The CUP could describe in detail the contents of the annual report. A report about a residential care facility, for example, could document the number of patients, the type of care provided, and the number of staff that either visit or reside on site. Also the number and frequency of visitors might be helpful in assessing possible adverse impacts on a neighborhood.

Once the report is filed, planners would probably have to verify the information. Such a report would also assist possible investigations about public nuisance activities (*e.g.*, noise, traffic) during the permit's term. This report can be used to determine if violations of the conditions are present as well. If staff time is necessary, the authorizing ordinance or the original CUP could authorize the payment of an annual monitoring fee to cover evaluation costs. In the housing case described above, a reporting requirement might have alerted our planning department to the owner's difficulties in finding senior citizen tenants before it was necessary to file a court action.

As part of the reporting conditions, it might be helpful to grant permission to planners to inspect the operation. In the senior citizen cases, each of the properties had changed ownership several times. One CUP was never recorded against one of the properties. Consequently, when it was necessary to determine the actual number of senior tenants living in the complexes, the new owners were generally uncooperative in granting permission to interview the tenants. An

express permit condition that allowed access to monitor CUP compliance would have facilitated our enforcement efforts.

Another drafting technique is to include a sunset clause in the CUP that limits its duration to a specified number of years. Such a condition would be ideal for uses located in urban preserves that will someday be rezoned for traditional development projects, *e.g.*, a commercial nursery in an agricultural zone. Note, however, that adequate notice and a revocation hearing are required even with an automatic expiration clause. See *Community Dev. Comm'n v City of Fort Bragg* (1988) 204 CA3d 1124, 1132, 251 CR 709, 714.

CODE ENFORCEMENT IMPACTS

Once the underlying ordinances and permit have passed code enforcement scrutiny, the municipal attorney's next role is to advise the applicable municipal divisions that will actually enforce the permit in the field. The attorney must ask the department supervisors and field staff the critical implementation and enforcement questions: Who will enforce this ordinance? How will they enforce it? What is the role of the municipal attorney and prosecutor? The balance between the roles of policy advisor at the outset and enforcer with regard to specific properties in violation can often lead to confusion and frustration, particularly in large offices where the roles of advisor and litigator are vested in two different attorneys or divisions within the same office. Strong communication links must be established and solidified between the enforcement and advisory attorneys. Unlike other areas of municipal law, code enforcement by its very nature demands both perspectives.

Another example of the importance of these questions arose in our office last year with the dramatic growth of privately operated jails and detention facilities. Although San Diego's CUP ordinance did not specifically address this new use, the facilities were initially classified as residential care facilities requiring a CUP. We raised questions about whether the ordinance defining and regulating residential care facilities adequately addressed the same issues that would arise for the private jails. In drafting a new ordinance, additional questions arose about whether the planning department had the expertise to monitor compliance with various criminal justice related conditions imposed on the operators (*e.g.*, a prohibition against occupants who had committed specified violent crimes). Should such permits be monitored by a planner, a probation official, or some other party with experience in the criminal justice system?

This issue led to discussion between our city manager and county officials regarding the county's role as the designated local enforcement agency for work furlough facilities. Despite the fact that the county regulated its own public work furlough facility, it did not have sufficient staff or finances to monitor the private facilities. Recognizing this fiscal reality, the city manager designated a code enforcement officer in the zoning division to oversee compliance with the terms of the CUP. Although this issue of compliance with the criminal justice conditions was resolved for economic and political reasons, the example illustrates the complex social and political implications both the planner and municipal attorney may encounter with a CUP. It also provides a good example of why municipal attorneys should raise such enforcement and implementation questions with planners and city managers at the outset.

Although judicial and administrative remedies are not mutually exclusive (the municipal attorney could decide to proceed with a criminal complaint after an administrative remedy fails), the goal should always be to commence the most appropriate course of action at the outset to avoid delay.

SELECTING A REMEDY

When a property owner refuses to comply with applicable zoning and building codes, the municipal attorney, as prosecutor, must advise the respective enforcement division about the available remedies. The selection of enforcement procedures is critical in determining the most effective means of gaining compliance. If code enforcement issues have been identified during the research, development, and drafting of ordinances and policies, the municipal attorney's effectiveness as prosecutor or enforcer will be significantly enhanced.

The city has two types of remedies for code violations: administrative and judicial. Administrative remedies can include abatement (*i.e.* municipal work crews actually remove the public nuisance) and quasi-judicial code enforcement hearings that determine whether violations exist, order compliance, and in some instances impose civil penalties. Judicial remedies include a civil injunction or a criminal prosecution (misdemeanor or infraction). Each category has unique advantages and disadvantages that must be carefully evaluated to determine whether they are the most appropriate remedy in a particular case.

Municipalities have broad discretion and flexibility to select the appropriate enforcement mechanism. A city is not always required to issue a criminal citation or enjoin nonconforming uses of property. *Riggs v City of Oxnard* (1984) 154 CA3d 526, 530, 201 CR 291, 294; *Fox v County of Fresno* (1985) 170 CA3d 1238, 1244, 216 CR 879, 883 (applying state housing law).

Although judicial and administrative remedies are not mutually exclusive (the municipal attorney could decide to proceed with a criminal complaint after an administrative remedy fails), the goal should always be to commence the most appropriate course of action at the outset to avoid delay. A close working relationship between the enforcement division and the municipal attorney will go a long way toward ensuring the proper selection of enforcement remedies.

Case Specific Criteria

In evaluating individual code enforcement cases, the enforcement division, together with their municipal attorney, should consider the following factors:

- *Sufficiency of Case Reports.* Is there enough evidence to connect the property owner, tenant, or building manager to the violation? Are there any inherent weaknesses in the enforcement division's case?
- *Violators' Profile.* What is the motivation for the violators' lack of compliance? Are they merely defying the law? Do they have the physical or financial ability to comply?
- *Inspectors' Recommendations.* What remedy does the enforcement division recommend? What must the violator do to comply? Is there room for flexibility?
- *Judicial Attitude.* Will a judge compel the violator to comply in the precise way suggested by the enforcement division? If the case is handled by judges who are not sensitive to enforcement issues, what type of order or sentence can be expected?
- *Nature of the Violation.* Do the violations pose an imminent threat to the public's health and safety?
- *Speed.* What is the quickest way to obtain compliance?

Judicial Actions

The answer to the questions listed above will generally guide the municipal attorney and the enforcement division in the selection of the most appropriate remedy. For example, if the violations pose an imminent threat to the public's health and safety, seeking a temporary restraining order might be the most appropriate remedy, particularly in situations with substandard dwellings, vacant and abandoned structures, or health and fire hazards. In contrast, if the violations involve zoning ordinances (*e.g.* nonpermitted uses, illegal signs, outdoor storage), a civil action may be ineffective because a judge will not issue a restraining order when imminent health and safety hazards are not present. A criminal prosecution might be more expedient because it can be filed without detailed declarations and pleadings. Moreover, almost all criminal prosecutions end with some type of negotiated plea within approximately one to three months. While it is true that a final order that compels compliance can be obtained by either a permanent injunction or misdemeanor terms of probation, the criminal route is often more efficient than a contested civil action, especially one that requires civil discovery. Although this option of criminal prosecution, unfortunately, may not be available to solo municipal attorneys with little staff to attend court appearances and a district attorney reluctant to prosecute code cases, it is generally a viable option worth exploring.

If a property owner or operator starts the use before obtaining the required CUP, a civil action may be appropriate. In an action to enjoin a zoning violation, if the city establishes that it is "reasonably probable" that it will prevail on the merits, there is a rebuttable presumption that the potential harm to the public outweighs the potential harm to the defendant. *IT Corp. v County of Imperial* (1983) 35 C3d 63, 196 CR 715. On this basis, it appears that a court could issue a preliminary injunction to compel compliance with the CUP's conditions based on a violation of a local zoning ordinance that prohibits maintaining or conducting a use without first obtaining the proper permits. See generally *City of Stockton v Frisbie & Latta* (1928) 93 CA 277, 289, 270 P 270, 274; *City of San Mateo v Hardy* (1944) 64 CA2d 794, 796, 149 P2d 307, 308 (municipalities may seek injunctive relief for zoning violations). The court also has the power to enjoin continuous violations of the law by prohibiting the ongoing operation of the use during the CUP hearing process. Despite the apparent strength of the holding in *IT Corp. v County of Imperial, supra,* many judges are still reluctant to shut down business or commercial uses while the owners go through the CUP process. In one recent case, a superior court judge denied our request for a preliminary injunction to compel compliance with fire and building code requirements at a private work furlough facility. The operators had been open for business for nearly a year before they filed their CUP application. Our concern for the safety of the occupants was caused by numerous fire code violations. Given the somewhat unusual facts of this case, the judge's ruling appeared to discount the safety of the occupants and the presumption established in *IT Corp.* in favor of having more work furlough beds available to lessen overcrowding in the county jail.

Administrative Remedies

As an alternative to judicial actions, many municipalities employ a variety of administrative remedies to compel compliance with local land use regulations. These remedies may be used early in a case as a precondition to a judicial action. Although not required by law, many municipalities use administrative alternatives before filing a case in court.

This is a critical consideration when evaluating possible enforcement actions against a CUP operator that has violated one or two conditions of the permit. If the objective is not to remove the entire use, the scheduling of an administrative hearing to compel compliance with the original permit or to modify its terms and conditions may be sufficient. Modification may be more appropriate where the original conditions are no longer necessary or practical (*i.e.,* the tennis court example mentioned earlier). This strategy was approved in *Garavatti v Fairfax Planning Comm'n* (1971) 22 CA3d 145, 148, 99 CR 260, 262.

If the underlying use has become incompatible with the neighborhood or the violations have been continuous and serious, a hearing to revoke the CUP may be more appropriate. Revocation before filing a court action might be tactically advantageous because it establishes a detailed administrative record that could be used as evidence in a subsequent enforcement action brought by the city. Moreover, the permittee has the difficult task of proving an abuse of discretion in any writ of mandate proceeding to overturn the final administrative order to revoke the CUP. In a subsequent enforcement proceeding, a judge is more likely to compel compliance if the permittee has already been provided due process at the administrative level. Once the revocation becomes final, the city's subsequent judicial action would be based not on the CUP provisions, but rather on the underlying zoning regulations, alleging that the activity is a nonpermitted use. Depending on the circumstances, this might be an easier case to prove because it would focus on whether the use is permitted by the zoning ordinance. Evidence regarding the previous CUP could be viewed by the judge as irrelevant in this subsequent enforcement action.

Administrative remedies can generally be classified into two groups: abatement and administrative hearings. Abatement is a unique remedy derived from the principles of public nuisance law. State law authorizes enactment of local ordi-

nances that establish abatement procedures. See Govt C §§38773–38773.7. The primary distinction between abatement and other administrative remedies is the ultimate power for municipal work crews or private contractors to enter onto private property and abate or remove the hazard. Abatement can include demolition, repair, or merely securing a vacant structure.

Administrative hearings are often substituted for a judicial action, *i.e.* as another procedural vehicle to compel compliance. Instead of seeking a court order, many enforcement departments take their cases to a specially designated code compliance board or hearing officer. Often local ordinances authorize the hearing boards to order compliance with the code and impose civil penalties. This system provides the advantage of avoiding court backlogs and strict rules of evidence. Of course, all such administrative hearings must still comply with fundamental notions of due process by providing reasonable notice and opportunity for a hearing. See generally *Blinder, Robinson & Co. v Tom* (1986) 181 CA3d 283, 226 CR 339. The primary disadvantage of this remedy is the inherent weakness of administrative orders. If the owner refuses to comply or pay the civil penalty, often the only feasible alternative is to obtain a court order that compels compliance. (This conclusion would not necessarily apply to abatement proceedings where the city can obtain compliance by sending its own crews to abate the nuisance.) In those cases involving neither complex issues nor health and safety hazards, however, administrative hearings are often used by many smaller municipalities. They are the proverbial "work horse" for many smaller cities.

When an owner has begun operating without obtaining a CUP, an administrative hearing could prove to be ineffective. Our enforcement case against the private work furlough facility provides a good illustration of this point. Despite written notice that a CUP and extensive repairs would be necessary before a former retail warehouse could be converted to a work furlough facility, the operators started without obtaining the necessary permits. When negotiations failed to obtain voluntary compliance, the enforcement department, relying on a local civil penalties ordinance, issued a notice and order demanding compliance within ten days or else civil penalties would begin to accrue on each subsequent day at a maximum rate of $2500 per violation until the property was brought into compliance. Pursuant to this local ordinance, a hearing was scheduled before an administrative hearing officer appointed by the city manager. The hearing officer found that the operators were in violation, assessed a $36,000 fine, and ordered them to file a CUP application or cease operation. Although the operators paid the fine, this type of administrative order did not have the legal power to shut down the facility if the CUP application was never filed or denied.

The primary distinction between abatement and other administrative remedies is the ultimate power for municipal work crews or private contractors to enter onto private property and abate or remove the hazard. Abatement can include demolition, repair, or merely securing a vacant structure.

Most administrative remedies in the code enforcement field do not confer the legal authority to issue orders that are self-enforcing (*e.g.*, sheriff can enter the property to enforce the order). Thus, when a property or business owner defies the order, the only viable recourse is to get a court order. Given the unique facts of this controversy, we should have anticipated that the work furlough operator would defy the administrative order and filed a civil complaint. We were forced to file our civil action to compel compliance with the applicable building and fire codes some 18 months later.

DEFENSES

When evaluating defenses to an enforcement action, an attorney representing the CUP applicant or operator should also consider the case-specific criteria discussed above and should review those issues with the client. What was the client's role in causing or creating the alleged violations? Who is primarily responsible? Did the city's actions create a possible foundation for an estoppel defense? Do the facts support any legitimate claim for nonconforming rights? Is the city's enforcement action consistent with the handling of other similarly situated properties? Although the answers to these questions may not absolve the operator from legal responsibility, they may uncover key points that can be used to avoid formal enforcement action by the city or facilitate a negotiated settlement.

As a practical matter, there are few successful defenses to a code enforcement action. The private attorney may challenge the validity of the underlying statute or administrative action on constitutional grounds (*e.g.*, vagueness, infringement of fundamental rights, denial of due process). In addition, because the city has the burden of proof, attacks on the sufficiency of the evidence may be successful. Generally, the most successful defense is nonconforming rights, *i.e.*, the use predated the regulation the applicant is alleged to have violated. Other plausible defenses include selective or discriminatory prosecution, and equitable estoppel. Again, alleging these defenses might not exonerate the client, but it might reveal information that could lead to a settlement.

CONCLUSION

Code enforcement generates a wide range of assignments. The required diversity of expertise still challenges the professional and intellectual abilities of this writer after nearly nine years as a municipal attorney. The blend of both theoretical and practical strategies in the role of "problem solver" best describes the essential demands of code enforcement. Consequently, the municipal attorney must be both a skillful advisor and litigator to effectively operate in the domain of code enforcement.

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'A Tradition Since 1928'

October 31, 1992

Senator Marian Bergeson, Chairman
Senate Committee on Local Government
State Capitol, Room 2085
Sacramento, CA 95814

Subject: Public Testimony, November 6, 1992
Resolving Land Use Disputes:

Dear Committee Members:

On November 6 you will conduct a public hearing on the important subject of litigation vs. arbitration/mediation. I would like to express my appreciation for the opportunity to comment.

In August when I was informed of the hearing, I had decided to confine my comments to the need for a broader application of arbitration and mediation techniques in the resolution of disputes in California's increasingly complex land use planning and statewide growth management issues. But in the meantime, I have just returned from six weeks of backpacking through Southeast Asia. I was overwhelmed by what I saw. This trip provided such a powerful insight into the need for <u>complete reform</u> of California's Tort Law system that I've decided, instead, to share a little bit of that experience with you. The experience reinforced my perception that while indeed consequential, a discussion of the merits of arbitration and mediation should be secondary to a broadbased, fundamental reform of California's Tort Law system.

In the course of traveling overland from Bangkok, Thailand, to Denpasar, Indonesia, I was surprised by the dynamic peoples and economies of Thailand, Malaysia, and Indonesia. I became aware of the significant competitive edge that is afforded the developing countries of South East Asia as a result of the way disputes are resolved - without resorting to litigation. As a result of that experience, I would like to caution the Legislature against creating a State Land Use Court that in any way would serve to perpetuate California's costly pro-litigation approach to dispute resolution.

On November 6, you will be confronted with the normal pressures from members of the California Trial Lawyer's Association and other pro-litigation lobbies. I hope you will take the time to weigh those viewpoints against the following observations of South East Asia:

Photo One: This photo was taken in Medan, capitol of the Island of Sumatra. I wondered how the State of California (and the U.S.) would fit into the global economy of the twenty first century (notice the age at which young people are out on the streets assisting their families to earn a living).

I understand that S.E. Asian populations are currently expanding at a rate above 3% per annum. This should put additional pressure on Indonesia to become competitive in the expanding world of low wage, high tech economies.

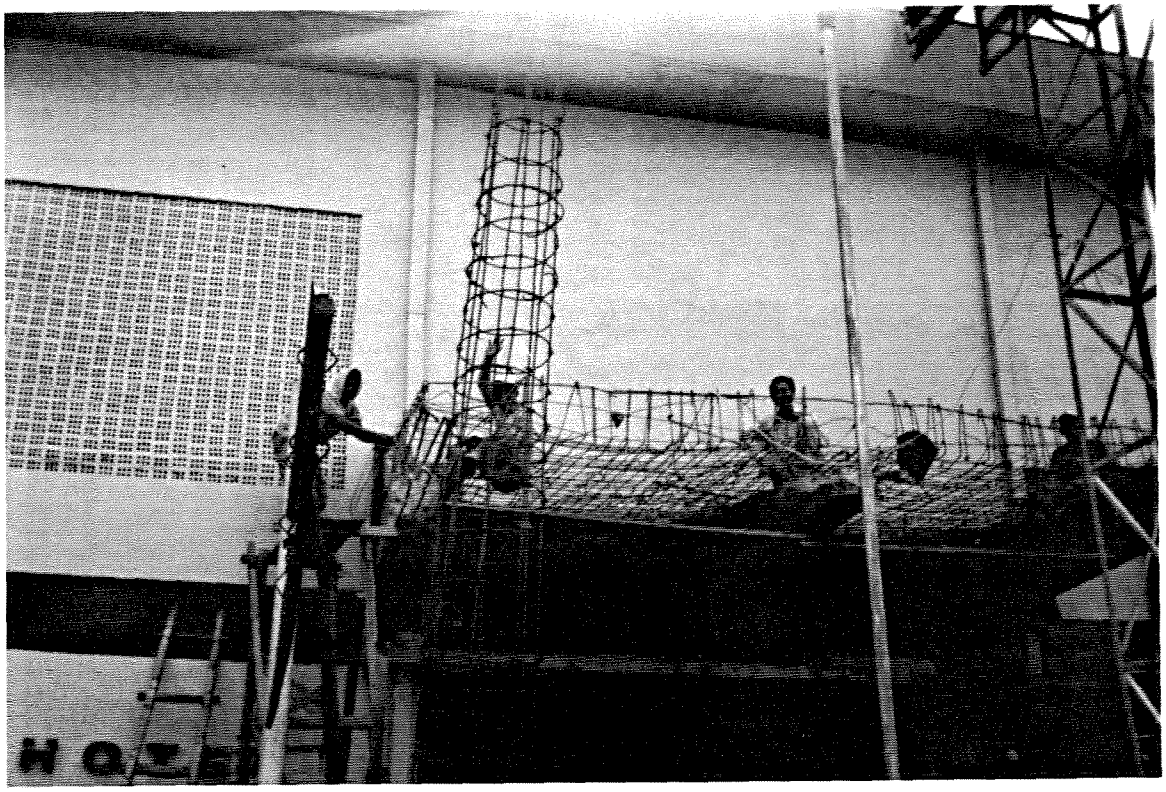
Photo Two: This photo is representative of many of the suburbs surrounding Jakarta, Indonesia. While not typical, this photo is representative of conditions throughout S.E. Asia. The wealth that is coming to the region - as S.E. Asia receives an increasingly larger market share of world trade from its north easterly neighbors Japan, South Korea, and Taiwan - is gradually changing this still prevalent scene.

The water in this photo may look clear. But it is a cesspool of jet black sewage from the surrounding neighborhoods!

Photo Three: This photo is a partial view of over 100 wooden sailing ships which are very much active throughout the islands of Indonesia today. It is indicative of the low overhead which makes it possible for S.E. Asia to attract modernized heavy industries, light manufacturing, and trade.

A Danish instructor of silversmithing, studying the art of Indonesian silver craft informed us that the Indonesian silversmiths under whom he studied earned an average of 5000 Rupiah per day: $2.46

Photo Four: In this photo, Javanese construction workers are breaking down three 14"x 24" reinforced concrete beams in a hotel remodeling project - using only 5 lb. single jacks and chisels! They were quite happy to be working and pleased that I would want to photograph them. Imagine the competitive edge available to Indonesia when these men eventually move over into Indonesia's expanding light manufacturing industry.



The above scene is typical throughout the region! I saw lots of construction projects but virtually no pneumatic jack hammers, nor stinger cranes and wrecking balls. On a trip around the far eastern edge of Bali, three separate rock and reinforced concrete bridges were being dismantled - by men, women and children using 10 lb sledge hammers (unfortunately I had run out of film).

Photo Five: This is a typical construction site! Men are walking across 2"x 12" planks, barefoot, carrying two pails of concrete, mixed on-site in a four cubic yard cement mixer. There is no consideration of such niceties as work shoes, guard rails, ready-mix concrete, concrete pumps, safety hats, workers compensation insurance, or litigation as a result of injury. No thought is given to worker safety! Workman's compensation fraud is unheard of - nor anything so sophisticated as litigation, arbitration or mediation!

Given the irrational, skyrocketing costs associated with litigation in California today, I wondered how small businesses in California will be able to compete with such low-overhead conditions that are certain to prevail in the future global economy.

Two years ago on a rainy night in Los Angeles, I slid into the rear of a car in front of me - doing no appreciable damage. Nevertheless, both occupants jumped out of their car clutching their necks. In S.E. Asia I witnessed several motorcycle/bicycle/automobile accidents. In all cases the parties got up, attempted to repair the damage among themselves as best they could, and went their separate ways. Compare that with the effects of California's Tort Law environment:

Big increase seen in repetitive motion suits

By Barnaby J. Feder
N.Y. Times News Service

Lawyers say hundreds of lawsuits blaming manufacturers of computer keyboards and other equipment for severe arm, wrist and hand injuries are being prepared for filing within a few weeks at the Federal District Court in Brooklyn after Tuesday's decision by a federal judge to group all such cases together.

serious RSI problems is carpal tunnel syndrome, a swelling of nerves at the point where they pass through the wrist.

The suits contend that the equipment used by office workers was defectively designed and that manufacturers failed to provide adequate warnings about how the equipment must be used to avoid injury. The 57 defendants so far in the cases brought together in Brooklyn read like a Who's Who of the

10-31-92

Lawyer Held as Planner of Crash Frauds

■ **Investigation:** Gary P. Miller is among 26 people newly charged in connection with staged accidents, including a truck wreck in which a man died.

LOS ANGE

Fired Auditor Awarded $2.6-Million Judgme

■ **Workplace:** The damage amount may be a record for a plaintiff who was employed for less than three months.

fired after less than three months at Summit solely because he uncovered financial irregularities in Summit's books. Summit maintained that Kaufman was simply incompetent.

A Los Angeles Superior Court jury said Summit must pay Kauf-

months before he was terminated."

Osten added that Summit is currently "reviewing" its options and may attempt to appeal or have the award overturned.

The award was not the largest in history, but it was highly unusual, said James Dertouzos

termination judgments, to a 1988 study by institute. The median the plaintiff was only cording to the study. award, which is

Truck driver awarded $2.2 million

By Jeff Cohan
Daily Bulletin

ONTARIO — A truck driver who suffered a broken hip and crushed wrist in a 1988 accident has received a $2.2 million award after successfully suing Riverside Cement Co.

just filled his trailers with cement powder. He climbed directly atop his truck to sweep off dust, slipped, and fell about 15 feet to the ground.

The cement plant has a catwalk for haulers who wish to safely clean the tops of their

mont-based lawyer Larry Sackey, blasted Riverside Cement Co.

"They expected the employees . . . to work under impossible conditions," Sackey said in the same statement. "Riverside Cement has been described as

Our system of handling grievances is out of control. Until the

State legislature restores a balance in our legal system between what is equitable to the individual **and** what is affordable to society an equitable statewide Growth Management Strategy is impossible. How growth is managed into the twenty-first century, **and at what cost**, will largely determine how well we protect our current standard of living - as those throughout Asia continue to rise. California's Tort Law system is strangling our ability to compete with the aspiring world of S.E. Asia (China and Vietnam have yet to flex their economic muscle). The excessive waste of financial resources associated with fraudulent, excessive litigation is debilitating in its effects on California businesses attempting to compete with underdeveloped nations that have no concept of litigation. Future Growth Management legislation must recognize that California can no longer afford the luxury of the frivolous lawsuit, and the casual $2,000,0000 award.

Balance **can** be restored through a Growth Management Strategy which emphasizes arbitration/mediation over litigation. But to do so a State Land Use Court must function as part of a broader based Growth Management quality control program. It must **not** become elitist, financed by local development fees only to focus exclusively on inter-agency conflicts. It must be accessible to all "stakeholders". Most importantly, it must be created to act as an integral part of a performance measurement program, using its role to identify where and why conflicts occur while overseeing not only the resolution of those conflicts, but legislative and administrative changes to the Strategy required to assure accountability, consistency, certainty, and equity in its implimentation. In other words, a Land Use Court system must have the staff and authority to interface with the appropriate bureaucracies up and down the growth management chain in the resolution of conflicts involving inconsistencies at all levels. It must monitor the performance of the Strategy and make recommendations when disputes involve correctable inconsistencies in the Strategy. It must have the authority to monitor how well local quality control management programs are functioning in their attempts to receive customer complaints related to Strategy consistency issues - and resolving those complaints before they arrive at the State Land Use Court in the form of costly, debilitating land use lawsuits.

What is needed are new approaches to how disputes are resolved in California. These approaches must reduce costs and frustrations for all Californians. A future Growth Management Strategy must recognize that California has reached the limit of its tolerance for the extravagant, self-serving litigious solution to conflict.

Sincerely,

William Graber
a:SLGNov

League of California Cities
California Cities Work Together

November 5, 1992

Members
Senate Select Committee on Planning for California's Growth
Senate Committee on Local Government
State Capitol
Sacramento, CA 95814

Dear Senator Bergeson and Members:

The League of California Cities shares your concerns that land use disputes too frequently stall community development, consume scarce economic resources and clog the courts. We appreciate the opportunity to address this critical issue. Our Growth Management and Regional Issues policy committee as well as our Housing, Economic and Community Development policy committee are reviewing these issues in relation to growth management and permit streamlining proposals. We hope to share with you some of our concerns and policy considerations.

The proposal for a land use court is intriguing. We have reviewed the Uberroth Commission Report, as well as SB 434. We see a number of unresolved issues which prevent our support of such a court at this time. These issues are discussed briefly below.

The land use court has essentially two components. One is going to protect us, local government, from environmental groups and others that are tying us up in courts. The second component is that applicants would have expanded remedies to override local decision making.

In order to protect local government, traditional superior court jurisdiction would need to be eliminated over land use issues. SB 434 did not explicitly do that. It appears likely that a constitutional amendment may be necessary to limit jurisdiction. Our concern is that if not expressly limited, the only people who are going to use this court are going to be developers looking to sue cities. NIMBY groups that are looking to slow down the approval process will go through the existing courts, unless their standing is limited elsewhere.

We are also concerned about making it too easy for the developers to attack decisions made by locally elected officials. Which means, we would oppose replacing permit decisions from the local government legislative body with a court's power to adjudicate legislative actions. Under proposed section 70330(a), the land use court's authority would be broadened to include "approval or denial" of local projects. While existing law is complicated, the

administrative mandamus procedure under which existing land use claims are adjudicated allows a court to set aside a decision, returning it to the local agency for cure of any legal defects. Even under the California Environmental Quality Act, the most a court can do is order the preparation of a specific environmental document. It can neither approve nor disapprove a project.

Approvals of development projects involve legislative decisions which courts are not prepared to balance. At best, courts are referees. They make judgments about the way the game is played, not the intrinsic value of the ball.

There are a number of other broad issues which we are believe need further analysis and debate. We believe that a five member panel of judges is unlikely to be adequate to address all California land use disputes in the 30-day time frame allotted. If a land use court were implemented, it would likely require substantially more resources than were proposed in SB 434. Related to this issue, is whether the court would operate by individual judge or by panel. Under the SB 434 proposal, the Land Use Court would have the option of assigning a case to either an individual judge or a panel. A more effective use of resources may be to limit cases to hearings by a single judge.

The bigger issue is whether the courts are the appropriate body for resolving land use disputes at all. Our initial discussions of regional growth management indicate a role for alternative dispute resolution.

Conflict resolution mechanisms are a key ingredient for each region to resolve jurisdictional disputes and reconcile inconsistencies over growth and urban development decisions. Conflict resolution mechanisms should be permitted at the regional or subregional level, or both. Any land use dispute legislation should address at least the following minimum guidelines for conflict resolution mechanisms:

1. Local agencies should be given full authority and flexibility to construct within their regional and subregional institutions appropriate conflict resolution mechanisms.

2. Legislation should at least contain time frames and deadlines for resolving disputes.

3. Conflict resolution should occur at the governance level nearest the affected agency. If the affected government cannot resolve the conflict, the conflict should be moved to the next immediate level of governance for resolution. Thus, if two cities cannot resolve a conflict, the dispute should be heard by

the relevant subregion. If the subregion cannot resolve the conflict, the region should then hear the dispute.

4. The principle of resolving conflict at the government level nearest to the conflict should also apply to determinations of planning consistency. The consistency of local plans with subregional and regional strategies should be self-certified. Certification should be presumed valid unless challenged by another agency within a limited period of time.

5. Legislation should permit the imposition of a conflict resolution structure on those areas without a procedure or when a local process fails to resolve a conflict.

6. The region should be the final arbiter of a conflict, if not resolved locally.

7. The state should be the final arbiter on state programs.

8. When a subregional structure is established, authority should be given to local governments to assign conflict resolution mechanisms to subregions if appropriate.

I hope that these remarks are helpful. Please contact me if I can provide any additional information.

Sincerely,

Ernest Silva
Legislative Representative

PRESENTED BY NONA EDELEN

1771

SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS

818 West Seventh Street,12th Floor • Los Angeles, California 90017-3435 (213) 236-1800 • FAX (213) 236-1825

TESTIMONY OF THE SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS BEFORE THE SENATE LOCAL GOVERNMENT COMMITTEE HEARING ON "RESOLVING LAND USE DISPUTES: MEDIATION, ARBITRATION, AND LITIGATION" NOVEMBER 6, 1991 SACRAMENTO, CA

PRESENTED BY

RIALTO MAYOR JOHN LONGVILLE

SENATOR BERGESON, MEMBERS OF THE COMMITTEE, MY NAME IS JOHN LONGVILLE, MAYOR OF THE CITY OF RIALTO AND A MEMBER OF THE EXECUTIVE COMMITTEE OF THE SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS (SCAG). I AM PLEASED TO BE HERE ON BEHALF OF THE SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS (SCAG), THE METROPOLITAN PLANNING ORGANIZATION (MPO) FOR THE SIX COUNTIES OF SAN BERNARDINO, VENTURA, ORANGE, IMPERIAL, RIVERSIDE AND LOS ANGELES, AND THE CITIES THEREIN.

THE EXECUTIVE COMMITTEE DOES NOT HAVE AN ADOPTED POLICY ON LAND USE MEDIATION, HOWEVER, I WILL SHARE WITH YOU A CONCEPT FOR RESOLVING INTER AND INTRA-JURISDICTIONAL CONFLICTS, WHICH SCAG HAS BEEN ASKED TO UNDERTAKE AS A RESULT OF A DISPUTE BETWEEN THE CITIES OF DIAMOND BAR, CHINO AND BREA, ON WHETHER OR NOT TONNER CANYON SHOULD REMAIN AN ENVIRONMENTAL PRESERVE OR BE USED TO SITE NEW HOUSING. A COPY OF AN AUGUST 6, 1991 LOS ANGELES TIMES (ORANGE COUNTY EDITION) ARTICLE HAS BEEN PROVIDED WITH MY TESTIMONY FOR YOUR REVIEW.

AN INTER/INTRA-JURISDICTIONAL LAND USE MEDIATION PROCESS WOULD BE PREFERABLE TO HAVING ALL DISPUTES BETWEEN LOCAL GOVERNMENTS ADJUDICATED IN THE COURTS. SCAG, BECAUSE OF ITS ROLES AND RESPONSIBILITIES UNDER STATE AND FEDERAL LAW (ATTACHED), WOULD BE THE APPROPRIATE FACILITATOR.

FIRST, TO PREVENT LIMITED AND DWINDLING FINANCIAL RESOURCES FROM VANISHING IN LEGAL COSTS; SECOND, TO ENSURE THE COORDINATION AND CONSISTENCY OF LOCAL, SUBREGIONAL AND REGIONAL PLANNING PROCESSES IN ACCORDANCE WITH STATE AND FEDERAL GOALS AND OBJECTIVES; AND THIRD, BY USING EXISTING INSTITUTIONAL ARRANGEMENTS RATHER THAN CREATING A NEW, SINGLE PURPOSE ENTITY OR PROCESS.

WHILE LOCAL PLAN DEVELOPMENT AND LAND USE DECISIONS ARE, AND SHOULD REMAIN UNDER THE PURVIEW OF CITIES AND COUNTIES, THERE ARE OPPORTUNITIES WITHIN CURRENT TRANSPORTATION, AIR QUALITY AND HOUSING PLANNING PROCESSES WHERE SCAG MIGHT ASSIST LOCAL GOVERNMENTS SO THAT DEVELOPMENT PROJECTS ARE NOT AT CROSS PURPOSES.

FOR EXAMPLE: WITH THE DEVELOPMENT OF THE REGIONAL TRANSPORTATION PLAN (RTP) AND REGIONAL TRANSPORTATION IMPROVEMENT PROGRAM (RTIP), SCAG NOW CONVENES THE "AB 1246" MEETING WITH THE COUNTY TRANSPORTATION COMMISSIONS AS A FORUM FOR REVIEW OF LOCAL PROJECTS AND PROGRAMS. THIS ACTIVITY COULD BE EXPANDED TO FORMULATE AGREEMENTS BETWEEN LOCAL GOVERNMENTS ON VARIOUS PLANNING ISSUES.

IN ADDITION, SCAG IS A COMPREHENSIVE PLANNING AGENCY. IT'S INTERGOVERNMENTAL REVIEW OF PROGRAMS SLATED TO RECEIVE FEDERAL FUNDING AND ITS CONFORMITY REVIEW OF PROJECTS FOR CONSISTENCY WITH THE REGIONAL AIR PLAN ARE READILY AVAILABLE MECHANISMS FOR EVALUATING THE MERITS OF VARYING PROPOSALS AND DETERMINING POSSIBLE COMPROMISES AND SOLUTIONS.

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THE QUESTION OF WHETHER OR NOT SCAG'S PLANNING PROCESS SHOULD INCLUDE A CONFLICT RESOLUTION COMPONENT WAS FIRST RAISED BY THE EXECUTIVE COMMITTEE THREE YEARS AGO. IT CONCLUDED THAT A MEANINGFUL CONFLICT RESOLUTION MECHANISM WILL BE KEY TO THE ULTIMATE SUCCESS OF THE PLAN IMPLEMENTATION PROCESS. ALSO, EXECUTIVE COMMITTEE REPRESENTATION BASED ON "ONE MAN, ONE VOTE", AND THE CREATION OF "BOTTOMS UP" REGIONAL TRANSPORTATION, AIR QUALITY, AND GROWTH MANAGEMENT PLANS WOULD IMPROVE BOTH, COORDINATION BETWEEN LOCAL JURISDICTIONS AND SCAG'S EFFICIENCY AS THE REGIONAL PLANNING AGENCY.

SCAG HAS SUPPORTED TRANSPORTATION, ENVIRONMENTAL AND HOUSING LEGISLATION WHICH CALL FOR THE EXISTING AND AFFECTED LOCAL, STATE, REGIONAL AND, OR FEDERAL ENTITIES TO WORK TOGETHER TO RESOLVE DIFFERENCES. SCAG WAS ESTABLISHED TWENTY-SEVEN YEARS AGO, AS THE REGION'S COUNCIL OF GOVERNMENTS (COG), FOR THE EXPRESS PURPOSE OF FOSTERING LOCAL GOVERNMENT COOPERATION AND COMMUNICATION. THE ARBITRATION OF LAND USE DISPUTES IS A NATURAL, REASONABLE AND PRACTICAL EXTENSION OF SCAG'S RESPONSIBILITIES.

AS I SAID EARLIER, THIS IS ONLY A CONCEPT AND IT HAS NOT BEEN FORMALLY APPROVED BY THE EXECUTIVE COMMITTEE. HOWEVER, YOU WILL BE KEPT APPRISED OF OUR PROGRESS.

THANK YOU, AGAIN, FOR AFFORDING ME THE TIME TO BRING THIS SUGGESTION TO YOUR ATTENTION.

CONTACT:
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SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS

175

Roles and Authorities

SCAG is a ***Joint Powers Agency*** established under California Government Code Section 6500 et seq. Under federal and state law, SCAG is designated as a Council of Governments (COG), a Regional Transportation Planning Agency (RTPA), and a Metropolitan Planning Organization (MPO). It has a number of mandated roles and responsibilities including:

SCAG is designated by the federal government as the Region's ***Metropolitan Planning Organization*** and mandated to maintain a continuous, comprehensive, and coordinated transportation planning process resulting in a Regional Transportation Plan and a Regional Transportation Improvement Program pursuant to 23 USC 134, 49 USC 1601 et seq., 23 CFR Part 450, and 49 CFR Part 613. SCAG, is the designated ***Regional Transportation Planning Agency***, responsible for both preparation of the Regional Transportation Plan (RTP) and Regional Transportation Improvement Program (RTIP) under California Government Code Section 65080.5.

SCAG is responsible for developing the demographic projections and integrated land use, housing, employment, and transportation programs, measures, and strategies portions of the ***South Coast Air Quality Management Plan***, pursuant to California Health and Safety Code Section 40460, et seq. SCAG is also designated under 42 USC 7504 ***Co-Lead Agency*** for air quality planning for the Central Coast and Southeast Desert Air Basin District.

SCAG is responsible under the Federal Clean Air Act for determining ***Conformity*** of Projects, Plans and Programs to the Air Plan, pursuant to 42 USC 7506.

SCAG is the authorized regional agency for ***Inter-Governmental Review*** of Programs proposed for federal financial assistance and direct development activities, pursuant to Presidential Executive Order 12372 (replacing A-95 Review).

SCAG reviews, pursuant to Public Utilities Code Sections 21083 and 21087, ***Environmental Impact Reports*** of projects of regional significance for consistency with regional plans (California Environmental Quality Act Guidelines Sections 15206 and 15125).

SCAG is the authorized ***Areawide Waste Treatment Management Planning Agency*** for the U.S. Environmental Protection Agency pursuant to 33 USC 1288 (Section 208 of the Federal Water Pollution Control Act).

SCAG is responsible for preparation of the ***Regional Housing Needs Assessment***, pursuant to California Government Code Section 65584.

SCAG is responsible for preparing the ***Southern California Hazardous Waste Management Plan*** (with the San Diego Association of Governments and Santa Barbara County/Cities Area Planning Council) pursuant to California Health and Safety Code Section 25135.3.

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Pressure Builds to Develop Canyon

■ Planning: Tonner Canyon, near Brea, is seen as a natural treasure to many, but to landowners and surrounding cities it's an alluring spot for homes.

By BERKLEY HUDSON
TIMES STAFF WRITER

DIAMOND BAR—Deep in a tawny canyon dotted by prickly pear, purple sage and green canopies of ancient oaks and walnuts, a rabbit scooted into the underbrush. Overhead, a great horned owl fluttered through treetops.

From a distant ridge came the sound of earthmoving equipment reshaping the land around a big house under construction amid a cluster of homes atop the canyon's western rim.

These are the two faces of Tonner Canyon, one of the last sizable chunks of undeveloped, privately owned land in the region. Its 6,500 acres—abundant in plants and wildlife, including rare and threatened species—are fast becoming an environmental battleground in a clash of open space versus development.

Los Angeles County in the mid-1970s designated Tonner Canyon a "Significant Ecological Area," a term that planners use to single out unusual private tracts of land that may face environmental difficulties from urbanization.

Now, as predicted, development pressures on Tonner Canyon indeed are coming to bear from many quarters:

■ Developers have proposed a massive project for the southern end of Tonner Canyon in an unincorporated area of Orange County next to the city of Brea.

■ The Diamond Bar City Council gave tentative approval to developers to build 63 custom houses in a $90-million project, and applications for more projects are in the works.

■ The Boy Scouts of America, which owns 3,700 acres in the canyon, is considering several options to develop part of the land.

Complicating any comprehensive planning for the canyon is the jurisdictional latticework that overlies its eight-mile-long crescent shape. The canyon spans portions of three counties—Los Angeles, Orange and San Bernardino—and three cities—Brea, Chino Hills and Diamond Bar.

Diamond Bar and Brea each has plans to annex portions of the canyon and for planning purposes considers it a part of its "sphere of influence." And, the new city of Chino Hills took in a third of the canyon when it was incorporated in December.

In Diamond Bar, where the 2-year-old city of 53,000 has put the finishing touches on its first General Plan, developers and environmentalists have voiced sharply contrasting ideas about what should be done with the canyon.

"The whole issue is about destruction of our natural environment, just for the dollar," said Don Schad, an industrial electrical contractor who served on an advisory committee for the General Plan and who has hopes of creating a local nature conservancy to protect Diamond Bar's remaining undeveloped canyons.

Schad has been among the dozens who have staged marches through the city with placards saying "Save Tonner Canyon" and who have crowded into local meetings decrying the possible demise of what environmentalists call "Diamond Bar's rain forest."

Developer Daniel O. Buffington, a podiatrist who is a principle in a company planning the $90-million project—which falls entirely within the county-designated Significant Ecological Area—offered a dissenting view.

"First of all, you have to remember it is private property," Buffington said. Beyond that, he said, "that land has become too valuable to leave it in its natural state."

In its entirety that project on the city's eastern boundary would remove 800 native walnut trees. To compensate, developers would be required to plant 3,200 walnut trees.

As it gave tentative approval last month for the development that Buffington's company and one other developer plan for 87 acres, the Diamond Bar council held back granting a proposal for new houses on 73 more acres and required the developer to prepare an engineering study.

And on July 14, in spite of objections from a small group fearing that the city was not taking adequate precautions to protect Tonner Canyon, the council unanimously approved its General Plan, outlining a course of action for the next 20 years.

The plan advocates that the city

Please see TONNER, B7

TONNER: Environmental Battleground

Continued from B6

should, "where ecologically feasible, maintain, protect and preserve biologically significant habitats," including Tonner Canyon.

Yet the plan acknowledges that development may be inevitable.

One of the projects that could most dramatically alter the canyon's environment is development of the Firestone Scout Reservation, which shut down in January as it coped with financial problems.

As a way to finance a new, scaled-down camp that would be built in a secluded 600-acre section of canyon woodlands, two Scout committees are considering potential residential or commercial developments for the reservation. A previous plan for a golf course fell through as the regional economy soured the Scouts' deal with a developer.

In explaining why the Scouts would even consider development, Scout spokesman Terry Tibor said: "The problem is the property has always been larger than we could use."

Straddling Orange and Los Angeles counties, the camp is just outside the Diamond Bar city limits but within the municipality's "sphere of influence."

Regardless of what happens at Firestone, Diamond Bar city officials hope to one day annex it. The General Plan lists the camp's zoning as "agricultural," but city officials said that could be changed if the Scouts develop a specific proposal.

In negotiating over any development at the camp, Diamond Bar Mayor Jay Kim said city officials face "a delicate situation." He said, "I'd like to leave [the canyon] the way it is . . . but we know that's not the reality."

Likewise, Orange County's Brea, a city of 32,000, is eyeing annexation of the canyon's southern end, where a Laguna Hills developer and three oil companies propose to build as many as 2,000 homes and a business and commercial district in a 7.4-square-mile area. One-eighth of the area includes 500-plus acres of Tonner Canyon near the Orange Freeway.

A citizens committee has completed a report on concerns about the project, which would increase Brea's land area by 70% if it were annexed.

Community members studying that area "discovered that it's not as pristine" as they had thought, said Jim Cutts, director of Brea's development services, who noted that oil companies have maintained wells for a century in Tonner's southern end.

Still, he said, officials realize the canyon's ecological importance and hope "to strike some kind of balance" between the ecology and development.

Soon, Cutts said, developers will begin environmental studies on the canyon.

Diamond Bar Planning Commission chairman Bruce Flamenbam said he would welcome studies on Tonner because "I just don't think we know enough about it."

Previous research has concluded that the canyon is ecologically significant for its diversity in native plants and animals, and for its unusual expanse of relatively undisturbed habitat, which once was commonplace.

Its stands of native oaks and walnut trees were among the reasons that Los Angeles county planners singled out the canyon.

According to Jack Bath, a Cal Poly Pomona biological sciences professor, the canyon has at least a dozen rare plants, including three extremely rare varieties possibly facing extinction: Braunton's Milkvetch, heart-leaved pitcher sage and the many-stemmed Live-for-ever.

In addition, Bath said the canyon is a major pathway for cougars, whose local habitat is dwindling.

Development in the canyon, especially on the scale planned in Brea, he said, could wipe out the cougars and set off a chain-reaction. Cougars, he said, would no longer be present to eat the deer, which would proliferate; an increased deer population could then overgraze native plants and herbs to extinction.

To further thicken the plot, the entire length of Tonner has been proposed as the location for a roadway or perhaps a monorail that might help ease increasingly severe traffic problems on the Pomona and Orange freeways, and on Grand Avenue and Carbon Canyon Road.

In its recently adopted General Plan, Diamond Bar left open the possibility of a transportation corridor. The development of a road is favored by many officials in surrounding communities, but it is opposed by others who say it would be an environmental disaster.

In addition, since December, part of Tonner Canyon has fallen within the domain of a new governmental entity. Chino Hills, with a population of 46,500 that is expected to double over the next several years, encompasses most of the canyon's northern third. The city is just beginning to develop its General Plan, which will include Tonner—on the western edge of one of the fastest-growing areas in the nation, Riverside and San Bernardino counties.

Worried about transportation issues as well as environmental ones, Chino Hills Mayor Gwenn Norton-Perry considers it a significant problem that no existing regional body supervises planning for Tonner Canyon. "It's called regional cooperation," she said, "and cities don't know how to do that."

But she said she is hopeful that government officials can somehow devise a way to plan comprehensively for the canyon.

Flamenbam of Diamond Bar's Planning Commission said he too is worried that the three counties and three cities will be unwilling to look at the canyon as a whole.

As it now stands, he said, with no single agency in charge, Diamond Bar would be hard-pressed to have much say even "if Brea wants to put a lead smelter in the canyon."

'First of all, you have to remember it is private property. That land has become too valuable to leave it in its natural state.'

DANIEL O. BUFFINGTON
Developer

TO: The Senate Select Committee on Planning for California's Growth and The Senate Committee on Local Government

FROM: Sarah Foster
Californians for Self-Governance
243 Kearny St.
San Francisco, California 94108

STATEMENT FOR THE JOINT INTERIM HEARING: November 6, 1982

RESOLVING LAND USE DISPUTES: MEDIATION, ARBITRATION, LITIGATION

I would like to thank Senator Bergeson, the Select Committee and the Senate Local Government Committee for this opportunity to present a few observations and concerns on the topic under discussion today.

But first, I would like to inform the Committees that two organizations who could not be here would appreciate the opportunity to submit written statements for inclusion in the record: Pacific Legal Foundation and the Claremont Institute. In the past the Local Government Committee has kept its doors open to accept statements from those who could not be present at a hearing or whose testimony could not be presented, and they hope you will extend a similar courtesy in this instance.

* * * * * * *

COMMENTS:

A number of objections might be made regarding the creation of a special State Land Use Court. At first glance it seems the intention is to provide a mechanism to offset the nuisance lawsuits initiated by individuals and groups motivated by anti-development sentiments. If so, let me say I am largely in accord with such an aim. I agree--in part--with the statement that a lawsuit challenging a decision by a city or county has a "chilling effect" on the confidence with which property owners and public agencies can proceed with development projects--etc.

But such a statement implies that the only obstacles to developing and otherwise using one's property are those placed by public advocate groups. It overlooks the far more notorious "chiller"--the climate created by government entities.

Cities, counties, redevelopment agencies, etc., make two kinds of decisions: they OK projects or they deny them. The latter is far more common and just as chilling to builders, contractors and property owners as those lawsuits threatened by overzealous public advocacy organizations.

The creation of a new kind of court will do little to help those who wish to use their property and find themselves caught in what has been termed a "regulatory Verdun." It will not help those

who are threatened with a regulatory taking. Instead, it seems these parties will be hit with a double whammy: first, by the regulation, the decision, the taking threat--whatever; second by denial to the courts wherein their cases should be heard.

The State Land Use Court would not be a court of justice; rather it would be more an <u>administrative</u> court, the kind you have to deal with when you get embroiled with any government agency. From such a court appeals are very difficult. It is imperative that decisions regarding land use be subject to appeal right up the ladder of litigation to the U.S. Supreme Court; yet it is unclear whether such a right will exist in this new court system.

The following issues must be made clarified:

a. The appeal process. Can a property owner appeal an adverse decision or is the State Land Use Court a court of last resort?

b. Are matters dealing with eminent domain and other takings disputes to be handled by the State Land Use Court?

c. What about redevelopment? How will the Land Use Court affect the present procedure whereby citizens may challenge a redevelopment plan?

Creation of a State Land Use Court is seen as a way to unclutter the calendars of the general court system. But if you want to end lawsuits, the solution is to eliminate the <u>need</u> for litigation. This can only be accomplished by cutting down the number of the regulations and the various hoops a builder must jump through (one-stop permitting is not the answer, the solution is fewer regs, period) and by ending the practice of willful, casual taking--regulatory and standard.

Unfortunately the various growth management bills last session--no matter who the author is or was--did not do that, rather they went the opposite direction and implementation of their proposals would have exacerbated the problem not helped it.

These proposals in essence mandated the very things that are driving the engine of litigation: more regulation and permit requirement and a diminishing of property rights. They insisted on projects being in "conformity" with goals set by planners and with various superimposed growth mangement "strategies." Such requirements <u>guarantee</u> a steady flow of dispute, conflict and lawsuits. How can it be otherwise?

This in itself is unfair and wrong. But to then deny those property owners who will be thus adversely affected by this onslaught full access to proper court procedures and protections would be grossly unjust.

Sarah Foster