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# Zoning by Initiative in California: A Critical Analysis

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# ZONING BY INITIATIVE IN CALIFORNIA: A CRITICAL ANALYSIS

## I. INTRODUCTION

The enactment of a zoning ordinance is no simple matter. California statutes governing the enactment of zoning ordinances<sup>1</sup> require a complex scheme of hearings, study, recommendations and further hearings before a proposed ordinance can be approved. The statutes require that the zoning ordinance be consistent with governmental land use planning goals<sup>2</sup> and further mandate careful consideration of the environmental impact of the proposed ordinance.<sup>3</sup>

"While the practical considerations of an expanding population long ago necessitated abandonment of "town meeting" decisionmaking<sup>4</sup> in favor of representative government, the power of the initiative<sup>5</sup> is reserved to the people by the constitutions of many states.<sup>6</sup> The California statutes regulating the initiative procedure require only that a specified number of signatures be obtained on a petition, that the proposed measure be placed on the ballot and that it be voted on in the same manner as are political candidates seeking elective office.<sup>7</sup>

Occasionally zoning ordinances are enacted by initiative. Zoning by

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1. CAL. GOV'T CODE §§ 65800-65912 (West 1966 & Supp. 1966-1978) [hereinafter referred to as "State Zoning Law"].

2. *Id.* § 65860.

3. CAL. PUB. RES. CODE § 21080(a) (West Supp. 1979).

4. The "town meeting" tradition is not completely dead. See Bryan, *Town Meeting Government Still Supported in Vermont*, 61 NAT'L CIVIC REV. 348 (1972).

5. An initiative is defined as "[t]he power of the people to propose bills and laws, and to enact or reject them at the polls, independent of legislative assembly." BLACK'S LAW DICTIONARY 923 (4th rev. ed. 1968). An initiative is distinguishable from a referendum, which is defined as "the right to adopt or reject any act or measure which has been passed by a legislative body, and which, in most cases, would without action on the part of the electorate become law." *Id.* at 1446.

6. In California, as in most states, the right of initiative is reserved to the people. CAL. CONST. art. IV, § 1 states: "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, *but the people reserve to themselves the powers of initiative and referendum.*" (emphasis added). See also ARIZ. CONST. art. 4, pt. 1, § 1; MICH. CONST. art. II, § 9. In a few states the right of initiative is conferred only by statute, e.g., KY. REV. STAT. § 89.610 (1971); N.D. CENT. CODE ch. 40-12 (1968).

The courts generally have adopted a liberal policy of protecting these reserved rights. See *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 596, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976); *Farley v. Healey*, 67 Cal. 2d 325, 328, 431 P.2d 650, 652, 62 Cal. Rptr. 26, 28 (1967).

7. CAL. ELEC. CODE §§ 3500-5162 (West 1977 & Supp. 1979).

initiative has been challenged on both constitutional<sup>8</sup> and statutory<sup>9</sup> grounds. The constitutional argument is that potentially aggrieved property owners have a fourteenth amendment right to procedural due process<sup>10</sup> before an ordinance is enacted that substantially affects the use of their property. Zoning by initiative arguably denies the property owners this right because hearings are not a part of the initiative procedure. The statutory argument is that the statutes regulating zoning and initiative procedures conflict, and that since the zoning statutes are a more specific legislation than the initiative statutes, the conflict must be resolved in favor of the zoning procedure.<sup>11</sup>

Recently, the California Supreme Court had occasion to review these constitutional and statutory objections to zoning by initiative.<sup>12</sup> It rejected both. This comment first examines the statutory objection, to zoning by initiative and considers whether zoning by initiative is accomplished at a cost to other important public objectives, namely, land use planning and environmental protection. Second, the constitutional objection that zoning by initiative deprives affected property owners of the protections of due process of law is explored. Also examined is the anomaly that arises from permitting land use control to be accomplished by two radically different procedures. Finally, a new decision of the California Supreme Court<sup>13</sup> that may affect the court's future

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8. *E.g.*, *City of Scottsdale v. Superior Court*, 439 P.2d 290 (Ariz. Sup. Ct. 1968) (landowners seeking to enjoin rezoning of residential parcels denied relief because Arizona cities have power to refer an ordinance for election); *Bell v. Studdard*, 141 S.E.2d 536, 539 (Ga. Sup. Ct. 1965) (ordinance "was in contravention to the constitutional requirements of due process" because it failed to provide notice and hearing).

9. *E.g.*, *Forman v. Eagle Thrifty Drugs & Mkts., Inc.*, 516 P.2d 1234, 1238 (Nev. Sup. Ct. 1973) (state zoning and land use laws are an inherent power of state and are not subject to initiative or ordinance); *Dewey v. Doxey-Layton Realty Co.*, 277 P.2d 805, 809 (Utah Sup. Ct. 1954) ("when appellants seek to initiate rezoning within the city without complying with the zoning statute, they are, in effect, attacking collaterally the very statute under which they claim their power to zone . . . [and] the appellant may not attack the validity of the statute").

10. U.S. CONST. amend. XIV, § 1; "No State . . . shall deprive any person of life, liberty, or property without due process of law."

11. It is a general rule of construction that a statute having special or specific application controls over a general one, without regard to date of passage. *People v. Gilbert*, 1 Cal. 3d 475, 479, 462 P.2d 580, 581, 82 Cal. Rptr. 724, 727 (1969); CAL. CIV. CODE § 3534 (West 1970) states: "Particular expressions qualify those which are general."

12. *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976) (statutory challenge); *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), *appeal dismissed*, 427 U.S. 901 (1976) (constitutional challenge). Decided at the same time as *San Diego* was *Builders Ass'n v. Superior Court*, 13 Cal. 3d 225, 529 P.2d 582, 118 Cal. Rptr. 158 (1974) (constitutional challenge).

13. *Horn v. County of Ventura*, 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979).

decisions on zoning by initiative is discussed.

## II. THE *HURST* DOCTRINE, *LIVERMORE* AND ZONING BY INITIATIVE

### A. *Hurst v. City of Burlingame*

In order to understand the suggested conflict between the procedures of zoning by statute and by initiative, the California Supreme Court decision in *Hurst v. City of Burlingame*<sup>14</sup> must be examined. This seminal case is the starting point for analyzing later zoning by initiative decisions. In *Hurst* a property owner in Burlingame sought to enjoin the enforcement of a comprehensive zoning ordinance that had been enacted by initiative, alleging that the city had not complied with the requirements of the California Zoning Act of 1917.<sup>15</sup> The specific violation alleged was that the city failed to hold a noticed hearing before enacting the ordinance. The supreme court struck down the ordinance using the following logic:<sup>16</sup> (1) The statutory zoning scheme is the only measure of the city council's power to zone; (2) the initiative procedure is "hopelessly inconsistent and in conflict [with the zoning scheme] as to the manner of the preparation and adoption of a zoning ordinance";<sup>17</sup> (3) "the Zoning Act is a special statute dealing with a particular subject and must be deemed to be controlling over the initiative, which is general in its scope";<sup>18</sup> and (4) therefore, the City of Burlingame could not enact a zoning ordinance unless it complied with the Zoning Act.

### B. *Associated Home Builders v. City of Livermore*

Although the *Hurst* doctrine was reaffirmed in California<sup>19</sup> and adopted in other states,<sup>20</sup> many commentators questioned its continued validity in zoning by initiative cases.<sup>21</sup> Finally, in *Associated Home*

14. 207 Cal. 134, 277 P. 308 (1929).

15. 1917 Cal. Stats. ch. 734, at 1419. The current State Zoning Law is found at CAL. GOV'T CODE §§ 65800-65912 (West 1966 & Supp. 1966-1978).

16. 207 Cal. at 138, 277 P. at 310.

17. *Id.* at 151, 277 P. at 311.

18. *Id.*

19. *Taschner v. City Council*, 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (1973); *People's Lobby, Inc. v. Board of Supervisors*, 30 Cal. App. 3d 869, 106 Cal. Rptr. 666 (1973); *Laguna Beach Taxpayers' Ass'n v. City Council*, 187 Cal. App. 2d 412, 9 Cal. Rptr. 775 (1960).

20. See note 9 *supra*.

21. *Higginbotham, Zoning by Initiative: A Need for Consistency*, 10:6 BEVERLY HILLS B.J. 11 (1976); Comment, *The Initiative and Referendum's Use in Zoning*, 64 CALIF. L. REV. 74 (1976) [hereinafter cited as *The Initiative*]; Comment, *Zoning by Initiative to Satisfy Local*

*Builders v. City of Livermore*,<sup>22</sup> the California Supreme Court decided it was time for a "long-needed reconsideration of the actual holding of *Hurst*"<sup>23</sup> that the statutory conflict is "hopeless" and for a re-examination of the court's previous resolution of the conflict.

The zoning ordinance in issue in *Livermore* prohibited the issuance of further residential building permits until such time as local educational, sewage disposal, and water supply facilities complied with certain specific standards.<sup>24</sup> The trial court and the court of appeal had followed *Hurst* in striking down the ordinance, but the supreme court reversed.<sup>25</sup>

Writing for the majority, Justice Tobriner<sup>26</sup> held there was no conflict between zoning by initiative and the State Zoning Law because the state legislature had never intended the notice and hearing requirements of the State Zoning Law to apply to the enactment of zoning initiatives. The requirements were "plainly" drafted only with a view to ordinances adopted by local legislative bodies.<sup>27</sup> The court reasoned that the State Zoning Law merely adds certain procedures to those required for enactment of ordinances in general.<sup>28</sup>

The court noted that *Hurst* had been treated as a case involving a conflict between two statutes of equal importance. The *Livermore* court found that this treatment was wrong because it overlooked a crucial point: although the procedure for exercising the right of initiative is spelled out by statute,<sup>29</sup> the right itself is guaranteed by the state constitution.<sup>30</sup> The court further noted that conflicting statutes should be reconciled when possible,<sup>31</sup> that statutes should be construed so as to

*Electoralates: A Valid Approach in California?*, 10 CAL. W.L. REV. 105 (1973) [hereinafter cited as *Zoning by Initiative*].

22. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

23. *Id.* at 593, 557 P.2d at 478-79, 135 Cal. Rptr. at 46-47.

24. For a history of the events leading up to the Livermore ordinance, see M. CRANSTON, B. GARTH, R. PLATTNER, & J. VARON, A HANDBOOK FOR CONTROLLING LOCAL GROWTH 90-96 (1973); Deutsch, *Land Use Growth Controls: A Case Study of San Jose and Livermore, California*, 15 SANTA CLARA LAW. 1 (1974) [hereinafter cited as Deutsch].

25. Another important issue in *Livermore* was the substantive issue of exclusionary zoning. The case was remanded to the trial court for a determination of the impact and duration of the ordinance's restrictions. 18 Cal. 3d at 611, 557 P.2d at 490, 135 Cal. Rptr. at 58.

26. For a discussion of Justice Tobriner's opinions in real property cases, see Adler & Mosk, *Justice Tobriner & Real Property*, 29 HASTINGS L.J. 127 (1977).

27. 18 Cal. 3d at 594, 557 P.2d at 479, 135 Cal. Rptr. at 47.

28. *Id.*

29. See CAL. ELEC. CODE §§ 3500-5162 (West 1977 & Supp. 1979).

30. 18 Cal. 3d at 594-95, 557 P.2d at 479, 135 Cal. Rptr. at 47 (referring to CAL. CONST. art. IV, § 1). See note 6 *supra*.

31. *Id.* at 596, 557 P.2d at 480, 135 Cal. Rptr. at 48, citing *Warne v. Harkness*, 60 Cal. 2d 579, 588, 387 P.2d 377, 382, 35 Cal. Rptr. 601, 606 (1963).

avoid constitutional questions,<sup>32</sup> and that the initiative provisions must be broadly construed in favor of the initiative.<sup>33</sup> On these grounds the court overruled *Hurst* and held that general law cities<sup>34</sup> may zone by initiative.

Justice Clark dissented, arguing that the *Hurst* doctrine remains compelling.<sup>35</sup> He stated that "[t]he zoning laws establish an administrative process which must be followed prior to the legislative act of adopting an ordinance."<sup>36</sup> The initiative statutes, noted Justice Clark, do not permit the administrative functions of the State Zoning Law to be carried out,<sup>37</sup> and this conflict must be resolved by the familiar rule of statutory construction that the specific governs the general when there is a conflict.<sup>38</sup>

### C. *Analysis and Effect of the Livermore Decision*

The *Livermore* decision raises a number of questions. First, it is not exactly clear whether the basic premise of *Hurst* — that the electorate's power of initiative is no greater than that of the legislative body — was,

32. 18 Cal. 3d at 596, 557 P.2d at 480, 135 Cal. Rptr. at 48, citing *In re Kay*, 1 Cal. 3d 930, 942, 464 P.2d 142, 150, 83 Cal. Rptr. 686, 694 (1970).

33. 18 Cal. 3d at 596, 557 P.2d at 480, 135 Cal. Rptr. at 48.

34. There are two types of cities in California. A general law city is organized under, and is subject to, the general law of the state in all matters. CAL. CONST. art. XI, § 7; CAL. GOV'T CODE §§ 34100-45345 (West 1968 and Supp. 1979) (Municipal Corporations Act). A charter city adopts its own charter, which takes precedence over the general law in areas of purely municipal concern. CAL. CONST. art. XI, §§ 3-6. Thus, the State Zoning Law (or the previous 1917 Zoning Act) applies in general law cities but, being a matter of purely municipal concern, does not apply in charter cities.

The city is free, of course, to adopt the provisions of the State Zoning Law if it chooses. One of the issues in *San Diego*, for example, concerned the effect of a section of the San Diego City Charter, which provides that the city planning commission be organized under, and have such powers and duties as prescribed by state law. See notes 106-08 *infra* and accompanying text.

While the majority of cities in California are general law, substantially all of the larger cities are governed by charter. For a list of the cities and their type, see D. HAGMAN, J. LARSON & C. MARTIN, CALIFORNIA ZONING PRACTICE 535-39 (1969) [hereinafter cited as HAGMAN].

For a discussion of one of the problems with the municipal affairs doctrine in the area of land use control, see Comment, *Land Use Control, Externalities, and the Municipal Affairs Doctrine: A Border Conflict*, 8 LOY. L.A.L. REV. 432 (1975).

35. 18 Cal. 3d at 611, 557 P.2d at 490, 135 Cal. Rptr. at 58.

36. *Id.* at 615, 557 P.2d at 492, 135 Cal. Rptr. at 60 (Clark, J., dissenting).

37. *Id.* Justice Clark also pointed out that the majority did not address the potential conflicts between the requirement of conformity with a general plan and zoning by initiative, as well as the substantive question of whether the Livermore ordinance violated CAL. GOV'T CODE § 65858 (West 1977) regarding interim ordinances. *Id.* at n.4.

38. See note 11 *supra*.

in fact, overruled. In *Bagley v. City of Manhattan Beach*,<sup>39</sup> a decision handed down just three months before *Livermore*, the supreme court, citing *Hurst*, stated: "It has long been settled that a city ordinance proposed by initiative 'must constitute such legislation as the legislative body of such . . . city has the power to enact under the law granting, defining and limiting the powers of such body'."<sup>40</sup> *Bagley*, coupled with the indirect approach of the *Livermore* majority in dealing with *Hurst*<sup>41</sup> and the fact that *Livermore* overruled only zoning by initiative cases,<sup>42</sup> lends credence to the idea that the *Hurst* doctrine remains viable law. If this is so, the *Hurst* doctrine requires a different result than that reached in *Livermore*, for the State Zoning Law clearly requires local legislative bodies to comply with the Zoning Law provisions.<sup>43</sup>

Another issue concerns *Livermore's* treatment of the legislative intent of the zoning statutes.<sup>44</sup> No mention is made of Government Code sections 65802 or 65804. Section 65802<sup>45</sup> provides that no statute outside the State Zoning Law shall restrict or limit the procedures provided by the Zoning Law. Section 65804 provides in part:

It shall be the purpose of this section to implement minimum procedural

39. 18 Cal. 3d 22, 553 P.2d 1140, 132 Cal. Rptr. 668 (1976).

40. *Id.* at 26, 553 P.2d at 1143, 132 Cal. Rptr. at 671 (quoting *Hurst v. City of Burlingame*, 207 Cal. 134, 140, 277 P.2d 308, 311 (1929)).

41. See text accompanying notes 29-43 *supra* and *infra*.

42. The court only overruled those cases holding that general law cities cannot zone by initiative, including *Taschner v. City Council*, 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (1973); *People's Lobby, Inc. v. Board of Supervisors*, 30 Cal. App. 3d 869, 106 Cal. Rptr. 666 (1973); *Laguna Beach Taxpayers' Ass'n v. City Council*, 187 Cal. App. 2d 412, 9 Cal. Rptr. 775 (1960); *Johnston v. City of Claremont*, 49 Cal. 2d 826, 323 P.2d 71 (1958).

No mention was made in *Livermore* of the line of cases upholding the *Hurst* rule that the initiative may be used to enact only such legislation as the legislative body has the power to enact. See, e.g., *Bagley v. City of Manhattan Beach*, 18 Cal. 3d 22, 553 P.2d 1140, 132 Cal. Rptr. 668 (1976); *Blotter v. Farrell*, 42 Cal. 2d 804, 270 P.2d 481 (1954); *Galvin v. Board of Supervisors*, 195 Cal. 686, 235 P. 450 (1925).

43. CAL. GOV'T CODE §§ 65802, 65804 (West 1966 & Supp. 1966-1978).

44. The only authority regarding intent cited by the court (*The Initiative*, note 21 *supra*, at 104-05) does not fully support the court's conclusion. The comment argues that "the presence of procedural safeguards in zoning enabling acts ought not to be interpreted as showing a state legislative intent to bar use of the initiative in zoning." *Id.* at 105. This does not necessarily mean the legislature never intended the safeguards to apply to initiative action. Cf. *Zoning by Initiative*, note 21 *supra*, at 111 n.48, which states:

The Zoning Act was probably drafted with no thought to the initiative and referendum, but rather only with the purpose of spelling out local power. The original Zoning Act was enacted only five years after the creation of initiative and referendum, when their tradition and importance in California politics was not yet established.

45. CAL. GOV'T CODE § 65802 (West 1966) provides in pertinent part: "[n]o provision of this code, other than the provisions of this chapter, and no provisions of any other code or statute shall restrict or limit the procedures provided in this chapter . . . of any zoning law, ordinance, rule or regulation."

standards for the conduct of city and county zoning hearings. Further, it is the intent of the Legislature that this section provide such standards to insure uniformity of, and public access to, zoning and planning hearings while maintaining the maximum control of cities and counties over zoning matters . . . .<sup>46</sup>

Moreover, section 65804 is expressly applicable to all cities and counties in California, regardless of whether they are charter or general law. These provisions seem to indicate a legislative intent to require compliance with the minimum standards set down in the State Zoning Law in *all* zoning matters.

Third, in its resolution of the supposed conflict inherent in zoning by initiative, the *Livermore* court distinguished the California Supreme Court decision in *Galvin v. Board of Supervisors*<sup>47</sup> on the basis of the exceptional nature of the statute involved in *Galvin*.<sup>48</sup> The statute in issue in *Galvin* permitted one county to legislate on a matter that otherwise required joint action of the state and all counties affected, but it permitted such action only if the legislating county complied with requirements designed to protect the interests of the state and the other counties.<sup>49</sup> The court held that the defendant county could not circumvent that statutory requirement by use of the initiative. However, there is no basis for distinguishing *Galvin*, because closer examination of the State Zoning Law reveals identical attributes. Further, in *Scott v. City of Indian Wells*,<sup>50</sup> a unanimous California Supreme Court held that non-residents of a city, whose properties are affected by a proposed zoning ordinance within the city, are entitled to the same rights under the State Zoning Law as are residents and have judicial standing to enforce those rights.<sup>51</sup> While the State Zoning Law does protect the interests of such non-residents, the initiative process, by its very nature, cannot; non-residents of the political entity cannot sign the petitions to place the proposed measure on the ballot<sup>52</sup> and, of course, are not entitled to vote on it.<sup>53</sup>

Finally, in declaring that the status of the zoning and initiative statutes are not equal,<sup>54</sup> the majority in *Livermore* implied that the power

46. *Id.* § 65804 (West Supp. 1966-1978).

47. 195 Cal. 686, 235 P. 450 (1925).

48. *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 594 n.11, 557 P.2d 473, 479 n.11, 135 Cal. Rptr. 41, 56 n.11.

49. *Id.* at 694-96, 235 P. at 452-54.

50. 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1973).

51. *Id.* at 549, 492 P.2d at 1142, 99 Cal. Rptr. at 750.

52. CAL. ELEC. CODE § 4005 (West 1977).

53. *Id.* § 100.

54. *See* text accompanying notes 29-30 *supra*.



to zone is merely statutory. The zoning power in California, however, is derived not from the State Zoning Law, but from article XI, section 7 of the California Constitution, which states: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."<sup>55</sup> Since zoning is an exercise of the police power,<sup>56</sup> it appears that there is still a conflict between zoning through representative government and the initiative process, but it is one of *constitutional*, rather than statutory, nature. Thus, the "crucial" distinction found in *Livermore* appears to be no distinction at all.

The clear problem with *Livermore* is, as Justice Clark stated in his dissent, that zoning by initiative fails to give effect to the extensive scheme of planning and environmental protection that presently exists. As Justice Clark lamented:

It is ironic that today's decision, reviewing a "no-growth" ordinance, may provide a loophole for developers to avoid the numerous procedures established by the Legislature which in recent years have made real estate development so difficult. Seeking approval of planned unit developments, land developers with the aid of the building trade unions should have little difficulty in securing the requisite signatures for an initiative ordinance. Because of today's holding that the initiative takes precedence over zoning laws, the legislative scheme of notice, hearings, agency consideration reports, findings, and modifications can be bypassed, and the city council may immediately adopt the planned unit development.<sup>57</sup>

It is important to realize just what is endangered. In 1909, land use control in Los Angeles consisted of a "comprehensive" zoning plan of a single residential and seven industrial districts.<sup>58</sup> There were no general plans or environmental impact reports, and the Coastal Commission did not exist. But since those days, land use regulation has developed into a pervasive and complex body of law and regulation.<sup>59</sup>

55. CAL. CONST. art. XI, § 7.

56. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926); *Zahn v. Board of Pub. Works*, 195 Cal. 497, 502-03, 234 P. 388, 391 (1925), *aff'd*, 274 U.S. 325 (1927); *Miller v. Board of Pub. Works*, 195 Cal. 477, 483, 234 P. 381, 382-83 (1925).

57. 18 Cal. 3d at 615, 557 P.2d at 492, 135 Cal. Rptr. at 60 (Clark, J., dissenting).

58. *Ex parte Quong Wo*, 161 Cal. 220, 222, 118 P. 714, 715 (1911).

59. Some authors oppose the use of zoning for land use control and argue that Houston, Texas achieves effective land use control through economic dictates and the use of private restrictive covenants, without the use of zoning regulation. B. SIEGAN, *LAND USE WITHOUT ZONING* 23-76 (1973). Bernard Siegan describes zoning as unworkable, inequitable and a serious impediment to the operation of the real estate market and the satisfaction of its customers.

It is absurd and tragic that the national goals of stimulating more and better housing and a desirable housing environment are being frustrated by local goals of limited

Both federal and state government is involved in California land use planning. At the federal level, "virtually every federal loan or grant-in-aid program affecting the physical development of a locality requires land-use planning by the recipient of federal help."<sup>60</sup> At the state level, the Legislature declared its intent to protect and preserve California's land resources.<sup>61</sup> This intent is carried out by the Office of Planning and Research which is responsible for comprehensive state planning, coordination of state agency planning,<sup>62</sup> and assisting local and regional planning.<sup>63</sup>

Regional planning is also of growing importance.<sup>64</sup> Each California county has a Local Agency Formation Commission (LAFCO),<sup>65</sup> which has broad control over the incorporation of new cities and over the

housing. It is equally inexcusable that federal policies to encourage business and development and competition are being impeded by local policies that operate to discourage them.

*Id.* at 247. Another commentator has suggested an alternate, middle-ground approach:

I do not recommend either uncontrolled use of property or regulated stultification. Nor is it urged here that resources which are needed for the general public welfare should not be regulated to that end. What *is* urged is that "the public" take a long, hard look at what its needs are, assess *all* the costs involved, and proceed accordingly. If "the public" wants land uses (or non-uses) which benefit "the public" generally, then "the public" should buy the property, or an appropriate interest in the property, rather than attempt to force individual property owners to devote their property to public use without compensation.

Berger, *To Regulate, or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 LOY. L.A.L. REV. 253, 257 (1975) (emphasis in original).

60. HAGMAN, *supra* note 34, at § 2.1. For a discussion of such federal programs and their planning requirements, see *id.* at §§ 2.1-7.

61. With regard to planning, the Legislature has stated:

The Legislature finds and declares that California's land is an exhaustible resource, not just a commodity, and is essential to the economy, environment and general well-being of the people of California. It is the policy of the state and the intent of the Legislature to protect California's land resource, to insure its preservation, and use in ways which are economically and socially desirable in an attempt to improve the quality of life in California.

CAL. GOV'T CODE § 65030 (West Supp. 1979).

62. See, e.g., CAL. HEALTH & SAFETY CODE §§ 50000-50153 (West Supp. 1979) (housing plans); CAL. PUB. RES. CODE §§ 5099-5099.12 (West 1972 & Supp. 1979) (outdoor recreation plans).

63. CAL. GOV'T CODE § 63035 (West Supp. 1966-1978). For organization, goals and function of the Office of Planning and Research, see *id.* §§ 65025-65049.

64. See Marks & Taber, *Prospects for Regional Planning in California*, 4 PAC. L.J. 117 (1973); Associated Home Builders, Inc. v. City of Livermore, 18 Cal. 3d 582, 607-08, 557 P.2d 473, 503, 135 Cal. Rptr. 41, 71 (1976); Scott v. City of Indian Wells, 6 Cal. 3d 541, 548, 492 P.2d 1137, 1141, 99 Cal. Rptr. 745, 749 (1973) ("To hold . . . that defendant city may zone the land within its border without any concern for adjacent landowners would indeed 'make a fetish out of invisible municipal boundary lines and a mockery of the principles of zoning.'").

65. CAL. GOV'T CODE §§ 54773-54799.5 (West 1966 & Supp. 1966-1978).

annexation of additional territory to existing cities. Each commission has general planning powers as well. Special planning legislation has also been enacted to regulate the use of particular areas of concern, such as the San Francisco Bay,<sup>66</sup> Lake Tahoe<sup>67</sup> and the Santa Monica Mountains.<sup>68</sup> Moreover, cities and counties in contiguous areas may form an area planning commission by a resolution of the interested political subdivisions.<sup>69</sup>

Most land use planning occurs at the local level. Each city and county is required by the legislature to adopt a comprehensive, long-term, general plan.<sup>70</sup> The general plan consists of a statement of development policies, including diagrams and text setting forth "objectives, principles, standards, and plan proposals,"<sup>71</sup> in certain required subject elements. The plan has many functions,<sup>72</sup> including serving as: (a) a source of information, (b) a program for correction, (c) an estimate of the future, (d) an indicator of goals, (e) a technique for coordination, and (f) a device for stimulating public interest and responsibility. In short, the general plan is "a constitution for all future developments."<sup>73</sup> Clearly, adoption of a general plan is not just an idle function. Each planning commission's recommendation on a proposed zoning ordinance must specify how the ordinance relates to and is consistent with<sup>74</sup> the general plan.<sup>75</sup> Moreover, local governments may not acquire, dispose of, or develop real property unless such action will conform to the general plan.<sup>76</sup>

In addition to the planning measures, the California Legislature has enacted a wide variety of environmental protection statutes that provide for specific<sup>77</sup> and generalized<sup>78</sup> types of environmental protection.

66. *Id.* §§ 66600-66661.

67. *Id.* §§ 66800-67130.

68. *Id.* §§ 67450-67488.

69. *Id.* § 65601. *See id.* §§ 65600-65604.

70. *Id.* § 65300.

71. *Id.* § 65302.

72. HAGMAN, *supra* note 34, at § 2.23.

73. *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774, 782, 42 Cal. Rptr. 283, 288 (1965).

74. CAL. GOV'T CODE § 65860 (West Supp. 1966-1978).

75. *Id.* § 65855.

76. *Id.* § 65402.

77. *See, e.g., Z'berg-Kapiloff Solid Waste Control Act of 1976*, CAL. GOV'T CODE §§ 66795-66796.82 (West Supp. 1966-1978); *CAL. HEALTH & SAFETY CODE* §§ 39000-43835 (West Supp. 1979) (air pollution); *California Noise Control Act of 1973*, CAL. HEALTH & SAFETY CODE §§ 46000-46080 (West Supp. 1979); *Porter-Cologne Water Quality Control Act*, CAL. WATER CODE §§ 13000-13998 (West 1971 & Supp. 1979).

78. *See, e.g., CAL. GOV'T CODE* §§ 66600-66661 (West 1966 & Supp. 1966-1978) (creating San Francisco Bay Conservation and Development Commission); *Suisun Marsh Preserva-*

One such statute is the California Environmental Quality Act of 1970 (CEQA).<sup>79</sup> Although there are certain enumerated exceptions,<sup>80</sup> the CEQA generally applies to all proposed discretionary projects to be carried out or approved by public agencies. These projects include the enactment or amendment of zoning ordinances, the issuance of variances and conditional use permits, and the approval of certain tentative subdivision maps.<sup>81</sup>

The key to environmental protection under CEQA is the preparation of an environmental impact report (EIR),<sup>82</sup> which is an "informational document" designed to: (1) provide public agencies and the general public with detailed information about the environmental effect of a proposed project, (2) list ways in which the significant effects of the project might be minimized, and (3) indicate alternatives to the project.<sup>83</sup> Whenever an EIR is required, it must be reviewed by the appropriate public agencies *before* a project is approved or disapproved.<sup>84</sup>

Another important environmental protection measure is the California Coastal Act of 1976 (Coastal Act).<sup>85</sup> The Coastal Act is a direct outgrowth of the California Coastal Zone Conservation Act of 1972,<sup>86</sup> *a measure enacted by state-wide initiative*, and which by its own terms was repealed on January 1, 1977.<sup>87</sup> The 1976 Coastal Act created six regional coastal commissions to govern land use in each zone's respective regions and a state-wide commission with authority over the regional commissions.<sup>88</sup> Each regional commission has the power to approve or reject coastal zoning ordinances submitted to them by local governments.<sup>89</sup> Each commission also requires those who wish to develop land within the zone to obtain a coastal development permit.<sup>90</sup>

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tion Act of 1977, CAL. PUB. RES. CODE §§ 29000-29612 (West Supp. 1979); California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30900 (West Supp. 1979).

79. CAL. PUB. RES. CODE §§ 21000-21176 (West 1976 & Supp. 1979).

80. *Id.* § 21080.5. CEQA does not apply to ministerial projects or emergency actions, *id.* § 21080(b), or to certain special regulatory programs. *Id.* § 21080.5.

81. *Id.* § 21080(a).

82. *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 75, 529 P.2d 66, 70, 118 Cal. Rptr. 34, 38 (1974).

83. CAL. PUB. RES. CODE §§ 21061, 21100 (West Supp. 1978).

84. *Id.* § 21061. In the event it is determined that a proposed project does not have a significant environmental effect, a negative declaration to that effect is adopted. *Id.* § 21080(c).

85. *Id.* §§ 30000-30900.

86. *Id.* §§ 27000-27650 (repealed by statute Jan. 1, 1977).

87. *Id.* § 27650.

88. *Id.* §§ 30300-30342 (West 1977 & Supp. 1979). The regional commissions consist of members from local government and from the general public. *Id.* § 30302.

89. *Id.* § 30513.

90. *Id.* §§ 30600, 30601.

Although *Livermore* held that the legislature did not intend the State Zoning Law to be applied to initiative actions,<sup>91</sup> planning and environmental protection laws should be so applied. The legislature has stated that the policy of the state on environmental protection is to "[e]nsure that the long-term protection of the environment shall be the guiding criterion in public decisions."<sup>92</sup>

The courts have construed environmental measures liberally,<sup>93</sup> in order to afford the environment the fullest possible protection within the reasonable scope of the statutory language.<sup>94</sup> In *Friends of Mammoth v. Board of Supervisors*<sup>95</sup> the California Supreme Court held that the legislature intended CEQA to apply to *all* private activity in which a governmental permit (e.g., building permits) or other entitlement is necessary.<sup>96</sup> In *No Oil, Inc. v. City of Los Angeles*,<sup>97</sup> the supreme court held that an EIR must be prepared *whenever* it can be fairly argued that a particular project may have a significant environmental impact. The court also noted that compliance with CEQA *after* the enactment of a zoning ordinance is similar to a *post hoc* rationalization of a decision already made, and is not sufficient.<sup>98</sup>

Finally, in light of the pervasiveness and scope of land planning and

91. See text accompanying notes 26-27 *supra*.

92. CAL. PUB. RES. CODE § 21001(d) (West 1977).

93. Michael Berger, a noted expert in land use matters, has written that the Coastal Commission has succeeded as a respondent at an 85.7% rate, and as an appellant at an 88.9% rate. Amazed by this success rate, Berger writes:

Examine that last statistic slowly. Taste it, as you roll it around on your tongue. Try to say it with a straight face. *Nearly nine times out of ten, the Coast Commission succeeds in reversing a trial judge.* Not even in wildly ecstatic fantasy does any mortal lawyer dream of such a record.

One ponders. Is the Coast Commission, in fact, some deity in mufti? Do its lawyers (under three-piece court uniforms) actually wear blue union suits with large red "S"s on the chest? Is it possible for any lawyer (let alone a single client) to be right 88% of the time, while the trial judges are almost uniformly wrong?

Berger, *You Can't Win Them All — Or Can You?* 54 CAL. ST. B.J. 16 (1979) (emphasis in original). The Berger article touched off a storm of controversy within the California bar. The March/April issue of the California State Bar Journal contained letters to the editor from well-known lawyers, one pro-Coastal Commission (written by Zad Leavy, a Commission member) and one pro-Berger (written by Gideon Kanner). *Id.* at 73 (1979).

94. See, e.g., *People v. Department of Hous. & Community Dev.*, 45 Cal. App. 3d 185, 119 Cal. Rptr. 266 (1975); *Plan for Arcadia, Inc. v. City Council*, 42 Cal. App. 3d 712, 117 Cal. Rptr. 96 (1974).

95. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972). See also Comment, *Aftermammoth: Friends of Mammoth & the Amended California Environmental Quality Act*, 3 ECOLOGY L.Q. 349 (1973).

96. Section 21065 was amended in 1972 to follow the *Friends of Mammoth* interpretation. See 1972 Cal. Stats. ch. 1154, § 17.

97. 13 Cal. 3d 68, 529 P.2d 66, 118 Cal. Rptr. 34 (1974).

98. *Id.* at 81, 529 P.2d at 74, 118 Cal. Rptr. at 42.

environmental protection in California, one further objection to zoning by initiative arises. Planning and environmental protection are matters of state-wide concern.<sup>99</sup> As such, local initiative action should not be permitted to interfere.<sup>100</sup>

### III. *SAN DIEGO*, DUE PROCESS, AND ZONING BY INITIATIVE

#### A. *Hurst and San Diego*

Although *Hurst* was decided on statutory grounds, the supreme court's decision contained constitutional overtones. Starting with the premise that the Zoning Act prescribes the measure of a general law municipality's power to zone, the court warned that the requirement of notice and hearing contained in the Zoning Act could neither be treated lightly nor be disregarded.<sup>101</sup> The court then noted:

When the statute requires notice and hearing as to the possible effect of a zoning law upon property rights the action of the legislative body becomes *quasi* judicial in character and the statutory notice and hearing then becomes necessary in order to satisfy the requirements of due process and may not be dispensed with.<sup>102</sup>

A number of courts, both in California<sup>103</sup> and elsewhere,<sup>104</sup> had construed this language as requiring notice and hearing in all zoning actions. In 1974, the California Supreme Court was called upon in *San Diego Building Contractors Association v. City Council*<sup>105</sup> to decide

99. As to planning, see note 92 *supra* and accompanying text. See also *Concerned Citizens of Murphys v. Jackson*, 72 Cal. App. 3d 1021, 140 Cal. Rptr. 531 (1977). As to environmental protection, see notes 85-90 *supra* and accompanying text. See also *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

100. *Friends of Mount Diablo v. County of Contra Costa*, 72 Cal. App. 3d 1006, 1013, 139 Cal. Rptr. 469, 473 (1977). See *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 596 n.14, 557 P.2d 473, 480 n.14, 135 Cal. Rptr. 41, 48 n.14 (1976) ("We distinguish those decisions which bar the use of the initiative and referendum in a situation in which the state's system of regulation over a matter of statewide concern is so pervasive as to convert the local legislative body into an administrative agent of the state."). See also *McDermott v. Wisconsin*, 228 U.S. 115 (1913) (restriction on statewide initiative as to legislative matters that are the exclusive domain of the federal government).

101. 207 Cal. at 141, 227 P. at 311.

102. *Id.* (italics in original).

103. *Taschner v. City Council*, 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (1973); *People's Lobby, Inc. v. Board of Supervisors*, 30 Cal. App. 3d 869, 106 Cal. Rptr. 666 (1973); *Laguna Beach Taxpayers' Ass'n v. City Council*, 187 Cal. App. 2d 412, 9 Cal. Rptr. 775 (1960). *Contra*, *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976) (overruling the above cases).

104. See, e.g., *Forman v. Eagle Thrifty Drugs & Mkts., Inc.*, 516 P.2d 1234 (Nev. Sup. Ct. 1973); *Dewey v. Doxey-Layton Realty Co.*, 277 P.2d 805 (Utah Sup. Ct. 1954).

105. 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), *appeal dismissed*, 427 U.S. 901 (1976). The companion case to *San Diego*, *Builders Ass'n v. Superior Court*, 13 Cal. 3d

whether notice and hearing were required constitutionally. *San Diego* involved an initiative ordinance that set a thirty-foot building height limitation within a certain coastal zone. The ordinance was challenged by several developer groups (BCA).

BCA first contended that a section of the San Diego City Charter impliedly precluded zoning by initiative. The section provides that state law shall prescribe the organization and operation of the city planning commission.<sup>106</sup> BCA argued that state law required the commission to give notice and hearing concerning a proposed zoning ordinance.<sup>107</sup> Because the initiative process does not encompass such a procedure, BCA contended that the city charter thereby precludes zoning by initiative. The court summarily rejected this argument and held that the charter provision simply governs the commission's conduct when that commission is authorized to act under the city charter; the section in no manner attempts to impinge upon the people's right of initiative.<sup>108</sup>

BCA also contended that the United States Constitution<sup>109</sup> requires notice and hearing before a zoning ordinance may be enacted. BCA urged that recent decisions of the United States<sup>110</sup> and California<sup>111</sup>

225, 529 P.2d 582, 118 Cal. Rptr. 158 (1974), reviewed the substance of the challenged ordinance after deferring to *San Diego* on the zoning by initiative issue. For a history of the ordinance, see Deutsch, *supra* note 24.

106. Article V, section 41(c) of the San Diego City Charter provides that the city planning commission is to be organized under, and have such powers and duties as prescribed by state law. *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d at 209, 522 P.2d at 572, 118 Cal. Rptr. at 148.

107. CAL. GOV'T CODE § 65854 (West Supp. 1966-1978).

108. 13 Cal. 3d at 209-10, 529 P.2d at 571-73, 118 Cal. Rptr. at 147-49.

109. U.S. CONST. amend. XIV, § 1.

110. *Boddie v. Connecticut*, 401 U.S. 371 (1971) (due process prohibits states from denying access to the courts to individuals seeking divorces solely on the basis of their ability to pay); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (states may not terminate individual welfare payments without a hearing); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (absent notice and a prior hearing, prejudgment garnishment procedure violates due process). The foundation of this rule lies in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), in which the Court held that the due process clause of the fourteenth amendment requires "at a minimum . . . that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing." *Id.* at 313.

111. In *City of Escondido v. Desert Outdoor Advertising, Inc.*, 8 Cal. 3d 785, 505 P.2d 1012, 106 Cal. Rptr. 172, *cert. denied*, 414 U.S. 828 (1973), the court emphasized that "ordinarily municipalities must follow statutory or charter zoning procedures strictly whenever they propose a substantial interference with land use, for such procedures are constitutionally mandated to insure that private property owners receive due process of law." *Id.* at 790, 505 P.2d at 1016, 106 Cal. Rptr. at 176. In *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1973), the court noted:

[I]t is clear that the individual's interest in his property is often affected by local land use controls, and the "root requirement" of the due process clause is "that an individual

Supreme Courts establish a general rule that individuals be afforded an opportunity for a hearing before being deprived of *any* significant property interest.

Writing for the court, Justice Tobriner distinguished these decisions on the ground that they involved quasi-judicial or administrative settings,<sup>112</sup> whereas the enactment of a zoning ordinance is “unquestionably a general legislative act.”<sup>113</sup> The court cited *Bi-Metallic Investment Co. v. State Board of Equalization*<sup>114</sup> in holding that it is “black-letter constitutional law” that notice and hearing are required only in quasi-judicial or administrative settings and not in legislative settings.<sup>115</sup>

The *San Diego* court also rejected the contention that zoning legislation should constitute an exception to the *Bi-Metallic* rule. First, the court noted that many other types of legislation affecting property value do not enjoy any exception.<sup>116</sup> Second, the court observed that legislation may significantly affect life, liberty and other rights protected by the fourteenth amendment,<sup>117</sup> but that these rights enjoy no exception.<sup>118</sup> Third, the court relied upon decisions of the United

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be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest . . . justifies postponing the hearing until after the event . . . .”

*Id.* at 549, 492 P.2d at 1141-42, 99 Cal. Rptr. at 749-50 (emphasis in original) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

112. But *City of Escondido* did *not* involve an administrative setting; rather, it concerned the enactment of a city ordinance regulating the placement of billboards and signs along freeways in the city. *City of Escondido v. Desert Outdoor Advertising*, 8 Cal. 3d at 787, 505 P.2d at 1013, 106 Cal. Rptr. at 173. The *San Diego* court, however, determined that the due process discussion in *City of Escondido* was “gratuitously suggested in dictum” and, to that extent, overruled it. 13 Cal. 3d at 216 n.6, 529 P.2d at 577 n.6, 118 Cal. Rptr. at 153 n.6.

113. *San Diego Bldg. Contractors Ass’n v. City Council*, 13 Cal. 3d at 212, 529 P.2d at 574, 118 Cal. Rptr. at 148.

114. 239 U.S. 441 (1915) (cited in *San Diego* as *Bi-Metallic Co. v. Colorado*). Writing for a unanimous Court, Justice Oliver Wendell Holmes wrote:

Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

*Id.* at 445.

115. 13 Cal. 3d at 211, 529 P.2d at 573, 118 Cal. Rptr. at 149. *Cf.* *Franchise Tax Bd. v. Superior Court*, 36 Cal. 2d 538, 549, 225 P.2d 905, 911 (1950) (“There is no constitutional requirement for any hearing in a quasi-legislative proceeding.”).

116. As examples, the court cited legislative decisions regarding location of public improvements, standards of building, health and safety codes, and level of property tax rates. 13 Cal. 3d at 213, 529 P.2d at 574-75, 119 Cal. Rptr. at 150-51.

117. U.S. CONST. amend. XIV, § 1.

118. The court pointed to trade and professional regulations that limit one’s liberty to



States Supreme Court which hold that legislation affecting the value of real property is governed by the *Bi-Metallic* principle.<sup>119</sup>

Finally, the court distinguished *Hurst*<sup>120</sup> on the ground that it was based entirely upon statutory interpretation rather than on constitutional grounds.<sup>121</sup> Since San Diego is a charter city, the statutory requirements do not apply. The court disapproved the due process dicta in *Hurst* and the California cases applying it,<sup>122</sup> describing the dicta as an ambiguous passage which "sowed the seeds of the plaintiffs' present confusion."<sup>123</sup>

A strong dissent,<sup>124</sup> written by Justice Burke and concurred in by Justices McComb and Clark, attacked the majority's holding, arguing that the initiative process

affords constitutionally inadequate protection to property owners, and that the essential demands of due process of law under the state and federal Constitutions may be satisfied only by a zoning procedure which incorporates some provision for notice and hearing in addition to the minimum opportunities available under the initiative election process itself.<sup>125</sup>

The dissent's position was premised on an assumption "that the area of zoning is in a class by itself and presents real and tangible risks of deprivation of private property far beyond those involved in ordinary 'legislative' measures."<sup>126</sup>

Justice Burke also rejected the contention that zoning by initiative provides, through the election process, safeguards equivalent to those afforded by the State Zoning Law.<sup>127</sup> Relying on *Taschner v. City Council*,<sup>128</sup> the dissenting justices claimed that a public debate on the merits of a proposed initiative ordinance cannot be equated with a dis-

engage in such occupations, and to criminal statutes that regulate "sharp" business practices. 13 Cal. 3d at 213-14, 529 P.2d at 575, 118 Cal. Rptr. at 151.

119. *Id.* at 214, 529 P.2d at 575, 118 Cal. Rptr. at 151 (citing *Bowles v. Willingham*, 321 U.S. 503 (1944) and *State R.R. Tax Cases*, 92 U.S. 575 (1875)).

120. Recall that *San Diego* was decided before *Livermore* overruled *Hurst*. See note 12 and text accompanying note 25 *supra*.

121. 13 Cal. 3d at 215-16, 529 P.2d at 576, 118 Cal. Rptr. at 152.

122. See note 103 *supra*.

123. 13 Cal. 3d at 216, 529 P.2d at 577, 118 Cal. Rptr. at 153.

124. *Id.* at 218, 529 P.2d at 578, 118 Cal. Rptr. at 154 (Burke, McComb & Clark, J.J., dissenting).

125. *Id.*

126. *Id.* at 222, 529 P.2d at 581, 118 Cal. Rptr. at 157 (Burke, McComb & Clark, J.J., dissenting).

127. *Id.* at 221-24, 529 P.2d at 580-82, 118 Cal. Rptr. at 156-58 (Burke, McComb & Clark, J.J., dissenting).

128. 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (1973), overruled by *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

passionate study, evaluation, and report by a staff of planning experts, or with the hearings before the planning commission and the legislative body.<sup>129</sup> Furthermore, the dissent pointed out that the extent to which one may be heard in an election will depend too often on the size of one's purse.<sup>130</sup>

### B. San Diego and the Administrative/Legislative Distinction

Basing its holding chiefly on the distinction between administrative and legislative acts, the *San Diego* majority noted, "It is long settled law that the enactment of a zoning ordinance is purely a legislative act. . . . It is to be distinguished from the granting or denial of a variance, a conditional use permit or an exception to use, all of which call for administrative action."<sup>131</sup> In theory, the administrative/legislative dichotomy requires only a simple test: "[T]he power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it."<sup>132</sup>

But in practice, the test is difficult to apply in the context of zoning.<sup>133</sup> The traditional *San Diego* approach—that the enactment of a zoning ordinance is a legislative act—is still considered the majority view,<sup>134</sup> but increasingly has been criticized as exalting form over substance. In illustration, consider the following example:<sup>135</sup> A developer seeks approval to construct a planned development consisting of two golf courses, tennis courts, clubhouses, 675 condominium units, and ninety individual lots on land zoned R-1, single-family, single-story residences. If the developer seeks a conditional use permit, *i.e.*, an exception adopted pursuant to a plan already enacted, the governmental action is administrative. On the other hand, if the developer (or the

129. 13 Cal. 3d at 223, 529 P.2d at 581, 118 Cal. Rptr. at 157 (Burke, McComb & Clark, J.J., dissenting).

130. *Id.*

131. *Id.* at 212 n.5, 529 P.2d at 574 n.5, 118 Cal. Rptr. at 150 n.5 (citing *Tandy v. City of Oakland*, 208 Cal. App. 2d 609, 611, 25 Cal. Rptr. 429, 430 (1962)).

132. *Fishman v. City of Palo Alto*, 86 Cal. App. 3d 506, 509, 150 Cal. Rptr. 326, 328 (1978) (citing *Seaton v. Lackey*, 182 S.W.2d 336, 339 (1944)). See also *Lincoln Property Co. No. 41, Inc. v. Law*, 45 Cal. App. 3d 230, 234, 119 Cal. Rptr. 292, 294 (1975).

133. See *Ward v. Village of Skokie*, 186 N.E.2d 529, 533-34 (Ill. Sup. Ct. 1962) (Klingbiel, J., concurring).

134. Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 130 (1972).

135. This example is based upon the facts of *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972).

municipality or the people through initiative) seeks a zoning change, *i.e.*, a change in the plan itself, the governmental action is legislative.

While the effect of each course of action can be identical, the procedural requirements are radically different. Due process of law requires that administrative actions include: (1) adequate notice of the basis for governmental action, (2) a neutral decision maker, (3) an opportunity to make an oral presentation to the decision maker, (4) an opportunity to present evidence or witnesses to the decision maker, (5) a chance to confront and cross-examine evidence or witnesses to be used against the individual, (6) the right to have counsel present the individual's case to the decision maker, and (7) a decision based on the record with a statement of reasons for the decision.<sup>136</sup> These due process protections are not required for legislative actions.<sup>137</sup> But more importantly the extent of judicial review differs radically as well. Legislative action is given substantial deference by the courts and will be disturbed only if the action is arbitrary, capricious, or contrary to law.<sup>138</sup> Administrative action, on the other hand, is subject to vigilant judicial review. Courts will review the administrative action to determine whether the administrative agency's findings support the agency's decision and whether the evidence supports the agency's findings.<sup>139</sup> In cases in which administrative action substantially affects fundamental vested rights, the courts exercise independent judgment.<sup>140</sup>

Responding to the traditional rule's shortcoming, a number of jurisdictions now treat zoning amendments that apply to specific property as administrative action.<sup>141</sup> Thus, in *Fasano v. Board of County Com-*

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136. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 499 (1978). *See also* Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).

137. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). *See* text accompanying notes 114-119 *supra*. *See also* the views expressed by Justice Newman in note 163 *supra*.

138. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *McCarthy v. City of Manhattan Beach*, 41 Cal. 2d 879, 264 P.2d 932 (1953), *cert. denied*, 348 U.S. 817 (1954).

139. *See, e.g.*, Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974); *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972).

140. *See Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974) (courts will use independent judgment if administrative action substantially affects a fundamental vested right).

141. *See, e.g.*, *West v. City of Portage*, 221 N.W.2d 303 (Mich. Sup. Ct. 1974); *Fasano v. Board of County Comm'rs*, 507 P.2d 23 (Or. Sup. Ct. 1973); *Fleming v. City of Tacoma*, 502 P.2d 327 (Wash. Sup. Ct. 1972). *See also* *City of Eastlake v. Forest City Enterprises, Inc.* 426 U.S. 668, 684-86 (1976) (Brennan & Stevens, J.J., dissenting).

*Eastlake* involved a developer's challenge to a city charter provision requiring a mandatory referendum on all zoning changes in the city. The Ohio Supreme Court had

*missioners*,<sup>142</sup> the leading case in this area, the Oregon Supreme Court noted that it would be

ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts . . . .

. . .

Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority . . . . On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority . . . .<sup>143</sup>

If the *Fasano* standard were applied to the land use regulatory scheme in California, it readily would be seen that the general policies laid down by the legislative body as contemplated by *Fasano* are those reached through the planning process. Determination of the permissible use of a specific piece of property through zoning amendments, subdivision approval, etc., under *Fasano* would be an administrative function.

If the courts must continue to rigidly adhere to the administrative/legislative dichotomy in zoning cases, they must in turn recognize the reality of modern land use control that dictates that a zoning change is an administrative decision and is therefore entitled to the protection of due process of law. But perhaps the problem is not with the application of the *San Diego* rule, but with the rule itself. The *Fasano* approach, like the traditional *San Diego* approach, does not clearly classify action that both sets down general policy and then applies that new policy to specific property. This is the type of action typically seen in zoning by initiative. It has been suggested that the

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accepted the developer's claim that no standards were available to guide the voters. In its comments on and ultimate rejection of this issue, the Court, per Chief Justice Burger, stated:

If respondent considers the referendum result itself to be unreasonable, the zoning restriction is open to challenge in state court, where the scope of the state remedy available to respondent would be determined as a matter of state law, as well as under Fourteenth Amendment standards. That being so, nothing more is required by the Constitution.

*Id.* at 677.

Because *Eastlake* involved a referendum situation, not an initiative, there was compliance with the statutory zoning procedures.

The *Eastlake* decision has given commentators a field day. See Hogue, *Eastlake & Arlington Heights: New Hurdles in Regulating Urban Land Use?*, 28 CASE W.L. REV. 41 (1977); Comment, *Zoning Change: Mandatory Referendum—A Permissible Reservation of Power by the People*, 23 LOY. L. REV. 243 (1977); Comment, *Preserving "The Blessings of Quiet Seclusion": The Eastlake Decision and a Community's Right to Control Growth*, 1977 U. ILL. L.F. 895.

142. 507 P.2d 23 (Or. Sup. Ct. 1973).

143. *Id.* at 26.

proper approach is to balance the private and governmental interests involved.<sup>144</sup> The United States Supreme Court has described this balancing approach as a three-pronged test, stating:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>145</sup>

Under this balancing test, zoning by initiative should not survive a due process analysis. The private interest affected—the right to private property—is a fundamental one protected by the Constitution.<sup>146</sup> Indeed, the first item incorporated from the Bill of Rights into the fourteenth amendment was the clause of the fifth amendment<sup>147</sup> that entitles property owners to “just compensation” whenever a governmental entity takes his or her property.<sup>148</sup> The Supreme Court underscored the importance of private property rights and their relationship to “liberty” in its decision of *Lynch v. Household Finance Corporation*.<sup>149</sup>

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a ‘personal’ right . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.<sup>150</sup>

There is a significant risk that zoning by initiative may erroneously

144. *The Initiative*, *supra* note 21, at 92.

145. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See also *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977).

146. U.S. CONST. amend. V, which provides in pertinent part: “[N]or shall private property be taken for public use, without just compensation.”

Recall also the teachings of the Tenth Commandment: “Thou shall not covet thy neighbor's house, thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, or any thing that is thy neighbor's.” *Exodus* 20:17 (King James). Recall as well in the words of the United States Supreme Court: “[N]o class of laws is more universally sanctioned by the practice of nations and the consent of mankind, than laws which give peace and confidence to the actual possession and tiller of the soil.” *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 466 (1831).

147. U.S. CONST. amend. V.

148. *Chicago B. & Q.R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

149. 405 U.S. 538 (1972).

150. *Id.* at 552.

and permanently deprive affected landowners of their property rights. The electorate is not required to ensure that its proposals are consistent with local planning, nor is it required to consider the environmental consequences of its action. The property owner becomes simply a voice in the wilderness left to compete with the sometimes selfish desires of society in general. He may be left saddled with the burdens of ownership while the initiative action takes away the benefits of ownership. Often, simply the fight itself is enough to bankrupt the owner.<sup>151</sup>

The remedies available to a property owner who alleges an unconstitutional deprivation or "taking" of property have been described as illusory.<sup>152</sup> *Agins v. City of Tiburon*<sup>153</sup> holds that inverse condemnation damages are not available. *Selby v. City of San Buenaventura*<sup>154</sup> holds that declaratory relief is not available unless there is a defect in the proceedings that led to the enactment, *i.e.*, a technical defect in the initiative procedure. What is left is invalidation of the ordinance.

At this point, the parties commence to play what is sometimes called the Yo-Yo game. If a reviewing court, for example, strikes down a regulation which permits one residential unit to be built every eight acres, the local entity on remand may pass a new regulation permitting one unit to be built every nine acres. If this is also struck down, the entity then enacts an ordinance permitting one unit for every 12 acres, or every six acres, or whatever. Infinite variations are possible. The object of the game is to exhaust the funds, or the patience, of the owner. The regulators, who may lose every court clash, nonetheless prevail.<sup>155</sup>

Compliance with the State Zoning Law scheme of hearings, study, recommendations, etc., would provide at least some safeguards to the property owner and put him on a more equal footing.

Finally, the burden imposed on government by the statutory scheme is minimal, especially in comparison to the expense of conducting an initiative election. At the very least, the administrative and fiscal burdens imposed by the State Zoning Law and the initiative process are comparable.

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151. See *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1978), *aff'd sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Southpark Square, Ltd. v. City of Jackson*, 565 F.2d 338 (5th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978). These cases are representative of many in which a property owner faced either foreclosure on the subject property, or actual bankruptcy, during the course of litigation. Appellants' Petition for Rehearing at 25, *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979) [hereinafter cited as Petition].

152. Petition, *supra* note 151, at 17-26.

153. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

154. 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).

155. Petition, *supra* note 151, at 22.

IV. *HORN V. COUNTY OF VENTURA*: A NEW PROSPECTUS

In *Horn v. County of Ventura*,<sup>156</sup> the California Supreme Court examined the question of whether due process of law requires notice and hearing before a tentative subdivision map is approved. In an opinion by Justice Richardson, it held that the fourteenth amendment<sup>157</sup> does require notice and hearing. Because of the similarity between the enactment of a zoning ordinance under the State Zoning Law and the procedure used in considering an application for tentative subdivision map approval under the Subdivision Map Act,<sup>158</sup> *Horn* raises questions regarding the continued validity of the *Livermore* and *San Diego* decisions.

In *Horn*, property owners challenged Ventura County's approval of a tentative subdivision map. An application for approval of a tentative subdivision map is reviewed by local government in much the same way as are zoning ordinances. The application receives study, recommendations, and hearings, generally before an advisory agency or planning commission and before the legislative body.<sup>159</sup> Like the State Zoning Law, the Subdivision Map Act requires the tentative subdivision map to be consistent with local planning<sup>160</sup> and CEQA requires consideration of the environmental consequences of the proposed subdivision.<sup>161</sup>

The court first reaffirmed the administrative/legislative dichotomy expressed in *Bi-Metallic* and *San Diego*<sup>162</sup> but noted its caution in *San Diego* that land-use decisions less extensive than general re-zoning were to be construed as administrative, thereby requiring due process considerations.<sup>163</sup> The court found that subdivision approvals, like variances and conditional use permits involve application of general standards to specific parcels of property, and that government conduct,

156. 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979).

157. U.S. CONST. amend. XIV, § 1.

158. CAL. GOV'T CODE §§ 66410-66499.37 (West Supp. 1966-1978).

159. *Id.*

160. *Id.* §§ 66473-66474.

161. CAL. PUB. RES. CODE § 21080 (West Supp. 1979).

162. 24 Cal. 3d at 612-13, 596 P.2d at 1137-38, 156 Cal. Rptr. at 721-22 (1979).

163. *Id.* at 615, 596 P.2d at 1137-38, 156 Cal. Rptr. at 722. *See* *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d 205, 212 n.5, 529 P.2d 570, 574 n.5, 118 Cal. Rptr. 146, 150 n.5 (1974), *appeal dismissed*, 427 U.S. 901 (1976). In a concurring opinion in *Horn*, Justice Newman argued that it was time to reject the administrative/legislative test in its entirety. Justice Newman warned that "we should not encourage legislators and rulemakers who conceivably yearn for a more comfortable past—when often they did proceed without notice, without hearing, in 'protective secrecy'." 24 Cal. 3d at 621, 596 P.2d at 1143, 156 Cal. Rptr. at 727 (concurring opinion).

affecting the relatively few, is determined by facts peculiar to the individual case.<sup>164</sup> It was significant to the court that applications for subdivision are evaluated for their impact on the environment and must be consistent with local planning; those statutory concerns were precisely the ones the plaintiff wished to raise.<sup>165</sup> The court concluded:

Resolution of these issues involves the exercise of judgment, and the careful balancing of conflicting interests, the hallmark of the . . . [administrative] process. The expressed opinions of the affected landowners might very well be persuasive to those public officials who make the decisions, and affect the outcome of the subdivision process.<sup>166</sup>

Finally, the court found that the notice and hearing procedures utilized were constitutionally inadequate. It rejected the proposition that the county's procedures for review of environmental impact under CEQA were sufficient.<sup>167</sup> The county had posted environmental documents at central public buildings and mailed notice to persons specifically requesting the documents. The court suggested that acceptable methods of giving notice would be to mail notice to all property owners within a given radius of the subject property, post notice at or near the project site, or do both.<sup>168</sup> Moreover, the court held that the county's process of reviewing the environmental impact did not constitute an adequate hearing. The CEQA procedures are intended only to evoke public response to *general* environmental concerns and do not guarantee landowners a pre-deprivation hearing on the *specific* aspects of the threatened interference to their property. Thus, the court held that CEQA procedures failed to satisfy the plaintiff's due process rights.<sup>169</sup>

The same considerations that led the supreme court to require notice and hearing in the context of subdivisions apply with equal force to zoning. Zoning involves the application of general standards to specific property, based on individual facts. Proposed zoning is subject to review for its environmental impact<sup>170</sup> and must be consistent with local planning.<sup>171</sup> Zoning by initiative might arguably provide constitutionally adequate notice, but it clearly does not provide a constitutionally adequate hearing.<sup>172</sup> Zoning, similar to subdivision approval, should

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164. 24 Cal. 3d at 614, 596 P.2d at 1138, 156 Cal. Rptr. at 722.

165. *Id.* at 614-15, 596 P.2d at 1139, 156 Cal. Rptr. at 723.

166. *Id.* at 615, 596 P.2d at 1139, 156 Cal. Rptr. at 723.

167. *Id.* at 617, 596 P.2d at 1141, 156 Cal. Rptr. at 725.

168. *Id.* at 618, 596 P.2d at 1141, 156 Cal. Rptr. at 725.

169. *Id.* at 619, 596 P.2d at 1142, 156 Cal. Rptr. at 726.

170. CAL. PUB. RES. CODE § 21080 (West Supp. 1979).

171. CAL. GOV'T CODE § 65860 (West Supp. 1966-1978).

172. See text accompanying notes 124-129 *supra*.



be considered an administrative act that requires the protections of due process of law and land use control procedures provided by statute.

#### V. CONCLUSION

Zoning by initiative is unworkable. It fails to give effect to important considerations of planning and environmental protection. Zoning proposals must have the benefit of public hearings and professional study so that the proposal will be consistent with the environmental and long-range planning objectives of society. Overall planning would be seriously crippled if the initiative process could be used in this field.

Finally, zoning by initiative fails to adequately protect the constitutional rights of the aggrieved property owner. The Michigan Supreme Court has described the initiative process and land use matters in the following manner:

It is the fate of all ideas, good and bad, that some will seek to extend them to an extreme beyond purpose and reason. It is the duty of the courts, in their area of responsibility, to guard against that tendency, and to confine this important reserved right of the people to its legitimate and proper scope lest, through misuse, it fall into disrepute.<sup>173</sup>

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173. *West v. City of Portage*, 221 N.W.2d 303, 307 (Mich. Sup. Ct. 1974).