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Land Development And The Environment: The Subdivision Map Act

While the Environmental Quality Act mandates consideration of the environmental impact of private projects requiring governmental approval, other laws contain provisions setting forth the manner in which such approval is to be granted or denied. This comment discusses one such law, the Subdivision Map Act. The Act is discussed in terms of the amount of authority local governments have to regulate the environmental impact of subdivisions, recent amendments to the Act to further strengthen it as a tool for environmental protection, and the interrelationship between the Subdivision Map Act and the California Environmental Quality Act.

> [A]part from business interests and vested rights, common people are rightly very conservative about changes in the land, for they are very powerfully affected by such changes in very many habits and sentiments.[1]

INTRODUCTION

The development of land, especially in this urban age, is a phenomenon which has a tremendous impact upon the environment of the community in which the land is located. It can affect the economy, either by generating new jobs and economic growth,[2] or by flooding an already glutted market with unneeded properties.[3] It can promote the public health and safety by providing adequate housing for the population,[4] or it can contribute to urban sprawl, thereby increasing automobile pollution and reducing the quantity of open land.[5] Most importantly, the manner in which land is developed establishes for all time the physical structure of the community which is thereby created.[6] The

1. P. GOODMAN & P. GOODMAN, COMMUNITAS 9-10 (2d ed. 1947).
2. PRESIDENT'S COMMITTEE ON URBAN HOUSING, REPORT: A DECENT HOME 165 (1968).
3. See for example, Berliner, *Plague on the Land*, 5 CRY CALIFORNIA No. 3, at 1, 5 (1970).
4. PRESIDENT'S COMMITTEE ON URBAN HOUSING, *supra* note 2, at 135 *et seq.*
5. See Belser, *The Making of Slurban America*, 5 CRY CALIFORNIA No. 4, at 1 (1970).
6. Once streets are constructed and parcels are conveyed to individual owners, the only way of correcting a faulty subdivision plan is for the government to condemn the subdivision parcel-by-parcel and redesign it properly. This is, of course, a very difficult and expensive process.

subdivision of land—designating lots and laying out streets—is the aspect of development which most permanently and significantly sets the pattern for the development of a community. It is the purpose of this comment to examine the way environmental considerations enter into the regulation of subdivisions by local communities and the way in which the Subdivision Map Act has come to be used as a principal tool of urban planning and land use regulation.

A. Historical Background

Although the development of land has a powerful impact upon a community, American communities have done surprisingly little in modern times to direct the manner in which such development occurs.[7] However, strong governmental control over the design and location of new development is a long-established tradition in Anglo-American history.[8] In the early history of this nation, underdeveloped land was owned by the community as a public resource, and its development was planned for the good of the community. The Spanish settlements in the Southwest,[9] the Puritan villages of New England,[10] and the development of the City of Philadelphia[11] are examples of cities laid out by governmental authorities in such a way as to provide for common areas, churches, and the efficient location of homes and businesses. However, this tradition of regulation did not survive the nineteenth century, and by the end of that century governmental authority had deteriorated to the point that local governments were not even conceded the authority to require that "official maps," setting out the location of major roads and highways, be recognized by land developers.[12] Development was left almost entirely to the discretion of the developer,[13] and land was treated as a mere commodity to be sold with only the subdivider being thought to have any interest in the development.

7. "Until we initiated the program [to direct urban growth] in 1964, the pattern was for the developers and speculators to make the decisions as to where growth would take place." *Editor's Comment*, 4 URB. LAW. No. 3, ix, xii-xiii (1972).

8. The development of a medieval English town is described in E. GUTKIND, URBAN DEVELOPMENT IN WESTERN EUROPE: THE NETHERLANDS AND GREAT BRITAIN 214 (1971).

9. Spanish settlements in America were laid out pursuant to regulations proclaimed by Phillip II of Spain in 1573. J. REPS, THE MAKING OF URBAN AMERICA 26, 29 (1965).

10. The process by which the land in the village of Sudbury, Massachusetts, was subdivided and conveyed to residents is described in S. POWELL, PURITAN VILLAGE (1963).

11. As early as 1721, Philadelphia provided for "surveyors and regulators" to establish streets and building lines in the city. M. SCOTT, AMERICAN CITY PLANNING 5 (1970) [hereinafter cited as SCOTT].

12. *Id.* at 135.

13. *Id.* at 2-3.

California's original Subdivision Map Act, enacted in 1907,[14] reflected this attitude. It provided for no government regulation and required submission of a subdivision map to local officials only to check the accuracy of the map in order to assure good title to the resulting parcels.[15] If the subdivider wished to, he could convey the lots by metes and bounds and did not have to submit a map to the local officials at all.[16]

Finally, in the 1920's public agencies began to assume once more the responsibility of planning and regulating new development. Under the leadership of Secretary Herbert Hoover, the United States Department of Commerce became active in promoting urban planning and local government control of land use.[17] It promulgated the Standard Zoning Enabling Act[18] which became the basis for zoning enabling acts of most states.[19] This Act delegated to local governments the power to divide their communities into zones and to regulate the use of land therein. Another act promulgated by the Department was the Standard City Planning Enabling Act,[20] which treated subdivision mapping as a planning tool and granted cities the authority to regulate subdivisions.[21] The local regulations enacted pursuant to the Act could provide for the arrangement of streets, the setting aside of open spaces, and the improvement of streets and utilities.[22]

In 1929, the year following the promulgation of the Standard City Planning Enabling Act, California repealed the 1907 Act and enacted a Subdivision Map Act similar to the Standard Act which allowed local governments to adopt by ordinance subdivision regulations which could include improvement of land dedicated for streets, highways, and pedestrian ways, minimum lot sizes and areas, setbacks and utility easements, street and sidewalk width and design, and conform-

14. CAL. STATS. 1907, c. 231, at 290.

15. The Act provided that if land were to be conveyed by reference to a map or plat, it must be recorded pursuant to the provisions of the Act. Furthermore, the developer was prohibited from making any dedications to the public that the local government did not accept—an apparent attempt to prohibit developers from designing faulty streets and then giving them to the city to maintain.

16. CAL. STATS. 1907, c. 231, §8, at 292.

17. For a history of this program, see SCOTT, *supra* note 11, at 192-98.

18. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1924).

19. A Department of Commerce bulletin from 1931 lists 37 states as having adopted laws based on the Department's Standard Act. U.S. DEP'T OF COMMERCE, THE PREPARATION OF ZONING ORDINANCES 27-28 (1931).

20. U.S. DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928).

21. "[N]o plat of a subdivision of land . . . shall be filed or recorded until it shall have been approved by such planning commission . . . ." *Id.* §13. Such subdivision control was to be exercised pursuant to regulations governing the subdivision of land adopted by the planning commission. *Id.* §14.

22. *Id.* §14.

ity with major street or other plans.[23] However, a provision in the law allowed subdividers to convey lots by metes and bounds even though the subdivision map had been turned down by the planning commission.[24]

The law was rewritten and re-enacted in 1937.[25] This enactment was the first to express the scope of local government regulatory power in terms of "design" and "improvement." The enactment also removed the loophole which existed in the 1929 legislation by prohibiting the conveyance of lots not approved by local governments.[26] The 1937 enactment was the basis for the 1943 codification[27] which is in effect today.

Senate Bill 977, introduced in the 1973-74 regular session, would revise and recodify the Subdivision Map Act and place it in the planning title of the Government Code.[28] Although the bill does not contain many substantive changes to the existing law, its removal from the Business and Professions Code to the Government Code symbolizes the Act's progression from a technical law to a policy-making law. Senate Bill 977 has passed the Senate and will be considered by the Assembly in 1974.

Despite the broad scope of regulation now permitted in the Act, local planning commissions and governing bodies have shown a marked bias in favor of developers[29] and have allowed subdivisions to be carried out solely for the profit of the subdivider and rarely for the good of the community and its environment.[30] As the quality of the urban environment declined in recent years (a condition that was aggravated by a sharp population increase and the development of poorly planned subdivisions[31]), this orientation became indefensi-

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23. CAL. STATS. 1929, c. 837, at 1790.
24. "If at the expiration of 30 days after the date of such recordation, the planning commission shall not have approved said map, the subdivider may then proceed to sell such property by metes and bounds description." *Id.* § 2, at 1792.
25. CAL. STATS. 1937, c. 670, at 1863.
26. *Id.* §4, at 1865.
27. CAL. STATS. 1943, c. 128, at 865.
28. CAL. GOV'T CODE §65000 *et seq.*
29. Planning commissioners, by and large, are developer or market oriented. More than this, they often are consumately involved in the concept of the deification of risk capital. Their consensus philosophy, although by no means unanimous, is that if a developer is willing to risk venture capital, we must accommodate him—developed land is better than vacant land.

Testimony of Mr. Donald A. Woolfe, Planning Director of Tulare County. *Hearings on Large-Scale Land Development before the Environmental Quality Study Council,* July 30, 1970, at 65.

30. See *Editor's Comments,* 4 URB. LAW. No. 3, ix, xii-xiii (1972).
31. Not only can the results of poorly planned subdivisions be environmentally disastrous for neighboring residents and property owners, but they can be costly for the local government which can be held liable regardless of negligence for damage resulting from the faulty design of subdivisions it approves. Frustuck v. City of Fair-

ble and public opinion has mandated a reversal by government of this traditional pro-developer bias.[32] As amended in recent years and as proposed to be recodified, the Subdivision Map Act is available as a vehicle for vigorous and innovative urban planning and environmental protection.

B. The Scope of the Subdivision Map Act

The Subdivision Map Act requires the developer of any "subdivision"[33] to submit a tentative map,[34] comply with appropriate local ordinances,[35] and if his tentative map is approved, file a final subdivision map.[36] "Subdivision" is defined in the Act as land which is divided for the purpose of sale, lease, or financing into five or more parcels.[37] However, the term does not include divisions into five or more parcels if: (1) the land before division contains less than five acres, if each parcel created by the division abuts on a public street or highway and no dedications are required by the governing body; (2) the land is to be divided into parcels of 20 acres or more and each resulting parcel has approved access to a public road; (3) the land is zoned for industrial or commercial uses, has access to a public street, and has local government approval as to street alignment and widths; or (4) the land is divided into parcels consisting of more than 40 acres each.[38]

Prior to the enactment of Assembly Bill 1301 in 1971,[39] if the division did not come within the definition of "subdivision," the Act required no filing of a map or local government approval whatever,

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fax, 212 Cal. App. 2d 345, 28 Cal. Rptr. 357 (1963); Steiger v. City of San Diego, 163 Cal. App. 2d 110, 329 P.2d 194 (1958) (both cases held the city liable for damage caused by a faulty drainage system installed by the subdivider and approved by the city).

32. During the first 183 years [of the history of this country from the year 1787] our goals involved such matters as development of land, extraction of resources, and increases in the standard and convenience of living. . . . Indeed, practically all our laws until about the latter half of 1969 were patterned around this one-sided optimism in progress and development. . . . Now we suddenly find ourselves with a new public opinion and new national goals favoring preservation.

Paul N. McCloskey, Jr., *The Legal Profession's Leadership in Rebuilding Environmental Quality*, in CALIFORNIA CONTINUING EDUCATION OF THE BAR, TRANSCRIPTS OF THE SPEECHES, NATIONAL CONFERENCNE ON ENVIRONMENTAL LAW 11-12 (1970).

33. S.B. 977, 1973-74 Regular Session, would retain the existing distinction between divisions of land for which subdivision tentative and final maps are required and those for which parcel maps are required. However, all divisions of land would be called "subdivisions." Proposed CAL. GOV'T CODE §§66424, 66426.

34. CAL. BUS. & PROF. CODE §11550.

35. CAL. BUS. & PROF. CODE §11551.

36. CAL. BUS. & PROF. CODE §11610.

37. CAL. BUS. & PROF. CODE §11535(a).

38. CAL. BUS. & PROF. CODE §11535(b), (c).

39. CAL. STATS. 1971, c. 1446, at 2854.

and property owners were free to split their land into four parcels or fewer (or more, if they came within the above exceptions) simply by deeding the parcels to other people or by recording a parcel map. Although local governments were authorized by the Act to require the submission of a parcel map for approval, few rural counties made this requirement, and the process of "lot-splitting" became a common method of circumventing local government regulation, large subdivisions were created by splitting a parcel into four parcels and selling them to four individuals who, in turn, divided each parcel into four parcels and sold them, and so on. Although an appellate court held this process to be illegal when carried out in a deliberate scheme to circumvent the Subdivision Map Act,[40] it was widely practiced on an *ad hoc* basis and resulted in poorly planned subdivisions with improper access and facilities and disastrous environmental consequences.[41]

To remedy the situation, Business and Professions Code Section 11535(d) was amended by Assembly Bill 1301 in 1971 to require the submission of parcel maps for all divisions of land not coming within the definition of "subdivision."[42] Parcel maps must now be considered and reviewed by the planning commission and must be approved as to design, improvement, and flood and water drainage control,[43] and dedications may be required.[44] Because of this amendment, the scope of permissible and mandatory authority to regulate divisions of land not coming within the definition of "subdivision" is nearly the same as that for "subdivisions."[45]

After the passage of Assembly Bill 1301, the real estate interests contended that the requirement for submission of a parcel map created a hardship on persons who were not generating new development but were merely adjusting property lines or making other insignificant divisions of land. The parcel map, which must be prepared by a licensed civil engineer or land surveyor,[46] is expensive, and it was argued that it was not worth the effort and expense in many situations. Therefore, legislation was passed in 1972[47] which, while retaining mandatory local

40. Pratt v. Adams, 229 Cal. App. 2d 602, 40 Cal. Rptr. 505 (1964).
41. *Hearings on Premature Subdivisions, S.B. 395, S.R. 326, before the Senate Committee on Local Government and the Senate Select Committee on Urban Affairs,* Dec. 7-8, 1970, Testimony of Joseph Busch, Chief Deputy District Attorney of Los Angeles County, at 78 *et seq.*; Testimony of Robert Remer, Deputy District Attorney of Los Angeles County, at 84 *et seq.*; Testimony of Lt. Stephen Lessels, at 192-93.
42. CAL. STATS. 1971, c. 1446, at 2854.
43. CAL. BUS. & PROF. CODE §11535(d).
44. CAL. BUS. & PROF. CODE §11575.
45. *See* CAL. BUS. & PROF. CODE §11540.1.
46. CAL. BUS. & PROF. CODE §11576(a).
47. CAL. STATS. 1972, c. 706, at 1287.

regulation of land divisions not coming within the "subdivision" definition,[48] allowed local governments to adopt ordinances waiving the submission of the parcel map.

As the law exists today, any physical division of land is covered by the provisions of the Subdivision Map Act and must comply with the requirements to be discussed in this comment. However, there is one sort of "division" which is not covered and may constitute a loophole. A form of land development which could be used to circumvent the Subdivision Map Act is the division of land into undivided interests. Pursuant to this scheme, land is divided into any number of undivided interests, the purchasers informally agreeing among themselves which portion of the land each is to occupy.[49] Because this division is a division of title to one parcel rather than a physical division of the parcel itself, it is not subject to local government regulation pursuant to the Subdivision Map Act although the result of such a division could be much the same as a physical division. The problem of the sale of such interests was recognized in 1971, and legislation was enacted[50] to require a public report to be issued by the Real Estate Commissioner on sales of undivided interests in the same manner as such reports are issued on regular subdivisions.[51] However, the Subdivsion Map Act was not at that time amended to include undivided interests within the scope of local regulatory power. Such an amendment would appear to be desirable.

Regulatory Authority of Local Governments

Unlike the zoning law,[52] the Subdivision Map Act does not grant maximum regulatory authority to local governments. Therefore, they may exercise only that authority which is expressly granted by the Act.[53] The next two sections of this comment will document the leg-

48. Although the parcel map is waived, there must be a finding by the governing body or advisory agency (planning commission) that "the proposed division of land complies with requirements as to area, improvement and design, flood and water drainage control, appropriate improved public roads, sanitary disposal facilities, water supply availability, environmental protection" and other requirements of the Act and local ordinances which are applicable to divisions of land not defined as subdivisions. CAL. BUS. & PROF. CODE §11535(d).

49. Of course, if a legally enforceable right to occupy a portion of the property is created, then an application for map approval becomes necessary. 38 OPS. ATT'Y GEN. 125 (1961).

50. CAL. STATS. 1971, c. 1285, at 2518.

51. Before a subdivider may sell lots in his subdivision, he must apply to the Real Estate Commissioner who obtains information regarding the subdivision and issues a public report. The public report must be given to each prospective subdivision lot purchaser. CAL. BUS. & PROF. CODE §§11010, 11018.1.

52. CAL. GOV'T CODE §65800 *et seq.*

53. "A local municipal ordinance is invalid if it attempts to impose additional requirements in a field that is preempted by the general law." *In re* Carol Lane, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

islative expansion of the regulatory authority granted by the Act, the first section covering permissible regulation and the next section covering recently enacted environmental protection measures.

A. The Scope of Permissible Regulation

1. Design and Improvement

Prior to the enactment of Assembly Bill 1301 in 1971, the only authority granted to California local governments to regulate the subdivision of land was contained in Business and Professions Code Section 11525, which states, "Control of the *design* and *improvement* of subdivisions is vested in the governing bodies of cities and of counties" (emphasis added). In addition to the material added by Assembly Bill 1301 (to be discussed below), "design" means

> street alignment, grades and widths, alignment and widths of easements and rights-of-way for drainage and sanitary sewers and minimum lot area and width.[54]

"Design" also means park dedications (to be discussed below). In addition to the material added by Assembly Bill 1301, "improvement" means

> such street work and utilities to be installed, or agreed to be installed by the subdivider on the land to be used for public or private streets, highways, ways, and easements, as are necessary for the general use of the lot owners in the subdivision and local neighborhood traffic and drainage needs as a condition precedent to the approval and acceptance of the final map thereof.[55]

Considering the potential impact which these definitions may have in determining the extent of local regulatory authority, there are very few cases interpreting them. This lack of interpretation could be the result of local government reluctance to impose stringent regulations on the subdivision of land, perhaps because of the uncertainty they perceived as to the limitations upon their regulatory power. However, the language in the above definitions is arguably broad enough to permit extensive local regulation of the layout and design of subdivisions. In fact, it seems that there is enough authority to allow the local government to specify in detail the manner in which the subdivision is to be developed. It could, for example, require cluster development, leaving the bulk of the property in open space; it could require the subdivider to accept a particular street system; or it could require the subdivision to be designed in a particular way so as to be developed

54. CAL. BUS. & PROF. CODE §11510.
55. CAL. BUS. & PROF. CODE §11511.

in a manner consistent with the topography, natural vegetation, and other features of the area.

Although local governments have demonstrated some reluctance to engage in as much regulation as they could, many have, pursuant to this authority, imposed obligations on developers to complete such improvements as are necessary for the future residents, including building site grading, street and utility installation, and provision of drainage control facilities. In urban and inhabited rural areas, these requirements ensure that the buyers of the lots will be able to use their property without considerable additional expense. However, this trend towards a higher level of subdivision improvement has resulted in a large amount of grading and other environmentally destructive activities in speculative rural subdivisions which will probably never have very many houses built upon them and which will eventually revert to acreage[56] bearing the scars of the developer's bulldozer.[57]

Although the "design" and "improvement" criteria are arguably very broad, there has been much confusion and concern as to the extent of regulatory power that is granted by the Subdivision Map Act. Therefore, in order to resolve such difficulties, it has been proposed that the Act be amended to provide, simply, that it is the intent of the legislature to grant local governments the maximum authority to regulate subdivisions.[58] This anti-preemptive device is similar to that contained in the zoning law[59] and would, while not adding measurably to local governments' present broad authority, allow them to proceed more confidently in their subdivision regulatory activities.

2. *Dedication Requirements*

There is probably no issue in subdivision law which has generated more controversy than that of dedications. The concept is very simple in theory—the subdivider, in return for the privilege of developing his land, agrees to donate to a governmental entity an amount of land (or money) needed to provide certain services necessitated by the influx of new residents into the community which his development will attract.

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56. CAL. BUS. & PROF. CODE §11700 *et seq.*
57. Testimony of Lt. Steven Lessels, HEARINGS ON PREMATURE SUBDIVISIONS, *supra* note 41, at 188, 191.
58. This provision was contained in S.B. 1118, 1972 Regular Session, *as introduced*, Mar. 15, 1972 (proposed CAL. GOV'T CODE §66411).
59. CAL. GOV'T CODE § 65800 reads in part: "The Legislature declares that in enacting this chapter, it is its intention to provide only a minimum limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters."

The local government argues that this arrangement is only fair—the developer has created a new, sometimes overwhelming, burden on local government facilities, and therefore he should offset the additional responsibilities required of the local government by the dedication of land needed to provide services required by the new residents. Furthermore, local governments may be unable to finance the capital facilities necessitated by new development because of the freeze on their tax rates imposed by recently enacted Revenue and Taxation Code Sections 2261 and 2262. The developer, on the other hand, contends that he (or his predecessor in interest) has been paying property taxes on his undeveloped land for years (although lower than taxes on developed land) which have benefited the developed land but not his own. Now, he claims, the beneficiaries of those years of taxes have disclaimed any responsibility to reciprocate.

Numerous kinds of dedication requirements under varying conditions are expressly allowed in California.[60] The broadest and most commonly used power is that of requiring dedication of streets, drainage facilities, and sanitary sewers. This authority was contained in the 1929 Act,[61] and although it was not expressly included in the 1937 Act or in the 1943 codification, the California Supreme Court found such authority to exist in *Ayres v. City of Los Angeles*[62] in which the court reasoned that the power to require dedication of streets was implicit in the definitions of "design" and "improvement."[63] Senate Bill 977 would expressly allow dedications for streets, sidewalks, and drainage and sanitary sewers.[64] This power to require dedications is limited only by the constitutional standards regarding the use of the police power.[65]

As the Subdivision Map Act existed prior to 1965, the statutory power to require dedications was found to be limited to the purposes spelled out in the "design" and "improvement" definitions, and therefore, subdividers could not be required to dedicate fees for the acquisition of park and school sites throughout the city.[66] In 1965 the legislature responded by enacting the Quimby Act,[67] which allows local

60. Many other kinds of dedications could possibly be required under the general plan consistency clause. See text accompanying note 115 *infra.*
61. See text accompanying note 23 *supra.*
62. 34 Cal. 2d 31, 207 P.2d 1 (1949).
63. CAL. BUS. & PROF. CODE §§11510, 11511.
64. S.B. 977, 1973-74 Regular Session (proposed CAL. GOV'T CODE §66475).
65. See text accompanying notes 193-213 *infra.*
66. Kelber v. City of Uplands, 155 Cal. App. 2d 631, 318 P.2d 561 (1958).
67. CAL. BUS. & PROF. CODE §11546, *enacted,* CAL. STATS. 1965, c. 1809, at 4183; see FINAL REPORT OF THE ASSEMBLY INTERIM COMMITTEE ON MUNICIPAL AND COUNTY GOVERNMENT, 6 ASSEMBLY INTERIM REPORTS No. 21, at 31 *et seq.* (1963-65).

governments to require as a condition for approval of a subdivision map the dedication of land or in lieu fees for park and recreation purposes. The authority to require such dedications is subject to the following restrictions:[68] (1) the ordinance requiring the dedication must be in effect 30 days before a dedication may be required; (2) the ordinance must contain definite standards for determining the amount of dedication; (3) the dedication can only be used to provide park services to the subdivision from which it was dedicated;[69] (4) the community must have adopted a recreation element[70] and the proposed park must be in accordance with its principles and standards; (5) the amount dedicated must be reasonably related to the use by future inhabitants of the subdivision; (6) the local government must specify when development of the park or recreation facilities will begin; and (7) only the payment of in lieu fees may be required for subdivisions of 50 parcels or less. Additionally, a park or recreation dedication may be required for approval of a parcel map (for divisions not coming within the definition of "subdivision"[71]), but only if the division is being made by or on behalf of a person engaged in the business of developing and selling real estate.[72]

In 1970 two additional types of dedications were added to the Subdivision Map Act. Section 11610.5 of the Business and Professions Code[73] *requires* dedication of reasonable access to the ocean coastline from public highways as a condition for approval of a subdivision fronting upon the coastline. Section 11610.7[74] makes the same requirement with regard to publicly owned lakes or reservoirs.

In 1971 a provision was added to the Public Resources Code[75] which prohibits local governments from approving subdivisions fronting on a public waterway, river, or stream which do not provide reasonable public access to the waterway, river, or stream from a public highway. Such access may be dedicated by fee or easement.[76] In addition, the subdivider must be required to dedicate a public easement

68. CAL. BUS. & PROF. CODE §11546(a)-(h).
69. This limitation is not necessitated by the United States Constitution, and the Sierra Club contended that it unfairly discriminates in favor of a subdivider whose land is located adjacent to an existing park. Associated Homebuilders v. City of Walnut Creek, 4 Cal. 3d 633, 640 n.6, 484 P.2d 610, 612 n.6, 94 Cal. Rptr. 630, 636 n.6 (1971).
70. Local governments are authorized, but not required, to adopt such an element. CAL. GOV'T CODE §65303(a).
71. CAL. BUS. & PROF. CODE §11535(a).
72. CAL. BUS. & PROF. CODE §11546(h), *amended*, CAL. STATS. 1972, c. 1388 at 2883.
73. CAL. STATS. 1970, c. 1308, at 2434.
74. CAL. STATS. 1970, c. 761, at 1442.
75. CAL. PUB. RES. CODE §10000 *et seq.*
76. CAL. PUB. RES. CODE §10020.

along a portion of the bank of the river or stream.[77] It was the intent of the legislature[78] in enacting this dedication provision to implement Section 2 of Article XV of the California Constitution, which prohibits private persons from excluding the right of way to any navigable water whenever it is required for a public purpose.

Another 1971 provision was enacted permitting local governments to require the dedication of bicycle paths and lanes.[79] However, this requirement may be imposed only upon subdivisions containing 200 or more parcels. It is unclear why this restriction was imposed since bicycle paths and lanes, especially those installed as part of a city-wide system, would seem to be of the same importance in small as well as large subdivisions.

In addition to land dedication requirements, two provisions allow local governments to require the dedication of fees. Section 11547 of the Business and Professions Code[80] allows a local government to require fees for the construction of bridges to serve the subdivision, and Section 11543.5[81] permits fees to be required to construct drainage and sanitary sewage facilities needed in the neighborhood, not to exceed the subdivision's per acre pro rata share of the cost of such facilities.[82]

Aside from the allowable dedication requirements, the law provides for a reservation requirement whereby a subdivider may be required to set aside land within his subdivision for purchase by an appropriate governmental entity. A 1965 law[83] allows the local government to require the developer of more than 200[84] dwelling units located in the same school district to "dedicate"[85] land for elementary schools to serve the subdivision. The subdivider is to be reimbursed for: (1)

77. CAL. PUB. RES. CODE §10021.
78. CAL. PUB. RES. CODE §10000.
79. CAL. PUB. RES. CODE §5078.9, *enacted,* CAL. STATS. 1971, c. 1361, at 2681. It is arguable that the power to require such dedications existed prior to this legislation since bicycle routes would constitute a means of access specified in the "design" definition and provisions for neighborhood traffic in the "improvement" definition. If this were true, the 1971 amendment had the effect of limiting the power to require such dedications.
80. *Enacted,* CAL. STATS. 1970, c. 663, at 1290.
81. *Enacted,* CAL. STATS. 1965, c. 831, at 2429.
82. This applies to off-site improvements. On-site improvements can be required, following the holding of Ayres v. City of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949), by authority of the "design" and "improvement" definitions, which include such facilities.
83. CAL. BUS. & PROF. CODE §11525.2, *enacted,* CAL. STATS. 1965, c. 1961, at 4489.
84. Prior to the enactment of CAL. STATS. 1972, c. 366, at 685, the subdivision had to have 400 or more units if the population of the local entity were over 30,000.
85. Existing law improperly labels the requirement a "dedication"—which it is not because the land is sold rather than given. S.B. 977 [proposed CAL. GOV'T CODE §66479(d)], if enacted, would substitute the correct term.

the original cost of the land to himself; (2) the cost of improvements installed since acquisition; (3) taxes assessed against the land since acquisition; and (4) costs of maintenance of the land since acquisition. While not a true dedication, this provision does allow local governments to acquire school sites at a price lower than market value at the date of acquisition—which is what the cost would be in an eminent domain proceeding.[86]

Senate Bill 977 would retain the school land reservation provisions and, additionally, would permit local governments to require subdividers to reserve land in their subdivisions for other public purposes, such as parks, fire stations, and libraries.[87] However, unlike school reservations, the subdivider would have to be reimbursed for the market value of the land at the time of the filing of the tentative map. No reservation would be allowed which renders the subdivision economically unfeasible. This provision offers some advantage over eminent domain in that, although the land is valued at the lower predevelopment price, it need not be acquired until two years following acceptance of the subdivision improvements.

B. *Recent Expansions of the Scope of Regulation—Environmental Protection*

Concern with the rapidly declining quality of the environment in general and the ecological damage caused by "recreational" subdivisions in particular has resulted in recent legislation broadening the scope of regulation involved in the review of subdivision maps. Because the legislature felt that local governments might approve unwise subdivisions even though their adverse consequences were apparent, this new expansion of authority was laid down in terms of mandatory denials—a subdivision map must be denied approval if an adverse finding is made. The thrust of the California Environmental Quality Act of 1970 (CEQA) and Assembly Bill 1301 is to give local governments broad enough authority to implement any regulatory scheme reasonably necessary to cope with any environmental threat posed by a subdivision and to implement the community's general plan.

1. *General Plan Consistency*

Subdivision regulation is only one element of what should be a comprehensive scheme of regulating land development.[88] The pri-

86. U.S. v. Miller, 317 U.S. 369 (1943).
87. S.B. 977 (proposed CAL. GOV'T CODE §66479 *et seq.*).
88. T. KENT, THE URBAN GENERAL PLAN 73 (1964).

mary element in the scheme should be the general plan since that is the tool by which the policy of the community as a whole is set.[89] In formulating the plan, California law requires[90] that the local government address itself to many issues, including land use, circulation, conservation, and housing. In addition, the general plan *may* contain any other element which the local government sees fit to include, such as transit, recreation, and capital improvement elements.[91] The law also allows local governments to formulate and adopt specific plans which are detailed development plans for particular areas within their respective jurisdictions.[92] The formulation of such general and specific plans involves studies by professional planners,[93] consultation with public and private entities,[94] public hearings and recommendation by the planning commission,[95] and formal adoption by the governing body.[96]

General and specific plans are not in themselves enforceable ordinances or regulations of the local government.[97] The local government regulates land development by means of zoning,[98] subdivision,[99] and other ordinances. Logically, these devices should be used in their particular applications to carry out the policies set forth in the general and specific plans. However, prior to the enactment of Assembly Bill 1301, there was no requirement that the regulatory ordinances be consistent with local planning. Therefore, the general plan remained only an idealistic statement of policy which might or might not be carried out and was often adopted merely to comply with state[100] and federal[101] laws. The real decisions were made in a sometimes arbitrary manner of case-by-case amendment of zoning ordinances and by the approval of individual zoning variances and subdivision map applications.

In its 1971 session, the California Legislature passed Assembly Bill 1301,[102] a bill which was part of a package formulated by a select

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89. "Each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city . . . ." CAL. GOV'T CODE §65300.
90. CAL. GOV'T CODE §65302.
91. CAL. GOV'T CODE §65303.
92. CAL. GOV'T CODE §65450 *et seq.*
93. See D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL §15 (1971).
94. CAL. GOV'T CODE §§65304, 65305, 65306.
95. CAL. GOV'T CODE §§65351, 65352.
96. CAL. GOV'T CODE §65357.
97. See D. HAGMAN, *supra* note 93, at §23.
98. CAL. GOV'T CODE §65800 *et seq.*
99. CAL. BUS. & PROF. CODE §11526.
100. CAL. GOV'T CODE §65300 *et seq.*
101. 42 U.S.C. §§1455(a)(iii), 1960(b)(1) (1969).
102. CAL. STATS. 1971, c. 1446, at 2854.

Assembly subcommittee[103] to curb the abuses of the Subdivision Map Act in rural areas. One of its provisions[104] requires that all zoning ordinances of a local government be consistent with its general or specific plan. In addition, the bill added the following language to the Subdivision Map Act:

> No city or county shall approve a tentative or final subdivision map unless the governing body shall find that the proposed subdivision, together with the provisions for its design and improvement, is consistent with applicable general or specific plans for the city or county.[105]

Consistent with the above, the following language was added to the definition of "design":[106]

> "Design" also refers to such specific requirements in the plan and configuration of the entire subdivision as may be necessary or convenient to insure conformity to or implementation of applicable general or specific plans of a city or county.[107]

The following language was added to the definition of "improvement":[108]

> "Improvement" also refers to such specific improvements the installation of which, either by the subdivider, by public agencies, by private utilities, or by a combination thereof, is necessary or convenient to insure conformity to or implementation of applicable general or specific plans of a city or county.[109]

These amendments extend the scope of regulatory authority beyond regulation of mere "design" and "improvement" as the Act provided before 1971, since first, the definitions of "design" and "improvement" were expanded to include general and specific plan requirements, and secondly, consistency with the general plan is to be determined by evaluating the subdivision as a whole, not merely with regard to those matters specified in the design and improvement definitions.

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103. Assembly Select Joint Subcommittee on Premature Subdivisions, created by Speaker Monagan in 1970.
104. CAL. GOV'T CODE §65860.
105. CAL. BUS. & PROF. CODE §11526(c). S.B. 977 would clarify this section by adding language similar to that added by CAL. STATS. 1972, c. 639, at 1190, to the zoning law (CAL. GOV'T CODE §65860). Proposed CAL. GOV'T CODE §66473.5 would read:

> A proposed subdivision shall be consistent with a general plan or a specific plan only if the local agency has officially adopted such a plan and the proposed subdivision or land use is compatible with the objectives, policies, general land uses, and programs specified in such a plan.

106. See definition of "design" in text accompanying note 54 *supra*.
107. CAL. BUS. & PROF. CODE §11510, *amended*, CAL. STATS. 1971, c. 1446, at 2854.
108. See definition of "improvement" in text accompanying note 55 *supra*.
109. CAL. BUS. & PROF. CODE §11511, *amended*, CAL. STATS. 1971, c. 1446, at 2854.

Although the plan-consistency requirement limits the discretion of local governments in the regulation of subdivisions by prohibiting them from approving subdivisions which violate their general plans, this is a beneficial provision in that it forces local governments to develop workable community plans and adhere to them. Additionally, the requirement prohibits local governments from arbitrarily approving subdivisions which violate basic principles and policies adopted for the public at large. It could also limit corruption on the part of local planning commissions and legislative bodies by requiring them to adhere to a general plan which was formulated and adopted prior to the submission of any individual subdivision application.

However, the most important aspect of the plan-consistency requirement of Assembly Bill 1301 is the additional regulatory authority granted to local governments. Because the general plan may contain those matters which the local government finds to be in the public interest of the community, and local governments may impose requirements necessary or convenient to implement the plan and must deny approval to a subdivision which is not consistent with the plan, it is clear that the local government's scope of regulation is potentially as broad as the public interest. This appears to be a significant new measure of regulatory authority. The following are three examples of regulatory actions which could possibly be permitted under the plan-consistency provision:

1. The general plan could provide for a policy of "sequential development," whereby certain designated land within the community is planned to be developed immediately, whereas other land is to be held in "reserve" to be sequentially developed at specified future times.[110] Furthermore, the local capital improvement plan could call for the construction of no urban service facilities in the "reserve" area until it is scheduled for development. Consequently, the local government would have to reject the subdivision map of an owner of land within the "reserve" area since subdivision of his land would violate the general plan. Care should be taken in the utilization of this scheme to manage and control urban growth so as not to exclude new residents entirely.[111]

110. Illustrative is the regulatory scheme upheld by the New York Court of Appeals in Golden v. Town of Ramapo, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972).

111. Exclusion of new residents may prove to be unconstitutional. See Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (1971); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970). In addition, it may violate CAL. GOV'T CODE §65008 if it excludes members of religious or ethnic minorities from the community.

2. The housing element[112] of the general plan could call for the integration of racial and economic groups throughout the community.[113] It could also call for all development to provide some low-income housing. When a subdivider applies for map approval, the local government could require the developer to sign, as a condition to map approval, an agreement whereby he agrees to develop part of his land for low- or moderate-income housing pursuant to the plan.[114]

3. Finally, the capital facilities plan could call for the dedication by the subdivider of land needed to provide any public services to the subdivision. Furthermore, the subdivider could be required to donate funds for the purpose of constructing necessary buildings on such land. Under this authority, land and funds may be required to be dedicated for such purposes as fire stations, police stations, schools, libraries, open space, transit routes and facilities, and other public purposes. In imposing these requirements, local governments should be certain that: (1) they comply with the constitutional standard of reasonableness;[115] (2) the required dedications are for facilities actually and clearly called for in the general plan in order to serve the proposed subdivision or its residents or to alleviate a problem which the subdivision will cause; and (3) the ordinance calling for the dedications imposes the requirement fairly and uniformly on all subdivisions.

2. *Environmental Considerations*

One of the strongest objections to rural subdivisions was that they were often executed without regard to their damage to the environment.[116] In addition, environmental degradation resulting from reckless subdividing poses a serious threat to urban as well as rural areas.[117] Legislative investigations into the adverse environmental impact of subdivisions resulted in the addition of Business and Professions Code

112. CAL. GOV'T CODE §65302(c).

113. The California Commission on Housing and Community Development guidelines, adopted June 17, 1971, call for the housing element to "promote and insure the provision of adequate housing for all persons regardless of income, age, race, or ethnic background."

114. Of course, the requirement must be reasonable. See Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. CAL. L. REV. 1 (1970).

115. See text accompanying notes 193-213 *infra*.

116. See generally, *Hearings on Premature Subdivisions, S.B. 396, S.R. 326, before the Senate Local Government Committee and the Senate Select Committee on Urban Affairs*, Dec. 7-8, 1970.

117. Testimony of Betsy H. Laties before the *California Environmental Quality Study Council*, *supra* note 29, at 14.

Section 11549.5,[118] which *requires* a local government to deny approval to a subdivision if it makes any one of the following findings:

a. that the proposed map is not consistent with applicable general and specific plans;

b. that the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans;

c. that the site is not physically suitable for the proposed type of development;

d. that the site is not physically suitable for the proposed density of development;

e. that the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and unavoidably injure fish or wildlife or their habitat;

f. that the design of the subdivision or the type of improvements is likely to cause serious public health problems;

g. that the design of the subdivision or the type of improvements will conflict with easements acquired by the public at large for access through or use of property within the proposed subdivision. In this connection, the governing body may approve a map if it finds that alternate easements for access or for use will be provided, and that these will be substantially equivalent to ones previously acquired by the public.[119]

It should be emphasized that the above section is mandatory and that if one of the findings is made, the local government *must* deny approval. However, since a finding will not be overturned except for lack of substantial evidence,[120] the discretion of the local government is thereby broadened. The practical effect of the section is that: (1) it mandates local governments to consider the environment; (2) it expressly permits local governments to disapprove subdivisions which are found to be harmful to the environment; and (3) it gives interested parties the right to sue for a writ of mandate[121] to overturn a subdivi-

118. CAL. STATS. 1971, c. 1446, at 2854.

119. This subsection was inserted to protect the rights of the public to implied easements recognized in the cases of Gion v. Santa Cruz and Dietz v. King, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

Because subdivisions tend to increase the number of automobiles in a community, thereby worsening the air pollution problem, the Air Resources Board has recommended that the law be amended to require, additionally, that a subdivision must be disapproved if it will directly or indirectly generate emissions which will cause specified limits to be exceeded. CALIFORNIA AIR RESOURCES BOARD, A REPORT TO THE LEGISLATURE ON GUIDELINES FOR RELATING AIR POLLUTION CONTROL TO LAND USE AND TRANSPORTATION PLANNING IN THE STATE OF CALIFORNIA 12 (1973).

120. CAL. CODE CIV. PROC. §1094.5.

121. *Id.*

sion approval if the proposed subdivision clearly violates one of the provisions of the section.

3. The California Environmental Quality Act

The California Environmental Quality Act of 1970 (CEQA),[122] as interpreted in *Friends of Mammoth v. Board of Supervisors*[123] and as amended in 1972,[124] seems to have a peculiar impact upon the application of Business and Professions Code Section 11549.5[125] in that an environmental impact report (EIR), which comments upon the amount of substantial environmental damage or injury to fish or wildlife caused by the subdivision, could constitute a finding on those matters which would necessitate the denial of approval of the subdivision map. The reason for this result is that the standard for the finding under both CEQA and the Subdivision Map Act is the same.

CEQA requires that an EIR be prepared by any governmental agency before it approves a private project having a significant effect on the environment if the agency has the discretion of either approving or disapproving the project.[126] CEQA specifically includes tentative subdivision maps in the category of discretionary projects for which an EIR is required.[127] An EIR is not required for an act of approval which is simply ministerial and involves no discretion on the part of the governmental agency.[128] While CEQA gives no examples of ministerial projects, the guidelines promulgated by the Resources Agency[129] under the authority of CEQA[130] list the "approval of a final subdivision map"[131] as an act which will nearly always be ministerial because the final map may not be denied if it substantially complies with the conditions imposed upon the tentative map.[132]

A striking similarity appears between the provisions of CEQA and Section 11549.5(e) of the Subdivision Map Act, which similarity is likely to have a profound effect upon the interpretation and practical application of both acts. It should be pointed out that the EIR prepared under CEQA is an "informational document which . . . shall

122. CAL. PUB. RES. CODE §21100 *et seq.*
123. 8 Cal. 3d 1, 500 P.2d 1360, 104 Cal. Rptr. 16 (1972).
124. CAL. STATS. 1972, c. 1154, at 2271.
125. Summarized in text accompanying notes 118-19 *supra.*
126. CAL. PUB. RES. CODE §21080.
127. *Id.*
128. CAL. PUB. RES. CODE §21080(b).
129. CAL. ADMIN. CODE tit. 14, §15000 *et seq.*
130. CAL. PUB. RES. CODE §21083.
131. CAL. ADMIN. CODE tit. 14, §15073(c).
132. CAL. BUS. & PROF. CODE §11549.6; see Great Western Savings & Loan Ass'n v. Los Angeles, 31 Cal. App. 3d 403, 107 Cal. Rptr. 369 (1973).

be considered by every public agency . . . ."[133] This section was added in 1972 because the author of the original CEQA and the 1972 amendments believed that the EIR should be carefully considered but, absent abuse of discretion, need not be conclusive on the issue of approving or rejecting a project.[134] This interpretation is concurred in by the guidelines promulgated by the Resources Agency pursuant to the CEQA.[135] Therefore, although there are cogent arguments to the contrary, it is doubtful that CEQA standing alone could require disapproval of a project if the local government can produce substantial social or economic evidence favoring approval. However, notwithstanding the intent of CEQA, because of the environmental language in the Subdivision Map Act, it seems that the EIR could be conclusive in determining whether a subdivision must be rejected.

An EIR is required whenever a project "may have a significant effect on the environment."[136] The guidelines define "significant effect" as "substantial adverse impact on the environment."[137] It will be recalled that Section 11549.5(e) of the Subdivision Map Act *requires* disapproval of a tentative map if the design of the subdivision or proposed improvements are "likely to cause substantial environmental damage." The only difference between the finding necessary to require an EIR and the finding necessary to mandate disapproval of the subdivision is the difference between the terminology "may have" and "likely to cause." This is the gap which the EIR is designed to fill—to determine to what extent potentially harmful projects are *actually* likely to harm the environment. Therefore, if the EIR indicates that a subdivision is likely to harm the environment, the subdivision must be disapproved.

There are certain circumstances detailed in the guidelines[138] which, if they occur, automatically cause a project to be designated as having a "significant effect." The circumstances are broad and loosely defined, but they serve as a guide to local governments:

1. impacts which have the potential to degrade and curtail the range of the environment;
2. impacts which achieve short-term, to the disadvantage of long-term, environmental goals;
3. impacts for a project which are individually limited but cumu-

133. CAL. PUB. RES. CODE §21061.
134. Interview with John T. Knox, Assemblyman for 11th District, Richmond, Calif., Sept. 24, 1972.
135. CAL. ADMIN. CODE tit. 14, §15012.
136. CAL. PUB. RES. CODE §§21100, 21151.
137. CAL. ADMIN. CODE tit. 14, §15040.
138. CAL. ADMIN. CODE tit. 14, §15082.

latively considerable;

4. the environmental effects of a project will cause substantial adverse effects on human beings either directly or indirectly.

A finding of any of the above should result in mandatory denial of approval under Section 11549.5.

In one situation, a local government may be precluded from finding substantial environmental damage by operation of CEQA because the Resources Agency has deemed that there will be none. Under the provision for categorical exemptions,[139] the Resources Agency has listed projects which have been determined to have no significant effect on the environment.[140] The only such project involving the Subdivision Map Act is the "division of existing multiple family rental units into condominiums," which the guidelines say has no significant effect on the environment. This is a significant exemption because in many areas of the state existing apartment buildings are being converted into condominiums,[141] and some local governments have advanced the argument that although the physical structure of the building remains unchanged, a condominium has a different effect on the environment than an apartment building because of the different lifestyle and activities of the people who reside in each type of structure.[142] The guidelines may exempt condominiums from the mandatory denial provision for environmental reasons and may establish a presumption against the reasonableness of such a denial.[143]

For projects other than those which are deemed to have no significant effect on the environment an EIR must be prepared. It is not required that the EIR itself contain a conclusion stating whether there would be substantial environmental damage or not, but EIR's generally contain definite statements regarding the environmental impact which become findings by the adopting agency. The EIR must be considered by the local government in making its decision on the project[144] and, therefore, also in making the finding of substantial environmental damage required in Section 11549.5. The EIR is undoubtedly the best, if not the only, record to be relied upon in determining whether a

139. CAL. PUB. RES. CODE §21084.

140. CAL. ADMIN. CODE tit. 14, §15101.

141. Such conversion is subject to the provisions of the Subdivision Map Act. CAL. BUS. & PROF. CODE §11535.1.

142. Senator Don Grunsky, News Release, March 13, 1973.

143. S.B. 430, 1973-74 Regular Session, would have granted local governments the authority to deny approval to condominium maps. It was referred to interim study by the Senate Committee on Local Government. Legislative Counsel expressed the opinion that such regulatory action may be unconstitutional. Cal. Legislative Counsel Opinion #10489, July 27, 1973, on file with the Senate Committee on Local Government.

144. CAL. PUB. RES. CODE §21061.

finding pursuant to that section is supported by substantial evidence. Therefore, even if a finding under Section 11549.5 is not by definition required by an adverse EIR, it would be an abuse of discretion not to make the finding if there is substantial evidence in the EIR showing adverse impact and no substantial evidence showing that such an impact does not exist.

A problem which local governments may face is that of obtaining sufficient information to make the environmental determination required by CEQA and Section 11549.5. While the Subdivision Map Act does not expressly authorize land use regulation, in most cases the subdivision of land is a necessary element in a development scheme involving change (or intensification) of land use. Consequently, the change in land use will be a "direct [or] indirect impact of the project,"[145] thereby requiring evaluation of the proposed land use in making the findings pursuant to CEQA[146] and the Subdivision Map Act.[147] However, there are likely to be cases in which a landowner wants to divide a large parcel located in an unrestricted zone[148] and to sell the subdivided parcels to developers who will develop them for uses which are not now known. He will, therefore, not be able to tell the local government to what use the property will be put, and the local government will have insufficient information upon which to base its EIR. Furthermore, the subdivision map proceeding may be the last opportunity the local government has to decide on the development of the property (and therefore the last opportunity to prepare an EIR), since there would be no need for a zoning change and building permits are ministerial acts in most localities. In such a situation, it would appear that the local government has the following options:

1. It may prepare an EIR and make a finding pursuant to Section 11549.5. In doing so, it must determine the impact of the division of land upon the environment which may occur fol-

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145. CAL. ADMIN. CODE tit. 14, §15143(a).

146. CAL. ADMIN. CODE tit. 14, §15143(a) requires the EIR to include "changes induced [by the proposed project] in population distribution, population concentration, [and] the human use of land . . . ."

147. Several provisions of the Subdivision Map Act explicitly or implicitly require the local government to take land use into consideration. For example, CAL. BUS. & PROF. CODE §11546(h) forbids park dedications to be required of industrial subdivisions. Section 11549.5 requires disapproval if the site is not physically suitable for the proposed type or density of development. Furthermore, regulation of "design" and "improvement" would be meaningless unless the proposed use of the land were known. A shopping district would have need for different kinds and configurations of streets, sidewalks, and other facilities than would a second home development.

148. Such zones are common in jurisdictions having cumulative zoning wherein the least restrictive zone (*e.g.*, manufacturing) allows all uses permitted in more restrictive zones.

lowing the uses permitted within the zone.[149] Because of the large number of uses permitted in unrestricted zones, this would appear to be very difficult and would of necessity be a vague and general EIR giving little, if any, specific information on the ultimate environmental consequences of the subdivision.[150]

2. As an alternative, the local government could offer to work out a specific plan[151] and/or rezoning as a condition to the approval of the subdivision map. Exact uses of the land could be formulated and an environmental impact report prepared on the development as a whole. This alternative may not be desirable to the subdivider since it would tend to restrict the market for his parcels.

3. The local government could rezone its undeveloped land to provide for a "holding zone" classification by which any development of the property would require rezoning or a conditional use permit.[152] The subdivision of the property, therefore, could not possibly contribute to any change in use without further approval of the local government (at which time a thorough EIR may be prepared) and, consequently, the local government could delay its option of approving or disapproving the ultimate development of the land to a time when more precise information is available. However, even if such a course is followed, a subdivision must not be approved which, by its very design, necessitates one particular use without a detailed analysis of the environmental impact of that use being made by the local government.

C. State Review and Regional Regulation of Subdivisions

Up to this point, the only subdivision regulation which has been discussed has been that which is undertaken by cities and counties pursuant to the Subdivision Map Act.[153] For a majority of subdivi-

149. It may be argued that there are situations in which the division of the land has no impact upon the development which follows. However, such a case would probably be uncommon since the division of land into parcels of appropriate size generally makes land more accessible for development.

150. The Secretary of the Resources Agency has proposed to amend the CEQA guidelines to provide that the level of specificity of the EIR will correspond to the level of specificity involved in the underlying activity described in the EIR. Proposed CAL. ADMIN. CODE tit. 14, §15147; N. Livermore, Proposed Amendments to Guidelines for Environmental Impact Reports, Aug. 31, 1973, at 17.

151. CAL. GOV'T CODE §65450 *et seq.*

152. The "holding zone" and other forms of individualized land use regulation are coming into greater favor with the courts, so long as such action is accompanied by comprehensive planning. Heyman, *Innovative Land Regulation and Comprehensive Planning*, 13 SANTA CLARA LAW. 183, 225 (1973). However, a community may still encounter difficulty in having the validity of such zoning upheld. CONTINUING EDUCATION OF THE BAR, CALIFORNIA ZONING PRACTICE §6.25, at 216 (1969).

153. This comment, concerned with environmental regulation, does not discuss the

sions in California, this is all the regulation which takes place. However, some areas of the state, such as the coastline, sparsely populated areas of the foothills and mountains, San Francisco Bay, and Lake Tahoe are considered to be of such importance to the environment of the state or a region of the state that additional review or regulation is necessary. Consequently, over the last several years the state has provided for safeguards in an attempt to ensure wise local subdivision regulation in these environmentally critical areas.

In 1970, the legislature responded to the problem of large-scale, poorly planned "recreational" subdivisions ravaging rural foothill and mountain areas of the state by enacting a package of bills, including Assembly Bill 1301 (applicable to all subdivisions) which has been discussed above.[154] Another bill, Assembly Bill 1300,[155] dealt solely with "land projects" which are subdivisions, containing 50 or more unimproved parcels in an area in which less than 1,500 registered voters live within two miles, offered for sale for other than commercial purposes.[156] The law requires that when a subdivider files a tentative[157] map for a land project, the local government must submit the map to the state's Office of Intergovernmental Management and request an evaluation of the environmental impact of the proposed subdivision.[158] The Office of Intergovernmental Management distributes copies of the proposed subdivision map to state agencies for review and comment and reports the reactions of the agencies to the local government within 30 days.[159] With regard to subdivisions not defined as land projects, the local government may, but is not required to, submit the tentative map to the Office of Intergovernmental Management.[160]

Concern over the rapid and uncontrolled filling of San Francisco Bay led to the establishment of the San Francisco Bay Conservation and Development Commission, first as a temporary agency in 1965,[161] and finally as a permanent agency in 1969.[162] The jurisdiction of the Commission includes the Bay, a 100-foot shoreline band around the Bay, saltponds, managed wetlands, and certain other waterways.[163]

California Real Estate Commissioner's considerable regulatory powers regarding the commercial aspects of subdivisions contained in the Subdivided Lands Law, CAL. BUS. & PROF. CODE §11000 *et seq.*

154. See text accompanying notes 42-46 and 88-121 *supra.*
155. CAL. STATS. 1971, c. 1327, at 2628.
156. CAL. BUS. & PROF. CODE §11000.5.
157. CAL. BUS. & PROF. CODE §11550.
158. CAL. BUS. & PROF. CODE §11550.1.
159. CAL. GOV'T CODE §12037.
160. CAL. BUS. & PROF. CODE §11550.1.
161. CAL. STATS. 1965, c. 1162, at 2941.
162. CAL. STATS. 1969, c. 713, at 1396.
163. CAL. GOV'T CODE §66610.

The law provides that anyone who wishes to place fill, extract materials, or make any substantial change in the use of land within the Commission's jurisdiction must apply for a permit from the Commission in addition to any permission required to be obtained from local governments.[164] "Substantial change" has been defined as "any . . . activity . . . [which] either: (1) has an estimated cost of $50,000 or more, or (2) involves a change in the general category of use . . . ."[165] This definition would appear to include subdivisions. The city or county to which application for the subdivision map approval has been made is required to report its investigation of the project to the Commission within 90 days,[166] and the Commission is to give full consideration to it.[167] The Commission holds hearings and conducts investigations and may grant or deny the permit. It must grant the permit if it finds that the subdivision is either necessary for the public health, safety, or welfare or is consistent with the Commission's Bay Plan.[168] If the project is on the shoreline band but outside the special areas designated in the Bay plan as "water-oriented priority land use areas,"[169] it may be denied by the Commission only if it fails to provide maximum feasible public access consistent with the proposed project to the bay and its shoreline.[170]

In 1972 the voters passed Proposition 20, an initiative measure which enacted the California Coastal Zone Conservation Act.[171] This Act establishes a California Coastal Zone Conservation Commission[172] and six regional commissions.[173] The regional commissions have powers similar to the Bay Conservation and Development Commission within the "permit area,"[174] an area between the seaward limit of the state and 1,000 yards landward from mean high tide. The Act expressly requires any person wishing to subdivide land located within the permit area to obtain a permit from the appropriate regional commission.[175] An application for a permit may not be made until approval has been granted by the appropriate local government.[176] However, the commission is notified of the application to the local government at the time such application is made, and the commission has

164. CAL. GOV'T CODE §66632.
165. CAL. ADMIN. CODE tit. 14, §10133.
166. CAL. GOV'T CODE §66632(b).
167. CAL. GOV'T CODE §66632(c).
168. CAL. GOV'T CODE §66632(f).
169. CAL. GOV'T CODE §66611.
170. CAL. GOV'T CODE §66632.4.
171. CAL. PUB. RES. CODE §27000 *et seq.*
172. CAL. PUB. RES. CODE §27200.
173. CAL. PUB. RES. CODE §27201.
174. CAL. PUB. RES. CODE §27104.
175. CAL. PUB. RES. CODE §§27103, 27400.
176. CAL. ADMIN. CODE tit. 14, §13210.

an opportunity to make recommendations to the local government.[177] The regional commission may issue no permit for a subdivision which will have a substantial adverse environmental or ecological effect or which violates the principles of the Act.[178] Any aggrieved person may appeal the decision of a regional commission to the state commission.[179] With regard to subdivisions which are not within the permit area but are within the coastal zone (which generally extends inland from the ocean to the highest point of the nearest mountain range[180]), no permit is required, but local governments must submit to the regional commission all proposed subdivision maps and the commission may transmit its recommendations to the local government.[181]

Finally, the State of California and the State of Nevada entered into a bi-state compact approved by Congress which established the Tahoe Regional Planning Agency.[182] The Agency is empowered to formulate an interim regional plan[183] and to adopt all necessary regulations to effectuate the plan, including regulation of subdivisions.[184] Wherever possible, the regulations are to be general and regional in nature.[185] The regulations are enforced by the Agency itself and by local governments.[186] No permit procedure is established in the compact.

Regulation of subdivisions by regional agencies, in addition to regulation by local governments, appears to be necessary in these cases in order to preserve valuable regional resources. However, in providing for regional regulation, the procedure for subdivision approval has become more complicated and involves more time and expense to all parties concerned.[187] Possible solutions to this problem would be to provide for greater participation by the regional agency in the local regulatory procedure or to provide for concurrent regulation by the regional and local agencies.

CONSTITUTIONAL LIMITATIONS UPON THE REGULATION OF SUBDIVISIONS

The United States Constitution prohibits the taking of private prop-

177. CAL. BUS. & PROF. CODE §11528.2.
178. CAL. PUB. RES. CODE §27402.
179. CAL. PUB. RES. CODE §27423.
180. CAL. PUB. RES. CODE §27100.
181. CAL. BUS. & PROF. CODE §11528.2.
182. CAL. GOV'T CODE §66801.
183. CAL. GOV'T CODE §66801, art. V(d).
184. CAL. GOV'T CODE §66801, art. VI(a).
185. *Id.*
186. CAL. GOV'T CODE §66801, art. VI(b).
187. Interview with Michael Wilmar, Planning Director of the San Francisco Bay Conservation and Development Commission, San Francisco, Calif., Sept. 21, 1973.

erty for public use without just compensation.[188] Because regulation of the use of land may, if excessive, result in a compensable taking,[189] it is apparent that there is an important constitutional restraint on the power to regulate subdivisions. Furthermore, by regulating subdivisions in a manner which unreasonably precludes people from moving into the community, the regulation may violate the due process clause of the fourteenth amendment. This section will discuss two areas in which there are possible constitutional problems—"sequential development" and mandatory dedications.

A. Sequential Development

It was noted above that the plan-consistency provision of the Subdivision Map Act allows local governments to regulate subdivisions in such a way as to implement a plan which provides for the community to develop in an orderly manner—some land being developed immediately, other land scheduled to be developed at a future time.[190] There are two constitutional challenges which could be made to such a scheme: (1) that it is a taking because it deprives the owner of the use of his land for a period of time; or (2) that it violates the due process requirement of reasonableness because it tends to exclude new residents from the community by limiting the number of new housing units. No California appellate court has dealt with this problem; however, the New York Court of Appeals upheld the constitutionality of a "sequential development" scheme in the case of *Golden v. Town of Ramapo*.[191] The court dispensed of the "taking" challenge by noting that the land use restrictions imposed are not absolute in that, first, the capital facilities, the existence of which are prerequisites to permission for development, were being constructed by the town in accordance with the plan and that developers could accelerate the date of development by constructing the facilities themselves and, secondly, many uses, such as agriculture and single homes, not requiring subdivision of land would be permitted before the land was scheduled for development. With regard to the exclusionary zoning argument, the court noted that "[w]hat we will not countenance . . . under any guise, is community efforts at immunization or exclusion," but that Ramapo's requirements "seek not to freeze population at present levels but to

188. U.S. CONST. amend. V.
189. See Van Alystyne, *Taking or Damaging by the Police Power: the Search for Inverse Condemnation Criteria*, 44 SO. CAL. L. REV. 1 (1970).
190. See, for example, Golden v. Town of Ramapo, 334 N.Y.S.2d 138, 285 N.E.2d 291 (1972).
191. *Id.* For an excellent history of the case by the town's attorney, see *Editor's Comment*, 4 URB. LAW. No. 3, ix (1972).

maximize growth by the efficient use of land . . . ."[192]

B. Constitutionality of Dedication Requirements

As urbanization accelerated in recent years, local governments began to demand subdivision dedications which not only provide absolute necessities to the lot owners, but mitigate the adverse impact of the subdivision on the communty, provide governmental services to subdivision residents, and implement the recommendations of the local general plan. The question of when a dedication requirement becomes an impermissible taking of private property without compensation has, with these developments, become more pressing. Although the cases vary considerably as to their approaches and their conclusions, one principle is commonly espoused—*the dedication must be reasonably necessitated by the nature of the subdivision if it is to be held a reasonable regulation.* The specifics of the analyses by the various courts is simply one of degree—must the subdivision be "uniquely and specifically" responsible for the needs which lead to the dedication requirement, or must there be only some reasonable relation between the subdivision and the requirement?

The California approach (also followed by New York) is the most logical and consistent with the United States Constitution. However, because various other state courts have misinterpreted California decisions, confusion and misconception have been generated.[193] The California approach, which will be analyzed below, can best be explained by the simple proposition that a valid dedication requirement is no more nor less than an exercise of the state's police power. If the local government goes beyond the reasonable use of its police power and requires an improper dedication, a taking thereby occurs for which the owner may recover from the local government in an action of inverse condemnation. The fact that a physical taking has occurred has nothing to do with whether a legal "taking" has occurred. When the government physically takes property, as happens in a dedication, the regulation giving rise to the requirement is to be judged according to the same standard as in the case in which property is restricted in use, but not taken by a regulation. The standard of reasonableness consists of two parts: (1) the regulation must be in furtherance of the public health, safety, or welfare; and (2) the regulation must be reasonable as to the person against whom it is enforced. Any

192. 334 N.Y.S.2d at 152, 285 N.E.2d at 302.
193. *E.g.*, Pioneer Savings & Trust Co. v. Village of Mt. Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1962).

further restraints upon the power to require a dedication are not founded in the Constitution.

The leading case demonstrating the California position is *Ayres v. City of Los Angeles*,[194] a 1949 case which upholds a street dedication requirement. The subdivider owned 13 acres of land within a 3,042-acre tract known as the Westchester District of Los Angeles. The district was bisected by two major streets, Manchester and Sepulveda (the latter of which the court calls a "highway"). The subdivider's land lay along Sepulveda although all the proposed lots faced on adjoining side streets and no access was provided to them by way of Sepulveda. The city required him, as a condition for approval of the map, to make four dedications which he considered objectionable —all four related to widening streets running through or adjacent to his subdivision to ease the flow of traffic. For example, the subdivider was required to dedicate a ten-foot strip for the widening of Sepulveda and a ten-foot planting strip along Sepulveda. The court found that the city had adopted a plan for the district which included the widening of the highway, and that a uniform dedication requirement was imposed for the widening of Sepulveda Boulevard and for a planting strip along the highway.[195] In upholding the dedication requirement, the court reasoned,

> [I]t is the petitioner who is seeking to acquire the advantages of lot subdivision and upon him rests the duty of compliance with *reasonable* conditions for design, dedication, improvement and restrictive use of the land so as to conform to the *safety and general welfare* of the lot owners in the subdivision *and of the public*.[196]

Although Justice Shenk gives no definite test or rule for determining the reasonableness of the dedication,[197] the same tests are used for dedications as for other uses of the police power—*i.e.*, does the public necessity outweigh the private harm caused by the regulation, and is the regulation applied fairly and uniformly or arbitrarily against this one landowner? The *Ayres* case demonstrates that benefit to the community (to which the subdivision belongs and which benefits the subdivision shares), and not some special relationship to the subdivision, is required for a valid dedication requirement.

The *Ayres* case was followed in subsequent California cases involving dedication required as condition for other types of local government

194. 34 Cal. 2d 31, 207 P.2d 1 (1949).
195. *Id.* at 33-34, 207 P.2d at 2-3.
196. *Id.* at 42, 207 P.2d at 7 (emphasis added).
197. The court says, "Questions of reasonableness and necessity depend on matters of fact. They are not abstract ideas or theories." *Id.* at 41, 207 P.2d at 7.

permit approval. In *Southern Pacific v. City of Los Angeles*,[198] for example, a dedication for the widening of a major street (the need for which was attributable to the general increase in traffic of the city as well as the developer's activities) was upheld because plaintiff-developer had contributed to the need for such widening although his was not an exclusive contribution.

In 1971 the California Supreme Court in *Associated Homebuilders v. Walnut Creek*[199] reiterated its stand in *Ayres* in a test of the Quimby Act[200] park dedication provisions. In rejecting plaintiff's claim that

> a dedication requirement is justified only if it can be shown that the need for additional park and recreational facilities is attributable to the increase in population stimulated by the new subdivision alone and the validity of the section may not be upheld upon the theory that all subdivisions to be built in the future will create the need for such facilities,[201]

the court cited *Ayres* for the proposition that

> a subdivider who was seeking to acquire the advantages of subdivision had the duty to comply with reasonable conditions for dedication so as to conform to the welfare of the lot owners and the general public. We held, further, that the conditions were not improper because their fulfillment would incidentally benefit the city as a whole or because future as well as immediate needs were taken into consideration and that potential as well as present population factors affecting the neighborhood could be considered in formulating the conditions imposed upon the subdivider. We do not find in *Ayres* support for the principle urged by Associated that a dedication requirement may be upheld only if the particular subdivision creates the need for the dedication.[202]

The decision went on to say by way of dictum that the Constitution does not require the dedication to serve the subdivision from which it was exacted if that subdivision is already served by adequate existing facilities. All that is required is a reasonable determination of the proper amount of park land to serve a stated number of residents of the community and a use of the dedicated fees to maintain the proper balance between people and facilities.[203]

An argument may be advanced that the *Associated Homebuilders*

198. 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1966).
199. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).
200. CAL. BUS. & PROF. CODE §11546.
201. 4 Cal. 3d at 637-38, 484 P.2d at 610, 94 Cal. Rptr. at 634.
202. *Id.*
203. *Id.* at 640 n.6, 484 P.2d at 612 n.6, 94 Cal. Rptr. 636 n.6.

decision is limited to its particular type of dedication requirement—park and recreation land—because of the peculiar relationship between the development of a subdivision and the disappearance of open space land. The court's emphasis upon the unique problem of preserving open space lends some credence to this theory.[204] However, it should be pointed out that the holding was supported by two independent lines of authority, either one of which would uphold a dedication: (1) *Ayres v. City of Los Angeles*,[205] the primary authority upon which the holding rests;[206] and (2) open space dedications would be upheld because of the unique problem presented by the decrease of open space land in California and the recent adoption of Article XXVIII of the Constitution which declares that it is in the best interest of the state to preserve open space.[207] In a footnote the court emphasized that it does not imply that exactions other than for open space are invalid, but only that open space exactions are justified by additional factors not present in other cases.[208] With regard to other exactions, although the open space argument cannot be used, it appears that they would be held valid under the authority of *Ayres* since that case did not rest on an open space argument.

A more convincing argument against increased use of dedication requirements is that by increasing the expense of housing with additional cost factors, poor people and minorities are prohibited from purchasing or leasing housing and moving into the community.[209] This is akin to exclusionary zoning, which has been carefully scrutinized and has been held unconstitutional by a few state courts.[210] The California Supreme Court indicates that if the dedication requirements were "deliberately set unreasonably high in order to prevent the influx of economically depressed persons into the community," legal problems

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204. *Id.* at 641, 484 P.2d at 610-11, 94 Cal. Rptr. 634-35.
205. 34 Cal. 2d 31, 207 P.2d 1 (1949).
206. 4 Cal. 3d at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634.
207. *Id.*
208. *Id.* at 642 n.8, 484 P.2d at 613 n.8, 94 Cal. Rptr. at 637 n.8.
209. Richard Babcock and David Callies, in a paper delivered at a Resources for the Future Forum, Apr. 13-14, 1972, stated,

> The ecological crusade, if taken literally, will either stifle growth or will drive up housing costs; in either event the heaviest burden will fall on the poor. By the same token, the production of all the housing that is needed, at the right place and near job opportunities, may be expected to have adverse effects on the environment that has become so precious to the white middle class.

Reprinted in, Babcock & Callies, *Ecology and Housing: Virtues in Conflict*, MODERNIZING URBAN LAND POLICY 206 (M. Clawson ed. 1973). Conservationists disagree with this point of view, arguing that, first, a sufficient amount of low-cost housing can be provided without sacrificing reasonable environmental objectives and, secondly, issues of environmental quality are as important, if not more important, to the poor and minorities as to the white middle class. Little, *The Environment of the Poor: Who Gives a Damn?*, CONSERVATION FOUNDATION LETTER (July 1973).
210. See authorities cited in note 111 *supra*.

would be presented.[211] Furthermore, the court indicates that if such an intent is not shown the "desirability of encouraging subdividers to build low-cost housing" must be balanced against the benefits to be derived from the dedications.[212] It is very possible that if local governments imposed large scale requirements of dedications for all kinds of community facilities, and this resulted in a marked decrease in the amount of low- and moderate-income housing available in suburban areas, such dedication requirements could be held unconstitutional. However, other equities may be involved. For example, pursuant to the "filtering" theory of the housing market,[213] the new housing in a community is purchased by the relatively affluent leaving their used housing for those of lesser means to purchase. Without dedication requirements, the supposedly less affluent residents of older housing would pay for facilities (by way of taxes) for the more affluent new subdivisions. Even if the "filtering" theory is not valid, failure to use dedication requirements could result in wealthy subdivisions, which are more than able to pay for their own facilities, being subsidized by the rest of the community. One solution to the problem would seem to be for the local government to eliminate dedication requirements in particular cases in which the developer agrees in return to provide low- or moderate-income housing in his subdivision. In such cases the city would subsidize the development of such housing by putting in the faciltiies at its own expense.

In conclusion, there are convincing arguments both for and against imposing additional dedication requirements. However, these are essentially policy questions to be decided by local governments, and so long as the constitutional standards set forth above are adhered to, their determinations should be upheld.

SUBDIVISIONS AND THE PUBLIC INTEREST: PROCEDURE

It has been demonstrated that the subdivision law has evolved, and continues to evolve, from a technical map-checking mechanism assuring that the subdivider has met certain professional standards, to a public policy-making tool. Given the thrust of CEQA and the 1971 amendments to the Subdivision Map Act, the Act now serves as a principal means by which a community designs its physical environment. The subdivider is no longer the only party with an interest

211. 4 Cal. 3d at 648, 484 P.2d at 618, 94 Cal. Rptr. at 642.
212. *Id.*
213. Grigsby, *The Filtering Process,* URBAN HOUSING 191 (W. Wheaton *et al.* ed. 1966).

in the proceedings. In fact, he arguably has not even the primary interest. The subdivider is concerned only with making a reasonable return on his investment. Once the subdivision is sold out, the subdivider is gone and is no longer concerned about the subdivision. The community, however, has a great interest in the subdivision because it must live indefinitely with the mistakes or accomplishments of the subdivider. Given these facts, it is ironic that the existing procedure prescribed by the Subdivision Map Act for approval of proposed subdivisions is basically written in the form of an ajudicatory provision as if the subdivider were the only one with an interest in the proceedings. Although important public decisions relating to urban planning and environmental quality are made pursuant to Map Act proceedings, insufficient provision is made for citizen participation. Although great advances in making the procedure more equitable have been made in recent years, it is imperative that the law be further amended to provide for maximum citizen participation.

A. Public Hearings

Tentative subdivision maps are required to be submitted to the clerk of the planning commission or, if there is none, to the clerk of the legislative body.[214] If there is no planning commission, the governing body must act on the map within 40 days of filing. If there is a planning commission, it must make its report within 50 days after the filing and may be authorized to take action on the map and report directly to the subdivider. If the planning commission is not so authorized, the local legislative body is required to take action on the map within 10 days of receiving the planning commission's report.[215] The Subdivision Map Act does not expressly require a public hearing on the proposed subdivision. However, there are two sources of authority for the proposition that a public hearing must be held. First, the Ralph M. Brown Act requires meetings of local legislative bodies to be open to the public.[216] This Act expressly applies to both governing bodies[217] and planning commissions.[218] Secondly, CEQA, while requiring that local governments consider the EIR when making their decisions,[219] does not expressly require that the EIR be considered at a public hearing. However, the Resources Agency guidelines state,

214. CAL. BUS. & PROF. CODE §11550.
215. CAL. BUS. & PROF. CODE §11552. S.B. 977 would recodify the procedure for tentative map filing in proposed CAL. GOV'T CODE §66452 *et seq.* Some minor changes would be made in the procedure.
216. CAL. GOV'T CODE §54953.
217. CAL. GOV'T CODE §54952.
218. CAL. GOV'T CODE §54952.5.
219. CAL. PUB. RES. CODE §21061.

> [I]t is a widely accepted desirable goal of this process to encourage public participation. All public agencies adopting implementing procedures in response to these guidelines should make provisions in their procedure for wide public involvement, formal and informal, consistent with their existing activities and procedures, in order to properly receive and evaluate public reactions, adverse and favorable, based on environmental issues.[220]

The guidelines also state that a public hearing should be held when "it would facilitate the purposes and goals of CEQA and these guidelines to do so." Furthermore, "a *draft* EIR should be used as the outline for discussion at a public hearing."[221] This indicates that the purpose of such public hearings is to gather further information required for preparation of the EIR. Public input is presented as an ingredient in the preparation of a good EIR. Without a public hearing, an argument could be made that the lack of information which hearings yield would result in an insufficient EIR. The courts have indicated a willingness to find that an EIR is insufficient and that projects upon which an insufficient EIR has been prepared may not go forward.[222] Therefore, to insure the validity of a subdivision approval, a local government should hold a public hearing on the EIR for the tentative subdivision map, even though none is called for under the Subdivision Map Act.

A deficiency more serious than the lack of a public hearing requirement is the lack of a notice provision. There is no requirement that notice of the hearing on the subdivision map be given to any interested party (not even to the subdivider himself).[223] Because a public hearing without notice to the public is an empty gesture, the public must know about the hearing and must be given an opportunity to prepare testimony if the public hearing is to be meaningful. CEQA guidelines reflect this concern when they state that the proposed EIR should be used as the outline for discussion at the public hearing[224] and that a timely notice must be given of the hearing and may be given in the same manner as notice of other hearings which the agency holds.[225] Since there are different requirements for different types of hearings, this provision is rather vague.

220. Cal. Admin. Code tit. 14, §15164.
221. Cal. Admin. Code tit. 14, §15165.
222. Environmental Defense Fund v. Coastside Water District, 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972).
223. The law now provides for notice to the subdivider and property owners within 300 feet of the proposed subdivision only if the proposed subdivision is located in the City of Los Angeles. Cal. Bus. & Prof. Code §11552.1.
224. Cal. Admin. Code tit. 14, §15165(b).
225. Cal. Admin. Code tit. 14, §15165(c).

The zoning law, which is similar to the Subdivision Map Act in its scope and purpose, requires that notice of the time and place of the public hearing be given at least 10 calendar days before the hearing by publication at least once in a newspaper of general circulation or by posting in at least three public places in the jurisdiction.[226] In addition, the local government may give notice in any other manner as it deems necessary or desirable.[227] Some local governments have adopted the effective method of posting a notice on the property itself, assuring thereby that neighboring residents and landowners will be notified. A notice provision similar to that in the zoning law would be added to the Subdivision Map Act by Senate Bill 977.[228]

B. Appeals

Two kinds of appeals are allowed from the actions of the planning commission on a subdivision map—administrative appeal and judicial appeal. Administrative appeal involves a consideration *de novo* on the merits of the subdivision by either the appeals board, if there is one, or by the legislative body. Such a body may, and is expected to, weigh policy considerations and make a determination as to whether the planning commission should be affirmed or overruled. The judicial appeal is taken under the administrative mandamus provision of the Code of Civil Procedure,[229] and a decision may be overturned only on the basis of invalidity (for not following the proper procedures) or unreasonableness.

Administrative appeal is provided for in Section 11552 of the Business and Professions Code. Obviously, from the point of view of environmental policy making, the administrative appeal provision is the more important because the governing body or appeals board may review the substantive policy decisions made by the planning commission.[230] However, the law provides that only the *subdivider* may appeal the decision of the planning commission. Both the subdivider and the planning commission may appeal from a decision of the appeals board to the governing body. Except for a provision allowing any affected party to appeal the decision of the planning commission in the City of Los Angeles only,[231] there is no statutory right to appeal provided to any other legitimately interested person, even severely in-

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226. CAL. GOV'T CODE §65854.
227. *Id.*
228. S.B. 977, 1973-74 regular session, *as amended* June 19, 1973 (proposed CAL. GOV'T CODE §66451.3).
229. CAL. CODE CIV. PROC. §1094.5.
230. CAL. BUS. & PROF. CODE §11552.
231. CAL. BUS. & PROF. CODE §11552.2.

jured and aggrieved adjoining property owners. Senate Bill 977 would add a provision allowing interested persons adversely affected by the decision of the planning commission to *complain* to the governing body, after which the governing body *may* set the matter for hearing.[232] However, this provision, while at least giving interested parties a *chance* that their case might be heard, does not give them the same *right* to present their case to the governing body as the subdivider has.

Another 1973 bill would allow local governments to provide for the right of appeal.[233] Although this provision would give interested parties full rights in jurisdictions which elect to adopt the procedure, persons in other jurisdictions would still not have the right. Considering the overriding interest which affected members of a community have in new subdivisions, and the severe environmental and property damage which could result from local subdivision decisions, the existing appeals provisions are entirely inadequate. Interested persons adversely affected (many of whom are probably more affected by a subdivision proceeding than is the subdivider) should be given an absolute right to administrative appeal equal to that of the subdivider. Clearly, the law is inequitable and should be changed. Senate Bill 1118 of the 1972 session[234] would have allowed appeal by the subdivider or any person "adversely affected or aggrieved" by the decision of the planning commission. These are the same words contained in the federal Administrative Procedure Act[235] and interpreted in *Sierra Club v. Morton*[236] in such a way as to limit appeals to those persons who have suffered actual injury,[237] thus precluding frivolous appeals.

Section 1094.5 of the California Code of Civil Procedure allows for judicial appeal from the decision of a governmental agency by writ of mandate. Judicial appeal under this section extends "to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." The Subdivision Map Act provides that such an action must be commenced within 180 days of the decision.[238]

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232. S.B. 977, *as amended*, June 19, 1973 [proposed CAL. GOV'T CODE §66452.5 (d)].
233. A.B. 497, 1973-74 Regular Session, passed the Assembly and is currently pending in the Senate.
234. As introduced, proposed CAL. GOV'T CODE §66452.6.
235. 5 U.S.C. §702 (1970).
236. 405 U.S. 727 (1972).
237. *Id.* at 734-35.
238. CAL. BUS. & PROF. CODE §11525.1.

CONCLUSION

California's Subdivision Map Act is emerging as an effective tool for regulating the physical design and environmental quality of new communities. It is conceivable that some communities, in over-reaction to years of governmental permissiveness and rampant urban sprawl, will enact overly restrictive land use controls to prohibit all urban growth. However, it is possible to chart a middle course between over-regulation and lack of regulation, and with the development of comprehensive community plans, it may be expected that local governments will wisely use the Act to promote subdivisions which will be designed to serve the public interest.

Stephen L. Taber