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Adoption of the General Plan in California: Prelude to a Permanent Constitution

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INTRODUCTION

Comprehensive land use planning is the subject of intensive legislative and judicial concern.¹ In California, the interest in the comprehensive planning process is manifested, in part, by legislation creating the California Coastal Zone Conservation Commission (Pub. Res. Code § 2700, *et seq.*), the California Tahoe Regional Planning Agency (Gov. Code § 66800, *et seq.*), the San Francisco Bay Conservation and Development Commission (Gov. Code § 66600, *et*

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1. Sullivan and Kressel attribute the renewed interest in the comprehensive planning process to three primary factors. First, adverse judicial reaction to *ad hoc* decision making at the local level, often thought to be replete with bias, ignorance and capriciousness; second, concern for the environment and an effort to prevent its destruction; and third, increasing

seq.), County Airport Land use Commissions (Pub. Util. Code § 21670, *et seq.*), and legislation mandating the adoption of general plans (Gov. Code § 65300, *et seq.*).

It is also manifested in the judicial recognition of the legislative attempt to alleviate the problem of the "deleterious consequences of haphazard community growth" and the prevention of "further random development" and the judicial effort to preserve planning options.²

While planning legislation continues to proliferate and attempts to enact statewide and federal land use controls are renewed annually,³ there are those who doubt the necessity for further land use legislation and dispute the presumption that planning is a panacea for anything, let alone environmental ills. One such critic is Professor Bernard Siegan, Distinguished Professor of Law at the University of San Diego Law School. Professor Siegan argues that public land use planning is doomed to failure in a representative society because the presumption that public land use planning is something precise, measurable or quantitative and comparable to a science is invalid. Siegan argues that land use planning is highly subjective and adulterated by the political process. He concludes that control of land use and development through planning is akin to performing surgery by a team consisting of faith healers, exorcists, and surgeons. While the patient may not die instantly, he may well wish he had.⁴

Be Siegan's views as they may, planning legislation in California, and specifically that legislation pertaining to general plans,⁵ has evolved to the state advocated by Charles Haar⁶ where the relationship between planning and zoning is analogous to that between "a constitution and legislation in which the former provides legal parameters for the latter." In California, adoption of a valid general plan is a precondition to zoning,⁷ the establishment of an agri-

state participation in the planning process. Sullivan, "Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement," 1975 URBAN LAW ANNUAL 33 (1975).

2. Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 120, 514 P.2d 111, 117, 109 Cal. Rptr. 799, 805 (1973).

3. See, e.g., Jackson Bill, Z'Berg, Udall bills.

4. Siegan, "Controlling Other People's Property Through Covenants, Zoning, State and Federal Regulation," 5 ENVIRONMENTAL LAW 385, 398-401 (1975).

5. CAL. GOV'T CODE § 65300, *et seq.* (West 1966).

6. Haar, "The Master Plan: An Impermanent Constitution," 20 LAW AND CONTEMPORARY PROBLEMS 353 (1955). See also, Sullivan, *supra* n.1, at 34.

7. CAL. GOV'T CODE § 65860 (West Supp. 1976).

cultural preserve, and the acceptance of open space easements.⁸ It is this state of statutory affairs, and in particular, the requirement of zoning consistency, which leads some writers to conclude that local government in California is failing to maintain the distinction between the long-range flexible plan which Haar addressed in his landmark article, "In Accordance with a Comprehensive General Plan,"⁹ and specific short-range schedules for development. It has been argued that the resultant effect is the creation of general plans which approach the detail of an official map.¹⁰

In light of the increasing importance of the comprehensive general plan in California and its immense influence on land use regulation, it is the purpose of this paper to examine three subject areas related to the adoption of the general plan. They are:

1. Effects of the consistency requirement in Government Code Section 65860;
2. The right to notice prior to adoption; and
3. The use of interim land use controls pending the adoption of the general plan.

THE CALIFORNIA LEGISLATION

California's general plan had its genesis in the early 1900's. In 1915, legislation was enacted which allowed cities to establish city planning commissions.¹¹ Once established, these commissions, at the city counsel's request, were directed to draft a map of the city showing, *inter alia*, street and highway locations, proposed location and relocation for public buildings, parks and the like and proposed widening of streets and highways.¹² In 1927, the Legislature provided that counties could also establish planning commissions.¹³ These commissions were to devise a plan with contents similar to that set forth in the 1915 legislation.¹⁴

8. CAL. GOV'T CODE §§ 51050, 51056(a), and 51230 (West Supp. 1976).

9. Haar, "In Accordance With A Comprehensive General Plan," 68 HARV. L. REV. 1154 (1955).

10. Comment, "Selby Realty Co. v. City of San Buenaventura: How General Is The General Plan?" 26 HAST. L.J. 614 (1974).

11. Cal. Stats. 1915, c. 428, p. 708 *et seq.*

12. *Id.*

13. Cal. Stats. 1927, c. 874, p. 1899 *et seq.*

14. *Id.*

In 1929, the scheme was revised so that cities were allowed to establish planning commissions but counties were *required* to establish them.¹⁵ If the entity had a planning commission, the commission was to develop a plan which contained the following mandatory elements: traffic street plan, districting plan, transportation plan, transit plan, parks and recreation plan and a group building plan.¹⁶ A radical change came in 1947 when the Legislature provided that "every city and every county shall adopt and establish as herein provided a master plan. . . ."¹⁷ Up till then, counties were the only entities required to adopt a general plan. The 1947 legislation provided for numerous elements; however all were apparently permissive.¹⁸

In 1951, the Legislature seemingly took a step backward by providing that general plans were required only where the entity had a planning commission (and only counties were required to have them).¹⁹ As with the 1947 legislation, while numerous elements were described, none were made mandatory.²⁰ A 1953 amendment to the general plan statutes made no changes insofar as which entities were required to have plans and the permissive nature of all listed elements.²¹ This permissive nature was changed in 1955 when legislation was passed requiring that plans contain a land use element, a circulation element, and an element articulating standards for population density and building intensity.²² Finally, in 1965, both cities and counties were required to establish some form of planning agency whose job was to prepare a general plan. The number of mandatory elements had been pared back to two: land use and circulation.²³

Although the mandatory elements of the general plan have varied throughout the years,²⁴ in all cases the scope of the plan appears to have been broad. In addition to whatever maps were necessary, the plan was primarily composed of statements of objectives, policies, and principles.²⁵ Thus, the early plan could certainly not be

15. Cal. Stats. 1929, c. 838, p. 1805, § 1.

16. *Id.*

17. Cal. Stats. 1947, c. 807, p. 1909, 1910, amended Stats. 1947, c. 868, p. 2045.

18. *Id.*

19. Cal. Stats. 1951, c. 334, p. 675.

20. *Id.*

21. Cal. Stats. 1953, c. 1355, p. 2913.

22. Cal. Stats. 1955, c. 1644, p. 2967.

23. Cal. Stats. 1965, c. 1880, p. 4334.

24. See text accompanying notes 11-23, *supra*.

25. Comment, "Selby Realty Co. v. City of San Buenaventura: How General Is The General Plan?" 26 *HAST. L.J.* 614 (1974).

characterized as a "constitution for all future development;"²⁶ rather, it served as a mere planning study for, at best, guiding future development.²⁷

The general plan of today is an extremely comprehensive, legislatively adopted document, which dictates zoning by virtue of the consistency requirement and thereby has tremendous legal implications.

Current Government Code provisions require that each city and county develop a general plan.²⁸ The legislative body of each city and county is required to establish by ordinance a planning agency.²⁹ Such agencies are required to carry out the development and maintenance of general plans.³⁰ The legislative body of the city or county must approve the plan, amendment to it, or zoning ordinance before it is to have any legal effect.³¹ The plan is required to be filed with a regional planning board for the purpose of coordinating long-term coordinated planning.³²

The general plan components are set out in Government Code Sections 65302 and 65303. The mandatory elements include seismic safety, noise, safety, scenic highways, land use, circulation, housing, conservation, and open space. Eleven additional permissive elements are set forth in the code, including a recreation element, expansion of the circulation element to include recommendations related to the improvement of traffic and transportation circulation, a public services and facilities element, and a housing element.³³ Thus, today's general plan is much more comprehensive than under the earlier legislation. Statutorily, the general plan is defined as: "consist[ing] of a statement of development policies and shall in-

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

27. This was due to the lack of any express requirement that zoning be consistent with the general plan. However, some argue that there were former Government Code provisions which could be construed to require consistency. See, Comment, "*Selby Realty Co. v. City of San Buenaventura: How General Is The General Plan?*" 26 HAST. L.J. 614 (1974).

28. CAL. GOV'T CODE § 65300 (West 1966).

29. CAL. GOV'T CODE § 65100 (West Supp. 1976).

30. CAL. GOV'T CODE § 65101 (West 1966).

31. CAL. GOV'T CODE §§ 65300, 65357, and 65359 (West 1966).

32. CAL. GOV'T CODE § 65067 (West 1966).

33. CAL. GOV'T CODE § 65303 (West Supp. 1976).

clude a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals" which includes the mandatory elements.³⁴

Prior to the evolution of the comprehensive plan requirements, a California court of appeals characterized the plan as "a constitution for all future development."³⁵ The court was prophetic in its pronouncement that the plan affects market values, and that once adopted it cannot be contemplated that the enacting body will go contrary to the plan which it adopts. The court further stated that the plan is the adoption of new policy, that it is permanent and general in character, and that it is a declaration of public purpose with reference to the physical form and character the city is to assume.³⁶

Recently, the California Supreme Court also addressed the nature of the general plan and found its adoption to be "several leagues short of a firm declaration of an intention to condemn property."³⁷ Despite the consistency requirement, the requirement that plans be legislatively adopted, and the specificity of the Ventura Avenue Area General Plan at issue, the California Supreme Court refused to recognize any legal consequences emanating from the adoption of a general plan.³⁸

The Supreme Court seemingly accepts the views of Charles Haar, noted Professor of Law, that property rights are not meant to be affected by the "mere" promulgation of a plan. Rather, such rights are affected only by the *implementation* of a plan.³⁹ In the opinion of Haar and other planners, planning and zoning should not be

34. CAL. GOV'T CODE § 65302 (West 1966). A question which arose in litigation brought pursuant to Government Code Section 65860, in which the Pacific Legal Foundation was involved was whether the statutory requirement that counties and cities adopt a comprehensive long-term general plan was satisfied if the general plan lacked one of the required elements set forth in Government Code Section 65302. It was concluded, based on the statutory language that the plan "shall" include the mandatory elements, together with a reading of Section 65860 as to the method of determining consistency, that a general plan had not been officially adopted since the plan in issue, among other things, lacked several of the required elements. The litigation, however, never reached the question of consistency or sufficiency of the general plan and was dismissed on procedural grounds. See *City of San Luis Obispo v. County of San Luis Obispo*, San Luis Obispo County Super. Ct. No. 44172.

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

36. *Id.*

37. *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 119, 514 P.2d 111, 116, 109 Cal. Rptr. 799, 806 (1973).

38. See Comment, *supra* note 25.

39. Haar, *supra* note 9, at 1154-1175.

merged; the plan should serve as a guiding and productive force by remaining flexible, embodying information, judgment and objectives formulated by experts.⁴⁰ Just how far the general plan in California has evolved from the characterization given by the Supreme Court and the ideal described by Haar will be discussed in the following section of this presentation.

Perhaps the single most influential part of the 1971 California land use legislation⁴¹ is that which amended Government Code Section 65860 to require that county or city zoning ordinances be consistent with the county or city general plans by January 1, 1973.⁴² Government Code Section 65860(b) permits any resident or property owner within a county or city to bring an action in the superior court to enforce compliance with the consistency requirement. Any such action must be brought within 90 days of the enactment of any new zoning ordinance or the amendment of any existing zoning ordinance.⁴³ Subpart (c) of Section 65860 directs cities and counties to achieve consistency within a reasonable time after adoption of or amendment to a general plan.

EFFECTS OF THE CONSISTENCY REQUIREMENT

The consistency requirement brought California into company with a minority of states whose land use regulations must be premised on a separately prepared and adopted comprehensive plan.⁴⁴

The threshold question posed by the consistency requirement is, what is consistency? There remains today considerable confusion among local government entities as to what is consistency.⁴⁵ In

40. *Id.* at 1176.

41. Cal. Stats. 1971, c. 1446, p. 2858, § 12, amending CAL. GOV'T CODE 65860 (West Supp. 1976).

42. The date was extended to July 1, 1973, by an amendment to CAL. GOV'T CODE § 65860. See Cal. Stats. 1972, c. 1299.

43. See DiMento, "Looking Back: Consistency In Interpretation Of And Response To The Consistency Requirement, A. B. 1301," 2 SYMPOSIUM PEPPERDINE LAW REV. S. 196, S. 212 (1974). DiMento notes that § 65860(b) has resulted in very little litigation. This may be due in part to a feeling of futility in light of the power of local governmental entities to amend their general plans pursuant to § 65361.

44. See, e.g., Sullivan, *supra* note 1 at 48-52, for a discussion of the Oregon consistency requirement.

45. See, Note, "Zoning Shall Be Consistent With The General Plan—A Help or Hindrance To Planning," 10 SAN DIEGO L. REV. 901 (1973).

a recent survey of local planning and community development agencies, some of the respondents indicated that the consistency requirement is a major planning issue and that an explanation of what was actually meant by the term "consistency" is needed.⁴⁶

Government Code Section 65860 specifies that a zoning ordinance is consistent with the general plan only when two conditions are satisfied. First, the city or county must have an *officially* adopted general plan. Second, the various land uses permitted by existing zoning must be compatible with the objectives, policies, general land uses and programs specified in the plan. The statutory definition seems only to raise further questions. If a city has officially adopted a "general plan," but does not have all the requisite elements completed, is it possible to achieve consistency? Second, does consistency mean that zoning must be *identical* to the general plan land use map?

The Attorney General of California at the request of the Director of the Office of Planning and Research has addressed this subject.⁴⁷ With regard to the first question posed, the Attorney General has concluded that if a city or county had an adopted "general plan" but the plan did not include all the required elements, an action could be brought pursuant to Section 65860(b). This would indicate that inconsistency exists where all the mandated elements are not adopted. The Attorney General indicates that the probable result in such an action would be to have the court retain jurisdiction and mandate the adoption of the required elements.⁴⁸

As regards the second question, the need for exact identity between zoning and the plan, the Attorney General states:

[A] zoning ordinance would not be consistent with a general plan unless there was a general plan encompassing the required elements with which to be consistent. The other test of consistency . . . is that the various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses and program specified in the general plan.

Apparently, the term 'consistent with' is used interchangeably with 'conformity with.'

[I]t is quite apparent that the 'consistency' or 'conformity' need not require an exact identity between the zoning ordinance and the general plan.⁴⁹ (Emphasis added.)

46. CALIFORNIA OFFICE OF PLANNING AND RESEARCH, "1974 LOCAL GOVERNMENT PLANNING SURVEY," at 18 (March, 1975) (hereinafter "1974 Survey"). See also pages 26-28 for a discussion of the survey findings regarding the consistency requirement.

47. 58 OP. ATTY GEN. 21 (No CV 72/114(a)).

48. *Id.* at 2.

49. *Id.* at 6. See also "1974 Survey," *supra* note 46 at 26-27; CALIFORNIA

In sum, while there is certainly need for further clarification of the consistency requirement, it appears that consistency exists where there is an officially adopted general plan containing the mandatory elements and existing zoning conforms to and does not conflict with the objectives, policies, general land uses and programs specified in the plan as a whole.⁵⁰ There is a third question which arises. That question is whether the Legislature intended the consistency requirement to effect consistency with outmoded or antiquated plans. Such could certainly be the result. In light of the policy that planning precede zoning, it seems anomalous to conclude that consistency does exist where zoning complies with an anticipated plan. Donald Hagman, noted California zoning law expert, concludes, however, that courts cannot be expected to invalidate rezoning when nonconformity to an outmoded general plan is called to its attention.⁵¹ The likely result would be court mandated adoption of a revised plan. Such a possibility, however, emphasizes the need for further legislative direction.

The United States Supreme Court's landmark decision in *Euclid v. Ambler Realty Co.*⁵² established the standard for review of zoning regulations. It was held that such regulations "must find their justification in some aspect of the police power asserted for the public welfare."⁵³ The public welfare concept is, however, extremely nebulous.⁵⁴

Arguably, the requirement of consistency set forth in the Government Code adds an additional standard of review. The validity of a zoning ordinance can now also be judged by whether it is consistent with the general plan. It would be misleading, however, to imply that the "consistency" standard is any less complicated to apply than the general welfare standard.

As previously indicated,⁵⁵ in order to achieve consistency, the city or county must have officially adopted a general plan containing

COUNCIL ON INTERGOVERNMENTAL RELATIONS, GENERAL PLAN GUIDELINES, SEPTEMBER, 1973, (Pts. II-11 through II-13).

50. CAL. GOV. CODE § 65860(a) (ii) (West Supp. 1976).

51. D. Hagman, CALIFORNIA ZONING PRACTICE, § 2.25, p. 35.

52. *Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

53. *Id.* at 387.

54. See *Berman v. Parker*, 348 U.S. 26, 33 (1954).

55. See text accompanying notes 40-49, *supra*.

all the mandatory elements, and the various land uses authorized by the ordinance must be compatible with the plan.⁵⁶ It is also clear that there need not be an exact identity between planning and zoning or a one-to-one relationship. If this were so, determining consistency would be considerably easier. Rather, the particular zoning ordinance under review must be consistent with the totality of the policies, land uses, and objectives in the plan.⁵⁷ Determining consistency, therefore, is at best a difficult judicial task. It is also one which the judiciary is reluctant to assume in light of judicial disinclination to serve as a super board of zoning appeal and substitute its judgment for that of "expert" planners.

Addition of this new standard of review pursuant to Section 65860 is not likely to give rise to a multitude of litigation.⁵⁸ The general plan can be amended to provide the basis for the desired zoning. In fact, several jurisdictions, without the threat of litigation, have used such means to achieve consistency. In the 1974 Local Government Planning Survey, approximately 29 percent of those cities and counties responding indicated that they were amending their general plans instead of, or in addition to, their zoning ordinances to achieve consistency.⁵⁹ This is arguably contrary to statutory intent that planning *precede* zoning.

One writer has concluded that in light of the possibility of plan amendment, citizen suits pursuant to Government Code Section 65860 are futile.⁶⁰ All indications are that very little litigation has been prompted by the consistency requirement. A survey of California counties in 1974 revealed only two such lawsuits.⁶¹

While the consistency requirement has not resulted in an avalanche of new litigation regarding zoning validity, the effects of consistency lawsuits are potentially significant. This type of lawsuit could theoretically result in two determinations. First, whether or not the city or county has a validly adopted general plan. Second, whether the plan and zoning are in conformance.

56. CAL. GOV'T CODE § 65860 (a) (West Supp. 1976).

57. CAL. GOV'T CODE § 65860 (a) (ii) (West Supp. 1976).

58. It should be noted that § 65860 arguably liberalizes the standing requirement for filing suit in providing that any resident or property owner within the city or county may sue.

59. 1974 SURVEY, *supra* note 46.

60. Note, "Zoning Shall Be Consistent With The General Plan—A Help or Hindrance," 10 SAN DIEGO L. REV. 901, 906 (1973).

61. DiMento, *supra* note 43 at S215. Note also a consistency lawsuit filed by the city of San Luis Obispo contesting consistency of a county zoning to the county general plan. City of San Luis Obispo v. County of San Luis Obispo, San Luis Obispo County Super. Ct. No. 44172.

If there is a valid plan, the problem would be to distill the policies of the plan to facilitate judicial review. In the event the court finds the plan and ordinance out of consistency, there are two options for the respondent to follow in achieving consistency. First, the zoning ordinance could be amended. Second, the plan could be amended, which is arguably *contra* to the intent of the general plan legislation. If the court determines that there is no valid plan (e.g., an element has not been completed), it could mandate adoption of a valid plan, retain jurisdiction in the matter and then proceed to determine consistency. Thus, the consistency requirement can be used to mandate adoption of a plan. The question then arises as to whether a municipality can continue to zone in the absence of a plan. In recent litigation against the County of Los Angeles challenging the County's 1973 General Plan, the superior court found that the General Plan Open Space Element was invalid because it was founded upon an inadequate environmental impact report. The court ordered the County, *inter alia*, to prepare a local open space plan which was consistent with state declared objectives and an open space ordinance. The court, however, reinstated the County's 1970 General Plan, referred to as the Environment Development Guide, and pointed out that the respondent County could use the Guide or adopt an entirely new plan. The problem, thus, of whether zoning could proceed in the absence of a general plan was avoided.

While consistency litigation can pose significant problems to local municipalities,⁶² it is questionable whether the threat has actually motivated implementation of the consistency requirement. The 1974 Local Government Planning Survey indicates that 45 percent of the cities surveyed and 47 percent of the counties surveyed believed that their zoning ordinances were inconsistent with their general plans.⁶³ This situation exists despite the fact that 70 percent of the jurisdictions responding reported no significant problems in the attempt to implement the zoning consistency requirement.⁶⁴

62. See text accompanying note 61, *supra*. Coalition for Los Angeles County Planning in the Public Interest v. Board of Supervisors of the County of Los Angeles, Los Angeles Super. Ct. No. 63218. See Judgment filed July 9, 1975.

63. See 1974 SURVEY, *supra* note 46 at 27.

64. *Id.* at 28. In light of this uneven application of the zoning consist-

A major effect of the consistency requirement may be its impact on market value and the marketability of land. The value of land may increase or decrease, in light of the consistency requirement, depending upon its designation under the general plan. A case example may be helpful in demonstrating this effect. In *American Homes Development Co. v. County of Sacramento*,⁶⁵ the pleadings reveal that American Homes purchased land in Sacramento County which was zoned for agricultural use. Pursuant to a 1962 and 1965 general plan for Sacramento County, this property was designated for residential and commercial development. In contemplation of developing the property, American Homes sought and obtained approval for establishment of an assessment district to finance a sewer system. In 1973, Sacramento County, in response to state law consistency requirements, adopted a general plan for the planning period through 1990 which designated the property owned by American Homes as "agricultural-urban reserve." (Consistency was thereby achieved by amending the plan to conform to existing zoning.) This designation does not allow development unless the Board of Supervisors approves an amendment to the general plan. American Homes is now left with agriculturally designated and zoned property. What recourse is available? A reading of the decision in *HFH, Ltd. v. Superior Court*⁶⁶ indicates that a landowner does not have a cause of action for inverse condemnation as a result of the taking of his land's residential development value. His recourse would appear to be limited, in practical effect, to petitioning the Board of Supervisors for a general plan amendment.

A consistency lawsuit pursuant to Section 65860 of the California Government Code poses the distinct possibility of a finding of an inadequate or insufficient general plan.⁶⁷ What are the consequences of such a finding? Hagman points out that "virtually every federal loan or grant-in-aid program affecting the physical development of a locality requires land use planning by the recipient of federal help."⁶⁸ For example, Hagman points out that federal funds are available for the preparation of an "urban renewal

ency requirement, the Office Of Planning and Research recommends that negative sanctions be imposed to insure equal compliance by all jurisdictions.

65. Sacramento Super. Ct. No. 249133. Lest this be viewed as an isolated case, the reader's attention is directed to Ernest Webber and Robert Waller v. City of Sacramento, *et al.*, Sacramento Super. Ct. No. 249487.

66. 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975). *Petition for Cert.* filed with United States Supreme Court on February 10, 1976.

67. See text accompanying notes 61-64.

68. HAGMAN, *supra*, note 51 at §§ 2.1-2.7.

plan" conforming to the general plan of the locality as a whole and "workable program" requirements.⁶⁹

The consequences under state law of the failure to have a general plan are numerous. As pointed out *supra*,⁷⁰ the adoption of a general plan is a precondition to the establishment of an agricultural preserve and the acceptance of open space easements. Furthermore, redevelopment under state law is not possible without a general plan,⁷¹ nor may fees be collected or the dedication of land for parks as a condition to the approval of a final subdivision map or parcel map be required unless the community has a general plan containing a recreational element.⁷²

The effects, therefore, of not having a general plan can conceivably range from a loss of funding for community redevelopment projects to the inability to exact fees or the dedication of land for subdivision map approval. However, where a plan is deemed to exist a finding of inconsistency may result in the suspension of a particular zoning ordinance until consistency is achieved with the resultant inability to proceed with prior planned development projects. In both instances the effects can pose particular hardships on both municipalities and property owners alike.

NOTICE AND THE ADOPTION OF THE PLAN

The general plan, reflecting a community's decision on its future development, should be shaped not only by technical studies, but also by citizen input during the planning process. The quantity and quality of citizen input is dependent on notice of the general plan hearings being given to the local citizenry. The time and manner of giving notice are both significant factors in the resulting input.

There are two possible sources from which requirements for a noticed public hearing might issue. The first source is the federal or state constitution. The notion of procedural due process is inherent in those documents and case law must be examined to determine what requirements, if any, it imposes. Recently, the California Su-

69. *Id.* at § 2.2.

70. See text accompanying notes 7-8, *supra*.

71. CAL. HEALTH AND SAFETY CODE § 33302 (West 1973).

72. CAL. Gov'T CODE §§ 66477(d), 66479(a) (West Supp. 1976).

preme Court addressed the issue of due process requirements in a related area.⁷³ *San Diego Bldg. Contractors Assn. v. City Council*, involved an attack on a zoning ordinance which was adopted by initiative. The plaintiffs argued, *inter alia*, that the city's initiative procedure did not provide for a noticed hearing and that due process precluded enactment of a zoning ordinance without affording a noticed hearing. The California Supreme Court indicated that the plaintiffs' due process argument ignored a fundamental concept of constitutional law. "Due process requires 'notice and hearing' only in quasi-judicial or adjudicatory settings and not with respect to adoption of general legislation."⁷⁴ The court indicated that this concept had been articulated nearly sixty years before by the United States Supreme Court.⁷⁵ The *San Diego* decision applies with equal force to the adoption of general plans since it is well established in California that such activity is a legislative act.⁷⁶ Thus, in California, there is no constitutional mandate for prior notice and hearing before enactment of a general plan.

The second possible source requiring a noticed hearing before adopting a general plan is state law. California has set forth statutory notice requirements for adoption of a general plan in Government Code Sections 65351 and 65355. Neither of these sections, which require a noticed public hearing, are applicable to charter cities except to the extent they are adopted by charter or ordinance.⁷⁷

Section 65351 provides that where a city or county has a planning commission, the planning commission "shall hold at least one public hearing before *approving* a general plan or any part or element thereof." This hearing must be preceded by notice given at least ten calendar days before the hearing. The notice is to be published at least once in a newspaper of general circulation published and circulated within the city or county. If there is no newspaper

73. *San Diego Bldg Contractors Ass'n v. City Council*, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974).

74. *Id.* at 211. For an example of a quasi-judicial proceeding see *Scott v. City of Indian Wells*, 6 Cal. 3d 541 492 P.2d 1137, 99 Cal. Rptr. 745 (1972). However, it should be noted that not all courts agree with the California Supreme Court's distinction between legislative and adjudicatory actions in respect to zoning, see *Fasano v. Board of County Commissioners of Washington County*, 507 P.2d 23 (1973).

75. *BiMetallic Invest. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

76. *O'Loane v. O'Rourke*, 231 Cal. App. 2d 744, 42 Cal. Rptr. 283 (1965); *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. (1973).

77. CAL. GOV'T CODE § 65700 (West Supp. 1976).

which satisfies the above criteria, the notice must be posted in at least three public places in the city or county. Finally, the planning commission may give notice of the hearing in any other manner it deems necessary or desirable.

Section 65355 requires that before *adoption* of a general plan or any part or element thereof, the city or county legislative body must hold at least one public hearing. The time and manner for giving notice of the public hearing are the same as that set forth for hearings before city and county planning commissions.⁷⁸

Although failure to provide a noticed hearing for adoption or amendment of a general plan raises no constitutional defect,⁷⁹ if this failure contravenes the statutory requirements it may invalidate the adoption or amendment. Government Code Sections 65351 and 65355, which dictate the manner of giving notice, are phrased in terms of "shall." While use of the word "shall" does not always signify a mandatory statute,⁸⁰ there is persuasive reason to believe that it is used in the mandatory sense in Sections 65351 and 65355. Government Code Section 14 indicates that use of the word "shall" makes the statute mandatory. In addition, consideration of the provisions regarding enactment of zoning ordinances bolsters the argument that these sections are mandatory and noncompliance will void the adoption of a general plan. Many of the statutes dealing with enactment of zoning ordinances are phrased in terms of "shall."⁸¹ Failure to comply with the statutes resulted in courts declaring many zoning ordinances invalid.⁸² In fact, the frequent invalidation of zoning ordinances caused the California Legislature to adopt a validating statute in 1965.⁸³ While the Legislature could enact a validating statute with respect to adoption of general plans, the fact that it has not done so is significant. The legislative intent, for the time being, seems to be that the statutory notice requirements for adoption of a general plan must be complied with. In view of the increased significance of general plans and the Legisla-

78. CAL. GOV'T CODE § 65351 (West 1966).

79. See accompanying text, *supra* notes 74-76.

80. *People v. Municipal Court*, 145 Cal. App. 2d 767, 303 P.2d 375 (1956).

81. See, e.g., CAL. GOV'T CODE §§ 65852-57 (West Supp. 1976).

82. See, *Hurst v. City of Burlingame*, 207 Cal. 134, 277 P. 308 (1929); *Hein v. City of Daly City*, 165 Cal. App. 2d 401, 332 P.2d 120 (1958); *Williams v. City of San Bruno*, 217 Cal. App. 2d 480, 31 Cal. Rptr. 854 (1963).

83. CAL. GOV'T CODE § 65801 (West 1966).

ture's expressed intent to involve the public in the formulation of general plans,⁸⁴ these requirements do not seem to be unreasonable.

From a public policy standpoint, a more pressing issue is whether the notice provisions should be strengthened. There can be no doubt that the general plan has become the most important land use instrument in California.⁸⁵ Indeed, the consistency requirement of Government Code Section 65860 means that a general plan casts the future pattern of land use for cities and counties. As such, there will be very few local government decisions affecting use of land which can be made without reference to the general plan. In view of the direct and binding effect which a general plan has on the use of property, sound public policy would seem to argue for earlier involvement of the public in the planning process and a concomitant upgrading in the type of notice given regarding the formulation and adoption of a general plan. One step toward implementation of this policy would be to give notice to owners of property both within the general plan area being considered and extending 300 feet outward.

Unfortunately, the likelihood that the notice provisions will be strengthened is minimal. The foremost obstacle may be the cost involved in printing and mailing the notices. In addition, there seems to be a trend toward lessening the requirements for notice. This trend is evidenced by the recent decision in *San Diego Bldg. Contractors Assn. v. City Council*, *supra*, and the Legislature's weakening of certain notice requirements with respect to zoning.⁸⁶

USE OF INTERIM ZONING PENDING ADOPTION OF GENERAL PLAN

Although planning may not be a panacea for environmental ills, it does serve some useful purpose. It deserves protection, therefore, from obstructionist influences.

One potential problem arising from advance notice of formulation of or change in a general plan is the rush to establish vested rights to certain uses which may turn out to be in conflict with the land use scheme of the new general plan. This problem has occurred frequently where there has been notice of a proposed zoning change.⁸⁷ In the realm of zoning, the device of interim zoning is

84. CAL. GOV'T CODE § 65304 (West 1966).

85. See text accompanying notes 28-31, *supra*.

86. See, e.g., CAL. GOV'T CODE § 65854.5.

87. See, Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. URBAN L. 65, 77-79 (1971).

being utilized with increasing frequency to combat the rush to establish vested uses in conjunction with proposed zoning changes. Essentially, the land which is the subject of the zoning study is placed under interim zoning which allows certain uses while prohibiting other uses which may be inconsistent with the proposed rezoning.⁸⁸ In addition to preventing establishment of nonconforming uses, interim zoning, by "freezing" the current land uses, serves two other related functions. The process of study, formulation, recommendation, and adoption of the zoning is protected.⁸⁹ The freeze provides ample time within which to make the necessary studies and policy decisions required for proper utilization of land. In addition, public debate and input can be encouraged and assimilated without worrying about time constraints.⁹⁰

California has long upheld the validity of interim zoning. In *Miller v. Board of Public Works*,⁹¹ the California Supreme Court upheld the validity of an emergency ordinance enacted as a prelude to a comprehensive zoning plan for Los Angeles. The court found that the city had the power to enact this type of zoning pursuant to the California Constitution and the state zoning enabling act.⁹² In support of its decision, the court stated:

[21] It is a matter of common knowledge that a zoning plan of the extent contemplated in the instant case cannot be made in a day. Therefore, we take judicial notice of the fact that it will take much time to work out the details of such a plan and that obviously it would be destructive of the plan if, during the period of its incubation, parties seeking to evade the operation thereof should be permitted to enter upon a course of construction which might progress so far as to defeat in whole or in part the ultimate execution of the plan.⁹³

In 1953, the Legislature codified the *Miller* case law with the adoption of Government Code Section 65806.⁹⁴ This section provided that if the planning commission or department, in good faith, was conducting or intended within a reasonable time to conduct

88. See, Freilich, *Development Timing, Moratoria and Controlling Growth*, INSTITUTION EMINENT DOMAIN, 147, 152 (1971).

89. *Id.* at 77-82.

90. *Id.* at 77-82.

91. 195 Cal. 477, 234 P. 381 (1925).

92. *Id.* at 482-83 (1925).

93. *Id.* at 496 (1925).

94. Stats. 1953, C.1355 § 3.

studies for the purpose of recommending to the legislative body the adoption or amendment of a zoning ordinance or in the event of annexation of new territory to the city, the legislative body could, to protect the public safety, health, and welfare, adopt a temporary interim zoning ordinance prohibiting such uses as may be in conflict with the proposed zoning ordinance. It should be noted that the ordinance did not require a noticed hearing prior to adoption of the interim ordinance nor did it limit the duration of the interim ordinance.⁹⁵ Although the courts would probably have tested the validity of the interim ordinance by determining if its duration was reasonable in relation to the scope of the proposed zoning, the Legislature amended this section to establish an absolute limit on the duration of an interim ordinance.⁹⁶ This amendment extensively revised Section 65806 by placing several restrictions on the adoption of interim ordinances. The amended statute now required that an interim ordinance could be enacted for only one year and only by a two-thirds vote of the legislative body.⁹⁷ The ordinance could be extended for two additional one-year periods upon a four-fifths vote of the legislative body taken at a noticed public hearing.⁹⁸ Finally, the amended section provided that when a temporary zoning ordinance was adopted, every subsequent ordinance adopted pursuant to that section which covered all or any part of the same property would terminate one year after the date of adoption of the first such ordinance.

In 1965, Section 65806 was repealed and replaced by Section 65858.⁹⁹ Section 65858 restated the provisions of former Section 65806 with three major changes. The duration of an interim ordinance enacted without a noticed hearing was limited to four months. The number of extensions was limited to one eight-month extension and a subsequent one-year extension, both as a result of noticed public hearings. Alternatively, an interim ordinance may be enacted after a noticed hearing for an initial one-year period, with a one-year extension.

Even a casual reading of Section 65858 indicates that it limits use of interim zoning ordinances to situations where the planning

95. *Metro Realty v. County of El Dorado*, 222 Cal. App. 2d 508, 518, 35 Cal. Rptr. 480 (1963).

96. Cal. Stats. 1961, c. 1871, § 1 (repealed 1965).

97. CAL. GOV'T CODE § 65806 (as amended by Stats. 1961, c. 1871, § 1 (repealed 1965)).

98. *See, e.g., Mang v. County of Santa Barbara*, 182 Cal. App. 2d 93, 5 Cal. Rptr. 724 (1960); *Anderson v. City Council*, 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (1964).

99. Cal. Stats. 1965, c. 1880, § 6.

commission or department is or intends to study a proposed zoning ordinance. The question remains whether interim zoning can be used in conjunction with general plan formulation and adoption. Charter cities, which are exempted from application of most of the planning and zoning statutes,¹⁰⁰ can look to Article XI, Section VII of the California Constitution for power to utilize interim zoning in conjunction with adoption of a general plan.¹⁰¹ The fact that a charter city has not provided in its charter or city ordinances that it may interim zone in conjunction with adoption of a general plan is of no consequence. The charter is viewed as a *limitation* on a city's power so that as long as the charter contains a provision that the city can make and enforce all ordinances and regulations in respect to municipal affairs, it has the power to interim zone.¹⁰²

The zoning powers of counties and general law cities are circumscribed by the statutory scheme in Government Code Sections 65800, *et seq.* As noted, these sections limit interim zoning to instances where proposed zoning is being studied.¹⁰³ Yet, the policy advanced in favor of interim zoning in conjunction with a proposed zoning,¹⁰⁴ the rationale of the *Miller* court,¹⁰⁵ and the probable legislative intent behind Section 65858 all support the application of interim zoning to formulation and adoption of general plans. Planning, even more than zoning, requires a considerable amount of time due to the necessity for studies and the importance of encouragement of public input.¹⁰⁶ The planning process needs to be protected during this time from creation of uses which would be inconsistent with the proposed plan. Given this identity of purpose and effect between protection of planning and zoning, it seems arguable that a court would allow a county or general law city to utilize interim zoning with general plan adoption if presented with a reasonable argument that such use was within the ambit of Section 65858.

100. CAL. GOV'T CODE §§ 65700, 65803 (West Supp. 1976).

101. *City of Redwood v. Moore*, 231 Cal. App. 2d 563, 42 Cal. Rptr. 72 (1965).

102. *Id.* See also *Fletcher v. Porter*, 203 Cal. App. 2d 313, 21 Cal. Rptr. 452 (1962); *Simpson v. City of Los Angeles*, 40 Cal. 2d 271, 253 P.2d 464 (1953); Comment, *Strumsky and the Source of California Chartered City Powers*, 6 PAC. L.J. 85 (1975).

103. See text accompanying notes 99-100, *supra*.

104. See text accompanying notes 87-89, *supra*.

105. See text accompanying note 92, *supra*.

106. See, *supra* note 88.

The consistency requirement of Government Code Section 65860 provides a basis from which to reasonably argue in favor of application of Section 65858 to general plans. Section 65860(c) provides, as already noted,¹⁰⁷ that zoning ordinances must be made consistent with the general plan within a reasonable time. Therefore, it seems to follow that when a county or general law city is in the process of developing or amending a general plan, it must also intend to study, within a reasonable time, a zoning proposal (designed to achieve consistency with the new or amended general plan). Indeed, one court seems to have accepted this analysis based on former Section 65806. In *Metro Realty v. County of El Dorado*,¹⁰⁸ the Court upheld an emergency zoning ordinance, the emergency being the pendency of a comprehensive water conservation and development plan which was to include formulation of zoning to implement the plan.¹⁰⁹ The Court had no problem in finding the use of Section 65806 to be reasonable in application and duration.¹¹⁰ In view of the importance of the planning process and the potential that it may be short-circuited by inconsistent development during its pendency, the above analysis and utilization of Section 65858 seems not only proper, but called for.

Assuming California courts will find that counties and general law cities can utilize interim zoning in conjunction with formulation and adoption of general plans, what avenues are available to challenge individual interim zoning ordinances? It is not unwarranted to assume that interim zoning ordinances used in conjunction with general plans will face the same type of challenges as when used pending a zoning proposal. These types of challenges can be broken down into two major groupings: procedural and substantive.

Since counties' and general law cities' zoning powers are governed by a statutory scheme,¹¹¹ the use of interim zoning with general plans will be subject to attack if they do not follow the statutory scheme in Section 65858. However, there should be no reason to prevent them from taking advantage of the validating provisions of Section 65801. Interim zoning ordinances of charter cities, which derive their zoning power from the California Constitution,¹¹² would be subject to attack if they did not follow the procedures,

107. See text accompanying notes 43-44 *supra*.

108. 222 Cal. App. 2d 508, 35 Cal. Rptr. 480 (1963).

109. *Id.* at 513. See also *State of California v. Superior Court*, 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974).

110. *Id.* at 518.

111. CAL. GOV'T CODE §§ 65800 *et seq.* (West. Supp. 1976).

112. See text accompanying notes 100-102, *supra*.

if any, set forth in the charter or ordinances of the city. In view of the decision in *San Diego Bldg. Contractors Assn.*, *supra*, there is no reason to believe that a court would find that minor deviations from the charter or ordinance invalidate an interim zoning ordinance.

Substantive attacks on interim zoning ordinances can be further divided into several general categories. Initially, interim ordinances will be subject to attack if they are unreasonable in duration or proscription. Counties and general law cities must limit the duration of interim zoning ordinances to the two-year period set forth in Section 65858. However, there could be a problem if they attempted to reenact an interim ordinance after an initial interim ordinance had run its full cycle. While Section 65858 contains no direct prohibition on such action, it seems to be contrary to the intent of the Legislature. This intent is evidenced by that portion of Section 65858 which provides:

When any such interim ordinance has been adopted, every subsequent ordinance adopted pursuant to this section, covering the whole or a part of the same property, shall automatically terminate and be of no further force or effect upon the termination of the first such ordinance or any extension thereof

Apparently, the Legislature's intent in adding this provision was to prevent a municipality from freezing property, under the guise of interim zoning, for over two years. The interim zoning ordinances of charter cities may also be found to be unreasonable in duration should it appear that the city is not proceeding in good faith toward completion of the general plan process. Finally, regardless of the character of the governmental entity, a complete prohibition of use is unlikely to be upheld.¹¹³

Interim ordinances may also be challenged as discriminatory and arbitrary. In *Kissinger v. City of Los Angeles*, the court found that an interim ordinance which changed plaintiff's land from an R-3 to an R-1 designation was arbitrary and discriminatory.¹¹⁴ *Kissinger* held that this application of interim zoning, being designed to reduce the value of plaintiff's property for future acquisition,¹¹⁵ resulted in inverse condemnation. However, it appears that chal-

113. See Freilich, *supra* n. 106 at 152.

114. 161 Cal. App. 2d 454, 460, 327 P.2d 10 (1958).

115. *Id.* at 462.

lenges to an interim zoning ordinance based upon a taking theory will, for the most part, be unsuccessful. This conclusion is drawn from a recent California Supreme Court decision in *State of California v. Superior Court (Veta)*.¹¹⁶ In the *Veta* case, the court upheld the interim permit requirement of the California Coastal Zone Conservation Act and reaffirmed cases upholding the validity of interim zoning in California stating:

It is true that the Act is not an interim zoning measure since it does not zone any property but merely requires the Commission to formulate a coastal zone plan for submission to the Legislature. Nevertheless, the cases cited above demonstrate that even more severe restrictions on the use of private property than those provided by the Act have been supported as a valid exercise of the police power pending the adoption of a comprehensive zoning ordinance (e.g., moratorium on the issuance of building permits in *Hunter v. Adams* (1960) *supra*, 180 Cal. App. 2d 511).¹¹⁷

Finally, interim ordinances may be challenged where they are utilized for a purpose inconsistent with the intent of Section 65858. This situation is best illustrated by the case of *Silvera v. City of South Lake Tahoe*.¹¹⁸ The City had a zoning ordinance which set a 50 foot height limitation in a certain area. One property owner applied to the City for a variance as to the height limitation. This variance was denied; however, the City then enacted an "emergency" ordinance pursuant to Section 65858 which allowed buildings in excess of 50 feet in that area. The court easily found that there was no emergency as intended by Section 65858 and that the ordinance violated the intent of Section 65858 by permitting rather than prohibiting a heretofore permitted use pending a proposed zoning change.¹¹⁹ This decision should provide judicial guidance for other courts faced with a misuse of interim zoning.

CONCLUSION

Legislative action should be undertaken to effect greater public

116. 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974); *Candlestick Properties, Inc. v. San Francisco Bay Conservation Com.*, 11 Cal. App. 3d 557, 89 Cal. Rptr 897 (1970).

117. *Id.* at 255. See also *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975). The Supreme Court in *HFH* was faced with an allegation that a downzoning of the plaintiff's property, resulting in a \$300,000 decline in market value, constituted inverse condemnation. The court held that "a zoning action which merely decreases the market value of property does not violate the constitutional provisions forbidding uncompensated taking or damaging . . ." *HFH, Ltd. v. Superior Court, supra* at 518. Thus, even a permanent devaluation of property will not be found to constitute inverse condemnation.

118. 3 Cal. App. 3d 554, 83 Cal. Rptr. 698 (1970).

119. *Id.* at 556.

input in the formulation of the general plan. Such input would work toward the formulation of land use choices which are based on a broader consensus. Additionally, measures should be undertaken to prevent a merging of planning and zoning. Zoning is but one means of implementing the long-range plan and should not eclipse planning. One such measure may be a reevaluation of the need for the consistency requirement. The requirement in its present form does not appear to be a catalyst to fulfillment of the general plan requirements. Secondly, there is a built-in presumption that planning is legitimate and that the lack of a consistent rationale for advance allocation of land development opportunities creates a substantial risk that these allocations will be both arbitrary and inefficient. This is not to say that planning has no utility. It is to say that the validity of a zoning ordinance should be determined on the basis of the reasonableness of the local decision making. If the decision is based on some prior planning that would be evidence of reasonableness. Elimination of the consistency requirement would, in effect, make the general plan the document the Supreme Court found it was in the *Selby* case, something that is "by its very nature merely tentative and subject to change."¹²⁰

120. *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 118, 514 P.2d 111, 116, 109 Cal. Rptr. 799, 804 (1973).