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Carlyle W. Hall Jr.

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Carlyle W. Hall, Jr.*

The past five years have witnessed an enormous change in the way in which the legal system relates to the local land use planning process. Previously, the statutory law was phrased almost entirely in terms of enabling legislation and thus imposed few restrictions on the decision-making options and procedures of local planners. Further, court decisions that involved land use planning issues were based almost exclusively on the concept of deferring to the legislative (elected officials') or administrative (experts') judgment, and thus took a "hands off" approach toward local planning decisions.

However, the lack of legislative and judicial checks upon the local land use planning and zoning practices resulting from this "traditional" approach lead to a wide variety of local planning abuses. Although California has typically been at the forefront in developing innovative approaches to reform, California's efforts to reform the local land use planning process to prevent these abuses have reflected some very deeply ingrained legislative and judicial trends within the United States.

* A.B., 1963, Yale College; J.D., 1966, Harvard Law School. U.S.C. Panelist and Lecturer; staff attorney and co-founder of Center for Law in the Public Interest, Los Angeles.

I. THE "TRADITIONAL" LEGAL APPROACH TO THE LOCAL LAND USE PLANNING PROCESS.

California cities were among the first in the United States to regulate land use through zoning ordinances, some of which were enacted as early as 1885.[1] These early zoning ordinances were founded upon the police power authority contained in Article XI, Section 11 of the California Constitution. The first state-wide zoning enabling act was legislated in 1917. This statute, as modified from time to time, has since provided the basis for zoning regulations in California.[2] California's first planning enabling legislation came later, as it did in most states,[3] when the Legislature adopted the Conservation and Planning Law.[4] From the time these two acts were adopted, the California courts took an extremely sympathetic view of their purposes and have consistently upheld local planners in their efforts to establish and implement a local land use planning and zoning process.

The California Supreme Court's decision in *Miller v. Board of Public Works*,[5] established the framework for all subsequent decisions. *Miller* upheld the constitutionality of local zoning regulations in the broadest possible language:

> [T]he police power is not a circumscribed prerogative, but is elastic and in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race.
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> A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. . . . Every intendment is to be indulged by the courts in favor of the validity of its exercise, and unless the measure is clearly oppressive it will be deemed to be within the purview of that power . . . . [A]s long as there are considerations of public health, safety, morals, or general welfare which the legislative body may have had

1. D. HAGMAN, J. LARSON AND C. MARTIN, CALIFORNIA ZONING PRACTICE (CEB 1969), at 4. [Hereinafter cited as CZP.]

2. *Id.*, at 4-13. California never adopted the Standard State Zoning Enabling Act.

3. *See generally*, C. Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

4. Calif. Stats. 1947, Ch. 807 § 78 at 1922. This statute has amended, but formed the basis of what is now CAL. GOV'T. CODE § 65000 *et seq.* (West 1966).

5. 195 Cal. 477, 234 P. 381 (1925).

> in mind, which have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation.[6]

The *Miller* approach was repeatedly used by the California Supreme Court to uphold local zoning ordinances attacked by landowners as being in violation of the constitutional prohibitions against "taking" of property without just compensation and without due process of law. For example, in *McCarthy v. Manhatten Beach*,[7] a city's zoning of three-fifths of a mile of privately owned sandy beachfront property as "Beach Recreational" (which meant that the only structures permitted were lifeguard towers and a small wire fence and that the property could be used only for beach recreational activities) was upheld by the supreme court as a legitimate exercise of the police power. And in *Consolidated Rock Products Co. v. Los Angeles*,[8] the California Supreme Court upheld a re-zoning, despite the defendant City's inability to show that the quarrying activities previously conducted on the land resulted in any nuisance-like activities and despite the plaintiff landowner's proof that the re-zoning to exlusively agricultural uses, in essence, totally destroyed the value of his land. One leading legal scholar writing in 1969 concluded that cases like *McCarthy* and *Consolidated Rock* demonstrated that local zoning was "more likely to be sustained by the California courts than in any other courts in the country" and that "whatever the decision of the local zoning body, California courts tend to uphold it.[9]

Other attempts to develop significant legal constraints upon the decision-making discretion of local planners were also rejected. Thus, in *Ayres v. Los Angeles*,[10] the California Supreme Court upheld subdivision exactions requiring, among other things, street dedications by a proposed developer as a condition to approval of his subdivision map. The court ruled that it was irrelevant that the city had no officially adopted local general or master plan by which the reasonableness and necessity of the exactions could be judged; the court concluded that it was acceptable to make such evaluations on a case-by-case basis. Similarly, California Government Code Section 65860 provided that the adoption of a local general plan was not a precondition to the adoption of a zoning ordinance.

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6. *Id.* at 485, 490, 234 P. 381, at 383, 385.
7. 41 Cal. 2d 879, 264 P.2d 932 (1953).
8. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962).
9. HAGMAN in CZP at 7.
10. 34 Cal. 2d 31, 267 P.2d 1 (1949).

However, the Planning and Zoning Law,[11] enacted in 1965, did provide that the local general plan was to be used as the "pattern or guide" for the "orderly physical growth and development" of the local jurisdiction.[12] One case decided in the mid-1960s gave some promise that local general plans would, under those provisions, become "a constitution for all future development within the city." *O'Loane v. O'Roark*[13] involved the question of whether the adoption of a local general plan was subject to referendum. The court of appeal viewed this issue as turning on whether adoption of such a plan was a legislative act. Relying heavily on a leading scholar's analysis of the proper planning role of a local general plan,[14] the court concluded that the adoption of a general plan was subject to referendum, particularly since subsequently enacted zoning ordinances "would surely be interpreted in part by their fidelity to the general plan as well as by the standards of due process." Speaking of the general plan at issue in the case, the court said:

> True, [the City's general plan] is couched in part in general terms, but there are many specifics, and once adopted it becomes very effective. Many facets of activities between other public agencies and the city are effectively determined by the plan. Any subdivision or other development would necessarily be considered in its relation to the general plan, and such consideration practically by itself would be a sufficient legislative guide to the exercise of such discretions.
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> It surely cannot be contemplated that the council, in the adoption of future zoning ordinances (which are admittedly legislative and subject to referendum) will go contrary, (in all but rare instances), to the general plan which it adopts.[15]

The *O'Loane* decision, however, was largely ignored by local planners and elected officials. They continued their now well-entrenched business-as-usual approach of making zoning decisions in a manner wholly independent of the provisions and policies set forth in the adopted local general plan. Some of the problems resulting from this *ad hoc*, unfettered approach are described below.

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11. CAL. GOV'T. CODE § 65000 et seq. (West 1966).
12. CAL. GOV'T. CODE § 65400 (West Supp. 1976).
13. 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (1965).
14. C. Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955). *See also* C. Haar, *The Master Plan—An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353 (1955).
15. *Id.* at 783, 42 Cal. Rptr. at 288.

II. The Planning Abuses Encouraged by the Traditional Legal Approach and Resulting Legislative Reforms.

The 1965 provisions of the Planning and Zoning Law required every city and county to adopt "a comprehensive, long-term general plan."[16] This plan was to consist of "a statement of development policies" and was to contain "a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals."[17] Certain elements were mandatory (a land use element and a housing element),[18] while other elements were optional (e.g., a "conservation element").[19] As noted above, once adopted, the general plan was to serve as a "pattern or guide" for the "orderly physical growth and development of the county or city."[20]

But it was soon observed that cities and counties were disregarding the thrust of both the statute and the *O'Loane* decision. The *1968 State Development Plan Program*, prepared by the State Office of Planning, found that:

> Although preparation of a General Plan is required by law, only about two-thirds of the cities of the state have adopted one. The plans exhibit major gaps in responding to primary development policy needs . . . . The plans tend to be static, prescriptive and locational. They also tend to ignore proposals for economic, social, visual, resource, fiscal, service and jurisdictional matters.
>
> Review and updating of plans is spotty, with less than one-fourth of cities with General Plans reconsidering them in a regularized way . . . . A substantial number of cities still use zoning as completely unrelated to long-range planning objectives.
>
> Probably less than 20 percent of all counties in the state can be considered to have thoroughly prepared, up-to-date, effective general plans.[21]

In 1970 the Legislature addressed itself for the first time to the local planning deficiencies described in the 1968 study. The Legislature had appointed a Joint Committee on Open Space Lands to recommend legislation to cope with some of these problems. The Joint Committee prepared a *Final Report*[22] in 1970 setting out the purpose of its proposed legislation. The *Final Report* focused on two particular inadequacies of local planning:

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16. Cal. Gov't. Code § 65300 (West 1966).
17. *Id.* § 65363 (West —).
18. *Id.* § 65302 (West Supp. 1976). The land use and circulation elements became mandatory in 1955. The housing element was made mandatory in 1969.
19. *Id.* § 65303 (West Supp. 1966).
20. *Id.* § 65400 (West Supp. 1976).
21. *1968 State Development Plan Program*, at 259-60.
22. California State Senate and Assembly Joint Committee on Open Space Lands, Final Report (1970). [Hereinafter cited as Final Report.]

first, a large number of local governments were not adequately planning for their open space resources, and second, those that did have such plans were disregarding them in their subsequent regulatory actions (e.g., zoning) rather than implementing them. The Joint Committee summarized its concerns over these problems as follows:

> Under present law there is no requirement that open space needs be considered in community planning. In those instances where open space requirements are considered in local planning, there is no requirement to relate land-use decisions to the plan. It is important, therefore, (a) to assure that open space be considered as a part of the overall planning process, and (b) to guarantee that public and private land-use decisions be made within the context of planning decisions.[23]

Regarding the first problem, the *Final Report* stated:

> While some local governments have adopted an open space element of their general plan, no requirement that they do is contained in the planning law.
>
> A large number of local agencies do not plan for open space. The result of this is that most local plans are development oriented. Planning for urban expansion frequently dominates planning for open space preservation.[24]

As a legislative solution to this first problem, the Joint Committee recommended[25] and the Legislature enacted[26] provisions requiring that open space elements be included as a mandatory element of each local general plan. To underscore the Legislature's sense of urgency, provisions were added[27] for the first time to establish deadlines for the preparation and adoption of the now mandatory open space element.[28]

The Joint Committee also prepared findings on the second problem: the flouting of these plans by the local governments

23. *Id.* at 37.
24. *Id.* at 23-24.
25. *Id.* at 25.
26. CAL. GOV'T. CODE § 65563 (West Supp. 1976).
27. *Id.*
28. The deadline date was initially established as June 30, 1972. This was postponed first for one year to June 30, 1973 (Stats. 1972, ch. 251), and subsequently to December 31, 1973 (Stats. 1973, ch. 120, § 4). It may be noted that cities and counties were required by state law enacted as early as 1929 to have master zoning plans. The California Attorney General had ruled that, in the absence of a deadline date, there was considerable leeway in the timing requirements. (4 OPS. CAL. ATTY. GEN. 150 (1944).)

which already had them. The *Final Report* focused on the problems resulting from the dichotomy between the general plan and the regulatory control measures, such as zoning. The Joint Committee criticized the practice, prevalent among cities and counties, of developing two parallel plans—one the official general plan, and the other the de facto plan drawn by the local body as it administers zoning and other land use programs. Instead, the Joint Committee reported, "Ideally, there should be unity between these two plans."[29] According to the *Final Report*:

> The best plan poorly followed can be of little value. . . . Until local actions are required to comply with the appropriate local plan, the danger of thwarting planning goals will continue. . . .
>
> It is not enough merely to plan for open space preservation. There must be some public assurance that the plans will be carried out. One means of insuring that local space plans are carried out is to require that land designated as open space in a local plan be restricted to open space uses.
>
> In the absence of such a requirement, there exists no guarantee that open space objectives will be carried out.[30]

The Legislature, which adopted these recommendations in several provisions in the 1970 Act, required an "action program" consisting of "specific programs" which the local body "intends to pursue in implementing its open space plan;[31] it also required adoption of a comprehensive "open space zoning ordinance" that would be "consistent with" the open space plan by December 31, 1972.[32] Most importantly, however, the Legislature provided for the first time that a "consistency requirement" be applied to all subsequent land use decisions in the local jurisdictions:

> Any action by a county or city by which open space land or any interest therein is acquired or disposed of or its use restricted or regulated, whether or not pursuant to this part, must be consistent with the local open space plan.[33]

And it further provided that:

> No building permit may be issued, no subdivision map approved, and no open space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open space plan.[34]

In 1971 the Legislature extended the consistency requirement to encompass not only the open space element of the general plan but

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29. FINAL REPORT, at 24.
30. *Id.* at 24-25.
31. CAL. GOV'T CODE § 65564 (West Supp. 1976).
32. *Id.* § 65910 (West Supp. 1976).
33. *Id.* § 65566 (West Supp. 1976).
34. *Id.* § 65567 (West Supp. 1976).

the entire general plan. The purpose of the 1971 legislation[35] which emanated from the Joint Assembly Subcommittee on Premature Subdivisions, was explained in the Subcommittee's *Staff Recommendations for Legislative Action*:

> At present, local zoning ordinances are not required to be consistent with city and county general plans. This type of latitude may have been justified during the initial period after the Legislature required all cities and counties to have general plans. At that time, some 'period of grace' was necessary during which existing zoning ordinances could be brought into conformity with new general plans.
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> At the present time, it is neither wise nor reasonable to permit this type of land use policy to continue any longer.
>
> The 1970 Legislature took the first step towards eliminating this inconsistency between local zoning by requiring that all local zoning ordinances dealing with open space be consistent with the open space element of local general plans (Chapter 1590). To insure proper local development, however, all local zoning ordinances should be required to be consistent with local general plans.
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> * * *
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> At present, the law does not require that proposed subdivisions be consistent with local plans.
>
> Thus, it is possible for a subdivision map to be approved which is actually at variance with local plans. This loophole in the law subverts the integrity and the utility of the local planning process.[36]

Thus, AB 1301 was drafted by the Subcommittee and enacted by the Legislature in 1971. The essence of AB 1301 was to require, first, that all zoning be made consistent with the local general plan by a deadline date of mid-1973[37] and, second, that all subdivision map approvals be consistent with the local general plan.[38]

The other major legislative response to some of the problems created by local planning abuses was the enactment in 1970 of the California Environmental Quality Act (CEQA).[39] Much has been written about CEQA and its peculiar legislative history[40] and it

35. CAL. STATS. 1971, ch. 1446, at 2852.

36. JOINT ASSEMBLY SUBCOMMITTEE ON PREMATURE SUBDIVISIONS, STAFF RECOMMENDATIONS FOR LEGISLATIVE ACTION, at 3-5 (1970).

37. Later postponed to December 31, 1973, by Stats. 1973, ch. 120, § 4.

38. AB 1301 also required denial of the subdivision map if certain "findings" regarding the environmental impact of the proposed development could not be made. CAL. GOV'T CODE §§ 66451, 66474.) (Formerly CAL. BUS. & PROF. CODE §§ 11526 and 11549.5).

39. CAL. PUB. RES. CODE §§ 21000 *et seq.* (West Supp. 1976).

40. *See* Friends of Mammoth v. Mono County Board of Supervisors,

would serve no purpose here to rehash some of the debates about what CEQA was and was not intended to do. Suffice it to say that the California Legislature was obviously copying CEQA's parent statute, the National Environmental Policy Act (NEPA).[41] Like NEPA, CEQA has two distinct parts: first, a policy section which sets forth the State Legislature's mandate that henceforth environmental preservation is to be "the guiding criterion" in public decisions[42] and, second, a procedural section which requires environmental impact reports (EIRs) on all projects which might have significant environmental consequences.[43]

III. The Judicial Response to the Problem.

A. Two Judicial Trends.

The California Legislature when it enacted CEQA, like Congress when it enacted NEPA, was giving legislative form to a fundamental, and now deeply ingrained, judicial trend toward requiring public agencies to articulate in writing the factors on which their actions are based. This trend has perhaps been best summarized and explained in *EDF v. Ruckelshaus*,[44] where Chief Judge Bazelon wrote:

> We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the 'substantial evidence' test, and a bow to the mysteries of administrative expertise. Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the decision, or a crucial factor had not been considered. Gradually, however, that power has come into more frequent use, *and with it, the requirement that administrators articulate the factors on which they base their decisions.*
>
> Strict adherence to that requirement is especially important now that the character of administrative litigation is changing. As a result of expanding doctrines of standing and reviewability, and new statutory causes of action, courts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health, and liberty. These interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a ratemaking or licensing proceeding.

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8 Cal. 3d 247, at 254-66, 502 P.2d 1049, at 1053-62, 104 Cal. Rptr. 761, at 765-74 (1972).

41. 42 U.S.C. § 4321 *et seq.*
42. Cal. Pub. Res. Code § 21000 (West Supp. 1976).
43. Cal. Pub. Res. Code §§ 21100, 21151 (West Supp. 1976).
44. 439 F.2d 584 (D.C. Cir. 71).

> To protect these interests from administrative arbitrariness, it is necessary, but not sufficient, to insist on strict judicial scrutiny of administrative action. For judicial review alone can correct only the most egregious abuses. Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. *Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible.* Rules and regulations should be freely formulated by administrators, and revised when necessary. *Discretionary decisions should more often be supported with findings of fact and reasoned opinions. When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought.*[45]

The federal courts have frequently been at the forefront of this judicial trend. Indeed, NEPA itself was largely a legislative codification of two landmark environmental cases—*Scenic Hudson Preservation Conf. v. Federal Power Comm'n*,[46] and *Udall v. Federal Power Comm'n*[47]—in which the federal courts required the public agency to affirmatively develop a reviewable written record regarding the environmental consequences of a proposed project, a list of alternatives to it, and a statement of the reasons why the project was thought desirable or necessary.[48]

Where NEPA has been involved, the courts have seen its commands as providing a strong legislative mandate supporting the judicial trend toward requiring public agencies to develop contemporaneous written records regarding all phases of their environmental decision-making process—even where it could be argued that no environmental impact statement is specifically required.[49] Indeed, apart from cases involving NEPA, the federal courts have increasingly required public agencies to prepare contemporaneous

45. *Id.* at 597-98 (Emphasis added).
46. 354 F.2d 608 (2d Cir. 1965).
47. 387 U.S. 428 (1967).
48. *See* COUNCIL ON ENVIRONMENTAL QUALITY, THIRD ANNUAL REPORT (1972) at 223. *See also*, Greene County Planning Board v. Federal Power Comm'n, 455 F.2d 412, 419 (2d Cir. 1972) and Scenic Hudson Preservation Conf. v. Federal Power Comm'n, 453 F.2d 463, 468 (2d Cir. 1971) (describing NEPA as codifying the judicial approach of these cases).
49. *See, e.g.*, Hanley v. Mitchell, 460 F.2d 640 (2d Cir. 1972); Hanley v. Kleindienst, 471 F.2d 823 (2d Cir. 1972); Scientists Institute for Public Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973). *See also*: EDF v. Froehlke, 470 F.2d 289 (8th Cir. 1972) (collecting cases).

written records of their decision-making process including a full discussion of the reasons for their decisions.[50] The leading commenators strongly support this judicial trend.[51] Among the state courts, the California appellate courts have long recognized the weighty reasons behind the trend and have supported it wherever possible.[52]

Viewed in this light, the California Supreme Court's controversial *Friends of Mammoth*[53] ruling and its subsequent decision in the *Topanga* case[54] are not surprising. Indeed, the court in *Mammoth* viewed the enactment of CEQA and its requirement of environmental impact reports as a legislative affirmation of this trend, particularly in the "field of ecology."[55] The court saw the EIR procedural requirements as being designed to assure that the CEQA substantive policies would, in fact, be carried out.[56] Only by the courts' rigorous insistence that the agency officials set out in writing their detailed analysis of the proposed project's environmental impacts would these lofty goals be accomplished. The judiciary was to be active in seeing to it that agencies actually made environ-

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50. *See*, e.g., Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n, of D.C., 477 F.2d 402 (D.C. Cir. 1973) (written statement of reasons for action must be prepared by zoning board in its quasi-legislative activities even though formal "findings" not required by statute); Greater Boston TV v. Federal Communications Comm'n, 444 F.2d 841, 851 (D.C. Cir. 1970) (agency must articulate with reasonable clarity the basis for its decisions); Jones v. D.C. Redevelopment Land Agency, 499 F.2d 502 (D.C. Cir. 1974); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) (agency required to articulate objective standards for agency's decision making); Holmes v. N.Y.C. Housing Authority, 398 F.2d 262 (2d Cir. 1968) (same); New Castle County Airport Comm'n v. CAB, 371 F.2d 733 (D.C. Cir. 1966) (reasoned analysis prepared by agency particularly required where it appears agency is acting inconsistently with previously adopted policies); Powelton Civic Homeowners Ass'n v. HUD, 284 F. Supp. 809 (E.D. Pa. 1968) (agency must base decisions on complete record reflecting views of all recognized interests).

51. *See*, Jaffe, Book Review, 84 HARV. L. REV. 1562 (1971); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.00 (Supp. 1970); Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966).

52. *See*, e.g., Broadway, Laguna, Etc., Ass'n v. Board of Permit Appeals, 66 Cal. 2d 767, 427 P.2d 810, 59 Cal. Rptr. 146 (1967); California Motor Transport Co. v. Public Utilities Comm'n, 59 Cal. 2d 270, 379 P.2d 324, 28 Cal. Rptr. 868 (1963); California Ass'n of Nursing Homes, Etc., Inc. v. Williams, 4 Cal. App. 3d 800, 813, 84 Cal. Rptr. 590, 599 (1970); County of Amador v. State Board of Equalization, 240 Cal. App. 2d 205, 216, 49 Cal. Rptr. 448, 458 (1966).

53. Friends of Mammoth v. Mono County Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

54. Topanga Ass'n For A Scenic Community v. Los Angeles County, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).

55. 8 Cal. 3d 252, 270, 502 P.2d 1049, 1064, 104 Cal. Rptr. 761, 776-77 (1972).

56. *Id.* at 263, 502 P.2d at 1059, 104 Cal. Rptr. at 771.

mental considerations play a significant role in their decisions and did not simply pay lip service to CEQA's substantive policies.[57]

Similarly, the court in *Topanga* emphasized that, even where EIRs were not necessarily required by CEQA, detailed written findings and analyses of a public agency's decisions were nevertheless required anytime the agency acted in a quasi-judicial capacity in its land use decision-making activities. Relying on California Code of Civil Procedure Section 1094.5 (which placed certain obligations on the courts), the court ruled that an implicit duty was imposed on the public agency to prepare specific written findings which "bridge the analytic gap between the raw evidence and the ultimate decision or order," and reveal the "analytic route the administrative agency traveled from evidence to action."[58] Candidly admitting that this *Topanga* requirement was judicially (rather than legislatively) created, the court noted that the requirement would "facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions."[59] Furthermore, such findings would enable the reviewing court to trace and examine the agency's mode of analysis, thereby facilitating judicial review of the agency's substantive decision.[60]

This judicial trend requiring written findings by administrative agencies is prompted largely by a judicially perceived need for more frequent, more probing and more intense judicial review of the public agency's decision on the merits. The procedural requirements of detailed, written analyses are designed to open the agency decision-making process, not only to the public, but also to the courts. Chief Justice Bazelon's approach in *EDF v. Ruckelshaus*,[61] is repeatedly reflected in the California Supreme Court's opinions—opinions which express concern with abuses which have arisen in the agency decision-making process and which view a more active judicial role as at least a partial solution to those problems.

In *Friends of Mammoth*,[62] the California Supreme Court said:

57. *Id.*
58. 11 Cal. 3d 506, 515, 522 P.2d 12, 17, 113 Cal. Rptr. 836, 841 (1972).
59. *Id.* at 516, 522 P.2d at 18, 113 Cal. Rptr. at 842.
60. *Id.*
61. 439 F.2d 584 (D.C. Cir. 1971).
62. 8 Cal. 3d 252, 297, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

> [CEQA] was designed to be a milestone in the campaign for 'maintenance of a quality environment for the people of this state now and in the future. . . .'[63]

The court stated further:

> In an era of commercial and industrial expansion in which the environment has been repeatedly violated by those who are oblivious to the ecological well-being of society, the significance of this legislative act cannot be understated.[64]

The judiciary plays a crucial role under this environmental legislation: its duty is to assure that the important legislative purposes, heralded in the legislative halls, are not lost or misdirected in the course of their day-to-day administration,[65] and that state and local entities do not simply give vague or illusry assurances that CEQA's substantive goals had been taken into account.[66]

Similarly, the *Topanga* decision repeatedly refers to the need for "vigorous and meaningful judicial review" of the agency's substantive decision (by means of the required findings) to ensure that administrative boards do not subvert the intended decision-making structure.[67] The *Topanga* decision takes special note of the "casual" procedures employed by many zoning boards, and cites the potential conflicts of interest that zoning board members (who are frequently drawn from the real estate development industry) often have.[68]

Thus, the past ten years have witnessed the accompanying development of a second judicial trend in which the courts have been increasingly active in protecting the public against abuses in administrative and local government decision-making. While in the past, courts might have held that judicial review of agency action is inappropriate because discretion to make the decision was vested in the agency, recently they have more frequently articulated substantive restrictions upon the exercise of government officials' discretion often basing these restrictions on very broad "policy" declarations contained in legislative acts.[69] For example, in the landmark U.S. Supreme Court case, *Citizens to Preserve Overton Park v. Volpe*,[70] the Court construed the broad policy embodied in the

63. *Id.* at 292, 502 P.2d at 1051, 104 Cal. Rptr. at 763.
64. *Id.* at 254, 502 P.2d at 1053, 104 Cal. Rptr. at 765.
65. *Id.*
66. *Id.* at 263, 502 P.2d at 1059, 104 Cal. Rptr. at 771.
67. 11 Cal. 3d 506, 517, 522 P.2d 12, 19, 113 Cal. Rptr. 836, 842 (1974).
68. *Id.* at 518, 522 P.2d at 19, 113 Cal. Rptr. at 843.
69. *See, generally*, Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L. J. 965 (1969); Saferstein, *Non-reviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).
70. 401 U.S. 402 (1971).

Department of Transportation Act of 1966,[71] which directed the Secretary of Transportation not to release funds for the construction of a highway using public park land if there is a "feasible and prudent alternative." The Secretary had contended that the statute imposed no limits upon his discretion, since the statute was simply a directive to consider these very broad matters. The Court, however, ruled that the command imposed substantive and judicially reviewable legal restrictions on the Secretary's discretion. Such actions were always subject to judicial review unless there was "clear and convincing evidence"[72] that the Legislature intended to preclude such review. Also, substantive decisions were never "committed to agency discretion" and thus insulated from judicial review except where statutes are drawn in "such broad terms that in a given case there [was] no law to apply."[73]

In *Overton Park* there was no such broad and "wide-ranging balancing of competing interest"[74] involved in applying the "feasible and prudent alternative" standard because the criteria which could be articulated[75] under that standard were sufficiently "clear and specific"[76] and gave the courts a basis for review of the propriety of the agency's action on a case-by-case basis. The Court went on to emphasize that judicial review of the merits of the agency's decision in such cases must involve a substantial inquiry; the presumption of regularity of the agency's decision should not shield it from a "thorough, probing, in-depth review."[77] The scope of such judicial review was first, to ensure that the agency had acted within the scope of its legal authority and, second, to inquire whether it was based on a consideration of the relevant factors and whether there has been a "clear error in judgment."[78]

71. 49 U.S.C. § 1653 (Supp. 1976).
72. 401 U.S. 402, 410 (1972).
73. *Id.*
74. *Id.* at 411.
75. *Id.*
76. Under the Court's articulated criteria, the statutory term "feasible" meant simply whether "sound engineering" principles would approve of it, while the statutory term "prudent" meant that, in contrast to the usual run-of-the-mill case, putting a freeway through a park in the instant case involved unusual factors and problems of truly extraordinary magnitude. The Court deduced these criteria from its analysis of the purpose of the statute, that, all other things being equal, the protection of parkland was to be given paramount importance.
77. 401 U.S. 402, 415 (1972).
78. 401 U.S. 402, 416 (1972).

The California Supreme Court has adopted an approach similar to *Overton Park*, concluding that public agency action is subject to judicial review on the merits in all cases "that seek to measure governmental performance against a legal standard."[79] In *Harmon v. City and County of San Francisco*,[80] the court stated that courts will not review public agency actions that "involve the exercise of indefinable discretion," but they must review agency "conduct that can be tested against legal standards."[81]

A recent environmental case shows how the California Supreme Court will implement this broad view of court review of an agency's substantive decision to ensure that the agency complies with the legislative mandate. In *Clean Air Constituency v. California State Air Resources Board*,[82] the legislation in question authorized the Air Resources Board (ARB) to administer a statewide program to equip 1966 through 1970 model year vehicles with devices to control nitgrogen oxide emissions and thereby consequently enhance the quality of the air throughout California. The ARB, however, chose to delay the implementation of the program for the stated reason of conserving gasoline during the energy crisis. The court ruled that the ARB had a limited authority and discretion to delay the program for reasons which relate to effectuating the purpose of the legislation but that it had no authority to delay it for reasons related to the energy crisis.

In discussing the relationship between the Legislature and the agencies, the supreme court stated:

> When the Legislature enacted the Air Resources Act and the NOx legislation, it concluded as a matter of fundamental policy that urgent action against automobile pollution was essential for the health of California's residents. In effect, it made clean air a higher priority than the concern for fuel consumption, the problem of rising costs in transportation, or the economics of the automobile industry. After making this policy determination, the Legislature directed the ARB to establish a program which would accomplish the goal of pollution control. In response, the ARB determined that urgent action against the energy crisis was essential for the economic well-being of the state. *In effect, its action to delay the NOx program for one year inverted the priorities by making energy consumption loftier in significance then concern for clean air. In other words, when the ARB postponed the NOx leg-*

79. Harman v. City and County of San Francisco, 7 Cal. 3d 150, 160-61, 496 P.2d 1248, 1255, 101 Cal. Rptr. 880, 887 (1972).

80. *Id.*

81. *Id. See also*, Calderon v. City of Los Angeles, 4 Cal. 3d 251, 481 P.2d 489, 93 Cal. Rptr. 361 (1971); Manjares v. Newton, 64 Cal. 2d 365, 411 P.2d 801, 49 Cal. Rptr. 805 (1966); Griffin v. Board of Supervisors, 60 Cal. 2d 318, 384 P.2d 489, 33 Cal. Rptr. 101 (1963).

82. 11 Cal. 3d 801, 523 P.2d 617, 114 Cal. Rptr. 577 (1974).

> *islation, it made the same kind of fundamental—though contrary—policy determination the Legislature had made when it enacted the program in the first instance.*[83]

The court concluded that, when the ARB exercised its authority to delay the NOx program, it was required to affirmatively justify that action with legitimate reasons:

> Each time the ARB elects to defer the Nox program, *it must justify the action* in terms which relate to speedy installation, substantial pollution reduction, or effective enforcement. This interpretation of Vehicle Code section 4602 *enables the ARB to exercise enough discretion to carry out the broad purposes of the Air Resources Act, and still reserves to the Legislature as the most representative organ of government the right to make those crucial policy determinations for which it has competence, information, and time.* (Davis, Administrative Law (3d ed. 1972) pp. 92-93.)[84]

These dual judicial trends—requiring detailed written analyses prepared by the agency and greater involvement by the courts in reviewing the substantive "merits" of the agency decision—have had enormous consequences for the local land use planner.[85] Some consequences of particular importance are discussed below.

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83. *Id.* at 817, 523 P.2d at 627, 114 Cal. Rptr. at 587. (Emphasis added.)

84. *Id.* at 819, 523 P.2d at 628, 114 Cal. Rptr. at 588. (Emphasis added.)

85. Because of space limitations, this article does not discuss some of the extremely important recent judicial developments relating to *constitutionally derived* substantive restraints on local planners. These include, for example, the recent series of California cases involving the "taking" clause and alleged inverse condemnation. E.g., *compare* Klopping v. Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972), with Selby Realty Co. v. San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973). The recent *H.F.H., Ltd.* case makes it clear that, except possibly in the most extreme situations, inverse condemnation is still unavailable in California as a basis for property owner attacks on local planning and zoning activities. (H.F.H., Ltd. v. Superior Court, 15 Cal. 3d 508, 125 Cal. Rptr. 365, 542 P.2d 237 (1975).) A series of recent federal cases, involving challenges to restricted growth and development of local general plan and zoning schemes, and based upon a wide variety of federal constitutional principles, makes it clear that the federal courts will continue to remain aloof from state and local planning and zoning issues. *See*, e.g., Village of Belle Terre v. Boras, 416 U.S. 1 (1974); Construction Industry Ass'n v. City of Petaluma, 522 F.2d 897, 8 ERC 1001 (9th Cir. 1975); Ybarra v. Los Altos Hills, 370 F. Supp. 742 (N.D. Cal. 1973). Litigation in the state courts under state constitutional principles may be much more likely to result in imposition of substantive control on the discretion of local planners. *See*, e.g., Southern Burlington County NAACP v. Mt. Laurel, 336 A.2d 713, 67 N.J. 151 (1975), discussed, infra.

Also beyond the scope of this article are judicially enforceable substantive restrictions on the decision-making discretion of non-local planners.

B. *Judicial Enforcement of the Substantive Duties Imposed on Local Planners by CEQA.*

It is, of course, now black letter law in California that the CEQA procedural duty to prepare environmental impact reports (EIRs) prior to taking proposed local government action runs virtually the full gamet of public agency decision-making activity in the land use planning process—ranging from preparation and adoption of a local general plan and plan amendments[86] at the most general level of decision-making, through adoption of zone changes,[87] all the way to issuance of conditional use permits[88] and even, in some cases, to issuance of building permits.[89] It is also settled that the courts have the power, indeed the obligation, to review the adequacy of the EIRs, when they are challenged in the courts, to ensure that they fully describe the potential environmental and growth-inducing impacts associated with the proposal, the alternatives to it, the possible mitigation measures, and the reasons for the proposed course of action.[90]

What has been less clear, until recently, is whether the substantive policies set forth in CEQA are simply unenforceable exhortations to action or whether they create binding legal requirements which circumscribe the agency's substantive decision making powers and are enforceable in the courts.[91] The federal courts are

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For example, in Bozung v. Local Agency Formation Comm'n, 13 Cal. 3d 263 (1975), the Supreme Court ruled that under the then-in-effect provisions of the Knox-Nisbet Act a local agency formation commission ("LAFCo") was under no substantive duty to disapprove a proposed annexation even though it would admittedly result in "urban sprawl." The Act has recently been amended, however, in a manner which may impose this substantive duty on LAFCos. (Gov. Code §§ 54790, 54790.1 and 54790.2).

86. State CEQA Guidelines, § 15037, Cal. Admin. Code, Tit. 14. Bozung v. Local Agency Formation Commission, 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975).

87. Pub. Res. Code § 21151. See Rosenthal v. Board of Supervisors, 44 Cal. App. 3d 815, 119 Cal. Rptr. 282 (1975).

88. Friends of Mammoth, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

89. Burger v. County of Mendocino, 45 Cal. App. 3d 322, 119 Cal. Rptr. 247 (1975).

90. *See*, e.g., EDF v. Froehlke, 470 F.2d 289, 4 ERC 1829 (8th Cir. 1972); EDF v. Coastside County Water District, 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972).

91. It should be emphasized that, even if CEQA were read as itself independently creating no judicially enforceable substantive obligations, a public agency's substantive decisions would in most cases still be subject to judicial review "on the merits." A petitioner seeking to challenge such action would argue that the substantive merits of the decision were inconsistent with other substantive obligations imposed on the agency by some other statute (as in the Clean Air Constituency and Topanga cases, or that

divided on the issue of whether NEPA creates substantive obligations upon federal agencies, with the majority of circuits concluding that it does.[92] In *EDF v. Corps of Engineers*,[93] the court ruled that the broad policies stated in section 101 of NEPA were "substantive" and that the courts "have an obligation on the merits" to review the action in question to see if these policies were not properly implemented. The requirement that agencies prepare environmental impact statements under Section 102 of NEPA was an "action-forcing" provision to ensure that the substantive Section 101 policies are given effect. The court stated:

> NEPA is silent to judicial review, and no special reasons appear for not reviewing the decision of the agency. To the contrary, *the prospect of substantive review should improve the quality of agency decisions and should make it more likely that the broad purposes of NEPA will be realized.*[94]

The California Supreme Court's *Friends of Mammoth* decision can be read as endorsing a similar concept under CEQA. The *Mammoth* court stated that:

> Obviously, if the adverse consequences to the environment can be mitigated, or if feasible alternatives are available, the proposed activity, such as issuance of a building permit, should not be approved.[95]

Accordingly, in *Burger v. County of Mendocino*,[96] the court of appeal ruled that issuance of a building permit for an 80-unit motel

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the decision was wholly unsupported by any substantive evidence and thus constituted an abuse of discretion properly set aside by the courts pursuant to CAL. CODE OF CIV. PROC. § 1085 or § 1094.5. In such a challenge, the petitioner would undoubtedly use the facts and analysis set out in the agency's EIR on the proposal as ammunition for the attack on the decision itself. *See, e.g.*, National Wildlife Federation v. Morton, 393 F. Supp. 1286, ERC 2128 (D.D.C. 1975) (agency's decision to permit off-road vehicles on public lands and EIS thereon rejected); Concerned About Trident v. Schlessinger, 8 ERC 1129 (D.D.C. 1975) (Trident project and EIS thereon upheld); Coalition for Los Angeles County Planning in the Public Interest v. Board of Supervisors, 8 ERC 1249 (L.A. Co. Sup. Ct. 1975) (Los Angeles County general plan and EIR thereon rejected), discussed infra.

92. *See, generally*, Note, *The Least Adverse Alternative Approach To Substantive Review Under NEPA*, 88 HARV. L. REV. 735 (1975), and EDF v. Corps of Engineers, 470 F.2d 289, at 299-300 and note 15 (8th Cir. 1972) (collecting cases).

93. 470 F.2d 289 (8th Cir. 1972).

94. *Id.* at 299 (emphasis added).

95. 8 Cal. 3d 247 at 263 and note 8, 522 P.2d at 1059, 104 Cal. Rptr. at 771 (1972).

96. 45 Cal. App. 3d 322, 117 Cal. Rptr. 247 (1975).

complex should be set aside. The EIR and planning staff reports on the complex had recommended against approval of the motel in the form proposed by the applicant and recommended a smaller alternative motel. However, the County Board of Supervisors had affirmed the project as proposed after "full consideration" of the EIR, without contradicting the EIR's environmental analysis and without stating any "overriding economic or social values."[97] The court's ruling was based both on the lack of any written or articulated reasons for rejecting the EIR recommendations and upon the conclusion that there was no evidence that the recommended (environmentally preferable) alternative was unfeasible economically or profitably.

Further, in *San Francisco Ecology Center v. City and County of San Francisco*,[98] the court of appeal expressly concluded that CEQA imposes substantive duties on local planning officials and that the courts were obliged to review agency decisions "on their merits" to assure that they complied with these substantive commands. Indeed, CEQA imposed substantive decision-making standards on state public officials that were considerably higher than those imposed on federal officials by NEPA; CEQA made environmental concerns "the guiding criterion in public decision,"[99] while under NEPA environmental factors were placed only on a par with other factors.

The most recent, and by far the most complex, instance in which CEQA's substantive obligations upon local planning officials have been involved is *Coalition for Los Angeles County Planning in the Public Interest v. Board of Supervisors of Los Angeles County*.[100] There, the Los Angeles County Board of Supervisors had adopted a local general plan in 1970 which had allocated 173 square miles of additional "urban expansion" through 1990 based on expected population growth of 2.2 million persons (above the 7 million 1970 population) by 1990.[101] The State Legislature in 1971 estab-

97. *Id.* at 326, 119 Cal. Rptr. at 570.
98. 48 Cal. App. 3d 584, 122 Cal. Rptr. 100 (1975).
99. *Id.* at 590-91, 122 Cal. Rptr. at 104.
100. 8 ERC 1249. (L.A. County Superior Ct. No. C-63218, July 9, 1975) (hereinafter cited as Coalition).
101. *Coalition* Finding of Fact No. 11. Under the 1970 plan's urban development policy, about half of the 2.2 million population growth was projected for proposed "centers" of urbanization, while the remainder was projected for the existing urbanized area and for the "urban expansion" areas. In addition, some scattered rural-type development was to be permitted in an area called "open and rural" which included the vast majority (approximately 3,000 square miles) of undeveloped land within the County's unincorporated area.

lished the consistency requirement by enacting AB 1301, which required Los Angeles County to follow the 1970 plan. Since following that plan would have required extensive downzoning of private property, the County in the fall of 1972 embarked on a "crash program."[102] The purpose of this program was to bring the County's 1970 plan into conformity with pre-existing zoning (and to honor the requests of individual property owners for specific treatment of particular parcels), rather than to bring the zoning into conformity with the local general plan as AB 1301 had required.[103] Ironically, at the same time that County planners were doubling the new plan's urban expansion areas (to 341 square miles) in order to suit this purpose, the County's population growth projections were plunging dramatically so that by 1973, when the new plan was adopted, only about 700,000 new persons were expected by 1990—a reduction in expected population growth of over 1.5 million.[104] Furthermore, the information and data that County planners did develop regarding the proposed additional urban expansion was never incorporated into the new plan nor even included in the EIR accompanying the plan.[105] One study, for example, showed that the new urban expansion areas conflicted with natural resource factors in 99 percent of all instances, including the intrusion of urban expansion into 10 percent of the "significant ecological areas" existing in the Santa Monica Mountains.[106] Another study showed that two-thirds of the land newly placed into urban categories within the Santa Monica Mountains was the least suitable for urbanization.[107]

The court ruled that the County had violated CEQA's procedures by deliberatley excluding this sort of information from the EIR, and it had also violated CEQA's substantive planning duties.[108] The sort of planning which was aimed at achieving a preconceived result that was implicit in simply adopting pre-existing zoning into the new general plan without re-evaluation of the propriety of

102. *Coalition* Finding of Fact No. 9.
103. *Id.* No. 12.
104. *Id.* No. 11.
105. *Id.* No. 12.
106. *Id.* No. 13.
107. *Id.*
108. *Coalition* Conclusion of Law No. 19.

urbanizing those parcels was impermissible under CEQA.[109] Rather, CEQA required that pre-existing zoning and individual property owner requests should have been re-evaluated "in terms of comprehensive goals and policies, of adequate environmental information and data. . . , and of current projection of expected future population growth."[110] The general plan should have been based not only upon adequate environmental information)presumably in the EIR) but also upon an "adequate relationship" to comprehensive goals and policies and upon an "adequate relation" to current population growth projections.[111]

The *Coalition* decision is remarkable because these duties were placed upon the local planner as a result of CEQA's somewhat general substantive policy commands. Matters which the silent Planning and Zoning Law presumably leaves to the discretion of local planners are now precluded by CEQA. Current population projections, for example, must not only be developed in preparing a local general plan but they must be used and incorporated into the plan. Although the County did not appeal the *Coalition* decision, the trial judge's ruling in that case serves as a landmark by which local planners will have to gauge the propriety of their actions and plans.

C. *Judicial Enforcement of the Substantive Duties Imposed on Local Planners by the Planning and Zoning Law.*

1. The Open Space Element.

The Planning and Zoning Law provisions relating to the open space element are unique. That element, as adopted, must be consistent with certain state objectives which are declared and set forth with detail. These state-declared objectives are set forth in the California Government Code. Section 65562 states the Legislature's intent to assure that local bodies prepare open space plans which will accomplish the objectives of a comprehensive open space plan, including the preservation of open space land whenever possible;[112] Section 65561 requires the local open space plan to meet other state objectives, including the discouragement of ". . . premature and unnecessary conversion of open space land to urban uses."[113]

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109. *See* EDF v. Coastside County Water District, 27 Cal. App. 3d 695, 104 Cal. Rptr. 197 (1972).
110. *Coalition* Conclusion of law No. 19.
111. *Id.* No. 18.
112. CAL. GOV'T CODE § 65562.
113. CAL. GOV'T CODE § 65561(b) (West Supp. 1976).

The Joint Committee on Open Space Land's 1970 *Final Report* explained why these provisions were included:

> It can be said that the state's overall interest in open space conservation will never be protected *until each of its subordinate units align its open space policies and programs with those of the state.* Local decisions can easily undercut and erode statewide objectives. Accordingly, *both cities and counties must be bound to carry out the objectives declared by the state.*"[114]

The Legislature thus required that local bodies may not simply prepare any open space plan they desire; rather, they must have a plan which is consistent with the dual stated objectives of (a) preserving open space land wherever possible, and (b) "discouraging premature and unnecessary conversion of open space land to urban uses."[115]

The *Coalition* case, also included a challenge to the Los Angeles County 1973 general plan based upon the alleged inadequacy of the open space element. Here, too, the court nullified the County's planning effort. When the 1970 plan had been adopted, three basic alternative forms of urban design had been studied: "centers" (where projected population growth and economic activity would be primarily directed toward certain designated existing and projected "centers"); "corridors" (where new growth would be directed to existing and projected traffice corridors); and "dispersal" (essentailly a "sprawl" pattern). The 1970 plan had chosen an urban development policy based on a "modified centers" concept which allowed for some urban expansion (although by no means in a "dispersal" pattern) with the primary emphasis on development of the "centers." However, according to the court, the 1973 plan had incorporated a "dispersal"[116] pattern by doubling the urban expansion area (despite the drop in projected population growth) and by using an "excess population capacity"[117] of approximately 1500 percent. Furthermore, the 1500 percent figure (which contrasted with the 1970 plan's deliberately chosen "excess population capacity" of 15 percent) was "not selected . . . on the basis of any calculated policy judgment, but was merely the ulti-

114. Final Report at 24, *supra*, Note 22 (emphasis added).
115. CAL. GOV'T CODE §§ 65561, 65562.
116. The difference between the amount of projected population growth over the time period of the plan, and the amount of development actually allowed to absorb that growth. An excess population capacity of zero means that permitted development exactly matches projected growth.
117. Coalition Finding of Fact No. 34.

mate result of the arbitrary planning procedures employed by the staff" in preparing the 1973 plan.[118] Indeed, the added urban expansion areas "conflicted with natural resource factors in almost all instances, many of which were serious conflicts, such as the intrusion of urban uses into flood hazard areas and into significant ecological areas throughout the County."[119]

The court ruled that this sort of planning violated California Government Code Sections 65561 and 65562. These provisions placed a substantive obligation on local governments to allow conversion of open space land to urban uses through a general plan and supplemental zoning ordinances only when there was a "rational basis" for this action. Judicial review was appropriate to ensure these requirements had been followed. According to the court:

> [The County] failed to comply with [its] duty . . . to adopt a general plan that carries out the State declared objectives set forth in Gov [*sic*] Code § 65561(b) in at least two respects: First, the designation of 178 additional square miles for urban expansion having nowhere been satisfactorily explained, constitutes a '. . . premature and unnecessary conversion of open space land to urban uses. . . .' Second, certain 'significant ecological areas' have been designated for urban expansion, and, having been nowhere satisfactorily explained, constitutes an unnecessary conversion of open space land to urban use.[120]

Besides conflicting with the policy of the state law, the court ruled that the open space plan had another defect: its regulatory program was too limited and superficial. Thus, the "Rural I" classification (which was the lowest density provided by the plan at one dwelling unit per two acres) included 119,925 acres "with widely varying conditions of topography, weather, vegetation, etc.," and encompassed "many types of natural resources subject to many different types of dangers to them from development uses."[121] The court ruled that these "broad brush provisions" of the open space regulatory program, without further provisions "to protect the widely varying natural resources in those areas from the different dangers to them" were inconsistent with the plan's stated policies of protecting the natural resources in those areas.[122] The program and the zoning should have been evaluated in the context of these widely varying circumstances so as to determine the best choices

118. *Id.* No. 36.
119. *Id.* No. 35.
120. Coalition Conclusion of Law No. 24.
121. Coalition Finding of Fact No. 41.
122. *Id.* No. 33(e).

from among all the different types of open space zoning for these different areas.[123]

The *Coalition* court issued its writ of mandate ordering the county to prepare and adopt a new open space plan and regulatory program—on which, this time, would comply with state law requirements. The *Coalition* decision, here again, represents the current "high water mark" of litigation designed to enforce the new legislative reforms. But *Coalition* is no maverick. A similar approach was taken in *Save Rural Woodside v. Woodside*[124] and similar judicial decisions are likely when appropriate challenges are brought to the courts.

2. The Housing Element.

The mandatory requirements of the housing element[125] are considerably less detailed than the requirements for the open space element. Although terse, the statutory requirement is of enormous consequence: "[The housing element] *shall* make *adequate* provisions for the housing needs of *all* economic segments of the community.[126]

This statutory command is supplemented by guidelines promulgated by the California Housing and Community Development Commission, which have been incorporated into the Council on Intergovernmental Relations' *General Plan Guidelines*.[127] These

123. *Coalition* Conclusion of Law Nos. 27 and 30.

124. San Mateo Co. Super. Ct. No. 185-D14 (May 20, 1975) (City's open space plan ruled inadequate). *See also* City of Oakland v. City of Alameda, Alameda Co. Super. Ct. No. 450083-0 (Aug. 13, 1974) (City's general plan ruled inadequate, especially as to failure to consider and plan for effect of Oakland Airport).

125. CAL. GOV. CODE § 65302(e) (West Supp. 1976).

126. CAL. GOV. CODE § 65302(c) (West Supp. 1976) (emphasis added). The statutory language previously reading that the local jurisdiction shall "endeavor to" make adequate provision for such housing was considerably tightened in 1971 by making this duty explicitly mandatory. (Cal. Stats. 1971, ch. 1803.) (Old language can be found in Cal. Stats. 1953, ch. 1355, P 291.)

127. Although these guidelines of the Housing and Community Development Commission ("HCDC") were termed "regulations" by the 1971 Amendments to Gov. Code § 65302(c), the 1972 provisions of Cal. Gov't Code § 43211.1 (West Supp. 1976) provide that the Council on Intergovernmental Relations shall use *its* guidelines for general plan preparation by local governments whatever the HCDC "guidelines" are. Moreover, the

guidelines require a thorough survey of housing needs and the development of goals, policies and specific action programs to achieve the statutory objectives.[128] The provisions of California Government Code Section 65008 also seem to require affirmative action plans by local governmental entities for providing low income housing.[129]

The basic California statutory provisions aim at the very same concept elaborated as a constitutional requirement by the New Jersey Supreme Court in *Southern Burlington County NAACP v. Township of Mount Laurel.*[130] There, the court held that, under the equal protection, substantive due process and general welfare provisions of the New Jersey Constitution, each municipality has an affirmative duty, by its land use regulations, to "make realistically possible an appropriate variety and choice of housing," and "must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need [for low and moderate income housing]."[131] The court further held that these obligations must be met unless the municipality could sustain the "heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do."[132]

The *Mount Laurel* decision establishes a benchmark by which other state high courts will be measuring their own low and moder-

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HCDC guidelines have apparently never been officially promulgated as "regulations" pursuant to the Administrative Procedure Act. *See generally* C. F. Knight, *"California Planning Law: Requirements For Low and Moderate Income Housing,"* 2 PEPPERDINE L. REV. S159, at S162-64 (1974). The California Court of Appeal recently decided in an unpublished opinion that the HCDC guidelines as to the housing element preparation are purely advisory. (Leonard v. City of El Cerrito, 1 Civil 34762 (filed Oct. 13, 1975).)

128. *See* Council on Intergovernmental Relations, *General Plan Guidelines* (Sept. 20, 1973).

129. *See* C.F. Knight, *supra*, note 127, at S160-S161.

130. 67 N.J. 151, 336 A.2d 713 (1975).

131. *Id.* at 173, 336 A.2d at 724. The Court held that the "fair share" of the regional need included a share both of those residing within the municipality, and of those presently and reasonably to be expected to be employed within the municipality. *Id.* 187-89, 336 A.2d at 731-32.

132. 67 N.J. at 174, 336 A.2d at 724-25. The Court rejected several defenses that the municipality offered: (1) lack of intent to discriminate against persons of low income, (2) that all or most municipalities were doing the same or worse as Mount Laurel, (3) that local fiscal reasons dictated the municipality seek out the "good" tax rateables to industry and commerce, while discouraging the housing of low income persons with many children, (4) that environmental reasons dictated discouraging development of all sorts in the municipality, and (5) that low income housing probably could not be provided without some sort of public subsidy.

ate income housing planning and requirements.[133] The issue is currently being raised in California in *Orange County Fair Housing Council v. City of Irvine.*[134] There, the plaintiffs urge that the City of Irvine has no housing which persons of low income can afford, while its zoning provides for huge industrial developments which will employ large numbers of low income persons unable to afford to live in the community. Such a policy, it is argued, violates the *Mount Laurel* principle as it is embodied in California's statutory planning requirements. The *Irvine* case is probably only the first among many California cases raising these issues.

3. The Consistency Requirement.

California is not the first state in which the courts have been confronted with cases arising from the failure of local planners to comply with the duty under the consistency requirement[135] to make zoning comply with the local general plan. In *Dalton v. City and County of Honolulu,*[136] the Hawaii Supreme Court construed a similar consistency requirement imposed by the Honolulu city charter. According to the charter, the local general plan was to "set forth the long-range, comprehensive physical development of the city." The consistency requirement was imposed by the charter's provision that "no . . . zoning ordinance shall be . . . adopted unless it conforms to and implements the general plan." The purpose of the requirement that a general plan be prepared, the court said, "was to prevent the deterioration of our environment by forcing the city to articulate long-range comprehensive planning goals," while the purpose of the consistency requirement "was to prevent the compromise of these planning goals." According to

133. *See e.g.*, Township of Williston v. Chesterdale Farms, 341 A.2d 466 (Pa. S. Ct., 1975) (Pennsylvania Supreme Court adopts "fair share" low and moderate income housing obligations). In a recent speech, Mr. Justice Stanley Mosk of the California Supreme Court (who has written most of the Court's land use decisions of recent years) has discussed the principle behind the *Mount Laurel* case in somewhat glowing terms. *See* Speech to Conference on Bay Area Urban Growth (San Francisco, Oct. 2, 1975). The Lawyers Committee for Civil Rights Under Law is presently circulating a proposal to raise funds for litigating the "*Mount Laurel* Cause of action" in four major state courts, including California.

134. Orange Co. Super. Ct. No. 225,824 (filed Mar. 7, 1975).

135. *See* discussion *supra.*

136. 51 Hawaii 400, 462 P.2d 199 (1969).

the court, "These provisions allow less room for the exertion of pressure by powerful individuals and institutions."[137] The court explained that the consistency requirement:

> [A]ttempts to avoid the danger that zoning, considered as a self-contained activity rather than as a means to a broader end, may tyrannize individual property owners. Haar, *'In Accordance with a Comprehensive Plan,'* 68 HARV. L. REV. 1154 at 1158 (1955). It puts teeth into the requirement that the general plan be 'long-range' by providing a test for courts to use in reviewing zoning ordinances, i.e., if a zoning ordinance does not 'conform to and implement' the general plan, then the city did not have the power to adopt it.[138]

The Hawaii general plan had designated the areas in question as appropriate for limited residential and agricultural uses only. The defendants wished to rezone the parcels for a more intensive use—medium-density apartments. Regarding the inconsistency between the plan and the proposed rezoning, the court stated:

> In the context of the present case [the consistency requirement] would have prevented the city from adopting [the two protested rezoning ordinances] without first amending the general plan, since clearly [those ordinances] do not conform to the unamended general plan.[139]

The Honolulu officials tried to avoid the consistency requirement by first amending the plan. Thus, parallel public hearings were held; and, in a two-step process, the plan was first amended and then the new zoning was adopted. Even this attempt to technically comply with the law did not satisfy the court.

> To allow the city to amend the general plan (under its general power to amend ordinances) and then adopt a zoning ordinance contrary to the unamended general plan, is to allow the city to accomplish by two ordinances exactly what the charter sought to prohibit.[140]

The court ruled that such "piecemeal" amendments to the general plan would "subvert and destroy" the purposes of the legislation and the general plan itself.[141] If the city wished to amend its plan, it was required to undertake a "comprehensive" rather than piecemeal updating of the plan, including appropriate studies and investigation to determine, *inter alia*, whether the initial plan had underestimated housing needs, whether more apartments were the solution to any such housing shortage and whether the area in question was most suited for such apartments or whether some

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137. *Id.* at 416, 462 P.2d at 208-09 (1969).
138. *Id.* at 413, 462 P.2d at 207 (1969).
139. *Id.*
140. *Id.* at 414, 462 P.2d at 208 (1969).
141. *Id.* at 416, 462 P.2d at 209 (1969).

other area was preferable.[142] In other words, the court required something very much like an EIR justifying the decision to amend the plan in this manner and demonstrating that the amendment itself was consistent with the overall declared goals and policies set forth in the plan.

Other state courts have also required that local zoning be consistent with the general plan. In *Palazzi v. State*,[143] for example, the Rhode Island Supreme Court ruled that inconsistent zoning was invalid and explained that the consistency requirement was designed to "avoid an arbitrary, unreasonable or capricious exercise of the zoning power that would result in haphazard or piecemeal zoning."[144]

In California, the legislature clearly contemplated that the consistency requirement imposed by AB 1301 would be subject to judicial enforcement. Thus, Section 65860(b) of the California Government Code gives standing to any resident in the local jurisdiction to enforce these provisions, while Section 65860(a) defines "consistency" to mean that "the various land uses authorized by the zoning ordinance are compatible with the objectives, policies, general land uses and programs specified [in the general plan."]."[145]

Once again, the *Coalition* decision apparently represents the first judicial decision in California nullifying a zoning program as being

142. *Id.* In California, under CAL. GOV'T CODE § 65351, the general plan cannot be amended more frequently than three times a year, and zone changes and plan amendments cannot be the subject of simultaneous public hearings.

143. 319 A.2d 658 (R.I. 1974).

144. *Id.* at 663. *See also* Udell v. Haas, 21 N.Y.2d 463, 228 N.Y.S.2d 888, 235 N.E.2d 897 (1968) (zoning must not conflict with comprehensive plan). *Cf.* Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291 (1972) (duty to implement general plan through zoning regulations); Fasano v. Bd. of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973) (zoning is quasi-adjudicatory act); Chrobuck v. Snohomish County, 78 Wash. D.C. 884, 480 P.2d 489 (1971) (same). See generally, Note, *Comprehensive Land Use Plans and the Consistency Requirement*, 2 FLA. ST. L. REV. 766 (1974); Comment, *Zoning Shall Be Consistent with the General Plan—A Help or a Hindrance to Planning?*, 10 SAN DIEGO L. REV. 901 (1973); Comment, Looking Back: *Consistency in Interpretation of and Response to the Consistency Requirement, A.B. 1301*, 2 PEPPERDINE L. REV., S196 (1974).

145. The California Attorney General has opined that the zoning program must further, and not undercut, the "policies and designations" established in the general plan. 58 Ops. Calif. Atty. Gen. 21 (1975).

inconsistent with a local general plan.[146] In *Coalition*, the court found three specific violations of AB 1301 and the consistency requirement:

> (1) The County had prepared the plan maps so that they would, in essence, conform to pre-existing zoning, rather than revising the zoning to bring it into conformity with a comprehensive plan;[147]
> (2) The County's open space zoning and regulatory program was inconsistent with the plan's textual policies relating to open space;[148]
> (3) The County's plan was internally inconsistent; certain textual elements conflicted with other textual elements, while the entire set of plan maps conflicted with the plan's text.[149]

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146. In Woodland Hills Residents Ass'n, Inc. v. City Council of Los Angeles, 44 Cal. App. 3d 825, 118 Cal. Rptr. 856 (1974), the Court of Appeal invalidated a subdivision map approval because the local jurisdiction failed to make the proper finding that such approval was consistent with the appropriate local general plan.

147. *See* discussion, *supra.*

148. *Coalition* Conclusion of Law No. 23. The court characterized as "numerous" the inconsistencies between the regulatory program and the general plan text, citing the following "substantial" conflicts as specific examples:

> (a) the non-agricultural uses permitted in all lands presently in agricultural uses are inconsistent with the stated textual policy to preserve agriculture where appropriate;
> (b) medium-to-high density and high density zoning employed throughout the Resource Management Area including the designation of virtually all the land along the Malibu Coast for U3 and U4 (medium and medium-high residential density) with some C (major commercial) is directly inconsistent with the policies and designations set forth for the Resource Management Area including the declared goal of restoring and preserving natural resources in those areas and the stated policy of preserving the Malibu Coastline as a scenic resource;
> (c) the provisions for residential development at the densities permitted within the 'significant ecological areas' depicted in the plan including the designation of ten (10) percent of the 'significant ecological areas' in the Santa Monica Mountains and twenty (20) percent in the San Jose and Puente Hills for urban (not even rural) uses, are inconsistent with the stated policies and designations to preserve significant ecological areas;
> (d) the designation of the additional 178 square miles of urban expansion in areas where there is fully a 99 percent conflict with natural resource factors is inconsistent with the stated policies of protecting natural resource areas, wildlife and vegetation areas, and watershed and conservation areas; and
> (e) the broad brush provisions permitting residential uses up to one dwelling unit per two acres throughout the entire Rural I (or Watershed Conservation Area) without further provisions to protect the widely varying natural resources in those areas from different dangers to them are inconsistent with the stated policies of protecting the natural resources in these areas." (*Coalition* Finding of Fact No. 33.)

149. *Coalition* Conclusion of Law No. 27. In addition to the inconsistencies cited, *supra*, note 148, the court found other basic inconsistencies:

> The addition of 178 square miles of urban expansion by the 1990 Land Use Maps of the 1973 General Plan over and above the 173 square miles of urban expansion provided by the *Guide*, when the 1990 population projection for the County in 1973 was 1.5 million

These inconsistencies were, of course, the inevitable result of the County's attempt to make its general plan maps conform to pre-existing (and excess capacity) zoning and its attempt to retain basic textual policies of the pre-existing 1970 plan. Although the *Coalition* court announced that its review over these inconsistencies would be "limited,"[150] the contradictory nature of the County's plan was so marked that the court voided the entire plan and regulatory program. The County is now well underway in its attempt to comply with the court's mandate to prepare a new plan and regulatory program which does not share these deficiencies.

IV. CONCLUSION

The Council on Intergovernmental Relations' *General Plan Guidelines* expressly recognizes (perhaps with understatement) that: "To meet court tests, general plans need to be clearly written, tightly structured, internally consistent documents."[151] The *Coalition* decision and others like it now being brought are designed to uphold the integrity of the local land use planning process. They protect our cities and our citizens from the abuses tolerated and even encouraged by previous judicial reluctance to exercise any review in this area. Courts are far from becoming planning and zoning appeal boards. But they are increasingly aware of the potential for abuse and, with the new policies and procedures established by state legislators, they are commencing an exciting and necessary journey into a new legal terrain.

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persons less than predicted in 1970, and the 1973 General Plan's tremendous 'overage factor' of 1500 percent, were in themselves inconsistent with the 'modified centers' urban development policy encompassed in the *Guide*, and purportedly followed by the 1973 General Plan, and actually followed the 'dispersion' urban development policy. The allocation of this additional urban expansion was also inconsistent with the 1973 General Plan's adopted interim growth policy, which incorporated the subsequently reduced 1990 population projection." (Finding of Fact No. 34.)

150. *Coalition* Conclusion of Law Nos. 21 and 25.

151. Council on Intergovernmental Relations, *General Plan Guidelines* (Sept. 1973) at III-2.