Comments

RECLAIMING THE URBAN ENVIRONMENT:
THE SAN FRANCISCO URBAN DESIGN PLAN

The urban environment is presently an "unchartered wilderness in the field of environmental protection." Few attempts have been made to identify, evaluate, or quantify urban factors which should be subject to environmental review during the approval process for public and private development. This Comment focuses on one aspect of this problem, urban design regulation, in reference to one city's attempt to establish sound environmental planning policies. After discussing the attributes of the new urban design component of San Francisco's master plan, the author turns to the perennial legal problem of how a city translates lofty policy statements of general plans into ordinances and regulatory controls. Specific attention is given to implementation efforts involving administrative planning procedures, zoning, and regulation of aesthetic factors in development. This case study of San Francisco's recent experience indicates that full achievement of the Urban Design Plan's goals will require formal and informal actions within the planning process, effective application of the state environmental quality act, and appropriate invocation of judicial review.

The quality of life in American cities is the area of concern which has received the least amount of attention from environmentalists in the past five years. This situation has recently begun to change1 with

1. To date, only a smattering of cases maintained under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq. (1970), have involved questions concerning the urban environment. See Save Our Ten Acres v. Kreger, 472 F.2d 463, 4 ERC 1941 (5th Cir. 1973), Maryland Planning Comm'n v. Postal Service, 487 F.2d 1029, 5 ERC 1719 (D.C. Cir. 1973) (both cases concerning the environmental impact of construction of large postal facilities in urbanized areas); Silva v. Lynn, 482 F.2d 1282, 5 ERC 1654 (1st Cir. 1973) (housing project); Hiram Clarke Civic Club v. Lynn, 476 F.2d 421, 5 ERC 1177 (5th Cir. 1973) (apartment complex); Saunders v. Washington Transit Auth., — F.2d —, 6 ERC 1111 (D.C. Cir. 1973) (subway construction); First National Bank of Chicago v. Richardson, 484 F.2d 1369, 5 ERC 1830 (7th Cir. 1973); Hanly v. Kleindienst, 471 F.2d 823, 4 ERC 1785 (2d Cir. 1972), cert. denied, 412 U.S. 908, 5 E.R.C. 1416 (1973) (both involving the impact of federal detention centers); Nucleus of Chicago Homeowners v. Lynn, — F. Supp. —, 6 ERC 1094 (N.D. Ill. 1973) (public housing project); Tierrasanta Community Council v. Richardson, —F. Supp. —, 6 ERC 1065 (S.D. Cal. 1973) (youth rehabilitation facility); Town of Groton v. Laird, 353 F. Supp. 344, 5 ERC 1217 (D. Conn. 1972) (military housing complex); BASYAP v. District of Columbia City Council, 339 F. Supp. 793, 3 ERC 1906 (D.D.C. 1972) (urban renewal); Goose Hollow Foothills

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the recognition that urban environmental problems affect a far larger number of citizens on a continuing basis than any other forms of environmental degradation. There is little doubt that the plethora of interrelated problems that contribute to the present urban crisis—housing, transportation, poverty, education, crime—has a significant impact on the daily lives and psychological health of urban residents. The rapid deterioration of our cities, in a very real sense, is self-reinforcing by the attitudes it creates among city dwellers. One response to this phenomenon which has developed from current environmental and city planning theories is an effort at the local level to restore and beautify the physical components of the cityscape. These efforts are based on two premises: first, that city planning should emphasize the human and spiritual characteristics of cities rather than their utilitarian commercial and residential functions; second, that environmental and aesthetic improvements in the physical structure of cities will have a direct

League v. Romney, 334 F. Supp. 877, 3 ERC 1087 (D. Ore. 1971) (highrise apartment building). While the pace of these decisions is quickening, their general tenor is one of uncertainty. The federal courts are experiencing difficulty in determining what urban environmental factors are cognizable under NEPA and receiving little aid from the responsible federal agencies in establishing workable criteria.


2. As Ian McHarg, the most eloquent of today's urban planning theorists, has stated:

And what of the cities? Think of the imprisoning gray areas that encircle the center. From here the sad suburb is an unrealizable dream. Call them nowhere although they have many names. Race and hate, disease, poverty, rancor and despair, urine and spit live here in the shadows. United in poverty and ugliness, their symbol is the abandoned carcasses of automobiles, broken glass, alleys of rubbish and garbage. Crime consorts with disease, group fights group, the only emancipation is the parked car... Both stimulus and stress live here with the bitch goddess success. As you look at the faceless prisms do you recognize the home of anomie?

I. McHARG, DESIGN WITH NATURE 20 (1969). In a test conducted in the early 1960's, a group of psychologists discovered there was little to distinguish nearly 20% of the population of midtown Manhattan from mental hospital patients. Mental Health in the Metropolis: The Midtown Manhattan Study (L. Srole, et al., eds. 1962). See also Symposium, Psychology and Urban Planning: Perception, Behaviour, and Environment, 38 J. AM. INST. PLAN. 67 (1972); Winsborough, The Social Consequences of High Population Density, 30 LAW & CONTEMP. PROB. 120 (1965).
bearing on the solution of other urban problems.³

San Francisco is the first city to undertake a program of this type on a comprehensive basis.⁴ On August 26, 1971, its Planning Commission unanimously adopted an Urban Design Plan⁵ as an integral component of the city's revised Master Plan.⁶ The Urban Design Plan establishes environmental policies for the guidance of all aspects of growth and development in the city. These policies will be embodied in both the comprehensive planning and shorter-term zoning and permit procedures of San Francisco. As an environmental and aesthetic statement of purpose, the Urban Design Plan represents one city's recognition that it has an obligation to enhance the quality of life of its citizens by improving their urban environment.

This Comment is a case study of the adoption and implementation of the Urban Design Plan in San Francisco. Part I examines the Plan's major contributions to urban environmental planning through its explicit recognition of the interrelationship between a city's physical characteristics and the quality of life of its residents. Part II provides an analysis of the planning, administrative, and legal problems confronting successful implementation of the Urban Design Plan. Since the major criticism of general plans⁷ is that they remain simply


⁴. Several other cities have initiated urban design studies or authorized some type of urban design review, but none have approached the level of the San Francisco program. For a description of the work done in Boston, Cincinnati, Minneapolis, New York, Oakland and San Antonio, see CITY OF SAN ANTONIO, CITY PLANNING DEP'T., SAN ANTONIO URBAN DESIGN MECHANISMS STUDY 18-47 (1972).


⁶. The city's existing Master Plan was adopted in the 1940's. Of ten elements envisioned for the new Master Plan, the Open Space & Recreation, Conservation, Residence, Transportation, and Urban Design elements have been completed. With the exception of urban design, California now requires each of these general plan elements of all cities. CAL. GOV'T CODE §§ 65300, 65302, 65700 (West Supp. 1973). Most of the remainder of San Francisco's planning activities are optional since the city falls within the charter city exception of the state constitution. See Sato, "Municipal Affairs" in California, 60 CALIF. L. REV. 1055, 1097-98 (1972).

policy statements, a close examination is made of the efforts thus far undertaken in San Francisco to enforce the Plan's policies. 8

The thesis of this discussion is twofold. It is contended, first, that the elements of the planning process are the key determinants in effectuating beneficial urban planning and land use policies. With respect to the Urban Design Plan, these include the formal and informal administrative procedures of the Department of City Planning and the Planning Commission, augmented by the environmental impact report process now mandated under the California Environmental Quality Act (CEQA). 9 As discretion may be involved in each of these areas, the need for judicial review of local decisions to insure compliance with the comprehensive plan is also discussed. 10 The second contention is that the legal tools for urban design implementation now available are sufficient, if imaginatively employed, to achieve the broad goals of the Urban Design Plan. Two examples, zoning and regulation of aesthetic factors in urban development, are examined to illustrate this point. Although this study focuses on a particular plan in a single city, most of the observations and conclusions about the planning process and the legal enforcement of general plans are relevant to any American city.

I

THE SAN FRANCISCO URBAN DESIGN PLAN

The Urban Design Plan was commissioned and adopted primarily because San Francisco residents care deeply about their city's appearance. There is of course a definite relationship between these public attitudes and the unique climatic and topographical nature of San Francisco. The city's magnificent natural setting has been enhanced by man-made developments which take advantage of nature's work rather than overwhelm it.

8. See Haar, "In Accordance With a Comprehensive Plan," 68 Harv. L. Rev. 1154 (1955). Professor Haar's position that all local zoning should conform to an adopted general plan has gained wide acceptance. See Roseta v. Washington County, 254 Ore. 161, 458 P.2d 405, 40 A.L.R.3d 364 (1969). However, to be truly effective, a general plan's policies must be utilized in all legal and administrative actions respecting land use, from zoning and enactment of general standards to review of individual permit applications.


10. The California Supreme Court recently strengthened this view in denying a claim for inverse condemnation filed by a developer whose building permit application for an apartment complex was rejected for failure to dedicate land for a street extension called for in the city and county general plan, even though the proposed extension would make it impossible to build the apartment complex. Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 119-20, 109 Cal. Rptr. 799, 804-05, 514 P.2d 111, 116-17 (1973). See also Van Sicklen v. Browne, 15 Cal. App. 3d 122, 125, 92 Cal. Rptr. 786, 788 (1971); O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (1965).
Apprehension that these assets were threatened prompted several environmental crusades in the decade preceding formulation of the Urban Design Plan. These included the freeway revolt of 1959, which gained national attention; the creation of the Bay Conservation and Development Commission (BCDC) in 1966 to control bay fill and shoreline development; and numerous urban renewal and public housing controversies which spurred widespread public discussion regarding the future of large areas of the city. Of particular relevance to this study was the proliferation in the late 1960's of actual or proposed highrise buildings in the central business district, on the waterfront, and on the crests of the city's most scenic hills, which caused near hysteria over the perceived "Manhattanization" of San Francisco. The intensity of the debate over highrise development twice led to municipal initiatives proposing absolute height limits throughout the city; on each occasion the measures, though defeated, obtained a significant percentage of votes. These civic battles have nurtured a strong public concern for the environmental quality and physical attributes of the city, a concern manifested during the drafting of the Urban Design Plan.

14. Plans of U.S. Steel Corporation for a massive office building on the waterfront provoked protest marches by downtown professionals in 1970. The project was scuttled when BCDC refused to issue a necessary permit on the basis of an Attorney General opinion limiting its permit approval power to water-oriented uses. 53 Ops. Cal. Att'y Gen. 285 (1970). S.F. Chronicle, Dec. 11, 1970, at 1, col. 7. This and a second confrontation over a "Ferry Port Plaza" proposal led to the creation of a special commission to draft guidelines for development of this section of the northern waterfront, and the eventual establishment of an 84-foot height limit (with discretion to go somewhat higher) for the area. For an extensive and very partisan description of these and other recent planning controversies, see B. BRUGMAN, ET AL., THE ULTIMATE HIGHRISE 14-29, 64-137 (1971).
15. The first initiative in 1971 would have set a six-story maximum limit for the entire city; the second in 1972 sought a 40-foot residential area and 160-foot downtown limit. The controversy centered on the alleged economic value or necessity of highrise development, its negative environmental impact, and the questioned ability of the Urban Design Plan to control the phenomenon. The two initiatives garnered 38 and 43% of votes cast, respectively. S.F. Chronicle, May 12, 1972, at 15, col. 7; id., Nov. 4, 1971, at 1, col. 1; S.F. Sunday Examiner & Chronicle, Oct. 31, 1971, § A, at 10, col. 1, and at 24, col. 3. See also Marlin, The Streets of Camelot, 138 ARCH. FORUM, Apr. 1973, at 24, 26, 31, 36; Svirsky, San Francisco Limits the Buildings to See the Sky, 39 ASPO PLANNING, Jan. 10, 1973, at 9, 11-13.
The original groundwork for the Urban Design Plan was laid in 1968, partially in response to the furor over highrise construction. The Department of City Planning staff recognized the need for comprehensive planning and controls to defuse a situation that cast every proposed development in adversary terms and cloaked the planning process in a perpetual state of conflict. In early 1969 the U.S. Department of Housing and Urban Development provided a planning grant of $180,000 to underwrite a two-year urban design study. The city planning staff was primarily responsible for the final product, working in conjunction with an Urban Design Advisory Committee composed of artists, politicians, and private design professionals.\(^6\) Public participation was a touchstone of the entire process; the staff and consultants issued eight preliminary reports on different phases of the study and obtained substantial public input on neighborhood concerns.\(^7\) Identification of major problems, such as traffic, access to recreational areas, and neighborhood deterioration, preceded formulation of the principal environmental goals of the Urban Design Plan. The staff then established specific policies to remedy these problems, primarily through influencing public and private design decisions. Antipathy towards intensified highrise development furnished the impetus for the rapid adoption of the Plan after presentation to the Planning Commission in May 1971. Only three months later, after several hearings, the Planning Commission unanimously adopted the Plan as one of ten elements of the city's revised Master Plan.\(^8\)

The results of any study or analysis are predetermined largely by the questions posed at the outset. The Urban Design Plan focused upon the quality of life in the urban environment.\(^9\) The Plan is organized around four major areas of concern defined by residents as

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7. The eight reports drafted between 1969 and 1971 covered the following subjects: (1) a description of the present physical structure of the city; (2) analysis of all existing plans and ordinances relating to urban design; (3) a tentative draft of overall goals based on public opinion surveys and committee deliberations; (4) a study of the current form and image of the city; (5) a preliminary draft of urban design principles; (6) a summary of a social reconnaissance survey involving resident interviews in 13 districts on perceptions of urban design factors; (7) a general description of potential implementation strategies; (8) a tentative draft of the final plan. Additional studies were assigned to consultants on open space needs, street livability in various neighborhoods, and special urban design problems of individual districts. URBAN DESIGN PLAN 154-55. For the theoretical basis of this methodology, see M. Wolfe & R. Shinn, URBAN DESIGN WITHIN THE COMPREHENSIVE PLANNING PROCESS (1970).


9. "Urban design planning is a response to human needs. It is part of the process of defining quality in the environment, and quality is based on human needs." URBAN DESIGN PLAN 3.
most crucial to their perceptions of the urban environment: City Pattern, Conservation, Major New Development, and Neighborhood Environment. All four sections are interrelated, and the policies set forth in each are mutually supporting. The individual sections are internally structured into the categories of human needs, overall objectives, fundamental design principles, and recommended policies for public and private action. The significant feature of this hierarchy is that it specifies satisfaction of human needs as the foremost goal of the Plan. As the term "urban design" connotes, the main thrust of the Plan's policies is to improve visual perception and enjoyment of distinct districts, individual neighborhoods, and the city as a whole. However, because the planning staff considered its function to be broader than simply embellishing or preserving views, a more general theme is the utilization of urban design policies to resolve or lessen the public and private conflicts inherent in all urban land-use decisions.

A. City Pattern

City pattern is defined in the Urban Design Plan as the visual framework composed of both natural phenomena and man's development. In San Francisco the elements that comprise the city pattern are water areas, hills and ridges, open space and landscaping, streets and highways, homes and other structures. In terms of human needs, the pattern of a city produces its image and character, identifying separate districts, and orienting residents and travelers, thus satisfying the psychological desire to comprehend the city's functional logic and internal cohesion. In highlighting the distinctive city pattern of San Francisco in three-dimensional terms, the Plan emphasizes not rigid form but balance and compatibility, with "diverse and even random features fitting together to form the whole."
The City Pattern section states as its objective the need to emphasize the city's characteristic pattern, particularly those elements which give the city and its neighborhoods an image, sense of purpose, and means of orientation. Recognizing that both public and private activity can affect city pattern, the 21 design principles provide examples of how private and city landscaping, adjustment of street width, and control of the scale of development adjacent to streets can contribute to the preservation of San Francisco's overall pattern and the clear demarcation of business districts and residential areas. Eleven policies stress, inter alia, maintenance of views of open space and San Francisco Bay, lighting and landscaping of arterial streets to amplify street patterns, and the ordering of building construction to accentuate rather than obscure natural topographical features. Since landscaping and lighting of public areas are fully within the control of city agencies, a majority of the policies emphasize their use as an effective and rapid means of implementing a panoply of design principles relating to city pattern.

B. Conservation

Natural areas within the city help satisfy human needs for rest, quiet, and freedom from urban confinement. The Plan remarks initially that such areas have reached as irreducible minimum in San Francisco. Public parks, San Francisco Bay, historical districts and buildings, views, and streets are included within the category of resources requiring conservation. Their maintenance and expansion would attain the Conservation section's overall objective of providing a sense of nature, continuity with the past, and freedom from overcrowding.

In one sense the Conservation section became a repository for several more traditional goals that the planning staff deemed worthy of special policies. Chief among these was protection of the remaining natural areas, open space, and the Bay, a goal which produced a very

23. Id. at 22-35. Design principles are phrased in very simple terms, e.g.: regarding streets, "[t]he city's overall visual structure can be strengthened and enhanced by use of large scale planting on certain streets and open spaces;" as for parks and open space, "[w]eak and disorganized development adjacent to parks neither complements nor effectively contrasts with the park edge;" and on development strategies, "[c]ontour streets on hills align buildings to create a pattern of strong horizontal bands that conflict with the hill form." However, commentary on and examples of individual principles reveal sophisticated permutations applicable in a variety of situations. In addition, the Plan makes liberal use of photographs, diagrams, and maps to illustrate its concepts.
24. Id. at 36-41. The urban design principles and policies are closely related within each section; the latter usually rephrase the former in an imperative sense.
25. Id. at 45, 53.
strong set of policies stating that significant development should not be permitted in these areas. However, the Conservation section also contains innovative approaches, especially in applying the term conservation to man-made elements and in incorporating city streets into the category of urban open-space and design resources. Historic preservation efforts are emphasized with reference to several identifiable districts and numerous individual buildings reflecting the richness of San Francisco's architectural and ethnic heritage. In addition to outright preservation activities, the policies relating to this issue advise that new construction be harmonized with older, distinctive architecture, and that five well-known districts receive special protection from inconsistent development because of their value to the city as a whole. City streets are singled out for their ancillary public benefits in aiding perception of city pattern, providing views, supplying light and air to adjacent development, and offering useable open space in residential neighborhoods. A firm policy recommends against unnecessary street vacation or sale of property rights by the city. In an aggregate form, the policies of the Conservation section seek to preserve both natural and cultural resources for the city's benefit.

C. Major New Development

San Francisco's skyline has undergone a radical transformation in the last 15 years, and concern over this change facilitated rapid adoption of the Urban Design Plan. In light of this intense public interest, the planning staff decided that almost all aspects of major new development required special urban design review. The 21 design principles enumerated in the Major New Development section are intended to maintain the relatively small scale of buildings in the city by assessing large projects in terms of their relationship to existing nearby development, appearance upon the skyline, and impact on nat-

26. Id. at 66.
27. Id. at 47-49, 67. In addition to areas in the Spanish Mission and Chinatown districts, San Francisco contains numerous neighborhoods composed of striking Carpenter Gothic and Queen Ann Victorian homes built at the turn of the century. Application of the city's historical preservation ordinance to these resources is discussed in Part II, E, 2, infra. The five significant areas suggested for special review criteria are Telegraph Hill, Russian Hill, Buena Vista and Upper Market, Pacific Heights, and Dolores Heights. Id. at 68-69.
28. Id. at 50-52, 70-71. The Plan states that every proposal for relinquishing street areas must be rejected if it contravenes any one of 12 specific review criteria, including, e.g., having a detrimental impact on vehicular or pedestrian traffic, causing removal of significant natural features, or obstructing or diminishing a significant view. Revocable permits are to be preferred to outright street vacation. See generally Clawson, Open (Uncovered) Space as a New Urban Resource, in New Resources, supra note 1, at 139.
The human goal is to control change in ways that recognize its continuous nature, moderating new development so that it complements existing neighborhood character. One of the principal methods of achieving this is to evaluate large projects in terms of their human scale, the objective indices of which are height, bulk, and overall appearance.\(^{30}\)

San Francisco is accustomed to harmony of color, scale, and architectural detail. The design principles formulated to maintain these values are relatively simply in theory. For example, light colors are suggested for major new structures to reinforce the character and visual unity of the city. Similarly, large buildings should taper or step down towards the bottom of hills and towards the bay. Massive developments on the slopes of hills can overwhelm natural features, block more views than they create, and disrupt the measured skyline of the area; located in the valley between hills, they can eradicate the entire effect of the natural topography.\(^{31}\) Highrise buildings are not per se objectionable under the Plan’s principles when they are located so as not to block views significantly, alter excessively the surrounding scale of development, or present discordant interruptions to the dominant neighborhood character.

In practical terms, however, it is difficult to devise measures that insure harmony between old and new buildings and avoid extreme contrasts in color, shape, and other physical characteristics in all locales. As recommended in the Plan, height and bulk limits have been legislated to conform building size to the present city and neighborhood patterns. A further suggestion that special review be accorded projects involving large sites has been held in abeyance by the availability of CEQA’s procedures.\(^{32}\) Questions involving choice of building materials and individual design regulation, however, present more difficult enforcement problems which are discussed in greater detail below.


30. \textit{Urban Design Plan} 75. While a building’s “height” seems self-explanatory, the hilliness of San Francisco demanded special measurement rules for sloped areas. “Bulk” is defined as “the apparent massiveness of a building in relation to its surroundings.” “Apparent massiveness” is a function of a building’s height and visible wall space, measured by a combination of the maximum plan dimension (greatest horizontal dimension along any wall) and the maximum diagonal plan dimension (distance between the two most separate points), both measured at the prevalent height of surrounding development. \textit{Id.} at 77, 94. For discussion of the height and bulk ordinance enacted pursuant to these principles, see Part II, D, 1 \textit{infra}. See also Sussna, \textit{Bulk Control and Zoning: The New York Experience}, 43 \textit{Land Econ.} 161 (1967).

31. Specific design principles in this section codify these and other relationships. \textit{Urban Design Plan} 80-82, 84.

32. \textit{Id.} at 96. Initial work was done on an ordinance which would apply to pro-
D. Neighborhood Environment

Bold and imaginative policies to clarify city pattern, conserve natural and man-made resources, and control major new development will contribute greatly to the quality of urban life in San Francisco. To appreciate these benefits, however, environmental quality must especially be achieved in residential areas. This view underlies the fourth main objective of the Urban Design Plan—the improvement of neighborhood environments to increase personal safety, comfort, pride, and opportunity.33

The Neighborhood Environment section contains indices depicting city-wide levels of environmental quality as functions of precise economic, social, and environmental criteria.34 Priorities for capital improvement expenditures and imposition of special controls are to be geared to specific neighborhoods having the greatest needs or to particular city-wide problems. The automobile emerged as the chief villain in survey interviews conducted during the urban design study, as residents classified traffic noise, fumes, vibration, and danger as predominant factors in the decline of neighborhoods.35 The numerous

posed development of sites involving aggregation of several lots. However, the planning staff has not yet decided whether or not CEQA's environmental impact review process would serve the same purpose.

33. Id. at 103. On the previous inadequate consideration given these aspects of city planning, see J. Jacobs, The Death and Life of Great American Cities 112-40 (1961).

The explicit reference to "public safety" reflects the high degree of concern accorded crime prevention by citizens in extensive neighborhood interviews. While at first glance it may seem incongruous to suggest the use of urban design principles to lessen crime, a substantial amount of study and some preliminary work has indicated that a direct relationship does exist and can be exploited. See generally O. Newman, Defensible Space: Crime Prevention Through Urban Design (1973).

34. Individual maps reveal levels of traffic flow, distance to useable open space, visual interest of street facades, level of public and private maintenance, presence of nature, density levels, and age and economic characteristics of residents. A composite map then graphically illustrates coincidence of environmental, social, and economic attributes and deficiencies which can be analyzed with respect to each city district. Urban Design Plan 99-102; cf. I. McHarg, supra note 2, at 187-95.

The extensive use of maps throughout the Plan adds a degree of specificity often lacking in general plans. Examples of actual application of policies to city areas carry the planning process a step further towards implementation and provide focus for citizen review.

35. Annoyance at a multiplicity of traffic-created problems was a common denominator of the Social Reconnaissance Survey (Preliminary Report No. 6) of different neighborhoods, showing that this was a leading concern of most residents. An additional study was conducted of residents along three streets having traffic loads of different intensities. While it has long been accepted that higher speed and volume of traffic has detrimental effects on the quality of life in residential areas, several results of this study were fascinating in their corroboration of this view. For example, when asked to draw the street fronting their homes, residents of the most heavily travelled street were unable to recall or locate obvious physical characteristics; some even drew curb lines completely through intersections, suggesting a perception of
principles and policies of this section relating to traffic control clearly reflect this concern. As one response the Plan calls for creation of "protected residential areas," which would involve extensive use of traffic diverters and appropriate landscaping to severely limit vehicle access and annoyance in residential areas. On a citywide level, the Plan recommends buffering of heavily used arterial streets, stricter controls on commercial garages and parking lots, and deployment of well designed street furniture to improve pedestrian amenities.

The other two resident concerns most widely voiced were neighborhood upkeep and access to open-space and recreational opportunities. To ameliorate these problems, the Plan states that increased design care must be evidenced in the construction and maintenance of public facilities to enhance property values and encourage voluntary private rehabilitation programs in various neighborhoods. In addition, visual quality in such areas should be improved by removal of distracting items and promotion of human scale in street furniture and landscaping. Regarding recreational opportunities, the Plan stresses the need to develop new outlets (including the innovative use of street space) to encourage or require useable open space in major new developments, and to guarantee that existing and proposed facilities serve all age groups.

The exceptional number of design principles and policies contained in the Neighborhood Environment section is predicated on the view that the liveability of residential neighborhoods is the most important factor affecting the quality of urban life and the personal outlook of residents. Personal satisfaction must be found in the neighborhood before citizens will turn their attention to matters affecting the entire city. In addition, an implicit goal of the Urban Design Plan is to

their street environment as a continuous blur of metal. Residents of less travelled streets, however, were able to pinpoint placement of manholes, trees, and trash receptacles, and could even identify certain types of cars by their sound. An analysis of this data is presented in Appleyard & Lintell, The Environmental Quality of City Streets: The Residents' Viewpoint, 38 J. AM. INST. PLAN. 84 (1972).

36. URBAN DESIGN PLAN 124-27. See Staten, supra note 16, at 19-20, for a further description of protected residential areas and initial efforts to establish them in several neighborhoods.

37. URBAN DESIGN PLAN 128, 130.

38. Id. at 118-19; see also 1973 CEQ REPORT, supra note 1, at 20-39.

39. Id. at 129-30. Reducing the number of moving traffic lanes, using intersections to slow traffic, and providing improvements such as benches and landscaping enhance normal streetspace. Exceptionally wide or steep streets also present opportunities for installation of mini-parks or viewpoints. Larger municipal parks are to be maintained primarily for their sense of nature, with limited development of recreational facilities. On the continuous conflict between aesthetic and recreational uses of urban parks, see A. RUTLEDGE, ANATOMY OF A PARK: THE ESSENTIALS OF RECREATION AREA PLANNING AND DESIGN 35-81 (1971).

40. URBAN DESIGN PLAN 99.
institutionalize participation by residents in all planning decisions that directly affect their living environment. Reflecting these views, the planning staff has attempted to open the internal processes of the Department of City Planning and the Planning Commission to public input and to allocate technical resources to private planning and rehabilitation efforts by neighborhood associations.\textsuperscript{41}

II

IMPLEMENTATION OF THE URBAN DESIGN PLAN

The Urban Design Plan stands as a definition of quality for urban development and represents a citywide consensus on environmental goals. A key assumption of its drafters was that development choices and conflicts are seldom susceptible to rational solutions when continuous confrontation exists over what public interest goals should be. By forging agreement on basic urban design principles for guidance of public and private decisionmakers, they hoped to minimize the conflicts arising from continuous change in the urban landscape.\textsuperscript{42} The Urban Design Plan is an eloquent statement of broad environmental design policy. A policy statement's true test, however, lies in its implementation.

Existing and potential implementation techniques for the Urban Design Plan do not fit into any single category of traditional land-use controls. Full achievement of the Plan's objectives will require application of the full range of the city's fiscal resources and police powers, as well as a persuasive public education effort on the benefits of urban design planning.\textsuperscript{43} This part examines the major implementation strategies already employed by the Department of City Planning to effectuate various Plan policies. The first section briefly sketches the myriad of informal and formal regulatory powers within the planning and per-

\textsuperscript{41} For examples of these efforts, see text accompanying notes 137-38, 148-49 infra.

\textsuperscript{42} Urban Design Plan 11; interview with Peter Svirsy, Planner V, San Francisco Department of City Planning, Mar. 2, 1972. Mr. Svirsy, a lawyer, has for eleven years been the principal author of zoning measures adopted in San Francisco. He was also editor of the Urban Design Plan. See also Rondinelli, Urban Planning as Policy Analysis: Management of Urban Change, 39 J. Am. Inst. Plan. 13, 19 (1973), on the political role of the master plan in facilitating interaction among various interest groups.

\textsuperscript{43} It should also be noted that some ingredients necessary for full implementation are beyond the city's direct control. Federal funding of redevelopment and rehabilitation programs is determined according to national priorities (see notes 49, 54 infra). BCDC plays a supplemental role in controlling land use on the bayfront with an elaborate permit process. A similar procedure is employed by the Coastal Zone Conservation Commission, recently authorized through a statewide initiative. Cal. Pub. Res. Code § 27000 et seq. (West Supp. 1973). The Commission's jurisdiction extends 1000 yards inland from the mean high tide line of the Pacific (although much of San Francisco's coastal areas is exempt under the "urbanized land" exception).
mit processes which allow the staff to influence all aspects of urban development. The contributions of the California Environmental Quality Act are then analyzed, both in terms of control of individual projects and as an aid to comprehensive planning. The relevance and importance of judicial review to each of these processes is illustrated in the third section. The last two sections examine specific regulatory tools available for Plan implementation—zoning and police power regulation of the aesthetic factors of development.

A. Implementation of Urban Design Policies Within the Planning Process

Given the premise that every decision affecting land use has urban design consequences, the realm of activities potentially subject to urban design regulation is limitless. Although the Department of City Planning drafted the Urban Design Plan, the Department's control of direct implementation techniques is not all-encompassing. Indeed, a significant aspect of its implementation role will be the degree of coordination and influence it can exercise through informal negotiation with other public agencies and private developers. In recognition of this fact, the discussion of implementation strategies appended to the Plan stresses design input and review by the Department of City Planning throughout all stages of the city's planning and permit processes.44 The addendum contains several flow charts (see figures 1 & 2 infra) illustrating the administrative channels for approval of public and private development and highlighting the critical points at which design input is likely to achieve the most beneficial results.45

44. Building permit applications are filed with the Central Permit Bureau which circulates them to agencies having jurisdiction in particular areas to assert compliance with code requirements. Permits are routinely granted if no special problems appear. A Zoning Administrator attached to the Department of City Planning handles most zoning matters—review of building applications, abatement of violations, variances, and presentation of Planning Commission cases. All applications for zoning amendments, conditional uses, and planned unit developments require hearings and approval by the Planning Commission. In addition, the Commission has by resolution made certain geographical areas subject to mandatory review because of their importance to the city as a whole. The Commission also can exercise discretionary review over any proposed project, even if it is in full compliance with all code provisions. In hearings before the Commission, the planning staff submits its recommended disposition of particular matters, based on city policies and ordinances. SAN FRANCISCO MUNICIPAL CODE, pt. II, ch. 2 [hereinafter cited as CITY PLANNING CODE] §§ 301-11 (1972); see also Fisher, Land Use Control Through Zoning: The San Francisco Experience, 13 Hast. L.J. 322 (1962), on the efficacy of combining the zoning and planning functions in one administrative office; Planning Comm'n Res. No. 6111 (June 18, 1967), requiring mandatory review of all proposed development affecting the Market Street Beautification project; see also note 58 infra, on the basis of the Commission's discretionary review power.

45. URBAN DESIGN PLAN 138-39. The charts outline the administrative process relating to normal private development, conditional uses, street vacations, the rede-
1. Influence in the Public Sector

Within the municipal government, the Department of City Planning's jurisdiction extends to a majority of the activities which bear directly on important urban design relationships identified in the Plan. Urban renewal, rehabilitation, and capital improvements are the three programs outside the Department's sphere having the greatest impact on the city's overall physical form.

In addition to physically rejuvenating slum areas, redevelopment can play an important social role in attempting to preserve economic, racial, and age balance within the city. Although the city's Redevelopment Agency is chiefly supported by federal funds, its projects are initiated according to local priorities. Over the past two decades the projects undertaken in San Francisco, almost exclusively in low-income areas, have been relatively successful in terms of the units of housing constructed and the architectural quality of completed projects. However, the sheer volume of redevelopment activity, involving eight major projects covering four percent of the city's land area, indicates its substantial impact and the consequent need for consultation with the Department of City Planning on all projects to insure conformity with urban design principles. This is achieved by involving Department development process, the capital improvements program, and public facility site selection and design. The implementation addendum to the Plan, at 133-51, is essentially a summary of the strategies suggested in Preliminary Report No. 7, Implementation Approaches, Oct. 1971, which generally advocated public expenditures and new controls to further Plan policies, but lacked more specific direction. The addendum was not included when the Plan was formally adopted. As shown by some of the public comment on the Plan prior to its adoption, the lack of specificity on implementation methods indicated to many that the Commission lacked the capacity or intention to follow through on urban design goals. See Memorandum to City Planning Comm'n from Director of Planning on Comments Received on the Urban Design Plan, Aug. 19, 1971, at 3-4.

46. By 1973 the Redevelopment Agency had produced 6787 units of new housing, of a projected total of 13,109 units for all eight projects. Should all federal money originally committed eventually arrive, total federal investment in all projects will reach $367 million, and the assessed valuation of these areas will increase from $50.7 to $228.5 million; through nimble use of public facilities and improvements credits, the city has been able to meet its share of project costs to date without overburdening general revenue funds. The Western Addition A-1 project was the first one in the nation to receive a "certificate of completion" from HUD in the 26 year history of the urban renewal program. SPUR Redevelopment Report, supra note 13, at 4, 12-13. S.F. Chronicle, Mar. 31, 1973, at 2, col. 1. The agency has collected 24 national and state awards for architectural excellence, ranging from total site development to quality of building facades. S.F. Chronicle, Sept. 20, 1972, at 18, col. 1. The city has not, of course, avoided the relocation and compensation problems which have plagued urban renewal programs in all large cities. See SPUR Redevelopment Report, supra, at 9; Kessler & Hartman, The Illusion and Reality of Urban Renewal: A Case Study of San Francisco's Yerba Buena Center, 49 LAND ECON. 440 (1973). See generally URBAN RENEWAL AND HOUSING (J. McCord & I. Cohen eds. 1969).

47. SPUR Redevelopment Report, supra note 13, at 11.
staff at the earliest planning stages of redevelopment proposals and by providing staff support in selection of project sites, preparation of specific development plans, and review of final proposals for compliance with the city Master Plan and Planning Code requirements;\textsuperscript{48} in addition, Planning Commission approval is required at several steps in the process. However, despite its potential for ameliorating a number of urban problems which are the subject of Urban Design Plan policies, the redevelopment program is forever at the mercy of federal funding priorities and is currently suffering debilitating cutbacks.\textsuperscript{49}

The Federally-Assisted Code Enforcement (FACE) program,\textsuperscript{50} which provides low-cost loans to individual owners for home rehabilitation, is a second significant program threatened with extinction through the demise of federal funding. Its importance has grown proportionately with recognition of the difficulties inherent in major redevelopment and of the value remaining in the stock of older housing in inner cities. The Urban Design Plan is replete with references to existing and potential uses of FACE, especially in implementing policies concerning neighborhood environments.\textsuperscript{51} In the past the planning staff has worked well with the Department of Public Works in undertaking district-wide rehabilitation efforts with FACE money.\textsuperscript{52} This type of approach is evidence of the flexible mix of techniques available and necessary to implement various aspects of the Plan.\textsuperscript{53} In

\textsuperscript{48} Urban Design Plan 139. The major problem at present with this type of coordination is that planning for most of the redevelopment projects was completed some years ago; only three of the eight main projects were begun after 1966. Thus, unless major changes are proposed during the course of construction, the degree of urban design input that the planning staff can now obtain respecting these large projects may be minimal. In addition, when the staff objected to the low income housing sites proposed in the Yerba Buena project (a $225 million sports arena and convention complex stalled for three years by suits over resident relocation), the objections were overridden by the desires of the Planning Commission and Board of Supervisors to get the project off the ground and eventually reap its economic benefits. S.F. Chronicle, June 12, 1973, at 6, col. 1.

\textsuperscript{49} S.F. Chronicle, Mar. 7, 1973, at 28, col. 1. The Redevelopment Agency already has been forced to scale down plans for ongoing projects, scrap new proposals, and lay off 25 percent of its staff.

\textsuperscript{50} 12 U.S.C. § 1715k (1970). The loans bear a 3% interest rate. The general intent of the legislation is to secure compliance of older structures with municipal building and safety codes.

\textsuperscript{51} Urban Design Plan 129, 146, 150. Restoration of the large stock of Victorian homes in numerous older neighborhoods is a major goal.

\textsuperscript{52} Four such programs are nearly completed, and three others are currently planned. SPUR Redevelopment Report, supra note 13, at 15-16.

\textsuperscript{53} The Glen Park area is an example of the combined impact of different techniques. It was not widely thought of as a distinct neighborhood by residents or others until it was designated as a stop in the Bay Area Rapid Transit system and was made eligible for FACE funds. Since then a neighborhood association has formed and received technical assistance from the planning staff on local improvement programs, and the city has initiated public improvements in the area commensurate with its new status. Interview with Peter Svirsky, May 2, 1973.
this instance, the availability of funds is the determinative factor, as planning and management resources can be provided by the two city agencies.\textsuperscript{54}

Urban design coordination, analysis, and staff support are also built into the existing review mechanisms for the capital improvements budget and for site selection and design of public facilities (see figure 1).\textsuperscript{55} This is particularly important in light of the numerous Urban Design Plan policies recommending increased capital investment in landscaping, traffic control, open-space acquisition, and maintenance of public facilities to enhance well-preserved neighborhoods and to trigger private investment and rehabilitation in deteriorating areas.\textsuperscript{56} Yet the availability of municipal revenues and the ability of the Department of City Planning to capture capital improvement funds are unpredictable and intangible factors. Although the Board of Supervisors has been sensitive to urban design issues since the Plan was adopted, other political considerations, such as the need to augment tax-producing properties, provide competing interests and necessarily lessen certainty in the planning process.\textsuperscript{57}

However, the importance of the Plan in each of these three areas transcends individual projects and perennial funding problems. As part of the city's Master Plan, the Urban Design Plan represents a set

\textsuperscript{54} When federal monies began drying up due to the revenue sharing changeover and altered administration priorities, the city sought to obtain alternative financing, first from the state, and later through its own municipal borrowing power from private banks. Plans are nearly completed to enter an agreement with a major bank to provide $20 million in rehabilitation loans over a 12-year term, at an interest rate of 4 1/2 percent to the city and at a slightly higher rate to private borrowers. S.F. Chronicle, May 25, 1973, at 2, col. 5; \textit{id.}, June 14, 1973, at 4, col. 1; see also \textit{Cassidy, San Francisco Fights to Save FACE}, \textit{39 ASPO PLANNING}, June 4, 1973, at 5. In addition, largely at San Francisco's urging, the state legislature adopted the California Residential Rehabilitation Act of 1973 (S.B. 1438, ch. 1201, § 1973 WEST'S CAL.LEGIS. SERV. 2857), legislation designed to provide similar funding.

\textsuperscript{55} \textit{URBAN DESIGN PLAN} 139.

\textsuperscript{56} \textit{Id.} at 124-31. The policies emphasize the sense of neighborhood pride the city can foster through improved lighting and landscaping of streets and public buildings, removal of cluttering items such as signs and garish parking areas, and provision of pedestrian amenities. However, capital improvement planning involves a severe time problem, since projects budgets often are established five years in advance. Thus, in addition to the difficulty of early detection of neighborhood deterioration, the use of public facility improvement to spark private rehabilitation is hindered by the inability of city government to mobilize resources to achieve a quick impact. Svirsky interview, \textit{supra} note 53.

\textsuperscript{57} For example, the receipt of $18 million in revenue sharing funds triggered political debate over their use. SPUR had recommended expenditures for long-term improvements in schools, recreation, transportation, and cultural facilities to revitalize areas of the city and make them environmentally competitive with suburbs. The initial desire of several supervisors, on the other hand, was to use the new money simply to lower the property tax rate. S.F. Chronicle, Oct. 23, 1972, at 5, col. 7. See also note 48 \textit{supra}. 226
of goals that should assist establishment of government priorities in a period of declining public revenues. In each fiscal year the Department of City Planning can help identify those neighborhoods or programs that deserve special urban design consideration. The success of these efforts, of course, depends in part on continued public interest in urban environmental improvement as expressed at the polls.

2. Influence Over Private Design Choices

With respect to private development, the Department of City Planning and the Planning Commission have under their direct control the usual land-use tools of zoning and administration of the building permit application process. In addition, the staff may request and the Commission may exercise its discretionary review power over any proposal, even if it fully complies with legislated standards. As in the case of public development activities, however, informal enforcement within the planning process is probably of greater significance. While zoning ordinances and permit requirements set the outer parameters of acceptable development, the actual processing of individual proposals has a greater potential for widespread implementation of urban design principles. One of the flow charts in the implementation addendum to the Plan notes the critical stages of the private development process at which urban design input can and should be obtained: initial site selection, preliminary and final design plans, negotiation over the terms of conditional uses, and filing of building permit applications (see figure 2). Ultimate approval or disapproval of applications de-
PROCESS FOR PRIVATE DEVELOPMENT UNDER OBJECTIVE ZONING STANDARDS

*Critical points for urban design input.

Source: Urban Design Plan 138
nently involves the exercise of formal administrative or legislative power.\textsuperscript{60}

The quality and degree of informal consultation and review that occurs prior to formal decision on specific projects will probably be the most significant factor determining the extent of incorporation of urban design principles in overall city development. Over-the-counter negotiation among developers, private design professionals, neighborhood groups, and the planning staff permits early critical review of all development proposals. This is particularly important in the case of large-scale projects, which have been the focus of recent citizen protests. Discussions and accommodations at the pre-permit stage on height, bulk, building materials, and external design can assure both a more orderly process for the developer and conformance with the policies of the Urban Design Plan. These principles are sufficiently flexible to allow trade-offs, relaxing general standards in return for added public amenities.\textsuperscript{61}

The staff tends to be in a position of strength at this point. A recalcitrant developer who ignores staff design recommendations or warnings of neighborhood opposition to certain aspects of his proposal may confront objections to his permit application based on noncompliance with Urban Design Plan policies or regular zoning and permit requirements. Even if a proposal fully complies with definite ordinance requirements, yet severely contravenes a Plan policy, the staff may request the Planning Commission to exercise its broad discretionary review powers and may accompany that request with a recommendation for disapproval. An appeal at any of these stages can impose a costly and time-consuming burden. Given the complex and often tenuous financing arrangements of many major projects, developers and their architects are prone to accede to reasonable suggestions for alterations when faced with the possibility of such resistance or delay.\textsuperscript{62}

\textsuperscript{60} The Zoning Administrator must pass on all permit applications, and, as previously stated, the Planning Commission must approve final granting of zoning amendments, conditional uses, and planned unit developments.

\textsuperscript{61} For example, while height limits in the new zoning ordinance adopted pursuant to the Plan are absolute, planning discretion may be exercised regarding bulk requirements. See text accompanying note 136 and Part II, D, 1, infra.

\textsuperscript{62} However, the Department may not go so far as to describe such agreements as "trade-offs." The staff indicates that its role is one of answering inquiries about proposed developments, providing advice and "design terms of reference" for specific sites, and passing on information about neighborhood concerns. Svirsky interview, supra note 53. While this may not be characterized as true bargaining, it is unlikely that general staff recommendations and advice would be completely ignored even if the threat of disapproval went unmentioned. Staff actions, formal and informal, are to be based on Plan criteria, and this makes its prophylactic influence far more significant than its remedial power in the private development sphere. The best description and analysis of the day-to-day interaction between regulators and the regulated in the urban
These informal enforcement measures already have appeared in the treatment of several controversial projects. The Planning Commission recently authorized a conditional use\(^{63}\) for a waterfront apartment complex at the base of Telegraph Hill, one of San Francisco's most famous landmarks, after a compromise was achieved involving relaxation of bulk requirements in return for alterations in the spacing and height of structures to preserve the views of residents living behind the site.\(^{64}\) A more complex solution was reached with regard to a massive apartment-shopping center complex slated to replace an amusement park in a choice spot on the Pacific coastline. When the original planned unit development proposal went before the Commission, the staff's recommendation of disapproval was upheld.\(^{65}\) Two additional proposals were submitted before the staff and the developer could agree on issues of height, density, type of housing to be provided, and public access to the beachfront.\(^{66}\)

The simple fact that the Urban Design Plan has been given effect as an element of the city's Master Plan undoubtedly has had great influence on developers and private design professionals in drafting initial project plans. The deterrent impact of the Plan depends in substantial measure on the resolve of the planning staff and the appointive Plan-

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63. Conditional uses may be approved by the Planning Commission under CITY PLANNING CODE § 303 (1972), if it finds that the proposed development is necessary in the neighborhood and will not harm the public health, safety, convenience or general welfare with respect to the following factors: the nature of the site and the placement of structures; impact upon traffic and parking patterns; offensive emissions; treatment of open space, landscaping, and lighting. In addition, the project must not adversely affect Master Plan policies. Id. § 303(c). The Commission also is empowered to impose conditions beyond those specified in the Code. Id. § 303(d). This provides the opportunity to insure conformance with Urban Design Plan principles.

64. Planning Comm'n Res. No. 7003 (Apr. 5, 1973). The three block, $32 million luxury condominium project contemplated 603 units in nine buildings "stepped down" from a maximum of 84 to 40 feet to stay within prescribed height limits. Additional conditions included landscaping rooftops and preserving 40 percent of the site as open space to offset the increased sewage disposal burden placed on the contiguous northern waterfront area.

65. CITY PLANNING CODE §§ 303-04 govern the granting of approval for planned unit developments.

66. Planning Comm'n Res. No. 6931 (Dec. 7, 1972). The original plans sought approval for two 36-story apartment towers containing 800 dwelling units on a ten-acre site. The final proposal called for a "ziggurat-style" arrangement of smaller structures snuggled against Sutro Heights hill, all of the buildings remaining within the 40-foot height limit as measured from the existing slope. After three reductions in density to a total of 710 units, Commission authorization was granted. However, the Sierra Club challenged this approval on the issues of height, density, and the need to preserve the rare "dune tansy" located on the affected hillside. The suit was settled after a minor reduction in density and agreement to transplant the tansy. See S.F. Chronicle, Sept. 15, 1972, at 2, col. 7; id., Apr. 7, 1972, at 6, col. 6.
ning Commission. Realization that both intend fully to enforce specific design policies will frequently eliminate the possibility of conflict before an application for a building permit is filed. However, the Planning commission's formal exercise of its review powers has not consistently followed the Plan's policies to date.\(^67\) Two possible remedies for this problem—control of discretion through judicial review and removal of discretion altogether—are discussed subsequently in the judicial review and zoning sections of this Comment.

**B. Effect of the California Environmental Quality Act**

Subsequent to adoption of the Urban Design Plan, the supreme court held the California Environmental Quality Act (CEQA) applicable to the granting of permits and entitlements for private development activity.\(^68\) Since the statute originally had been thought to apply only to public works projects, the decision significantly widened its scope and forced revision of decisionmaking processes at all levels of government throughout the state.\(^69\) In San Francisco the mandates of CEQA will have both a procedural and substantive influence on planning and regulatory actions undertaken to implement policies of the Urban Design Plan. In particular, compliance with CEQA will aid the comprehensive planning process and insure consideration of some factors not previously reviewed under the Plan and related City Planning Code provisions. Further, CEQA will necessarily open additional channels of judicial review to supervise the exercise of discretion by municipal administrative bodies.

**I. Augmentation of the Comprehensive Planning Process**

CEQA was enacted in 1970 as a direct response to the need for greater consideration of environmental factors in state and local decisionmaking. Its primary implementation tool is the environmental impact report (EIR), a document which must be prepared for all proposed projects that may have a significant effect on the environment. The EIR must contain detailed statements concerning the immediate and long-term environmental impact of the proposed action, unavoidable adverse effects, and potential alternatives and mitigation measures.\(^70\) Its purpose is to insure that all relevant environmental data

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67. See text accompanying notes 92 to 113 infra.
68. Friends of Mammoth v. Mono County Bd. of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761, 4 ERC 1593 (1972). The opinion forced the legislature to amend CEQA to conform to the judicial interpretation of the act's requirements. **CAL. PUB. RES. CODE § 21000 et seq.** (West Supp. 1973).
are before decisionmakers and are considered equally with traditional economic and technical factors in making the ultimate decision to undertake or approve a particular project. It is also a vehicle for obtaining public participation in these decisions through the solicitation of comments from interested parties and the possible conduct of public hearings on completed EIRs.\textsuperscript{71}

After the supreme court decision and subsequent legislative revision, the City Attorney and the planning staff drafted an ordinance designed to superimpose the EIR process on existing planning and review procedures.\textsuperscript{72} While attempts were made wherever possible to harmonize these processes by consolidating notice and hearing requirements, the final product emphasizes the procedural benefits CEQA was intended to achieve. The Department of City Planning is designated as the "responsible agency" for determinations of the need for and preparation of EIRs for all public and private activities.\textsuperscript{73} Apart from projects excluded under categorical exemption regulations or as ministerial actions,\textsuperscript{74} the private applicant or public agency must refer the project proposal to the Department for initial review and a finding of whether or not it may have a significant effect on the environment.\textsuperscript{75} The Department must consult State Implementation Guidelines for definitional criteria of "significant effect," but is also given the freedom to develop new criteria by administrative regulation based on the policies of the city Master Plan.\textsuperscript{76} This affords the opportunity to refine

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\item\textsuperscript{71} See Comment, supra note 69, at 381-84.
\item\textsuperscript{72} SAN FRANCISCO ADMIN. CODE § 31.00 et seq. (1973) adopted by Ordinance No. 134-73 (Apr. 11, 1973). The sole purpose of the ordinance is to establish EIR procedures, as it incorporates by reference the substantive policy statements concerning environmental quality contained in CEQA and the administrative guidelines issued by the Secretary for Resources. See 14 CAL. ADMIN. CODE § 15000 et seq. (1973) for the Implementation Guidelines applicable to all state and local agencies.
\item\textsuperscript{73} SAN FRANCISCO ADMIN. CODE § 31.05(b) (1973). This provision, centralizing the EIR process in the Department, was the subject of some bureaucratic infighting; however, it does effectively permit the development of expertise and the exercise of sound coordination within the city government.
\item\textsuperscript{74} The State Guidelines list numerous categorical exemptions covering projects, such as single family homes, which will not in the Secretary's view have a significant effect on the environment. Ministerial actions are those regarding which no discretion may be exercised, including, under the State Guidelines, the granting of building permits. The restrictive effect of this exclusion is obviated in San Francisco by the broad discretionary review power of the Planning Commission, which theoretically gives it power to review almost any kind of permit decision. See note 58 supra.
\item\textsuperscript{75} SAN FRANCISCO ADMIN. CODE § 31.05(c).
\item\textsuperscript{76} Id. § 31.23(b): "Supplemental criteria . . . may be adopted as administrative regulations by resolution of the City Planning Commission after public hearing, . . . In determinations of significant effect, consideration shall be given the objectives and policies of the San Francisco Master Plan." The State Guidelines also mention that local environmental plans and goals are to be taken into account in such decisions. 14 CAL. ADMIN. CODE § 15081(c)(1). For discussion of the State Guidelines' narrow
\end{itemize}
Urban Design Plan standards which may be employed in the initial determination of possible adverse effects.

On the basis of the preliminary information provided, the planning staff either issues a "negative declaration," denoting a finding that there could be no significant effects, or notifies the sponsoring party that an EIR must be prepared. Either finding may be appealed by anyone to the Planning Commission, but its decision is final. The staff is to prepare draft EIRs, using data submitted by the applicant and consulting public and private parties having interest or knowledge concerning the project. Draft EIRs must be circulated to all agencies having legal jurisdiction over different aspects of the project, and may be distributed to persons having special expertise regarding any alleged adverse environmental effects. The Commission is then required to conduct a public hearing on the draft report. The final EIR must be based on the draft report, comments submitted, and testimony at the hearing. Any major changes suggested and rejected by the staff must be noted and the reasons for the rejection explained.

Following transmittal by the staff, the Planning Commission must certify completion of the EIR and make findings that it is "adequate, accurate and objective," and that the project will or will not have a significant effect on the environment. The EIR then goes to the appropriate agency which must adopt it and consider its contents in making its decision on approving the project in question. The discretion of the decisionmaking body is preserved—a finding of significant effect does not necessarily require rejection of the project proposal.

In a mechanical sense, the imposition of CEQA's requirements on pre-existing review procedures simply adds an extra hearing and
report. Theoretically, however, once full implementation of the EIR procedure is achieved, important improvements in the decisionmaking process should result. First, the primary investigation of a project's effects will be far more encompassing in scope and detail than had previously been the case; this aspect is discussed at greater length in the succeeding section. Second, the mandatory consultation between city agencies will forge a greater degree of coordinated, comprehensive planning in carrying out municipal activities. Such coordination should assist the planning staff's efforts to implement policies of the Urban Design Plan with respect to activities under the jurisdiction of other agencies. Third, the solicitation of public comments and the conduct of a hearing on the draft EIR insures more effective public participation at all stages of the decisionmaking process. Particularly in the conflict- and emotion-laden area of major new development, this involvement should facilitate more fruitful negotiation and compromise among the staff, developers, and affected residents. Extensive input early in the planning process will provide neighborhood associations a greater sense of participation and improved confidence in their chances to preserve neighborhood character. On the other side, since modifications can be made early in the approval process on the basis of the initial impact study or virulent resident objections, benefits will also accrue to developers and architects who now may avoid massive public opposition at the later Planning Commission hearing held on a major project.

2. **Widened Scope of Substantive Inquiry**

Although the Urban Design Plan in conjunction with pre-existing code requirements posits an extensive review of certain types of public and private development activities, this review is not as thorough as the investigation envisioned under CEQA. Thus the EIR requirement is a valuable addition to the planning process, in that it elicits data and forces study of alternatives that otherwise rarely would have been undertaken. This is particularly true regarding treatment of natural phenomena, a category emphasized by CEQA and accorded less consideration under earlier planning and review criteria. However, CEQA also makes valuable contributions to other facets of the substantive inquiry involved in review of all types of development in San Francisco.

A comparison of the factors considered in reviewing two large apartment towers proposed for the crest of Russian Hill (the Haas Towers)\(^82\) with those demanded under CEQA illustrates the expanded

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\(^82\) This proposal, which was submitted just prior to the adoption of the Plan, was reviewed several times by the Planning Commission and has been the subject of litigation. See text accompanying notes 97-102 infra.
scope of review now required. In evaluating this project the staff report considered several environmental factors, including: the height and bulk of the buildings, particularly with respect to the Urban Design Plan's suggested ranges for the area; numerous design factors, including impact on the skyline and the scale of surrounding development; and the probable impact of increased population density on traffic and parking congestion. The report also indicated possible alterations in the siting and design of the towers which were considered "minimum" by the staff for reasonable development of the lots in question.83

Several factors which were not considered, however, could now be deemed mandatory subjects of inquiry under CEQA's direction that all environmental effects be examined. These included the harmful effects of increased noise pollution and high wind velocities on general living conditions, impact on open space on the hill, and earthquake dangers. A further serious omission in the investigation was the increased burden on public services to be caused by the increased population density of the area, especially in provision of water, recreational access, and solid waste disposal facilities.84 Failure to evaluate these basic factors precluded full analysis of the other areas noted in the EIR procedure: unavoidable adverse effects, the effect upon short- and long-term productivity, and mitigation measures. While the staff report did suggest the minimum acceptable design alternatives, this fell far short of CEQA's mandate to study all feasible alternatives and weigh their respective environmental costs and benefits. Finally, the specific focus on the Haas Towers meant that secondary effects, such as the encouragement of further development on Russian Hill by approval of this project, were ignored.85

This comparison demonstrates two basic attributes of the EIR process which will benefit planning and review under the Urban Design Plan. First, full compliance with CEQA will engender a more in-depth study of a larger number of environmental factors germane to urban land use. Requiring this detailed examination of particular projects and sites will facilitate formulation of appropriate indices of relevant factors that must be considered in the context of the urban envi-

84. Whether or not failure to study these elements prevented "substantial compliance" with CEQA is the focus of a suit brought by residents seeking to block construction of the Haas Towers now before the state court of appeal. See Brief for Appellants at 25-28, Russian Hill Improvement Ass'n v. Board of Permit Appeals, Civ. No. 31836 (1st Dist. Ct. App., filed May 11, 1973) [hereinafter cited as Haas Towers Appellants' Brief].
85. CAL. PUB. RES. CODE § 21100(a)-(g) (West Supp. 1973) lists the seven specific categories to be covered in an EIR.
In this respect, the principles of the Urban Design Plan should provide a sound normative framework for development of criteria to be applied to all public and private development. Indeed, the framework provided by general plan elements such as the Urban Design Plan should be used as a comprehensive reference base for EIRs, since the EIR procedure alone could at times generate too narrow a focus on specific proposals.

The second important contribution is that preparation of an EIR will result in compilation of all relevant data in a single document. In addition to enhancing public participation through the comment and hearing procedures, the draft and final EIR reviewed by the appropriate agency should aid decisionmaking by clearly disclosing the environmental costs and benefits to be weighed against economic, technical, and social factors in reaching a final determination on particular projects. The city ordinance requirement that the planning staff explain rejections of various alternatives and whether or not Master Plan polices are served by the project will clarify the choices before the administrative body and provide improved bases for decision. Although disclosure of unavoidable adverse effects will not necessarily require disapproval of a given proposal, it should force a full articulation of the offsetting economic or social benefits deemed to justify approval. Conducted in the context of active public involvement, this balancing process will produce a more rigorous and effective scrutiny of future development in San Francisco.

C. Judicial Review of the Planning Process

The bane of even the best-laid local planning schemes is arbitrary, short-sighted, and uneven enforcement by boards and commissions having review power over specific zoning or permit decisions. The countervailing forces of local politics and economic necessities often disembowel the most attractive general plans or zoning ordinances in their application to individual projects. San Francisco has proven no exception to this phenomenon. This section examines means by

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88. See, e.g., Broadway-Laguna Ass'n v. Board of Permit Appeals, 66 Cal. 2d 767,
which judicial review can be employed to affirm the values of the planning process, particularly with respect to the goals of the Urban Design Plan. The problem is the perennial one of control of administrative discretion. Given the express policies of the Plan and of CEQA, the planning process in San Francisco should be better insulated from future administrative abuses, provided courts are willing to uphold the substantive policies of these acts.

1. Control of Administrative Discretion in Land-Use Decisions

The Planning Commission is empowered to exercise discretionary review on its own initiative with respect to projects which otherwise fully comply with all applicable ordinances. The power is usually exercised with regard to private development proposals which will have an extensive or controversial effect in their surrounding area. Mobilization of neighborhood opposition to any significant degree is often sufficient to trigger discretionary review by the Commission. In addition, the planning staff can recommend that review be granted. Appeals from Commission decisions are taken to the Board of Permit Appeals, where four of five votes are necessary for reversal. Since no explicit standards govern exercise of the discretionary review power, however, its application does not always result in amelioration of detrimental aspects of proposals that come before the Planning Commission. Soon after adoption of the Urban Design Plan, the Commission twice had occasion to review major projects which did not strictly adhere to Plan criteria regarding their respective locales and which provoked neighborhood opposition. Since both permit applications involved questions of whether or not the projects could escape the interim controls adopted pursuant to the Plan, the results cannot be deemed rep-


89. See generally L. Jaffe, Judicial Control of Administrative Action (1965); Comment, Administrative Discretion in Zoning, 82 Harv. L. Rev. 668 (1969).

90. See note 58 supra. The Commission is composed of two ex officio members plus five citizen members appointed by the mayor for four-year terms. Political considerations are apparent in the selections made.

91. The San Francisco Board of Permit Appeals is probably unique in the annals of municipal government, as it is authorized to hear appeals on any type of permit issued by any city agency. Needless to say, little expertise is evident on any particular category of permits, and a layman's equity principles often suffice for decisionmaking criteria. See Divided Responsibilities and Conflicting Jurisdictions, in The New Zoning: Legal, Administrative and Economic Concepts and Techniques 110-15 (N. Marcus & M. Groves eds. 1970) [hereinafter cited as The New Zoning] for a discussion of the Board's haphazard performance in the land-use area.

92. Concurrently with the adoption of the Urban Design Plan, the Commission passed a resolution promulgating its recommended city-wide height ranges as interim height-limit controls pending adoption of a comprehensive ordinance regulating the
resentative for purposes of assessing future treatment of like applications. The two examples do suffice to illustrate some of the pressures inherent in local land-use decisionmaking, with which the Plan must contend to become effective.

The first confrontation erupted over a proposed 36-story, 608-unit Holiday Inn to be built on a major thoroughfare located in a valley accenting the city's natural contours. The hotel exceeded by eight stories the Plan's recommended height limit for the predominantly lowrise area, and doubled the permitted bulk dimensions. Moreover, the bland, institutional facade clashed with surrounding buildings and exemplified precisely the poor-quality commercial design which the Plan's policies abhorred. Opponents of the Holiday Inn contended that it would destroy the existing scale of the district by ushering in a series of highrises along the avenue. The developer emphasized that he had filed an application in conformance with existing laws before the Plan was adopted, that nearly $2 million of the total $11 million cost had already been expended (primarily in land investment), and that a significant number of jobs would be provided by construction and operation of the hotel.93 The staff report concluded that the interim zoning controls technically did not apply to the Holiday Inn, but recommended disapproval anyway in light of the detrimental impact the building would have on the area.94 The Commission nonetheless approved the application by a four-to-three vote,95 refusing to apply the Plan's criteria adopted but three weeks earlier. As a result ten members of the Urban Design Advisory Committee resigned in disgust and joined the San Francisco Planning and Urban Renewal Association (SPUR) in filing suit to halt construction of the Holiday Inn.96

The second case, concerning the Haas Towers, provoked even greater controversy and convinced many residents that the Urban Design Plan was just an elaborate sham.97 The original site permit appli-
cation contemplated construction of a massive apartment tower on the crest of Russian Hill. Once again, since the application had been filed prior to promulgation of the interim zoning controls based on the Plan, the only means of challenging the development was through exercise of the Commission’s discretionary review powers. This was successfully done in August 1971, when the Commission unanimously rejected the single highrise proposal. The Commission determined that the proposal violated the Plan’s guidelines on height, bulk, and design treatment of the building’s facade and lower elements, and that the apartment development would have a significant detrimental impact on both the neighborhood and the city. The developer subsequently submitted revisions to the original application, specifying two towers of 37 and 25 stories. This proposal was closer to the Plan’s height and bulk limits but added 96 units to the initial number of apartments. Although the proposal also increased landscaping and usable open space, modified the texture and color of the building, and further recessed the garage access as requested, the developer asserted that he could not economically comply with all the design terms of reference suggested by the planning staff for the site. In again recommending disapproval the staff report stressed the unacceptable den-

88 Id., Jan. 13, 1972, at 23, col. 1. It is clear that the Commission’s actions on these two proposals strengthened the view that the Plan lacked implementation capability and compounded the staff’s problems in later winning public acceptance of a comprehensive height and bulk zoning ordinance. See note 15 supra and Part II, D, 1 infra.

98 Planning Comm’n Res. No. 6743 (Aug. 12, 1971). The developer had never contacted the planning staff prior to filing his application, nor did he obtain the design terms of reference devised from Urban Design Plan principles for that particular site (as had other developers). Those terms recommended a general height limit of 40 feet, but permitted point towers (having slender bulk) up to 300 feet if the lower elements were compatible with existing lowrise development with respect to building form, landscaping, and design of parking facilities and facades. Memorandum to Planning Comm’n from Ass’t Director of Planning on Discretionary Review of Bldg. App. No. 398946 (Aug. 6, 1971), at 2.

99 Between August and November the original Commission action was before the Board of Permit Appeals several times without a final decision being rendered. On October 15 the developer withdrew his appeal after gaining assurance in the form of a city attorney’s ruling that he could substitute a new set of plans on the former building permit application. Memorandum to Planning Comm’n from Director of Planning on Discretionary Review of Alternate Plans filed under Bldg. App. No. 398946, Nov. 17, 1971, at 2. By not having to file a new application, which would have been received well after adoption of the Plan and the interim controls, Haas preserved his claim to pre-Plan review standards.

100 Id. By November the staff had issued more stringent design terms of reference for the site, including a 250-foot height limit, substantial required setbacks, and uniform R-4 density and floor area ratio standards (although the entire area was zoned R-5, allowing the development of up to 400 units). Id. at 4-5.
sity, height, bulk, floor-area ratio, and treatment of lower elements. However, without referring to any particular factor favoring the development, a bare majority of the Commission approved the revised application.

The Board of Permit Appeals upheld both the Holiday Inn and Haas Towers decisions and both actions were challenged in court. Both suits depended heavily on construction of applicable grandfather clauses, and the Haas Towers appeal is being waged primarily on the basis of alleged violations of CEQA. Of more direct relevance to this discussion, the Holiday Inn case, already decided, raised the specific question of abuse of discretion by the Planning Commission and Board of Permit Appeals.

The chief issue in *SPUR v. Central Permit Bureau* was whether or not the Planning Commission and Board of Permit Appeals were required under section 302(e) of the Planning Code to apply the interim height and bulk controls of the Plan in their review of the Holiday Inn application. The court construed the code section to mean that only applications filed after a resolution of intention to reclassify property was adopted would be subject to the new restrictions. Since

101. Memorandum to Planning Comm'n from Director of Planning on Discretionary Review of Modified Alternate Plans Under Bldg. App. No. 398946, Jan. 13, 1972, at 2-3, 6-7 [hereinafter cited as Memorandum from Director of Planning]. By this time Haas had reduced the height and bulk slightly while retaining the same total of 376 apartment units.

102. Planning Comm'n Res. No. 6799 (Jan. 13, 1972). The resolution states, without further explanation, that

... the Commission finds ... that the proposal ... is a reasonable development of the subject R-5 zoned site, and is in conformity with the principles and policies of the current Urban Design Element of the Master Plan; and the Interim Height and Bulk Controls adopted by the City Planning Commission on August 26, 1971. (Emphasis supplied.)

103. The appellants in the Haas Towers suit have also claimed an abuse of discretion on the part of the Commission in approving an application which violated Urban Design Plan policies, but this is a secondary ground and has been constrained by the result in the Holiday Inn suit. See Haas Towers Appellants' Brief, supra note 84, at 34-42.

104. 30 Cal. App. 3d 920, 106 Cal. Rptr. 670 (1973). Appellants specifically were appealing a denial of a writ of mandate revoking the permit approval.

105. Section 302(e) states in pertinent part:

No application for a building permit ... for a new use of property filed subsequent to the day that ... a resolution of intention has been adopted for the reclassification of such property ... shall be approved by the Department of City Planning while proceedings are pending on such reclassification ... unless the construction and use proposed ... would conform to the existing classification ... and also to the different classification ... under consideration in those proceedings ... .

*CITY PLANNING CODE § 302(e) (1972)* (emphasis supplied).

106. 30 Cal. App. 3d at 926, 106 Cal. Rptr. at 673. Once this primary decision was reached, the majority gave short shrift to appellants' additional contentions that the effect of the approval was to grant a prospective variance, that findings of fact should
the Holiday Inn application was filed several weeks in advance of adoption of the Plan and its height and bulk ranges, it was thus exempted from the interim zoning controls despite the fact that extensive administrative review had yet to be completed before the permit could be deemed lawfully granted. The court did note that the Commission's discretionary review power permitted it to apply either pre-existing law or the interim controls in passing on the application; but since the Commission had exercised this discretion to approve the development under prior ordinances, its action was final. Appellant argued that the Commission's failure to adhere to the Urban Design Plan standards when discretion existed to apply them constituted an abuse of discretion. The court, however, remarked in a conclusory fashion that "[t]he fact that the Agencies could use the proposed law as a standard, in certain situations, is immaterial here as they did not and were not required to do so." 107

In recommending reversal of the administrative decision, Judge Brown's dissent emphasized the related points that the purpose of the interim controls had been frustrated 108 and that the refusal to apply the new height and bulk limits constituted an abuse of discretion. 109 On the latter point the dissent maintained that the agencies had refused to follow ascertainable standards in exercising their discretion. They had compounded this abuse of discretion by apparently considering only one relevant factor, the economic benefits accruing from construction and operation of the hotel. 110 The available standards and rele-

have been filed by the Board, that the project necessitated an EIR, and that appellate courts are bound to apply the final zoning ordinance in effect at the time of their decision. Id. at 928-31, 106 Cal. Rptr. at 675-78. The findings of fact and EIR issues are further discussed in text accompanying notes 117-20, 124-25 infra.

107. 30 Cal. App. 3d at 927, 106 Cal. Rptr. at 674.

108. The majority's often confused opinion ignored the consequences of its decision, since the goal of the interim controls was completely negated. The purpose of interim control ordinances is to prevent races to stake claims and the perpetuation of non-conforming uses. The majority's interpretation of section 302(e) protects these interests only with respect to applications filed after interim controls are promulgated. In summarily dismissing the policy arguments favoring liberal construction of interim controls and the fact that the real effect of the decision was to approve a prospective variance, the opinion permits destruction of these same interests. The mere filing of a site permit application, which is just the beginning of the administrative approval process, should not be so easily transformed into a vested development right. See Russian Hill Improvement Ass'n v. Board of Permit Appeals, 66 Cal. 2d 34, 56 Cal. Rptr. 672, 423 P.2d 824 (1967); Hunter v. Adams, 180 Cal. App. 2d 510, 4 Cal. Rptr. 726 (1960); see also Freilich, Interim Development Controls: Tools for Implementing Flexible Planning and Zoning, 49 J. Urb. Law 65 (1971); Comment, Stop-Gap and Interim Legislation, A Device to Maintain the Status Quo of an Area Pending the Adoption of a Comprehensive Zoning Ordinance or Amendment Thereto, 18 Syracuse L. Rev. 837 (1967).

109. 30 Cal. App. 3d at 935, 106 Cal. Rptr. at 679 (Brown, J., dissenting).

110. Id. at 937, 106 Cal. Rptr. at 681.
vant factors ignored included the urban design and environmental principles of the Urban Design Plan,\textsuperscript{111} the Commission's resolution adopting the interim controls,\textsuperscript{112} and the provisions of section 101 of the Planning Code setting forth the code's purposes.\textsuperscript{113} Judge Brown felt it was the court's duty to force the Planning Commission and Board of Permit Appeals to comply with these criteria, which the agencies themselves had adopted to govern their decisions.\textsuperscript{114}

These two examples point out the often noted susceptibility of local agencies to economic and political pressure despite the presence of seemingly well-drafted and explicit land-use plans. Because both of these cases arose during initial implementation of one aspect of the Urban Design Plan, they posed unique issues. However, they illustrate the need for judicial intervention to assure compliance with the applicable standards and policies of the Plan. Until the discretion of the permitting agencies is constrained more effectively by judicial review, similar abuses may occur, and there will be no certainty that the city will implement the Plan by enforcing its standards at all levels of the development approval process. To provide this type of check courts must be willing to accord more weight to the legislative policies established in general plans, moving beyond the broad precept that municipal zoning alone should comport with comprehensive plans and requiring that such policies be applied in more specific instances such as the discretionary review of individual permit applications.\textsuperscript{115}

\textsuperscript{111} Although Judge Brown joined the majority in ruling that no EIR was required for the hotel, he stated that the Urban Design Plan (over and above the height and bulk restrictions contained in the interim controls) constituted an "environmental plan" for the benefit of San Francisco residents, and condemned the lack of consideration of environmental impact by the city agencies.

\textsuperscript{112} The resolution stated that
\begin{quote}

The Planning Commission may permit a height within the range specified, but \textit{in no event and under no circumstances} shall it or any appeal agency permit a height greater than that specified in the map legend as "The Maximum Height That may be Permitted by the City Planning Commission after Review."
\end{quote}


\textsuperscript{113} Section 101 lists the general goals which are to guide Commission decisions on all matters arising under the planning code, and forms part of the enabling language of the Commission's discretionary review power. See note 58 supra.

\textsuperscript{114} Van Sicklen v. Browne, 15 Cal. App. 3d 122, 92 Cal. Rptr. 786 (1971), provides strong support for Judge Brown's view that reviewing courts should require planning commissions to adhere to master plan standards. In that case the court approved denial of a use permit for a service station which, although complying with specific zoning criteria, violated a city master plan policy.

2. Judicial Review Under CEQA

A further substantial contribution provided by CEQA is the increased likelihood of judicial review of discretionary administrative action. Lack of compliance with CEQA was alleged in the litigation concerning approval of the Holiday Inn and Haas Towers projects. Both suits, however, primarily involved questions of retroactive application of CEQA and do not present a true test of the act's procedures or substantive policies. The court in *SPUR v. Central Permit Bureau* held, in a very restrictive reading of CEQA, that the Holiday Inn application was exempted from the EIR process under the amended act's litigation exception.116

In response to a similar challenge in *Russian Hill Improvement Ass'n v. Board of Permit Appeals*,117 the defendants have maintained that completion of the normal review process and consideration of the staff report submitted on the Haas Towers constituted "substantial compliance" by the Planning Commission with CEQA's requirements. This argument appears deficient on several grounds, as neither in procedure nor substance did the administrative action taken on the Haas Towers resemble the EIR process. The final staff report was only made available on the day of the Commission's decision, allowing no intervening period for public comment and appropriate Commission study.118 The substantive inadequacies of the staff report in comparison with a full EIR have previously been noted.119 Finally, since that report strongly recommended disapproval on the basis of environmental criteria contained in the Urban Design Plan, the Commission is vulnerable to a charge of abuse of discretion under CEQA for not providing a countervailing rationale for granting the permit application.120

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116. 30 Cal. App. 3d at 931, 106 Cal. Rptr. at 677. CAL. PUB. RES. CODE §§ 21169-70 (West Supp. 1973) were the provisions in dispute. Section 21169 exempts all projects "undertaken, carried out or approved" prior to adoption of the CEQA amendments. Section 21170 modifies this to exclude from the exemption projects "which were being contested in a judicial proceeding in which the pleadings, prior to the effective date of this section, alleged facts constituting a cause of action for . . . violation of this division. . . ." Although the appeal briefs filed by the appellants and the California Attorney General as amicus alleged CEQA violations before the section was adopted, the majority ruled that the allegations must have been raised in the original pleadings in the suit. While the validity of this holding was suspect, a rehearing and appeal to the supreme court by appellants and the Attorney General were denied. The denial presumably was due in large part to the appellants' failure 18 months earlier to obtain a preliminary injunction, which allowed the building to be topped out by the time of the supreme court's denial of the petition for hearing.


118. See text accompanying notes 77-80 supra.

119. See text accompanying notes 82-85 supra.

120. The staff report stated that the Haas Towers would have "a massive detrimental effect on the surrounding neighborhood" in terms of sheer density, even if other
The retroactivity and substantial compliance issues raised in these cases are of limited duration and only tentatively illustrate the probable impact of CEQA on judicial review of city administrative action. In terms of the procedural scheme adopted by the Department of City Planning to implement CEQA, three distinct levels exist at which judicial review may be exercised to insure that the policies of the act are fully achieved. The first level consists of a city's negative declarations regarding specific projects and categorical exemptions for entire classes of projects devised by the city under the State Guidelines. The vagueness of the Guidelines with respect to definitional terms and the lack of precedent in the context of the urban environmental impact of many types of development require close judicial scrutiny of both categories to prevent the erroneous large-scale exemption of questionable projects and administrative planning actions from the EIR process. The second level concerns the actual preparation of EIRs, as it is clear that some degree of litigation on a case-by-case basis will be necessary to establish standards of sufficiency and objectivity. With respect to urban design issues were not considered. The report also suggested viable design alternatives and modifications to reduce this impact. Despite clear evidence that the project contravened both the general policies of the Plan and the specific criteria of the interim controls, the Commission, without supporting facts, declared the contrary to be the case. See Memorandum from Director of Planning, supra note 101, at 7-8; Planning Comm'n Res. No. 6799 (Jan. 13, 1972), quoted in note 102 supra. This contradiction alone approaches abuse of discretion.

Furthermore, the supreme court remarked in Friends of Mammoth that "[o]bviously, if the adverse consequences to the environment can be mitigated, or if feasible alternatives are available, the proposed activity, such as the issuance of a permit, should not be approved." 8 Cal. 3d 247, 263 n.8, 104 Cal. Rptr. 761, 771 n.8, 502 P.2d 1049, 1059 n.8, 4 ERC 1593, 1599 n.8 (1972). Thus, even if one assumes that the Commission's review constituted substantial compliance with CEQA's procedures, the failure to implement feasible alternatives or mitigation measures, as appellants have contended in seeking a writ of mandate, could represent abuse of discretion under CEQA unless strong nonenvironmental justifications for the project exist and are presented by the agencies. See Haas Towers Appellants' Brief, supra note 84, at 34-39. See also Comment, supra note 69, at 377-78.

121. See, e.g., No Oil, Inc. v. Los Angeles, — Cal. App. 3d —, 111 Cal. Rptr. 487 (1973). The Guidelines are particularly murky on the meaning of "substantial adverse impact," the term most important in determining whether or not a negative declaration or categorical exemption is justified. See 14 CAL. ADMIN. CODE §§ 15033, 15040, 15081, 15083, 15100-16 (1973). As an example of local interpretation of the Guidelines, the Planning Commission has exempted all zoning changes which impose greater restrictions on development than previously existed. San Francisco Dep't of City Planning, Categorical Exemptions from the California Environmental Quality Act, Apr. 26, 1973 at 11. Although imposition of tighter controls or a more restrictive zoning envelope will in almost all cases prove environmentally beneficial, the second important consequence of CEQA should be to improve overall comprehensive planning. On this basis even positive government actions should traverse the EIR process, despite the added time and cost, because of the beneficial spillover in enhanced planning capabilities.

122. An analogous development has occurred under NEPA. See, e.g., Sierra Club v. Froehlke, 359 F. Supp. 1289, 5 ERC 1033 (S.D. Tex. 1973); EDF v. Armstrong, 352 F. Supp. 50, 4 ERC 1760 (N.D. Cal. 1972), aff'd, 487 F.2d 814, 6 ERC 1068 (9th
urban development in San Francisco, the Urban Design Plan's principles should constitute the main criteria within several of the EIR categories for evaluation of many types of projects.

Finally, decisions of the city agencies should be subject to review on their merits for compliance with the substantive policies of CEQA. Even if all procedural requirements are met, the beneficial aspects of an environmental protection measure such as CEQA can still be vitiated if there is no check on administrative action to insure that the environmental impacts disclosed in an adequate EIR are taken into account in making the ultimate agency decision to approve or reject a specific project. Admittedly, the agencies retain discretion to balance environmental factors against traditional technical and economic criteria in reaching a decision; but the goal of improving consideration of environmental values can never be achieved if agencies are given free rein to ignore documented evidence of adverse impact. For example, the Planning Commission should not be allowed to approve individual proposals having negative environmental effects unless it provides a compelling explanation of the overriding benefits deemed to justify such action and of the reasons why mitigation measures are not feasible.

This latter point highlights an additional procedural benefit of CEQA that will be fully realized only through effective exercise of judicial review. The EIR process obligates administrative bodies to make explicit findings concerning the environmental impact of proposed projects. In disputed cases where adverse effects are likely, this requirement should be interpreted to require clear identification of the policies served which support approval of development having some degree of detrimental impact. The requirement that such find-


123. See Comment, supra note 69, at 375-78. The federal courts have now embraced the position that substantive review may be exercised in reviewing agency decisions in light of the broad policy provisions of NEPA. EDF v. Corps of Engineers, 470 F.2d 289, 4 ERC 1721 (8th Cir. 1972), cert. denied, 409 U.S. 1072, 5 ERC 1416 (1973); see also Note, Substantive Review Under the National Environmental Policy Act: EDF v. Corps of Engineers, 3 ECOLOGY L.Q. 173 (1973).

124. This is the only practical means of guaranteeing that environmental considerations are treated equally with other factors in reaching ultimate project decisions. In construing NEPA, federal courts have adopted this view and required reasoned analysis of environmental impact statements by agencies in the final stage of their decision-making process. This not only facilitates judicial review, but also aids interested parties in commenting on or challenging impact statements. See EDF v. Froehlke, 473 F.2d 346, 351, 4 ERC 1829, 1832 (8th Cir. 1972). This new attitude was most aptly described by the District of Columbia Court of Appeals in a non-NEPA case:

We stand on the threshold of a new era in the history of the long and
ings be made will alleviate the current problem of the excessive latitude possessed by the Planning Commission and Board of Permit Appeals to pass on zoning and permit matters without fully articulating the grounds for their decision. Once this process becomes institutionalized, the difficulties discussed earlier in controlling exercise of discretionary powers in the city planning process should recede.

D. Exercise of the Municipal Zoning Power

The most direct legal method of implementing several specific policies of the Urban Design Plan is through use of zoning ordinances enacted under the municipal police power. Bonus provisions in commercial district zoning ordinances can be employed to encourage provision of visual and pedestrian amenities in major new projects. Special controls can prevent serious deterioration or alteration in areas having unique attributes; five such areas are noted in the Plan itself, and one additional area has been expressly designated an his-

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. To protect these [new environmental] interests from administrative arbitrariness . . . [c]ourts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible.

EDF v. Ruckleshaus, 439 F.2d 584, 597-98, 2 ERC 1114, 1122 (D.C. Cir. 1971).


126. See generally D. MANDELKER, THE ZONING DILEMMA (1971), for an extensive analysis of how zoning can be used to effectuate the broad policies of a comprehensive general plan. The focus of the Mandelker case study was King County (Seattle), Washington, a large area undergoing heavy and rapid development. San Francisco, however, already is almost completely urbanized. The discussion infra considers how zoning ordinances can be used for the same goal in this different urban context, the planning and legal strategies being in several respects different in kind from those needed in a suburban context.

127. San Francisco has operated a bonus system for commercially-zoned districts in the downtown area since 1968. The system is correlated to the floor area ratio requirements of the particular zoning district. The ratio permitted for a commercial structure may be increased above the maximum 14:1, 10:1, or 7:1 ratios for any one or a combination of ten compensating factors provided by the developer. These include direct access to BART subway stations or parking facilities, widened sidewalks and open air plazas, greater side setbacks, and reduction of upper floor coverage. Cnty Planning Code § 122.3 (1972). For a description of the development of the bonus provisions and the early results of their use, see Svirsky, San Francisco: The Downtown Development Bonus System, in THE NEW ZONING, supra note 91, at 139; see also Comment, Bonus or Incentive Zoning—Legal Implications, 21 SYRACUSE L. REV. 895 (1970).

128. See note 27 supra. To date no ordinances have been enacted to apply directly to any of these areas; however, within the Department of City Planning all applications for development in or near them receive special scrutiny.
urban district under the city's historic preservation ordinance.\textsuperscript{129} This section examines two uses of the zoning power to attain goals set forth in the Urban Design Plan. Since limitations on the height and bulk of buildings were a prime objective of the Plan, the process leading to their adoption is discussed first in some detail. The second example concerns downzoning of residential areas, reducing permitted densities in order to control undesirable growth and alleviate fears of sudden and drastic changes in neighborhood character.

1. Height and Bulk Limitations

The highrise issue has been particularly acute in San Francisco because of the city's unique topography and visually attractive skyline. Pressures beginning in the early 1960's for commercial growth and new apartment development posed definite threats to these attributes. Thus one of the most important and controversial implementation problems presented by the Urban Design Plan was that of imposing city-wide height and bulk controls to regulate major new development and preserve the form and character of San Francisco.

Highrise buildings certainly have a significant impact on the urban environment. Their erection can despoil views, block sunlight, and create mini-climates of extreme wind velocity. Structures lacking exceptional height but having massive, unusual dimensions or shapes can achieve the same result, while also wreaking havoc on the pre-existing architectural character of an area. This is particularly true in residential areas, where many types of multi-unit apartment building may be considered a "highrise." Construction of cheap four- and six-plex apartment buildings also causes removal of more visually appealing single family dwellings. In downtown areas, the imposing concrete, glass, and steel presence of highrise monoliths may have a negative psychological impact both on pedestrians and on the workers who inhabit them. Despite these characteristics, spiralling urban land costs and municipal needs for more tax-generating property provide strong economic incentives for continued highrise development.\textsuperscript{130}

\textsuperscript{129} See text accompanying notes 169-71 infra. Although historic preservation ordinances are not technically considered zoning ordinances, when they are applied to entire areas they tend to achieve the same effect. Thus, San Francisco's historic district ordinance controls alterations, demolitions, and design of structures on all property within the area. See Part II, D, 2 infra.

\textsuperscript{130} See B. Brugman, et al, The Ultimate Highrise (1971); Hoch, The Three-Dimensional City, supra note 29, at 86-104; Dornbusch & Co., Intensive Development Impact Study, San Francisco, Apr. 1973. The latter study is the first segment of a comprehensive three-part evaluation of the environmental, social, economic, and psychological effects of highrise development in San Francisco. It was commissioned by SPUR, and covers both downtown and residential highrise impact.
The fact that the intensive public debate over highrise construction had spurred adoption of the Urban Design Plan was not lost on the Planning Commission. Indeed, the Commission's only implementation action taken at the time of approving the Plan was promulgation of its general height and bulk guidelines as interim controls, coupled with instructions to the planning staff to complete with all due speed a comprehensive ordinance which would control the highrise phenomenon without stifling economic growth.

The result was a draft ordinance submitted in February 1972, designed to preserve the natural form of San Francisco by restricting the height and bulk of new buildings in all areas of the city. A maximum height of 700 feet was imposed at the center of the downtown business district, with limits tapering down to 300 feet towards the waterfront and adjacent commercial and residential areas. Almost the entire waterfront was placed under a 40-foot limit, with only two small exceptions subject to 84-foot limits. Three-fourths of the remainder of the city received a 40-foot maximum height limit (including 95 percent of all residential districts), although numerous spot districts allowed greater heights where commercial or apartment development was both expected and deemed beneficial. A total of nine height steps were employed for all districts in the city. As a result of public pres-

131. See note 15 and accompanying text supra.

132. Planning Comm'n Res. No. 6746 (Aug. 26, 1971). See also Svirsky, supra note 15, at 10. Only a few non-residential areas in San Francisco (principally along the waterfront) had been classified as special height districts prior to adoption of the Plan. These districts, however, constituted only a small portion of the entire city and represented ad hoc responses to particular problems. CITY PLANNING CODE, art. 2.5 (1972). In general the city's attractive skyline had evolved without the benefit of height controls.

133. Department of City Planning, Proposed City Planning Code Text for Permanent Height and Bulk Controls, Feb. 17, 1972 [hereinafter cited as Proposed Permanent Controls]; see also Memorandum to City Planning Comm'n from Director of Planning on Presentation of Proposed Permanent Height and Bulk Controls, Feb. 17, 1972. The new limitations would become a separate set of zoning districts correlated to the pre-existing use districts. The proposed controls did alter use districts in one important respect, as the new ordinance was used to classify all public land with recreational or open space value as "open space districts." Properties as small as 10,000 square feet were included in this category, and all future development of any type would be strictly limited in accordance with Master Plan policies. Proposed Permanent Controls, supra § 290. On the difficulties of urban open space preservation, see J. SHOMON, OPEN LAND FOR URBAN AMERICA: ACQUISITION, SAFEKEEPING AND USE 63-75 (1971).

134. Proposed Permanent Controls, supra note 133, at § 250 and accompanying maps. Precise criteria were provided for measuring heights of buildings on hillsides. Id. § 102.11.5. The Plan's "point tower" concept, which would have allowed tall, slender structures on the crests of hills, was abandoned in the new ordinance, primarily because of its limited applicability. See Memorandum to City Planning Comm'n, supra note 133, at 5-6.
sure and the difficulty encountered in administering the Plan's height ranges during the period of interim controls, all of the heights were made fixed limits, with the exception of four small areas, three of which had previously been subject to varying height limits. No discretion remained to alter the limits even under variance or conditional use provisions. Changes could be made only by legislative action of the Board of Supervisors.

Bulk restrictions, which are applicable only in height districts above 50 feet, were proposed in four main sets of limits correlated to building heights. In each area these limits were related to the existing scale of development in order to prevent encroachment by structures that would have an overwhelming effect on their surroundings. The bulk controls were made more flexible in administration, permitting relaxation of specific limits in conditional use applications in return for compensating design alterations to assure compatibility with surrounding development and to increase public service amenities.

Upon completion of the draft ordinance, the Planning Commission initiated a series of public hearings, one in each quadrant of the city, to obtain public reaction to the proposed limits. It soon became apparent that the Urban Design Plan, and specifically the matter of height and bulk controls, had become a lightning rod for resident hostility towards highrise development. The hearings were attended by more than 3000 people, and at each the vast majority of speakers representing neighborhood associations demanded lower height limits than those proposed. In light of this overwhelming sentiment, the draft ordinance and maps were further refined to eliminate many small

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135. Proposed Permanent Controls § 263. Three of the areas were adjacent to the central business district near the waterfront, and the discretionary upper limits retained ranged from 125 to 200 feet. The fourth area was the crest of Russian Hill, though a smaller portion than had previously been permitted highrise construction under the point towers concept.

136. Proposed Permanent Controls §§ 270-71. For an illustration of this type of trade-off, see text accompanying notes 63-64 supra.

137. This antipathy was not limited to further marring of the downtown skyline, as would result from the recent Holiday Inn and Haas Towers approvals, but extended to opposition to construction of multi-unit apartment buildings in residential areas. Development interests were generally muted by the outpouring of demands for even greater restrictions. The only opposition to the predominant 40-foot height limits was voiced by sponsors of low-income housing who were legitimately concerned about the economic viability of building such units under these restrictions. On the vitriolic tenor and content of the hearings, see S.F. Chronicle, Mar. 17, 1972, at 5, col. 5; id., Mar. 31, 1972, at 2, col. 7; id., Apr. 13, 1972, at 4, col. 7; id. Apr. 27, 1972, at 8, col.5. Regarding scattered zones exceeding 40 feet in height in the Sunset and Richmond residential districts, columnist Herb Caen pertly opined that if a 40-foot limit was not clearly required for these neighborhoods, representing the city's most valuable heritage, "then we are lost and may the original Doggie Diner become our holy shrine." Id., Apr. 26, 1972, at 29, col. 1.
districts permitting heights greater than 40 feet and one of the four discretionary height areas. A substantial majority of the areas discussed in the amendments to the ordinance received lower height limits than those originally suggested.\textsuperscript{138} Following final revision and approval by the Planning Commission,\textsuperscript{139} the Board of Supervisors passed the ordinance after one additional hearing and it was signed by the Mayor on August 18, 1972,\textsuperscript{140} not quite a year after the Urban Design Plan had been adopted.

The speed with which this entire process was completed surprised even members of the planning staff, who earlier had felt the drafting and approval of both the Plan and a complex ordinance could require as much as two years. One staff member attributed the rapid adoption of the ordinance to several often intangible factors.\textsuperscript{141} First, the thoroughness and quality of the professional planning work at all stages of the drafting of the ordinance influenced opponents, supporters, and the legislative bodies responsible for final enactment. As the height and bulk controls were presented in a specific map and ordinance form, debate focused on the primary issues affecting each interest group. Second, the use of interim controls allowed time to formulate a comprehensive ordinance, forestalled a race for building permits, and provided a practical means of testing several of the innovative concepts contained in the final product. Third, the entire effort rode a wave of citizen opposition to highrise construction. While this presented the danger of the draft ordinance being dashed against the shoals of public emotion, the remarkable degree of public participation achieved at each stage of the planning process enabled the staff to overcome popular distrust. Public education on urban design issues, detailed drafting of the ordinance to avoid controversy on minor points, and incorporation in the final product of legitimate concerns and criticisms insured general public acceptance of the completed ordinance. This work also

\textsuperscript{138} Id., May 26, 1972, at 1, col. 6. Russian Hill received a flat 40-foot limit in the final version. The original motives for permitting greater heights in certain specific areas combined a desire to accent city pattern and district boundaries, a recognition that further development would probably occur, and a view that in some instances such development was justified. However, in abandoning or moderating these positions in numerous instances, the staff achieved a more important overall goal of the Plan, that of responding to the environmental preferences of the people who actually lived and worked in such areas. Svirsky interview, \textit{supra} note 53.


\textsuperscript{140} Ordinance No. 234-72 (Aug. 18, 1972), amending arts. 1, 2.5, 3, and 6 of the \textit{City Planning Code}. Mayor Alioto remarked that the ordinance creates “thoughtful parameters for both height and bulk that will best accommodate the competing demands of aesthetics and economic development, [providing] the uses of the present while preserving the beautiful forms of the past.” S.F. Chronicle, Aug. 17, 1972, at 1, col. 2.

\textsuperscript{141} Svirsky, \textit{supra} note 15, at 13-14.
had a substantial effect on the Board of Supervisors, as it recognized
the value of the political consensus obtained on the volatile issue of
new development.

Enactment of the height and bulk ordinance thus resulted from
a combination of quality planning, sound legal draftsmanship, and po-
litical sensibility. In terms of implementing the Urban Design Plan,
the major benefit of early adoption of height and bulk controls lay
in their establishment of a definite zoning envelope to guide and mod-
erate all future development in each area of San Francisco.142 The
ordinance protects the city's appearance by providing distinct transi-
tions between contrasting districts; major new development is di-
rected to areas where it comports with existing uses and transportation
patterns. Since the limits are geared to the prevailing scale of develop-
ment in specific districts, they also serve Plan policies relating to con-
servation of natural and man-made resources and protection of the
character of residential environments. Finally, by imposing mandatory
height limits, the ordinance removes this important aspect of new
development from the whim and caprice of Planning Commission dis-
cretion.

2. Control of Residential Densities

Sheer density of development is frequently the source of problems
the Urban Design Plan is intended to remedy. Residential areas which
are crowded or threatened with overdevelopment have negative psycho-
logical effects on residents, tending to drive families to suburbs for
access to open space and the privacy of single family dwellings.143
Control of density levels through downzoning, in conjunction with the
use of other techniques suggested in the Urban Design Plan, can pre-
vent deterioration in the quality of life of residential areas.

The construction of multi-unit apartment houses increased in
many areas of San Francisco in the 1960's. This occurrence was par-

142. The ordinance states as its purposes with respect to the Urban Design Plan:
(a) Relating of the height of buildings to important attributes of the city pattern . . . ; (b) Relating of the bulk of buildings to the prevailing scale of
development to avoid . . . a dominating appearance in new construction; (c) Promotion of building forms that will respect and improve the integrity of
open spaces and other public areas; (d) Promotion of harmony in the visual
relationships and transitions between new and older buildings . . . .

City Planning Code § 251 (1973).

143. See Stokols, A Social-Psychological Model of Human Crowding Phenomena,
38 J. Am. Inst. Plan. 72 (1972); Sussna, Residential Densities or a Fool's Paradise?, 49
Land Econ. 1 (1973); Winsborough, supra note 2; compare Cassel, Health Consequences
Although San Francisco's population declined during the 1960's, the city still has the sec-
ond highest population density per square mile of all American cities.
tially the result of the abnormally high density limits imposed during the last major rezoning in 1960 when few were overly concerned about the likelihood of excessive growth.\textsuperscript{144} In addition, a greater and more rapid financial return is realized through multiple rentals than by rehabilitation and resale of existing structures. An excess of R-4 and R-5 districts has invited development of large and small apartment complexes which often exacerbate the problems associated with deteriorating residential areas, or initiate decline in stable neighborhoods by increasing population density and encouraging replacement of older, attractive homes by inexpensive wood-frame apartment buildings.

Established residents recently have expressed growing concern about the aesthetic disasters such buildings represent by their massiveness and lack of yards and appropriate setbacks, as well as about the traffic and noise problems associated with their use.\textsuperscript{145} Thus the modification or downzoning of various districts has received a good deal of attention since adoption of the Urban Design Plan.\textsuperscript{146} The interests to be balanced in these decisions are those of residents in preserving their neighborhood's quality of life and architectural character, and those of owners and investors who have purchased or held property with a view towards eventual construction of income-producing structures. Several major downzonings have recently been accomplished in San Francisco, each representing a different variation or example of how the Plan's flexible policies may be used to moderate this conflict.

In rezoning 72 acres in the Haight-Ashbury district in 1972, the largest such action in the city's history, the Planning Commission was attempting to salvage an area in desperate condition. While the district boasted several of the city's most attractive concentrations of houses of Victorian design, it had suffered both commercial and social decline in the wake of the "flower child" era of the mid-1960's. Skyrocketing crime rates and social delinquency associated with a high degree of transiency had stimulated an exodus of established businesses and families. Vacancy rates soared from four to 35 percent in six years, and lending institutions "red-lined" large portions of the district. The area had been zoned R-4 and R-5, permitting maximum development in still sound neighborhoods, endangering the older but still colorful and useable Victorians.\textsuperscript{147}

\textsuperscript{144} Svirskey interview, supra note 53. See Fisher, \textit{Land Use Control Through Zoning: The San Francisco Experience}, 13 \textit{HAST. L.J.} 322, 326-29 (1962), for a discussion of these zoning classifications and their administration until recent changes.

\textsuperscript{145} See notes 34-37 and accompanying text supra.

\textsuperscript{146} The Residence element of the city's Master Plan, adopted shortly before the Urban Design Plan, also has encouraged changes in zoning classifications.

\textsuperscript{147} S.F. Sunday Examiner & Chronicle, Apr. 23, 1972, § A, at 9, col. 1; S.F. Chronicle, Apr. 25, 1972, at 5, col. 5.
In response, planning staff members had spent nearly two years attending meetings, discussing alternatives, and trying to forge agreement on a rehabilitative program between long-term residents and disparate elements of the counter culture which had established roots in the Haight. One result of these efforts\textsuperscript{148} was near unanimity in requesting a downzoning to R-3, a classification conforming to the current density and scale of most development in the district. The Planning Commission unanimously approved the request, with minor modifications, remarking that such action complied with the Urban Design Plan's goals of preserving diversity of neighborhoods and curbing new development to respect the nature of existing residential areas. In addition, the downzoning would protect the inexpensive and substantial supply of older housing and would tend to upgrade the entire district\textsuperscript{149}.

The rationale and context were somewhat different but similar results were achieved in two subsequent downzonings applicable to large portions of the Richmond district. The areas were middle-class residential neighborhoods with substantial greenspace provided by the 120-foot depth of most lots. This latter feature, however, also attracted developers, since four- and six-plex apartment buildings fit snugly on such lots and were permitted under the existing R-3 and

\textsuperscript{148} The planning done in the Haight-Ashbury district concerned far more than just rezoning. Studies were made of means to rejuvenate commercial areas, provide FACE funds for home rehabilitation, and undertake public improvements to beautify Haight Street. See Department of City Planning, Haight-Ashbury: Improvements Recommended by the San Francisco Department of City Planning (July 1973). While the planning staff encourages self-help and local planning efforts and attempts to maintain liaisons with neighborhood associations, the type of comprehensive work undertaken in the Haight-Ashbury district is rare. Staff resources are scarce, and intensive area planning will never have all the manpower it deserves. Svirsky interview, supra note 59. However, other measures in addition to rezoning are available to respond to neighborhood concern about beginning deterioration. One example is the creation of "protected residential areas" to minimize one of the more harmful intrusions on residential neighborhoods—automobile traffic. See text accompanying notes 35-36 supra. In contrast to the negligible financial costs of zoning changes, this technique depends on the ability of the staff to capture capital improvement funds and coordinate projects undertaken by the Department of Public Works.

\textsuperscript{149} Planning Comm'n Res. No. 6815 (Mar. 2, 1972). Three-quarters of the property owners in the area signed the petition requesting rezoning. The 894 parcels of property affected were divided into three general classifications of zones, with numerous alterations in various spots respecting existing densities and uses, scale of buildings, topography, and access to thoroughfares and open space. On the need to protect the housing stock in the area, the Director of Planning stated:

\begin{quote}
Housing in the Haight represents a major resource of reasonably priced larger units which are presently in short supply throughout the city. Reclassification . . . would reaffirm the city's commitment to provide maximum housing choice, especially for moderate-income families, by encouraging retention of those family units as well as new construction of housing for family occupancy.
\end{quote}

S.F. Chronicle, Mar. 3, 1972, at 1, col. 2.
R-4 zoning. Spurred by several controversies over actual construction of “plastic box” types of apartment buildings,\textsuperscript{150} neighborhood associations requested downzoning to an R-2 classification, under which the removal of existing houses would not be economically feasible; no construction more intensive than very unprofitable duplexes would be permitted. With staff support, the associations persuaded the Planning Commission to accede to their requests with respect to most of the areas affected. The resolutions retained higher zoning classifications in spots where significant apartment construction had already occurred.\textsuperscript{151}

These rezonings were prompted in large part by resident dissatisfaction with encroaching development incompatible with the character of the respective areas. It soon became apparent that similar sentiments existed in numerous residential neighborhoods throughout the city, and the Planning Commission was deluged by additional petitions for classification changes. As a result, the staff recommended and the Commission authorized a comprehensive two-year study of all residential densities with a view towards developing new city-wide zoning classifications. Preservation of neighborhood open space, through requirements of larger backyards and setbacks, and possible incentives to encourage conversion of attractive older homes into multi-family dwellings would be the major focus of this investigation. This was a significant action, but as neighborhood feelings coalesced, even it was not sufficient to stem the tide of new rezoning requests. Thus the Commission was forced to direct the staff to formulate interim zoning controls as quickly as possible, to remain in effect pending completion of the overall study.\textsuperscript{152} Density levels clearly had succeeded height limits as the chief environmental issue in San Francisco.

E. Regulation of Aesthetics in the Urban Environment

The dominant motif of the principles contained in the Urban Design Plan is a concern for the visual qualities of San Francisco. The

\textsuperscript{150} See S.F. Chronicle, Feb. 6, 1973, at 4, col. 7; \textit{id.}, Jan. 29, 1973, at 2, col. 1. One application for a four-plex building caused the Board of Permit Appeals to hold several hearings in the face of heated opposition to the proposed structure’s impact on the neighborhood and restriction of sunlight to a neighbor’s garden.

\textsuperscript{151} Planning Comm’n Res. No. 7004 (Apr. 5, 1973); Planning Comm’n Res. No. 7058 (Aug. 9, 1973). Both resolutions, acted on favorably by the Board of Supervisors, stressed the need to preserve the existing viable and attractive neighborhoods of single family dwellings in San Francisco.

\textsuperscript{152} Planning Comm’n Res. No. 7065 (Sept. 6, 1973). The Commission subsequently approved interim controls which are now awaiting action by The Board of Supervisors. Planning Comm’n Res. No. 7106 (Nov. 29, 1973). \textit{See also} Memorandum from Director of Planning to the City Planning Commission on Presentation of Recommended Interim Residential Zoning Controls 3-7 (Nov. 1, 1973).
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notion of aesthetic enhancement or preservation permeates all four chapters, and the Plan in its entirety represents the most comprehensive program for aesthetic regulation yet attempted through local land-use controls. To the extent that these policies on urban aesthetic improvement concern environmental amenities, rather than what may be termed environmental necessities, the Plan stands as a measure of the distance yet remaining before full environmental quality is achieved. This section first examines implementation of aesthetic policies with respect to current development and historic preservation, and then turns to the question of the legal validity of such controls.

1. Aesthetic Influence on New Development

It should be noted at the outset that "influence" is a better term than "control" in speaking of the Plan's aesthetic impact. The overall approach employed is one of establishing general guidelines with respect to what design or type of structure is aesthetically acceptable in a given area, rather than imposing the narrow strictures of an architectural review board with power to approve or disapprove every detail of a building's design. Three distinct levels of influence exist: policies in the City Pattern section of the Plan regarding the overall physical shape of the city; ordinances governing specific design factors applicable citywide; and "design terms of reference" supplied by the Department of City Planning to potential developers of individual sites having extra-local significance.

The principles and policies enumerated in the City Pattern section of the Plan are intended to maintain the predominant design characteristics, as well as types of uses, of existing districts. With respect to the image and character of the city and specific neighborhoods, the Plan emphasizes preservation of views, reinforcement of existing street pattern related to natural topography, and promotion of landscaping and other public improvements which recognize the special characteristics and boundaries of identifiable districts. Given the variety of cultural and geographic districts in San Francisco, such policies contemplate enhancing perception of already attractive areas and improving others now lacking visual appeal or separate identity.

A recently enacted city ordinance exemplifies implementation possibilities at the second level. San Francisco architecture had long

153. However, this latter method is necessary in the limited domain of historic preservation controls. See text accompanying notes 165 to 167 infra.

154. See Part I, A supra. The height and bulk ordinance, discussed in Part II, D, I supra, represents the most ambitious and effective implementation of these policies.

155. City Ordinance No. 212-73 (June 6, 1973), amending Part II, Chapter II, SAN FRANCISCO MUNICIPAL CODE, adding art. 5, "Use of Street Areas."
been known for its attractive use of small bay windows and detailed ornamentation of building projections. However, a 1969 revision of the Building Code eliminating restrictions on the width and spacing of bay windows threatened this architectural characteristic by permitting projections of up to four feet to extend for the entire width of a structure.156 Responding to citizen concern over loss of light and air, blockage of views, and destruction of existing architectural character in nearby older development, the Department of City Planning drafted an ordinance designed to halt proliferation of blank facades in new development and rehabilitated structures. The ordinance as adopted establishes an envelope regulating the maximum width and minimum separation for bays and balconies, requiring a minimum of 50 percent glass or open space for such projections on both sides and front, and setting a maximum extension length for purely decorative projections and fire escapes.157

This ordinance helps to implement those policies in the Conservation section of the Plan stating that the design of new development should respect the prevailing design character of its surroundings and conform its external details to the scale and texture of pre-existing facades. This type of restriction, promoting visual variety along streets, is predicated on the city's power to control intrusions on public street space; it regulates private design choice only when a structure's exterior extends over city property.158 However, few design aspects are so amenable to regulation by ordinance.

At the level of individual site design, the Department of City Planning has initiated formulation of "design terms of reference" for large sites or those having particular significance in and beyond their immediate environs. These terms are based on Plan principles as applied to specific locations. Depending on the setting, they may address preferred siting of structures with respect to the entire lot, types of materials and colors, landscaping, and means of pedestrian and vehicle

156. See Memorandum from Director of Planning to City Planning Comm'n on Proposed Amendment to City Planning Code to Regulate Building Projections over City Streets and Alleys, Jan. 18, 1973.

157. The outward projection now is limited to two or three feet, depending on the width of the adjacent sidewalk. The maximum width and minimum spacing of projections in no case can be more than 15 feet (at the property line) or less than two feet, respectively. Ornamental decoration is restricted to a one-foot protrusion over the property line. All permits for overhang projections approved by the Central Permit Bureau are deemed to grant only revocable licenses for use of the public space affected. CITY PLANNING CODE § 501 (1973).

158. URBAN DESIGN PLAN 67, 70-71. The last three policies of this section call for close review of all proposals for the surrender of street areas in terms of the public values streets afford, and for the use of conditional releases whenever possible if surrender is determined beneficial.
Design terms of reference, while not mandatory requirements, serve the purpose of informing developers and their architects about concerns which are important to neighborhood residents or the Department of City Planning. Failure to deal adequately with such concerns in project proposals could provoke resistance from the public at hearings on permit applications and possibly a recommendation of disapproval from the staff to the Planning Commission if conditional use or discretionary review is exercised. This degree of individual treatment is rare, but it is appropriate in light of the express policies of the Plan for close review of major new development.

2. **Historic Preservation**

A city with San Francisco's colorful past necessarily contains districts and structures of unique historic import. As an original Spanish mission and military base and the debarcation point for Asian immigration and the 1849 gold rush, the city possesses a rich architectural heritage representing several distinct cultures and epochs. Although an historic preservation ordinance was adopted in 1967, it is not as strong a law as it could be, nor has it been vigorously utilized.

Memorandum from Director of Planning, supra note 101, at 4. Although these particular terms were issued prior to adoption of the Urban Design Plan, they were based on principles contained in the Major New Development section and incorporated in the interim controls promulgated concurrently with the adoption of the Plan. Since the Plan was adopted, the Department of City Planning has established a separate unit to draft design terms of reference, which are more extensive and detailed than those listed above, for significant sites which are candidates for new construction. Roughly two or three sets of terms are formulated per month.

By the very nature of the sites subject to this type of pre-planning, almost every development proposal would involve a conditional use or discretionary review procedure in which hearings and Planning Commission approval are required. Another example of individual treatment of aesthetic factors, also concerning major new development, is the policy of the Department of City Planning discouraging extensive use of "mirror glass" for building facades. This glass is economical since it lowers heating and cooling costs more than other types of glass; and in some settings the reflection it provides can be an attractive design element. However, the glare from large structures in prominent locations often will detract from or harm the visual quality of San Francisco.

CITY PLANNING CODE §§ 1001-15 (1972). Minor procedural and scope
Recently, however, the impetus provided by the Urban Design Plan for preserving cultural and historic resources combined with renewed public interest has prompted the filing of a spate of applications under the ordinance. Its effective use can implement several of the policies of the Conservation and Neighborhood Environment sections of the Plan.

The historic preservation ordinance created a Landmarks Preservation Advisory Board (LPAB) with power to initiate or hear applications for designation of structures or districts deserving of special protection because of their architectural, historic, or aesthetic value. Such designations must be approved by the Planning Commission and the Board of Supervisors before they become final. Once final, all permit applications for demolition or significant alteration of facades, heights, or other exterior features of landmark structures or buildings within historic districts are referred to the LPAB for initial review and to the Planning Commission for decision. The general standards for approval of applications are that the proposed modification preserve or restore the architectural features of the subject property with respect to architectural style, texture and color of building materials, and other characteristics of the site and its setting. The Commission may simply issue or refuse to issue a "certificate of appropriateness" on applications for alterations. Regarding demolitions, if the Commission determines the contemplated removal will be detrimental it can bar demolition of landmarks for 180 days and buildings within historic districts for 90 days. The Board of Supervisors can order a further suspension of action on the permit for 90 or 180 days. The intent of such suspension orders is to provide time for the LPAB to seek public or private acquisition of the designated structure.

Amendments to the ordinance were made in 1972; the only major change removed the power of final review from the Board of Permit Appeals to the Board of Supervisors. City Ordinance No. 222-72 (Aug. 9, 1972).


164. See S.F. Chronicle, May 18, 1972, at 6, col. 1; id., Mar. 10, 1972, at 1, col. 1.


166. Id. § 1006.7. Additional enforcement powers, including a right of inspection and enlistment of the city attorney to prosecute violations, are granted to the Director of Planning. Id. § 1013.

167. Id. §§ 1006.2, 1006.6(a)-(c).

168. Id. § 1006.6(d). As a result of the renewed public interest in preservation, the private Foundation for San Francisco's Architectural Heritage was formed in 1971. It has acquired several individual buildings and has opened one for public viewing. S.F. Chronicle, Nov. 9, 1973, at 4, col. 4.
Thus far one major district and numerous individual buildings have received protection under the historic preservation ordinance. The Board of Supervisors approved the Jackson Square Historical District ordinance in August 1972. The area included 94 parcels containing a prime architectural legacy of the turbulent period of the 1860's, when the district housed the original retail and commercial center of the city. The Jackson Square ordinance established tight controls on remodeling, posting and painting of signs, and design of new construction by requiring that all alterations be compatible with the character of the historic district. Individual buildings protected from demolition under the historic preservation ordinance have included the old United States Mint, several noteworthy structures which survived the 1906 earthquake, and numerous Victorian mansions having exceptional architectural merit.

Imposition of special restrictions on areas or structures of historic interest has long been justified as a proper exercise of the police power under the view that the general welfare is enhanced by preservation of varied architectural styles which enrich the cultural and educational dimensions of the municipality. With reference to the Urban Design

171. In addition to its general restrictions, the general ordinance also empowers the Planning Commission in enacting an historic district ordinance to impose specific conditions furthering the intent of the law with respect to the target area.
172. Local efforts under the municipal ordinance to save the Mint, one of the few remaining examples outside Washington, D.C., of Federal Greek Revival architecture, in part prompted issuance of an Executive Order by the President designating the Mint as a national landmark. It has since been reopened as a combined museum and center for Treasury Department numismatic services. S.F. Chronicle, Apr. 12, 1973, at 2, col. 5.
173. Id., May 18, 1972, at 6, col. 1. Many of these former mansions had long since been divided into flats or apartments, and after a period of deterioration, were threatened with demolition.
(a) The protection, enhancement, perpetuation and use of structures, sites and areas that are reminders of past eras, events and persons important in local, state or national history, or which provide significant examples of architectural styles...
(b) The development and maintenance of appropriate setting and environments for such structures...
Plan, imposition of such controls implements the conservation policies recommending protection of examples of past architectural excellence for their contributions in character and human scale unlikely to be found in modern development. In terms of aesthetic regulation, designation of historic landmarks and districts also brings into play the most detailed controls over private design choice.

3. Legal Basis for Aesthetic Regulation

The concept of regulating aesthetic aspects of development through exercise of the police power has suffered a difficult period of gestation. Indeed, its history until recently left serious doubt concerning its viability as a legal doctrine. However, a brief review of the development of aesthetic regulation, with emphasis on its recent acceptance in a variety of contexts by state courts, indicates that the type of controls employed under the Urban Design Plan should not suffer any debilitating judicial impairment. Rather, the approaches to aesthetic regulation suggested in the Plan are likely to become the planning model and the legal norm for similar undertakings in other cities.

The policy conflict implicit in the question of whether or not to consider aesthetics in land-use decisions is clear. Planners often are spurred by citizen complaints to resist "disruptive" intrusion of buildings of unusual architecture into established residential neighborhoods. Aesthetic controls, carried to their furthest degree in architectural review ordinances, provide a means of achieving this goal. On the other hand, the ownership of private property still bequeaths substantial rights in modern society, and individual owners frequently desire to

(c) The enhancement of property values, the stabilization of neighborhoods . . . , and the promotion of tourist trade and interest;
(d) The preservation and encouragement of a city of varied architectural styles, reflecting the distinct phases of its history: cultural, social, economic, political and architectural; and
(e) The enrichment of human life in its educational and cultural dimensions in order to serve spiritual as well as material needs, by fostering knowledge of the living heritage of the past.

CITY PLANNING CODE § 1001.

175. URBAN DESIGN PLAN 67-70. The specific policies call for preservation of landmarks, efforts to harmonize design of new development with traditional structures and styles, and provision of special review or controls for unique areas.

176. The general subject has provoked a great deal of discussion in the legal literature. See especially Anderson, Architectural Controls, 12 SYRACUSE L. REV. 26 (1960); Dukeminier, Zoning for Aesthetic Considerations: A Reappraisal, 20 LAW & CONTEMP. PROB. 218 (1955); Leighty, Aesthetics as a Legal Basis for Environmental Control, 17 WAYNE L. REV. 1347 (1972); Turnbull, Aesthetic Zoning, 7 WAKE FOREST L. REV. 230 (1971).

177. For an analysis of the current extent of these diminishing rights, see Sax, Takings, Private Property and Public Rights, 81 YALE L.J. 149 (1971); see also Cribbet,
express their own personal tastes in the structures they choose to erect. This conflict always has been compounded by the apparent, or inherent, lack of any commonly accepted definition of "aesthetic," thus raising due process questions regarding the application of such ordinances to property owners.

Aesthetic controls first materialized in police power regulations as an outgrowth of the "City Beautiful" movement at the turn of the century, when residents became concerned about the aesthetic quality of residential areas and the rapid growth of urban slums. Initially, courts uniformly rejected attempts to employ aesthetic criteria in local ordinances, on two main grounds. First, most courts deemed aesthetics to be solely a question of personal tastes, and thus clearly outside the realm of matters of public necessity justifying use of the police power. Second, many judicial decisions emphasized that such notions lacked the element of justiciable standards necessary to check discriminatory enforcement and preserve due process rights.

This blanket resistance soon began to unravel when proponents succeeded in pinning aesthetic considerations to the coattails of traditional police power measures enacted for the protection of public health, safety, morals or the general welfare. Instead of supporting laws dealing only with visual effects, they appended aesthetic criteria to ordinances governing more easily definable aspects of development.


178. Courts have been unable to provide a definition that is not as intangible as the term itself. See, e.g., People v. Wolfe, 127 Misc. 382, 386, 216 N.Y.S. 741, 744 (Sup. Ct. 1926) ("relating to that which is beautiful or in good taste"); General Outdoor Adv. Co. v. Department of Pub. Works, 289 Mass. 149, 185, 193 N.E. 799, 815 (1935) (relating "to the character form and appearance of proposed constructions"). In a general sense, aesthetic controls can be considered the regulation of the external appearance of uses and structures.


181. The predominant view was expressed by the Ohio Supreme Court in reversing a denial of a building permit based on aesthetic objections:

    Certain legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats. Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard impractical as a standard for use restrictions upon property. The world would be at continual seesaw if aesthetic considerations were permitted to govern the use of the police power.

such as height and setback limitations.\footnote{182} This concurrent grounds rationale, combining aesthetics with a traditional police power purpose, induced many state courts to adopt the view that the presence of aesthetic criteria would not automatically invalidate an otherwise permissible land-use regulation.\footnote{183}

The earliest successes were achieved in the field of sign and billboard control, where courts were amenable to discerning legitimate justifications in protection of pedestrian and vehicular safety and elimination of health dangers in laws attacked as being solely aesthetic restrictions.\footnote{184} While such rationales continued to serve the purpose of supporting local aesthetic control of billboards, the awkward constructions needed to justify the ordinances under the rubric of health and safety eventually forced some courts to face the issue more openly and declare that the preservation of views along highways was a valid purpose for exercise of the police power.\footnote{185} A similar doctrinal develop-
ment occurred concerning regulation of the siting of junkyards along highways.\textsuperscript{186}

The need to preserve the natural aesthetic attributes of an area in order to promote tourism was an important element in many of these decisions.\textsuperscript{187} The contention, either directly stated or implied, is that the protection of an important state business underpinning the economic well-being of many citizens is a valid basis for exercise of the police power. This reasoning also pervades the numerous opinions upholding historic preservation ordinances, as the municipal economic benefit accruing from tourist patronage is often as important as the cultural and architectural merit of the landmark.\textsuperscript{188}

This last rationale, that protection or enhancement of economic values is a valid purpose under the general welfare clause controlling the police power,\textsuperscript{189} has become the primary justification for the extension of aesthetic considerations into municipal zoning. A few early decisions quickly made preservation of property values the “standard ground” which would support aesthetic regulation barring intrusions of unorthodox buildings, accessories, or uses in residential neighborhoods.\textsuperscript{190} However, a later opinion of the Wisconsin Supreme Court, \textit{State ex rel. Saveland Park Holding Corporation v. Wieland},\textsuperscript{191} became the leading authority for the general proposition. An architectural review board had refused to issue a building permit on a finding that the proposed structure would cause a “substantial depreciation” in property values in the neighborhood. In a full exposition of the policy questions involved, the court recognized that, for purposes of judicial review, matters of aesthetics and property values were difficult to isolate in a clear relationship. However, it maintained that property values were integrally related to the prosperity and general welfare of the

\textsuperscript{186} See, e.g., Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. Ct. App. 1964); Deimeke v. State Highway Comm’n, 444 S.W.2d 480 (Mo. 1969).

\textsuperscript{187} Florida’s beaches have been the recipients of special attention. See Eskind v. City of Vero Beach, 159 So. 2d 209 (Fla. 1963); City of Miami Beach v. Ocean and Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941); Little, \textit{New Attitudes About Legal Protection for Remains of Florida’s Natural Environment}, 23 U. FLA. L. REV. 459 (1971). See also Carlin v. City of Palm Springs, 14 Cal. App. 3d 706, 92 Cal. Rptr. 535 (1971); Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961).

\textsuperscript{188} See sources cited in note 174 supra.

\textsuperscript{189} See Note, \textit{The Constitutionality of Local Zoning}, 79 YALE L.J. 896, 908-21 (1970), for a thorough discussion of the administrative and judicial expansion of the general welfare clause in local zoning.

\textsuperscript{190} See, e.g., Ware v. Wichita, 113 Kan. 153, 214 P. 99 (1923); State ex rel. Civello v. City of New Orleans, 154 La. 271, 97 So. 440 (1923); State ex rel. Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923). The court in Civello, supra, reasoned that an eyesore could be as much of a nuisance and as detrimental to property as a disagreeable odor or health menace, an analogy often employed by other courts.

\textsuperscript{191} 269 Wis. 262, 69 N.W.2d 217, cert. denied, 350 U.S. 841 (1955).
entire community, and hence their preservation was a legitimate basis for exercise of the police power.\textsuperscript{192}

The problem of delineating the exact relationship of aesthetic and economic justifications in land-use decisions has not hindered later similar decisions,\textsuperscript{193} nor should it. The value of property has always been more susceptible of measurement than any abstract, popular conception of beauty or ugliness. Indeed, as any patron of the arts can verify, an object's beauty often can be tangibly represented only by the monetary value the community places on it. In the same vein, it can be argued that general property values do reflect a possible quantification of a community's standard of beauty and that the interdependence of the terms should not undermine, but rather should strengthen, a court's evaluation of aesthetic controls.

Yet efforts have continued unabated to achieve judicial acceptance of purely aesthetic restrictions on land use.\textsuperscript{194} While two zoning decisions are cited most often as supporting the proposition that a strictly

\textsuperscript{192} Id. at 270, 69 N.W.2d at 222. The Supreme Court has considered the issue of aesthetics only tangentially in an eminent domain case, Berman v. Parker, 348 U.S. 26 (1954), which was significant primarily for harmonizing the concepts of "public use" and "public purpose." However, Justice Douglas' dictum, quoted by the court in Saveland Park, has become the most memorable aspect of the decision.

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

\textsuperscript{193} As stated by the New Jersey Supreme Court,


aesthetic ordinance is a legitimate exercise of the police power, only one of the cases provides an explicit approval of this view. In People v. Stover, the New York Court of Appeals upheld a municipal ordinance prohibiting maintenance of a clothes line in front or side yards abutting a public street. The ordinance was clearly aesthetically motivated. Although the court employed language which suggested that aesthetic considerations alone could support such a restriction, the opinion did make direct reference to the fact that such an ordinance would protect and enhance property values in the areas regulated.

The court indicated that the true test in this type of case is not whether the ordinance under review was primarily aesthetic, but whether it was "an arbitrary and irrational method of achieving an attractive, efficiently functioning, prosperous community . . . ." In the second decision, Oregon City v. Hartke, the Oregon Supreme Court upheld an ordinance which absolutely prohibited a particular use of private property (auto dismantling yards) within city limits. After citing Stover as the scant authority available for its holding, the court stated that it concurred in the view that "aesthetic considerations alone may warrant an exercise of the police power." However, as the earlier discussion emphasized, courts consistently have been less inhibited in approving aesthetic restrictions on junkyards and signs than

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195. 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272, appeal dismissed, 375 U.S. 42 (1963). The court also rejected a first amendment claim by the property owners, who had used the clothesline for some years to fly a splendid variety of rags as a protest against local taxes.

196. The court remarked:
We have actually recognized the governmental interest in preserving the appearance of the community . . . . Once it be conceded that aesthetics is a valid subject of legislative concern, the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power.

Id. at 466, 240 N.Y.S.2d at 737, 191 N.E.2d at 274. It is apparent that the "governmental interest" and "legislative concern" in this situation were the preservation of property values.

197. Id.

198. Id. at 467, 240 N.Y.S.2d at 737, 191 N.E.2d at 275. This statement is a direct quotation of the broad test suggested earlier by Professor Dukeminier, supra note 176, at 225. It represents the most important doctrinal addition of the case, since, whether or not protection of property values was the determinative rationale in the specific Stover decision, this standard clearly would allow purely aesthetic restrictions in a variety of land use situations.

199. 240 Ore. 35, 400 P.2d 255 (1965).

200. Id. at 49, 400 P.2d at 262. The court felt increasing judicial acceptance of aesthetic controls reflected
the refinement of our tastes and the growing appreciation of cultural values in a maturing society. The change may be ascribed more directly to the judicial expansion of the police power to include within the concept of "general welfare" the enhancement of the citizen's cultural life.

Id. at 47, 400 P.2d at 261.
on private residences. Indeed, two subsequent cases which have contained the strongest statements affirming the inclusion of aesthetic criteria in police power ordinances have both involved sign regulations.\(^{201}\)

The advent of the environmental movement has provided further impetus for classifying aesthetic concerns, in and of them themselves, as judicially protectible values. Both NEPA and CEQA specifically mention aesthetic criteria in their policy or definition provisions,\(^{202}\) and several cases have discussed their use in evaluating individual projects in environmental impact statements.\(^{203}\) While most of these cases involved preservation of natural scenery, an increasing number of decisions have begun to apply similar tests to the urban environment.\(^{204}\) Arguably a distinction can be drawn on a conceptual level between protecting natural vistas and regulating exterior designs and shapes of structures in a heavily urbanized area where the impact on the property

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201. State v. Diamond Motors, 429 P.2d 825 (Hawaii 1967); Cromwell v. Ferrer, 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749 (1967). In the Cromwell decision the New York Court of Appeals restated the test used in Stover, holding that a regulation was not necessarily invalid if its primary or exclusive purpose was the aesthetic enhancement of the area, as long as "it is related if only generally to the economic and cultural setting of the regulating community." \textit{Id.} at 263, 279 N.Y.S.2d at 27, 225 N.E.2d at 753. \textit{See also} People v. Berlin, 62 Misc. 2d 272, 307 N.Y.S.2d 96 (App. Div. 1970).

202. One of the stated purposes of NEPA is to "assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings." 42 U.S.C. § 4331(b) (1970). CEQA defines "the environment" to include "objects of historic or aesthetic significance." \textit{CAL. PUB. RES. CODE} § 21060.5 (West Supp. 1973).


204. Whether or not a highrise building proposed for construction in a low-lying area would block views of nearby mountains was one of the factors discussed in Goose Hollow Foothills League v. Romney, 334 F. Supp. 793, 3 ERC 1906 (D. Ore. 1971). The negative aesthetic impact of proposed military housing was one of the bases asserted by plaintiffs in Town of Groton v. Laird, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761, 4 ERC 1593 (1972).

However, in the first treatment at any length of aesthetic considerations under NEPA, the District of Columbia Court of Appeals cavalierly dismissed aesthetic objections to a new postal facility in Maryland Planning Comm’n v. Postal Serv., 487 F.2d 1029, 1038-39, 5 ERC 1719, 1724-25 (D.C. Cir. 1973). After simply adverting to the turn of the century judicial position that aesthetics are matters of individual taste and hence not legally cognizable, the court concluded that Congress could not have intended to make such factors reviewable under the "substantial inquiry" test which has been applied to agency threshold decisions on whether an environmental impact statement (EIS) is required for a project. This position can be contrasted to the Seventh Circuit Court of Appeals' heavy emphasis on the architectural merit of a planned detention facility in Chicago in approving an agency decision that an EIS was not warranted for the project. First Nat’l Bank v. Richardson, 434 F.2d 1369, 1374, 5 ERC 1830, 1834 (7th Cir. 1973). \textit{See also} Hanly v. Kleindienst, 471 F.2d 823, 832, 4 ERC 1785, 1791 (2d Cir. 1972), \textit{cert. denied}, 412 U.S. 908, 5 ERC 1416 (1973).
owner may be more severe. Yet the principles served in either context are the same—the preservation or creation of an aesthetically pleasing environment. A further development in the environmental area, the beginning quantification of aesthetic standards, may eliminate due process challenges to aesthetic regulations in the future.

The continuing debate in most jurisdictions over whether aesthetics alone can be a proper ground for exercise of the police power seems rather pointless after a review of the legal history of the issue and recent analogous developments in environmental law. It is not a disabling or negative factor that so many courts feel compelled to buttress decisions upholding aesthetic regulations by reference to concurrent grounds, particularly protection of property values. Any ordinance that directly attempts to assert an express community interest in the area of aesthetics could not avoid enhancing property values. Indeed, the economic improvement argument provides a workable test on which to rest judicial inquiry. As one court remarked concerning this interrelationship: "Today, economic and aesthetic considerations together constitute the nearly inseparable warp and woof of the fabric upon which the modern city must design its future." Thus the two elements should not be seen as awkwardly juxtaposed, but rather as complementary in both city planning and judicial review.

4. Summary

The San Francisco Urban Design Plan is the most comprehensive city planning scheme yet enacted for the regulation of aesthetic factors in urban development. In view of the preceding analysis of applicable law, neither its general planning policies dealing with the overall appearance of the city nor specific regulations adopted to apply to individual structures should encounter any severe judicial resistance.


Three characteristics of the plan itself lend support to this conclusion. First, it resulted from a comprehensive planning process which documented the relationship between the stated aesthetic goals of the Plan and the means to be employed to attain them. Second, regarding the legal vagueness of "aesthetics," the principles enumerated in the Plan represent a community consensus on acceptable and desired standards of design in various city districts.\textsuperscript{207} Such judgments are not left to the whim and caprice of a design review board, but are prescribed by clear standards set forth in the Plan. Third, the planning process previously described provides ample opportunity for individual owners to contest decisions affecting their property. The procedures for notice, hearings, and public participation appear legally sufficient to forestall any due process challenges of aggrieved landowners.\textsuperscript{208}

\textbf{CONCLUSION}

The deterioration of the urban environment and its effects on urban residents have prompted the creation of innovative city planning responses. The San Francisco Urban Design Plan is the most energetic effort of this type yet undertaken. Predicated on the view that systematic planning and direct ameliorative actions respecting the physical factors of urban development can strongly influence the quality of life within the city, the Plan advances a variety of planning, design, and regulatory principles to guide all aspects of physical change in San Francisco.

Since implementation of the hortatory policies of Master Plan elements is usually the most difficult step in the planning process, this Comment has focused on the available means of implementation and their likely impact. The strongest implementation tool will be the formal and informal planning process itself, as it touches on all facets of public and private development. Exercise of the municipal police power, through zoning and other ordinances, assists achievement of numerous Plan goals regarding restrictions on the degree of permitted development and control of the physical and visual impact of structures.

All of the implementation steps thus far taken pursuant to the Urban Design Plan should achieve judicial acceptance. Professor Heyman has suggested that the values courts tend to protect in land-use

\textsuperscript{207} See Dukeminier, \textit{supra} note 176, at 225-29.

\textsuperscript{208} See \textit{State ex rel. Stoyanoff v. Berkeley}, 458 S.W.2d 305 (Mo. 1970); Comment, \textit{Community-Wide Architectural Controls in Missouri}, 36 Mo. L. REV. 423 (1971). The most direct challenge to the aesthetic criteria derived from the Plan would arise if the Planning Commission in a discretionary review matter refused issuance of a building permit because of failure by the developer to comply with the design terms of reference drafted for the site. However, it would be a very rare circumstance for a denial to rest on this basis alone.
decisions are rationality and equality of treatment. In viewing the evolution of modern planning activities, he stresses four factors necessary for a comprehensive planning program to provide persuasive support for innovative land-use controls: extensive information gathering regarding the urban environment; establishment of a hierarchy of objectives based on the data collected; creation of a comprehensive short-term implementation program; and direct enforcement of short-term measures. 209 This is the type of overall framework which has characterized the formulation and implementation of the Urban Design Plan.

San Francisco perhaps provided a special case for urban design regulation of land use, given its unique natural features and the long-standing concern of its citizens for the visual attributes of their city. However, both the innovative urban design policies and the implementation processes which have been discussed are relevant to any urban setting. While each city presents its own urban design problems, the chief elements of San Francisco's experience—an awareness of the relationship of urban design factors to the quality of life in an urban environment, sound comprehensive planning processes, and flexible application of administrative and legal implementation tools—may easily be extended to other cities.

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209. Heyman, supra note 87, at 225-34.