The abandonment of the rule does not leave the above situation ungoverned, however, for it is within the province of California's recording acts. If the reservation is properly recorded, there can be no harm done to an innocent purchaser.

In other cases before Willard, the rule was either not the basis of decision or was avoided on equitable grounds. From the beginning, the courts evidently recognized that the rule was primarily technical and that it could interfere with a grantor's intent. For example, in Eldridge, the court noted the "many subtle and unsubstantial distinctions, and technical and arbitrary rules" of construction and operation. Many cases, while ostensibly honoring the rule, also stressed the importance of the grantor's intent. Now the supreme court has eliminated the need for evasion of the rule, permitting the parties to establish a price with the knowledge that their reservation will be honored, giving meaning to a statute that had been too long ignored and making it possible to give effect to the grantor's intent.

Leslie Ann Johnson

X

STATE AND LOCAL GOVERNMENT

A. Competitive Bidding for Management Contracts

City of Inglewood v. Superior Court. California, like most states, requires its political subdivisions to award contracts for the construction of public works projects through competitive bidding.

30. See, e.g., CAL. CIVIL CODE § 1214 (West 1970) (prior recording of subsequent conveyances, mortgages, judgments).

1. 7 Cal. 3d 861, 500 P.2d 601, 103 Cal. Rptr. 689 (1972) (Mosk, J.) (4-3 decision).
The contract must be awarded to the "lowest responsible bidder." In City of Inglewood the California Supreme Court considered a contract award to a bidder who was deemed better qualified to do the work than the lowest responsible bidder. The court held that the applicable statute afforded no basis for imposing a relative superiority standard, and that in order to award a contract to a bidder other than the lowest one, the awarding authority must find that the lowest bidder is not "responsible." Although this result is a correct application of present law, the facts of this case suggest that a need exists for reevaluating the competitive bidding statutes and their relevance to modern municipal needs.

The Civic Center Authority was created by the City of Inglewood and the County of Los Angeles to construct a joint civic center. The total cost of the multi-building project was to be about $12 million. On the recommendation of its architect, the Authority decided to use a management contracting method rather than the traditional lump-sum method of bidding. Under the traditional method, "contractors enter the project process upon the completion of working drawings [at which time] they have little opportunity or incentive to contribute to cost reduction." Under the management contracting method, on the other hand, bidding takes place after the completion of preliminary plans. Significant savings can be achieved since the contractor can bring its experience to bear on the development of working drawings. After the working drawings are completed, there is a second round of bidding for the actual construction contract. The management contractor performs none of the actual construction work itself unless it wins a separate contract for the work through competitive bidding. As the plans near completion and subcontract bids begin to come in, the management contractor converts its cost estimate for the project into a guaranteed outside price (GOP). The contract in this case provided that if the actual cost exceeded the GOP, the Authority was to pay only the GOP, while if the actual cost was lower the Authority and the management contractor would share the savings in agreed-upon proportions.

The Authority advertised for bids for the management contract. After elaborate evaluation, three bidders were found to be responsi-

5. 7 Cal. 3d at 867, 500 P.2d at 605, 103 Cal. Rptr. at 693.
6. Id. at 864, 500 P.2d at 602, 103 Cal. Rptr. at 690.
7. Id. at 865, 500 P.2d at 603, 103 Cal. Rptr. at 691.
8. Id.
9. Id.
10. Id. at 865-66 n.3, 500 P.2d at 603 n.3, 103 Cal. Rptr. at 691 n.3.
11. Bidders were required to submit information regarding their financial responsibility. Nine of the twelve bids received were rejected by the reviewing panel, con-
ble, including Argo, the lowest bidder of the three, and Swinerton, to whom the Authority proposed to award the contract. Argo obtained a writ of mandate in the superior court to prevent the award of the contract to Swinerton, and the Authority in turn sought mandate in the supreme court to annul the superior court's order.\textsuperscript{12}

The Authority argued that the management contract was essentially one for services as a manager and supervisor rather than for a construction project, and thus fell within a well-established exception to competitive bidding requirements.\textsuperscript{13} The court acknowledged the validity of the exception in cases where the services of a professional or highly skilled person are procured by contract, but refused to conclude that the exception applied to the management contract in question. This refusal was based upon the court's review of the management contractor's contractual duties and obligations in addition to the performance of supervisory and managerial services, particularly its guarantee of an outside price for the project. These additional duties and obligations made the management contracting procedure "too closely akin to traditional . . . contracting to be held exempt from . . . competitive bidding requirements."\textsuperscript{14} To hold otherwise as a broad principle, the court believed, would "open the door to possible favoritism, fraud or corruption."\textsuperscript{15}

Having concluded that the management contract was subject to the competitive bidding requirements of the statute, the court next considered whether these requirements had been fulfilled. Argo, the unsuccessful low bidder, argued that the Authority had made no finding that it was not a responsible bidder. The award of the contract to Swinerton had therefore been made on a basis of relative superiority, Argo contended, thereby frustrating the very purpose of competitive bidding laws and violating the public's interest in having public works

\textsuperscript{12} Id. at 863-64, 500 P.2d at 602, 103 Cal. Rptr. at 690.

\textsuperscript{13} Id. at 863-64, 500 P.2d at 602, 103 Cal. Rptr. at 692.

\textsuperscript{14} "[S]trict compliance with competitive bidding requirements need not be maintained in procuring an expert's services to prepare plans and specifications." Id. at 872, 500 P.2d at 608, 103 Cal. Rptr. at 696 (dissenting opinion). See also Kennedy v. Ross, 28 Cal. 2d 569, 581, 170 P.2d 904, 912 (1946) (engineer retained to prepare plans for sewage treatment plant); San Francisco v. Boyd, 17 Cal. 2d 606, 620, 110 P.2d 1036, 1044 (1941) (civil engineer retained to solve traffic and transit problems); 10 E. McQuillan, Municipal Corporations § 29.35 (3d rev. ed. 1966).

\textsuperscript{15} Id.
projects awarded without favoritism and constructed at the lowest possible price consistent with standards of quality and reasonable expectations of completion.  

The court agreed with Argo's contentions. Stating that the statute afforded "no basis for the application of a relative superiority concept," the court held that a contract subject to the statute must be awarded to the lowest monetary bidder unless he is found not to be responsible within the meaning of the statute. Since the trial court had found that the Authority made no determination of whether Argo was a responsible bidder, the court held that the award of the contract must be set aside.

The court, however, rejected Argo's contention that due process required a quasi-judicial hearing, including pleadings, cross-examination, and formal findings, on the issue of whether it was responsible. Instead, the court held that before a public body may award a contract to other than the lowest bidder, it must notify the low bidder of negative evidence received from others or revealed by independent investigation, afford an opportunity to rebut such evidence, and allow the low bidder to present evidence of responsibility.

The holding that the management contract was subject to the competitive bidding statute was founded upon the policy of protecting the public's interest in having public works projects completed without favoritism, fraud, or corruption. The three dissenting justices, while recognizing the propriety of this policy, felt that this interest had been adequately protected by the Authority's bid evaluation system. The dissenters acknowledged that certain provisions of the contract, such as the guaranteed outside price, suggested that competitive bidding was appropriate here, but argued that the contract was sufficiently similar to a contract for consulting and supervisor-management services to permit the governing board to consider a number of factors other than the size of the bid.

The only specific factor cited by both the majority and the dissenters as requiring competitive bidding was the guaranteed outside project.

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16. *Id.* at 867, 500 P.2d at 605, 103 Cal. Rptr. at 693.
17. *Id.*
18. *Id.*
19. *Id.* at 870, 500 P.2d at 607, 103 Cal. Rptr. at 695.
20. *Id.* at 870-71, 500 P.2d at 607, 103 Cal. Rptr. at 695.
21. *Id.* at 866, 500 P.2d at 604, 103 Cal. Rptr. at 692. The prevention of such abuses is the purpose of competitive bidding laws. See 10 E. McQuillan, MUNICIPAL CORPORATIONS § 29.29 (3d rev. ed. 1966); Cyr v. White, 83 Cal. App. 2d 22, 27, 187 P.2d 834, 837 (1st Dist. 1947).
22. 7 Cal. 3d at 873, 500 P.2d at 608, 103 Cal. Rptr. at 696. For a description of the bid evaluation system, see note 11 *supra*.
23. 7 Cal. 3d at 872, 500 P.2d at 608, 103 Cal. Rptr. at 696.
price feature of the contract. This feature in effect allows the management contractor to perform consulting and management services during the planning stages of the project and to submit the functional equivalent of a lump sum bid at a later date. After the GOP has been set, the management contractor becomes nearly indistinguishable from a contractor operating under traditional procedures, since both are bound to deliver the completed work for no more than a fixed price. That the management contractor performs no actual construction work under the management contract, and that any savings over the GOP are shared rather than all going to the contractor seem insufficient to bring this case within the "expert services" exception to competitive bidding since both of these features could be present in a traditional lump sum contract.

The dissenters differed with the majority in their view that the potential for favoritism, fraud, and corruption had been adequately safeguarded in this case by the Authority's elaborate system for evaluating the bids. The difficulty with the dissenters' argument, however, is that other public bodies might not use such an elaborate system since nothing in the statute requires them to do so. Absent standards setting forth the extent and nature of the safeguards required, the courts might well be faced with an increasing number of case by case reviews of the procedures used by public bodies to award contracts.

Formulation of specific standards for the contract-awarding process would, of course, make the elimination of favoritism, fraud, and corruption a more manageable goal, but the court was understandably reluctant to adopt such an approach. In announcing due process standards for the protection of the low bidder, and, thereby, the public interest in securing work at the lowest price, the court was operating in an area of traditionally recognized judicial competence. The "lowest responsible bidder" requirement, on the other hand, represents a clearcut legislative resolution of the problem of how best to secure the construction of public works at the lowest price consistent with the quality desired, without favoritism, fraud, corruption or waste. Even assuming the court's competence to formulate guidelines which would achieve these goals while affording the awarding authority greater flexibility in finding the optimal price-quality balance, the court's unwillingness to undertake this task reflects a prudent respect for the separation of the legislative and judicial functions.

The court's second holding, that before a public body may award a contract to other than the lowest bidder it must find that the lowest

24. See text accompanying note 10 supra.
25. 7 Cal. 3d at 873, 500 P.2d at 608, 103 Cal. Rptr. at 696.
bidder is not "responsible," may restore some of the awarding body's discretion that the first holding seems to circumscribe.\textsuperscript{27} Under statutes using the phrase "lowest responsible bidder," there are two steps to the contract-awarding process. The public body must first determine which of the bidders are "responsible"; then, it must compare the amounts of the bids.\textsuperscript{28} The court emphasized that the word "responsible" is not to be given a constricted meaning.

[It] is not necessarily employed in the sense of a bidder who is trustworthy so that a finding of non-responsibility connotes untrustworthiness. Rather, while that term includes the attribute of trustworthiness, it also has reference to the quality, fitness and capacity of the low bidder to satisfactorily perform the proposed work.\textsuperscript{29}

The decision whether a particular bidder is "responsible" within the context of the proposed work therefore involves "an irreducible minimum of discretion.\textsuperscript{30} It would seem that so long as the criteria used by the awarding body to determine responsibility were reasonably related to the character of the particular work to be done or materials to be supplied, the decision of that body should not be overturned by a court absent fraud or abuse of discretion,\textsuperscript{31} even if application of the criteria leads to the conclusion that only one bidder is "responsible."

\begin{itemize}
\item \textsuperscript{27} This holding has substantial foundation in authority. \textit{See, e.g.,} Seyslor v. Mowrey, 29 Idaho 412, 160 P. 262 (1916) (findings of fact required to reject lowest bid); Fourmy v. Franklin, 126 La. 151, 52 So. 249 (1910) (plausible reason must be shown for rejection of lowest bid); Ward La France Truck Corp. v. New York, 7 Misc. 2d 739, 160 N.Y.S.2d 679 (Sup. Ct. 1957) (rejected low bidder entitled to have negative evidence made available and to present evidence of responsibility). \textit{See generally} 10 E. McQuillin, \textit{Municipal Corporations} \S 29.73 (3d rev. ed. 1966); Anno., 27 A.L.R.2d 917, 931 (1953) (differences in character or quality of materials, articles, or work as affecting acceptance of bid for public contract).
\item \textsuperscript{28} Rosenbaum, \textit{Criteria for Awarding Public Contracts to the Lowest Responsible Bidder}, 28 Cornell L.Q. 37, 40-41 (1942).
\item \textsuperscript{29} 7 Cal. 3d at 867, 500 P.2d at 604, 103 Cal. Rptr. at 692. The phrase has also been defined to include financial or pecuniary ability to complete the contract, integrity and trustworthiness, skill, judgment, ability to perform faithful and conscientious work, promptness, experience, necessary facilities and equipment for doing the work, efficiency, previous performance of satisfactory work, together with other essential factors which may be dependent upon the type and kind of contract involved (footnotes omitted).
\item \textsuperscript{30} Comment, \textit{Rights of the Unsuccessful Low Bidder on Government Contracts}, 15 Case W. Res. L. Rev. 208, 212 (1963).
\item \textsuperscript{31} Because it concluded the Authority had made no finding that Argo was not responsible, the court refused to discuss whether the award of a contract to other than the lowest bidder may only be attacked for fraud or collusion [West v. Oakland, 30 Cal. App. 556, 560-61, 159 P. 202, 204 (1st Dist. 1916)] or whether it is sufficient to show an abuse of discretion [Diablo Beacon Printing & Pub. Co. v. City of Concord, 229 Cal. App. 2d 505, 508, 40 Cal. Rptr. 443, 445 (1st Dist. 1964)]. 7 Cal. 3d at 870 n.8, 500 P.2d at 607 n.8, 103 Cal. Rptr. at 695 n.8.
\end{itemize}
Argo's challenge to the award of the contract, however, was not that improper criteria were used to determine responsibility, but rather that the Authority had made no decision, either express or implied, that Argo was not responsible. The court agreed with this contention. Yet the court also noted that whether or not the awarding authority must make an express finding of non-responsibility, if it awards a contract to one other than the lowest monetary bidder, "the ineluctable implication is that the latter is not responsible." Had the court followed this reasoning through, it could have held that the Authority impliedly found that the lowest monetary bidder was not responsible since it awarded the contract to Swinerton after a thorough evaluation of the qualifications of all the bidders. There is some authority for such a result. The supreme court held in Rice v. Board of Trustees\textsuperscript{32} that the governing board of a public body was not required to record specific reasons for the rejection of a bid. Citing Rice as authority, West v. Oakland\textsuperscript{33} held that a public body need not expressly find the lowest bidder non-responsible in order to award the contract to a higher bidder. Although such a rule would increase the discretion of the awarding body, the court rejected these older cases since the absence of any standards for determining what procedures constitute an adequate substitute for competitive bidding would open the way for favoritism, fraud, and corruption.

CONCLUSION

The result in City of Inglewood is consistent with the philosophy and purpose of the competitive bidding laws, which are a legislative reconciliation of the sometimes competing interests of protecting the public from fraud and corruption and of affording public bodies maximum discretion for securing the best quality work at the lowest possible price. Despite this doctrinal correctness, the result in City of Inglewood is disturbing. The total cost of the project was $12 million, but Argo's bid was lower than Swinerton's by only $70,000.\textsuperscript{35} Swinerton had been found to be somewhat better qualified than Argo in terms of financial responsibility, and far better qualified in terms of performance capability.\textsuperscript{36} Yet the Authority could have awarded the contract to Swinerton consistent with the principles set forth in City of Inglewood only by skewing the criteria for evaluating responsibility so that only

\begin{itemize}
\item \textsuperscript{32} 7 Cal. 3d at 867, 500 P.2d at 604, 103 Cal. Rptr. at 692.
\item \textsuperscript{33} 107 Cal. 398, 40 P. 551 (1895).
\item \textsuperscript{34} 30 Cal. App. 556, 159 P. 202 (1st Dist. 1916); accord Cyr v. White, 83 Cal. App. 2d 22, 187 P.2d 834 (1st Dist. 1947). After City of Inglewood, it is extremely doubtful that the holding in West is any longer valid.
\item \textsuperscript{35} 7 Cal. 3d at 868, 500 P.2d at 605, 103 Cal. Rptr. at 693.
\item \textsuperscript{36} See note 11 supra.
\end{itemize}
Swinerton qualified. Such use of administrative discretion is highly undesirable, however, because it is only slightly, if at all, less susceptible to abuse than would be awarding the contract on a basis of relative superiority.

Paul Dorroh

B. Duty of Private Parties to File Environmental Statement

_Friends of Mammoth v. Board of Supervisors of Mono County._

The supreme court considered the scope of California's Environmental Quality Act of 1970. The case concerned whether a county board of supervisors could issue a conditional use or building permit for a private project without first determining whether an environmental impact report (EIR) was required by the Environmental Quality Act (EQA). The principal question was "whether the EQA applies to private activities for which a permit or other similar entitlement is required."

The EQA and the National Environmental Policy Act of 1969 (NEPA), the prototype of the EQA, are legislative efforts to protect and preserve the environment. Each act compels detailed analysis by governmental entities of the environmental impact of certain projects or actions. Written environmental impact reports or environmental impact statements (EIS) must be prepared before a project or action can be approved. While NEPA had been construed both administratively and judicially as applying to private as well as public actions, 1

37. If this were done for the purpose of awarding the contract to Swinerton, it would run afoul of the principle that "the public body shall prescribe a common standard on all matters that are material to the proposal." _10_ _McQuillan, Municipal Corporations_ § 29.29 (3d rev. ed. 1966). See also _Baldwin-Lima-Hamilton Corp. v. Superior Court_, 208 Cal. App. 2d 803, 821, 25 Cal. Rptr. 798, 810 (1st Dist. 1962). On the other hand, standards of responsibility that lead to the conclusion that only one bidder was responsible, if uniformly applied to all bidders alike, should not constitute an abuse of discretion.

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1. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972) (Mosk, J.) (6-1 decision).
4. 8 Cal. 3d at 253, 502 P.2d at 1052, 104 Cal. Rptr. at 764.
6. 8 Cal. 3d at 260, 502 P.2d at 1057, 104 Cal. Rptr. at 769.
the corresponding EQA issue was unresolved until Friends.12

The project involved in Friends, planned by International Recreation, Ltd. (hereinafter International), the developer and real party in interest, was a condominium development, composed of six multistory buildings.13 These structures were to be clustered in close proximity to each other on a narrow half-mile stretch of land bordering the Mammoth Lakes in the wilderness of Mono County. While the conditional use permit at issue in Friends covered only a portion of the project,14 ultimately the development was to comprise a densely populated, recreational resort.15

The Mono County Planning Commission issued a conditional use and building permit for the initial portion of the project; the County Board of Supervisors approved the issuance.16 Neither body determined the project's probable effect on the environment or prepared an EIR on the project.17 Both entities believed the EQA applied only to projects in which the government entity had a direct proprietary interest.18 Plaintiff, Friends of Mammoth, an unincorporated association of residents and property owners in the Mammoth Lakes area,19 and the other plaintiffs, individual residents and property owners representing the class of all such persons, claimed that the EQA also applied to private projects requiring governmental approval.

To deal with this contention, the court had to determine the breadth of the term "project" in section 21151 of the EQA. The court held that:

[to achieve that maximum protection the Legislature necessarily intended to include within the operation of the act, private activities


13. 8 Cal. 3d at 252, 502 P.2d at 1052, 104 Cal. Rptr. at 764.

14. See Exhibit A attached to Real Party at Interest Answer to Petition for Hearing in Supreme Court.

15. 8 Cal. 3d at 252, 502 P.2d at 1052, 104 Cal. Rptr. at 764. There was some consideration by the Mono County Planning Commission of the effect of International's project on various environmental factors such as traffic, water supply, etc. See id. at 263 n.8, 502 P.2d at 1059-60 n.8, 104 Cal. Rptr. at 771-72 n.8. By way of dictum, the majority suggested that such scrutiny would not constitute "substantial compliance" with the EIR requirements of the Environmental Quality Act.

16. 8 Cal. 3d at 252, 502 P.2d at 1052, 104 Cal. Rptr. at 764.

17. See, e.g., Respondent's Answer to Petition for Hearing at i.

18. 8 Cal. 3d at 252, 502 P.2d at 1052, 104 Cal. Rptr. at 764.

19. See note 16 supra.
for which a government permit or other entitlement for use is necessary.\textsuperscript{20}

Because governmental entities had assumed that private projects were not covered by the EQA, the impact of this holding was immediate: nearly all permit-issuing functions at the local and state levels were brought to a temporary halt.\textsuperscript{21}

This Note will first examine the process through which the court reached the above construction of the EQA. While the court's desire to protect the state's environment from the blind "pursuit of economic advantage"\textsuperscript{22} is commendable, the reasoning employed by the majority in the case can scarcely be defended.

Second, the practical impact of the \textit{Friends} decision will be discussed. Much of the confusion, which followed the decision, it will be argued, was due to the ineptitude of the legislature and local governments.

Third, the ramifications of the majority's decision are considered, particularly its legacy of unanswered questions, and the legislature's less than clear answers to those questions in the form of Assembly Bill (AB) 899.\textsuperscript{23}

Finally, this Note considers the effect of this decision on procedural mechanisms for challenging public and private projects that threaten the environment. \textit{Friends} sets a new posture for the judiciary in enforcing environmental legislation and increases the opportunities for citizen participation in the decision-making process.

I. THE DECISION

\textit{a. Exhaustion of administrative remedies in class action suits}

Aside from its substantive holding, \textit{Friends} decided an important procedural question regarding class action suits contesting a locality's permit or other entitlement decision.\textsuperscript{24} Exhaustion of administrative remedies is a prerequisite to an action seeking judicial relief in such cases.\textsuperscript{25} The court held that this requirement is satisfied in class action suits if any member of the plaintiff's class exhausts administrative remedies, even though those members of the class bringing the action did not do so personally.\textsuperscript{26}

\begin{itemize}
  \item \textsuperscript{20} 8 Cal. 3d at 259, 502 P.2d at 1056, 104 Cal. Rptr. at 768.
  \item \textsuperscript{21} See, e.g., Amicus Brief of County of Los Angeles for Rehearing at 1; San Francisco Chronicle, Oct. 7, 1972, at 2, col. 5.
  \item \textsuperscript{22} 8 Cal. 3d at 256, 502 P.2d at 1055, 104 Cal. Rptr. at 767.
  \item \textsuperscript{23} Ch. 1154, [1972] Cal. Stat. 188 (Deering).
  \item \textsuperscript{24} 8 Cal. 3d at 267-68, 502 P.2d at 1062-63, 104 Cal. Rptr. at 774-75.
  \item \textsuperscript{25} See, e.g., Hesperia Land Development Co. v. Superior Court, 184 Cal. App. 2d 865, 876, 7 Cal. Rptr. 815, 822-23 (2d Dist. 1960).
  \item \textsuperscript{26} 8 Cal. 3d at 268, 502 P.2d at 1063, 104 Cal. Rptr. at 775.
\end{itemize}
Two members of the class represented by the nominal plaintiff in *Friends* had appealed the decision of the Mono County Planning Commission to the Mono County Board of Supervisors. The Board affirmed the issuance of a conditional use permit.\(^{27}\) The majority reasoned that since there had been an exhaustion of administrative remedies by an interested party in the action, the primary policy considerations behind the exhaustion doctrine had been fulfilled: notice was given to the administrative entity of dissatisfaction with a lower body's decision, and an opportunity to settle the matter without judicial interference was provided.\(^{28}\) This holding facilitates challenging administrative decisions in the environmental context, since groups such as Friends of Mammoth are often formed after the final administrative decision for the purpose of contesting it.\(^{29}\)

### b. Application of the EQA to private projects

The court in *Friends* had to decide whether the legislature intended the word "project" as used in the operative sections of the EQA to include private projects in which the governmental involvement was solely as an administrator issuing an entitlement for use. The legislature provided the court with little help in this task. First, the legislature did not define the word "project," or the other crucial terms of the EQA such as "significant effect" and "environment."\(^{30}\) Second, the determination of the legislature's intent was made more difficult by inconsistencies between the EQA's operative and nonoperative sections. For example, the general intent and policy sections contained broad references that arguably support an inference that the legislature intended the EQA to affect private activities.\(^{31}\) However, the EQA sections specifically operating on local governmental entities contained language that made nonsensical such an interpretation.\(^{32}\) Third, the legislature did not use uniform terminology in the act. For instance, the legislature spoke of both "action"\(^{33}\) and "project,"\(^{34}\) two different terms apparently embracing the same undefined concept. Finally, the legislature indicated its own uncertainty as to the precise contours of the term "project" by enacting inconsistent subsequent legislation.\(^{35}\)

\(^{27}\) Id.
\(^{28}\) Id.
\(^{29}\) See text following notes 201-03 infra.
\(^{31}\) 8 Cal. 3d at 256-57, 502 P.2d at 1054-55, 104 Cal. Rptr. at 766-67.
\(^{32}\) Id. at 274-76, 502 P.2d at 1067-69, 104 Cal. Rptr. at 779-81.
\(^{33}\) CAL. PUB. RES. CODE §§ 21000(a),(b),(d) (West 1972).
\(^{34}\) CAL. PUB. RES. CODE § 21151 (West 1972).
\(^{35}\) See, e.g., CAL. BUS. & PROF. CODE § 11550.1 (West Supp. 1972), added by ch.
This legislative ineptitude made it difficult for the court in Friends to pinpoint the legislative intent behind section 21151.

The rules to be followed in construing a statute have been variously stated. Courts on occasion have held that they do not have the power to depart from the meaning of unambiguous language in a statute, even though as a consequence of inartful drafting the purpose of the statute will be defeated. On the other hand, courts have said that once the legislative intent is isolated this intent will prevail over the strict or literal meaning of the words employed in the statute. If an ambiguity is found, the court will give an interpretation of the statute based upon the legislative intent. While such intent should be determined primarily, if not exclusively, from the words or language of the statute itself, extrinsic aids such as legislative history may be employed.

The majority in Friends began its construction of section 21151 by assuming that since the term "project" is nowhere defined in the EQA, the statute is necessarily ambiguous. This assumption is not justified. The context in which the term "project" appears in section 21151 is sufficient to delineate its scope. As the dissent points out, section 21151 requires EIRs only on projects that "they [local governmental entities] intend to carry out." This qualification implies that the

1327, § 1, [1971] Cal. Stat. 2628. This section requires that environmental impact studies be made by a special state agency, the Office of Intergovernmental Management [CAL. GOV'T CODE §§ 12035-38 (West Supp. 1972)] for all land-project subdivisions—wilderness, second-home recreational subdivisions—[see CAL. BUS. & PROF. CODE §§ 11000, 11000.6, 11025 (West Supp. 1972)] before a local governmental entity can approve a tentative subdivision map for such subdivisions. Yet section 11550.1 does not require such studies for nonland project subdivisions, even though such subdivisions may have significant effects on the environment. This redundant statutory scheme (in light of Friends which arguably extends the EIR requirements to tentative subdivision map approval hearings as involving an "entitlement for use" and therefore a project under section 21151), is inexplicable and contradicts the legislative intent found in Friends.

36. See City of Eureka v. Diaz, 89 Cal. 467, 469, 26 P. 961, 962 (1891). See also Smith v. Union Oil Co., 166 Cal. 217, 135 P. 966 (1913).
40. See In re Application of the Monrovia Evening Post, 199 Cal. 263, 248 P. 1017 (1926).
41. CAL. CODE CIV. PRO. § 1859 (West 1967).
42. 8 Cal. 3d at 256, 502 P.2d at 1054, 104 Cal. Rptr. at 766. Congress also failed to define the key term in the NEPA, "action". See 42 U.S.C. § 4332(2)(c) (1970).
43. Compare the approach of the court in People v. Knowles, 35 Cal. 2d 175, 182, 217 P.2d 1, 10 (1950).
44. 8 Cal. 3d at 275; 502 P.2d at 1068, 104 Cal. Rptr. at 780; CAL. PUB. RES. CODE § 21151 (West 1972).
section's requirements apply only to projects in which the governmental entity has a direct proprietary interest.\textsuperscript{46}

In addition, there is, within the same sentence, the requirement that the EIR be included in the report to the locality's planning agency required by section 65402 of the Government Code.\textsuperscript{46} Section 65402 is an administrative procedure devoted exclusively to the processing of public work projects. This again indicates that the legislature intended to limit the application of section 21151 to public work projects. Requiring private project EIRs to be processed through section 65402 would be meaningless.\textsuperscript{47}

Thus, contrary to the majority's assertion, the lack of an express definition for "project" does not ipso facto render section 21151 ambiguous. The context and surrounding language sufficiently define and qualify the word.

Having decided that there was an ambiguity, however, the majority turned to the general intent sections of the EQA.\textsuperscript{48} In the majority's view, those sections "considerably simplified" its task and led to the "ineluctable conclusion" that the legislature intended "to include within the panoply of the act's provisions private activities for which a permit, lease or other entitlement is necessary."\textsuperscript{49}

With myopic focus, the court insisted that since the legislature had used the terms "regulate," "regulatory," "every citizen," "public and private interests," and "public decisions"\textsuperscript{50} in the general intent section, it meant to include permit and other entitlement decisions as projects that local governmental entities carry out.\textsuperscript{51} The legislature's broad language in these nonoperative sections does support such an inference. But the majority ignored language in section 21151 itself that evidenced a more specific and contrary intent.\textsuperscript{52} For example, the majority rejected the qualifying effect of the phrase "they intend to

\begin{itemize}
\item \textsuperscript{46} Cal. Pub. Res. Code \S 21151 (West 1972).
\item \textsuperscript{47} 8 Cal. 3d at 276-77, 502 P.2d at 1069, 104 Cal. Rptr. at 781. This reporting requirement is deleted in new section 21151 added by Calif. A.B. 889. Cal. Pub. Res. Code \S 21151 (West 1972).
\item \textsuperscript{48} Cal. Pub. Res. Code \S\S 21000, 21001 (West 1972).
\item \textsuperscript{49} 8 Cal. 3d at 256, 502 P.2d at 1054, 104 Cal. Rptr. at 766. See the court's modification order in \textit{Friends, id.} at 271, 502 P.2d at 1065, 104 Cal. Rptr. at 777. The court there emphasized that even though it held the EQA applicable to private as well as public projects, it would not pass on the threshold issue of whether International's project required an EIR since the administrative body below had not reached a decision on that issue.
\item \textsuperscript{50} 8 Cal. 3d at 256-57, 502 P.2d at 1054-55, 104 Cal. Rptr. at 766-67.
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} See text accompanying notes 43-47 supra.
\end{itemize}
carry out,” explaining it away as inconsistent with the general legislative intent. With superficial ease, the court also surmounted the explicit procedural reference in the same sentence that links section 21151 projects with section 65402 public work projects. According to the majority, this link was “directory” rather than “mandatory” and therefore did not contradict the legislative intent that the EQA apply to private projects. This directory-mandatory dichotomy disregards the failure of the statute to provide for exceptions to the filing requirement.

The court’s approach to ascertaining legislative intent conflicts with the usual rules of legislative construction: intent should be determined by looking at the language of the act as a whole, and a particular intent should prevail over a more general one. Moreover, the court’s analytic approach suggests that once the court has found any language in a statute sufficiently flexible to support its inference of legislative intent, it can then ignore any literal operative language of the statute to the contrary. This rule of statutory construction invites judicial legislating and is a threat to the important constitutional principle of separation of powers. Further, piecemeal judicial legislating

53. 8 Cal. 3d at 259, 263-64, 502 P.2d at 1056, 1059-60, 104 Cal. Rptr. at 768, 771-72.
54. Id. at 265, 502 P.2d at 1061, 104 Cal. Rptr. at 773.
55. CAL. PUB. RES. CODE § 21151 (West 1977). The brevity with which the court brushed aside this qualifying language supports those critics who believe the majority was result-orientated in the sense that the majority would not look further once it found language in the act supporting the legislative intent that it felt most appropriate. Had the majority examined the act as a whole and investigated the context in which the legislature had used the term project in another operative section of the EQA, it could have argued more convincingly that private projects were intended to be included within the act’s scope. Section 21150 specifically limits projects in the following manner:

State agencies, boards, and commissions, responsible for allocating state or federal funds on a project-by-project basis to local governmental agencies for land acquisition or construction projects which may have a significant effect on the environment, shall, unless exempted by formal procedures developed under the provisions of section 21103, require from the responsible local governmental agency a detailed statement setting forth the matters specified in section 21100 prior to the allocation of any funds, other than funds solely for planning purposes.

57. See note 41 supra.
58. 8 Cal. 3d at 259, 502 P.2d at 1057, 104 Cal. Rptr. at 769.
of the kind that occurred in *Friends* can create internal inconsistencies within a complex statutory scheme such as the EQA. As the court in *Friends* pointed out in a subsequent modification order, further legislative action might be necessary to harmonize the court's construction of "project" to include private ones with the statutory scheme of the EQA as a whole. The court's premonition was confirmed by the legislature's prompt enactment of AB 889, a bill that revised the EQA in light of *Friends*.

Having found an apparently controlling legislative intent within the statute, the majority sought to buttress its conclusion by using other extrinsic aids indicative of legislative intent. While the court failed to expressly identify these aids, it initially rejected attaching any value to the opinions of individual legislators and consultants on the intended scope of "project." The court then turned to the legislative history of the EQA as a relevant extrinsic aid. With little explanation or justification, it concluded that the legislature must have intended the EQA to have the same scope as NEPA. The apparent rationale for this conclusion was that NEPA was passed shortly before the EQA and contained similar features, such as the identity in substantive detail of the EIR and the EIS. Since the state legislature must have been aware that the administrative guidelines for the National Act included decision-making functions of federal agencies such as entitlement issuance within the scope of "actions" under NEPA, the court reasoned it must have intended the EQA to affect similar decision-making functions. Yet the majority never cited any evidence that the legislature was aware of these guidelines.

The court also failed to consider or explain the differences in the key operative terms of the two acts. In scrutinizing the legislative amendments to the EQA prior to its passage, the majority labeled those changes mere "intricate semantic changes." The amendments

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60. See text accompanying notes 112 et seq. infra.
61. 8 Cal. 3d at 873, 502 P.2d at 1066, 104 Cal. Rptr. at 778.
63. 8 Cal. 3d at 258, 502 P.2d at 1056, 104 Cal. Rptr. at 768.
64. Id.
65. Id. at 260, 502 P.2d at 1057, 104 Cal. Rptr. at 769.
66. Id. at 260-61, 502 P.2d at 1057-58, 104 Cal. Rptr. at 769-70.
67. Id.
68. Id. But see CAL. PUB. RES. CODE § 21065 (West 1972), in which the legislature incorporated the Federal Guidelines under NEPA into the EQA some two years after the latter's enactment.
69. See text accompanying notes 11-12 supra.
70. See dissent's delineation of these differences, 8 Cal. 3d at 281-82, 502 P.2d at 1072-73, 104 Cal. Rptr. at 784-83.
71. Id. at 265, 502 P.2d at 1061, 104 Cal. Rptr. at 773.
changed the key operative language of section 21151 from “program” to “change in zoning” to “project.” While the dissent pointed to these changes as indicative of a narrowing of the scope of the EQA, the majority argued that “the Legislature appears to have intended, in order to prevent confusion, to use the same broad terminology in effect under federal law rather than to adopt an entirely different set of phrases of its own.” However, the legislature did not adopt the same operative terms as then existing under NEPA. Moreover, if the legislature intended to prevent confusion it could have enacted the applicable NEPA guidelines verbatim or at least deleted the qualifying language immediately following the term “project” in section 21151. The actual draftsmanship belies an intention to include all public decision-making functions within the scope of the EQA.

Finally, the court refused to consider proposed legislative amendments to the EQA as indicative of the original legislative intent. In a footnote, the majority reasoned that since the legislative proposals would amend the EQA so as to confirm the result and intention found by the majority in Friends, it would ignore any implication that the legislature at the time of enacting the EQA was uncertain about its scope. Moreover, the majority disregarded legislation enacted subsequent to the EQA that was inconsistent with the intent and scope ascribed to section 21151. Thus, the court refused to give weight to objective indices of legislative intent contrary to that which it purported to discover.

The court correctly pointed out that if private activities such as International’s condominium project were allowed to proceed without compliance with the EQA, a significant loophole would exist, which would seriously hamper its effectiveness. Even if one grants the existence of such a loophole, it seems more appropriate for the legislature, rather than the court, to close it. Moreover, the legislature may

72. Id.
73. Id. at 265, 281, 502 P.2d at 1061, 1072, 104 Cal. Rptr. at 773, 784.
74. Id. at 265-66, 502 P.2d at 1061-62, 104 Cal. Rptr. at 773-74.
75. The key term under the EQA is “project” while the key term under NEPA is “action”. Moreover, given the similarities in the two acts, the differences must be taken as being meaningful. See 8 Cal. 3d at 281-83, 502 P.2d at 1072-74, 104 Cal. Rptr. at 784-86.
77. 8 Cal. 3d at 266 n.9, 502 P.2d at 1062 n.9, 104 Cal. Rptr. at 774 n.9. Compare majority's with dissent's view, 8 Cal. 3d at 283-86, 502 P.2d at 1073-76, 104 Cal. Rptr. at 785-88.
79. 8 Cal. 3d at 263-64, 502 P.2d at 1059-60, 104 Cal. Rptr. at 771-72.
have felt that existing environmental controls were adequate with respect to private activities, or that the mechanics and the contents of the EIR needed a trial and error period for public projects before wholesale application to private projects.

As discussed below, the procedural and substantive provisions of the EQA as they existed as the time of Friends left a considerable amount of uncertainty as to how to apply the Act to private projects. If the legislature had intended the result which the majority reached, it could have provided more substantive detail to forestall many of these questions. The legislature's response to Friends, discussed below, was an attempt to clarify the application of the EQA to private projects.

II. THE IMPACT OF FRIENDS

After Friends, local governmental entities, particularly cities and counties, suddenly found themselves obligated to comply with the EQA before issuing entitlements for use to private projects. Moreover, the court made clear that no subterfuges to avoid EIRs would be countenanced. Under the Friends rationale, planning agencies and other governmental entities must make a threshold determination whether the particular project "may have a significant effect on the environment." This threshold decision, in light of Friends and similar fed-
eral decisions under analogous provisions of NEPA, must be more than a "naked conclusion that the environment will not be harmed by the project." Only if the government entity finds that the project will have no significant effect on the environment under any reasonably foreseeable circumstances do the EQA requirements not apply.

Yet, the court's insistence on conscientious compliance with the EQA for private as well as public projects might have had a less cataclysmic, practical impact if local governments had been abiding by the pre-Friends legislative guidelines generally. For one thing, if the city or county had a conservation element in its general plan, it need merely have found that any project, public or private, was consistent with such an element. No EIR would have been necessary. The conservation element as statutorily defined is not as exhaustive or as potentially protective of the environment as the EIR. Nonetheless, virtually every city and county in the state lacked such an element at the time of Friends, even though it was required by law.

Given the intricate detail that EIRs required, it initially seemed advantageous for cities and counties to adopt conservation elements and


87. 8 Cal. 3d at 263 n.8, 502 P.2d at 1059 n.8, 104 Cal. Rptr. at 771 n.8. See also Daley v. Volpe, 350 F. Supp. 252 (W.D. Wash. 1972); Save Our Ten Acres v. Kreger, 472 F.2d 463, 466-67 (5th Cir. 1973) (court can look outside administrative record in order to determine possibility of project having significant effect on the environment).

88. See note 49 supra.

89. If the project may have a significant effect on the environment, then the governmental entity must find that the project is consistent with the conservation element [Cal. Gov't Code § 65302(d) (West Supp. 1972)] of the locality's general plan [Cal. Gov't Code § 65302 (West Supp. 1972)]. In the absence of such an element, the local entity must compile and consider an EIR on the project before making a decision on the project. California A.B. 889 has amended section 21151 of the EQA preventing a local entity from avoiding EIR compilation by finding the project consistent with the locality's conservation element. All section 21151 projects must now have an EIR not withstanding the fact that the project may be consistent with the locality's conservation element.

90. See note 89 supra.

91. 8 Cal. 3d at 256, 502 P.2d at 1052, 104 Cal. Rptr. at 764.

92. However, section 11 of A.B. 889 amends section 21151 so as to require all local agencies, even those with a conservation element in their respective general plans, to compile an EIR on any public or private project that may have a significant effect on the environment. Ch. 1154, § 11, [1972] Cal. Stat. 197-98 (Deering).


avoid the delay and uncertainty involved in applying the EIR requirements. However, the legislature subsequently blocked such an escape route: it removed the ability of a local entity to substitute a finding of consistency with the entity’s conservation element for an EIR.\(^9\) Now an EIR must be compiled for all projects subject to the EQA.

Another factor contributing to the post-

Friends turmoil was that prior to Friends, few, if any, of the entities had guidelines for EIR preparation for public projects.\(^7\) Such guidelines could have assisted in EIR preparation for private projects. Strangely, the majority, in denying a rehearing in Friends, urged local entities to refer to these apparently nonexistent public project guidelines to facilitate compliance with EIR requirements on private projects.\(^8\)

Further, Friends contains within it an implication which could make the application of the EQA to private projects less disruptive in the future than the initial uproar suggested. Governmental entities must compile and consider an EIR on a project before reaching a decision on the merits of the entitlement requested. The broad construction given the term “project” in Friends suggests that an EIR is necessary at the earliest possible entitlement stage—that is, at the time a subdivider submits his tentative subdivision map for approval. This early EIR scrutiny would be most desirable from both the developer’s and the public’s point of view. Early EIR formulation protects the developer from committing funds and labor to a project that may require modification or abandonment. Moreover, early consideration before actual or substantial construction commences prevents irreversible environmental damage. Thus, the economic disaster Friends was said to presage can be minimized while at the same time fulfilling the purposes of the EQA.

III. RAMIFICATIONS AND UNANSWERED QUESTIONS

Friends left a number of unanswered questions. The court, in an order modifying its original decision, attempted to answer some of these questions by way of dicta.\(^9\) The legislature through the enactment of AB 889 provided more answers.\(^9\) Despite this legislative guidance, however, many of the unanswered questions will have to be resolved on a case-by-case basis.\(^1\)

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97. See 8 Cal. 3d at 272-73, 502 P.2d at 1066, 104 Cal. Rptr. at 778.
98. Id.
99. Id. at 271-73, 502 P.2d at 1065-66, 104 Cal. Rptr. at 777-78.
101. See the majority’s dictum to that effect, 8 Cal. 3d at 271, 502 P.2d at 1065, 104 Cal. Rptr. at 777.
California courts, following the *Friends* lead, will probably rely heavily on the federal case law construing analogous problems under NEPA. The reason for this reliance would be threefold. First, the EQA and NEPA have similar terms and ambiguities. Second, the majority in *Friends* found that NEPA formed an important part of the legislative history of the EQA and that the legislature modeled the EQA substantially after the Federal Act. Third, the *Friends* court acknowledged with approval the active role of the federal judiciary in giving a broad construction to NEPA, clearly envisioning a similar role for the California judiciary with regard to the EQA.

### a. Retroactive effect of *Friends*

At the time of *Friends*, the EQA, with an effective date of November 23, 1970, was silent regarding its retroactivity. The retroactivity issue was important since many private projects that may have significantly affected the environment had been approved, commenced or completed after the effective date of the act. For example, in Los Angeles County over 903 million dollars in building permits and 192 zoning changes had been approved between the effective date of the Act and the court's decision in *Friends*.

The majority in *Friends* suggested in dicta that local statutes of limitation on entitlement proceedings and the equitable doctrine of laches would severely limit the retroactive application of the decision. The court did, however, hold the EQA applicable to a project subject to approval after the EQA's effective date, not considering whether or not construction had begun. Thus, the inference was that all projects subject to entitlement for use approval after the effective date of the EQA were subject to its provisions. Also there was uncertainty as to

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102. See, e.g., the court's reliance on federal case law interpreting the NEPA in *Environmental Defense Fund v. Coastside County Water District*, 27 Cal. App. 3d 695, 703-05, 104 Cal. Rptr. 197, 201-02 (1st Dist. 1972).

103. 8 Cal. 3d at 260-61 n.4, 502 P.2d at 1057-58 n.4, 104 Cal. Rptr. at 769-70 n.4.

104. 8 Cal. 3d at 260-62, 502 P.2d at 1057-59, 104 Cal. Rptr. at 769-71.

105. Id. at 261, 502 P.2d at 1058, 104 Cal. Rptr. at 770. The EQA is arguably broader in scope than NEPA since the former applies to all projects that may have any significant effect on the environment, while the latter applies only to those that may have an *adverse* significant effect. See *Howard v. Environmental Protection Agency*, 4 ERC 1731, 1733 (W.D. Va. 1972).

106. See Amicus Brief of the County of Los Angeles Requesting a Rehearing, at 3, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761.

107. 8 Cal. 3d at 272, 502 P.2d at 1066, 104 Cal. Rptr. at 778.

108. Various governmental entities, along with the State Attorney General, requested that *Friends* be given only prospective application and that a moratorium be imposed until the legislature could have an opportunity to harmonize and clarify the court's application of the EQA to private projects. The court denied the requests as well as requests for a rehearing in a modification order. 8 Cal. 3d at 247, 271-73,
the application of the EQA: (1) to projects approved prior to the effective date of the EQA, but that were either still under construction or ready to commence construction after that date; (2) to projects approved after that date whose construction had been substantially completed; and (3) to on-going projects begun and approved prior to the effective date but requiring periodic reconsideration after that date.

The federal cases that apply the NEPA to these three situations are in conflict. Some cases hold that any project or action, whether on-going or not, which has been approved before the effective date of NEPA, is exempt from the Act's EIS requirements. This is so even though construction has not yet commenced on the project. Other cases apply the NEPA to projects approved before the effective date of the act regardless of the stage of completion where there has been a "significant departure from the original approved plan having ecological significance." Still a third line of cases hold NEPA applicable to all projects regardless of the date of approval, as long as they are still under construction or consideration as of the effective date of NEPA. These cases would require an EIS to be drawn up and implemented to the "maximum extent practical" under the circumstances.

Whether the federal courts will actually enjoin further construction on projects already approved and under construction pending the compilation of an adequate EIS is a separate question. The elements to be considered include:

(1) community participation in the decision-making process . . . ;
(2) the extent to which the state agency has taken environmental factors into account . . . ; (3) the substantiality and likelihood of harm to the environment if the project is constructed as planned; and
(4) the cost to the state measured in terms of dollars and to the public in terms of safety if substantial delay in completion of the project occurs.


110. See e.g., San Francisco Tomorrow v. Romney, 342 F. Supp. 77, 82 (N.D. Cal. 1972). Assembly Bill 889 adds section 21166 to the EQA requiring an additional EIR when "substantial changes are proposed" or "occur" that require "major revisions" of the original EIR. Ch. 1154, § 6, [1972] Cal. Stat. 196 (Deering). California courts in interpreting what constitutes "substantial changes" would undoubtedly look to the federal case law that apply the NEPA to projects involving "significant departures" for guidance.


112. Jicarilla requires EIS preparation notwithstanding the fact that the project may have progressed too far to be practically reassessed. 471 F.2d at 1279-85.

Notwithstanding the retroactive application of NEPA in some instances, the legislature in AB 889 provided that all private projects "undertaken, carried out or approved on or before the effective date" of AB 889 are valid notwithstanding a failure to comply with the provisions of the EQA. The legislature failed to define "undertaken" or "carried out." It would seem, however, that there should be an application for entitlement before a public agency, without the application necessarily having reached the approval or denial stage, in order to have been "undertaken" or "carried out" in reliance on official action. To allow private planning or financing steps to suffice to bring the project within the retroactivity exemption would be to expand its scope beyond the reliance rationale that the legislature seemed to presuppose.

Additionally AB 889 provides for a 120 day moratorium following its effective date during which EIR preparation on private projects is waived. This was done to allow state and local public agencies to develop and implement EIR guidelines.

Assembly Bill 889 does not exempt from retroactive application of the Friends doctrine those projects whose legality was being challenged in judicial proceedings at the time of the passage of AB 889. However, if such a project had not been determined illegal in any judicial proceeding before the effective date of AB 889, it would be validated under certain circumstances if, prior to the commencement of judicial proceedings, there had been substantial construction and substantial liabilities for such construction incurred in good faith reliance on the issuance of an entitlement by a public agency. Therefore, unlike one line of federal court decisions, there is no attempt to implement an EIR to the maximum extent possible in such cases.


114. CAL. PUB. RES. CODE § 21169 (West 1972).
115. CAL. PUB. RES. CODE § 21171 (West 1972). The effective date of A.B. 889 is December 5, 1972, and the end of the moratorium period, when compliance with the EQA will be required for all projects, is April 5, 1973. See Resources Agency Proposed EIR Guidelines, supra note 86, at 5-6.
117. CAL. PUB. RES. CODE § 21170(a) (West 1972). The effective date of A.B. 889 was December 5, 1972. See Los Angeles Daily Journal, Dec. 6, 1972, at 1, col. 2.
118. CAL. PUB. RES. CODE § 21170(a) (West 1972).
119. See note 117 supra.
120. However, pre-Friends projects and those undertaken during the moratorium
The proposed administrative guidelines do not extend the exemption from EQA scrutiny contained in AB 889 to those projects directly undertaken by a public agency prior to Friends or during the moratorium period. Thus, EIRs will be required for public-work projects and other projects undertaken by a public agency if they may have a significant environmental effect.

Assembly Bill 889 establishes a three-tier statute of limitation for handling challenges to projects for noncompliance with the EQA. First, if the governmental entity fails to make the necessary threshold decision regarding whether the project "may have a significant effect on the environment," then a 180 day limitation period applies from the date of the project's approval, or actual commencement, if done without approval. Second, if the governmental entity makes a threshold decision on the significance of the project's effect on the environment, challenges to the decision must be made within 30 days after notice of the decision is filed with the Secretary of the Resources Agency in the case of state-level public agencies, or with the county clerk in the case of regional or local agencies. Third, if an EIR is compiled, challenges to the report on the grounds of inadequacy must be made within 30 days of the filing of the notice with the Secretary or the county clerk.

An unanswered question is whether such exemptions also apply to an on-going project if and when renewal of entitlement is necessary. If, in the absence of legislative guidance, the California courts follow the better reasoned federal cases considering the analogous problem under NEPA, such renewal entitlement projects would be made subject to the EQA, particularly when there has been a change in the period may eventually require an EIR. If such previously exempted projects are on-going, in the sense that new entitlements must be sought after the moratorium period, e.g., renewal of a conditional use permit, business license, etc., then such renewal entitlement requests will be subject to the EQA and its EIR requirements. See Resources Agency Proposed Guidelines, supra note 86, at 5-6.

121. See Resources Agency Proposed EIR Guidelines, supra note 86, at 5. However, the guidelines exempt those projects where a substantial portion of the committed public funds have already been spent, modification is infeasible, and no proposals have been made to modify the project in a manner that would produce a significant effect on the environment.

122. CAL. PUB. RES. CODE § 21167(a) (West 1972).

123. CAL. PUB. RES. CODE §§ 21108, 21167(b) (West 1972).

124. CAL. PUB. RES. CODE §§ 21152, 21167(b) (West 1972).

125. CAL. PUB. RES. CODE §§ 21108, 21152, 21167(c) (West 1972). While failure of the entity to comply with the statutory notice sections would toll the statute of limitations, the equitable doctrine of laches might prevent untimely challenges to the entity's decision. 8 Cal. 3d at 272, 502 P.2d at 1066, 104 Cal. Rptr. at 778 (dictum).

project's original scope or design that has environmental significance.¹²⁷ The breadth and scope of the EQA would then be enhanced since most exempted projects must eventually renew existing entitlements for use and thus come within the web of the EQA.¹²⁸

Finally, California courts in applying the above legislative guidelines to future projects will have to balance the strong policy articulated in Friends that requires protection of rapidly dwindling environmental resources against the disruptive impact of compliance with the EQA in the areas of public safety and the economy. The good faith decision of the governmental entity in reaching the threshold decision of the project's effect on the environment should be accorded some weight in the matter.¹²⁹ However, given the Friends view that the EQA and the required report are primarily intended to ensure that governmental entities will not forsake "ecological cognizance in pursuit of economic advantage,"¹³⁰ the factor to be given the most weight should be one that considers the likelihood of irreversible environmental damage if the project continues unabated.¹³¹

b. Public agencies subject to the EQA

Friends involved the application of the EQA to cities and counties and their planning agencies. The dissent reasoned that the EQA applies on the local level only to cities and counties and not to other local entities such as water districts, port commissions, and school districts.¹³² While the majority in Friends did not reach this issue, another decision on the EQA applied the Act to a county water district.¹³³ Further, in Desert Environment Association v. Public Utilities Commission,¹³⁴ the supreme court indicated that the EQA applied to the issuance by the California Public Utilities Commission of certificates of convenience and necessity for power plant construction. The spirit of Friends, in light of the broad legislative intent behind the Act—substantial protection of the environment through mandatory good faith consideration of environmental effects of projects—compels application

¹²⁸. See note 126 supra.
¹³⁰. 8 Cal. 3d at 256, 502 P.2d at 1055, 104 Cal. Rptr. at 767.
¹³². 8 Cal. 3d at 276 n.3, 502 P.2d at 1068 n.3; 104 Cal. Rptr. at 780 n.3. See also Los Angeles Times, November 14, 1972, Part II, p.1, col. 5, wherein over 5, 758 units of local government in California are categorized.
¹³⁴. 8 Cal. 3d 739, 505 P.2d 223, 106 Cal. Rptr. 31 (1973).
of the Act's requirements to all local and state governmental entities. Otherwise a large number of private projects that might significantly affect the environment would be exempt from EIR scrutiny. Assembly Bill 889 and its broad definition of public agencies envisions the application of the EQA to all agencies involved in discretionary entitlement issuance functions.135

c. Entitlements for use

The majority in *Friends* broadly defined section 21151 projects: We . . . conclude that to achieve that maximum protection the Legislature necessarily intended to include within the operation of the act, private activities for which a government permit or other entitlement for use is necessary.136

Given this broad entitlement language, whenever any level of the governmental decision-making process is called upon to authorize private activities that may have a significant effect on the environment by issuing a building permit or business license, approving a subdivision map, or granting a zoning variance, for instance, then the EQA applies.137

Assembly Bill 889 confirms the majority's broad construction of "project,"138 and also applies the EQA to the "discretionary projects" that are to be carried out or approved by the public agency, including but not limited to "the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits and the approval of tentative subdivision maps."139 However, the legislature exempts strictly "ministerial projects" of the public agency, i.e., those not involving any discretionary role of the agency in approval or denial.140

136. 8 Cal. 3d at 259, 502 P.2d at 1056, 104 Cal. Rptr. at 768.
137. *Id.* at 271-72, 502 P.2d at 1065, 104 Cal. Rptr. at 777.
139. **CAL. PUB. RES. CODE** § 21080(a) (West 1972).
140. **CAL. PUB. RES. CODE** § 21080(b) (West 1972). For example, the act of signing a contract let by a city council is ministerial. Earl v. Bowan, 146 Cal. 754, 81 P. 133 (1903). A closely related issue under the NEPA is the "minor" federal action exemption. *See*, e.g., Julis v. City of Cedar Rapids, 349 F. Supp. 88, 90 (D. Iowa 1972). The ministerial exception to EQA projects should be construed narrowly to preclude subversion of the paramount goal of the EQA, namely to compel governmental consideration of the environmental consequences of public and private resource development. For example, while the act of issuing a building permit is ministerial when the applicable law has been complied with [*see*, e.g., Selby Realty Co. v. City of San Buenaventura, 28 Cal. App. 3d 624, 104 Cal. Rptr. 866 (2d Dist. 1972)], the issuance of such a permit should not be considered "ministerial" under the EQA since the latter is part of the "applicable law." Feasibility or planning studies for possible
Assembly Bill 889 requires the Secretary of the Resources Agency, within 60 days of the effective date of the amendments to the EQA, to compile and distribute to all public agencies a listing of projects and entitlements that are exempt in all cases from the provisions of the EQA.\textsuperscript{141} The Secretary is also given the authority to permit an EIS to be submitted in lieu of an EIR.\textsuperscript{142} A public agency can request the addition or deletion of a class of projects to this exemption list; however, the Secretary must approve such requests.\textsuperscript{143} Thus, much of the vitality of the EQA and its EIR requirements will depend on scope of the Secretary's exemptions.\textsuperscript{144} This state-level approach of creating a broad class of exempted projects may destroy much of the effectiveness of the EQA in the sense that in a state as geographically diverse as California, a project in one area may in all cases never have a significant effect on the environment. Yet in another area such a project may always have such an effect. The exemptions, if any, should come from the local agencies, which are more familiar with the local environmental considerations relevant to the "significant effect" threshold decision.\textsuperscript{145}

The proposed administrative guidelines set forth four classes of categorically exempted projects. These are classes that have been found in all instances not to have a significant impact upon the environment and thus require neither a threshold decision (referred to in the guidelines as a "negative declaration") nor an EIR.\textsuperscript{146} These classes include projects involving repair, maintenance or minor alteration of future actions by the agency also are excluded from EQA scrutiny [CAL. PUB. RES. CODE §§ 21102, 21150 (West 1972)], as are emergency disaster-aid projects [CAL. PUB. RES. CODE § 21172 (West 1972)]. Curiously, section 21154 severely limits the scope of an EIR on projects which any state agency, board or commission orders a local agency to undertake. The EIR cannot include factors or alternatives which might conflict with such an order even if such factors or alternatives would reveal an adverse environmental impact of the project. In an effort to maintain subordination, this section has removed many of the benefits of EIR scrutiny on state "ordered" projects. Hopefully, such projects would require a full-fledged EIR at the state level.

141. CAL. PUB. RES. CODE § 21084 (West 1972).
142. CAL. PUB. RES. CODE § 21083.5 (West 1972).
143. CAL. PUB. RES. CODE § 21086 (West 1972).
144. If the Secretary's exemptions are too broad and conflict with the strong policy behind the EQA, which requires detailed analysis and consideration of the potential environmental impact of projects, then they may be subject to judicial challenge. As the court points out by way of dicta in Desert:

This is not to say, of course, that regulations under the EQA will be immune from review once adopted by the commission. An administrative regulation authorized by statute is invalid unless it is "consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov. Code, § 11374.)

8 Cal. 3d at 742-43, 505 P.2d at 225, 106 Cal. Rptr. at 33.

145. However, the legislative policy is to the contrary since the public agency's objectives, criteria and procedures must be consistent with the Secretary's. See CAL. PUB. RES. CODE § 21082 (West 1972).
existing structures, facilities or machinery, the construction of individual family dwellings that are not part of a residential subdivision, certain alterations in the condition of land, and certain alterations in land-use regulation. However, in order to decide whether a particular project fits into one of the exempted classes, the public agency must initially determine whether the project will "alter the physical character of the area," "involve fresh impacts on the environment," or "impact on a resource of critical environmental concern." Given these broad and vague qualifications, it appears that the scope of projects falling within the exempted class is quite limited. Thus, a single family development or an alteration in an existing structure which requires a variance from height or lot-coverage regulations could conceivably involve a "fresh impact" or "alteration" of the physical character of the area which would remove it from the categorically exempted category. Moreover, an alteration in the condition of land, such as earth filling, or a zoning reclassification, that threatens a unique or endangered species of flora or fauna certainly would have an impact on a resource of "critical environmental concern."

d. The cost and responsibility of compiling the EIR

At the time of the decision in Friends, the EQA did not establish an adequate procedure for the processing of private projects under the Act. This skeleton approach was in marked contrast to other environmental protection statutes. The prime responsibility for compiling the EIR was on the governmental entity directly involved with the project, with advisory guidance from the state agency.

Assembly Bill 889 provides more clearly defined state-level guidance and control over EIR compilation. The Secretary of the Resources Agency, in conjunction with the Office of Planning and Research, is responsible for drawing up, within 60 days of the Act's effective date, guidelines for all public agencies on how to apply the threshold ("significant effect") test, how to determine when an exemption from EIR submission is warranted, and how to compile an EIR when an exemption is not allowed. The Secretary will review all requests for exemption from the EIR requirements. He will also

147. Id.
148. Id.
149. See, e.g., CAL. PUB. RES. CODE §§ 21082-88, 21103 (West 1972).
150. See CAL. BUS. & PROF. CODE § 11550.1 (West Supp. 1972); CAL. GOVT
151. See note 149 supra.
152. See, e.g., CAL. PUB. RES. CODE §§ 21082-88 (West 1972).
review application of the threshold test and supervise compilation of the EIRs. So that the Secretary may fulfill his duties, all public agencies are required to file certain notices with his office. 154 Essentially, state-level control over the administration of EQA appears to be an effort to achieve uniformity in its application. 155 Also, the state-level control and guidance is intended to ease the burden on the manpower of public agencies applying the EQA to private projects seeking entitlements. However, the public agency actually involved in carrying on or approving the project must itself make the threshold decision, compile the EIR, and attach the appropriate weight and significance to the report. 156

The public agency may require the person seeking approval of a project to submit whatever data may be necessary to enable the agency to determine the effect of the project on the environment and, if necessary, to compile an EIR. 157 Also, AB 889 enables the local entity to have the EIR "prepared by contract" if it chooses not to use its own staff. 158

If the federal case law is followed, the governmental entity itself, and not the private person seeking approval of the project, would have to assume final responsibility for the contents of the report. 159 The entity would not be allowed to adopt a developer's impact report as an EIR; rather an independent investigation would have to be made, either by the agency's own staff or by a disinterested third party under contract. 160 Objectivity is essential to the effectiveness of the EIR. Without it, the entity's weighing of the environmental and economic benefits and costs is a meaningless gesture.

Under AP 889 the entity may impose a reasonable processing fee for EIR preparation. 161 Undoubtedly the cost of such a fee will be passed on to the ultimate consumer of the project or its services.

e. Contents of the EIR—the substantial compliance doctrine

The EQA, as amended by AB 889, requires certain items to be covered in every EIR:

156. CAL. PUB. RES. CODE §§ 21061, 21102, 21151 (West 1972).
158. CAL. PUB. RES. CODE §§ 21100, 21151 (West 1972).
160. See note 159 supra.
161. CAL. PUB. RES. CODE § 21089 (West 1972).
(a) The environmental impact of the proposed action.
(b) Any adverse environmental effect which cannot be avoided if the proposal is implemented.
(c) Mitigation measures proposed to minimize the impact.
(d) Alternatives to the proposed action.
(e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.
(f) Any irreversible environmental changes which would be involved in the proposed action should it be implemented.
(g) The growth-inducing impact of the proposed action.  

While the depth of analysis and the importance attached to the various items will vary from case to case, federal courts reviewing the sufficiency of Environmental Impact Statements have held that conclusionary statements will not satisfy the need for detailed analysis and scientific data. In strong dictum in Friends, the court indicated that substantial compliance with the EQA's EIR requirements will demand analysis as detailed and exhaustive as the federal courts require. A California court of appeals held in Environmental Defense Fund (EDF) v. Coastside County Water District that the California judiciary has the authority to review the sufficiency of the EIRs.

162. CAL. PUB. RES. CODE § 21100 (West 1972).
163. See, e.g., Hanly v. Mitchell, 460 F.2d 640, 647-48 (2d Cir. 1972); Monroe County Conservation Council v. Volpe, 4 ERC 1886, 1892 (2d Cir 1972); Daly v. Volpe, 350 F. Supp. 252 (W.D. Wash. 1972). A cost-benefit analysis of the project, in environmental terms, is required. See Calvert Cliffs' Coordinate Community, Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). In a questionable decision, the court in McPhail v. Corps of Engineers, 4 ERC 1908, 1912 (E.D. Mich. 1972) held that data upon which such cost-benefit analysis was based could be omitted from the EIS. See also Comment, Cost-Benefit Analysis and the National Environmental Policy Act of 1969, 24 STAN. L. REV. 1091 (1972). For example, one federal court said:

The impact statement inadequately describes the detrimental effects of air pollution on people . . ., fails to back up its conclusions on noise pollution with scientific data or reference to specific studies, and neglects to consider in detail the long-term effect of such a major highway on land use and population distribution . . . . It claims that oil spills on the bridge would be adequately contained, but fails to identify the precise method of containment. There is inadequate discussion of circulation and possible congestion of traffic on other roads caused by the new highway lanes. The impact statement fails to elaborate on the extent of damage to homes above the tunnels, the manner in which projected needs were estimated, long term effects of the project, and resources to be irretrievably committed. Finally, there is no detailed comparison of the costs and benefits for each of the stated alternatives.

Lathan v. Volpe, 350 F. Supp. 262, 266 (W.D. Wash. 1972). Even though the environmental effects are matters of conjecture or rough estimates, failure to include such conjectures or estimates renders the EIS inadequate. See Environmental Defense Fund v. Armstrong, 352 F. Supp. 50 (N.D. Cal. 1972). However, the mere inability to offer substantive solutions to environmental problems raised in the EIS will not render it inadequate. See Citizens Airport Committee v. Volpe, 351 F. Supp. 52 (E.D. Va. 1972).

164. 8 Cal. 3d at 263 n.8, 502 P.2d at 1059 n.8, 104 Cal. Rptr. at 771 n.8.
One function of the EIR, as the court saw it, was to provide information on the environmental impact of a project to state and local governments and to the general public. This information allows those not involved in the decision-making process to evaluate the decision, and the EIR is insufficient if it does not provide enough information to support an intelligent, independent judgment on the merits of the decision. However, courts should not declare an EIR insufficient simply because they disagree with its conclusions. The court in EDF then held the water district's EIR inadequate on the ground, inter alia, that the report did not disclose the objections of qualified experts to the project. As a result, the court enjoined further construction on the project until an adequate EIR was compiled and considered.

The sufficiency of an EIR is a problem when only one agency is involved; when two or more agencies must issue an entitlement, the problem takes a quantum leap in complexity. Assembly Bill 889 adopts the lead agency approach in attempting to solve this problem. The lead agency, defined as the "public agency which has the principal responsibility for carrying out or approving a project" subject to the EQA, is to assume responsibility for making the threshold determination on the project's environmental impact and, if necessary, for compiling and preparing an EIR on the project. While the non-lead agency has the right to be consulted by and submit comments to the lead agency, it does not have authority to prepare an EIR on the project. Disputes over which agency is to be the lead agency are to be settled by the Office of Planning and Research.

This lead-agency solution to the problem may be a costly one from the viewpoint of informing the public of the environmental sacrifices a project entails. For example, when the jurisdictions of the two agencies are at the same level, e.g., planning commission of cities and counties, then one EIR on the project should suffice. However, when dif-

166. *Id.* at 705, 104 Cal. Rptr. at 202.
167. *Id.* See also Environmental Defense Fund v. Coastside County Water District, 28 Cal. App. 3d 512, 513, 104 Cal. Rptr. 714 (1st Dist. 1972).
168. For example, a subdivision map may be subject to approval by the State Real Estate Commissioner and the local governing body. See Cal. Bus. & Prof. Code §§ 11000 et seq. (West 1964).
174. Under NEPA, failure to have the EIS reviewed by all federal agencies that have jurisdiction over the project renders the EIS inadequate. See Monroe County Conservation Council v. Volpe, 4 ERC 1886, 1888 (2d Cir. 1972).
ferent levels of government are involved, the same EIR may not be sufficient since different information may be required and the opportunity for constructive public scrutiny and criticism by opponents of the project may not be the same. For example, if the state's Real Estate Commissioner compiles an EIR on a subdivision, it would still seem that the local entity should prepare its own version, since members of the local community may not have had an effective opportunity to articulate their views and have them incorporated into the state-level EIR. Such a deficiency was considered substantial in *Environmental Defense Fund v. Coastside County Water District.*\(^{176}\) Both *Friends*\(^{177}\) and *EDF*\(^{177}\) rate citizen participation and full disclosure as key components of an EIR.\(^ {178}\) Moreover, the threshold determination regarding the significance of the project's effect on the environment may vary depending on which agency is designated as the lead agency. For example, a state agency, removed from the project's immediate impact, may be less inclined to find that the project may have a significant effect than would a public agency closer to the project's actual implementation. Thus, "giving due consideration to the capacity of such agency to fulfill adequately the requirements" of the EQA,\(^ {179}\) it would appear improper in some instances to designate the state-level agency as the lead agency.\(^ {180}\)

Assembly Bill 889 also provides that once an EIR is compiled on a project, a subsequent EIR is necessary only when substantial changes are proposed or occur.\(^ {181}\) Thus, when renewal of an entitlement is

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175. 27 Cal. App. 3d 695, 104 Cal. Rptr. 196 (1st Dist. 1972).
176. 8 Cal. 3d at 263; 502 P.2d at 1039, 104 Cal. Rptr. at 771.
177. 27 Cal. App. 3d at 704-05, 104 Cal. App. 3d at 202-03.
178. The Resources Agency Proposed EIR Guidelines make the holding of public hearings on EIR preparation and consideration discretionary with the public agency. See *Resources Agency Proposed EIR Guidelines,* supra note 86, at 14. Permitting the formulation and scrutiny of EIRs without offering members of the public an opportunity to voice their views and criticism appears to subvert the goals of the EQA as communicated in *Friends* that the EIR should serve as a focal point of public comment and consideration of the environmental costs of a project to the community. A regulation that fails to provide for mandatory public hearings on all projects requiring an EIR may be subject to judicial challenge as inconsistent with the purposes and policies behind the EQA. See *Desert Environmental Conservation Assn. v. P.U.C.,* 8 Cal. 3d at 742-43, 505 P.2d 223, 106 Cal. Rptr. 3 (1973). However, it should be noted that public hearings are not mandatory under NEPA, See *Jicarilla Apache Tribe v. Morton,* 471 F.2d 1275 (9th Cir. 1973).
180. On the other hand, it might be argued that a state or regional agency is preferable to a local one since the former is less sensitive to local economic pressures that might cause ecological considerations to be disregarded. See, e.g., the tough prohibition on conflicts of interest in the California Coastal Zone Conservation Act of 1972, applicable to the regional and state commissions created by the Act. *CAL. PUB. RES. CODE* §§ 27230-34 (West 1972).
necessary, for example, of a business license or conditional use permit, no new EIR would be necessary unless substantial changes have occurred. The federal decisions in similar reentitlement cases, have viewed changes as significant where they have been of major ecological significance. It would appear that in virtually any questionable case an EIR should be prepared as insurance against further delays by the person seeking the reentitlement.

f. The threshold decision: "significant effect" and "environment"

The EQA, even as amended by AB 889, sheds little or no light on the meaning of the terms, "significant effect" or "environment," so crucial to the threshold decision. The majority in its modification order regards this uncertainty as necessary in order to assure the public agencies sufficient flexibility in applying the EQA to varying factual settings. In dictum, the majority suggests that an EIR will rarely be required for entitlements to construct, improve or operate an individual dwelling or small business since, in the absence of "unusual circumstances," such projects will not have a significant effect on the environment.

One federal court, interpreting the analogous problem under NEPA, set forth the criteria for determining whether a major project or action under NEPA "significantly affects the environment," including: "[S]ignificant adverse impact on natural ecology, highly controversial projects, disruption of an established community of planned development, and inconsistent with national environmental standards."

Assembly Bill 889 contemplates that the "significant effect" guidelines will be promulgated by the Secretary of Resources within 60 days after AB 889's effective date. The Secretary has proposed only vague guidelines so far, but this seems to have been done purposefully on the theory that "an iron-clad definition of significant effect is not possible because the significance of an activity may vary with the set-
ting."\textsuperscript{188} For instance, the proposed guidelines offer serious "adverse public reaction based on environmental issues" as an example of a "significant effect" that would require preparation of an EIR.\textsuperscript{180} Thus, apparently any time concerned residents express serious objections to a proposed project on environmental grounds, an EIR is necessary.

The legislature requires a finding that the project may have a significant effect, however, if any of the following conditions exist:

(a) A proposed project has the potential to degrade the quality of the environment, curtail the range of the environment or to achieve short-term, to the disadvantage of long-term environmental goals;

(b) The possible effects of a project are individually limited but cumulatively considerable;

(c) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.\textsuperscript{190}

Condition (b) set forth above is most significant in that it requires the agency to consider the project not in isolation but in connection with similar projects and their total effect on the environment. Thus, for example, if a project requires a variance for a single-family dwelling from height or setback requirements, the public agency must consider the total impact of the potential granting of variances to similarly-situated projects in the future. Condition (c) appears to be poorly drafted in that, unlike conditions (a) and (b) which address themselves to "potential" and "possible" effects, it requires an actual finding that the project will cause "substantial adverse effects."\textsuperscript{191} It is highly unlikely that at the threshold decision level a public agency will have sufficient information, comparable to that provided by an EIR, to make such a finding.

The term "environment" is not defined any better in the proposed guidelines than is "significant effect." The federal judiciary has construed the "environment" under NEPA very broadly to include such things as plant and animal life, aesthetics, population and land-use distribution, urban traffic circulation and congestion, garbage disposal, noise and other considerations affecting the quality of life.\textsuperscript{192} Assembly Bill

\textsuperscript{188} Resources Agency Proposed EIR Guidelines, supra note 86, at 11-12.
\textsuperscript{189} Id.
\textsuperscript{190} CAL. PUB. RES. CODE § 21083 (West 1972). The proposed regulations also require an EIR to be prepared whenever a project "will impact on resources of critical concern, as identified by the Office of Planning and Research, and specified in the Environmental Goals and Policies of the State adopted by the Governor . . . ." Resources Agency Proposed EIR Guidelines, supra note 86, at 12.
\textsuperscript{191} CAL. PUB. RES. CODE § 21083(c) (West 1972).
\textsuperscript{192} See, e.g., Scherr v. Volpe, 466 F.2d 1027, 1033 (2d Cir. 1972); Hanly v.
889 gives a similar broad, nonexclusive definition of "environment." Given these parameters, the focus of the threshold decision and the EIR will necessarily be broad and exhaustive indeed.

g. An adverse EIR—so what?

Assembly Bill 889, in defining the EIR, labels it as an "informational document" to be "considered by every public agency prior to its approval or disapproval of a project." The EQA contains no provision purporting to empower a public agency to disapprove a project on grounds of an adverse EIR. However, under existing statutory law, projects having an adverse EIR could be rejected or, at the very least, be required to be modified to lessen or eliminate adverse environmental consequences. For example, an adverse EIR would virtually require denial of a permit for a project subject to the jurisdiction of the regional commission recently set up by the California Coastal Zone Conservation Act of 1972. Also, a subdivider whose tentative subdivision map was the subject of an adverse EIR could find his map and project denied approval by the local public agency under provisions of the Subdivisions Map Act.

As the majority in Friends points out, the EIR offers the opportunity for increasing public participation in the decision-making process as well as for providing reliable data on the environmental consequences of the project to the public agency. The decision to approve or disapprove a project despite an adverse EIR finding remains with the governmental entity, but the courts, while not substituting their

193. CAL. PUB. RES. CODE § 21060.5 (West 1972).
194. CAL. PUB. RES. CODE § 21061 (West 1972).
195. CAL. PUB. RES. CODE § 27402(a) (West 1972).
196. CAL. BUS. & PROF. CODE § 11549.5 (West Supp. 1972). A public agency's disapproval of a project because of an adverse EIR or its requirement of modifications to minimize its adverse environmental effects may, in instances where the project's sponsor has its ability to either sell or develop the property impaired or destroyed, render the agency liable for damages for inverse condemnation. In Selby Realty Company v. City of San Buenaventura, 28 Cal. App. 3d 624, 636-37, 104 Cal. Rptr. 866 (2d Dist. 1972), the court held that a complaint stated a cause of action against the city for inverse condemnation where it was pleaded that the denial of a building permit unless certain land dedications were made rendering the developer's project consistent with the city's general plan rendered the developer's scheme of property development useless. See also Klopping v. City of Whittier, 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).
197. 8 Cal. 3d at 263 n.8, 502 P.2d at 1059 n.8, 104 Cal. Rptr. at 771 n.8.
198. No section of the EQA requires a public agency to disapprove a project if
judgment for that of the public agency,\textsuperscript{199} will require full disclosure and substantiated analysis, rather than mere conclusionary findings.\textsuperscript{200} While economic advantage may still prevail over environmental protection, governmental officials and concerned private citizens will enter the bargain with eyes wide open as to the ecological price that must be borne by present and future generations.

\textbf{CONCLUSION}

This Note has shown that the analysis offered by the supreme court in \textit{Friends of Mammoth} is unsupportable from premise to conclusion. Be that as it may the decision has given the EQA a scope and construction that will compel attention to the protection of the environment.

\textit{Friends} and its contemporary counterpart at the Court of Appeals level, \textit{EDF},\textsuperscript{201} facilitate the procedural mechanisms for challenging projects that may have an adverse effect on the environment. Although opponents of environmentally damaging projects must still overcome standing problems,\textsuperscript{202} the need to exhaust administrative remedies has been considerably eased.\textsuperscript{203}

\footnotesize
\begin{itemize}
\item \textsuperscript{199} 8 Cal. 3d at 263 n.8, 271, 502 P.2d at 1059 n.8, 1065, 104 Cal. Rptr. at 771 n.8, 777. \textit{See also} Environmental Defense Fund v. Coastside County Water District, 27 Cal. App. 3d at 705, 104 Cal. Rptr. at 202. Challenges to the public agency’s decision can be made only if there was a “prejudicial abuse of discretion,” established where “the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.” CAL. PUB. RES. CODE § 21168.5 (West 1972). If in the future EIRs are merely compiled and ignored by public agencies, then perhaps the EQA should be amended to prohibit an agency from approving an entitlement for a project, in light of an adverse EIR, where the project’s adverse environmental effects are substantial and avoidable, or at the very least, require modifications where such effects are susceptible to mitigation measures at reasonable cost to the entitlement-seeker. Compare the approach of a federal court under NEPA in reviewing an EIS on its merits. Jicarilla Apache Tribe v. Morton, 471 F.2d 1275, 1279 (9th Cir. 1972) (arbitrary—abuse of discretion standard of review).
\item \textsuperscript{200} 8 Cal. 3d at 263 n.8, 271, 502 P.2d at 1059 n.8, 1065, 104 Cal. Rptr. at 771 n.8, 777.
\item \textsuperscript{201} 27 Cal. App. 3d at 705, 104 Cal. Rptr. at 202.
\item \textsuperscript{202} \textit{See}, e.g., Sierra Club v. Morton, 405 U.S. 727 (1971); San Francisco Tomorrow v. Romney, 342 F. Supp. 77 (N.D. Cal. 1972).
\item \textsuperscript{203} 8 Cal. 3d at 267, 502 P.2d at 1062, 104 Cal. Rptr. at 774. Also, the procedural means for challenging adverse administrative action, \textit{i.e.}, writ of administrative mandamus \textit{[CAL. CODE OF CIV. PRO. § 1094.5 (West Supp. 1972)]} have been considerably facilitated by a substantial relaxing of the bond requirements. \textit{See} Environmental Defense Fund v. Coastline County Water District, 27 Cal. App. 3d at 705, 104 Cal. Rptr. at 202 (1st Dist. 1972). \textit{See also} National Resources Defense Council v. Grant, 4 ERC 1659 (4th Cir. 1972).
\end{itemize}
Friends sets an important posture for the California judiciary in the years to come in the enforcement of environmental legislation—a posture of judicial activism in giving a broad liberal construction to the EQA and similar remedial environmental legislation.

Jack H. Kaufman, Jr.

C. Liability for Precondemnation Announcements

Klopping v. City of Whittier. Property owners Klopping and Sarff brought suit in inverse condemnation, alleging that unreasonable delay between the defendant city's public announcement of plans to condemn and its institution of condemnation proceedings resulted in the loss of rental income for which they were entitled to compensation. The supreme court concluded that when the condemnor acts unreasonably by prematurely announcing condemnation plans or excessively delaying condemnation proceedings the owner must be allowed to prove his damages even when the unreasonable acts do not constitute a de facto taking. In the process of reaching this conclusion, the court approved, but did not apply, the concept of "condemnation blight."

In May of 1965, the City of Whittier officially expressed its intention to commence condemnation proceedings for the formation of a parking district. It was not until November that condemnation lawsuits to acquire the property for the district were instituted. Faced with legal opposition to assessments necessary to establish the district, the City authorized dismissal of the condemnation suits in July of 1966, declaring it would reinstitute the proceedings in the event assessment objections were overcome. Klopping and Sarff filed suit in July, 1967, alleging that the City's announced intention to condemn, made prior to the institution of proceedings, had caused a decline in the fair market value of their property. Plaintiffs sought damages for

1. 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972) (Mosk, J.) (unanimous decision).
2. Id. at 51-52, 500 P.2d at 1355, 104 Cal. Rptr. at 11.
3. Id. at 45, 500 P.2d at 1350, 104 Cal. Rptr. at 6.
6. Both plaintiffs filed claims with the city for damage resulting from the combined effect of the precondemnation announcement, the abandonment of the condemnation proceeding and the announcement that the proceeding would be reinstated when feasible. Rejection of the claims precipitated these suits.
this diminution in value as measured by the loss of rental income.\textsuperscript{7} The City's demurrers to the suits were sustained and both suits were dismissed without leave to amend regarding matters prior to the dismissal of the original condemnation proceedings, but plaintiffs were permitted to amend concerning matters occurring thereafter. This plaintiffs declined to do, and the suits were dismissed. The court of appeal affirmed the dismissal, stating that plaintiffs' argument was based upon a condemnation blight theory, which the California cases had "rejected."\textsuperscript{8}

I. POSSIBLE THEORIES OF RECOVERY

Three possible theories support plaintiffs' claims for damages. First, they could have alleged that the condemning authority had taken actual possession of plaintiffs' property prior to filing suit in eminent domain; under this theory of de facto taking, plaintiffs would be entitled to calculate damages based on the date of the "actual" taking.\textsuperscript{9} Alternatively, plaintiffs could have argued that the publicity surrounding the anticipated condemnation caused a decline in market value; under this "condemnation blight" theory, the condemning authority would be unjustly benefited unless plaintiffs were allowed to calculate damages on the basis of market value at the time of taking.\textsuperscript{10} Finally, plaintiffs could argue, generally, that they had been injured and were entitled to "be made whole."\textsuperscript{11}

a. The de facto taking theory

The facts of this case made successful argument for a de facto taking improbable, as the California courts have consistently stressed that plaintiffs must show overt oppressive acts by the taking authority. Typical of a successful suit for de facto taking is \textit{Jacobson v. Superior Court}.\textsuperscript{12} There the condemnor, the Petaluma Municipal Water District, proposed to conduct test bores on the condemnee's property by sinking six-foot-diameter pits to a depth of fifteen feet, drilling 150 feet into the earth, and trampling the landowner's crops. The court held such acts constituted a taking and not a mere survey of the property.\textsuperscript{13}

\begin{itemize}
  \item \textsuperscript{7} 8 Cal. 3d at 46, 500 P.2d at 1351, 104 Cal. Rptr. at 7.
  \item \textsuperscript{8} Klopping v. City of Whittier, 100 Cal. Rptr. 363, 365 (2d Dist. 1972) (deleted from 23 Cal. App. 3d upon reversal and remand by the supreme court).
  \item \textsuperscript{9} 4 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 12.3151(5) (3d ed. rev. 1971) [hereinafter cited as NICHOLS].
  \item \textsuperscript{10} \textit{Id.}
  \item \textsuperscript{11} \textit{See, e.g.}, Jacksonville Expressway Auth. v. Henry G. Du Pree Co., 108 So. 2d 289, 292 (Fla. 1958).
  \item \textsuperscript{12} 192 Cal. 319, 19 P. 986 (1923).
  \item \textsuperscript{13} \textit{Id.} at 328, 219 P. at 990.
\end{itemize}
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The substantiality of such overt acts is another important criterion for a finding of de facto taking. In Breidert v. Southern Pacific Co., 14 an inverse condemnation proceeding, the plaintiffs were deprived of use of an intersecting street which turned their street into a cul-de-sac. The court held that because plaintiffs had alleged “substantial impairment of the . . . right of access,” their pleading was sufficient to withstand defendant’s general demurrer.16 In arriving at its conclusion, the court emphasized that the alleged damage “must be more than formal. It must be a true loss; it must be substantial . . . .”16

Severe legal restraint—such as oppressive height restrictionsor arbitrary and restrictive land-use regulation—has also been recognized in California as constituting a de facto taking.

Not only were the Kopping facts inappropriate for finding a de facto taking, the measure of damage sought was inconsistent with such a theory. In a de facto taking, “the owner claims his property has been taken on the earlier date; thus all decline in value after that date is chargeable to the condemner . . . [including] damages wholly unrelated to the precondemnation activity of the public agency.”19 In Kopping, only recompense for the diminution in value resulting from the precondemnation publicity and unreasonable delay was sought from the City; plaintiffs were willing to bear personally any decline in market value attributable to other factors.20

In rejecting the applicability of the de facto taking to Kopping, the court reaffirmed its earlier decisions in Jacobson and Breidert that “before a de facto taking results there must be a ‘physical invasion or direct legal restraint.’ ”21

15. 61 Cal. 2d at 661, 394 P.2d at 720, 39 Cal. Rptr. at 904.
16. Id. at 668, 394 P.2d at 725, 39 Cal. Rptr. at 909. Breidert represents a retrenchment from a more permissive attitude towards recovery for loss of access to intersecting streets. See Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943).
18. Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (2d Dist. 1958). It should be noted that this case did not entail payment of compensation, as did both Peacock and Sneed but invalidated the ordinance as “arbitrary” and “discriminatory.” Id. at 462-63, 327 P.2d at 15. See note 17 supra.
19. 8 Cal. 3d at 46, 500 P.2d at 1351, 104 Cal. Rptr. at 7.
20. Id. at 47, 500 P.2d at 1351, 104 Cal. Rptr. at 7.
21. Id. at 46, 500 P.2d at 1351, 104 Cal. Rptr. at 7. The court quotes from City of Buffalo v. Clement Co., in which the New York court of appeals rejected the plaintiff’s argument that a three-year delay between the announcement of a redevelopment program encompassing plaintiff’s property and the institution of suit in con-
b. The condemnation blight theory

Condemnation blight is defined by the Klopping court as the decline in market value due to the adverse impact of governmental condemnation plans upon a general area. The court concluded that condemnation resulted in such a restraint on the use of plaintiff's property as to amount to a taking. Noting that the company planned to move in any event as its old quarters were inadequate, the court stated that "to hold that there can be a de facto appropriation absent a physical invasion or direct legal restraint would . . . be to do violence to a workable rule of law." 28 N.Y.2d 241, 253, 269 N.E.2d 895, 902, 321 N.Y.S.2d 345, 356 (1971).

An unreasonable delay following announcement of condemnation plans, accompanied by acts on the part of the condemning authority discouraging productive use of the property, can amount to a de facto taking, and the court cites Foster v. City of Detroit, 254 F. Supp. 655 (E.D. Mich. 1966), affd, 405 F.2d 138 (6th Cir. 1968), as an example of de facto taking. In Foster, the city commenced condemnation proceedings in 1950, abandoned them in 1960 and then again filed suit in 1961. During the decade ensuing between the initial and the final proceedings, the value of the condemnee's property declined drastically as tenants (under city pressure) vacated, vandals looted the buildings, and age diminished the soundness of the structures. The market value of the buildings in 1963, when finally acquired by the city, was but a fraction of their original value thirteen years before. The district court held that the city's actions "which substantially contributed to and accelerated the decline in value of the plaintiffs' property constituted a 'taking'" prior to the date when condemnation proceedings were re instituted in 1961. 254 F. Supp. at 665. The court chose lost rentals as an appropriate measure of damages, following In re Urban Renewal, Elmwood Park Project, 376 Mich. 311, 136 N.W.2d 896 (1965). See also Cleveland v. Carcione, 118 Ohio App. 525, 190 N.E.2d 52 (1963). Cf. In re Appropriation for Highway Purposes of Lands of Goldflies Storage & Moving Co., 18 Ohio App. 2d 116, 247 N.E.2d 315 (1969).

The plaintiffs in Klopping had eschewed a de facto taking theory, conceding that the taking occurred as provided by law, with the issuance of the summons, 8 Cal. 3d at 46-47, 500 P.2d at 1351, 104 Cal. Rptr. at 7, thus distinguishing their case from Foster.

22. 8 Cal. 3d at 44-45, 500 P.2d at 1350, 104 Cal. Rptr. at 6. The New York Court of Appeals, in City of Buffalo v. Clement Co. contrasts blight with de facto taking. The latter is "an out and out appropriation of property" whereas the former "relates more properly to certain affirmative value-depressing acts on the part of the condemning authority, requiring only that evidence be received of value prior to such acts in an effort to arrive at just compensation . . . [The concepts] differ only insofar as one involves essentially the rules of evidence." 28 N.Y.2d at 254, 269 N.E.2d at 902-03, 321 N.Y.S.2d at 356. See note 21 supra.

The opposite of condemnation blight is project enhancement. Project enhancement is explored in Merced Irrigation Dist. v. Woolstenhulme, 4 Cal. 3d 478, 483 P.2d 1, 93 Cal. Rptr. 833 (1971). In this case the condemnee contended that her property must be valued as enhanced by the proposed recreational development of Lake McClure, for which development the District had condemned her land. The court distinguished three types of market enhancement attributable to a government project: (1) the increased value of property known to lie within the project; (2) the value increase of property expected to be condemned due to speculation based upon the anticipated taking; and (3) the increased value of property expected to lie outside the project, due to proximity to the project. Id. at 490, 483 P.2d at 8, 93 Cal. Rptr. at 840. In the first two situations, the landowner is not entitled to be recompensed for the enhanced value. As to the last category, the court held "that increases in value, attrib-
"[i]n the case at bar . . . the precondemnation publicity complained of consisted of announcements directly aimed at plaintiffs’ properties and not at an undesignated area. We therefore are not concerned here with blight . . . ." 23 In so concluding, and by “disapproving”24 Atchison, Topeka & Santa Fe Ry. v. Southern Pacific Co.,25 the court resolved a conflict in court of appeal decisions as to whether or not California recognizes the theory of condemnation blight.26

In Atchison the court rejected, as an invitation to speculation, the plaintiff's argument that a publicly announced development plan encompassing its land “stigmatized” the property and that a just measure of compensation must disregard the resultant decline in value: “The market value is an effect and we are not governed by the cause that brings it about in order to determine it.”27 It was of the opinion that San Diego Land etc. v. Neale,28 holding that enhancement in value attributable to the condemnor's activities could not be considered, demanded that the detrimental effects of a condemnor's activity also be ignored and no evidence permitted as to their impact.29

This conclusion Klopping denounced as the “converse” of the correct rule, stating that if “increases due to precondemnation publicity should be disregarded, it follows that . . . decreases are likewise to be disregarded” and this is possible "only by allowing testimony as to

utable to a project but reflecting a reasonable expectation that property will not be taken for the improvement, should properly be considered in determining 'just compensation.'” Id. at 495, 483 P.2d at 12, 93 Cal. Rptr. at 844. General enhanced value of land near a proposed project “is a legitimate element of . . . 'fair open market value.'” Id. at 492, 483 P.2d at 10, 93 Cal. Rptr. at 842; and an accurate measure of what the landowner has actually lost, id. at 494, 483 P.2d at 11, 93 Cal. Rptr. at 843. The Merced case is discussed in 60 CALIF. L. REV. 949 (1972).

23. 8 Cal. 3d at 45, 500 P.2d at 1350, 104 Cal. Rptr. at 6.
24. Id. at 49-50, 500 P.2d at 1353, 104 Cal. Rptr. at 9.
27. 13 Cal. App. 2d at 517, 57 P.2d at 581.
29. 13 Cal. App. 2d at 518, 57 P.2d at 581. The first and second appellate districts adhered to this rule. In Community Redevelopment Agency v. Henderson, 251 Cal. App. 2d 336, 59 Cal. Rptr. 311 (2d Dist. 1967), the trial court refused to allow the condemnee to cross-examine the condemnor's witness on aspects of a proposed redevelopment project plan. The court of appeals affirmed, holding that “[s]uch inquiry would have elicited evidence bearing upon the depreciation or enhancement of defendant's property as a result of the redevelopment. The challenged ruling was not improper . . . .” Id. at 343, 59 Cal. Rptr. at 315. Similarly, the court of appeals in People v. Lucas, 155 Cal. App. 2d 1, 317 P.2d 104 (1st Dist. 1957), affirmed the trial court's ruling that the condemnor's witness could not be asked on cross-examination whether newspaper reports of an impending highway development might not have depreciated the value of the condemnee's land. Id. at 6-7, 317 P.2d at 106-07.
what decline . . . was due to any announcements . . . .” The court explicitly endorsed the two appellate court decisions, *People ex rel. Dept. of Public Works v. Lillard*31 and *Buena Park School Dist. v. Metrim Corp.*,32 that recognized a condemnation blight concept.33 However, so as not to “deter public agencies from announcing sufficiently in advance their intention to condemn” the court restricted the condemnation blight theory to “unreasonable” delays by the taking authority.34

The court very briefly disposed of the incidental damages theory, stating that loss of rental income is directly related to fair market value “and hence is distinguishable from such traditional incidental damages as . . . moving expenses.”35

II. THE REMEDY

The court’s ultimate conclusion poses the greatest difficulties. Having explicitly stated that the facts did not establish condemnation blight,36 the court then endorsed the two appellate court condemnation blight cases, and building upon their reasoning held that the plaintiffs must, upon remand, be allowed to establish a decline in market value of their properties attributable to unreasonable conduct of the condemnor prior to the institution of condemnation proceedings.37

Justice Mosk did purport to find an analogous remedy in recently enacted Code of Civil Procedure section 1243.138, which provides that

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30. 8 Cal. 3d at 48, 500 P.2d at 1352, 104 Cal. Rptr. at 7.
31. 219 Cal. App. 2d 368, 33 Cal. Rptr. 189 (3d Dist. 1963). Here, the trial court sustained the condemnor’s objection to a question posed to its valuation witness by the condemnee—whether it was not true that “[f]or the past ten years the freeway has been threatening to take these access openings and condemn more property . . . .” Although it affirmed the ruling, the court of appeals did so only because no proper foundation had been laid. *Id.* at 377, 33 Cal. Rptr. at 194.
32. 176 Cal. App. 2d 255, 1 Cal. Rptr. 250 (4th Dist. 1959). The condemnee had subdivided and graded its land; had already graded, though not paved, roads; and had brought equipment and materials to the site in preparation for the laying of sewage lines when the condemnor instituted proceedings. The trial court permitted the condemnee to establish the value of its property for subdivision purposes, although the condemnor had hastened to institute proceedings before the landowner could file a subdivision map and thus it was a legal impossibility to subdivide. Holding that the trial court had committed no error, the court of appeals stated that “the jury should disregard not only the fact of the filing of the case but should also disregard the effect of steps taken by the condemning authority toward that acquisition.” *Id.* at 259, 1 Cal. Rptr. at 153.
33. See 8 Cal. 3d at 45, 500 P.2d at 1350, 104 Cal. Rptr. at 6.
34. *Id.* at 51-52, 500 P.2d at 1354, 104 Cal. Rptr. at 11.
35. *Id.* at 54 n.7, 500 P.2d at 1357 n.7, 104 Cal. Rptr. at 13 n.7.
36. See text accompanying note 23 supra.
37. 8 Cal. 3d at 52, 500 P.2d at 1355, 104 Cal. Rptr. at 11.
38. CAL. CODE CIV. PRO. § 1243.1 (West Supp. 1972). Section 1243.1 provides, in pertinent part:

In any case in which a public entity . . . which possesses the power of eminent domain establishes by resolution or ordinance the necessity to acquire
a property owner may bring an action in inverse condemnation if, within six months of a declaration of necessity, the condemning authority has not brought an action in eminent domain. This section further provides that additionally—or alternatively—to an award of fair market value, damages may be awarded. This “obviously contemplates” an award of lost rental income, whether or not the property is ever taken, Justice Mosk concluded.\footnote{9}

Klopping and Sarff sought to prove loss of rental income, which, the court reasoned, was “an appropriate criterion for measuring fair market value.”\footnote{40} While it is true that rental income has long been an element to be taken into consideration in ascertaining fair market value,\footnote{41} the capitalization of rental income has not heretofore been

\begin{quote}
39. 8 Cal. 3d at 57, 500 P.2d at 1359, 104 Cal. Rptr. at 15.

40. Id. at 53, 500 P.2d at 1356, 104 Cal. Rptr. at 12. The court cites Luber v. Milwaukee County, 47 Wis. 2d 271, 177 N.W.2d 380 (1970), noted in 1971 Wis. L. Rav. 657. In Luber, the Milwaukee County Expressway Commission condemned the plaintiff's property three years after making public its plans to do so. Due to the impending condemnation the plaintiffs lost one of their two tenants and were unable to relet the premises occupied by him—normally rented at $350 a month. The plaintiffs claimed damages of $11,200—thirty-two months' lost rental income—but were awarded $2,100 under a Wisconsin statute providing that “[n]et rental losses resulting from vacancies during the year preceding the taking” were compensable, and limiting even this recovery to an amount exceeding the average rental losses for a four-year period preceding condemnation. Act of September 15, 1961, ch. 486, § 18 [1961] Wis. Laws 485, \textit{as amended}, Wis. Stat. § 32.19(4)(c). The Wisconsin court held that “one's interest in rental loss is such as is required to be compensated under the "just compensation' clause” and that “[t]he rule making consequential damages \textit{dammum absque injuria} is, under modern constitutional interpretation, discarded . . . .” 47 Wis. 2d at 283, 177 N.W.2d at 386.

41. California recognizes three methods of valuation.
\end{quote}

I. Market data:

[A] witness may take into account as a basis for his opinion \cite{[on the value of condemned property]} the price and other terms and circumstances of any sale or contract to sell and purchase which included the property or property interest being valued or any part thereof if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation . . . .

\textbf{CAL. EVID. CODE} § 815 (West 1968). A witness is authorized to take into consideration similar data as regards “comparable property” which must be:
deemed alone conclusive of market value. In California, it is employed in conjunction with the market data and replacement methods of calculation.

Nonetheless, capitalization of rental income has been described as one of the better tests of property value, and the court is correct in pointing out that "[i]f as a result of precondemnation statements rental income is lost, the anticipated rental income would be diminished and a decline in the fair market value would follow." located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued.

CAL. EVID. CODE § 816 (West 1968).

II. Capitalization of income: This is the method referred to by the Klopping court. When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the rent reserved and other terms and circumstances of any lease which included the property or property interest being valued or any part thereof which was in effect within a reasonable time before or after the date of valuation.

CAL. EVID. CODE § 817 (West 1968). Again, similar data may be considered as regards "comparable property." CAL. EVID. CODE § 818 (West 1968). It is also provided:

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon (as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon).

CAL. EVID. CODE § 819 (West 1968).

III. Replacement cost less depreciation:

When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the value of the property or property interest being valued as indicated by the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the property or property interest for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered.

CAL. EVID. CODE § 820 (West 1968).

Generally, such evidence of income is admissible as throwing light on market value, but does not alone determine that value. P. NICHOLS, supra note 9, § 12.312[1]. In de Freitas v. Town of Suisun City, 170 Cal. 263, 149 P. 553 (1915), the trial court permitted a witness to testify to the sum he would pay for certain property given that the market value of crops grown upon such property in the previous year had been $1200. In reversing the trial court, the supreme court explained that two errors had been committed—gross income was employed in the valuation (thus incorporating irrelevant factors such as the skill and industry of the property owner and the market for the crop grown in a given year) and the result was deemed conclusive. The court said that "[g]ross income does not determine value. . . . The actual market value is the thing to be determined and while net revenue should be considered, it does not, in general, furnish a conclusive measure of such market value." Id. at 265-66, 149 P. at 555.


Nichols, supra note 9, § 12.312[3].

8 Cal. 3d at 53, 500 P.2d at 1356, 104 Cal. Rptr. at 12.
This remedy is not, however, a holding upon the merits of plaintiffs' cases. The dismissal of Klopping's suit was affirmed as he failed to claim loss of rental income when the City's second condemnation action was tried. The judgment dismissing Sarff's suit was reversed and the case remanded. Sarff had lost his property through foreclosure prior to the filing of the second condemnation suit, but was to be permitted to establish loss of rental income following the pre-condemnation announcements and, if feasible, damages for the foreclosure which, Sarff argued, could have been avoided had he been able to derive income from his property.

III. OTHER ISSUES

Additional complexities were raised by defendant's argument that Civil Procedure section 1255a required that plaintiffs recover no more than "costs and disbursements" as provided by subsection (c) of that statute. This argument the court dismissed by pointing out that section 1255a does not speak to damages constitutionally due a landowner whose property is taken or damaged. Turning to construction of the statute, the court stated that it is designed to protect public entities which had commenced condemnation proceedings from having to take property which they no longer needed. To prevent abuses of the right of abandonment thus granted, the statute provides in subsection (b) that, when detrimental reliance upon condemnation proceedings has resulted, the landowner may have the abandonment set aside, and in subsection (c) that, when there has been no detrimental reliance, the landowner may be compensated for costs incurred in anticipation of trial. Further, the court—citing City of Whittier v. Aramian—noted that it was the action, not the project, which must be abandoned and that any losses consequential to pre-condemnation announcements occurred regardless of whether proceedings might later be brought.

46. Id. at 58-59, 500 P.2d at 1360, 104 Cal. Rptr. at 16.
47. Id.
48. The Code of Civil Procedure provides:
Upon the denial of a motion to set aside . . . abandonment [of condemnation proceedings] or, if no such motion is filed, upon the expiration of the time for filing such a motion, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their recoverable costs and disbursements . . . .
49. 8 Cal. 3d at 56, 500 P.2d at 1358, 104 Cal. Rptr. at 14.
50. Id.
52. Id.
This explication of the statute accords with accepted construction of its purpose and scope. It has been held that the legislature was concerned solely with abandonment of condemnation proceedings and the costs incident thereto and the statute addresses no other subject. Section 1255a imposes "a new and different obligation" upon the condemnor abandoning proceedings in eminent domain who would otherwise have borne a constitutionally-mandated obligation of compensation for property taken. The costs awarded by section 1255a are purely statutory in origin, having no constitutional basis. The possibility that a property owner might have an action for damages to his property resulting from the activities of the condemnor does not preclude an abandonment of proceedings by the condemnor. No costs whatsoever are recoverable unless suit is filed and the action subsequently abandoned as it is the purpose of the statute to compensate a property owner for expenses incurred as a result of the would-be condemnor's failure to prosecute the action to its conclusion.

It is clear from the facts in Klopping that it was only the first condemnation suit, filed November 10, 1965, which was abandoned and for that suit plaintiffs had—as a result of the Aramian decision—already been awarded costs. The City filed its second suit on August 21, 1969, and this suit was prosecuted to completion. The measure of damages for this taking was the subject of the appeal in Klopping. There could be little question under these facts that no abandonment had occurred. Subsection (c) of section 1255a comes into

57. La Mesa-Spring Valley School Dist. v. Otsuka, 57 Cal. 2d 309, 317-18, 369 P.2d 7, 12, 19 Cal. Rptr. 479, 484.
59. 8 Cal. 3d at 43, 55, 500 P.2d at 1348, 1358, 104 Cal. Rptr. at 4, 14.
60. See County of Los Angeles v. Hale, 165 Cal. App. 2d 22, 331 P.2d 166 (2d Dist. 1958), in which the County originally sought to condemn a portion of defendant's property for road-widening purposes but subsequently determined that all of the property was required. It thus moved to dismiss the action under Code of Civil Procedure section 581 [CAL. CODE CIV. PRO. § 581 (West 1967)] and immediately thereafter re instituted proceedings in eminent domain against the entire tract. The property owner contended that the original dismissal constituted an abandonment under § 1255a. The court disagreed. "The county now owns the land . . . so it can hardly be said that the county abandoned its efforts to acquire [it]." 165 Cal. App. 2d at 27, 331 P.2d at 169.
operation only when the proceedings in condemnation are dismissed—(1) "[u]pon the denial of a motion to set aside . . . abandonment"—a motion which would be made only by the condemnee—or (2) in the absence of such motion, "on motion of any party." The City's second suit was never dismissed.

Thus, the City's argument regarding section 1255a not only was addressed to an issue beside the legal point—since the court was posed a constitutional issue by the appellants—but was irrelevant on the facts.

CONCLUSION

This decision should serve as a spur to public authorities in the conduct of their condemnation proceedings. The public fisc will no longer enjoy any windfalls as a result of delayed suit following the announcement of an intent to condemn.

The court's dicta endorsing the concept of condemnation blight may yet prove to be the most important aspect of this case, however. And its dicta regarding section 1243.1 will inevitably affect future application of that statute. The court not only has stated that the statute "obviously contemplates" reimbursement for loss of rental income at such time as the property is actually taken, but has further construed subdivision (3) as implying that this remedy is available "whether condemnation proceedings are abandoned or whether they are instituted at all." This last conclusion is by no means self-evident upon a cursory reading of the statute.

Hence, principles contained in dicta and a holding not on the merits are Klopping's not inconsiderable contribution to California's condemnation law.

Dan Leer

D. Notice Requirements to Parties Outside of City's Zoning

Scott v. City of Indian Wells. The California Supreme Court considered, in Scott, an issue of first impression in the state. The City of Indian Wells had, after public hearings, granted a conditional use permit for the construction of a planned development of 675 condominium units,
90 individual lots, two golf courses, tennis courts and clubhouses on a parcel that formerly was zoned for single story, single family residences. The development was to be located on a parcel of land that abutted the city line. The city sent notice of the proposed zoning changes and public hearing to all the property owners within the city limits whose land was within 300 feet of the planned development; it did not, however, believe it necessary to extend notice to those who owned property within 300 feet of the proposed project whose property was outside the city limits. The city failed to notify owners outside the city even though its own ordinances arguably required notice to all property owners within 300 feet of the project irrespective of the location of the property inside or outside the city boundaries.

The plaintiffs were the class of property owners whose property was located within 300 feet of the development, but to whom no notice had been provided because their property was outside the city limits. They alleged that the lack of notice made the granting of the permit defective and that the issuance of the permit could not be substantively upheld because the city had failed to consider the effects of the development on the outsiders' land.

The city's general and specific demurrers to the complaint were sustained by the trial court and the complaint was dismissed. The supreme court reversed, holding that the plaintiffs were entitled to notice to the extent given to city residents and had standing to challenge the zoning decisions which affected their property.

In providing for notice and standing to adjacent landowners who were not city residents, the supreme court recognized, as it has in other cases, the principles of regional economics and external locational effects. External effects are the costs and benefits an economic activity imposes upon locations other than the site upon which the activity

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2. Id. at 544, 492 P.2d at 1138, 99 Cal. Rptr. at 746. The facts as summarized by the court were from plaintiff's allegations. Since the case was on appeal from judgment entered after sustaining defendant's demurrer, the court treated the allegations as true.

3. Id.

4. Id. at 545, 492 P.2d at 1139, 99 Cal. Rptr. at 747.

5. It was never determined by the court whether the Indian Wells ordinances did so provide. See 6 Cal. 3d at 545 n.3, 492 P.2d at 1139 n.3, 99 Cal. Rptr. at 747 n.3.

6. Id. at 544, 492 P.2d at 1138, 99 Cal. Rptr. at 746. Even though Mr. and Mrs. Scott had received actual notice by mistake, the court treated them as having received no notice. Id. at 550, 492 P.2d at 1142, 99 Cal. Rptr. at 750.

7. Id. at 545, 492 P.2d at 1139, 99 Cal. Rptr. at 747.

8. Id. at 545-46, 492 P.2d at 1139, 99 Cal. Rptr. at 747.

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

10. See People v. County of El Dorado, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971); Orange County Air Pollution Control Dist. v. Public Utilities Comm'n, 4 Cal. 3d 945, 484 P.2d 1361, 95 Cal. Rptr. 17 (1971).
itself is located. These effects pose a particular problem in local government decision-making; the plethora of local governments in most metropolitan areas often creates situations in which the costs of decisions made by one municipality are borne by another or benefits are received by a municipality with no payment by it to the body providing these benefits.\textsuperscript{11} For example, the downstream city bears the costs of pollution of the stream caused by upstream cities, and when the downstream city decides to clean up the river, the cities further downstream receive a free benefit.\textsuperscript{12} It is in recognition of this problem that there is a movement towards regional governments and area-wide special districts that can equalize the costs and benefits created by projects with regional effects.

To date, however, there has not been significant regional planning of zoning policy. In many areas, zoning has become a means for a municipality to attempt to assure that costs fall upon other locations in the region while it keeps all of the benefits for itself. Such beggar-thy-neighbor policies can be most effective at the border of a municipality, since it is easy to plan for imposing the costs of a decision on the adjoining city while keeping many of the benefits at home. It is in this context of metropolitan fragmentation and conflict that the court in \textit{Scott v. City of Indian Wells} attempted to provide rules for resolving disputes.

I. NOTICE

The notice issue, although never dealt with previously by the supreme court in this context, was easily handled. First, the court catalogued the cases from other jurisdictions that, on similar facts, imposed a requirement that the views of affected nonresident property owners be heard.\textsuperscript{13} The court then considered due process requirements.


\textsuperscript{12} The water pollution example is easy to see, but almost any economic activity has external costs and benefits. In fact, the implicit assumption on which most zoning is based is that what is done on one property will have an effect on neighboring properties. Problems related to external effects become acute in urban areas; the large number of local governmental agencies makes it difficult to provide an institutional procedure to consider external costs and benefits which accrue to people outside the municipality in which the economic activity is located. If no mechanism is provided, when each local government acts in its own economic interests a regionally irrational outcome may result. City \textit{A} upstream will not want to clean up the river because city \textit{B} downstream will receive some of the benefits of the clean-up without cost. \textit{City B} will not clean up the river because it will be incurring the costs of cleaning up part of \textit{A}'s pollution and giving free benefits to \textit{C} downstream—hence, the need for a regional institution to handle the problem.

\textsuperscript{13} 6 Cal. 3d at 547-48, 492 P.2d at 1140-41, 99 Cal. Rptr. at 748-49.
Zoning does not deprive an adjoining landowner of his property, but it is clear that the individual's interest in his property is often affected by local land use controls, and the "root requirement" of the due process clause is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest . . . justifies postponing the hearing until after the event. . . ."

Arguably, this due process rationale requires notice to all persons who will be affected by a zoning decision. However, there are obvious practical limits to this argument. First, it would be virtually impossible for a city to foresee all the external effects of a project. Secondly, elaborate examination is costly. The court's decision, however, stopped far short of this practical limit. The court held that the notice requirement only extends as far as the notice required to be given to similarly situated city residents. In this case, that meant 300 feet from the boundary of the land being zoned—the limits of the notice prescribed by the Indian Wells ordinance.

The court's solution fails to measure up to the breadth of the due process premise the court had asserted. That is, there is a right to notice before a significant property interest is affected. Many zoning decisions have easily predictable external effects that extend much further than the 300 foot notice requirement of the Indian Wells ordinance. For example, any regional shopping center will create traffic problems for an area that extends beyond the 300 foot limit. Almost any project that is the destination point for many trips will have similarly broad effects. Certain kinds of industrial or commercial facilities may also cause wide external effects. If foreseeable external effects extend beyond the 300 foot limit of an ordinance, the due process premise of Scott argues for a broader rule than that which the court created. Notice of pending zoning decisions should be given to all property owners whose property interest may be substantially affected by that decision, provided they can be determined at a reasonably low cost.

Recognition of this argument will create new issues in legal challenges to zoning decisions. But the issues are judicially manageable.

15. 6 Cal. 3d at 549, 492 P.2d at 1142, 99 Cal. Rptr. at 750.
16. E.g., universities, large office buildings, airports, and sports stadiums.
17. These effects are likely to include some pollution of the environment. Some examples are coal-burning electricity plants (air pollution), airports (noise pollution), and chemical plants (water pollution).
Larger projects, the ones most likely to have wide external effects, are usually required to submit with their application for zoning changes reports that evaluate the external effects of the proposed project.  

These reports would provide an adequate data base for deciding who gets notice. They would also provide a record upon which a reviewing court could later judge the adequacy of notice.

If the notice question reaches the judicial review stage, it should not become an argument over the substantive merits of a zoning decision involving a detailed analysis of a project's external effects. The court should merely examine the plaintiff's claim to determine whether the external effects are substantial as they relate to plaintiff's property. Even if the court decides that the effects are substantial, the zoning decision should only be overturned for lack of notice if it appears that the external costs are such that reasonable analysis of the project by the city administration would have discovered them. A municipality should not be made responsible for discovering external effects when the costs of such an inquiry would be unreasonable.

II. STANDING

The court in Scott also considered the standing of the plaintiffs to challenge the zoning decision. Traditionally, standing in zoning cases depended upon proof by the plaintiff of special damages. It had to be shown that the zoning policy adopted had a detrimental effect on the plaintiff's property and that effect was greater either quantitatively or qualitatively than the effects on the general community. Essentially, the plaintiff had to prove that an inordinate portion of the external

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18. A good example of the kinds of reports required of larger projects is the environmental impact statement required by the Environmental Quality Act of 1970, CAL. PUB. RESOURCES CODE §§ 21000-21151 (West Supp. 1972). The Act has been interpreted by the supreme court as applying to private projects. Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972). Friends of Mammoth was subsequently modified by the legislature in the form of Assembly Bill 889, Stats. 1972, c. 1154 (Deering).

19. No city administration should be required to know or analyze effects on property that result in problems because of the owner's idiosyncrasies. For example, if a property owner watches birds from his property, the city administration should not be required to discover that a particular zoning decision will change the flight path of the birds so that they no longer traverse the birdwatcher's land; nor should any decision be overturned by a court because of failure to discover these effects and provide notice. The cost of discovery of such idiosyncratic factual data is too high to make the effort worthwhile. It is also probable that as awareness of environmental problems increases, there will be an increasing number of situations where zoning decisions will have recognizable effects on sites a considerable distance from the locality doing the zoning. Such environmental effects might be extremely difficult for a city to predict and therefore notice should not be required.

20. See generally Renard v. Dade County, 261 So. 2d 832 (Fla. 1972), for a good discussion of the special damages doctrine in zoning cases.
costs of the zoning policy would fall upon him. This doctrine, borrowed from private nuisance law, has been largely abandoned in favor of a more liberal standard borrowed from administrative law. The Florida Supreme Court in abandoning the special damage rule recently said:

An aggrieved or adversely affected person having standing to sue is a person who has a legally recognizable interest which is or will be affected by the action of the zoning authority in question. The interest may be one shared in common with a number of other members of the community as where an entire neighborhood is affected, but not every resident and property owner of a municipality can, as a general rule, claim such an interest. An individual having standing must have a definite interest exceeding the general interest in community good share [sic] in common with all citizens.\(^{21}\)

California also does not follow the special damages approach. Under California law, any person affected by any zoning decision has standing to challenge the decision.\(^{22}\) In some cases there is statutory authority for review of an administrative decision when “any person [is] aggrieved or [is] a taxpayer affected by any decision of the administrative agency or of any governing body of a city or county.”\(^{23}\)

The Scott court's holding on the standing issue requires only that standing be given to adjoining owners.

We are satisfied that adjoining landowners who are not city residents . . . have standing to challenge zoning decisions of the city which affect their property.\(^{24}\)

This seems to be a rather narrow ground for standing. It might imply that those property owners clearly affected by a zoning decision, but whose land is not adjoining, do not have standing. But the case must be read in light of who the plaintiffs were. All were adjoining landowners who resided outside the city of Indian Wells. The issue was thus not how far away one could be and still have standing, but whether one residing outside the city had standing to sue at all. The former question is still unanswered. However, the California doctrine of an affected or aggrieved person having standing and the analysis of the economic dynamics of metropolitan regions suggest that standing should not be limited to those whose property adjoins the rezoned property.

In both the standing and notice cases, municipal boundaries should not serve to differentiate between in-city and out-of-city land-

\(^{21}\) \textit{Id.} at 837.
\(^{22}\) 56 CAL. JUR. 2D Zoning §§ 215-16 (1960).
\(^{23}\) CAL. GOV'T CODE § 50485.11 (West 1966). This provision is contained in the chapter regulating airport approach zoning.
\(^{24}\) 6 Cal. 3d at 549, 492 P.2d at 1142, 99 Cal. Rptr. at 750 (emphasis added).
owners affected essentially the same way by land use regulations on their properties. To do so would be, as the court states, "to make a fetish out of invisible municipal boundary lines . . . ."25

III. SUBSTANTIVE REVIEW

The last issue raised by Scott is what standard should be used to review the substance of zoning decisions that affect neighboring municipalities. Because the case came to the supreme court on appeal from the grant of the defendant city's demurrer, it was not necessary for the court to review the substance of the zoning decision. The court did state that the city has a duty "to consider the proposed development with respect to its effects on all neighboring property owners."26 The normal standard of review of zoning decisions is that the decision of the city will be overturned only if it is arbitrary, capricious, or an abuse of discretion.27

In economic terms it is obviously rational for a municipality to plan so that the costs of zoning determinations are imposed outside and the benefits are kept inside. But is it permissible for a city to ignore the costs its zoning decisions will impose on other communities? The mere assurance to outsiders that they will be heard is no guarantee that their legitimate complaints will be heeded. The language of Scott strongly suggests that a municipality may not ignore the costs it imposes on those residing out of the city.

In today's sprawling metropolitan complexes, however, municipal boundary lines rarely indicate where urban development ceases. We have come to recognize that local zoning may have even a regional impact.28

The requirement of notice and grant of standing to landowners outside the city would be fruitless if the municipality making zoning decisions did not have to account for the effects of its decisions on those landowners. The only way to assure that local zoning decisions reflect regional rationality rather than beggar-thy-neighbor policies is to require municipalities to consider on an equal basis the costs to the municipality and the costs that will fall outside the city. This requires the city to do no more than it must do in the normal case where all the costs and benefits will fall on persons and property entirely within the city limits.

25. Id. at 548, 492 P.2d at 1141, 99 Cal. Rptr. at 749. The court was quoting from the leading case of Cresskill Borough v. Dumont Borough, 15 N.J. 238, 247, 104 A.2d 441, 446 (1954).
26. 6 Cal. 3d at 549, 492 P.2d at 1142, 99 Cal. Rptr. at 750 (emphasis in original).
27. See generally 56 CAL. JUR. 2D Zoning §§ 218-20 and cases cited therein.
28. 6 Cal. 3d at 548, 492 P.2d at 1141, 99 Cal. Rptr. at 749.
One of the cases cited by the *Scott* court, *Borough of Cresskill v. Borough of Dumont*,\(^2\) presents a good example of substantive review of boundary line zoning decisions. In that case, the New Jersey Supreme Court affirmed the reversal of a borough zoning variance which allowed the construction of a shopping center on the edge of the borough. The variance was rejected by the court as spot zoning because it permitted a shopping center to be built in a residential neighborhood that had many other accessible shopping areas. The borough contended that it did not have to consider the needs or desires of residents of the adjoining town. The court rejected this approach and considered the zoning variance in light of the character of the property in the adjoining town and the shopping facilities available there. It is difficult to conceive of a different result if the shopping center was to be in the interior of the borough. All the elements considered by the court would be the same as in the actual case. The only difference in the case of a center in the interior of the city is that all the affected property is within the city limits.

Such an approach could be used to fight all zoning policies aimed at keeping benefits at home and imposing costs on other municipalities.\(^3\) For example, suburban large-lot zoning diminishes the supply of land available for multi-family dwellings (usually the only kind of housing low-income families can afford) and as a result the price of land in the city that is available for multi-family dwellings is driven up. The decision to use large-lot zoning can be seen as rational only if one ignores the resulting increase in land costs to other residents of the region. However, in a case based only upon this increased-cost theory, it is unlikely that the courts would accept the argument since the connection between the suburban zoning and city housing costs is difficult to prove.\(^3\) Still, in many zoning cases where the regional external effects are more direct, the courts, by accepting this argument, will be doing nothing more than is normally done in zoning cases in which the regional economy is not an issue. But the courts are not

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\(^2\) 15 N.J. 238, 104 A.2d 441 (1954).

\(^3\) The Pennsylvania Supreme Court has adopted a similar position in a number of cases striking down zoning that either mandates minimum lot sizes or excludes all apartment houses from a municipality. Concord Township Appeal, 439 Pa. 466, 268 A.2d 765 (1970); Girsh Appeal, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965). The theory of the Pennsylvania court was that zoning cannot be used to prevent the growth of a region from intruding upon a municipality. The factual situation in these cases was not the same as in the *Scott* case because the plaintiffs were all owners of property that was subject to the zoning regulations, but the substantive considerations are similar.

\(^3\) Although the standing doctrine is fairly liberal for challenges to zoning decisions, it does not appear to be liberal enough to allow lawsuits by plaintiffs who urge as their damage a possibly imperceptible increase in the cost of housing.
in business primarily to serve as regional governments, so the ultimate solution must lie with some form of regional decision-making structure.

CONCLUSION

Scott v. City of Indian Wells is not likely to have a large direct impact on the zoning law of California since only a small part of the zoning done by municipalities involves zoning on boundary lines. However, the regional effects and due process rationale of the case should be used to expand judicial scrutiny of zoning decisions in order to ensure that local zoning takes into consideration the region as well as the locality.

Lee Charles Rosenthal

E. Reapportionment

Legislature v. Reinecke. Article IV, section 6 of the California constitution provides that the legislature shall reapportion the state in its first session after every decennial federal census. When the legis-

1. 6 Cal. 3d 595, 492 P.2d 385, 99 Cal. Rptr. 481 (1972) (Wright, C.J.) (unanimous decision). This holding was modified in Legislature v. Reinecke, 7 Cal. 3d 92, 496 P.2d 464, 101 Cal. Rptr. 552 (1972), to permit the legislature to attempt to reapportion itself in a special session after the general election in November of 1972. However, the court reaffirmed its power to enact a plan if the legislature should fail to reapportion itself.

2. Section 6 in its entirety provides:
   For the purpose of choosing members of the Legislature, the State shall be divided into 40 senatorial and 80 assembly districts to be called senatorial and assembly districts. Such districts shall be composed of contiguous territory and assembly districts shall be as nearly equal in population as may be. Each senatorial district shall choose one Senator and each assembly district shall choose one member of Assembly. The senatorial districts shall be numbered from 1 to 40, inclusive, in numerical order, and the assembly districts shall be numbered from 1 to 80 in the same order, commencing at the northern boundary of the State and ending at the southern boundary thereof. In the formation of assembly districts no county or city and county, shall be divided, unless it contains sufficient population within itself to form two or more districts, and in the formation of Senatorial districts no county, or city and county, shall be divided, nor shall a part of any county, or of any city and county, be united with any other county, or city and county, in forming any assembly or senatorial district. The census taken under the direction of the Congress of the United States in the year 1920, and every 10 years thereafter, shall be the basis of fixing and adjusting the legislative districts; and the Legislature shall, at its first regular session following the adoption of this section and thereafter at the first regular session following each decennial Federal census, adjust such districts, and reapportion the representation so as to preserve the assembly districts as nearly equal in population as may be; but in the formation of senatorial districts no county or city and county shall contain more than one senatorial district, and the counties of small population shall
lature fails to enact a reapportionment plan at the first session after the census, the article further provides that a Reapportionment Commission shall be convened to reapportion the state.\(^3\) The first legislative session after the 1970 census ended on December 2, 1971 without the passage of a reapportionment plan. A special session, called by Governor Reagan on December 4, 1971, passed a reapportionment bill but this bill was vetoed by the Governor.\(^4\) Following the mandate of the state constitution, Lieutenant Governor Reinecke then called the Reapportionment Commission to begin deliberations.

The Governor vetoed the bill because the plan adopted by the Democrat-controlled legislature would have sharply cut into the number of legislative seats held by the Republicans.\(^5\) Since a majority of the Reapportionment Commission were Republicans, Governor Reagan may have reasoned that his party's interest would be better served by the Commission than by the Democrat-controlled legislature. In fact, during its brief deliberations, the Commission considered a Republican reapportionment plan that created safe districts for each of the 37 incumbent Republicans in the assembly.\(^6\) The Democrats were understandably unhappy with the plan and they initiated three separate lawsuits designed to withdraw power to reapportion from the Commission.

be grouped in districts not to exceed three counties in any one senatorial district; provided, however, that should the Legislature at the first regular session following the adoption of this section or at the first regular session following any decennial federal census fail to reapportion the assembly and senatorial districts, a Reapportionment Commission, which is hereby created, consisting of the Lieutenant Governor, who shall be chairman, and Attorney General, State Controller, Secretary of State and State Superintendent of Public Instruction, shall forthwith apportion such districts in accordance with the provisions of this section and such apportionment of said districts shall be immediately effective the same as if the act of said Reapportionment Commission were an act of the Legislature, subject, however, to the same provisions of referendum as apply to the acts of the Legislature. Each subsequent reapportionment shall carry out these provisions and shall be based upon the last preceding federal census. But in making such adjustments no persons who are not eligible to become citizens of the United States, under the naturalization laws, shall be counted as forming part of the population of any district. Until such districting as herein provided for shall be made, Senators and Assemblymen shall be elected by the districts according to the apportionment now provided for by law.

CAL. CONST. art. IV, § 9.

3. Id.

4. For a summary of the reapportionment bill, see NATIONAL LEGISLATURES CONFERENCE, REAPPORTIONMENT IN THE STATES 39 (1972).

5. The Republicans, who then held 37 of the 80 house seats, determined that the plan drafted by the legislature would enable them to win only 29 seats at the next election. See T. O'ROURKE, REAPPORTIONMENT, LAW, POLITICS AND COMPUTERS 91 (1972) (hereinafter cited as T. O'ROURKE). This slim volume sets out in lay language how the Republican reapportionment plan was designed. In so doing it not only demonstrates how computers can be used to effect sophisticated gerrymandering, but also how they might be used to prevent gerrymandering. Id. at 73-97.

6. For the makeup of the Commission, see note 2 supra.

7. See T. O'ROURKE, supra note 5 at 89.
In these suits, consolidated in *Reinecke*, the Democrat-controlled legislature, the Secretary of State (a Democrat), and 32 members of the United States House of Representatives (the entire Democratic caucus plus several Republican members), sought writs of mandate ordering the Commission to cease attempting to reapportion the state. The complaints alleged first, that the unsigned reapportionment bill passed by the legislature at its special session was valid and second, even if the bill were not valid, the Commission had no authority to reapportion the state.

In *Reinecke* the California Supreme Court held that the legislature's unsigned reapportionment bill was invalid. The court also held that the Reapportionment Commission does not have the power to reapportion the state. Since the Commission could not reapportion the state, and since the legislature had failed to reapportion the state, the court held that the Federal Constitution required the court to adopt a temporary plan reapportioning the state for the upcoming election. The court retained jurisdiction over the case to draft a revision of the temporary plan if the legislature failed to pass a reapportionment plan by the end of its regular 1972 session.

This note examines the reasons the court offered for its holding in *Reinecke*, and discusses the criteria the court must use under the United States Constitution to evaluate any plan adopted by the legislature. Finally, the note considers the criteria the court ought to adopt if in the future it must itself reapportion the state.

I. THE HOLDING OF REINECKE

a. The reapportionment commission

The court disposed of plaintiffs' allegation that the special session reapportionment bill was valid with appropriate abruptness. Since the California constitution provides that a bill passed by the legislature does not become law until signed by the Governor, the court held the legislature's unsigned bill was not a law. The court next held that the Commission does not have the power to reapportion the State, because the constitutional provision for its creation was inseverable from the provision that Senate districts could be apportioned other than by population, a provision which had been declared unconstitutional by the United States Supreme Court in *Jordan v. Silver*. If one were invalid,

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8. The willingness of some members of the Republican caucus to join this suit may be explained by the bipartisan agreement which had been reached on the reapportionment plan drafted for the Congressional districts.
9. CAL. CONST. art. 4, § 10(a).
10. 381 U.S. 415 (1965). The Court held article IV's provision for state senatorial districts apportioned by criteria other than population invalid under the United States Constitution. Id. at 419.
so was the other, the court reasoned. In so holding, the court claimed reliance on its prior decision in *Silver v. Brown*, but in reality it elevated a dictum in *Brown* about the inseverability of the constitutional provision to the status of a holding.

The critical section, section 6 of article IV, established the Reapportionment Commission as well as five standards to be met by any reapportionment of the state: (1) there are to be 40 senatorial and 80 assembly districts; (2) the districts are to be drawn from contiguous territory; (3) the assembly districts are to be as nearly equal in population “as may be” while the senatorial districts are not so limited; (4) in forming the assembly districts no county, or city and county, is to be divided unless it contains sufficient population to form two or more districts, and in forming senatorial districts counties are never to be divided; (5) each district is to be a single-member district. At the time of *Reinecke*, only the provision that the senate need not be apportioned on the basis of population had been found unconstitutional by the Supreme Court: in *Brown* the court had determined that the state’s population distribution necessitated abandonment of either the requirement of single-member districts or the requirement that no county, or city and county, is to be divided unless it is large enough to form two or more districts. *Reinecke*’s decision that the Commission was powerless to reapportion depended on the *Brown* court’s belief that if the voters known these criteria could not be followed, they would not have entrusted to the Commission the power to break a legislative impasse over reapportionment. This belief, as well as the court’s conclusion that it would itself apportion the state whenever the legislature failed to take on the task, certainly would have startled the voters who, in 1926, approved the amendment that is now Article IV, section 6.


12. *Brown* held only that the Reapportionment Commission was not properly called because the legislature had not as yet failed to reapportion the state after the census. The subsequent discussion of the severability of the provision that provides for the Commission from the unconstitutional reapportionment criteria in the same provision must be seen as dictum since the issue can not be said to have been before the court. As noted above, the court held that since the legislature had not failed to reapportion, the issue of the legitimacy of the Commission could not be at issue. *Silver v. Brown*, 63 Cal. 2d 270, 281, 405 P.2d 132, 140, 46 Cal. Rptr. 308, 316 (1965). In support of its argument that the provision was inseverable the *Brown* court merely asserted that the people would not have delegated the power to reapportion the state to the Commission had they known the standards set forth in Article IV, section 6 to be used by the Commission subsequently would be found to be inconsistent with the United States Constitution. No justification was given in either *Reinecke* or *Brown* for not following the established rule that when an otherwise constitutional provision may be severed from an unconstitutional provision in the same section it should be saved. See *Robinson v. Bidwell*, 22 Cal. 379 (1863). See also *Fort v. Civil Service Comm’n*, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964).
But if Brown is correct, it is equally true that these criteria are no longer binding on the legislature; yet the court did not intimate that the legislature does not, therefore, have the power to reapportion the state. The court did not make clear why the abandonment of these criteria would strip the Commission of its power to reapportion but at the same time not affect the power of the legislature.

Article IV, section 6 was one of two alternative amendments proposed in 1926 after the legislature had for six years failed to reapportion the state. On the ballot, along with this amendment was an alternative measure that was identical except that it would have required the Senate as well as the Assembly to be apportioned on the basis of population. Both proposals provided for the creation of a Reapportionment Commission if the legislature failed to pass a reapportionment plan. After six years of inaction by the legislature, it was conceded by all that a Commission had to be created to break this impasse. Significantly the Commission is made up of five elected officials. The intent of the voters seems, therefore, to have been to provide that when one group of elected officials—the legislature plus the governor—has failed to act, a smaller body of elected officials—the Commission—should have the power to reapportion the state.

In light of this history the Reinecke court's decision that the Commission no longer has authority to reapportion the state seems unsupported. Although it is true the Commission can no longer follow all the standards for reapportionment originally incorporated in the amendment, it is unlikely the voters of 1926, who voted for a constitutional amendment that would make some elected body of politicians responsible for reapportioning the state, would have wished to see the Commission eviscerated and the power to reapportion vested in the judiciary.

b. The court's temporary plan for reapportioning the state

Having decided the Commission could not reapportion the state, the court next considered how the state should be districted for the 1972 election. Under the Election Code, it was necessary to have a plan by February 23, 1972, some 35 days after the decision in Reinecke, so county registrars would have sufficient time to prepare for the upcoming primaries. The court could choose to: (1) let the previ-

14. Id.
ous apportionment plan remain in force; (2) draft a plan of its own; (3) adopt a plan proposed by the Republican party; or (4) implement the legislature's apportionment plan that had been vetoed by the Governor. The second option, drafting its own plan, was not realistic. As the court noted, reapportionment is an extremely complex matter and it could not undertake this task itself unless interested parties had time to present suggestions. Thirty-five days was simply not enough time. The court instead decided to approve the apportionment plan presently in effect in the state which had been used in the past election. The analysis supporting this decision was curious.

As an initial premise, the court noted that the judiciary should defer to the reapportionment decisions of the legislature and the governor unless compelled to intervene by the state or Federal Constitution. The court then concluded that since the number of seats in the legislature would not change regardless of which plan was adopted, "it would be far less destructive of the integrity of the electoral process to allow the existing legislative districts, although imperfect, to survive for an additional two years, than for the court to accept even temporary plans that are at best truncated products of the legislative process." From premise to conclusion there was no discussion of the constitutional principle that the courts should strike down apportionment schemes in which districts have not been fairly apportioned on the basis of population. No party to this litigation disputed that the existing districts were unequally propulated. The court's refusal to implement the vetoed legislative plan that had drawn districts almost equally populated deserved closer analysis than the conclusory justification offered.

Although unmentioned by the court, there were some excellent reasons for preserving the status quo. Recall the court had three options: it could have adopted the plan drafted by the Democrat-dominated legislature, the plan proposed by the Republicans, or left the districts as they were. Buttressed by the deference argument above, maintenance of the status quo permitted the court to avoid discussion of the Republican plan. Consideration of that plan and its impressive deviation of less than .2 percent from ideal average population would have required the court to enter the uncharted territory of constitutionally impermissible reapportionment criteria. The Republican

17. 6 Cal. 3d at 602, 492 P.2d at 390, 99 Cal. Rptr. at 486.
18. Id.
19. Id.
20. See note 46 infra and accompanying text.
21. The largest district was 13.1% greater than an ideal district while the smallest was 14.9% smaller than an ideal district. See The National Legislatures Conference, Reapportionment in the States 28 (1972).
plan fully complied with the one person one vote requirement. However, the consulting firm that prepared the plan had interviewed all the Republican incumbents to "ascertain their individual needs, the location of their campaign workers and financial contributors, and any area which they might wish to retain in their districts."22 The final plan created 37 safe seats for the 37 Republican incumbents.23

Such criteria and resulting plan are certainly constitutionally suspect. The object of reapportionment is not to protect incumbents, but rather the creation of equally populated districts that fairly represent the political balance of the area. Courts have been reluctant to examine reapportionment plans drafted by a legislature for the use of improper criteria, but when evidence of impermissible criteria has been before a court, tainted plans have been struck down.24 With little

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22. T. O'ROURKE, supra note 5, at 88.
23. Id. at 89.
24. See Bussie v. Governor of Louisiana, 333 F. Supp. 452, 456 (E.D. La. 1971) where the court noted, "[t]hose elected to office for specific terms do not thereby acquire a vested interest in the office." The court went on to state, "[n]either historical boundaries nor state policy nor state constitutional provisions may be used as vehicles by which to deprive the people of their . . . constitutional right to equal participation in the election process . . . . The court-approved plan seeks to protect the rights of the people while the primary purpose of the Senators' plan appears to be the protection of incumbent office holders. . . . We must give more than lip service to the right to participate in the election process, no matter whose official status might be put in jeopardy thereby." Id. at 457-58. At another point the court noted, "It is the people who have the constitutional right at all times to be equally and fairly represented. The office holder has no constitutional right to represent anyone except for the specific term for which he is elected." Id. at 456.

In Klahr v. Williams, 313 F. Supp. 148 (D. Ariz., 1970), aff'd sub nom. Ely v. Klahr, 403 U.S. 108 (1971), the computer that drew the reapportionment plan had been programmed to ensure that no more than one incumbent senator and two incumbent representatives would live within any proposed district. In striking down this plan the court noted, "The incumbency factor has no place in any reapportioning or redistricting. . . . In addition, we disapprove as inapposite the consideration of party strength as a factor in reapportioning or redistricting. Id. at 112.

In League of Nebraska Municipalities v. Marsh, 242 F. Supp. 357 (D. Neb. 1965), appeal dismissed, 382 U.S. 1021 (1966) the court noted, "[t]he goal of reapportionment . . . is just representation of the people, not the protection of incumbents in a legislative body." Id. at 360.

These cases contain little analysis to support their discussion of the incumbency factor. Marsh talks of equal protection while Klahr merely notes that consideration of incumbency is "inapposite." In the brief filed in Reinecke as a motion for leave to intervene by Angelita Garcia et al. (June 13, 1972), these cases are discussed. The brief contains an extended argument on the issue of racial gerrymandering. In Reinecke the court noted:

We regret, of course, that the only readily available congressional reapportionment plan is one that has been vetoed by the Governor. We note, however, that it has the bipartisan support of all of the California members of the United States House of Representatives appearing herein and that it is opposed by none of such members. We would be naive not to recognize that the plan was drafted with the interests of the incumbents in mind. Whether or not we may deem it appropriate to consider those interests when and if we
guidance on this question from other courts, and less from the briefs filed in this case, the Reinecke court may have considered any examination of the Republican plan ill advised. While this is sufficient to explain its failure to discuss the Republican plan, the court could have at least noted the existence of these issues.

Preservation of the status quo also served the court's need to minimize its intrusion into the reapportionment process. The only remaining plan—the legislature's—increased the Democratic majority in the House from 43 to 51 seats. If the court had chosen to accept the legislature's plan, it would have placed its imprimatur on a major political shift in the California legislature towards the Democratic party. In Reinecke, neither implementation of the legislature's plan nor refusal to take any action would avoid some amount of judicial interference in the reapportionment process. Accepting the status quo would mean that population shifts that had taken place in California since the previous reapportionment would remain unrecognized. However, maintaining the existing plan, although still an interference, was politically less dangerous: it did not threaten incumbents. Doubtless the court did not wish to implement a plan that seemed no more principled than the Republican plan. Further, because of the press of time, the case did not present an opportunity for adequate deliberation. It is very likely the court did not want to venture into the political arena without an opportunity to consider fully the political consequences. These seem to be the fundamental reasons for the court's decision to accept the status quo apportionments for the approaching election.

c. *Congressional districts*

While the court refused to adopt the legislature's reapportionment plan for state legislative districts, it did adopt the legislative plan for congressional districts. Because of the growth of population reflected in the 1970 census, California was entitled to five new congressional seats. Under an unacknowledged bipartisan "arrangement" the legislature had redrawn the existing congressional districts to ensure that incumbents had approximately the same balance of Republicans to Democrats within their districts that existed before redistricting. The five new seats were divided between two safe Democratic districts, two safe Republican districts and one "toss up" district.25 With such a di-

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vision of the spoils, both parties devoted little attention in the briefs to any attack on the congressional plan.

The court held that not only was there a federal statutory duty to fill these seats, but public policy dictated full representation for the California delegation. Since, again, the court did not have the time to draft its own plan and since federal law mandates single-member districts, the only option open to the court was to adopt the legislature's plan.

It was suggested earlier that the court's acceptance of the status quo for the state legislature districts was best explained as a refusal to stir up a political battle when the court was itself uncertain what principles should govern reapportionment. The court could accept the state legislature's congressional districting, however, because the political parties' informal agreement to that plan meant there would be no political furor. The governor's veto of the districting plan for congressional seats is understandable because he could not approve that portion of the plan without accepting the legislative districts also. Since he was unwilling to accept the districts drawn for the legislature, he had to reject the entire package. By accepting the congressional reapportionment, the court therefore was not frustrating the will of the legislature or the Governor. Of course, the court thereby approved a plan that was, to a large degree, designed to protect incumbents. But there was no evidence of this in the record and, in light of the necessity to act quickly and the undeveloped state of the law surrounding this problem, the court's holding was proper.

d. The reservation of jurisdiction

Finally Reinecke held that acceptance of the present state legislative districts and the proposed congressional districts was only a tem-
porary measure necessitated by the press of time. The court stated that if the legislature did not enact a valid reapportionment plan by the end of the special session in 1972, the court itself would draw up a plan for the 1974 elections. Part II of this Note discusses the criteria the court should use if it reapportions the state. Preliminarily the Note considers standards the court should apply to any plan drafted by the legislature. The particular focus of these sections is on political gerrymandering.

II. REAPPORTIONMENT AND THE GERRYMANDER

Any legislature with the power to reapportion is likely to indulge in gerrymandering. Recognizing this, seven states have assigned the reapportionment task to special committees. While the California constitution permits the legislature to reapportion itself, it limits this power by requiring that counties, and cities and counties, not be divided unless they contain sufficient population within themselves to form two or more districts. Although counties can be districted to favor the majority party, local boundaries at least restrain attempts to maximize the gerrymander by districting across county lines. Following existing governmental subdivisions also tends to minimize voter

30. 6 Cal. 3d at 604, 492 P.2d at 391, 99 Cal. Rptr. at 487.
31. "Incumbent legislators cannot be expected to do other than seek their own personal advantage in the process of districting, and it is nonsensical to ask them to do so. This is particularly the case with a full-time, relatively well paid 'career' legislature." Letter from Eugene C. Lee to Ed Reinecke, January 3, 1972, on file with the declaration of Ed Reinecke, June 17, 1972, Legislature v. Reinecke, 6 Cal. 3d 595, 492 P.2d 385, 99 Cal. Rptr. 481 (1972). This is a private letter written by Dr. Lee to Lieutenant Governor Reinecke. Dr. Lee is the Director of the Institute of Governmental Studies and a Professor of Political Science at the University of California, Berkeley. The main thrust of the letter is that the decision to vest the reapportionment process in the legislature inevitably means the legislature will try to create safe districts for incumbents and the majority party. The letter notes the probable effect of such safe districts:

A preponderance of safe districts weakens the political system by reducing effective citizen information about and control of "their" representatives. Existing evidence indicates that, in contrast to competitive districts, the minority party organization in safe districts becomes steadily weaker, while the voters receive less information about candidates and issues and do not participate in elections in as great numbers.

Id. at 2. See also M. Jewell, The Politics of Reapportionment 20 (1962).
32. See National Legislatures Conference, Reapportionment in the States 14 (1972). Forty-one states require the legislature to reapportion itself while two have assigned the task to the governor. However, only 15 of the most recent plans were actually drawn up by the legislature. The remaining plans were drafted by the courts or by special panels. Id.
33. For text of Cal. Const. art. IV, § 6, see note 12 supra.
confusion. If districts for municipal, county, state and national offices tend to follow the same lines, rather than districts for each office being drawn without relation to other offices, the voters in these districts will know that those who are in their municipal districts, will also be in county districts; and this knowledge will encourage ongoing voter organizations in the area for all political offices. But in *Silver v. Brown*, the court held that this potential restraint must be subordinated to the Federal Constitution’s mandate of one person one vote. That holding has proven to be a license to the legislature for the most flagrant forms of the gerrymander.

There are three basic modes of gerrymandering. In each the gerrymandering party (party A) intends to make the votes of the opposition (party B) as ineffective as possible. One method is for party A to set up a district in which party B will have “excess” votes—that is, considerably more votes will be cast for Party B’s candidate than he needs to win. A second method is to create a district where Party B’s wasted votes—those cast for a predictable loser—will be increased. And the third is to design a district so that Party A’s “effective” votes will be increased—usually by putting its own known followers into small districts compared to much larger districts for Party B’s known followers.

35. A defense of the use of county boundaries is found in *Subcommittee on Reapportionment of the Senate General Research Comm., Statement of Intent and Justification in Formulating and Adopting the Plan of Senate Reapportionment Contained in Senate Bill No. 6* (1965). Beyond the justifications of deterring gerrymandering and ensuring the representation of communities of interests that are examined in the above authorities, two other justifications for following county lines have been offered. It is argued that if counties have two or more legislators, district lines will tend to divide communities of interest. This fracturing of communities will tend to lower the interest in political issues and thus lessen a community's ability to organize itself around an issue. Furthermore, political divisions within a community will tend to confuse voters and to add to administrative costs. The abolition in 1965 of the traditional reapportionment guideline . . . drastically affected the administration of elections in heavily populated counties throughout the state . . . . Frequently, the boundaries were separated by no more than a city block which, along with the influence of supervisorial, municipal and judicial boundaries resulted in the large counties being split into a multiplicity of unnecessary balloting districts. The consequences were increased costs, more confusion among voters and greater possibility of error.


39. A. Hacker, *Congressional Districting* 49 (1963), cited in S. Slingsby,
The evils of the gerrymander were recognized by the framers of the Federal Constitution and continue to receive attention. Its greatest threat is to the legitimacy of the government. As John Stuart Mill argued, efficiency is not the primary goal of government. Rather, the government must seek to maximize the interest and participation of the governed. If fifty-one percent of the people elect representatives who reapportion the state so that in the next election their party will win seventy percent of the legislature, members of the minority party will have reason to lose confidence in the government and become alienated from the electoral process. Moreover, if there is a shift in party affiliation, in the next election conceivably a minority of the people could elect a majority of the representatives.

The equal protection clause of the fourteenth amendment has been held to mandate that congressional districts be as equally populated as


A basic goal of legislative election and subsequent legislative action is maintenance of popular faith in the system. This goal is the core meaning of the slogan "consent of the people" and as one critical study has shown, its only operative meaning. A second goal is really a twofold one, affecting the crucial role of parties as opinion-organizers and candidate-selectors. In one aspect it is a goal of ensuring continual existence of a power to govern in a majority party by avoiding a splintering, multiparty development. In its other aspect it is a goal of maximizing the effectiveness of the minority party as an opposition party potentially capable of leadership, and in any event capable of representing effectively the interests whose allegiance the majoritv party has failed to capture. A third major goal, in part reflective of the second, is that the legislative action process shall not be a mere process of rubber-stamping of previously prepared positions, but shall be a deliberative process of compromise and adjustment in which the right to be heard is preserved to all even though the right to control is reserved to those who can organize majority sentiment on the issue at hand.

44. See note 31 supra.

45. In R. Dixon, Democratic Representation, Reapportionment in Law and Politics 494 (1968) it is reported that in the 1966 New Jersey congressional election the Democrats swept the election by nine seats to the Republican six. At the time the statewide Republican vote exceeded the Democratic vote by 1,045,641 to 1,020,779.
is practicable.\(^46\) State and county districts are held to a lesser standard and deviations from equally populated districts are permitted if they are the result of a legitimate countervailing state policy.\(^47\) Under the Fifteenth amendment districts may not be drawn with the intent to discriminate against racial minorities.\(^48\) Beyond these points, the constitutional limits on gerrymandering are largely undefined.

Recently, in *Whitcomb v. Chavis*,\(^49\) the Supreme Court held that a challenge to a multimember district; on the grounds that the apportionment plan was designed to dilute the voting strength of a minority,\(^50\) could not be sustained by a showing that a racial ghetto did not have the voting strength it would have if it were a single-member district. Although the Court has never found a multimember district invidiously discriminatory, previous cases had suggested the Court might be more receptive to challenges of multimember districts for their tendency to disenfranchise minorities.\(^51\)

The Court has also halted its earlier movement toward requiring substantial population equality in state and local election districts. In *Abate v. Mundt*\(^52\) the Court held that boundaries for the electoral districts for county government could be drawn to respect the integrity of municipalities even though a variation of twelve percent in population between the largest and the smallest districts was created. The Court noted two rationales in support of its decision. First, districts

\(^{46}\) Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964). It remains to be seen if this principle will be enforced by the current Court. The recent case of Mahan v. Howell, 93 S. Ct. 979 (1973) cites Wesberry with apparent approval, but does not specifically approve the decisions following Wesberry that have required absolute equality. See Kirkpatrick v. Preisler, 394 U.S. 526 (1969).


\(^{50}\) Id. at 158-60:

Criticism is rooted in their [multimember districts] winner-take-all aspects, their tendency to submerge minorities and to overrepresent the winning party as compared with the party's statewide electoral position, a general preference for legislatures reflecting community interests as closely as possible, and disenchantment with political parties and elections and devices to settle policy differences between contending interests.

\(^{51}\) The earlier cases indicated the Court was considering a much closer examination of multimember districts. See Burns v. Richardson, 384 U.S. 73 (1966); (noting several elements, which if present, might result in a finding of invidious discrimination); Fortson v. Dorsey, 379 U.S. 433, 439 (1965) (indicating multimember districts should be appraised by whether they in practice submerge minorities, and that it is not necessary to show the intent of the legislature.); Lucas v. Colorado General Assembly, 377 U.S. 713 (1964) (indicating a sensitivity to the undesirable features of multimember districts).

\(^{52}\) 403 U.S. 182 (1970).
for county and municipal offices require less parity than districts for state and national offices. Second, the Court stressed that since it found the population within the county to be quite homogeneous, the districting was not likely to affect the political balance in the local government.

Finally, in *Mahan v. Howell* the Court held that state districts were not to be held to the standard of equality applied to federal districts and approved state legislative districts with a 16.4% variation in population from the smallest to the largest district. Reasoning that the equal protection clause permits states greater flexibility in drafting state districts, the Court accepted the deviations as the product of a legitimate, countervailing state policy. The legislature had justified the deviations on the theory that they resulted from attempts to draw district lines along the lines of existing county subdivisions.

These cases indicate the United States Supreme Court is now more receptive to legislative findings of fact offered to justify variations in population between state legislative districts that it previously would have found unacceptable. Since a small population shift may have a significant power to swing the political balance of a district, such population variations as *Abate* and *Mahan* permit may well turn out to facilitate legislative attempts to gerrymander.

### III. JUDICIAL CONTROL OVER GERRYMANDERING

Beyond the one person one vote requirement, the judiciary has not taken an active role in controlling gerrymandering. The United States Supreme Court has twice refused, in per curiam opinions, to hear cases in which political gerrymandering was charged. Although

54. 403 U.S. at 187.
55. 93 S. Ct. 979 (1973).
56. *Id.* at 985. The majority opinion, by Justice Rehnquist, was joined by Chief Justice Burger, and Justices Stewart, White and Blackmun. Justice Brennan, dissenting, reasoned first, that the actual deviation was 23.6 percent and second, that the equal protection clause did not permit two standards of population equality, one for federal districts and one for state districts. He seemed to indicate that if a state constitution required the state to draw district lines along county boundaries (as does the California Constitution) he might be willing to accept a greater degree of deviation. *Id.* at 995.
58. WMCA v. Lomenzo, 382 U.S. 4 (1965) (per curiam). The dismissal was without opinion. Justice Harlan in a concurring opinion stated that the dismissal affirmed the district court's holding that political gerrymandering was not subject to federal constitutional attack. The facts of the case do not support this assertion. *See R. Dixon, Democratic Representation, Reapportionment in Law and Politics* 486 (1968). Badgley v. Hare, 385 U.S. 114 (1966) (per curiam), was another dismissal of a suit that sought to raise the question of political gerrymandering. This
recognizing that favoring incumbents is an improper criterion for districting, the lower federal courts have refused to accept sophisticated offers of proof of its use, requiring instead direct evidence of favoritism. Moreover, some lower federal courts have held that the question of gerrymandering is a nonjusticiable political issue.

This Note argues that to the extent the nonjusticiability of gerrymandering depends on the premise that the reapportionment process is too complex to be evaluated by the judiciary, the holding is no longer supportable. Until recently reapportionments have been done by staffs laboring over maps trying to draw lines to please a majority of the legislature. The criteria used by these staffs, the legislative log-rolling done to pass the bill, and the motive of those who voted for the bill were intangible and practically incapable of being proved. Thus when the legislature decided to draw a district in a certain fashion, it was impossible to know why such a plan was accepted. But this is no longer the case. Since reapportionment is often done by computer, a court can examine the criteria set up in the computer's program. The computer program is a hard fact susceptible to judicial evaluation. To illuminate the issues involved in such an evaluation, this Note examines criteria a court might itself use if it were to draft a reapportionment plan. The note then presents standards a court could use to evaluate an allegedly gerrymandered plan drafted by the legislature.

a. Court-drafted reapportionment plans: criteria and methodology

In drafting federal districts, Mahan seems to indicate that the Kirkpatrick v. Priesler standard of districts as nearly equal as possible is still good law. It appears also that Silver v. Jordan is still good law if it is not a legitimate goal for the legislature to seek to apportion districts on the basis of "area" in an attempt to weight the legislature to favor rural areas. Such rural favoritism was the goal of the California constitutional provision for senate districting on a basis

59. See cases cited in note 24 supra.


62. See Mahan v. Howell, 93 S. Ct. at 984-85. At no point does the Court go any further than to state the holding of Kirkpatrick. It may be that this is not significant since the court was only concerned with state districts and had distinguished Kirkpatrick on the grounds that it concerned federal districts and therefore the court did not have to consider the vitality of the Kirkpatrick holding. See id. at 985.

other than population. It may be that the current Court will cut back on Jordan's holding, but until it does it seems that such rural weighting would be found unconstitutional.

Beyond the limit of the Federal Constitution, the California Supreme Court will have to consider what weight is to be attributed to California's version of the equal protection clause.\(^64\) While the clause has been given independent significance in a variety of situations,\(^65\) it has never been relied upon in a reapportionment decision because the federal judiciary has taken the initiative in requiring the one person one vote standard. Mahan may be seen as an invitation to the individual states to set such standards as each state sees as appropriate for state districts. Whether the California Supreme Court will find that the state's equal protection clause mandates that state districts be apportioned solely on the basis of one person one vote—as nearly equal in population as practicable—is an open question.

b. Multimember districts and existing local boundaries

A 1965 reapportionment plan drafted by the California Supreme Court, but not used, created 18 multimember districts. The court, however, did not analyze the political problems caused by multimember districts, even though such districts had been severely criticized by scholars for their tendency to submerge minority political views.\(^66\) Moreover the California constitution requires single-member districts.\(^67\) Nevertheless, because of the strict one person one vote mandate of the United States Federal Constitution, the court found that either the state constitution's requirement of single-member districts or the requirement that counties not be divided had to be abandoned. If the court had chosen to abandon county lines, it would have had the difficult task of drafting district boundaries. The court obviously did not have the skill or manpower to do so; one would be surprised to have found a cartographer on Chief Justice Traynor's staff. In view of this difficulty, it is not surprising the court chose instead to take advantage of the data on population within existing boundaries that were already in manageable form, and created multimember districts where necessary. Since the state constitutional requirement of single-member districts was only abandoned in order to meet the competing consideration of absolute equality and since in Mahan the requirements of strict pop-

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64. CAL. CONST. art. I, §§ 11, 21.
66. An examination of this criticism is beyond the scope of this note. For a bibliography of the authorities see Whitcomb v. Chavis, 403 U.S. 124, 157 n.38 (1970).
67. CAL. CONST. art. IV, § 6. For full text see note 2 supra.
ulation equality was relaxed, the court might well revitalize the state constitution's mandate that existing county lines be followed insofar as is possible. Requiring the legislature to justify variations from county lines could be used to control gerrymandering. The court could scrutinize the reasons offered in support of variations to ensure that apportionment is not used to favor a particular political party.

c. *Use of an expert panel and computer programming*

While greater population flexibility may permit the court to follow quite closely existing county lines for state districts, there will still remain problems such as how to group existing counties in one district or on what basis to divide a county when it is entitled to two or more representatives. Since the court's expertise is in articulating general principles and not in cartography or demography, it will best function if it can set out the applicable principles and then assign the actual drafting to specialists. The supreme court's power to appoint a master can be used to achieve this goal.68

The court can choose between three types of master panel. The first would have an even number of Republicans and Democrats with a tie-breaker appointed by the court. The second would be a panel of experts in the fields of demography, reapportionment, cartography, and computer programming. The third would be a panel of nonexpert neutral persons who would be respected by all sides for their impartiality.69 A panel of politicians would appreciate the political nuances of the reapportionment process and, given criteria no more explicit than those set out above, would be the more appropriate choice. The politicians could be empowered to draft specific criteria subject to court review before incorporation in the computer program. However, if the court chooses to provide more explicit guidelines, a panel of expert technicians would more likely follow the spirit of the criteria than would politicians who would naturally be tempted to seek an advantage for their party. A panel of neutral persons might well labor under the disadvantage of lacking technical or practical experience in this area but it has the countervailing strength that it could develop from its neutrality a quality of legitimacy that may be an important asset.

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68. If the legislature were to refuse to apportion money for the court for preparation of the plan, the court has the power on its own to demand the money from the budget. See Cal. Gov't Code § 68802 (West 1964). Judicial appointment of a master to do reapportioning is not without precedent. Judge Smith appointed Professor Bork as a special master and charged him with the duty of preparing a reapportionment plan when the Connecticut legislature failed to prepare a constitutional reapportionment plan. See Cummings v. Meskill, 341 F. Supp. 139 (1972); 347 F. Supp. 1175 (1972). These cases report only that a master was to be appointed but do not report that Professor Bork was the master picked by the court.

69. Such a panel was chosen by the California Supreme Court. See the Order entered by the court in Legislature v. Reinecke, March 23, 1973.
If the court does create an expert panel, its instruction to the panel will be crucial. If the court were to give only the minimum standards set out above\textsuperscript{70}, the panel would be largely unguided. The constitutional minimum does not consider, for example, the weight that should be given to existing community boundaries or the relative importance of compact contiguous districts. The panel would have to weigh these criteria itself. But the decision which principles should be given more weight than others is within the special expertise of the court.

Not only is the weighing of criteria within the court's expertise, but, because of computer technology, the implementation of such an ordering of priorities is now a manageable task. The court might invite interested parties to submit arguments for various criteria, considering such argument in the final ranking of criteria. This ranking would then go to the expert panel charged with drafting an appropriate computer program which would incorporate the priorities finally assigned by the court.

Existing technology makes possible a computer program that will compare and measure the competing values to be followed in the districting process. For example, the program could set the one person one vote requirement as the highest value and assign a lesser value to the delineation of districts within existing county boundaries. The computer would start by arranging existing counties to achieve parity. When it finds this cannot be done, it would make the smallest necessary changes from existing lines to achieve parity. So long as program categories are not mutually exclusive, a multiplicity of ranked criteria could be managed.\textsuperscript{71}

In designing such a computer program, the two highest ranking values would be maximum population equality\textsuperscript{72} and racial neutrality.\textsuperscript{73} Also highly ranked would be contiguity and compactness of districts,\textsuperscript{74} and congruence of districts with existing governmental boundaries.\textsuperscript{75}

\textsuperscript{70} See text accompanying notes 61-67 supra.
\textsuperscript{71} See T. O'Rourke, supra note 5, at 73-97; J. Weaver, Fair and Equal Districts: A How-To-Do-It Manual on Computer Use (1970).
\textsuperscript{73} Gomillion v. Lightfoot, 364 U.S. 339 (1960).
\textsuperscript{74} See Roman v. Sincock, 377 U.S. 695 (1964). See also Subcommittee for Reapportionment of the Senate General Research Comm., Statement of Intent and Justification in Formulating and Adopting the Plan of Senate Reapportionment Contained in Senate Bill No. 6 (June 10, 1965). "In arranging groupings of counties, although substantial equality of population was the basic criterion, three additional elements were considered: contiguity of territory, community of interest, and balancing of Senate representation with respect to existing Assembly districts." Id. at 17.
\textsuperscript{75} See note 35 supra. Overlapping municipal districts make it impossible to
Beyond these criteria, on the importance of which most authorities agree, two others are of particular importance: gerrymandering must be prevented and communities of interest should not be divided between separate districts unless such division is unavoidable. The high political cost of gerrymandering has been discussed above. This next section sets out model criteria that could be introduced into a computer program to prevent gerrymandering. These criteria are offered not as a solution but only as an example of an approach to the problem.

d. **Criteria for a court-drafted plan—prevention of the gerrymander**

   Successful gerrymandering requires the manipulation of geographic areas of known voting patterns to maximize representation of a given political interest. To prevent gerrymandering, apportionment criteria must be adopted that will prevent the drafter from introducing a factor into the program which is designed to favor a particular party. Judicial review of a completed program would quickly reveal impermissible criteria. When, however, the court is drafting its own plan the following neutral criterion, by which the computer can add to, or subtract from, county population where necessary to achieve equal districts, might be considered.

   When, to achieve population parity, an existing county or municipality must be divided, such division shall be made in such a manner as to maximize competition between the parties within any counties to be divided.

   In operation this criterion would work as follows: The computer would be given the existing county boundary lines and the smallest available geographic breakout for each part of the state. For example, in a city the computer would be given the population and political breakdown of either existing precincts or, if possible, individual city blocks. Starting from existing county boundaries, the computer would seek to arrange the counties into equally populated districts. For a county too small to comprise an entire district or so large that it must be divided, the computer would follow the criterion suggested above. The computer would begin to add or subtract the smallest contiguous geographic blocks available in order to achieve population parity and at the same time maximize the competition among existing political parties.

   Within large cities the suggested criterion has one very undesir-
able side effect. If a large city were divided into a number of districts and voters in the center of the city predominantly belonged to party $A$, while the surrounding area was heavily populated by members of party $B$, the attempt to achieve fair representation by maximizing party competition would split up the core city and attach it to a number of outlying areas. This result, especially if a neighborhood populated largely by a minority group were divided and attached to suburban areas, exactly mimics the purposive gerrymandering that racial minorities have long attacked.\footnote{But such has not always been the case. \textit{Compare} Wright v. Rockefeller, 376 U.S. 52 (1964), \textit{with} Wells v. Rockefeller, 273 F. Supp. 984 (S.D. N.Y. 1967). In \textit{Wells} the black plaintiffs argued there was a racial gerrymander because the ghetto was split up between a number of districts with white majorities. In \textit{Wright}, however, the black plaintiffs argued there was a racial gerrymander because the ghetto had been concentrated in one district. \textit{See} Motion for Leave to Intervene by Angelita Garcia et al. (January 13, 1972), on file at the California Supreme Court in the case of Legislature v. Reinecke, Sac. No. 7917.} To overcome this side effect, the model criterion should incorporate the following caveat:

When a county is to be divided, neighborhoods should be kept within a single district insofar as possible.

It is important to note that this caveat could define “neighborhood” in a racially neutral manner by focusing on geographic, economic and political criteria. The political power of interest groups centralized in certain neighborhoods would probably be protected by such definitions because these neighborhoods would tend to be economically and politically distinguishable from the surrounding city. Of course, such a definition would not protect racial enclaves with the same precision as would one that incorporates race \textit{per se}. In fact, two racial or ethnic groups that share economic and political characteristics, such as income level and party membership, would not be distinguished by the suggested definition. This is the price of a racially neutral definition of “neighborhood.” On balance it would seem that this cost is not too high since rarely would one find two racially distinct neighborhoods, side by side, economically and politically indistinguishable. Moreover, where there is this close identity, since the groups are already predominantly voting for one party, the marginal benefit to be gained from using racial or ethnic criteria to afford each group its own representative is outweighed by the harm that would be done to the legitimacy of the plan as a whole by the use of racial criteria.

Application of the competition criterion modified by the neighborhood definition raises a number of issues. The competition criterion requires a definition of political patterns in geographic areas. To determine such a pattern the court could use voter registration, voting results, or a mixture of the two. Voter registration may distort the actual
voting pattern of the area. However, unless a number of elections are considered, a particularly one-sided contest may also distort the actual partisan division reflected in past voting within the area. The best measure would consider voting patterns of all elections since the prior apportionment. Secondly, this criterion will tend to maximize competition in every election. When a state wants a professional fulltime legislature, it is possible that there is a certain value to the notion that incumbents should be given some edge over their challengers to ensure continuity. Obviously the use of this criterion is to some extent a rejection of such a suggestion.

It will be difficult to define the concept of “neighborhood.” Several approaches suggest themselves. First, the court could consider boundaries that already exist within the metropolitan area. However, if these boundaries have been drawn not to reflect neighborhoods, but to achieve local gerrymandering, adoption of such criteria would merely perpetuate the existing problem. A more appropriate approach would be for the court to adopt its own definition of neighborhood. The expert panel could be instructed to design a program that would break the city into neighborhood groups, on the basis of multiple indicia, including the geographic, economic, and political characteristics of the city.

In sum the criteria suggested include:

1. One person one vote (population equality).
2. Districts shall be as contiguous and compact as possible.
3. If possible, districts shall be drawn to respect county lines.
4. When, to achieve population parity, a county or municipality must be divided, the division shall be made in such a manner as to maximize competition among the political parties.
5. When a county or municipality is to be divided, neighborhoods should be kept in a single district insofar as possible.

e. Judicial review of legislatively drawn plans

The above discussion of methods available to a court in drafting a reapportionment plan reveals several analytic tools the court might use in considering a plan drafted by a legislature. First, apportionment by computer is uniquely susceptible to judicial review. Where problems of proof and institutional deference have previously supported judicial refusal to review reapportionment plans, these problems do not exist when apportionment has been done on a computer. Both the initial data and the program are hard facts that may be easily examined to rule out the use of improper criteria. In fact, if the legislature attempts to frustrate judicial review by refusing to use computers, the court might justifiably refuse to approve the legislature’s plan.
Second is the concept of the crucial nature of the criteria when adding to or subtracting from existing county lines to form election districts. When an existing county must be divided there is a clear opportunity for adding or subtracting areas to favor the majority party. By examining the program to ascertain by what criteria the computer added or subtracted areas to make the districts, the court could ensure that these criteria were not designed to favor a particular party.

Finally, gerrymandering of the core city has long been a major concern. The court should carefully scrutinize the criteria a program uses to divide up large cities. Since the legislature itself has found that people are concerned that communities of interest are not unnecessarily split up, any criterion that divides up cities but does not respect neighborhoods should be suspect.

CONCLUSION

The Reinecke court's invalidation of the California Reapportionment Commission is not supported by its reasoning. Having invalidated the Commission, however, the court's decision to accept the existing legislative districts and proposed congressional districts was correct in light of the time pressures created by the rapidly approaching election. The reservation of jurisdiction to modify this judgment if the legislature did not itself adopt a reapportionment plan was a most appropriate remedy. If the court does have the opportunity to draft a reapportionment plan, it should use a more sophisticated approach to this problem than it used in the past. Such an approach could also be

77. See Declaration of Houston I. Flournoy (Jan. 17, 1972) on file with the briefs at the California Supreme Court in the case of Legislature v. Reinecke, Sac. No. 7917. This declaration was filed in response to the letter of Dr. Lee. See note 31 supra. In this Declaration, Mr. Flournoy states that, since he is the State Controller, he is an ex officio member of the reapportionment commission. In this capacity he examined the legislative reapportionment plan drafted by the legislature as well as the plan drafted by the Republican party. His two criteria were: (1) does the plan create a "safe" district and (2) does the plan tend to increase competitiveness for the district. He defined a "safe" district as one in which either party had more than 60 percent of the registered voters in the district. He chose this figure because he had found that when one party has had over 60 percent of the registered voters, in only one out of eight elections has a member of the minority party been elected. Id. at 7. The Democrat-controlled legislature's plan would have created 82 percent safe seats in the Senate and 78 percent safe seats in the House. In contrast, the Republican plan would have created only 45 percent safe seats in the Senate and 52 percent seats in the House. Using his second criterion, his examination disclosed that the Democratic plan made 24 Senate seats more competitive while 14 were made more competitive; 51 House seats were made less competitive while 26 were made more competitive. There were no analogous figures for the Republican plan. On the issue of "safe" seats, see W. FLANIGAN, POLITICAL BEHAVIOR OF THE AMERICAN ELECTORATE 29 (1968).

78. See note 34 supra.