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Recent California Planning Statutes and Mountain Area Subdivisions: The Need for Regional Land Use Control

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Land use controls loom large among suggested solutions to a variety of environmental problems. Numerous states and the federal government are presently considering the adoption of comprehensive regulatory schemes to limit uncontrolled development of remaining open areas. In the past three years, California has enacted several new statutes designed to make local jurisdictions more attentive to the environmental ramifications of their land use planning and decisions. This Comment examines the current debate on land use controls by focusing on the particular problem of mountain subdivisions. The common law has proved unable to provide remedies for this type of development, and analysis of the recent regulatory devices adopted in California indicates that they are only a partial answer. The author recommends regional and statewide controls as the only realistic solution to the land use crisis.

Recent years have witnessed significant progress in the passage of federal and state legislation aimed at controlling air and water pollution. Less success has been achieved, however, in an area of equivalent environmental magnitude—land use control. Few states have come to grips with the need for an integrated statewide land use policy, and no comprehensive federal land use legislation has yet been enacted. One particular land use problem that presently demands attention is the proliferation of subdivision development in the foothills and mountains of the western United States. The prevailing scheme of local approval of mountain subdivisions has resulted in chaotic de-

1. A useful bibliography of recent publications dealing with various aspects of land use policy, problems, and control is found in Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess., National Land Use Policy 103-21 (Comm. Print 1972) [hereinafter cited as LAND USE (Comm. Print)].

2. See note 57 infra. A strong argument can be made that an effective remedy for many environmental problems is sound land use planning and control. If a polluting industry or project can only be built in an area carefully selected on the basis of a rational pre-existing plan for its low susceptibility to pollution damage, and if the project is subjected to strict pollution control regulations, environmental damage will be drastically reduced.

velopment, severe soil erosion and stream pollution, and the destruction of millions of acres of timber and range land. Local planning commissions and boards of supervisors have not often been influenced by environmental considerations when faced with the need or opportunity for economic development. It is also apparent that increased use of common law damage actions and the adoption of locally enforced planning and environmental legislation are unlikely to impede the present pattern of destructive mountain area development.

This Comment describes the actual physical impact of subdivision developments in the mountains of California and Utah and discusses why common law actions are inadequate to control this phenomenon. It then examines in detail new California statues which are designed to make local legislative bodies give substantial weight in their decision-making processes to the environmental consequences of subdivision approval. Finally, the Comment discusses two recent proposals for implementing regional and statewide land use controls which promise to deal more effectively with the types of problems created by mountain area subdivisions.

I

THE PHYSICAL IMPACT OF MOUNTAIN AREA SUBDIVISIONS

A. The Scope of the Problem

Whether they buy to build or to invest, most purchasers of subdivided foothill or mountain land are probably unaware that their desire to own a bit of mountain solitude has anything to do with a very serious environmental problem. But the ever-increasing rush of the past decade on mountain property has indeed created a land use crisis. Over one million acres of California land were subdivided in the 1960's, and of that amount, over 500,000 acres were located in foothill and mountain areas. These figures do not include the large number of parcels created by lot splitting. In fact, county governments estimate "that lot splits create as many lots as subdivisions under the

4. CAL. DIV. OF SOIL CONSERVATION, STATE RESOURCES AGENCY, ENVIRONMENTAL IMPACT OF URBANIZATION OF THE FOOTHILL AND MOUNTAINOUS LAND OF CALIFORNIA 16 (1971) [hereinafter SOIL CONSERVATION REPORT].

5. Id. at 17. Lot splitting is the division of a large parcel into four or fewer parcels in order to avoid the necessity of filing a subdivision map (required for five or more parcels) under the Subdivision Map Act, CAL. BUS. & PROF. CODE §§ 11500 et seq. (West 1964). See Pratt v. Adams, 229 Cal. App. 2d 602, 40 Cal. Rptr. 505 (1964), for an interesting but unsuccessful attempt to circumvent the Subdivision Map Act. Section 11535(d) (West Supp. 1973) now requires submission of a parcel map to the local governing body or advisory agency for approval of all divisions into less than five parcels unless the requirement is waived by local ordinance. Whether the map requirement is waived or not, all divisions of land must comply with the applicable design, improvement, and environmental protection requirements of section
Subdivision Map Act. If that estimate holds true generally for California's foothill and mountain areas, it could mean that over one million acres of such land were subject to parcel division between 1960 and 1970.

This explosion of subdivision activity is not limited to California. Even in the more sparsely populated western states, such as Utah, subdivision development in foothill and mountain areas is proceeding at alarming rates. A total of 193 land subdivisions were approved in Utah between July 1, 1969, and June 30, 1972. Of these, roughly 46 percent could be clearly identified as located in foothill or mountainous terrain, and this percentage has increased sharply in the past year over the previous two. When compared with the sheer volume of subdivision activity in California, this level of development may not seem alarming. However, projections based on the information contained in 16 randomly selected recent subdivision public reports for Utah indicate the gravity of the problem. The subdivisions ranged in size from 15 to 1,240 acres, averaging approximately 320 acres. If this is a representative sample, and if Utah land continues to be subdivided at approximately the same rate for a ten-year period, the total subdivided acreage for the period 1969 to 1979 will exceed 200,000 acres.

However, a further purpose of lot splitting is to avoid local requirements for design, improvements, dedication of land, and sewage facilities. Section 11525 (West Supp. 1973) vests local governments with control over design and improvements of subdivisions. Such bodies may also require dedication of land for schools, parks, and recreational facilities as a condition for map approval under sections 11525.2 and 11546 (West Supp. 1973). Subdivision map approval may also be denied for lack of compliance with applicable sewage regulations. Id. § 11551.6.


9. Published by the Real Estate Division of the State Dep't of Business Regulation (copies on file with the Ecology Law Quarterly).

10. If the 1971-72 increase is indicative of future trends, the total could approach 325,000 acres.
Considering that vast areas of western, eastern, and southeastern Utah are desert land not suitable for subdivisions, one appreciates the rate at which the remaining land—particularly mountain land—is being subdivided. California's land area is much greater than Utah's, and California's vast population exerts far more pressure on her mountain areas than does Utah's. Yet a conservative estimate shows that fully one-fifth as much land area may be subdivided in Utah during the decade ending 1979 as was subdivided in California during the decade ending 1969, and most Utah subdivisions will be confined to that state's fertile mountain and valley areas. The situation has been referred to—with understandable alarm—as a "land development crisis," and a "subdividing stampede."

**B. Soil Erosion and Stream Sedimentation**

Many people purchase subdivided land for investment purposes and do not "improve" it in any way. But a substantial portion of the investment property, as well as most property purchased with the intention of building, is at least provided with access roads. In most cases interior streets and lot pads are also constructed. Yet the available data reveal that many of these streets and lot pads remain vacant and unimproved for years. Every road bed bulldozed out of a foothill or mountainous area is a potential soil erosion problem. Even if roads are quickly surfaced and provided with adequate gutters and storm drains, a period exists during which the bare soil is subject to erosion. But if a foothill or mountain tract is subdivided and "improved" by bulldozing out access and interior roads, and then left untouched for years on end, severe soil erosion and stream sedimentation are certain to occur. The erosion danger is magnified in moun-

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13. In 24 recreational subdivisions that include a total of 107,000 lots, 3,240 homes have been built since the lots were first offered for sale in 1960. This is an average of 0.3% per year; it would take 150 years to fill half of the lots if past trends continue into the future. *Soil Conservation Report*, supra note 4, at 17.
14. Of all the activities associated with urban development, the construction of roads has the most serious impact on the soil mantle. Exposure of soil during the construction period can result in sediment production equal to 10 times the normal rate from cultivated lands, 200 times that from grassland, and 2,000 times that from forest land. *Id.* at 19-20. One study has placed the sediment production from development sites as high as 20,000 to 40,000 times that from farms and woodlands. See L. Leopold, *Hydrology for Urban Land Planning—A Guidebook on the Hydrologic Effects of Urban Land Use* 12 (U.S. Geological Survey Circular 554, 1968). For a wide-ranging analysis of the role of geology in sound environmental land use planning and development, see U.S. Dep't of the Interior & U.S. Dep't of Housing and Urban Development, *Environmental Planning and Geology, Proceedings of the Sym*
tainous terrain, where "steep cross slopes result in higher cuts, longer fill slopes, and greater areas exposed to erosion for a given road width."\textsuperscript{15}

Aside from scarring the land and destroying the topsoil, soil erosion causes severe stream pollution: "The sediment produced by the erosion of land resources is by far the Nation's largest single water pollutant, exceeding sewage by some 500 to 1,000 times."\textsuperscript{16} A significant amount of that sediment is produced by road grading and subdivision development. The most common effects of severe stream sedimentation include: increased turbidity; increased propensity to transport in the sediment such pollutants as plant nutrients, pesticides, toxic metals, bacteria and viruses; increased water treatment costs; increased growth of phytoplankton in lakes caused by inorganic plant nutrients in the eroded soil; and an increase in the nutrients that cause eutrophication in lakes.\textsuperscript{17} The impact of sedimentation of streams, lakes, and estuaries on fish can be devastating. "Sediment settles in riffle areas, smothers fish eggs, kills fish food organisms, and fills resting pools."\textsuperscript{18} The increased turbidity starts a chain reaction by cutting out light, which in turn inhibits photosynthesis.\textsuperscript{19} Plankton growth (the base of the food chain) is thus curtailed, and the overall production of essential fish foods is reduced.\textsuperscript{20}

Sedimentation also has a profound effect on water storage capacity. Of the approximately 500 million acre-feet of reservoir storage capacity throughout the nation, about one million acre-feet are lost annually because of sediment buildup in reservoirs. The cost of removing this sediment has been estimated at close to one billion dollars.\textsuperscript{21}

\textbf{C. Destruction of Flora and Fauna}

Many developers destroy large areas of native vegetation to make
way for their subdivisions. This destruction is most widespread where the entire subdivision area is completely stripped.\textsuperscript{22} Such stripping not only creates eyesores and a high danger of severe soil erosion, but if it occurs in a forested area, it can also endanger the remaining timber.\textsuperscript{23} Even if the more responsible course is followed of clearing only that land which is absolutely necessary for roads, sewers, and house pads, unless care is exercised, such clearing operations can have damaging secondary effects on nearby vegetation. If slash piles (the debris from clearing) are not disposed of promptly, they become both breeding grounds for timber-infesting pests and severe fire hazards. Unless extensive landscaping is undertaken, undesirable weeds are the first plants to grow back in the cleared areas. Since the danger of range and forest fires increases greatly as new foothill and mountain areas are developed, provision must also be made to extend adequate fire protection to each newly developed area. This often requires the construction of new fire breaks and access roads,\textsuperscript{24} producing additional soil erosion.

The clearing operations necessary for foothill and mountain subdivisions also have a severe impact on wildlife populations by destroying important feeding grounds and migratory trails. If feeding grounds are destroyed, animals are forced to move to other feeding areas that are often supporting all the wildlife they can. The result is overgrazing, range erosion, food shortage, disease, and starvation.\textsuperscript{25} Subdivisions may also block migratory trails passing through narrow canyons, meadows, or along streams. This endangers foragers, such as deer, by forcing them to remain at higher elevations, where snow often buries their food source during the winter months.\textsuperscript{26}

\textbf{D. Inadequate Public Services}

Some of the practices of careless mountain subdividers which damage the natural environment also impose severe inconveniences on buyers or expose them to health hazards. Often little provision is made

\begin{itemize}
  \item \textsuperscript{22} \textit{Id.} at 32.
  \item \textsuperscript{23} The trees exposed along the edge of the subdivision become subject to windthrow and fall into the cleared areas. Also, trees which had previously existed in a shaded environment can be weakened or killed when exposed to intensive sunlight. The weakened trees become susceptible to invasion from undesirable pests and insects. These pests and insects in turn can infest adjacent trees and create a blighted area. \textit{Id.} at 33.
  \item \textsuperscript{24} \textit{Id.}
  \item \textsuperscript{25} \textit{Id.} at 35. Little-used back country roads can actually benefit foragers because of the grass that usually grows along the road edge. However, high-speed, heavily used highways are deadly to wildlife. “Various estimates indicate that more deer are killed by automobiles than by hunters.” \textit{Id.} at 40.
  \item \textsuperscript{26} \textit{Id.}
\end{itemize}
for minimum public services such as adequate water and power supplies, sewage disposal, and roads.\textsuperscript{27} Other developers fail to provide artificial drains or storm sewers, claiming that the land is not subject to flooding.\textsuperscript{28}

One of the most serious continuing problems is sewage disposal, and the most troublesome sewage disposal system is the septic tank—if only because it is the most widely used system in mountain developments.\textsuperscript{29} If septic tanks are not properly designed, installed, and maintained,\textsuperscript{30} septic tank effluent can seriously pollute streams and lakes, over-fertilize plant root systems with nitrates and phosphates, and retard or kill plants by raising the level of the ground water table.\textsuperscript{31} Furthermore, it is not uncommon for a mountain subdivision to pollute its own water supply with septic tank effluent, and even more common to pollute the supply of downstream users.\textsuperscript{32}

Some form of community system is generally considered the best method of sewage disposal in mountain areas.\textsuperscript{33} Such systems are ex-

\textsuperscript{27} Subdivision public reports from Utah, for example, indicate that some developers make absolutely no provision for supplying water to the project, and in fact openly admit in their reports to the Utah Real Estate Division that home owners are expected to haul in their own water—sometimes from miles away—and construct their own cisterns. \textit{Real Estate Div., Utah Dep't of Business Regulation, Subdivision Public Reports No. 371, Dec. 7, 1970, and No. 400, May 18, 1971.}

\textsuperscript{28} In one case in Utah, the public report which contained the subdivider's claim that the land was not subject to flooding also contained an excerpt from a letter by an engineering geologist explaining that many lots in the subdivision in question were within the ponding area of some 60 flood retention dikes constructed by the developer across normally dry drainage channels. The geologist also indicated that the dikes were entirely uncompacted and could present a danger of washout. \textit{Id., Subdivision Public Report No. 378, Dec. 4, 1970.} The obvious contradiction between the developer's claim that the land was not subject to flooding and the actual condition of the property raises serious doubts as to the accuracy or the usefulness of reports which depend on the developer for most of the information contained in them and do not require an on-site inspection by the state agency involved.

\textsuperscript{29} \textbf{SOIL CONSERVATION REPORT, supra note 4, at 44.}

\textsuperscript{30} \textit{Id.} Such factors as soil suitability and depth, ground slopes, required land area, water tables and population density must be adequately considered prior to installation.

\textsuperscript{31} \textit{Id.} See also L. Leopold, \textit{supra} note 14, at 15-17.

\textsuperscript{32} A dramatic example of this problem is the experience of the Mammoth Creek subdivision in southern Utah. Some 33 cabins, either built or under construction, occupied a narrow canyon along Mammoth Creek. Most cabin owners used the stream or nearby springs as their domestic water source. All of the cabins had seepage devices for sewage disposal, and most were located close to the stream. Water quality tests conducted in the stream immediately above and below the subdivision and on cabin faucets revealed a coliform count 19 times higher than the limit considered safe for human consumption. R. Devore, Impact: Water Quality and Land Use, Mammoth Creek, Utah (unpublished paper released by the Office of Community Development, Southern Utah State College, Fall 1970) (copy on file with the Ecology Law Quarterly).

\textsuperscript{33} \textbf{SOIL CONSERVATION REPORT, supra note 4, at 46.} This presupposes, of course, a sufficient population to make a community system economically feasible.
pensive, and require either an adequate sewage treatment plant with an appropriate method of disposing of treated wastes, or a hookup with an existing county line and payment of the accompanying charges. However, there are numerous instances where topography, soil conditions, or economics would still dictate use of a well-designed septic or holding tank system.

Regardless of the method chosen for sewage disposal—or for confronting any of the other problems created by mountain subdivisions—such decisions should not be the product of ad hoc, short-sighted judgment, but should be arrived at through coordinated advance planning that has had ample opportunity to consider the alternatives and make long-range, ecologically sound choices. That such planning can best take place within the framework of a comprehensive, statutory land use policy can be clearly demonstrated by examining the inadequacies of a case-by-case, common law approach to solving problems caused by subdivisions.

II

SUBDIVISIONS AND THE COMMON LAW

Judicial involvement in environmental problems caused by subdivision development has produced at best patchwork results. The adequacy of a purely judicial solution to a particular subdivision problem depends largely on the nature of the damage, the person or property injured, and whether the plaintiff must rely on common law tort principles for recovery or can take advantage of some statutory scheme intended either to grant him a remedy or to protect the environment.

Although a number of subdivision cases have been decided favorably to environmental concerns, court action alone cannot bring order out of the present chaotic and fragmented non-system of land use and development.

34. Depending on the circumstances, "appropriate" disposal of treated waste may include discharging it into a lake or stream, piping it underground for subsurface percolation, feeding it into ponds for evaporation and percolation, and spraying or irrigating selected areas with it. At South Lake Tahoe, however, it was found that evaporation and ground percolation disposal was "seriously affecting the vegetation and adding to the enrichment" of the lake. Because of this, treated sewage must now be exported from the basin. SOIL CONSERVATION REPORT, supra note 4, at 46. For an account of the Tahoe experience, see Ayer, Water Quality Control at Lake Tahoe: Dissertation on Grasshopper Soup, 1 ECOLOGY L.Q. 3, 15-36 (1971).

35. See, e.g., Ellman, Book Review, 1 ECOLOGY L.Q. 234, 235-36 (1971). If a number of homes in a mountain subdivision had to be located on the downhill side of a community sewage line for topographical reasons and adequate pumping facilities were not available to prevent sewage from flowing into the homes, a properly located and constructed septic or holding tank system would clearly be in order.
A. Examples of Common Law Actions for Damage Caused by Development

One common law remedy available to a property owner whose land has been damaged by construction of a neighboring subdivision is an action for trespass. For example, courts have granted relief in trespass for an invasion of or damage to property rights caused by an increase in surface drainage resulting from the developer's having changed the nature of his land.\textsuperscript{36} Recovery for trespass has also been granted where septic tank effluent has polluted a neighbor's well, percolated under his land, or even caused his water table to rise. If the defendant knows or has reason to know of the invasion, he may be held liable for intentional trespass whether or not actual injury results.\textsuperscript{37} However, if a development discharges effluent or sediment into a natural watercourse which flows across another's property, an action for trespass will usually not lie, and recovery in such cases depends on whether or not the defendant's action causes actual damage to the plaintiff's land.\textsuperscript{38}

\textsuperscript{36} Burkshire Terrace, Inc. v. Schroerlucke, 467 S.W.2d 770, 2 ERC 1596 (Ky. 1971) (defendant liable simply because his alterations of the land had increased the surface runoff crossing the plaintiff's property, causing damage to plaintiff's home).

\textsuperscript{37} In Reter v. Talent Irrigation Dist., 258 Ore. 140, 482 P.2d 170, 3 ERC 1288 (1971), seepage from defendant's canal caused the water table in plaintiff's orchard to rise; holding for plaintiff, the court declared: "One who knowingly causes water to flow onto or beneath the land of another commits a trespass and is liable for damages." \textit{id.} at 144, 482 P.2d at 172, 3 ERC at 1288. For a case in which the knowledge of the defendant was one step removed from the trespassory flooding, see Land Development, Inc. v. Louisville Gas & Elec. Co., 459 S.W.2d 150, 2 ERC 1001 (Ky. 1970). There, the defendant knowingly permitted debris-saturated land fill next to an open culvert, a situation that foreseeably caused flooding during a heavy rain, resulting in damage to plaintiff's electrical substation. The court declared that the defendant's action constituted an unreasonable use of his land, and awarded damages to the plaintiff.

\textsuperscript{38} Larson v. Village of Capron, 3 Ill. App. 3d 764, 278 N.E.2d 830, 3 ERC 1992 (1972); White v. Long, 12 Ohio App. 2d 136, 231 N.E.2d 337 (1967); Fink v. Board of Trustees of Southern Ill. Univ., 71 Ill. App. 2d 276, 218 N.E.2d 240 (1966). In addition to trespass, where recovery is based on a physical invasion of plaintiff's land regardless of actual injury, a cause of action in subdivision cases may be based on nuisance if defendant's action interferes with plaintiff's use and enjoyment of his land—but the interference must be unreasonable and cause substantial harm (as where sewage discharged into a natural watercourse causes substantial and unreasonable odors). \textit{3 Water and Water Rights} 41-45 (R. Clark ed. 1967). "Substantial harm" occurs where the defendant's action causes "definite offensiveness, inconvenience or annoyance to the normal person in the community," W. Prosser, \textit{Torts} 578 (1971), and "unreasonable" is determined by balancing "the gravity of the harm to the plaintiff . . . against the utility of the defendant's conduct." \textit{id.} at 596. \textit{See also} Bryson & Macbeth, \textit{Public Nuisance, the Restatement (Second) of Torts, and Environmental Law, 2 Ecology L.Q. 241 (1972); Note, Private Remedies for Water Pollution, 70 Colum. L. Rev. 734 (1970); Note, Water Quality Standards in Private Nuisance Actions, 79 Yale L.J. 102 (1969).
In these cases, courts have usually based judicial relief on some well-established tort theory. Relief is conditioned on the existence of a plaintiff who has suffered injury of a legally protected right so as to have standing to bring the action, and on the existence of a defendant who has breached a judicially created duty to the plaintiff and has thereby proximately caused the injury. If these conditions do not prevail, and if no statutory violation exists upon which to base an action, the law is helpless to correct a serious environmental harm. Even if these conditions are met and an individual plaintiff obtains relief, a single successful action still has a minimal impact on the overall process of local planning and subdivision control. Nor is integrated planning and control much improved when the common law is strengthened by statute to overcome problems of standing and limited judicial authority, as in the case of the Michigan Environmental Protection Act of 1970. One must still face the fact that courts are not planning agencies, and simply lack the time and the expertise to provide the comprehensive planning necessary to assure orderly and environmentally sound development on a statewide basis.

B. Subdivision Control Through an Expanded Common Law

Professor Joseph Sax, the principal draftsman of the Michigan Environmental Protection Act, has stated that the Act has three purposes: to recognize in the public an enforceable legal right to a decent environment; to make that right enforceable by private citizens; and "to set the stage for the development of a common law of environmental quality." The Act does indeed provide a foundation for an environmental common law. First, it grants standing to "any person" to initiate an original action in any appropriate county circuit court, or to intervene as a party in any administrative action or judicial review thereof, merely by alleging actual or potential harm to the environment of


Secondly, it grants power to the courts to fashion appropriate equitable relief and to impose on the defendant whatever conditions may be required to protect the environment.

This statute recently provided the basis in *Irish v. Green* for a cause of action against a Michigan developer and local and state agencies that approved his 1200-acre, 745-unit residential subdivision at Little Traverse Bay on Lake Michigan. The plaintiffs first alleged that the projected use of individual or on-site septic tank systems on such a large scale threatened to pollute springs and seeps along a nearby bluff, individual wells in the project (unless they were installed at a great depth), and the lake itself. Second, they contended that the size of the project would require widening the only access road (scenic M-131), and threaten the destruction of many unique trees through road widening and increased exhaust fumes. Finally, they argued that extensive bulldozing necessary for site preparation on steep grades in the project would cause an unacceptable soil erosion danger.

After making extensive findings of fact concerning the technical aspects of the plaintiffs' charges, the court concluded that they had established all three of their allegations "by a preponderance of the evidence," and imposed the following conditions on the project:

1. That no more than forty percent of the lots in Plat No. 1 and no lots in as yet unplatted areas of the project should be built upon unless and until central water and sewer are provided . . .

2. That an improved access road from Plat No. 1 be opened upon Middle Road as well as upon M-131 to divide the traffic burden.

3. That appropriate sodding and other surface water dams, re-

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44. 4 ERC 1402 (Mich. Cir. Ct. 1972).
45. Although the approving government agencies were named as defendants along with the developer, the suit was brought "in the nature of a bill in equity filed under . . . the Michigan Environmental Protection Act . . . for declaratory and equitable relief" to protect the environment, and not, apparently, to seek judicial review of the agencies' approval. Since the Act grants standing to "any person" to bring such an action, the court completely omitted the usual description of the plaintiffs' relation to or interest in the case, and of the nature of their injury. The injury was to the environment, not to the plaintiffs directly. Cf. Mr. Justice Douglas' dissent in *Sierra Club v. Morton*, 405 U.S. 727, 741; 3 ERC 2039, 2044 (1972).
46. 4 ERC at 1405.
47. *Id.*
servoirs and other devices be provided to restrain the flow of surface water within the subdivision.\textsuperscript{49}

This decision is a good example of the inherent flexibility of a court to respond to the needs of a particular situation when given the power and the tools to do so. Moreover, the court was conspicuously un-hampered by the traditional common law restraints noted earlier.\textsuperscript{50} Nevertheless, it is still a common law case. The only state or local legislation referred to by the court was the Michigan Environmental Protection Act. There was no mention of any applicable state or local water pollution standard, land use scheme, zoning ordinance or building permit system.\textsuperscript{51} The court did not even allude to whatever standards had to be met before approval for the subdivision was granted.\textsuperscript{52}

In other words, the court was relying entirely on its own judgment—and on the testimony of numerous expert witnesses—in deciding exactly what constituted “pollution, impairment or destruction of the air, water and other natural resources.” To this extent the case conforms with the clear intent of the Michigan Environmental Protection Act, to set the stage for an environmental common law. The question is whether or not this approach is a wise choice as a policy matter. Admittedly the common law has an inherent flexibility and the capacity to draw on well-established principles developed in analogous areas.\textsuperscript{53} There are, however, at least four dangers in trying to develop an environmental common law without referring to statutorily established standards as to what constitutes “pollution, impairment or destruction” of the environment. First, such a system is limited to reacting to planned activities or potential defendants on an ad hoc basis. Since no previously established minimum standards exist against which to hold builders or developers, even a careful and responsible developer cannot tell whether his project will generate a lawsuit. “Any person” could delay the project for months simply by filing an action alleging the likelihood of “pollution, impairment or destruction.” In addition, since the court has no legislative guide, it must take substantial testi-

\textsuperscript{49} 4 ERC at 1405.

\textsuperscript{50} See text accompanying notes 39 and 40 supra.

\textsuperscript{51} However, the Michigan Act specifically declares that it is “supplementary to existing administrative and regulatory procedures provided by law.” \textit{Mich. Comp. \textsc{Laws} Ann.} \textsection{} 691.1206 (Supp. 1972).

\textsuperscript{52} The only administrative standards mentioned by the court were the “safety,” “base,” and “surface” tests of the Michigan Highway Department, and even these were not defined: the court merely stated that highway M-131 was deficient according to these tests. 4 ERC at 1404.

\textsuperscript{53} \textit{See, e.g.,} Reter v. Talent Irr. Dist., 258 Ore. 140, 146, 482 P.2d 170, 173, 3 ERC 1288, 1290 (1971): “The genius of the common law is its flexibility—the ability to develop a consistent legal tradition in light of changing notions of legal relationships.”
mony in all but the most frivolous suits before it can determine that its own notion of "pollution, impairment or destruction" has been proved. Such an ad hoc decision-making process seems likely to lead to inconsistent adjudications and court congestion.  

Second, it could require years, or even decades, before reliable judicial standards emerge from the present smattering of lawsuits. In the meantime, responsible developers may be reluctant to proceed with legitimate projects for fear of being sued, while small, fly-by-night projects not subject to statutory standards might be simply overlooked by "any person" who otherwise would be willing to take them to court. The need for meaningful and consistent environmental land use standards is too urgent to await such a lengthy process.

Third, granting courts power to develop an environmental common law without reference to statutory standards invites judicial lawmaking. In fact, the Michigan Act specifically invites judicial lawmaking in the case of administrative standards adopted pursuant to statutory authority. This grant of judicial authority raises obvious questions about the separation of powers, the propriety of the court substituting its own judgment for that exercised by an agency under authority granted by the legislature, the ability of the court to digest and interpret the voluminous technical material necessary to arrive at sound environmental standards, and the appropriateness of judges making policy decisions usually left to a representative legislature.

Fourth, no common law scheme—no matter how liberal its policy

54. Professor Sax has reported that he is "aware of no case [under the Michigan Act], in which a defendant is under a restraining order and ready for a trial that is being delayed . . . by court congestion." Sax & Conner, supra note 41, at 1009. But he also indicates that a major reason for the unexpectedly low number of cases to be brought under the Act may be the inability of many of Michigan's volunteer environmental groups to finance any kind of concerted litigation campaign, and not the natural propensity of the act to keep court calendars clear. Id. at 1008.

55. Section 2 of the Act [MICH. COMP. LAWS ANN. § 691.1202(2) (Supp. 1972)] provides that where there is involved a standard for pollution . . . fixed by rule or otherwise . . . the court may: (a) Determine the validity, applicability and reasonableness of the standard. (b) When a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.

56. Professor Sax correctly points out that section 2 of the Michigan Act does not empower the court to overturn standards set by statute, but only standards set by agencies. Sax & Conner, supra note 41, at 1065. But a reviewing court could easily find authority under this section to overturn agency standards "deficient" in the court's eyes, but plainly not inconsistent with an empowering statute. One would expect many courts to be reluctant to exercise that kind of authority. See id., at 1066-69. Compare the power of California courts to overturn final agency action only if not supported by "substantial evidence." CAL. CODE OF CIVIL PROC. § 1094.5 (West 1955). See also the discussion of the competence of courts as opposed to legislatures and agencies to deal with complex environmental problems, in Cramton & Boyer, supra note 41, at 410-19.
on standing or how sweeping its judicial remedy-fashioning power—
can make a planning agency out of a court. The court in *Irish v. Green*
did not address itself to the policy questions that should have
been decided months earlier by state and local planning agencies as to
whether developments such as the one under attack were compatible
with regional or statewide plans for areas like Little Traverse Bay, or
with any choice mountain, scenic, or vacation area. Nor was the court
equipped to consider these issues. Lacking a staff of expert planners,
a structure for administrative-type hearings, and a means to gather and
weigh—free of the constraints of formal evidence-taking—the wide
range of technical information and policy considerations required to
formulate a comprehensive land use policy, it was forced to grope its
way to a compromise solution to the immediate legal conflict.

Although the court in *Irish v. Green* did not refer to any state or
local environmental land use legislation, most states have some statu-
tory scheme to regulate land use. If used as a supplemental device
within the framework of such a system, expanded judicial authority
under an environmental common law can serve the useful function of
filling gaps where the statutory scheme proves incomplete or inade-
quate. This is essentially the type of system that has evolved in
California over the past three years. The California Legislature has
revised the state's planning, zoning and subdivision statutes to require
that local governing bodies consider the environmental consequences of
their land use decisions, and has empowered California courts to re-

57. For references to, and short summaries of, those state statutes which have
implemented various forms of regional and statewide land use control, see ALI
MODEL LAND DEVELOPMENT CODE art. 7, Commentary at 2-4 (Tent Draft No. 3,
1971); SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, LAND USE POLICY AND
PLANNING ASSISTANCE ACT OF 1972, S. REP. NO. 869, 92d Cong., 2d Sess. 40-42
(1972). A short digest of some important recent reports on developments in state
land use policies is found in LAND USE (Comm. Print), supra note 1, 95-101. See
also F. BOSSelman & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL
(prepared for the Council on Environmental Quality, 1971); Note, STATE LAND USE
REGULATION—A SURVEY OF RECENT LEGISLATIVE APPROACHES, 56 MINN. L. REV. 869
(1972).

58. Court action under an environmental common law system may at times be
the only way one can force either a private defendant or a government agency to
comply with statutory standards. It may also be the most effective way to resolve a
private controversy having environmental implications where no express statutory
standards apply. See Sax & Conner, supra note 41, at 1010-17. Courts can also pro-
vide some extra-local participation in land use decisions having extra-local impact,
even in the absence of an appropriate statute. See, e.g., Scott v. City of Indian Wells,
6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972) (non-resident landowners
adjacent to a city have standing to challenge zoning decisions of the city which affect
their property); Township of River Vale v. Town of Orangetown, 403 F.2d 684 (2d Cir.
1968) (municipality in one state has standing to challenge zoning ordinances of a con-
tiguous municipality in an adjacent state which affect property values in the first
view local decisions and enforce the environmental requirements of the statutes. The next chapter will examine how these new provisions affect mountain area subdivisions in that state.

III

RECENT CALIFORNIA STATUTES

A. State Coordination of Land Development Control

1. Statewide Planning Coordination

In 1970 the California Legislature took a significant step toward consolidating and coordinating land use planning at the state level by enacting sections 65030-65049 of the Government Code. Although these sections do not declare a statewide planning and land use policy and specifically disavow any attempt to control local prerogatives, they do provide a mechanism within the Governor's Office through which a statewide land use policy can be formulated.

It is the express goal of these provisions "that future growth of the state should . . . proceed within the framework of officially approved statewide goals and policies directed to land use. . . ." The formulation and execution of "statewide environmental goals" are defined as executive functions to be assigned to an office reporting directly to the Governor. As it was intended that the state planning process influence legislative policy and actions, the new provisions request "regular review and positive action by the Legislature on statewide environmental goals, plans and policies" and "clear identification of legislative actions required to carry out statewide environmental goals."

To implement these policies, the Legislature created the Office of Planning and Research (O.P.R.) in the Governor's Office and assigned as its primary mission the task of assuring an orderly process of environmental policy development and implementation within the state government. The O.P.R. is to develop and operate a statewide en-

59. See generally, California Legislature, Joint Comm. on Open Space Land, Final Report (1970), for background information on the political and historical context giving rise to many of the statutes discussed below. The report emphasizes the preservation of open spaces as the key to effective environmental land use regulation.

62. Id. § 65031.
63. Id. § 65034.
64. Id. § 65037.
65. Id. § 65035. The Office has since been given primary responsibility for developing detailed guidelines for the preparation of environmental impact reports under the California Environmental Quality Act (CEQA). Cal. Pub. Res. Code
vironmental monitoring system and a system for reporting and evaluating the environmental impact of public and private actions throughout the state. Although the activities of the O.P.R. reach every level of state government, the Legislature in 1970 was not prepared to enact mandatory statewide environmental planning, since it specifically disavowed any intent “to vest in the Office . . . any direct operating or regulatory powers.”

However, the statute does provide for a comprehensive State Environmental Goals and Policy Report to be prepared by the Governor and submitted to the Legislature every four years. This report is to give priority to the development of a statewide land use policy, and undoubtedly will be based largely on the results of the work performed by the Office of Planning and Research during each four-year period. However, the report has no binding effect. The Legislature may either approve it as an expression of legislative intent, or may change or reject any part of it.

This planning coordination scheme was designed to provide a foundation upon which to build a future program of comprehensive land use planning and control, and contemplates the orderly development of a carefully researched and fully integrated statewide system. But it lacks a firm legislative commitment to actual implementation. Whatever impact these provisions may have on controlling mountain development will not be great, as substantive statewide controls will probably not be enacted for some time. Hopefully, the voluminous research and reports contemplated here will not become a conscience-salving substitute for real state and regional controls.


66. CAL. GOV'T CODE § 65040(f) (West Supp. 1973). This provision is being implemented by the Office of Planning and Research in the form of a computerized data inventory and mapping system containing the information supplied by all environmental impact reports filed under CEQA. Moreover, the California Secretary for Resources intends to establish an environmental monitor similar to the Section 102 Monitor now in existence under the National Environmental Policy Act. Telephone interview with Mary Hawkins and John Pastorella, California Office of Planning and Research, Apr. 18, 1973.


68. Id. § 65035.


70. CAL. GOV'T CODE § 65045.

71. Regional planning districts are dealt with in CAL. GOV'T CODE §§ 65060-69.5 (West 1966), added in 1963. However, these provisions are aimed mainly at urban regions (§ 65060.2), are advisory only (§ 65060.8), are cursed with a cumbersome make-up and decision-making process (§§ 65061.2, 65063-63.5), and do not require that the environment be given due consideration in the planning process (§§ 65065.1, 65067, 65067.2), as opposed to most of the newer California planning statutes consid-
2. **Coordinated Open-Space Planning**

Although general statewide planning and land use control has not yet become a reality, the California Legislature has declared that open-space planning does require statewide coordination for the conservation and preservation of open-space resources. The local open-space plans must be prepared, adopted, and submitted to the Secretary of the Resources Agency by January 1, 1974. Although the Legislature specifically intended that local open-space plans be coordinated to act as a comprehensive open-space program, the only operative coordinating requirement binding on local governments is that each local open-space plan be submitted to the Resources Agency. Nothing requires the various local plans to be substantively consistent with one another. Requiring substantive consistency would coordinate open-space planning far more effectively than a simple command that all plans be filed with the same agency.

Although mutual consistency is not assured, the subject matter of local open-space plans is fairly closely prescribed. Open-space land is defined as "any parcel or area of land or water . . . designated on a local, regional or state open-space plan" for devotion to the preservation of open-space resources.

The relevance of the regional planning districts created by these sections to the control of mountain area subdivisions is questionable. An able analysis of several of the existing, largely voluntary structures for limited regional control in California is found in Marks & Taber, Prospects for Regional Planning in California, 4 Pac. L.J. 117 (1973).

For a description of bi-state regional planning in the Tahoe area, see Comment, Regional Government for Lake Tahoe, 22 Hastings L.J. 705 (1971). See also Ayer, supra note 34, at 50-57 (1971). Authority for regional planning at Lake Tahoe is found in Cal. Gov't Code §§ 66800-01 (Tahoe Regional Planning Compact) and §§ 67000-130 (California Tahoe Regional Planning Agency) (West Supp. 1973). These statutes require the formation of a regional plan for the entire Tahoe basin, which is to include correlated elements dealing with land use, transportation, conservation, recreation, and public services and facilities. The plan is to be formulated and adopted by the Tahoe Regional Planning Agency, and to be enforced through appropriate ordinances of the Agency. The Agency's ordinances establish minimum standards for the region, and local governing bodies may adopt ordinances establishing equal or higher standards for those subjects covered by the Agency's ordinances. The subjects to be covered by the Agency's ordinances which are of interest here include: subdivisions; sewage disposal; land fills, excavations, cuts and grading; soil and sedimentation control; and watershed protection. See, e.g., Tahoe Regional Planning Agency, Land Use Ordinance (Ord. No. 4), adopted Feb. 10, 1972, and Tahoe Regional Planning Agency, Subdivision Ordinance (Ord. No. 7), adopted Mar. 22, 1972 (copies on file with the Ecology Law Quarterly).

73. Id. § 65560(a).
75. Id. § 65562(b).
76. Id. § 65560(b). This provision offers some hope of extra-local coordination, since a regional or state plan could theoretically create local open-space lands merely by so designating them.
tation of natural resources, managed production of resources, outdoor recreation, or public health and safety. The separate enumeration and definition of these terms is clearly intended to guide local governments in preparing and adopting their open-space plans.

The three sections of these provisions that are of greatest significance in controlling mountain area subdivisions are those which either require or restrict action by the local governments. The first requires each open-space plan to contain an "action program" for its specific implementation. The second requires all county or city actions which regulate the use of open-space land to be consistent with the local open-space plan. A third section provides that "no building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open-space plan." If the substance of the open-space plan is environmentally sound and follows the guiding definitions noted above, these three sections could prove instrumental in preventing many mountain area subdivision problems by prohibiting development on vast areas of designated open-space land in the mountains of California.

B. Local Planning Provisions

1. Mandatory General Plans

Each city and county in California is required to prepare and adopt a comprehensive, long-term general plan for its physical develop-

77. Id. Each of the specific terms used is defined in detail in this section.
78. Id. § 65564.
79. Id. § 65566. Section 65910 requires all cities and counties to prepare and adopt an open-space zoning ordinance consistent with the local open-space plan by June 30, 1973.
80. Id. § 65567.
81. For a comprehensive legal analysis of open-space regulation and the police power, see CALIFORNIA LEGIS., supra note 59, at 56-115. For discussions of whether or not open-space zoning and other, similar land use regulation which prohibits selected uses of private property is an unconstitutional taking, see Bowden, Open Space and the Police Power in California, 1 PAC. L.J. 461 (1970); Heyman, Innovative Land Regulation and Comprehensive Planning, 13 SANTA CLARA LAW. 183, 208-25 (1972); Krasnowiecki & Paul, The Preservation of Open Space in Metropolitan Areas, 110 UNIV. OF PA. L. REV. 179 (1961); Kusler, Open Space Zoning: Valid Regulation or Invalid Taking, 57 MINN. L. REV. 1 (1972); Note, Techniques for Preserving Open Spaces, 75 HARV. L. REV. 1622 (1962).

The California Assembly Select Committee on Open Space Lands is proposing two promising measures in the 1973 Legislature. One would create a Park and Open Space Acquisition Fund of approximately $100 million per year to enable local governments to acquire park and open space lands, and the other would provide local governments with specific authority to condemn certain interests in land for open space purposes. Assembly Select Committee on Open Space Lands, Open Spaces News Letter, No. 2 (Feb. 1973). See also CAL. LEGIS. JT. COMM. ON OPEN SPACE LANDS, STATE OPEN SPACE AND RESOURCE CONSERVATION PROGRAM FOR CALIFORNIA (1972).
In 1970 the Legislature declared that all general plans must include a conservation element "for the conservation, development, and utilization of natural resources including water and its hydraulic force, forests, soils, rivers and other waters, harbors, fisheries, wildlife, minerals, and other natural resources." The conservation element is required to consider these subjects. Other subjects which it "may" also cover include: stream pollution, land use regulation in stream channels, control of soil, beach and shore erosion, and protection of watersheds. If the local planning agencies and governing bodies are conscientious in drafting the conservation element, it is certain to have a major role in controlling careless mountain developments—especially since all local zoning ordinances must now be amended to conform to the general plan.

82. CAL. GOV'T CODE § 65300 (West 1966). On Jan. 21, 1965, the Second District Court of Appeal in O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (1965), held that the operation of the Planning Act is discretionary with a city council: "The statute states on its face that a city may have a planning commission; however, a planning commission is not necessarily required in a city." 231 Cal. App. 2d at 779-80, 42 Cal. Rptr. at 286. Although that is still technically correct, the formation of a planning agency (whether a department, a commission, or the council itself) as well as the development of a general plan has since been made mandatory. Ch. 1880, § 5, [1965] Cal. Stat. 4334, enacted on July 23, 1965, provides: "By ordinance the legislative body of each county and city shall establish a planning agency . . . See CAL. GOV'T CODE § 65100 (West Supp. 1973). "The functions of the planning agency are as follows: (a) It shall develop and maintain a general plan. (b) It shall develop such specific plans as may be necessary or desirable. . . ." id. § 65101 (West 1966). CAL. GOV'T CODE § 34211.1 (West Supp. 1973) requires the Council on Intergovernmental Relations to formulate advisory guidelines to assist the cities and counties in drawing up their general and specific plans. Section 34217 (b) requires all cities and counties to report annually to the Council the degree to which their respective plans conform to the guidelines, but conformance is not mandatory. For a discussion and critique of present planning for physical development, and proposals to include social and economic development in the local planning process, see Heyman, supra note 81, at 225-35.

In a recent California District Court of Appeal case, a landowner alleged that the city's denial of his permit to build an apartment house unless he dedicate land for construction of a street extension indicated on the general plan would render his land useless because not enough land would be left after the dedication to construct his apartments. The court held this allegation sufficient to overcome a demur to a cause of action in inverse condemnation for taking the landowner's property without just compensation. This case may lead to a requirement that local governments pay for substantial diminution of land values caused by not allowing otherwise legal development that is inconsistent with the provisions of a general plan. This question is likely to be decided soon by the California Supreme Court. Hearing was granted on January 24, 1973. Selby Realty Co. v. City of San Buenaventura, 28 Cal. App. 3d 785, 104 Cal. Rptr. 866 (1972).

83. CAL. GOV'T CODE § 65302(d) (West Supp. 1973). In 1972 the California Legislature set June 30, 1973, as the deadline for the preparation and adoption of the conservation element. Id. The general plan must also contain a seismic safety element to deal with hazards from earthquakes and slides. Id. § 65302(£).

84. See note 101 and accompanying text infra.
The general plan requirements do not amount to statewide or regional planning, however. Although each local government is encouraged and advised to consult with other governments in its region as part of the planning process,\(^85\) such consultation is not mandatory. Even though the city or county planning agency is to include in its general plan all land outside its jurisdiction which the agency deems to have a direct bearing on its overall planning,\(^86\) there is no requirement that neighboring governments be consulted, or that the part of an entity's general plan extending beyond its boundaries be consistent with a neighboring entity's plan dealing with the same territory. As a practical matter, one would hope that neighboring governments do consult with one another; the statutory machinery for cooperation is certainly available for them to use if they wish.\(^87\)

2. **Optional Specific Plans and Zoning**

Section 65101(b) stipulates that each local planning agency must develop "such specific plans as may be necessary or desirable."\(^88\) Specific plans include "all detailed regulations, conditions, programs and proposed legislation which shall be necessary or convenient for the systematic implementation of each element of the general plan,"\(^89\) and may be drawn up by the planning agency for those specific areas of the city or county where the agency or the governing body feels they are needed.\(^90\) In 1971 the Legislature promulgated a list of items required to be among those subjects covered by the proposed regulations or legislation of specific plans.\(^91\) Several bear directly on the control of development in foothill and mountain areas:

- **(a)** . . . The location of areas, such as flood plains or excessively steep or unstable terrain, where no building will be permitted in the absence of adequate precautionary measures being taken to reduce the level of risk to that comparable with adjoining and surrounding areas.

- **(c)** . . . Provisions for water supply, sewage disposal, storm water drainage and the disposal of solid waste.

- **(d)** Standards for the conservation, development, and utilization of

\(^85\) See **Cal. Gov't Code** §§ 65065.1, 65067, 65067.2 (West 1966); §§ 65305 & 65306 (West Supp. 1973). None of these sections has any binding effect on the planning process.

\(^86\) Id. § 65300 (West 1966).

\(^87\) Id. § 65065.1 (West 1966); §§ 65305, 65306 (West Supp. 1973).

\(^88\) Id. § 65101(b) (West 1966).

\(^89\) Id. § 65451 (West Supp. 1973).

\(^90\) Id. § 65450.1. "A specific plan need not apply to the entire area covered by the general plan." Id.

\(^91\) Id. § 65451(a)-(f).
natural resources, including underground and surface waters, forests, vegetation and soils, rivers, creeks, and streams, and fish and wildlife resources. Such standards shall include, where applicable, procedures for flood control, for prevention and control of pollution of rivers, streams, creeks and other waters, regulation of land use in stream channels and other areas which may have a significant effect on fish, wildlife and other natural resources of the area, the prevention, control and correction of soil erosion caused by subdivision roads or any other sources, and the protection of watershed areas.\footnote{92}

The preparation of a specific plan is within the discretion of the local planning agency or governing body,\footnote{93} but if it so chooses, the legislative body may adopt the proposed regulations and legislation of the specific plan by ordinance or resolution,\footnote{94} and may also promulgate administrative rules and procedures “for the application and enforcement” of the plan.\footnote{95} The procedure for adopting specific plans as local ordinances is almost identical to the procedure for adopting zoning ordinances,\footnote{96} and specific plans so adopted would undoubtedly have the same force and effect as zoning ordinances. Yet the Legislature expressly provided that the two kinds of ordinances were to be distinguished from one another: the procedure for adopting specific plans applies only to specific plans and to nothing else.\footnote{97} One author has suggested that specific plans so adopted become “a complete alternative source of authority” to implement almost any program the local governing body wishes, as long as the program is “properly part of a general plan.”\footnote{98} The advantage in using specific plans to

\footnote{92. \textit{Id.} It is interesting to note that the items specified in the last sentence of subsection (d), which “shall” be covered by the “regulations, conditions, programs and proposed legislation” of the specific plan, correspond exactly with the items listed in \textit{Cal. Gov't Code} § 65302(d)(1-7) (West Supp. 1973), which “may” be covered by the conservation element of the general plan. One is tempted to look for significance in the fact that the same items that were discretionary for the general plan in 1970 became mandatory for the specific plan in 1971. Perhaps the Legislature is moving progressively toward more stringent control; the number of provisions designed to control the environmental effects of subdivisions passed in 1971 and 1972 would seem to support this view. The adoption of a specific plan, however, remains discretionary with the local governing body.}

\footnote{93. \textit{Cal. Gov't Code} § 65450 (West 1966).}

\footnote{94. \textit{Id.} § 65503 (West 1966), § 65507 (West Supp. 1973).}

\footnote{95. \textit{Id.} § 65550 (West 1966). If the specific plan relates to the use of open-space land, no streets, street improvements, sewers, public works, public building, or schools may be constructed within the area covered by the specific open-space plan unless the project conforms to the plan. \textit{Id.} § 65553 (West Supp. 1973).}

\footnote{96. \textit{Compare id.} §§ 65500-07 with §§ 65853-58.}

\footnote{97. “Nothing in this article applies to the adoption or amendment of any ordinance by the legislative body . . . except ordinances expressly adopting or amending a specific plan. . . .” \textit{Id.} § 65506 (West Supp. 1973).}

\footnote{98. \textit{D. Hagman, Public Control of California Land Development} § 2.27 (1973).}
implement such programs seems to be that certain technical limitations on local power, such as the requirement for uniformity in zoning, and the statutory limitations on subdivision ordinance exactions, can be avoided.

Despite this technical distinction between specific plans and zoning ordinances, a local governing body may find at least one practical reason to label a specific plan a zoning ordinance and adopt it outright as such, or at least base a zoning ordinance upon it. In 1971 the State Legislature required that all zoning ordinances be made consistent with the local general plan by January 1, 1973. Since one of the purposes of the specific plan is to propose legislation to implement the general plan, one would expect such proposals to be consistent with that part of the plan they intend to carry out. It would be a wasteful duplication of time, effort, and money for a planning agency to prepare acceptable legislation in a proposed specific plan, only to have the governing body then ignore it in the process of revising the zoning ordinances to conform to the general plan. But a zoning ordinance based on a specific plan containing the required items quoted above would certainly be a major factor in strengthening local control over environmental damage caused by mountain subdivisions.

C. Direct Regulation of Subdivisions

1. Subdivision Public Reports

All persons who plan to sell or lease "subdivided lands" in California are required to file with the real estate commissioner a notice of intent containing specified items designed to inform the purchaser or

100. D. HAGMAN, supra note 98, at § 2.27.
101. CAL. GOV'T CODE § 65860 (West Supp. 1973). In 1972 the Legislature added the following clarification to § 65860(a):

A zoning ordinance shall be consistent with a city or county general plan only if: (i) The city or county has officially adopted such a plan, and (ii) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses and programs specified in such a plan.

Id. § 65860(a). Any resident or property owner in the city or county may bring a court action to enforce compliance with this section. Id. § 65860(b).

Section 65858 (West Supp. 1973) provides for the adoption of interim zoning ordinances as an urgency measure without following normally required procedures, if such ordinances are necessary to prevent uses which may conflict with contemplated zoning changes currently under study, or to be studied "within a reasonable time." An urgency zoning measure would obviously be useful while existing zoning ordinances were being rewritten to conform to the general plan. Urgency zoning has been upheld where it was used as intended by the statute to preserve the status quo pending passage of contemplated zoning revisions. Compare Metro Realty v. El Dorado County, 222 Cal. App. 2d 508, 35 Cal. Rptr. 480 (1965) with Silvera v. City of South Lake Tahoe, 3 Cal. App. 3d 554, 83 Cal. Rptr. 698 (1970).
lessee of the nature of the property, the condition of the title, the terms of the sale or lease, and other factors necessary to insure a fair and informed transaction. This notice must include a statement of the provisions made for public utilities, including water and sewer facilities, the depth of fill used or proposed for each lot, and the soil conditions in the subdivision, "supported by engineering reports showing the soil has been, or will be, prepared in accordance with the recommendations of a registered civil engineer." The commissioner is required to examine the subdivision site and to issue to the subdivider a public report based on the information supplied by him or gathered by the commissioner. The report may be withheld for various reasons, including, in the case of residential subdivisions, failure to indicate that "vehicular access and a source of potable domestic water either is available or will be available." The commissioner must withhold the report if the subdivider fails to show that the soil will be prepared as recommended by a registered civil engineer to avoid structural damage.

In the case of "land projects," a category of development embracing many large mountain area subdivisions, the commissioner cannot issue a public report unless he finds that the proposed improvements—"including storm sewers, sanitary sewers, roads, utilities, community facilities, recreational amenities"—are adequate for the projected population of the project, and that adequate measures have been taken to prevent potential property damage from flooding, erosion or other natural occurrences common to the area.

103. Id. § 11010(f). See notes 27 and 28 supra.
104. Id. § 11010(i).
105. Id. § 11018.
106. Id. See note 28 supra.
107. Id. § 11018(f). See note 27 supra.
108. Id. § 11018.4.
109. A "land project" is a subdivision containing 50 or more parcels, any 50 of which are not improved with buildings but are sold for chiefly residential or recreational use, and which has less than 1,500 registered voters residing in the subdivision or within two miles of its borders. Community apartment, condominium and stock cooperative projects are not included. Id. § 11000.5.
110. Id. § 11025. A copy of the public report on a land project must be given on request to any member of the public, and, whether requested or not, to every adult who visits the land project as a prospective purchaser. Id. § 11027. Anyone who buys or leases a lot in a land project may rescind the transaction "without cause of any kind" merely by sending written notice thereof to the subdivider within fourteen days of signing the contract. This right to rescind must be "clearly and conspicuously" disclosed by the subdivider. Id. § 11028. As for divisions of land not classified as land projects, the sale of a lot resulting from any division of land which does not conform to state law or local ordinance is voidable at the sole option of the buyer within one year of the discovery of the illegality of the division. The buyer may also
The subdivision public report does not guarantee that a particular mountain area subdivision will have a minimal or even an acceptable impact on the surrounding environment. However, it does provide a buyer with enough facts to help him evaluate the worth of his purchase, protect him against fraud, and suggest some possible environmental consequences of the project. Moreover, the mechanism of issuing the reports, as mandated by statute, could prevent the sale of lots in land projects that may damage the environment. First, no subdivision lots may be sold without obtaining a public report. Second, the commissioner may not issue a report on a land project unless he finds that the project is compatible with existing zoning ordinances. And third, all zoning ordinances must be consistent with the applicable general plan by January 1, 1973, including the conservation element and the local open-space plan. If effectively used, the power to withhold subdivision public reports could provide the real estate commissioner with strong control over the adverse environmental effects of mountain area land projects which are inconsistent with local conservation elements or open-space plans.

2. Approval of Subdivision Maps

Perhaps the most direct mechanism currently available for controlling mountain subdivisions in California was created by the Legislature in 1971 with the passage of Assembly Bill 1301. Section three of this measure declares that no tentative or final subdivision map shall be approved unless the local governing body determines bring an action for damages against the seller of the illegally divided lot. Id. § 11540 (West 1964). In a recent class action against Boise Cascade Corporation for fraudulent sales of mountain subdivision lots, a settlement offer for $58.5 million was given conditional approval by a United States District Court on March 10, 1973. McCubrey v. Boise Cascade Home and Land Corp., Civil No. 72-470 (N.D. Cal., filed March 16, 1972). The court ordered mailing of notice to the class by March 26, 1973 and set May 15, 1973, as the hearing date for final approval of the settlement. See also Christian Science Monitor, Jan. 20, 1973, at 9, col. 1; id., Jan. 22, 1973, at 7, col. 1.

111. CAL. BUS. & PROF. CODE § 11018.2 (West Supp. 1973). Failure to obtain a report does not in itself prevent construction of the project, but construction is unlikely if the lots cannot be sold.

112. Id. § 11025(5).


114. See text accompanying notes 83 and 74 supra. The deadline for completion of both the conservation element and the open-space plan is June 30, 1973. CAL. GOV'T CODE §§ 65302(d), 65563 (West Supp. 1973). As a practical matter, the procedure suggested in the text could be effectively implemented only after that date. It seems likely, however, that one could thereafter compel compliance with that procedure under a writ of mandate. See CAL. CODE CIV. PRO. §§ 1084 et seq. (West 1955); cf. note 126 infra.

that it will be consistent with the applicable general or specific plans.\textsuperscript{116} Section four requires denial of final map approval for land projects unless: "(a) The city or county has adopted a specific plan covering the area proposed to be included within the land project, [and] (b) The city or county finds that the proposed land project . . . is consistent with the specific plan for the area."\textsuperscript{117} If the local general and specific plans are drawn up in the manner prescribed by the provisions and guidelines previously discussed,\textsuperscript{118} these two sections should have a direct and substantial effect in controlling environmental damage attributable to mountain developments.

The Legislature did not stop here, however. Even if the local general and specific plans are deficient in some respects, the governing body must still deny map approval for subdivisions likely to damage the environment. Section seven of the new measure states:

A governing body of a city or county shall deny approval of a final or tentative subdivision map if it makes any of the following findings:

(a) That the proposed map is not consistent with applicable general and specific plans.

(b) That the design or improvement\textsuperscript{119} of the proposed subdivision is not consistent with applicable general and specific plans.

(c) That the site is not physically suitable for the type of development.

(d) That the site is not physically suitable for the proposed density of development.

(e) That the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.

(f) That the design of the subdivision or the type of improvements is likely to cause serious public health problems.\textsuperscript{120}

In many ways, these provisions tie together most of the California statutes previously discussed. Subsections (a) and (b) provide real enforcement power to the local planning process. Even if local zoning ordinances are not yet consistent with the general plan, or local special interests apply undue pressure for approval of an ecologically unsound development, if the governing body has prepared and adopted the


\textsuperscript{117} Id. § 11526.1.

\textsuperscript{118} See text accompanying notes 83 and 92 supra.

\textsuperscript{119} For definitions of "design" and "improvement," see Cal. Bus. & Prof. Code §§ 11510 and 11511 (West Supp. 1973). Section 11525 vests control of design and improvement of subdivisions in local governing bodies through appropriate ordinances, which must "specifically provide for proper grading and erosion control, including the prevention of sedimentation or damage to offsite property."

\textsuperscript{120} Id. § 11549.5.
kinds of general and specific plans that the planning statutes contemplate, the subdivision may not be built.\textsuperscript{121}

Subsections (c) and (d) apply whether or not general and specific plans have been adopted. These subsections can be interpreted either narrowly, to refer simply to the lot fill disclosure requirements of the subdivision public reports,\textsuperscript{122} or broadly, to refer to any adverse physical consequences that may result from the proposed development. Practically speaking, the meaning of “not physically suitable” will depend more on the makeup and attitude of local planning commissions and governing bodies than on any other single factor. One would expect their definition of the term to be strongly influenced by the environmental considerations specifically required by statute to be included in conservation elements of general plans,\textsuperscript{123} in local open-space plans,\textsuperscript{124} and in specific plans formulated pursuant thereto,\textsuperscript{125} whether or not such plans actually have been adopted.

Subsections (e) and (f) likewise operate independently of general and specific plans, but are compatible with them. Again, the meaning of such terms as “likely to cause,” “substantial damage,” “avoidably injure,” and “serious problems” will depend largely on the local decision makers. But ample guidance has been provided by the recent planning and subdivision statutes, and judicial review of the local decision is available if findings made under this section are not supported by evidence of actual on-site conditions.\textsuperscript{126}

\textbf{D. \textit{Environmental Quality Acts}}

Finally, brief mention should be made of two California statutes which can be used in the gap-filling role of an environmental com-

\begin{itemize}
\item \textsuperscript{121} A weakness of this procedure is that the governing body, if it really wants the proposed subdivision in its jurisdiction, can revise the general or specific plan to make it amenable to the proposed development—or it can simply refuse to find any inconsistencies between the two. One could still attack the decision to approve an offending subdivision, however, under subsections (c)-(f) and available judicial review provisions. See note 126 infra.
\item \textsuperscript{122} See text accompanying note 104 supra.
\item \textsuperscript{123} \textit{Cal. Gov't Code} § 65302(d) (West Supp. 1973).
\item \textsuperscript{124} \textit{Id.} §§ 65560-67.
\item \textsuperscript{125} \textit{Id.} § 65451. The beneficial aspects of judicial review discussed in Part II, supra, can also be applied to achieve the result described here. See note 58 and accompanying text supra.
\item \textsuperscript{126} See \textit{Cal. Code Civ. Pro.} §§ 1084 et seq. (West 1955). Perhaps the most important document California courts are likely to consider in determining whether or not the local governing body's findings are supported by evidence of on-site conditions is the environmental impact report that now must be prepared before any tentative subdivision map may be approved. See text accompanying notes 146 and 149-56 infra.
\end{itemize}
mon law to supplement the planning and subdivision provisions described above.

The first clearly is modeled after the Michigan Environmental Protection Act, but is not as far-reaching. It grants standing only to the Attorney General to "intervene in any judicial or administrative proceeding . . . concerning pollution or adverse environmental effects," or to bring an injunctive action "against any person for the protection of the natural resources of the state from pollution, impairment or destruction." As with the Michigan Act, the California statute grants the court power to impose on the defendant whatever conditions may be necessary to protect the environment and stipulates that in reviewing administrative actions, the court may not allow conduct which may harm the state's natural resources unless "consistent with the protection of the public health, safety, or welfare." However, the California statute does not give the court authority to substitute its own pollution standard for one already established which it finds deficient.

The second statute is the California Environmental Quality Act of 1970 (CEQA). As originally enacted, the Act's last section stated:

The legislative bodies of all cities and counties which have an officially adopted conservation element of a general plan shall make a finding that any project they intend to carry out, which may have a significant effect on the environment, is in accord with the conservation element of the general plan. All other local governmental agencies shall make an environmental impact report on any project they intend to carry out which may have a significant effect on the environment and shall submit it to the appropriate local planning agency.

127. See notes 58-59 and accompanying text supra.
130. Id. § 12607.
131. Id. § 12610. See text accompanying note 43 supra.
133. See discussion of MICH. COMP. LAWS ANN. § 691.1202(2) (Supp. 1972) accompanying notes 55 & 56 supra. Both the Michigan and the California statutes are intended to supplement existing law. Compare MICH. COMP. LAWS ANN. § 691.1206 (Supp. 1972) with CAL. GOV'T CODE § 12601 (West Supp. 1973). Since the California statute grants standing only to the Attorney General, its practical impact on mountain subdivisions is limited by the large number of projects to be regulated as compared with the relatively small number of attorneys in the Attorney General's office assigned to deal with environmental matters. Moreover, these attorneys are concerned with all facets of environmental control, not just with mountain subdivisions, effectively precluding their participation in all but the most important cases. See, e.g., the Boise Cascade settlement discussed at note 110 supra.
The contents of the environmental impact report (EIR) are designed to provide the basic environmental data necessary for sound decision-making.

This section had been widely assumed to apply only to public projects carried out directly by public agencies, but the California Supreme Court recently held, in *Friends of Mammoth v. Board of Supervisors of Mono County,*\(^8\) that "the Legislature necessarily intended to include . . . private activities for which a government permit or other entitlement for use is necessary,"\(^9\) and that "the word 'project' as used in section 21151 . . . includes the issuance of permits, leases and other entitlements."\(^8\)

The court ruled that EIR’s were therefore to be prepared and filed by local legislative bodies not having conservation elements in their general plans on all projects they authorized—public or private—which were likely to have a significant effect on the environment.\(^1\)

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136. Contents of the report are to include: the environmental impact of the project, unavoidable adverse environmental effects, proposed mitigation measures, alternatives to the project, the relationship between short-term and long-term environmental decisions, any irreversible changes the project would cause, and the growth-inducing impact of the project. CAL. PUB. RES. CODE § 21100 (West Supp. 1973). A recent California District Court of Appeal case held that the court had the duty to pass judgment "on the sufficiency of the report as an informative document,” but not "on the validity of the conclusions expressed in the [report].” EDF v. Coastside County Water Dist., 27 Cal. App. 3d 695, 104 Cal. Rptr. 197, 4 ERC 1573 (1972). Apparently, the governing body may choose not to follow the report's recommendations, if it does so after having given the report full consideration. 27 Cal. App. 3d at 707, 104 Cal. Rptr. at 204, citing EDF v. Corps of Engineers, 325 F. Supp. 749, 759, 2 ERC 1260, 1267 (E.D. Ark. 1971). The decision not to follow the report is open to limited judicial review, however. CAL. PUB. RES. CODE § 21167(b) (West Supp. 1973); cf. EDF v. Corps of Engineers, 470 F.2d 289, 298-301, 4 ERC 1721, 1726-28 (8th Cir. 1972) (substantive review of agency decision on environmental impact report under National Environmental Policy Act proper to determine whether agency's decision was within the scope of its authority and whether or not it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").
137. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 16, 4 ERC 1593 (1972).
138. Id. at 259, 502 P.2d at 1056, 104 Cal. Rptr. at 24, 4 ERC at 1597.
139. Id. at 262, 502 P.2d at 1059, 104 Cal. Rptr. at 26, 4 ERC at 1598.
140. Id. at 256, 262, 502 P.2d at 1054, 1059, 104 Cal. Rptr. at 21, 26, 4 ERC at 1595, 1598. Although full analysis of *Friends of Mammoth* is not appropriate here, careful study confirms the initial impression that the majority opinion is an incredible exercise in result-oriented judicial illogic. Not only did the plain meaning of the words then contained in section 21151 obviously not apply to private projects authorized by local governing bodies, but the specific command of the second sentence of the section that the environmental impact reports should be submitted to the local planning agency "as part of the report required" (italics added) by CAL. GOV'T CODE § 65402 (West Supp. 1973) specifically limited the reports to those required by the latter section. No separate report was contemplated. The reports required by sec-
The decision is particularly relevant to mountain developments, as it involved an application for a conditional use permit to build a condominium project on a five and one-half acre parcel in the Mammoth Lakes area of the eastern Sierra Nevada Mountains. Under the court's ruling, local legislative bodies authorizing construction of mountain area subdivisions in California, in addition to complying with all the newly enacted statutes previously discussed, would have been required either to find that the particular project would conform to the conservation element of the applicable general plan, or, if there were no conservation element, to prepare an environmental impact report on the project, the sufficiency of which "as an informative document" was reviewable by the courts.

Since it was not clear how to define projects which "may have a significant effect on the environment," or whether or not the decision would apply retroactively to projects already under construction, numerous cities and counties temporarily halted all construction as a precautionary measure. Developers and local governments generated enormous pressure upon the California Legislature to clarify the decision. The result was Assembly Bill 889, a compromise revision of the Environmental Quality Act which effectively supersedes the Friends of Mammoth decision, and which should have considerable impact on mountain subdivisions in California.

Most significantly, the Legislature adopted the State Supreme Court's view that the term "project" includes all private activities having a significant impact on the environment for which a public agency is to issue a "permit, license, ... or other entitlement for use." The Act also now specifically applies to "the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of use permits, the issuance of building permits, and the enactment and amendment of subdivision maps." The Act also now specifically applies to "the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of use permits, the issuance of building permits, and the enactment and amendment of subdivision maps."
ance of conditional use permits and the approval of tentative subdivision maps. ...”  

As amended, section 21151 requires all local agencies carrying out or approving such projects to have an environmental impact report prepared for those projects which may significantly affect the environment, whether or not there is an applicable conservation element of a general plan, and whether or not the proposed project is consistent with the conservation element.

Some important limitations have also been added to the Act. Any court action brought to compel a public agency to determine whether or not a given project may have a significant effect on the environment must be brought within 180 days after the decision to approve the project. Any action either alleging that a public agency has erroneously made this determination, or challenging the sufficiency of an environmental impact report, must be commenced within 30 days after filing notice of the determination or of the completion of the report with the Resources Agency. The reviewing court is barred from exercising its independent judgment on the evidence, and may only decide whether or not the decision of the public agency was supported by “substantial evidence.”

Despite the short limitation periods, these review provisions are the key to the common law gap-filling role described above and, as such, can provide an effective—if somewhat cumbersome—process to supplement the new planning and subdivision statutes and to impose additional controls on environmentally harmful mountain subdivision projects which may be approved by local governing bodies. Since approval of tentative subdivision maps is specifically mentioned as a

146. Id. § 21080(a).
147. Id. § 21151. See text accompanying notes 137-42 supra. If a report should be required under CAL. GOV'T CODE § 65402 (West Supp. 1973), the environmental impact report may be submitted as part of that report, but it is now clear that the impact report is required for private projects covered by the Act, whether or not a section 65402 report is involved. See note 140 supra.
148. CAL. PUB. RES. CODE §§ 21169-71 (West Supp. 1973) postponed the environmental impact report requirement for private projects until 121 days after the effective date of the statute.
149. Id. § 21167(a).
150. Id. § 21167(b) and (c). The Act says nothing about who has standing to bring the actions described in this section, thereby leaving the question to be answered by existing law. See note 39 supra. Standing has been granted the Attorney General to bring such actions, however. See text accompanying notes 128-33 supra.
151. Id. §§ 21168, 21168.5. These two sections contain different standards for reviewing agency action: one which applies if a formal agency hearing has been required and one which applies to other types of actions. Id. §§ 21168, 21168.5. The two sections are “declaratory of existing law” (id. § 21168.7) and should be studied carefully in conjunction with CAL. CODE CIV. PRO. § 1094.5 (West 1955) and cases decided thereunder.
project which may require an environmental impact report,\textsuperscript{152} a reviewing court is likely to be sympathetic to an argument that a given subdivision "may have a significant effect on the environment," and hence require preparation of a report. Even though the report is supposed to be "an informational document" only\textsuperscript{153} and does not determine the local agency's decision, it may become the most important piece of evidence in a subsequent court proceeding on a petition for writ of mandate to review the local agency's refusal to deny approval of the tentative subdivision map.\textsuperscript{154} If the environmental impact report establishes that any of the adverse conditions mandating denial of the subdivision map in fact exists,\textsuperscript{155} it would be very difficult for the local agency to show that a decision to approve the map was supported by "substantial evidence" or that the agency had "proceeded in a manner required by law."\textsuperscript{156}

\textbf{E. Summary}

Since 1970 the California Legislature has made significant progress in providing both a rational state planning process and a locally enforced statutory scheme to prevent mountain area development from placing unreasonable burdens on the fragile ecological balance of the mountains. The chief weakness of this system, however, is that its implementation depends heavily on the judgment of local legislative bodies. If the local body wishes to see the area over which it presides developed with due regard to environmental values (which may mean that many areas will not be developed at all), it has certainly been provided with adequate legislative tools to accomplish this goal. But the statutory scheme cannot force environmental considerations upon a local body which is chiefly interested in broadening its tax base, increasing its population, or attracting commerce, industry or tourist trade. In such a case, environmentalists, local agencies, and developers all must resort to the uncertainties and delay of judicial review to resolve a controversy that could, and unquestionably should, have been settled in advance by including regional and statewide interests in those phases of the local planning and decision-making process having more than local implications.

Given the strong interest of all people of the State in the preservation and enhancement of its mountain areas, this continuing existence of a local veto over environmental control of mountain develop-

\textsuperscript{153} \textit{Id.} § 21061.
\textsuperscript{155} \textit{See Cal. Bus. & Prof. Code} § 11549.5 (West Supp. 1973), reprinted at text accompanying note 120 \textit{supra}.
ment is one of the strongest arguments in favor of regional and statewide planning and land use control. Until regional and statewide interests become part of the decision-making process, California's mountain areas will remain subject to the whim and caprice of local pressures—pressures that provide adequate protection in enlightened jurisdictions but generate needless court battles in parochial, self-interested ones.

IV

TWO PROPOSALS FOR REGIONAL AND STATEWIDE CONTROL

One of the most common grounds for local opposition to any kind of regional or statewide land use control scheme is the fear that administrative bureaucrats unfamiliar or unconcerned with special local problems will not only destroy the ability of local citizens to determine the direction and extent of their own growth, but will exercise their usurped control over local development to the detriment of legitimate local interests. Yet the reverse is also true—many purely local development decisions profoundly affect an entire region, or even the whole state. Those outside the local jurisdiction whose interests are significantly affected by local land use decisions should surely have some way to have their views represented in the decision-making process. Article 7 of the American Law Institute's Model Land Devel-

157. That the Reporters to the Model Land Development Code were sensitive to this problem is demonstrated both by the structure of the Code and by the introductory commentary on Article 7:

... [It is important to recognize that at least 90 per cent of the land use decisions currently being made by local governments have no major effect on the state or national interest. Furthermore, most of these decisions can be made intelligently only by people familiar with the local social, environmental and economic conditions. ... The Reporters have tried, therefore, to balance the need for expanded state participation in the control of land use against a policy that this participation be directed toward only those decisions involving important state or regional interests, while retaining local control over the great majority of matters which are only of local concern. ALL MODEL LAND DEVELOPMENT CODE art. 7, Commentary at 5 (Tent. Draft No. 3, 1971). See Senate Comm. on Interior and Insular Affairs, Land Use Policy and Planning Assistance Act of 1972, S. Rep. No. 869, 92d Cong., 2d Sess. 19-25 (1972).

158. Examples of mountain area land use decisions having a regional impact on at least an entire watershed include development of large ski areas, major logging and mining operations, trans-mountain highway construction, rapid commercial expansion of mountain towns and cities, and development of second-home subdivisions. For examples of general land use decisions of greater than local import, see Comment, Regional Planning and Local Autonomy in Washington Zoning Law, 45 Wash. L. Rev. 593, 594-95 (1970), and Ellman, Book Review, 1 ECOLOGY L.Q. 234, 235-38 (1971).

159. For general discussions of the need for and proposals to implement regional and statewide participation in land use control, see Delogu, Beyond Enabling Legislation, 20 MAINE L. REV. 1 (1968); Walsh, Are Local Zoning Bodies Required by the
opment Code (MLDC)\textsuperscript{160} and the proposed Federal Land Use Policy and Planning Assistance Act of 1972 (S. 632)\textsuperscript{161} propose a rational scheme through which land use decisions having extra-local effect may be defined, and under which both local and statewide groups may participate in those decisions and have their legitimate interests represented and protected.

\textbf{A. The Model Land Development Code (MLDC)}

Three categories of land or development activities are defined in Article 7 which may be subject to regional or statewide control: Districts of Critical State Concern,\textsuperscript{162} Developments of Special Regional Benefit,\textsuperscript{163} and Large Scale Developments.\textsuperscript{164}

Districts of Critical State Concern may be designated in specific geographical areas of the state by rules promulgated by the State Land Planning Agency.\textsuperscript{165} The Agency may so designate a particular area only if it is likely to affect or be affected by "major public facilities," contain or have an impact upon "historical, natural or environmental resources of regional or statewide importance," or comprise a site for a proposed "new community."\textsuperscript{166} The rule designating a District must specify the reasons why the area is of critical concern to the state or region, and must contain general principles to guide its future development.\textsuperscript{167} Once an area has been so designated, the powers of local governments to permit development there are suspended pending adoption of regulations for the area.\textsuperscript{168} These regulations are prepared


160. ALI MODEL LAND DEVELOPMENT CODE art. 7 (Tent. Draft No. 3, 1971).


163. Id. § 7-301 et seq. This category of project relates only marginally to mountain area subdivisions, and will not be discussed in the text.

164. Id. § 7-401 et seq.

165. The Agency is created under id. § 8-101 et seq.

166. Id. § 7-201(3). See the Explanatory Note following section 7-201 for examples of areas a state may wish to designate as Districts of Critical State Concern (e.g., site for development of a major airport; area occupied by a number of strip mines which are polluting a major river; Civil War battle site threatened by uncontrolled commercial development; major salt marsh and bird refuge threatened by indiscriminate landfill operations).

167. Id. § 7-201(1).

168. Id. § 7-202. Section 7-207(2) provides a narrow exception to the development freeze, during the time when development regulations are being prepared, for
and adopted by the local governments having jurisdiction over the District, in accord with the guiding principles set forth in the State Land Planning Agency's rule creating the District.\textsuperscript{109} If these regulations comply with the regional development principles specified for the District, the State Land Planning Agency must approve them.\textsuperscript{170} The local Land Development Agency then administers regulations thus approved.\textsuperscript{171}

Under these provisions a State Land Planning Agency could reasonably declare most mountain areas of the state Districts of Critical State Concern, since a state's mountains contain a major share of its watershed, timber, mineral, range, and recreational resources, and the preservation of those resources is vital to the state's social, environmental and economic well-being.\textsuperscript{172} Once development regulations for the mountains were adopted by local governments and approved by the State Land Planning Agency, development compatible with the State Agency's rules designating the Districts could take place in an orderly fashion designed to protect both local and statewide interests, balance the probable benefits and burdens of proposed projects in a rational way,\textsuperscript{173} and protect ecologically fragile areas from destruction.

Large subdivisions proposed for those mountain areas which may not be included in Districts of Critical State Concern would be subject to state control under the Model Land Development Code's Large Scale Development provisions.\textsuperscript{174} The State Land Planning Agency projects needed "to protect the public health, safety or welfare because of an existing emergency."

\textsuperscript{169} Id. § 7-203(3).

\textsuperscript{170} Id. If a local government fails to prepare and adopt development regulations within six months of the designation of the District, the State Land Planning Agency may do so in its stead. The local Land Development Agency administers regulations adopted in this manner by the State Agency and, if the local government thereafter adopts acceptable regulations, they supersede the state regulations. \textit{Id.} § 7-204(1)-(4).

\textsuperscript{171} Id. § 7-207(3). The provisions just described reflect the feeling of the Reporters that policy should be established at the state level but the enforcement of that policy should be handled by the local Land Development Agencies in deciding particular cases, subject to appeal to a State Land Adjudicatory Board on the record made before the local Land Development Agency. Thus the state legislature and the State Land Planning Agency determine policies, the local Land Development Agencies administer them in conjunction with local policies, and the State Land Adjudicatory Board exercises an appellate function.

\textit{Id.} art. 7, Commentary at 6.

\textsuperscript{172} Note that California could achieve largely the same effect as designating Districts of Critical State Concern in the mountains through using its coordinated open-space program. See text accompanying notes 78-81 \textit{supra}.

\textsuperscript{173} \textit{See MLDC} §§ 7-501, 7-502.

\textsuperscript{174} Id. § 7-401 \textit{et seq.} Compare the designation and regulation of Large Scale Developments with the discussion of California Land Projects in the text accompanying notes 109-14 \textit{supra}. 
may define as Large Scale Developments those projects which, because of their magnitude or the magnitude of their effect on the surrounding environment, are likely in the judgment of the Agency to involve issues of state or regional significance.\(^7\) Once a project is defined as large scale, it may be undertaken only if the local Land Development Agency grants a special development permit.\(^8\) Such permits are to be issued only if the projected benefits of the development outweigh the projected detriments, the objectives of the applicable land development plans will not be unreasonably interfered with, and any departure from the local development ordinance is "reasonably necessary" to provide access to housing, jobs, schools, or recreational opportunities for a "substantial segment" of the population of the area surrounding the local political jurisdiction.\(^9\) Here again, provision is made to protect both local and statewide interests by having the state agency decide which projects are to be defined as large scale, and having the local agency decide when, within the limits of the statute, a proposed large scale development is to be granted a permit to build.

**B. The Proposed Land Use Policy and Planning Assistance Act of 1972 (S. 632)**

On September 19, 1972, the United States Senate passed S. 632, the proposed Land Use Policy and Planning Assistance Act.\(^8\) Although no action was taken on it by the House,\(^9\) the fact of Senate passage indicates both the gathering momentum for major land use

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\(^7\) Id. § 7-401(1). Section 7-401(2) enumerates those factors the Planning Agency must consider in defining a particular project as a large scale development: (a) the amount of pedestrian or vehicular traffic to be generated; (b) the number of persons likely to be present; (c) the potential for creating environmental problems such as air or water pollution or noise; (d) the size of the site to be occupied; and (e) the likelihood that additional or subsidiary development will be generated. Each of these factors could easily apply to a large mountain subdivision. Section 7-401(3) allows the State Land Planning Agency to vary the rules defining large scale developments in different areas of the state to respond to varying local conditions. For example, a narrower definition might be appropriate for a large city. See id., Explanatory Note § 7-401.

\(^8\) Id. §§ 7-402(2), 7-403.

\(^9\) Id. § 7-404. The criteria to be considered in weighing probable benefits against probable detriments are found in sections 7-501 and 7-502, and include impact on the environment, relative cost burdens to be borne by local governments throughout the region, housing needs, and effect on local and state land development plans.

\(^10\) S. 632, 92d Cong., 2d Sess. (1972); 118 CONG. REC. S15278 (daily ed. Sept. 19, 1972). For an interesting debate in the form of letters to the editor of the Washington Post from the sponsors of S. 632 and S. 992, the Administration's land use proposal and chief competitor of S. 632, see LAND USE (Comm. Print), supra note 1, at 21-27. A summary of the committee hearings on S. 632 is found in this Committee Print at 27-38.

\(^11\) 3 ENV. RPTR.—CURR. DEV. 993 (1972).
reform, and the general direction such reform is likely to take. The central provisions of S. 632 are nearly identical to Article 7 of the Model Land Development Code. The proposed Land Use Policy Act envisions a program of federal land use planning grants to the states to be administered by an Office of Land Use Policy Administration in the Department of the Interior. To receive grants, the states must set up land use planning processes and programs meeting the requirements of the Act.

As a condition of continued state eligibility to receive grants after the third year following passage of the Act, a state must demonstrate that it has developed an adequate land use planning process, which includes: the preparation of a continuing inventory of the state's land and natural resources; gathering of data relating to population, economic needs, and environmental problems; and projections of the nature and quantity of land needed for the conservation and preservation of natural resources and for all types of economic growth and development. To complement this information-gathering process, the state is to establish methods for identifying large-scale development and land use of regional benefit, and for compiling an inventory of "areas of critical environmental concern and areas which are, or may be, impacted by key facilities."

180. A digest of some 87 bills in the 91st Congress relating to land use may be found in LAND USE (Comm. Print, supra note 1, at 59-76. S. 268, 93d Cong., 1st Sess. (1973), a bill identical to S. 632, was introduced in the Senate by Senator Henry Jackson on January 9, 1973. 3 ENV. RPTR.—CURR. DEV. 1058 (1972). The corresponding House bill is H.R. 2942. Id. at 1433. On February 20, 1973, Senator Jackson introduced S. 294 on behalf of the Administration. This bill is similar to S. 268, but contains sanctions in the form of a loss of up to 21% of federal funds for airports, highways, and land and water conservation if states fail to enact acceptable land use programs by 1979. Id. at 1312. [Ed. Note: The Senate passed S. 268 on June 21, 1973, after defeating an amendment introduced by Senator Jackson which would have added the sanctions of S. 294. 4 ENV. RPTR.—CURR. DEV. 273 (1973).]

181. S. 632, § 201. The Act would authorize a total of $170 million to be available for grants over a five-year period. Id. § 510. A complete copy of the Act as it passed the Senate is found at 118 CONG. REC. S15278-84 (daily ed. Sept. 19, 1972).

182. S. 632, §§ 302(a)(1) to (5).

183. Id. §§ 302(a)(7) and (8). These four categories of land and land use are based on the Model Land Development Code. MLDC §§ 7-201, 7-301, 7-401. The proposed Land Use Policy Act defines each of these categories in some detail. Of particular interest here are the following provisions:

(e) The term "areas of critical environmental concern" means areas as designated by the State on non-Federal lands where uncontrolled development could result in irreversible damage to important historic, cultural, or esthetic values, or natural systems or processes which are of more than local significance. . . . Such areas shall include—

(4) areas of unstable soils and high seismic activity;
(5) rare or valuable ecosystems;
(6) significant undeveloped agricultural, grazing and watershed lands;
To continue receiving grants under the program after five years, the state must develop an adequate state land use program, including both the planning process described above and methods of implementation designed to assure that land use in areas of critical environmental concern, or in areas likely to be impacted by key facilities, and development of large-scale subdivisions and other large-scale projects are all consistent with the state land use program.\textsuperscript{184} These methods of implementation are to include either one or a combination of two general techniques: implementation of state-established standards by local governments (subject to state administrative review to assure compliance with state guidelines) and direct state land use planning and regulation.\textsuperscript{185} That the first technique is preferred under the Act is made clear in section 303(b)(2)(A), which provides that methods of implementation are to be selected "so as to encourage the employment of land use controls by local governments." Whichever method of implementation is selected must contain an administrative appeal procedure to assure that any party aggrieved by the state or local government under the state land use program will have adequate opportunity to present his viewpoint.\textsuperscript{186}

Both this proposed Act and the Model Land Development Code require state participation in land use regulation only when the proposed land use is likely to have extra-local consequences. Land uses

\begin{itemize}
\item[(7)] forests and related land which require long stability for continuing renewal;
\item[(8)] scenic or historic areas; and
\item[(9)] such additional areas as a State determines to be of critical environmental concern.
\end{itemize}

The term "large scale development" means private development on non-Federal lands which, because of its magnitude or the magnitude of its effect on the surrounding environment, is likely to present issues of more than local significance in the judgment of the State.

S. 632, §§ 501(e) and (h). There follows a list of factors to be considered in designating large scale developments. The list is almost an exact copy of MLDC § 7-401(2), reprinted at note 175 supra.

184. S. 632, §§ 303(a) and (b)(1).

185. Id. §§ 303(b)(2)(B)(i) and (ii). \textit{Compare} MLDC art. 7, Commentary at 6, reprinted at note 171 supra. The real enforcement power of the Act is provided in section 303(b)(2)(C). That section stipulates that state implementation methods shall include "where necessary" the state's authority to prohibit, under the police power, any development in areas of critical environmental concern, or in areas designated for key facilities, development of regional benefit, large-scale subdivisions, or other large-scale development, if the project is inconsistent with the applicable state land use program for each such area. Section 303(b)(2)(E) assures the right to petition the appropriate court for a determination as to whether or not any action taken under section 303(b)(2)(C) would require compensation for taking or diminishing the value of any land involved.

having only local effects remain under the regulatory power of local
governments. Even when extra-local consequences are involved, a lo-
cal agency administers the applicable state land use plan, although it is
devised and formulated on the state level. Thus both statutes preserve
local participation and representation in all land use decisions which
affect local interests, even when those decisions will have a regional
or statewide impact. The significant innovation of both acts is that
local governments could no longer ignore the impact of their land use
decisions on land and people outside the limits of their own juris-
diction.

CONCLUSION

Subdivision activity in the mountains of many western states has
reached epidemic proportions. Many local government officials have
been either unwilling—because of their desire for "growth and prog-
ness”—or unable—because of inadequate statutory authority—to con-
trol the process. The judiciary has proven equally unable to deal
with the problem where limited to common law principles: since the
common law reacts only to real or threatened harm in individual cases,
it lacks the ability to influence land use patterns beyond the controversy
before it. Even when endowed with statutory authority to protect
the environment, as in Michigan, the courts are not equipped to ad-
minster a comprehensive system of land use planning and control.

California's recent statutory amendments give real power to local
governments to control subdivision development and to protect their
mountain environments from overdevelopment and destruction. Those
local governments more interested in rapid economic progress than
in balanced environmental protection, however, can still ignore the de-
structive aspects of mountain subdivisions, although their decisions are
subject to limited judicial review.

A balanced synthesis of local, regional, and statewide land use
planning and control presents the only practical, long-range solution to
the problems presented by mountain area subdivisions. What happens
to a state's mountains is of concern to all the people of the state, not
just to the people who own property or reside there. The Model Land
Development Code and the proposed Land Use Policy Act provide a
rational mechanism for achieving that balanced synthesis. Hopefully,
California and other western states will adopt land use controls based
on these measures without waiting to be prodded by Congress. The
destruction caused by rapid expansion of mountain area development
must be brought under control without delay.

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