Defining and Implementing Local Plan-Land Use Consistency in California

G. Edward Diener*

INTRODUCTION

California's local land use planning and zoning law contains complex, detailed requirements designed to force local governments to implement land use and development decisions that adhere to local long range planning goals. Both the state government and private individuals have the power to compel local governments to follow the mandate of the planning law. However, because the state has only begun to exercise its enforcement power,1 private individuals must play a major enforcement role.

The state's planning and zoning laws are currently in flux. Many of the statutes were enacted within the last six years, and still await clarification in the courts. The statutes require "consistency" or "compatibility" between land use decisions and local development goals,2 but that vague command has yet to be defined in a way that is useful to planners and other individuals concerned about community growth and development. Private persons who wish to compel local governments to implement development goals through land use decisions, and thereby stop unplanned development, need to be advised of the status

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* B.S. 1976, Bowling Green State University; Third Year Student, School of Law, University of California, Berkeley; Special Topics Editor, Ecology Law Quarterly.

1. Some local governments have moved quite slowly to comply with the statutes. CALIFORNIA OFFICE OF PLANNING AND RESEARCH, LOCAL GOVERNMENT PLANNING SURVEY 1976, at 3-5 (1977) [hereinafter cited as OPR SURVEY]. Recently, the state successfully blocked approval of a subdivision map when the relevant general plan lacked several elements. People ex. rel. Younger v. Sonoma County, No. 92671 (Super. Ct., Sonoma County, June 19, 1978). The case was not appealed. Telephone conversation with Alexander Henson, Deputy State Attorney General, San Francisco (Oct. 27, 1978). A consistency action against Mendocino County was filed by the state in late November, 1978. Telephone conversation with Alexander Henson, Deputy State Attorney General, San Francisco (Dec. 18, 1978).

2. For in-depth discussion of the statutory scheme, see text accompanying notes 20-52 infra.
of the law and the tools at their disposal to enforce it. They need a litigation road map to the plan-land use consistency requirements.

This Article discusses how plan-land use consistency requirements function and their use as a basis for suits to stop development not in accord with long run land use policy. First, background data on the nature of planning and the statutory scheme is provided. Next, two remedies for unplanned development are discussed. Finally, the application of one aspect of the plan-land use consistency requirements to the relatively new practice of initiative rezoning is explored.

I

BACKGROUND: PLANNING AND LAND USE STATUTES

City and county general plans are collections of objectives, programs, and policies designed to guide local land use and development. In addition to planning for areas within their jurisdictions, local governments must plan for areas outside their jurisdictions, the land use and development of which will have an impact on the plans for the governed areas. Plans allocate possible land uses by dividing the plan-

3. Consistency requirements are scattered throughout California law. This Article discusses Government Code § 65860 (zoning ordinances), Government Code § 66473.5 (subdivision maps), Government Code §§ 65566-65567 (open space lands), and Government Code § 65402 (capital projects). Not discussed are Government Code § 16146 (Williamson Act subvention payments), Government Code § 66577 (park lands dedication), Public Resources Code § 30513 (zoning ordinances in the local coastal program), Health & Safety Code § 33331 (redevelopment plans), Health & Safety Code § 34326 (considerations of consistency in planning housing projects by housing authorities), and Streets & Highway Code § 32503 (parking facilities planned by parking authorities). The undiscussed consistency requirements are less likely to give rise to litigation by private plaintiffs. However, the principles espoused here should apply to all these consistency requirements.

4. General plans have been variously defined. T. J. Kent, Jr. defines them as “master design[s] for the physical development of the territory of the city.” T. KENT, JR., THE URBAN GENERAL PLAN 30 (1964) [hereinafter cited as T. KENT]. They have also been called “a set of more or less general statements that clearly express a city's intentions and desired directions of change.” CITY OF OAKLAND, OAKLAND POLICY PLAN—A COMPONENT OF THE COMPREHENSIVE PLAN 18 (1972) (amended through July, 1976) [hereinafter cited as OAKLAND POLICY PLAN].

5. CAL. GOV'T CODE § 65300 (West 1966). Impact could be caused by physical features such as major thoroughfares or natural topographic features forming barriers to circulation, or physical features, such as bodies of waters, which tend to create shared problems between cities. CALIFORNIA COUNCIL ON INTERGOVERNMENTAL RELATIONS, GENERAL PLAN GUIDELINES III-4 (1973) [hereinafter cited as CIR GUIDELINES].

The Council on Intergovernmental Relations (CIR) was established in 1963. It was a state agency composed of representatives from cities, counties, school districts, special districts, regional organizations, and state agencies. CAL. GOV'T CODE § 34200 (Deering 1974) (repealed 1975). CIR was organized to promote cooperation and coordination between these represented agencies. Clifford R. Anderson, Jr., A Word about the Council on Intergovernmental Relations and the General Plan Guidelines, in CIR GUIDELINES, supra [hereinafter cited as Anderson Letter].

Government Code § 34211.1 gave CIR the responsibility to develop guidelines for the preparation and content of general plans. CAL. GOV'T CODE § 34211.1 (Deering 1974) (re-
ning area into smaller planning districts such as neighborhoods and sub-areas. Then one of the basic land uses—commercial, residential, industrial, or open space—or some form of those land uses is designated for each planning district. Several planning districts may have the same designation, but no district will contain more than one of the basic types of use. The relationships between areas chosen for different land uses should be indicated in the general plan. Taken as a whole, plan objectives, programs, and policies should reflect community-held values concerning land use.

In California, general plans must contain local policy decisions which concern various facets of community life. Land use, circulation (transportation facilities and flow), housing, conservation, open space, seismic safety, noise, scenic highway, and general safety elements must appear in each such plan. Separate statement of these elements is not required; in fact, there is a tendency for several of the categories to overlap. This has sometimes led, for example, to a consolidation of the safety and seismic elements, or of the open space and conservation factors. Regardless of any such overlaps, however, the required consideration of the enumerated elements is intended to provide an integrated, internally consistent statement of policies to guide local land use development.

General plans can be implemented through the use of several tools, among them specific plans and zoning ordinances. Specific plans are designed to apply to planning districts the policies of the general plan. The planning law gives cities and counties the authority to create specific plans to execute general plan policies. Larger cities often find

pealed 1975). CIR stressed that its guidelines are advisory only, and that local conditions may cause variations from the suggested norms. Anderson Letter, supra. In 1975, the duty to develop guidelines was transferred to the Office of Planning and Research, but prior CIR Guidelines remain effective. Cal. Gov’t Code §§ 65040, .2 (West Supp. 1966-1977).


7. CIR Guidelines, supra note 5, at II-12.


10. The CIR Guidelines point to interrelationships among the elements and discuss consolidation techniques. CIR Guidelines, supra note 5, at III-5 to III-7.

11. Oakland Policy Plan, supra note 4, Safety and Seismic Safety.

12. Id. at Open Space & Natural Resources. Berkeley has combined the required open space and conservation elements with an optional recreation element. Berkeley Planning Commission, Berkeley Master Plan, D-1 to D-50 (Open Space, Conservation, and Recreation Element (1976)) [hereinafter cited as Berkeley Plan].


14. Id. § 65450 (West 1966). However, this enabling provision does not apply to char-
specific plans to be an integral part of the planning process. The City of Berkeley uses specific plans to pinpoint problems encountered in applying general plan policies. Analysis of these problems may lead to general plan amendments. In contrast to general or specific plans, zoning ordinances set detailed standards for each parcel of land. They have an immediate effect on land use and are the basic means of implementing land use planning.

II
THE STATUTORY SCHEME

This section outlines the statutory scheme of plan-land use consistency. The statutes involve zoning changes, subdivision map and public works project approvals, and open space land development (hereinafter referred to collectively as land use decisions). The laws sometimes overlap and sometimes conflict, and cases have not yet arisen to aid in resolution of some of these problems.

No one policy underlies the various requirements, but a rough guide does exist. As a rule, counties and general law cities are subject to the requirements. Charter cities are exempt, except where specifically included.

A. Zoning

California Government Code section 65860 requires zoning to be consistent with the general plan and with specific plans made pursuant thereto. Consistency with the plan is possible only if the local government has officially adopted a general plan. The land uses authorized in the zoning ordinance must then be compatible with the objectives, policies, general land uses, and programs specified in the official plan.

- Interview with Michael Lara, Staff member, Berkeley Comprehensive Planning Dep't, in Berkeley (Feb. 23, 1978) [hereinafter cited as Lara Interview].
- Sacramento has adopted community plans designating land uses for all individual parcels of property throughout the city. This blends specific planning generality with zoning specificity. Cal. Dep't of Finance, Mandated Cost Estimate for A.B. 283, at 2 (Aug. 31, 1977) [hereinafter cited as Mandated Cost Estimate for A.B. 283]. Los Angeles has begun the same process.
- ELLMAN & WOOLFE, supra note 8, at 64.
- Id. § 65700 (West Supp. 1966-1977).
- Id. § 65860(a)(i).
- Id. § 65860(a)(ii).
The requirement applies only to counties and general law cities, and to the City of Los Angeles.

Although section 65860 requires existing zoning to be consistent with the plan, private persons have the power to force only those zoning ordinances and amendments which are new to be made consistent. Suits to force consistency must be brought under section 65860(b), which allows only new zoning ordinances, rezonings, or changes in uses permitted in existing zones, collectively referred to as zoning changes, to be challenged. Such suits must be filed within ninety days of the enactment of the zoning change.

While section 65860 applies to the wide range of land use controls that local governments can enact under the general zoning power, some controls are subject only to indirect review. For example, in Hawkins v. County of Marin, a property owner applied for a conditional use permit to construct high density housing units for the elderly in a low density area. The court held that the issuance of a use permit need not be examined for consistency as long as the permit was issued pursuant to an authorizing section in a zoning ordinance which was consistent with the general plan. The Hawkins court did not examine the authorizing section itself for consistency, however. It was, in fact, foreclosed from doing so, since no duty of zoning consistency existed in 1972, when the permit was issued. Thus, even if the authorizing section were invalid in 1974 when suit was filed, it was valid when the permit was issued. The Hawkins court was therefore prevented from ruling on the only inconsistency it could have possibly found.

The dilemma of Hawkins promises to recur in a different form.
Hawkins indicates that a suit to prevent issuance of an inconsistent use permit is really a suit to invalidate the authorizing section of the zoning ordinance. If the authorizing section existed in its present form on January 1, 1974, then the statute of limitations has run on any suit and the section is presumptively valid. The same is true of any new authorizing section in a zoning ordinance, or any amended section, once the ninety day statute of limitations has run. In either situation, courts will be foreclosed from examining the authorizing section for consistency, as in Hawkins. The result is that the issuance of many permits for uses which are inconsistent with the locally-adopted plan cannot be prevented under the zoning law.\(^{31}\)

Furthermore, the granting of a variance cannot be prevented by application of section 65860. Only land uses authorized by the zoning ordinance need be consistent.\(^{32}\) A variance is not an authorized use but is granted when hardship would result from the restriction of uses to those authorized.\(^{33}\) Nor is a variance a zoning change.\(^{34}\) However, since by statute a variance may be granted in California only to provide property owners equality of treatment with their neighbors,\(^ {35}\) and since "use variances" are forbidden,\(^ {36}\) the probability that a variance inconsistent with a general plan will be granted is negligible.

**B. Subdivisions**

Closely related to section 65860 is Government Code section 66473.5, which requires a finding be made that a proposed tentative subdivision map is consistent with the local government's general plan before map approval is granted.\(^ {37}\) Without such approval, a proposed subdivision cannot be built.\(^ {38}\)

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31. There is a possibility that conditional use permits can be attacked under Government Code §§ 65563-65567. In Sierra Club v. County of Alameda, 140 Cal. Rptr. 864 (1977), hearing granted Nov. 25, 1977, the Court of Appeal reviewed a conditional use permit for consistency with the open space element of the Alameda County general plan, apparently under section 65566. The court found that the permit was closely attuned to the goals of the general plan. *Id.* at 872. However, on December 29, 1977, the case was retransferred to the Courts of Appeal for refiled of its opinion, and the Reporter of Decisions was subsequently directed not to publish the opinion in the Official Appellate Reports. The opinion cannot therefore be cited as authority for this review procedure. *Cal. R. Ct.* 977. For discussion of §§ 65563-65567, see text accompanying notes 50-52 infra.


33. *Id.* § 65906.

34. HAGMAN, supra note 27, at 260 (relying on language in section 65906).


36. *Id.*

37. *Id.* at 66473.5 Although the section does not use "tentative" to describe proposed subdivision maps, the California Supreme Court recently held that only tentative, and not final, maps need to be consistent with the then current plan. Youngblood v. Bd. of Supervisors of San Diego County, 22 Cal. 3d 644, — P.2d—, — Cal. Rptr. — (1978).

Sections 66473.5 and 65860 both define consistency in terms of "compatibility," but no consistency determination is possible under either section unless a general plan has been officially adopted. However, while section 65860 applies only to counties and general law cities, section 66473.5 applies as well to charter cities.

In private suits brought pursuant to section 66473.5, the role of the court is to review the evidence underlying the administrative finding of consistency to determine whether or not the finding is supported by substantial evidence. Section 66473.5 challenges to subdivision map approvals must be filed with the appropriate court within 180 days of the date of approval.

Section 66473.5 plugs a significant loophole in section 65860, however, with respect to new subdivision proposals. Under section 65860, if a proposed subdivision required no zoning change, no challenge founded on the inconsistency of the proposed map with the general plan would be possible; existing zoning ordinances are immune to section 65860 challenges. With section 66473.5, however, a subdivision map which is itself inconsistent with the general plan may be attacked without regard to the status of zoning laws for the area in which the new subdivision is to be built.

C. Public Works Projects

No statute comparable to section 65860 or section 66473.5 requires public works projects (including real property acquisitions and dispositions by governments) to be consistent with the general plan. However, before a proposed public works project can be approved, section 65402 of the Government Code requires that the local planning agency be given the opportunity to report on the conformity of the proposal with either the entire general plan or those elements of it which would have their implementation affected by the project. To illustrate, suppose a

39. Id. §§ 66473.5, 65860(a)(ii).
40. Id.
41. Id. at 65700. See note 25 and text accompanying notes 24 & 25.
44. CAL. GOV'T CODE § 65402(a) (West Supp. 1966-1977). Cities and counties cannot approve public works projects outside their jurisdictional boundaries until the planning agency of the local government having jurisdiction over the site has been given the opportunity to report concerning conformity with that locality's plan. Id. § 65402(b). The planning agency must report within forty days, or conformity with the relevant plan is assumed. Id. § 65402(a)-(b).
Charter cities are exempt. Id. § 65700.
street improvement project would affect the implementation of the noise and circulation elements, but not the housing or conservation elements. If, in addition, the general plan lacks a valid housing element, the planning agency could report on project conformity under section 65402 despite the deficiency. This is so since the missing element is unaffected by the project. Compare sections 65860 and 66473.5, where an incomplete general plan is grounds for withholding approval of a proposed project.45

If a specific plan exists for the implementation of open space policies and programs, public works projects must conform to this specific plan under Government Code section 65553.46 Public works projects should be required to be consistent with all applicable plans in counties and general law cities. This pattern of general plan predominance over local land use determinations has been established by sections 65860 and 66473.5. The requirement that public works projects conform to specific open space plans is a reflection of this pattern.47 To allow the legislative body of a county or general law city to ignore the local plan when approving public works projects would be contrary to the prevailing state policy and statutory scheme. To date, however, charter cities have been clearly subject only to section 66473.5;48 they have been deliberately exempted from the remainder of the planning and zoning law.49 To impose a public works projects consistency requirement on charter cities would counteract the autonomy granted them by the present planning and zoning statutes.

D. Open Space Land Development

An additional consistency requirement has been placed by implication on all cities and counties. Government Code sections 65566-65567 require the acquisition or disposition of open space land, regulation of its use, building permit issuances, subdivision map approvals, and adoption of open space zoning ordinances to be consistent with the local open space plan.50 These statutes themselves fail to mention charter cities. It is arguable that the broad statutory exemption of charter

45. See text accompanying notes 53-65 infra.
47. Id. § 65553.
48. Charter cities are probably subject also to the open space plan consistency requirements of Government Code §§ 65566-65567, discussed in text accompanying notes 50-52 infra. But interpretation of conflicting statutes is required to reach this conclusion. No case law has yet arisen to aid in the interpretation.
49. CAL. GOV'T CODE § 65700 (West Supp. 1966-1977); id. § 65803 (West 1966). The successful opposition by charter cities to attempted extension of § 65860 to them demonstrates that the legislature deliberately refrains from imposing duties on charter cities in local land use matters. See note 25 supra.
cities from the planning law\textsuperscript{51} applies. But this approach fails to read the statutes of the Open Space Lands Act\textsuperscript{52} as a whole. The sweeping language of the Act evidences a state-wide concern for the protection and development of open space lands. Thus no local government should be insulated from the consistency requirements contained in the Act.

III
CHALLENGING LAND USE DECISIONS BASED ON INCOMPLETE GENERAL PLANS

A. Plan Incompleteness

In 1976, forty-two percent of all cities and over half of all counties in California had general plans lacking one or more of the required nine elements.\textsuperscript{53} A survey made in that year by the state Office of Planning and Research (OPR) showed that the elements most frequently missing were the noise, safety, seismic safety, and scenic highway factors.\textsuperscript{54} About eighty percent of the local governments with incomplete plans reported that lack of planning staff and budget problems had prevented completion of their plans.\textsuperscript{55}

Of course, even a general plan which is "complete" in the sense that it contains all the elements required by law may in fact be inadequate due to a failure to meet other statutory requirements or administrative guidelines. For example, the various plan elements may not adequately consider regional needs. A detailed exploration of standards against which plan adequacy is measured as well as the potential for attacking a failure to meet such standards by means of suits under the consistency requirements is beyond the scope of this Article.\textsuperscript{56} With that in mind, this Article henceforth will, for reasons of convenience, use the word "complete" to describe a plan containing all nine elements adopted in basic compliance with statutory requirements.

B. Remedies Under the Statutory Scheme

Subdivision map approvals, building permit issuances, and adoptions of open space zoning ordinances can be stopped when the local

\textsuperscript{51} Id. § 65700.
\textsuperscript{52} Id. §§ 65560-65570. See especially § 65563, requiring every city and county to adopt plans for open space lands.
\textsuperscript{53} OPR SURVEY, supra note 1, at 3.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 5. The other 20% blamed the necessity of extended public hearings or legislative inaction. Id.
\textsuperscript{56} For a more thorough discussion of the adequacy issue, see Note, Judicial Limitations on Local Growth Controls: Regional Needs as an Element of the "General Welfare," 66 CALIF. L. REV. 373 (1978), and sources cited therein.
open space plan is incomplete. In *Save El Toro v. Days*, the City of Morgan Hill, though lacking a valid open space plan, had approved tentative and final subdivision maps. The court held that the consistency requirements of sections 65566-65567 could not be met in the absence of such a plan. Hence Morgan Hill could not approve the proposed subdivision until a valid open space plan existed with which the maps could be compared.

Zoning changes in general law cities and counties can be voided or enjoined when the local general plan is incomplete. Section 65860 requires official adoption of the plan before a consistency determination is possible. All nine plan elements must be included to make official adoption complete. If a plan element is missing and the plan is incomplete, applying the *El Toro* rationale, no valid general plan exists against which to test consistency in compliance with section 65860. The implication is clear: no zoning change can be consistent with a general plan which is, in effect, non-existent. As a result, no change can be legally approved until a complete plan is adopted.

Similarly, subdivision map approval in all cities and counties can be prevented under section 66473.5 when the local plan is incomplete. Section 66473.5 specifically requires consistency with a complete general plan. The required findings of consistency, supported by substantial evidence, cannot be made when no complete plan exists; in such a circumstance there is nothing with which the proposed subdivision map may be deemed consistent.

Public works project approvals in counties and general law cities may be challenged in a similar way. If the proposed project would affect the implementation of plan elements that are missing, the local planning agency cannot make the report required by section 65402.

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57. 74 Cal. App. 3d 64, 141 Cal. Rptr. 283 (1977).
58. Morgan Hill did not have a complete general plan, so its existing open space plan could not be a valid open space element of the general plan. *Id.* at 73, 141 Cal. Rptr. at 287. The existing open space plan lacked the required open space inventory, and so could not be a valid open space plan under §§ 65563-65564. *Id.*, 141 Cal. Rptr. at 288.
59. *Id.* at 74, 141 Cal. Rptr. at 288.
63. *Id.*, § 66474(a).
64. Superior court cases have so held, independently of the *El Toro* decision itself. *See* Reinsch v. City Council of Lafayette, No. 163757 (Super. Ct., Contra Costa County, Sept. 13, 1976); No Man's Land Homeowners Ass'n v. City of Ceres, No. 144416 (Super. Ct., Stanislaus County, Jan. 10, 1978).
65. *Cf.* Friends of "B" Street v. City of Hayward, 142 Cal. Rptr. 51, *hearing granted* Jan. 26, 1978 (holding that injunctive relief was unavailable to prevent public works projects in charter cities when the project would affect implementation of a missing plan element). The court found no source for the injunctive relief in Government Code § 65302 or the remainder of the planning law. However, it is persuasively argued on appeal by the Califor-
An invalid specific open space plan would prevent the local legislative body from approving public works projects under Government Code section 65553.

C. The Diminishing Availability of These Remedies

As more local governments complete their plans, however, the remedies just discussed will become less available. Land use decisions will be subject to attack only on grounds of their inconsistency with such complete, valid plans. Consequently, the remainder of this Article is concerned with challenging proposed developments for consistency in the face of a valid plan.

IV
CONSISTENCY: LIMITATIONS, DETERMINATION, AND DEMONSTRATION

A. Limitations

Although private lawsuits provide an attractive vehicle for challenging the land use decisions of local governmental agencies, their usefulness has been limited by the courts in two significant ways. First, courts have ruled that the consistency of a challenged land use decision with the local general plan must be determined with reference to the plan as it exists at the time the case comes before the court. As of 1976, all counties and 96% of all cities had completed open space elements. OPR SURVEY, supra note 1, at 4. Thus the remedy for an incomplete plan under §§ 65566-65567 is practically extinct.

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67. Selby v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973). The rule is different when a challenge to a land use decision alleges an incomplete general plan. In that case, the courts use the plan as it existed at the time the land use decision was made to determine the plan's completeness. See Save El Toro Ass'n v. Days, 74 Cal. App. 3d 64, 141 Cal. Rptr. 283 (1977).

As the approval of final subdivision maps has been held not to be a land use decision, but rather a non-discretionary (ministerial) act, subdivision map approval challenges will focus on the decision to approve the tentative map and the plan in existence at the time of that decision. Youngblood v. Bd. of Supervisors of San Diego County, 22 Cal. 3d 644, — P.2d —, — Cal. Rptr. — (1978). See text accompanying notes 85-88 infra.
tical effect of this time-of-review rule is that a city or county may act without regard to its general land use plan. If its decision is subsequently challenged in court, the local government can then amend its general plan to conform to the land use decision under attack. Application by the courts of the time-of-review rule, combined with the ease with which land use plans may be amended, significantly impairs the value of private lawsuits as a means of forcing local governments to act in accordance with long-run land use planning goals.

In addition, the effectiveness of private suits intended to enforce the statutory consistency requirements is limited by the traditional nature of the judicial decision-making process. General land use plans, even when "complete," as defined in this Article, frequently consist of a set of vague and poorly defined policies. Moreover, given the statutory definition of consistency—i.e., that a land use decision must tend to further the policies of the planning district—where a general plan is overly broad or vague, many land uses may arguably be compatible with that plan. Faced with such an absence of standards, courts find

68. The OPR contends that such amendments are contrary to the intent of the consistency requirements—that general plan policies should determine land use decisions, not vice versa. The OPR survey indicates that such amendments generally occur in small towns unfamiliar with the principles of the state planning law. OPR SURVEY, supra note 1, at 6. See also Commentary, Mandatory Comprehensive Planning: Perspective from Three States, 30 LAND USE L. AND ZONING DIG., No. 4, at 5, 9 (1978).

69. General law cities and counties may amend their plans when their legislative bodies deem it to be in the public interest to do so. CAL. GOV'T CODE § 65356.1 (West Supp. 1966-1977). When the plan amendment is proposed first, two weeks must pass before hearings can be held with respect to amendment of the zoning ordinance to make it consistent. Id. § 65862. But when the zoning change is proposed first, no such statutory restriction applies.

Charter cities follow their own rules, except to the extent they adopt section 65356.1. Id. § 65700.

70. Policy generality may result from the impossibility of knowing what physical design measures are required to generate desired social or economic goals. T. KENT, supra note 4, at 104.

71. CIR GUIDELINES, supra note 5, at II-13. No legislative history exists to indicate what was meant in section 65860 by "compatibility." Catalano & DiMento, Mandating Consistency Between General Plans and Zoning Ordinances: The California Experience, 8 NAT. RESOURCES L. 455 (1975). The compatibility definition was added to section 66473.5 in 1974, two years after its initial appearance in section 65860. 1974 Cal. Stats., ch. 1536, § 4.

Various definitions of consistency or compatibility exist besides the CIR formulation. Citing Shay v. Roth, 64 Cal. App. 314, 221 P. 967 (1923), the California Attorney General defines consistency as "agreement with, harmonious with." 58 OP. CAL. ATT'Y GEN. 21 (1975). Others note the tentative and sometimes unrealistic nature of general plans to support their belief that any land use not grossly inhibiting the achievement of plan policies is consistent. II ASS'N OF BAY AREA GOVERNMENTS, HOW TO IMPLEMENT OPEN SPACE PLANS FOR THE SAN FRANCISCO BAY AREA, REGULATION TO CONSERVE OPEN SPACE 148-50 (1973). See also C. SENEKER, LAND USE REGULATION FOR URBAN GROWTH CONTROL, SELECTED LEGAL PRINCIPLES 20-21 (1974).

The CIR formulation is accepted here for two reasons. First, CIR was responsible for developing general plan guidelines under state law. CIR GUIDELINES, supra note 5. Second, the CIR definition seems broad enough to encompass the variations stated above.
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themselves unable to resolve with confidence the issue of consistency. The traditional judicial response in such circumstances is to defer to the decision of the local legislative body. The practical effect of this response is that plaintiffs challenging land use decisions lose. Only where the plan sets forth with more specificity the objectives it is designed to serve will more active judicial review—and greater promise for successful challenge of local land use decisions—result.

The opportunities for challenging a zoning ordinance change under section 65860 are restricted by the way plans are made in practice. When significant development has already occurred within a planning district, zones are designed to accommodate as many predominating existing uses as possible. Therefore, the land use designation for the district strongly reflects the predominant land uses and zoning patterns already in existence. Seldom do planners decide that substantial alteration of existing land uses in developed areas is worth the large cost. Zones and general plans are tailored to implement these "no change" decisions. As a result, inconsistencies between general plans and zoning patterns are rare. However, the absence of such inconsistencies is not a product of the adherence to long range planning goals, but of the expedience in drafting general plan objectives in such a way as to avoid conflict with existing developed land use patterns.

Such inconsistencies are more likely to appear in open space or redevelopment areas. Because of the flexibility of future uses of the land, present use of open space does not always dictate its treatment in the plan. Urban redevelopment may call for a change from the present intensity of land use. When present land use does not dictate planning, the possibility of inconsistencies arises.

Even if the challengers of a land use decision manage to avoid the pitfalls previously discussed, they must still demonstrate the alleged inconsistency to win. The next section of this Article suggests an approach to demonstrating inconsistencies in court. It assumes, therefore,

72. This is done to avoid imposing the hardship of nonconforming use status on the majority of uses in a zone. Lara Interview, supra note 16.

73. CITY OF WALNUT CREEK, GENERAL PLAN, Open Space Element at 8-29 (1971) (amended 1973) [hereinafter cited as WALNUT CREEK PLAN].

74. The plan may not reflect all the uses within a developed district; it can only reflect predominant uses. Small zones inconsistent with the plan designation may protect minority uses from nonconforming use status. If they are created by a new ordinance or zoning amendment, these small zones can fall under a section 65860 challenge.

75. CITY OF EL CAJON, AMENDED GENERAL PLAN 45-46 (1976) [hereinafter cited as EL CAJON AMENDED GENERAL PLAN]; EL CAJON GENERAL PLAN 1990 & MAP, supra note 6; CITY OF LIVERMORE, COMMUNITY GENERAL PLAN 1976-2000, at 138 (1976) [hereinafter cited as LIVERMORE PLAN].

76. EL CAJON AMENDED GENERAL PLAN, supra note 75, at 70, 76; EL CAJON GENERAL PLAN 1990 & MAP, supra note 6, at high density areas.
that the relevant plan policies are reasonably specific and that the plan has not been amended to conform to the land use decision.

B. Determination: Uncompensated Specific Inconsistencies

I. The Test

Land use classifications utilized by local governments in zoning ordinances tend to be more specific than those in general plans. For example, while the City of El Cajon and the City of Walnut Creek use the same general low-medium-high classification schemes with respect to residential density in their plans, the two cities, faced with different specific problems, are required to define differently and with more particularity the zones to be used. In addition, planning districts often cover far more territory than do single zones. This is a result of the different natures of planning and zoning. Planning is not concerned with individual parcels or city blocks; zoning is.

The specificity of zoning and the size of planning districts make possible the satisfaction of plan requirements for a district through many combinations of permissible zoning. Zone combinations can operate as a working whole to meet plan requirements especially in residential areas, where planned low, medium, or high density is stated as an average. Density averages can be met by using a variety of housing densities instead of by monotonously designing each zone to make it conform to the density standard. As a result, zoning tends to be mixed within a planning district. Depending on the district, some exceed and some fall well within the many policy requirements for any single planning district.

Often the land uses permitted by a zoning pattern may violate a policy or policies for a planning district. If that occurs, the offending zone should be found inconsistent for the planning district unless the

78. Both cities use this system with slight variations. Walnut Creek Plan, supra note 73, Land Use Element at 3-7; El Cajon General Plan 1990 & Map, supra note 6.
79. Underutilized, narrow lots in El Cajon and open space preservation problems in Walnut Creek have caused the cities to tailor zoning ordinances accordingly. El Cajon Amended Plan, supra note 75, at 65, 76; Walnut Creek Plan, supra note 73, Open Space Element at 8-26 to 8-27.
80. D. Mandelker, supra note 77, at 59-60. See also City of Berkeley Comprehensive Planning Dep’t, Southeast Berkeley Proposed Revised Initiation (May, 1978) (hereinafter cited as Southeast Berkeley Proposed Revised Initiation); Walnut Creek Plan, supra note 73, Open Space Element at 8-29 (areas to be rezoned are smaller than the planning districts).
81. Southeast Berkeley Proposed Revised Initiation, supra note 80. See also text accompanying notes 15-19 supra.
82. Walnut Creek Plan, supra note 73, General Plan Goals at 2-13 (the averages are intended only to indicate the primary type of dwelling in the district); El Cajon Amended General Plan, supra note 75, at 40, 43. See also D. Mandelker, supra note 77, at 59-60.
83. D. Mandelker, supra note 77, at 60; Southeast Berkeley Proposed Revised Initiation, supra note 80.
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owners of the property within the zoning possess other property within the district which can be zoned to fully compensate for the inconsistency. Under this approach, the zoning within each district will work as a designed unit to implement the plan for each district. When one zone fails to implement plan policies, some other or others will compensate; otherwise the zoning as a whole will fail to implement the policies. When one or more other zones fail to remedy the inconsistency, however, plan policies will be thwarted unless the court takes action with respect to the problem zoning pattern.

A requirement that the compensation for an inconsistency come from property owned by those who get the advantage of the inconsistency is necessary to avoid a problem of inequity. The advantage to a landowner of an inconsistency is that it confers to the property owner land use rights that would otherwise not exist. In order to implement policies for the district, however, those land use rights must be taken from other land within the same district. If the rights are taken from other parcels owned by the advantaged property owners, each owner compensating fully for the rights gained, then no uncompensated loss in land use rights has occurred. There is no inequity. However, the result may be different when property owners who gain no advantage from the inconsistent use are nevertheless deprived of land use rights for the benefit of those who do. This would occur if consistency were determined by simply viewing all the zoning within each district as a unit. One zone could compensate for the deficiencies of another, without concern for the resulting allocation of economic benefits among property owners. Some owners would be entitled to highly profitable development, while others would bear the cost by way of a reduction in their own land use rights. Whether or not such a shift in property

84. Landowner A may have a relatively small parcel, W, in the inconsistent zone, and a much larger parcel, X, elsewhere in the district. Parcel X could compensate for the inconsistency of parcel W as well as those of parcels Y and Z in the inconsistent zone, owned by Landowners B and C respectively. B and C only own Y and Z; they cannot compensate for their own inconsistencies. The implementation of plan policies would be unaffected if B and C were able to pay for the land use rights they would gain by compensating A for the land use rights A would lose in all of parcel X. In effect, A would transfer its land use rights in parcel X to B and C. They would use these rights to compensate for the inconsistencies of parcels Y and Z. This system of transferrable rights (TDR) is permissible under the California zoning law, and a TDR system was being implemented in Livermore in 1975. G. Richards, Development Rights Transfer in Livermore: A Planning Strategy to Conserve Open Space, 5 GOLDEN GATE L. REV. 191, 192, 200-17 (1975).

rights would be an unconstitutional "taking," it is an undesirable policy to promote under the banner of progressive land use control.

Using the principles discussed for zoning, the same "uncompensated specific inconsistency" test should apply to other land use decisions. Subdivisions, public buildings, and open space are some of the possible land uses in a zone. The validity of a zone is measured by the validity of the land uses allowed in the zone. Thus the consistency analysis for each of these land use decisions should reach the same conclusions as the analysis for zoning.

2. Application of the Test

Application of this method of consistency determination can be illustrated by using the facts of Youngblood v. Board of Supervisors of San Diego County.85 In mid-1974, the Santa Fe Railroad (the Railroad) proposed to subdivide land it owned in an area planned for .75 dwelling units per acre. The Railroad's tentative subdivision map stated an overall density of .60 units per acre. On December 10, 1974, the Board of Supervisors (the Board) approved the tentative map subject to a number of conditions, one of which was that the Railroad file for a rezoning. On December 31, 1974, the Board amended the general plan pursuant to an in-depth, months-long study by the planning commission. The planning district containing the proposed subdivision was targeted in the amended plan for .50 units per acre density. Several months later, the Board denied the Railroad's rezoning request, and at the same time refused Youngblood's request to rezone the property to reflect the changed plan. Finally, in October, 1975, after the Railroad had made the required improvements to satisfy the other conditions, the Board approved the final subdivision map, which contained the same density as the tentative map originally proposed by the Railroad. While the case was before the Courts of Appeal, the Railroad sold all the lots in the subdivision.

The plaintiff alleged that the Board had abused its discretion in approving the tentative map because: 1) the map conflicted with a plan policy calling for greater density near the coast and lesser density in the hills where the subdivision would be located; 2) the subdivision was approved despite its location in a primarily agricultural zone; and 3) the map called for sewage disposal by means of septic tanks.85a The California Supreme Court found that, although the general plan did call for a "sliding scale" of density, no language in the plan applied that notion to land within the .75 dwelling units per acre category. Additionally, the court found that the zone containing the subdivision al-

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85a. Id. at 652-53.
allowed higher density residential housing than the subdivision would contain, and the Board had taken steps to ensure that the septic tanks would not lead to sanitation risks. Hence, the tentative map was held consistent with the plan as it existed when the map was approved.85b

The plaintiff also alleged that the Board abused its discretion by approving the final map when it was inconsistent with the general plan as it existed when that map was approved.86 The Youngblood court did not decide whether or not the final map actually was inconsistent with the new plan. It held that, when the tentative map was consistent and the final map substantially complied with the tentative map, approval of the final map was a ministerial act not giving rise to possible abuse of discretion.87 The court felt that developers, who spend considerable sums altering the land to satisfy conditions attached to tentative map approvals, had a right to rely on those approvals.88

Assuming, arguendo, that the Railroad's final map had been found inconsistent with the current plan's density requirement, the subdivision could possibly be saved if the suggested rule were applied. Absent a requirement that subdivisions conform to the average density of the planning district, developments like that proposed by the Railroad could be treated as part of the composite of land uses which must meet as a whole the plan requirements for the district. If the Railroad owned other land in the district that could be zoned at a density low enough to compensate for the higher density of the proposed subdivision, the district could fulfill the policies of the general plan and at the same time the Railroad could proceed with its planned development. On the other hand, if the Railroad owned no other land in the district, it would be incapable of compensating for the inconsistent use and its proposal, under the suggested test, would be forbidden.

However, there are instances where a proposed zoning change which conflicts with the policies of the general plan is incapable of being cured, regardless of a developer's ownership of other land within the planning district. In Ensign Bickford Realty Corp. v. City Council,89 a developer requested a zoning change to permit construction of a neighborhood shopping center in an area designated for that complex

85b. Id.
86. The planning district density standard was one dwelling unit for every two acres (.50 units/acre), while the 217 acre subdivision would have averaged 1.2 units for every two acres (.60 units/acre). Youngblood sued to compel the Board to change the zoning in the area to conform to the new general plan. The Board had done so by the time the case was decided by the Supreme Court; hence the issue was moot. Id. at 651.
87. Id. at 654. The Court reconciled several unclear statutes to reach this result. Id. at 653-57.
88. Id. at 655-56.
89. 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977).
in the plan. Because projected housing construction had not occurred, the population of the area fell short of that required by the plan to support the complex. In the absence of the necessary population base, the proposed development was in direct conflict with a specific provision of the plan, a conflict which could not be cured no matter how much other land the developer might have owned in that planning district. The court was not faced with deciding the inconsistency issue because the developer’s request for rezoning was denied. However, this case is useful to illustrate an instance where no compensatory action is possible. In such instances, the suggested test provides no relief for the landowner requesting a zoning change.

C. Demonstration: Use of CEQA Compliance

Land use decisions can be made by local governments only after compliance with the California Environmental Quality Act (CEQA). These land use decisions nearly always require an Environmental Impact Report (EIR).

The CEQA compliance process and its relevance to the consistency requirements will be explained as follows. First, the nature of the CEQA compliance process for land use decisions and the data it generates is explained. Then the value of the data as evidence in a consistency suit is discussed.

90. Cf Sierra Club v. Bd. of Supervisors of Contra Costa County, No. 39994 (Ct. App. 1st Dist., Div. 1, Sept. 25, 1978) (unpublished opinion) (the court unnecessarily reached a consistency issue). In Sierra Club, the Board of Supervisors approved a rezoning from general agriculture district to planned unit district to enable construction of a 14,000 person planned unit development on the slopes of Mt. Diablo in September, 1974. Plaintiff’s consistency challenge to the rezoning was rejected by the court, which found that the county general plan had been devised specifically to permit this planned unit development. Id. at 12-13. The court noted that, after the trial court decision upholding the rezoning, the Board of Supervisors amended the general plan to make even clearer its decision to permit the development to be built. Id. at 16. Having found the rezoning consistent under the older general plan, the Sierra Club court concluded that it did not have to decide whether the rezoning was validated by the subsequent plan amendment. Id. Yet, in failing to begin its analysis by using the plan as it existed when the case reached it, the Sierra Club court ignored the command the California Supreme Court issued in Selby v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973).

91. Ensign Bickford Realty Corp. v. City Council, 68 Cal. App. 3d at 479, 137 Cal. Rptr. at 311. One of the reasons cited by the court for upholding the city’s decision was the discussion in the record concluding that the area lacked the population to support the complex. Id. at 478, 137 Cal. Rptr. at 310.


93. An EIR should be prepared whenever it can be fairly argued that a proposal may have a significant environmental effect, or when serious public controversy exists concerning the environmental effects of a project. 14 CAL. AD. CODE § 15084(b)-(c) (1978). These expansive requirements mean that any significant land use decision will nearly always require an EIR. See text accompanying note 97 infra.
I. Data Gathering Under CEQA

Land use decisions are subject to a two-tiered environmental analysis under CEQA. An Initial Study must be conducted by the local government to determine whether the land use decision may have any significant environmental effects. To facilitate this process, a property owner or developer must submit an Application for Initial Study as part of the application for a land use decision. From the Application will come the basic data for the Initial Study. If the Initial Study shows that the land use decision will have no significant environmental effects, then a Negative Declaration must be prepared. However, if the Initial Study finds that significant environmental effects may occur, an EIR must be prepared. The EIR is designed to examine thoroughly seven elements central to identifying and evaluating not only the impact of a proposal but the alternatives to it as well.

The CEQA compliance process produces detailed data on the effects a land use decision might have. The privately-prepared Application and the government-prepared Initial Study contain very similar information. For example, complete descriptions must be provided of any projects intended to follow immediately a proposed zoning change. Air, water, noise, and solid waste pollution effects of a suggested land use decision must be disclosed, as must the impaction.

95. Id. § 15080(e). See, e.g., City of Berkeley, Application for Environmental Initial Study [hereinafter cited as Berkeley Application]. If the city or county is proposing a public works project, open space development, or zoning change, it will already have all the data it needs for the Initial Study, and consequently no application will exist.
96. A Negative Declaration is a brief written statement describing the reasons why a proposal will have no significant environmental effects, and thus does not require an EIR. CAL. PUB. RES. CODE § 21064 (West 1977).
97. 14 CAL. AD. CODE § 15084(a) (1978). See also note 93 supra.
98. See CAL. PUB. RES. CODE § 21100 (West 1977) for a listing of the seven elements. Each EIR must contain a brief summary of the proposed action and its consequences in language that laymen can understand. 14 CAL. AD. CODE § 15140(b) (1978).
99. Some doubts still exist, however, concerning the existence of analytic tools to derive the kinds of data required for evaluation of the environmental impacts of alternative land use choices. I ENVIRONMENTAL ANALYSIS SYSTEMS, INC., THE CEQA: AN EVALUATION EMPHASIZING ITS IMPACT UPON CALIFORNIA CITIES AND COUNTIES WITH RECOMMENDATIONS FOR IMPROVING ITS EFFECTIVENESS 31-32 (1975) (report prepared for the Assembly Committee on Local Government).
100. Berkeley Application, supra note 95, passim; City of Berkeley, Environmental Initial Study passim [hereinafter cited as Berkeley Initial Study]; City of Oakland, Initial Study—California Environmental Quality Act passim [hereinafter cited as Oakland Initial Study].
102. Berkeley Application, supra note 95, at questions 24-27; Berkeley Initial Study, supra note 100, at questions II-2(a)-(b), II-3(e), II-6, II-16(f); Oakland Initial Study, supra note 100, at questions III-6 to III-7, III-19 to III-20.
local plants and animals. The impact on municipal services, traffic circulation patterns, population, energy consumption, and the contours of the affected land must be analyzed. Additional environmental considerations not covered by the specific questions of the Application are contained in the Initial Study, including the view of the planning commission regarding the consistency of the proposed land use with existing plans for local development. An EIR is a more in-depth study of the significant potential effects of a proposed land use decision and therefore contains a more thorough and detailed analysis than does an Initial Study.

When a private party proposes a land use decision, the local government must either prepare the EIR itself or allow the private party to submit a draft EIR which is then evaluated by the government before being accepted. Cities with small planning staffs often do not prepare EIRs for privately-proposed projects, preferring to review privately-prepared EIRs. Privately-produced EIRs are quite likely to contain objective data, for several reasons. A developer whose EIR contains inaccuracies discovered upon review is unlikely to generate much sympathy for his or her proposal from the planning commission. Another motivating factor is the ever-present threat of suit by environmentalists.

A failure on the part of a developer to analyze thoroughly

103. Berkeley Initial Study, supra note 100, at questions II-4 to 5; Oakland Initial Study, supra note 100, at questions III-10 to III-11; Berkeley Application, supra note 95, at questions 33-34.
104. Berkeley Application, supra note 95, at questions 16, 21, 30, 31; Berkeley Initial Study, supra note 100, at questions II-1(c), II-11, II-13 to II-15; Oakland Initial Study, supra note 100, at questions III-2, III-15 to III-16, III-18, III-20, III-24.
105. Berkeley Initial Study, supra note 100, at question II-21; Oakland Initial Study, supra note 100, at question IV.
106. 14 CAL. AD. CODE § 15080(c)(5) (1978). Berkeley Initial Study, supra note 100, at question II-8; Oakland Initial Study, supra note 100, at question III-12. Initial Studies must contain this analysis.
108. CAL. PUB. RES. CODE § 21082.1 (West 1977). If a private party proposes a land use decision, the local government can charge a reasonable fee for EIR preparation. Id. § 21089. This has made it possible for planning commissions to avoid bleeding the treasuries of small towns.
109. Id. § 21082.1. Section 21082.1 permits private parties to draft EIRs, which must then be evaluated by the local government. 14 CAL. AD. CODE § 15061(b) (1978).
111. Id. Irvine hired a consultant to review applicant-made EIRs. Id.
112. An industry group in the San Francisco Bay Area, fearful of just such legal hazards, has warned developers preparing draft EIRs for that region to make them objective
The cost of CEQA compliance is an added incentive to provide objective data. Typical costs for an EIR on a proposed project covering as little as a few acres in 1975-76 in San Diego County were between $5,000-$10,000. In Santa Clara County, an EIR costs between $3,000-$5,000. Private developers are unlikely to be willing to invest such sums for superficial or vulnerable data.

Finally, additional third party pressure for objective information in privately-prepared reports may also exist. In Santa Clara County, for example, financial institutions require in an increasing number of cases an analysis of the environmental consequences of a developer's proposed project as part of their preliminary feasibility appraisals for financing.

EIRs prepared or approved by local governments are also likely to contain reliable data. As in privately-prepared studies, the cost of EIRs is a major factor. Another powerful incentive is the threat of judicial review of the sufficiency of the EIR if the local government's approval of a proposed land use is challenged. Once having ruled that an EIR is insufficient, thus voiding approval of the project, a court may retain jurisdiction until a complete, objective EIR is filed. Courts have not been afraid to use this power. A city spent $12,600 on a report analyzing a land use proposal, but the court rejected it for noncompliance with CEQA.
2. The Data As Evidence

The data required in an EIR (or in the Application and Initial Study) may be closely correlated to the types of policies generally embodied in local land use plans. For example, data regarding the projected effects of a proposed land use on plants and wildlife relate closely to local conservation policies,\(^{121}\) and the anticipated impact of a proposed use on population size and density as well as on housing patterns must be viewed in light of its import for long range population and housing policies.\(^{122}\)

Assuming the policies underlying a given land use plan are reasonably specific, the data gathered in the preparation of an EIR may be of enormous value in identifying land uses inconsistent with existing plans. At the same time, such information may suggest ways in which compensation can be made for the inconsistent uses. In fact, the “mitigation measures proposed” element required in each EIR provides an excellent opportunity for the developer to discuss alternative schemes for compensating within a planning district for inconsistent land uses.\(^{123}\)

Courts should treat the data created by the CEQA compliance process as primary evidence of the consistency or inconsistency of land use decisions. Courts have relied on this information in related settings. For example, one court found that EIR data showing that a proposed site was physically unsuitable for development provided substantial evidence to deny approval of a subdivision map.\(^{124}\) Where a local ordinance required issuance of conditional use permits to be in substantial compliance with the local plan, the Application and Initial Study data were among the substantial evidence found to support findings required for the permit issuance.\(^{125}\)

The effects of a land use decision analyzed in an EIR (or in an

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121. See, e.g., WALNUT CREEK PLAN, supra note 73, General Plan Goals at 2-11 to 2-12; LIVERMORE PLAN, supra note 75, at 91; EL CAJON AMENDED GENERAL PLAN, supra note 75, at 22-24. Cf. Berkeley Initial Study, supra note 100, at questions II-4 to II-5; Oakland Initial Study, supra note 100, at questions III-10 to III-11.

122. See, e.g., WALNUT CREEK PLAN, supra note 73, at App. 2; LIVERMORE PLAN, supra note 75, at 98, 110, 138-39; EL CAJON AMENDED GENERAL PLAN, supra note 75, at 39-44; BERKELEY PLAN, supra note 12, Land Use Element at B-14 to B-15, Housing Element at E-11. See also Berkeley Application, supra note 95, at questions 16, 21, 30, 31; Berkeley Initial Study, supra note 100, at questions II-1(c), II-11, II-13 to II-15, II-21; Oakland Initial Study, supra note 100, at questions III-2, III-15 to III-16, III-18, III-20, III-24, IV.

123. The discussion of proposed mitigation measures is required. CAL. PUB. RES. CODE § 21100(f) (West 1977).


Application and Initial Study, if no EIR is required) which are not explicitly forbidden by plan policies or objectives should be deemed consistent with that plan. This standard demands that for each district explicit statements be made prohibiting land uses causing impacts thought to be undesirable by local planners. Local governments will be forced to consciously decide whether or not particular impacts will be prohibited. When only conscious choices can be enforced, courts can be more confident that they are in fact implementing local desires with respect to land use and development. Demanding that conscious choices be made also assures that local governments will actually consider the issues. The process of getting city councils or boards of supervisors to adopt specific prohibitions with respect to certain impacts caused by land use decisions will insure that the impacts are deemed undesirable within the affected community. Where a plan makes no provision with respect to a given land use impact, that silence would, in accord with the suggested standard, be viewed as a lack of concern about that impact; a finding of consistency would result.126

V

CONSISTENCY IN INITIATIVE ZONING

Use of the initiative or referendum process to enact zoning changes (initiative rezoning) has been on the rise in California,127 and

Land use proposals had to meet the consistency requirement, general welfare, and site adequacy standards. Id. at 377-78, 137 Cal. Rptr. at 910-11.

126. Ambiguous policy directives would be interpreted as either silence or a specific statement, depending on the facts and circumstances of the case.


Another initiative rezoning case was filed against the city of Alameda. Associated Home Builders of the Greater East Bay, Inc. v. City of Alameda, No. 438829 (Super. Ct., Alameda County, 1973) (initiative charter amendment to forbid city from issuing building permits for multi-family housing). The case was later dropped. CALIFORNIA OFFICE OF PLANNING AND RESEARCH, GROWTH MANAGEMENT PRACTICES IN CALIFORNIA—A SUR-
since due process objections to its use have been overcome, further increases in the use of the initiative rezoning process can be expected in the future. The immediate result of this practice has been to throw zoning law into confusion; the policies supporting the initiative rezoning power have uncertain applications to much of planning and zoning law. This section of the Article analyzes the impact of section 65860 on initiative rezoning.

A. Application of Section 65860

Until 1976, initiative rezonings were barred in general law cities, in circumstances exemplified by the facts of Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore. Using the initiative process, Livermore voters enacted a residential building permit issuance freeze. The initiative was brought pursuant to election law requirements, which do not provide notice to affected property owners nor public hearings on the initiative measure. However, Livermore is subject to statutory notice and hearing procedures when contemplating land use ordinances. Since due process requirements in the past had been held to be controlling over the initiative law, initiative rezonings such as that passed by the Livermore voters had been effectively barred in general law cities.

Rejecting the prior decision, the California Supreme Court restored the equality of the scope of local initiative and legislative zoning powers. Cities and counties had previously been prevented from accomplishing through local initiatives what they could accomplish through their legislative bodies. However, recognizing that the scope of the initiative power is constitutionally guaranteed, the Livermore...
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court had the choice of either striking down the due process laws inhibiting exercise of the initiative right or finding that those laws did not apply.\textsuperscript{135} Referring to the legislative intent,\textsuperscript{136} as well as to the language of the due process statutes,\textsuperscript{137} the Livermore court concluded that the statutes applied only to zoning by elected governing bodies (administrative zoning). Equality of scope was restored.

The language of section 65860 and the policy of equality reaffirmed in Livermore dictate the application of section 65860 to initiative rezonings. Unlike the due process statutes at issue in Livermore, which are replete with references to the administrative zoning process,\textsuperscript{138} section 65860 reflects no special concern with administrative zoning. It refers to neither administrative nor initiative zoning, but to zoning in general.\textsuperscript{139} Thus it should apply. Administrative zoning power is limited, at least somewhat, by section 65860. If initiative rezoning were not so limited, then cities and counties could zone under the initiative power in ways in which they are barred from zoning under the local legislative power. The premise of equal scope of power would be violated.

B. Which General Plan to Use

The general plan as it exists at the time a case is decided should be used in section 65860 suits in initiative rezonings. By using the then-existing plan in administrative zoning cases, courts allow suits to be foreclosed by amendment of the plan to match the zoning change.\textsuperscript{140} No cases have yet arisen to test the extension of this general rule to initiative rezoning, but it should get the same treatment, even if it means that suits will be foreclosed.\textsuperscript{141} If the plan as it existed at the time the initiative passed were used, disparities would develop between

\begin{itemize}
  \item \textsuperscript{135} See note 127 supra.
  \item \textsuperscript{136} 18 Cal. 3d at 594, 557 P.2d at 479, 135 Cal. Rptr. at 47.
  \item \textsuperscript{137} \textit{Id}.
  \item \textsuperscript{138} The title to section 65853 speaks of notice to the planning commission; sections 65854 and 65854.5 discuss the commission's notice and hearing duties; section 65855 requires a commission report to the legislative body; section 65856 discusses the legislative body's notice and hearing duties; section 65857 contains further instructions for the legislative body. \textsc{Cal. Gov't Code} \S\S 65853-65857 (West 1966 & Supp. 1966-1977).
  \item \textsuperscript{139} \textit{Id} § 65860 (West Supp. 1966-1977).
  \item \textsuperscript{140} See text accompanying note 69 supra.
  \item \textsuperscript{141} After passage of the Livermore initiative, the freeze was not implemented due to the challenge. However, the city created a new general plan that embraced a limited growth policy. The housing element adopted the principles of the initiative. Before approval of a subdivision is possible, the developer must show the capability of the schools to handle the increase in population without overcrowding, and must show that the city water and sewage systems can accommodate the new burden. \textsc{Growth Management Practices in California}, \textit{supra} note 127, at 85; \textsc{Livermore Plan}, \textit{supra} note 75, at 110-13.
  \item Thus a consistency challenge to the Livermore initiative would be mooted by the new plan.
\end{itemize}
what could be accomplished through initiative and administrative rezoning powers. The desire to avoid disapproval of a rezoning allowable under the present plan would guide courts in administrative, but not initiative, rezoning. The equal scope policy of Livermore would be violated.

If initiative backers neglect or choose not to preclude a section 65860 suit, then initiative rezoning challengers can get into court. What they must try to demonstrate is discussed next.

C. Factors and Evidence

The consistency standard previously advocated for administrative zoning changes—uncompensated specific inconsistencies would cause a zoning change to be struck down—applies equally in initiative rezoning. Initiative and referendum powers are to be liberally construed, yet should only be equal in scope to local legislative powers. Hence, if an administrative zoning change is struck down under the uncompensated specific inconsistency test, equality of scope dictates the same result in initiative rezoning. If some different method (most likely more lenient) of determining consistency were used in initiative rezoning, then the probability of a disparity in zoning changes permissible under the two approaches would increase enormously.

Consistency can be demonstrated in an initiative rezoning through data like that found in an Application, Initial Study, and EIR. The evidence should be the same because the consistency test is the same as in administrative zoning changes. However, initiatives are not "projects" under CEQA, so no CEQA compliance is required.


143. General plans can be amended by initiative, at least in charter cities. Duran v. Cassidy, 28 Cal. App. 3d 574, 104 Cal. Rptr. 793 (1972). What restrictions exist on this initiative power are unclear, although amendment power is liberal in administrative zoning. See note 69 supra. Notice and hearing provisions applicable to general law cities and counties (CAL. GOV'T CODE § 65350) do not apply to initiative plan amendments under the Livermore rationale.

Subsequent plan amendments to conform to an initiative rezoning could moot a suit, just as in administrative zoning. Another method of foreclosing section 65860 suits in initiative rezonings is simultaneous amendment of the zoning ordinance and the plan (to conform to the zoning change) in one initiative vote.

144. See text accompanying notes 77-88 supra.

145. Associated Home Builders of the Greater East Bay, Inc. v. City of Livermore, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976), and cases cited therein.


147. In-depth discussion of the merits of permitting CEQA circumvention by initiative rezoning is beyond the scope of this Article. It can be noted, however, that if CEQA compliance were required, many fewer initiative rezonings would be attempted. In Livermore, initiative proponents spent $2,800, opponents $6,700; in San Jose, proponents spent $1,500.
The same evidence as would appear in an Initial Study or EIR could be gathered and used, but the high cost of this evidence will hamper initiative rezoning challengers.148

CONCLUSION

California's consistency requirements are a powerful means of forcing planned development on communities. Challengers of unplanned development can use the requirements as one way to slow down or halt questionable land use decisions. Presently, the inconsistency laws are an imperfect scheme. However, they are an ambitious attempt to statutorily mandate planned development and provide for private enforcement. Persons concerned about the hazards of unplanned development should take note.

M. CRANSTON, B. GARTH, R. PLATTNER, & J. VARON, A HANDBOOK FOR CONTROLLING LOCAL GROWTH 77, 108 (1973). The cost of an EIR in Santa Clara County (San Jose) was between $3,000-$5,000 in 1975-76. See note 115 supra.

148. Rezoning challengers may not need a full EIR in order to demonstrate uncompensated specific inconsistencies. But judging from the cost of a full EIR, even gathering less evidence of this technical nature could be expensive.