

5-15-1975

Hagman's Hallucinations: Some Predictions about Planning Law in California

Donald G. Hagman

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Land Use Law Commons](#)

Recommended Citation

Donald G. Hagman *Hagman's Hallucinations: Some Predictions about Planning Law in California* , 2 Pepp. L. Rev. Iss. 3 (1975)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol2/iss3/1>

This Symposium is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Hagman's Hallucinations: Some Predictions About Planning Law in California

DONALD G. HAGMAN*

My hallucinations, predictions about the future of planning law in California, were first delivered on August 20, 1974, at the Annual Summer Program at UCLA. Some of my hallucinations at that time, my predictions, have already come true. I am going to dust off my crystal ball here again and try to see into the future.

I. CALIFORNIA COURTS WILL CONTINUE TO UPHOLD ALL LOCAL GOVERNMENT LAND USE DECISIONS, EXCEPT THOSE WHICH ARE GROWTH ORIENTED OR ENVIRONMENTALLY DEGRADING.

California courts will continue to be hard on landowners. We've got a gung-ho environmental court in California. While for years the California court was a court that upheld *everything* that a local government did with respect to land use control, that is no longer true. It upholds everything provided that what the government does is not environmentally degrading. If it is, then local governmental action can be struck down; however, that's about the only exception.

I cite as authority for that proposition a speech given by Norman

* Professor of Law, University of California, Los Angeles.

Williams¹ a few months ago. Norman Williams knows more about zoning than any other person in America. If you are thinking about buying a treatise on planning and zoning law, wait a couple of months. By then, Callahan & Co. will have published his four volume opus on zoning in America. It'll be the best thing there is.

Williams was speaking to the National Committee Against Discrimination in Housing.² The Committee, believing that the federal courts have given up on the poor and the minorities in America, wanted Williams to suggest what state courts would be sympathetic to the plight of the poor and the minorities with respect to exclusionary land use controls. Williams first described the period of zoning litigation prior to 1915. The developers always won in those days. In the second period, the zoning principle came to be accepted. The third period, which he dates as the 1950's and 1960's, was the period of municipal autonomy; the California courts canonized municipal autonomy during that time. It was the "farthest out" court in that third phase, with its only close rival being the New Jersey court. But now, Williams notes an incoming fourth period. This represents a revival of creative judicial review and is characterized primarily by an attitude of skeptical inquiry as to what the towns are up to. The possibility is at least raised that a wide-spread pattern of anti-social regulations may be involved.

Could that be true of our local governments in California? Williams noted that the change of attitude has been most noticeable in the outburst of antiexclusionary litigation in recent years, but the new attitude is also true in other areas, *e.g.*, the wide-spread reversal of previous law on the relation between zoning and planning. That is not so true in California. The reversal in California as to the relation between planning and zoning has been statutory, not judicial. It certainly is true with respect to the other example he gives, which is the judicial attempt in many states to tighten up the administration of variances. That began in California in 1966 with *Cow Hollow*,³ the first case in California to ever reverse the grant of a variance, despite the fact that it has been common knowledge that 99% of the variances granted were illegal. The *Topanga*⁴ case, which was decided last year, is the ultimate case in that genre.

1. Professor of Planning, Rutgers University, New Brunswick, New Jersey.

2. This is a group of lawyers and others working to promote integration in housing.

3. *Cow Hollow Improvement Club v. DiBene*, 245 Cal. App. 2d 160, 53 Cal. Rptr. 610 (1966).

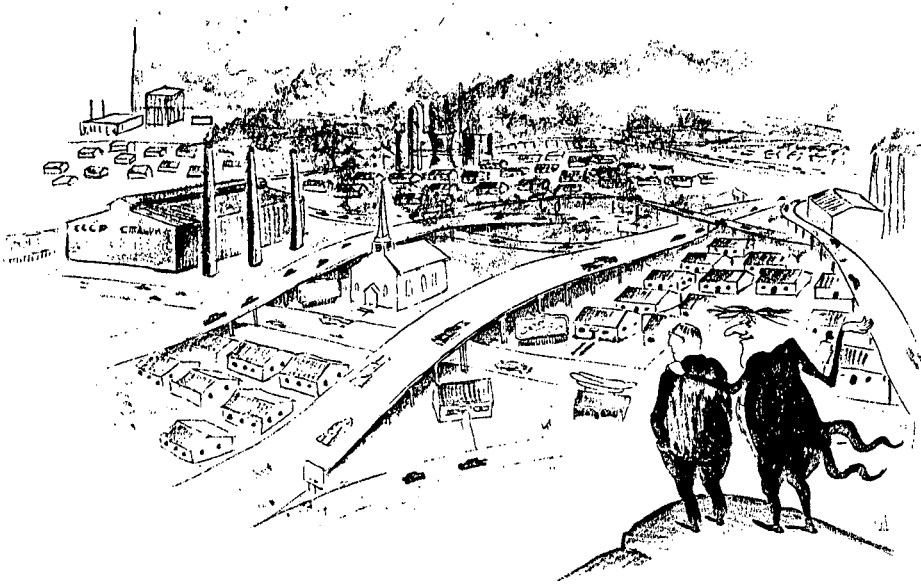
4. *Topanga Ass'n for a Scenic Community v. Los Angeles*, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).

In such creative judicial review, Williams says, the courts are re-asserting their basic function of evaluating local restrictions in light of basic constitutional values, fairness, equal treatment, equal opportunity, and so on, in the present day context.⁵ Yet things are not quite so simple, he continues, for at the same time the implications of the environmental movement have served to strengthen the public powers on behalf of environmental protection, a trend which points in exactly the opposite direction. So the California court today is not in the lead in the fourth stage; it's at about three and a half. The New Jersey court, the only one which rivaled California for leadership in the third phase, has taken the lead. Why New Jersey? . . . because New Jersey, as described by Richard Babcock,⁵ is a zoo of local governments. New Jersey courts realize that local governments are not always the epitome of virtue, and if they can make environmentally degrading decisions, they are also capable of making other degrading decisions. The courts in this fourth phase have a responsibility to review those actions of local governments as well. I submit that except in the environmental area, the California courts haven't done much.

II. NO MAJOR LEGISLATION RATIONALIZING THE INCREDIBLE
MISHMASH OF CURRENT PLANNING LAW WILL BE PASSED
EITHER ON THE STATE OR NATIONAL LEVEL.

We have this incredible mishmash of planning law. Planning law has not served us well, even when it was simple.

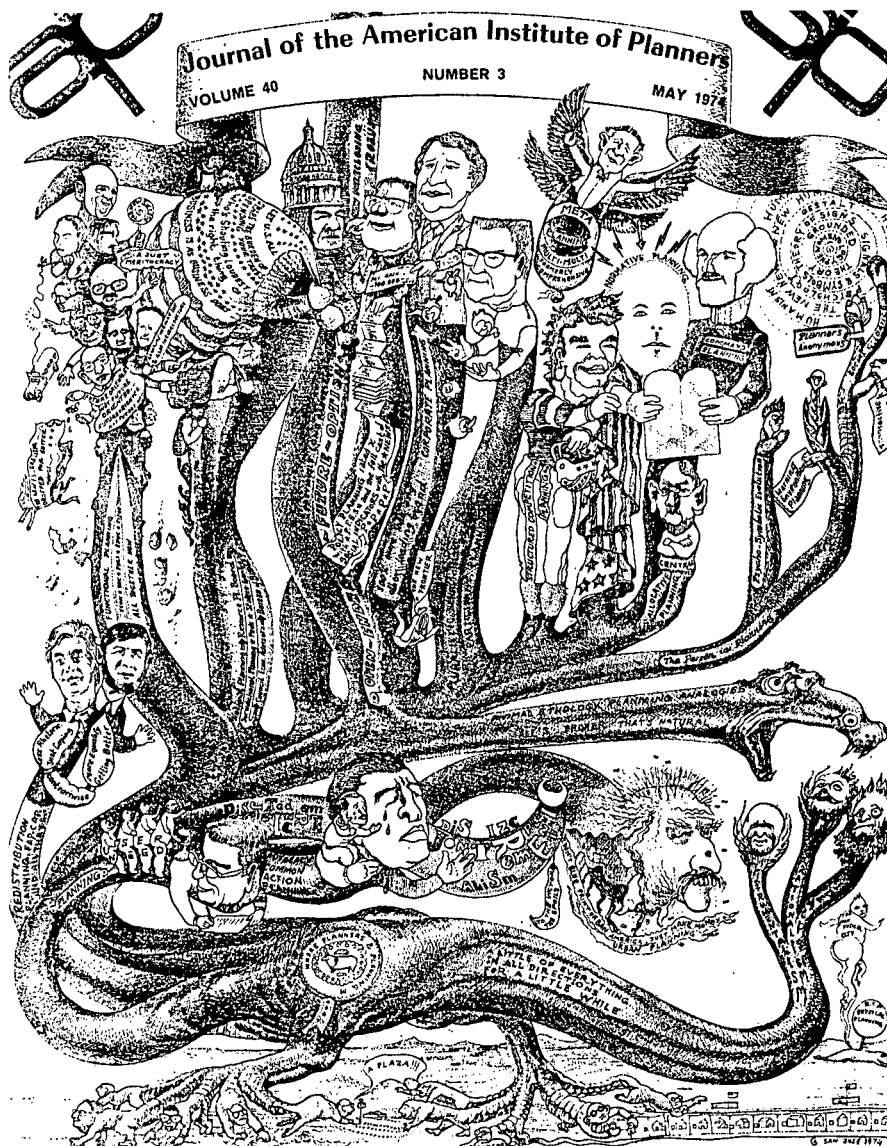
5. Attorney at law, Chicago, Illinois.



Without Planning This Would Have Been a Mess

"Copyright 1967, American Society of Planning Officials. Reprinted by permission."

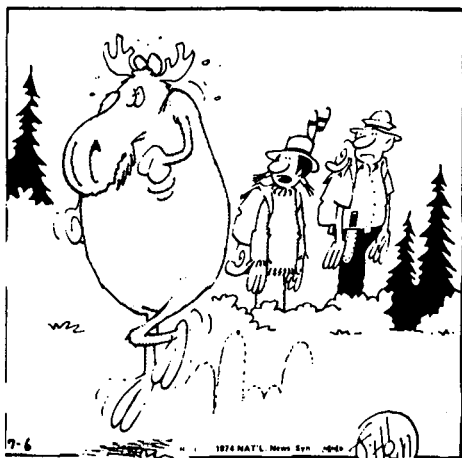
Here is what it is in 1974.



"Copyright, 1974, Julio San Jose. Reprinted by permission."

How can anyone deal with such a system? How can anyone survive? As if planning weren't enough, consider what the Water Control Amendments of 1972⁶ have done.

6. 33 U.S.C. §§ 1151 *et seq.* (1972).



"The E.P.A. has made it illegal
for him to go to the bathroom."

"Copyright, 1974, National Newspaper Syndicate. Reprinted by permission."

. . . and the Clean Air Act?⁷ How about NEPA, the National Environmental Policy Act⁸ and the California Environmental Quality Act (hereinafter CEQA)?⁹

7. 42 U.S.C. §§ 1857 *et seq.* (1970).

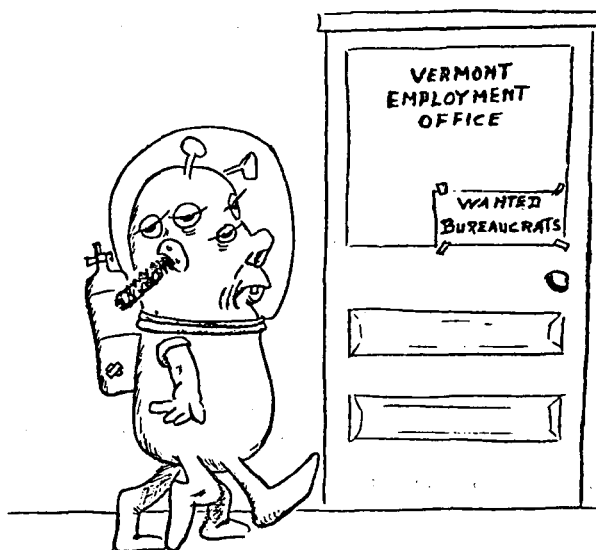
8. 42 U.S.C. §§ 4231 *et seq.* (1970).

9. CAL. PUB. RESOURCES CODE §§ 21000 *et seq.* (West Supp. 1974).



"Copyright, 1974, Los Angeles Times. Reprinted by permission."

And the bureaucracy, the bureaucracy which has always existed, has gotten worse.



HELP WANTED: Department heads and bureaucrats. No experience necessary. Highest salaries paid. A degree in socialism desirable but not necessary. We will teach you. Applicant must show proof that he has never before resided in Vermont, nor has he any interest whatsoever in the people of Vermont or their Constitutional rights. Applicants who bring their own far-out programs will be given preference.
•Apply State House, Montpelier, Vt. VERMONTERS NEED NOT APPLY

"Vermont Watchman, November 1974 at 6."

All these laws and the uncertainty with respect to them is compounded by the fact that all were passed in total disregard of the others, thus creating a paralyzing mishmash.

Noise regulations dictate an airport out there, but indirect source rules under the Clean Air Act amendments¹⁰ preclude it out there. It should be close to maximize access to mass transit. But as an ongoing source of water pollution, it cannot be put in areas of low water quality. This bubbling cacophony of multitudinous edicts comes from freshmen administrators attempting to apply new and

10. 40 C.F.R. § 52.22(b) (1974).

untried laws whose land use implications were never adequately considered. This confusion has a devastating impact on land markets. Buyers and sellers are so confused by the numerous and conflicting signals that they don't know where to jump. Markets that seem likely to be heavily impacted by these regulations may dry up. Sellers refuse to sell at a discount, hoping, perhaps, that the regulators will go away. Buyers, on the other hand, are not about to pay full development prices for land that may be undevelopable. Values just lie there, quivering, supply and demand unable to meet. Confounded by this market disequilibrium, assessors and appraisers find estimating the value effects of these erratic environmental laws an exercise in intuitive conjecture.¹¹ You know who said that? I said that.



"Andy Capp, by Reg Smythe, published in The Los Angeles Times 11/20/72, courtesy of Field Newspaper Syndicate."

Will there be any rationalization of all this incredible mishmash? I predicted in August that there would not be any. I'm not so sure now whether there will be some or not. On the state level, I am depressed because everybody has an idea about how to provide rationalization. Everybody knows it needs to be done, but there are about ten groups, all very powerful, each with its own idea of how to do it. I wonder if those ten groups will be able to get together. The Governor is such a "group," I suppose, and you noticed in his inaugural address that he said, "The state must cut through the tangle of overlapping environmental and land use rules which delay needed construction. In the long run, the air, the water, and the land will be protected, but only by clear rules which are fairly enforced and without delay."¹² You know that anything the League

11. Hagman & Misczynski, *The Quiet Federalization of Land Use Controls: Disquietude in the Land Markets*, *The Real Estate Appraiser* 5, 7 (Sept.-Oct. 1974), reprinted in *California Real Estate Magazine* 14, 16 (Feb. 1975).

12. Governor Edmund G. Brown, Jr., Inaugural Address, January 7, 1975.

of California Cities wants in California, the League of California Cities gets. It has an idea as to environmental control and land use, and a bill in the Legislature is their idea. So does the County Supervisors Association, so does this group, so does that group. . . .

On the federal level, I thought that a national land use policy was dead. There is some chance it may be revived, though it doesn't do much. The main problem with that bill was its title, yielding images of federalization. But there was no such thing as national land use policy; the bill was merely an aid for planning. So recognized, it might pass, with the Department of Interior in charge. Meanwhile, the Department of Housing and Urban Development (hereinafter, HUD), has a planning rationalization study under way. Now, there's a desirable goal. HUD, which everyone thought was a moribund agency has suddenly sprung to new life. You saw in 1974 the Flood Control Acts amendments,¹³ very powerful, new teeth in the Interstate Land Sales Act,¹⁴ and the fascinating Housing and Community Development Act in 1974,¹⁵ all tremendous new powers that HUD is aggressively exercising. Some people feel that the HUD rationalization study is an attempt to take over the action with respect to national land use planning from the Department of Interior. Maybe they will fight to a draw. The National Environmental Policy Act (hereinafter NEPA)¹⁶ deals broadly with the environment; yet, as we all know, it is more paper shuffling than effective land use control. The Environmental Protection Agency (hereinafter EPA), despite its mandate, probably will not be carrying off very much in the way of the land use controls under Air and Water Acts.¹⁷ But the Air Act is potentially real federal control of land use: where land use is dictated by an uncompromisable edict, we shall have clean air; nothing else matters. This represents the "damn the torpedoes, full speed ahead" theory of resource allocation. It is an incredible piece of legislation. That it could have been enacted in a non-parliamentary federal republic must confound all theorists of political compromise. It could only be, and probably was, passed at the apogee of proletarian dictatorship dom-

13. Pub. L. No. 93-234, 87 Stat. 975; 42 U.S.C. §§ 4002 *et seq.* (1973).

14. 15 U.S.C. §§ 1701 *et seq.* (1968).

15. Pub. L. No. 93-383 (93d Cong. 2d Sess.), Aug. 22, 1974, *effective Jan. 1, 1975.*

16. 42 U.S.C. §§ 4231 *et seq.* (1970).

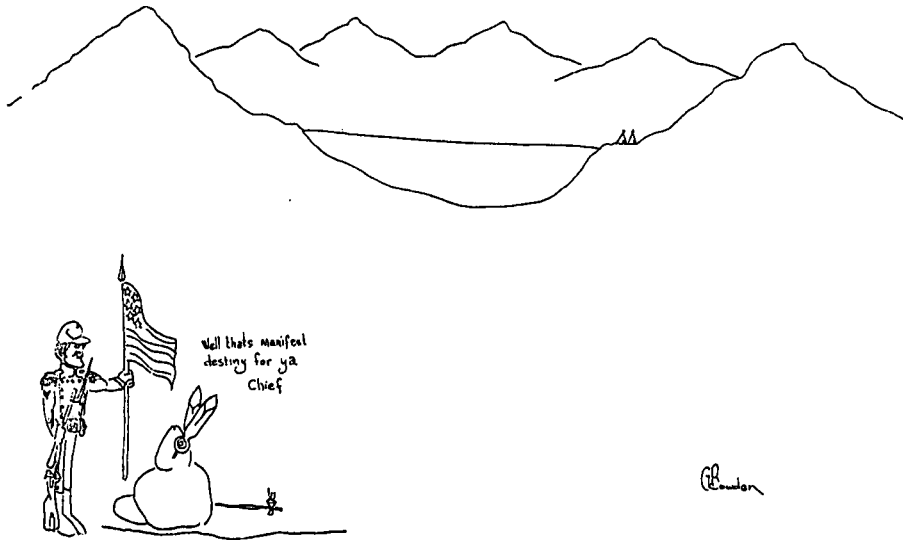
17. 42 U.S.C. §§ 1857 *et seq.* (1970) and 33 U.S.C. §§ 1151 *et seq.* (1972).

inated by environmentalism. EPA began to administer that law the way it was written, as an uncompromising edict, but administration has wavered as the years passed and as people, the Congress, and even the EPA began to realize what had been wrought. By the time the Water Act¹⁸ was passed, the environmental movement had passed its apogee, as is clear by comparing the Water and Air Acts.¹⁹ Gone are the sweeping national standards; gone are the very early deadlines; gone are the impositions of duties as distinguished from grants to buy compliance. Included are more economic and cost concerns and relationships to more general land use control. Take nothing from the Water Act—but for the Air Act comparison, it is still absolutist—we shall have clean water. It is still considerable federalization of land use control.

III. NO MAJOR REGIONAL PLANNING DEVELOPMENTS WILL OCCUR.

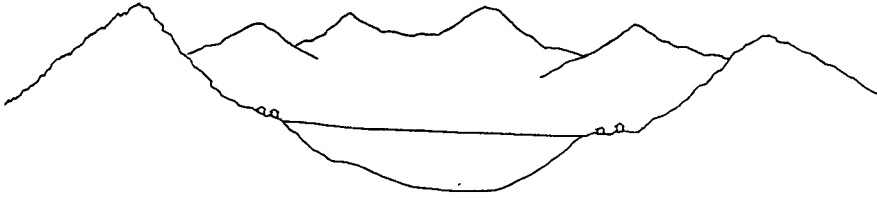
How about regional planning developments? We certainly need regional planning, don't we?

The Saga of Lake Tahoe in Six Parts



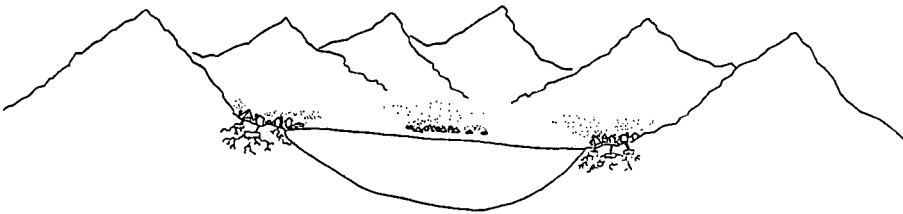
18. 33 U.S.C. §§ 1151 et seq. (1972).

19. 33 U.S.C. §§ 1151 et seq. (1972) and 42 U.S.C. § 1857 (1970).



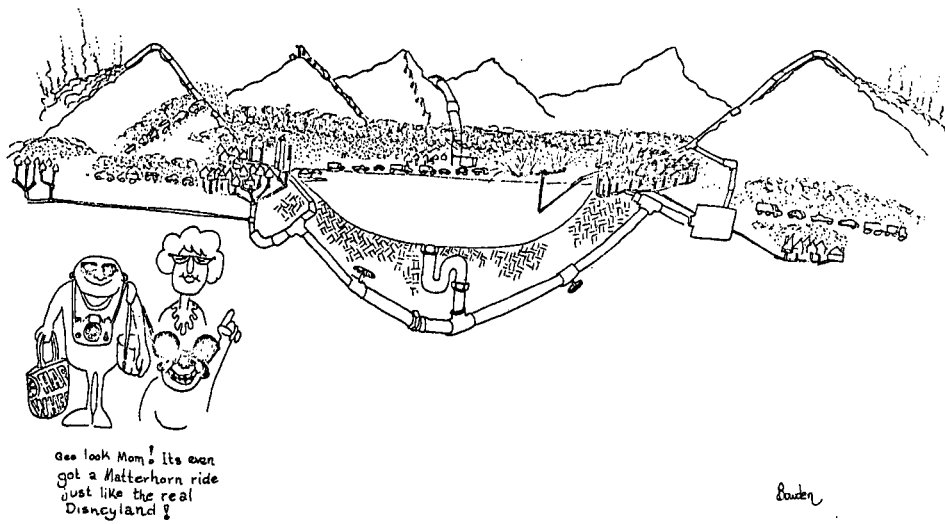
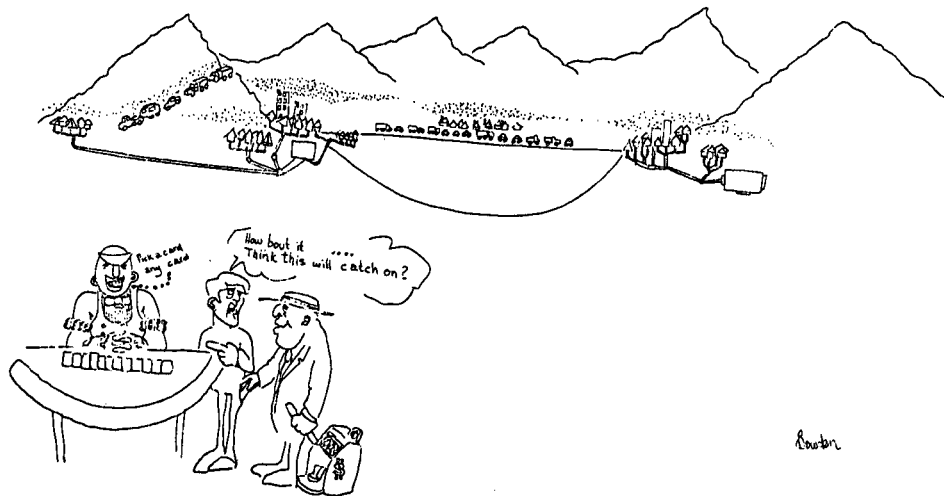
A decent road
would sure put
this place on
the map

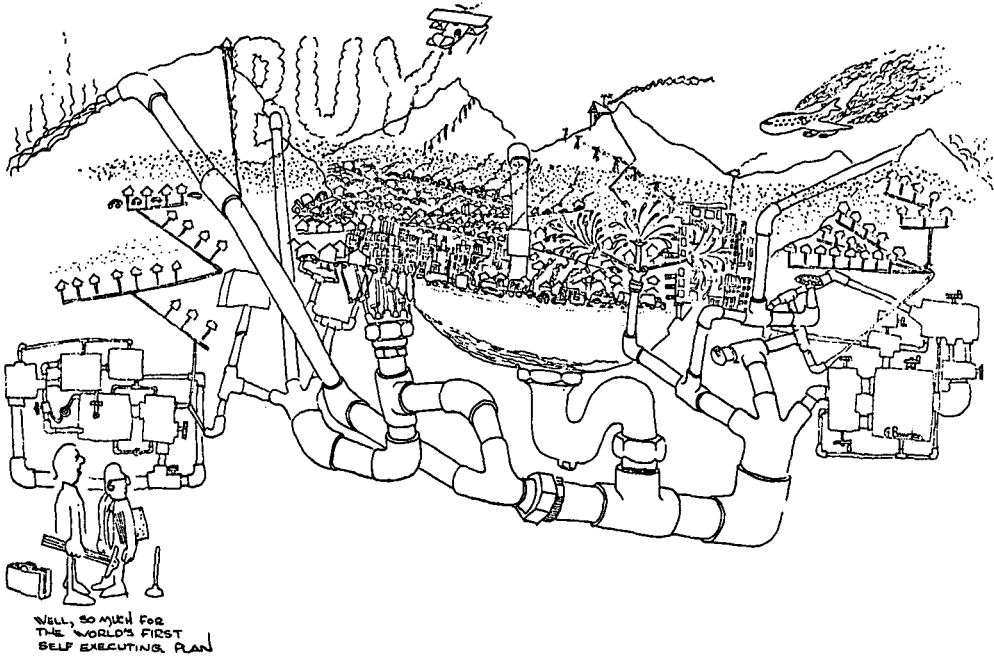
Chuter



A decent
sewer system
would sure
be good for
business!

Chuter



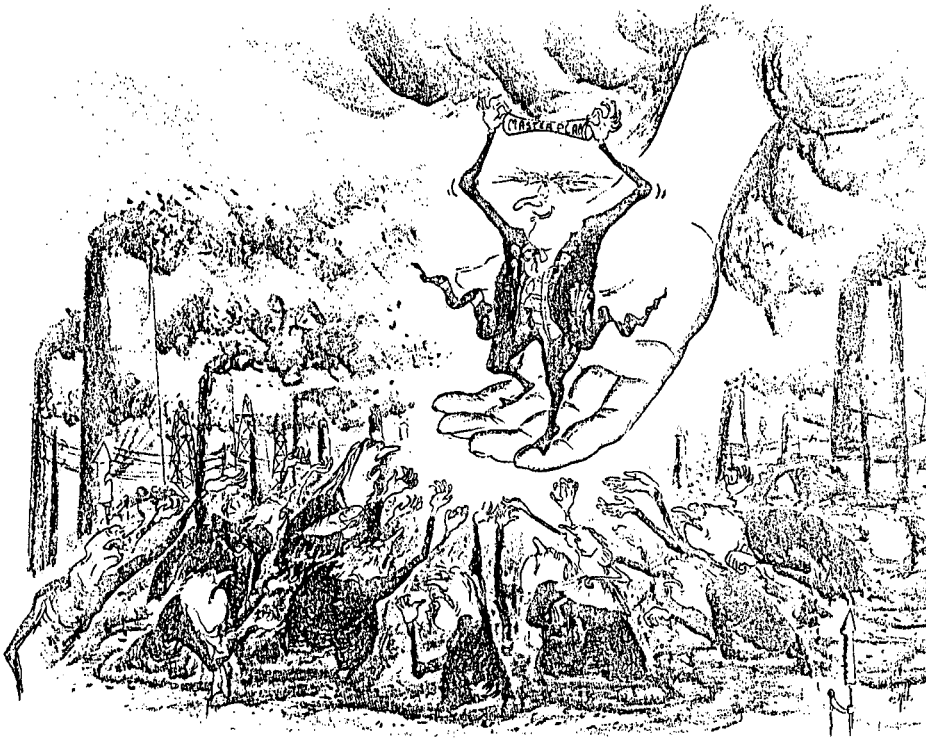


Courtesy of Gerald Bowden, Assistant Professor of Environmental Studies,
University of California, Santa Cruz.

Lake Tahoe needed regional planning. It got it. It still needs regional planning! Regional planning is not nirvana, unfortunately.

IV. RIGOROUS PLAN-MAKING AND CONSISTENCY REQUIREMENTS
WILL NOT BRING NIRVANA TO LOCAL PLANNING EITHER,
AND IT WILL BE BUSINESS AS USUAL.

We've now got this plan-making requirement in California. You've got to have a plan; its got to have all these elements. All these elements have to be completed by a certain date; boy, that'll bring us nirvana, won't it?



"And on the Eighth Day . . ."

"Copyright, 1967, American Society of Planning Officials. Reprinted by permission."

I don't think such local planning will bring us nirvana; I think it will be business as usual. I don't think governments really want to plan or be bound by plans. I think decisions out to be made on the basis of the best information available at the time so you know what you're doing. Your plan is what you're doing, not what you say you're doing, so you better know what you're doing. That's my theory of planning.

V. INCORPORATION AND ANNEXATION WILL BECOME MUCH MORE PLANNING CONSCIOUS.

Through the application of CEQA, incorporation and annexation will become more planning conscious. The *Bozung*²⁰ case decided that annexation was subject to the CEQA Environmental Impact Report requirement.²¹ The question of the formation of new gov-

20. *Bozung v. Local Agency Form. Comm. of Ventura County*, 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975).

21. CAL. PUB. RESOURCES CODE § 21151 (West Supp. 1974).

ernments and their boundary changes is a fundamental planning problem. Governments plan, but part of the planning function is to plan the organization of governments, and we presently have this incredible fragmentation in California which makes it very surprising that anything gets done.

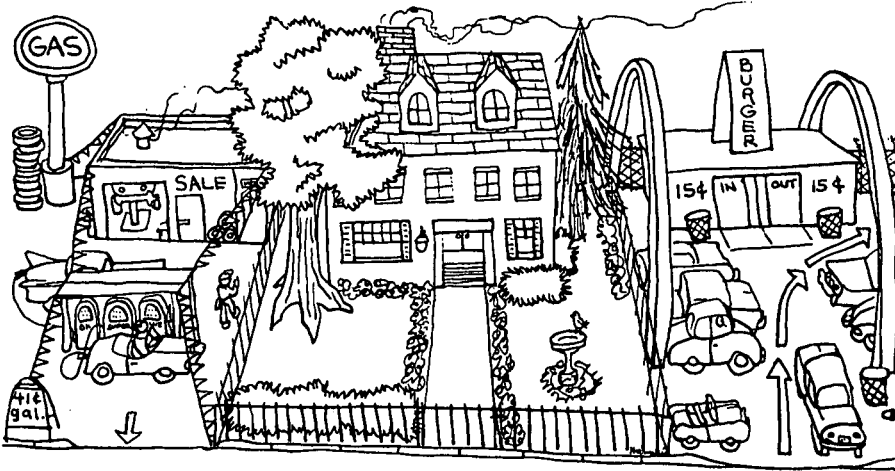
VI. BUILDING PERMITS ARE AND WILL BE MORE
EXTENSIVELY USED AS LAND USE CONTROLS.

Though building permits theoretically, classically, and traditionally were not regarded as land use controls because they dealt with matters from the skin of the buildings toward the inside, it happens in our system that a building permit is the last thing the developer needs to get before he can go and dig some dirt. It represents the last chance for the local government to ask, even though the plan and zoning say the development is all right and the environmental impact report says its all right, "do we really want that building there?" Since it is the last chance, the building permit has come to be used as a land use control. The building permit has become a discretionary matter. Conditions are imposed such as street widening, dedication of park land, and so forth. These are all legal, I think; almost any condition can be put on any kind of development permission in California and be legal.

VII. THE TAKING ISSUE WILL REMAIN UNSETTLED
IN CALIFORNIA.

The taking issue has become more important because in our environmental age land use controls can be very tough. We have realized, for example. . . .

WITHOUT ZONING

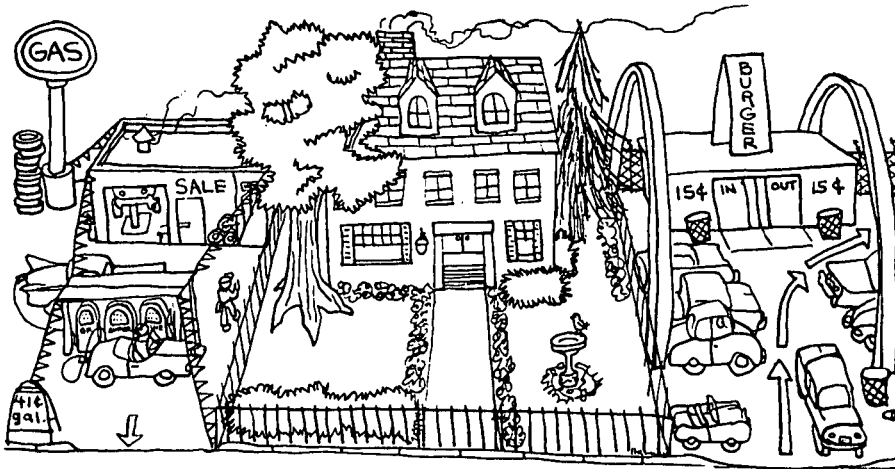


Without zoning you can have a gas station on a corner, an expensive house down the street, and a drive-in hamburger stand around the corner.

Id.

Of course, . . .

WITH ZONING



In a zoned city, you can have a gas station on a corner, an expensive house down the street, and a drive-in hamburger stand around the corner.

"Copyright, 1973, American Society of Planning Officials. Reprinted by permission."

Maybe land use controls aren't as important as some think. But there are a number of people who say they are, such as F. Bossel-

man, D. Callies, and J. Banta, in *The Taking Issue*—so important that regulations, no matter how severe, cannot constitute a taking. I predicted in August, 1974, that when that issue was brought to the California Supreme Court it would follow the theory of *Boselman et al.*, namely that no regulation, no matter how tough, would constitute a taking. I now change my prediction a bit because of *HFH, Inc. v. the City of Cerritos*.²² In that case, Cerritos downzoned some property from commercial to residential. *HFH*, the plaintiff, said that that action constituted a taking, and made the proper allegations that no economic use was left to the property. The trial court held, as it must under California law, that having made such allegations, the plaintiff stated a cause of action and the case could go to trial on the question of whether the regulation should be invalidated. But the plaintiff, in effect said, there was an alternate theory: the regulation is valid, but since it constitutes a taking, the city has just bought the property. The trial court did not accept that. Never in the history of America has a court ever held that a pure regulation, a mere down zoning, gave the regulated owner the right to require the city to pay damages or to pay the purchase price for the property. The downzoning in question had no hint of acquisition underlying the facts; there was no indication the city wanted to downzone the property in order to later acquire it "on the cheap." That's what I meant by a pure regulation, the kind in question in this case. But maybe the California Supreme Court, which has agreed to take the case, will buy the *HFH* argument. I have just participated in an amicus brief²³ which suggests that *HFH's* suggested remedy has not existed in the past, but it should. A property owner whose land is severely damaged by a regulation should be able to allege that it has been taken and that the city should be required to pay damages or to purchase the property, if proven. The reason why I cannot predict the outcome of the case is that I don't know how persuasive my brief will be. Many of these kinds of cases in the California Supreme Court are being decided by four to three opinions. Perhaps briefs on the landowner's side need persuade only one more judge.

Many land use experts say that if the government had to pay, that would inhibit planning. I disagree.

22. 41 Cal. App. 3d 908, 116 Cal. Rptr. 436 (1974), *appeal granted*, Nov. 13, 1974.

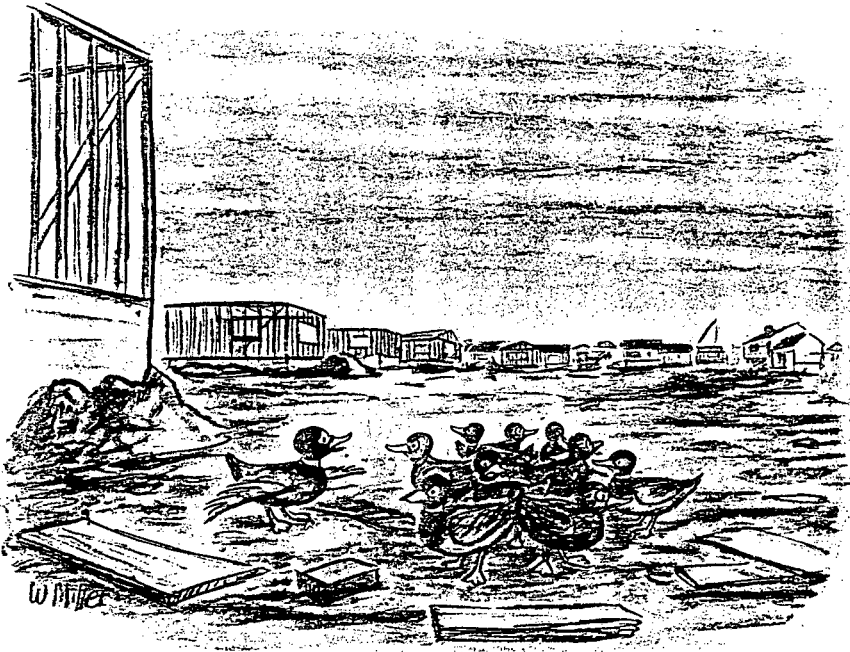
23. With Gideon Kanner, Member, State Bar of California.



"A compromise has been reached, friends. A parking lot replaces the park; the asphalt, however, will be painted green!"

"Copyright, 1974, Jack Corbett. Reprinted by permission."

This cartoon illustrates that even though the government has the power to regulate severely, it seldom does. It isn't political. Land-owner resistance is too strong. Therefore, there should be a planning option so the local government, instead of having the court invalidate its regulations, can have the court uphold the regulations on the payment of damages. Why not provide that option? Why not have that park by paying a decent amount of compensation instead of trying to acquire it by regulation? Here's another example. Pity these poor ducks.



"Gosh, I'm sorry. I could have sworn this area was all wetlands last year."

Drawing by W. Miller, Copyright, 1974, The New Yorker Magazine, Inc. Reprinted by permission.

Why not permit regulations for wetlands provided some compensation is paid? John Delafons is one of the top civil servants in the Department of the Environment in England. The Department of the Environment in England is a combined HUD-DOT (Department of Transportation) and Department of Public Works kind of operation. In 1960, Delafons was in the United States studying our land use control system. He wrote a book, as a kind of modern day De Toqueville, looking at our system from the outside. This is what he said.

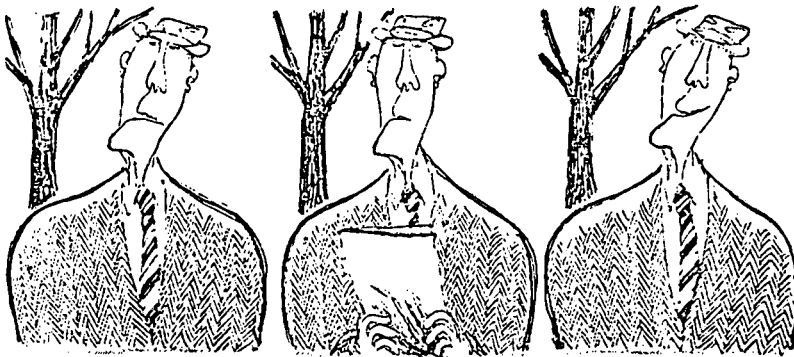
The third obstacle to the future progress in American planning is that there is still no obligation or even power to compensate owners for the losses incurred as the result of controls. Such a situation cuts both ways. It may facilitate controls since its exercise is not a charge on the public funds, but it may also stultify control by imposing too heavy a penalty on private property. There comes a point in the exercise of control where the community is reluctant to require that the cost of public benefit should be borne entirely by private loss. A crucial question facing American planners and their legal strategists is whether the urgent need to grapple with the problems can be met only by new measures of control ac-

panied by compensation for damage to property rights and values.²⁴

Delafons said that, a veritable socialist. If one looks at the provisions for compensation in English planning law, as evolved by a leftist Labour government, one will find that the English are much more generous in compensating regulated landowners than we are here in America, a fact which our brief calls to the attention of the California Supreme Court.

VIII. EXCLUSIONARY LAND USE CONTROLS ARE INVULNERABLE IN CALIFORNIA.

The California Supreme Court has a bad record on exclusionary land use controls. You would think it would be different, given that this is the court that decided the *Serrano*²⁵ case. Yet the court seemingly doesn't care. It is like the character in Carl Sandburg's poem: So you want to divide all the money there is and give every man his share? That's it; put it in one big pile and divide it evenly. And the land, the gold, the silver, the oil, the copper, you want that divided up? Sure, and even a whack for all of us. You mean that to go for the horses and cows? Sure. Why not? And how about the pigs? Oh, to hell with you; you know I got a couple of pigs. The California Supreme Court sees no evil.



WHY IS IT PEOPLE KEEP ACCUSING US SUBURBS SOUTH OF DAYTON OF BEING RESTRICTIVE? THE CENSUS SHOWS THAT ONE BLACK MOVES IN TO THESE SUBURBS EVERY THREE DAYS.... AND WE'LL LET THAT GUY KEEP COMING BACK IN AS MUCH AS HE WANTS

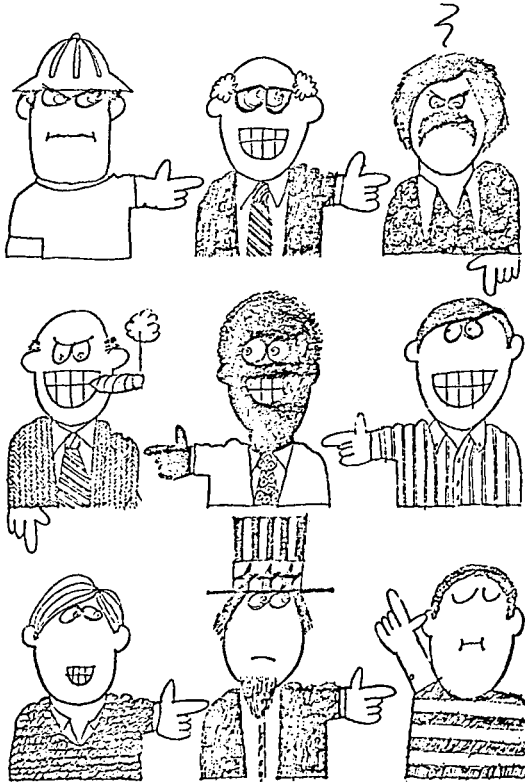
Elmer
(A73812)

"Courtesy of Dayton Daily News. Reprinted by permission."

24. J. Delafons, *Land-Use Controls in the United States* (2d ed. 1969).

25. *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

The low-cost housing crisis: Whose fault is it?



Watch the buck get passed and see where it stops. Tonight at 7 on Channel 4.
Watch "No Place to Live." Narrated by Macdonald Carey.

KNBC!

Reprinted with permission of KNBC.

Part of the fault is the court's fault. The California court has not shown leadership in the exclusionary land use control area. They only mentioned it once, in *Associated Home Builders v. City of Walnut Creek*²⁶ and didn't, maybe properly in that case, recognize the

26. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

validity of the claim that the Walnut Creek ordinance was exclusionary. It would be different if one could go to federal courts. I have never in my life written to a court about a case except recently when I read the opinion in *Ybarra v. City and Town of Los Altos Hills*.²⁷ I was so annoyed that I wrote to a Judge I know on that court. He promptly wrote back to tell me that one just doesn't write to judges. The City and Town of Los Altos Hills had minimum one acre lot zoning, and some low income Chicanos wanted to move in. They established that they were low income and were kept from Los Altos Hills by the ordinance. The court said they failed to show that adequate low cost housing was unavailable elsewhere. It seems to me that if an ordinance excludes low income people, it should not be the burden of the low income people to show they cannot live elsewhere. It should be the burden of the defendant city to show that there are all kinds of places in which the plaintiffs can live so that they can be kept out of this particular town. The court also messed up California law. In California, every city, town, and county must have a housing element. A housing element must provide for all economic segments of the community, and the community is the housing region, not the city and its boundaries.²⁸ So if everybody who lives in a city has an income of \$50,000 per year, the housing element is not adequate just because it takes care of all the people who make \$50,000 a year if there are people who make \$40,000 a year living around it—or \$30,000, or \$20,000, or \$5,000. But the Court of Appeal in this *Ybarra* case disagreed with that analysis. It said that the community means the city. I think that it's rather clear in the guidelines, published by the Office of Planning and Research in California²⁹ and by the HUD regulations, which are incorporated by reference into the California statutes,³⁰ that community means region. This whole theory is favorably reinforced by the 1974 Housing and Community Development Act,³¹ which, for the first time in America requires economic integration, I think, on a regional basis, as a condition for getting special revenue sharing funds under the Act.

27. 503 F.2d 250 (9th Cir. 1974).

28. See the discussion of this matter in Knight, *California Planning Law: Requirements for Low and Moderate Income Housing*, *infra* this issue at —, and related articles immediately following.

29. See, *Legislative Comment, The Housing Element: How Can Its Adequacy Be Measured?*, Appendix A, *infra* this issue at

30. CAL. HEALTH & SAFETY CODE § 37123 (West 1973).

31. Pub. L. No. 93-383 (93d Cong. 2d Sess.) Aug. 22, 1974, effective Jan. 1, 1975.

IX. *Strumsky* WILL NOT BE BROADLY APPLIED TO
LAND USE CONTROL CASES.

*Strumsky*³² says that if a vested fundamental right is taken away by an administrative decision, and the administrative body is not one which gets its authority directly from the constitution of the State of California—which is true of almost all local agencies in California—then the court reviewing that administrative decision will exercise its independent judgment. There have been a few cases decided under this rule in the land use context. That's a very important context because there is all kinds of law about vested rights under land use controls. There are now three cases which say if there is a rezoning or a permit given, or the like, and the neighbors don't like it, those neighbors do not have a fundamental vested right in the denial of the development permission.³³ Then there is the *Transcentury*³⁴ case which says that the landowner denied a permit may have a fundamental vested right to a permit, which matter falls within *Strumsky*. But I cannot believe that the California Supreme Court is going to constitute itself a super Board of Zoning Appeals body and review all these cases on a de novo basis.

There is one other case which I think is not correctly decided. In *People v. Gates*³⁵ the court held that *Strumsky* did not apply to the termination of a non-conforming use. Maybe it doesn't, but I don't think the reason given was very good. The court said that *Strumsky* did not apply because the court's attention to the matter was raised by way of an original action for an injunction of a public nuisance instead of by way of review of an administrative decision. In other words, the court held that it depended on how its attention to the need for review was raised. I don't think that should make any difference.

32. *Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

33. *Friends of Lake Arrowhead v. San Bernardino*, 38 Cal. App. 3d 491, 113 Cal. Rptr. 539 (1974); *Topanga Ass'n for a Scenic Community v. Los Angeles*, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974); *Plan for Arcadia, Inc. v. Arcadia City Council*, 42 Cal. App. 3d 712, 117 Cal. Rptr. 96 (1974).

34. *Transcentury Properties, Inc. v. State*, 41 Cal. App. 3d 835, 116 Cal. Rptr. 487 (1974).

35. 41 Cal. App. 3d 590, 116 Cal. Rptr. 172 (1974).

X. REZONINGS OF INDIVIDUAL PROPERTIES WILL BE FOUND
TO BE ADMINISTRATIVE MATTERS.

Rezoning in California have traditionally been legislative matters, but *Fasano*,³⁶ an Oregon case, held that the rezoning of a piece of property was essentially an administrative decision. Everyone realizes that rezoning of particular pieces of property does not involve the body politic in making some broad, general, overview kind of decision. When a legislative body, such as a city council, rezones a particular piece of property, *Fasano* says it is wearing an administrative hat. I think that the California Supreme Court, particularly if the matter were raised by an anti-environment local government decision, would also so conclude. That makes all denials of rezonings of particular properties subject to the *Strumsky* rule. If *Transcentury* is right, that's an interesting possibility.

XI. INITIATIVES CANNOT BE USED FOR REZONING
PARTICULAR PROPERTIES.

Despite *San Diego Contractors Ass'n v. San Diego*,³⁷ where the court held that an initiative zoning the entire San Diego coastline for certain height limits was possible because it was a general kind of policy decision that the people were making, that does not mean that an initiative is proper for the rezoning of a particular piece of property. *Fasano*-like considerations are the reason. In the *San Diego* case, the court suggests that it would distinguish between a general overall zoning change and the rezoning of a particular piece of property. The latter, as an administrative matter, would not be subject to an initiative since initiatives apply only to legislative matters.

As one can tell from all the above, there are a lot of things for lawyers to do in this environmental age. It reminds me of the story of the doctor, the planner, and the lawyer who were talking about which was the world's first great profession. The doctor said, well, the medical profession was the world's first great profession because a rib was taken out of Adam and made into Eve, and that was the first great operation. The planner said no, planning was the world's first great profession because the planner took chaos and made it into order. And the lawyer said, who do you think made the chaos?

36. *Fasano v. Board of County Comm'rs*, 264 Ore. 574, 507 P.2d 23 (1973).

37. *San Diego Building Contractors Ass'n v. City Council of San Diego*, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974).