PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 2
Issue 3 *Land Use Planning Symposium*

Article 2

5-15-1975

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Existing land use regulatory tools in the state of California consist principally of general and specific plans, zoning regulations, subdivision map regulations and building regulations. Each serves a different function but together they comprise one of the most comprehensive land use regulatory schemes ever developed. The purpose of this article is to analyze the existing regulatory scheme and its current application in the state of California and to prognosticate future trends both in the application of the existing regulatory tools and the addition of new techniques and devices to the land use planning arsenal.

General Plans

General Plans are the basic planning tool in the state of California. Their evolution from Master Plans, a merely discretionary planning device, to the mandatory provisions of existing planning and zoning law illustrate a phenomenon which is common with land use planning in California. What was once discretionary generally tends to become mandatory and what becomes mandatory generally tends to have a greater and greater impact on pre-existing

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techniques. This phenomenon is not unlike the traditional development of the American automobile exemplified by Ford's introduction of the Thunderbird in the 1950's as an economy sportscar and its evolution to the top of the Ford line of automotive products in the 1970's.

A General Plan is a comprehensive long-term plan for the physical development of the local agency and of any land outside the boundaries of the local agency which in the judgment of the agency bears a relation to its planning. General Plans must contain nine mandatory elements and such other additional elements which in the judgment of the local agency relate to the physical development of the jurisdiction.[1] The mandatory elements of a General Plan are as follows:

1. A land use element designating the proposed general distribution and location and extent of the uses of land within the jurisdiction.

2. A circulation element correlated to the land use element.

3. A housing element which must make adequate provision for the housing needs of all economic segments of the community.

4. A conservation element containing both mandatory and nonmandatory provisions relating primarily to natural resources.

5. An open space element.

6. A seismic safety element.

7. A noise element related to existing and proposed major transportation elements.

8. A scenic highway element.

9. A safety element in addition to the seismic safety element oriented to the protection of the community from fires and geologic hazards.[2]

Additionally there is provision for certain permissive elements:[3]

1. A recreational element which must be adopted if park land or recreational facilities are to be required by a local agency pursuant to the provisions of the Quimby Act.[3a]

2. A circulation element including recommendations concerning parking facilities and building setbacks in addition to the requirements of the mandatory circulation element.

3. A transportation element showing a comprehensive transportation system.

4. A transit element showing a proposed system of transit lines including rapid transit, streetcar, motorcoach and trolley coach line.

5. A public service and facilities element showing the general plans for sewage, refuse disposal, drainage, etc.

6. A public building element showing the location and arrange-

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1. CAL. GOV. CODE § 65302 (West Supp. 1974).
2. CAL. GOV. CODE §§65302, 65302.1 (West Supp. 1974).
3. CAL. GOV. CODE § 65303 (West Supp. 1974).
3a. CAL. BUS. & PROF. CODE § 11546 (West Supp. 1974).

ment of civic and community centers, etc. This element is mandatory if reservations are to be obtained pursuant to the provisions of Article 4 of the Subdivision Map Act.[3b]

7. A community design element.

8. A housing element which calls for the elimination of substandard building conditions in addition to the mandatory provisions of a housing element.

9. A redevelopment element.

Once a General Plan has been adopted, each local agency whose jurisdiction lies wholly or partially within the county or city adopting the General Plan, whose function also includes recommending and preparing plans for or constructing major public works, must submit a list of proposed public works recommended for planning, initiation or construction during its ensuing fiscal year for review by the Planning Agency as to consistency with the adopted General Plan.[4] These provisions have not been widely publicized and even when called to the attention of local agencies have largely been ignored. These provisions are specifically made applicable to special districts and school districts.

Moreover, once the General Plan has been adopted no city or county, nor any other city or county owning property or constructing facilities within the corporate limits of a city or county with a General Plan, nor any local agency operating within the jurisdiction of the city or county adopting a general plan, may acquire real property by dedication or otherwise for street or other public purposes. Additionally, no real property may be disposed of, no street vacated or abandoned and no public building or structure constructed or authorized unless and until the location, purpose and extent of such acquisition and disposition or such public building or structure has been submitted to and reported upon by the planning agency of the city or county having adopted the General Plan as to conformity thereto.[5] This provision also is more honored in the breach. If present trends continue we may soon discover that a finding of nonconformity with an adopted General Plan precludes the development of public works facilities or the acquisition and disposition of public buildings or structures desired by local agencies within city or county limits. Such a requirement while perhaps

3b. CAL. GOV. CODE § 66479 *effective* March 1, 1975.
4. CAL. GOV. CODE § 65401 (West Supp. 1974).
5. CAL. GOV. CODE § 65402 (West Supp. 1974).

not unwarranted will represent a significant departure from pre-existing intergovernmental relationships.

One other somewhat innocuous provision which may ultimately have real significance to local government is the provision of Government Code section 65307[6] which requires a report to the council on intergovernmental relations as to compliance with the provisions requiring the adoption of a General Plan. It is not inconceivable that ultimately the council or some other state agency may have final authority with respect to the content of plans adopted by cities or counties. Such a requirement would be consistent with an overall trend toward the regionalization of planning authority which will be discussed more fully below.

Specific Plans

Specific Plans, although not as highly evolved from their progenitor, Precise Land Use Plans, potentially provide an even greater source of planning regulation. The purpose of Specific Plans is to implement the General Plan. The legislative body is given broad authority to establish administrative rules and procedures for the application and enforcement of Specific Plans including the assignment or delegation of administrative functions, powers and duties to another agency within the city.[7] Some authors argue that a Specific Plan may be a device whereby traditional technical limitations on the zoning power may be avoided.[8] It is suggested however that if a Specific Plan were in fact utilized to circumvent the procedural or technical limitations on either of the zoning provisions of the California Planning and Zoning Law or the Subdivision Map Regulations[9] contained therein, that a court would be unlikely to view such efforts with favor. Even if so limited, however, Specific Plans provide a significant opportunity for innovative land use regulation over and above existing zoning and subdivision regulations.

Zoning Regulations

Zoning regulations are the traditional means of land use regulation, although the term "traditional" should be used advisedly since comprehensive zoning as a permissible exercise of the power of the

6. Cal. Gov. Code § 65307 (West Supp. 1974). *See also* Cal. Gov. Code § 34217 (West Supp. 1974).

7. Cal. Gov. Code §§ 65550-51 (West Supp. 1974).

8. *See* D. Hagman, *Public Control of California Land Development Syllabus 20*, 20th Annual Summer Program For California Lawyers, Aug. 23-30, 1974.

9. Cal. Gov. Code § 66479 *effective* March 1, 1975.

state was not consistently upheld until 1926.[10] The zoning power is now, however, potentially limited since Government Code section 65860,[11] added originally in 1970, provides that a zoning ordinance must be consistent with a General Plan. Consistency is defined as compatibility with the objectives, policies, general land uses and programs specified in the General Plan.[12] It is quite conceivable that this requirement could limit the zoning power if a General Plan is narrowly drawn.

SUBDIVISION MAP REGULATIONS

Subdivision map regulations provide the opportunity for the most detailed review of a proposed development. Opportunities for land use control arise from the specific provisions authorizing a city or county to impose dedication and fee requirements for public facilities as well as requiring improvements to benefit the subdivision itself. Under the provisions of the revised Subdivision Map Act[13] this authority is extended even further to authorize the reservation of sites for public facilities and the construction of supplemental sizing in otherwise required improvements subject to reimbursement for the costs thereof.[14]

The most significant planning opportunities, however, are afforded not by these specific provisions of the Map Act,[15] but by the grounds of denial set forth therein. The grounds for denial contained in the new Subdivision Map Act are as follows:

> A legislative body of a city or county shall deny approval of a final or tentative subdivision map if it makes any of the following findings:
>
> (a) That the proposed map is not consistent with applicable general and specific plans.
>
> (b) That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans.
>
> (c) That the site is not physically suitable for the type of development.
>
> (d) That the site is not physically suitable for the proposed density of development.

10. Euclid v. Amber Realty Co., 272 U.S. 365 (1926).
11. CAL. GOV. CODE § 65860 (West Supp. 1974).
12. *Id.*
13. CAL. GOV. CODE § 66479 *effective* March 1, 1975.
14. *Id.*
15. *Id.*

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

(f) That the design of the subdivision or the type of improvements is likely to cause serious health problems.

(g) That the design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of, property within the proposed subdivision. In this connection, the governing body may approve a map if it finds that alternate easements, for access or for use, will be provided, and that these will be substantially equivalent to ones previously acquired by the public. This subsection shall apply only to easements of record or to easements established by judgment of a court of competent jurisdiction and no authority is hereby granted to a legislative body to determine that the public at large has acquired easements for access through or use of property within the proposed subdivision.[16]

The opportunity for land use regulation arises by virtue of the fact that if a city or county has the right to deny a map for failure to comply with any of the above grounds of denial, it implicitly has the authority to condition the approval of a map so as to avoid any of the above.

Building Regulations

Although building regulations have not traditionally been considered to be a land use regulatory device they do provide an opportunity to review in detail developments which either are not subject to the provisions of the Subdivision Map Act[17] or which were subdivided so long ago that conditions which would or could currently be required were not then imposed. For this reason it is felt that building regulations will play a more and more significant role in the land use regulatory scheme. It should be noted, however, that by and large existing building regulations in cities and counties do not contain authority for the imposition of such conditions and care should be taken both by local agencies in seeking to impose such conditions and by developers upon whom such conditions may fall.

Source of Government Land Use Regulatory Power

The basis of the regulatory devices described above is the police power. The police power is by nature an expanding concept which reacts to changing social attitudes and conditions subject only to limitation by constitutional amendment or in some cases through legislative enactment. It is the concept of police power which makes it impossible to define with precision the legal limits of land

16. Cal. Gov. Code § 66474 *effective* March 1, 1975.
17. Cal. Gov. Code § 66410 *et seq., effective* March 1, 1975.

use regulation.

The following is as precise an exposition of the concept of police power as is contained in the case law:

> The police power of a state is an indispensible prerogative of sovereignty and one that is not to be lightly limited. Indeed, even though at times its operation may seem harsh, imperative necessity for its existence precludes any limitation upon its exercise save that it not be unreasonable and arbitrarily invoked and implied. . . .
>
> In short, the police power as such is not confined within the narrow circumspection of precedence, resting upon past conditions which do not cover and control present day conditions obviously calling for revised regulations to promote the health, safety, moral or general welfare of the public. That is to say, as a commonwealth develops politically, economically and socially, the police power likewise develops within reason to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power. . . . As our civic life has developed so has the definition of "public welfare" until it has been held to embrace regulations, "to promote the economic welfare, public convenience and general prosperity of the community." Thus, it is apparent that the police power is not a circumscribed prerogative, but is elastic, and in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral and intellectual evolution of the human race. In brief, "there is nothing known to the law that keeps more in step with human progress than does the exercise of this power."[18]

Thus the concept of police power is unique in the law which has traditionally relied upon certainty of expected behavior as its foundation. This concept, however, gives the law the flexability it needs to function in a changing society.

In general, the police power of local government in California is limited by specific statutory enabling legislation, referred to as the General Laws of the State of California. Exceptions exist for charter cities and counties organized pursuant to Article XI, Section 3 of the California Constitution. Article XI, Section 7 of the California Constitution, however, does vest even general law cities and counties in the state of California with a general police power provided its exercise does not conflict with the general laws.

Although once a matter of dispute it is now generally recognized

18. Miller v. Board of Public Works, 195 Cal. 477, 484-85, 234 P. 381, 383 (1925).

that the zoning power and implicitly the power to adopt general and specific plans and building regulations emanates from Article XI, Section 7 of the California Constitution rather than the specific provisions of the California Planning and Zoning Law.[19] In *Scrutton v. County of Sacramento*,[20]

> [I]n their intrinsic character and by expressed declaration the laws on county and city zoning are designated as standardizing limitations over local zoning *practices*, not as specific grants of authority to legislate.[21]

If any question remained after the decision in *Scrutton*, admittedly not a Supreme Court decision, that uncertainty should have been laid to rest by the 1965 repeal and re-enactment of Government Code section 65800 which now provides in part as follows:

> Except as provided in Article 4 (commencing with section 65910 of this chapter) the Legislature declares that in enacting this chapter it is its intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters.[22]

The regulation of subdivisions, however, is an entirely different matter. The governmental power to regulate the subdivision of land is delegated to local agencies by the Subdivision Map Act[23] and unlike the zoning power the power of local agencies to regulate in this area has been uniformly considered to be limited by the terms, express and implied, of the Subdivision Map Act itself.[24]

The purpose of the Subdivision Map Act[25] and the local ordinances passed in conjunction therewith have been stated to be as follows:

> The Subdivision Map Act and the ordinances passed in conformity with it have several salutary purposes, such as: to regulate and control the design and improvement of subdivisions, with proper consideration for their relationship to adjoining areas; to require a subdivider to install streets; to require a subdivider to install

19. CAL. GOV. CODE § 65000 (West Supp. 1974). *See* Hunter v. City of Pittsburg, 207 U.S. 161 (1907).

20. 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1960).

21. *Id.* at 417, 79 Cal. Rptr. at 876.

22. CAL. GOV. CODE § 65800 (West Supp. 1974); *accord*, Taschner v. City Council, 31 Cal. App. 3d 48, 107 Cal. Rptr. 214 (1973).

23. CAL. BUS. & PROF. CODE § 11525 (West Supp. 1974).

24. *Id.*; *see generally* Santa Clara County Contractors and Homebuilders Association v. Santa Clara, 232 Cal. App. 2d 564, 43 Cal. Rptr. 86 (1965); Newport Building Corp. v. Santa Ana, 210 Cal. App. 2d 771, 26 Cal. Rptr. 797 (1962); Longridge Estates v. Los Angeles, 183 Cal. App. 2d 533, 6 Cal. Rptr. 900 (1960); Wine v. Council of City of Los Angeles, 177 Cal. App. 2d 157, 2 Cal. Rptr. 94 (1960); Evola v. Wendt Construction Company, 170 Cal. App. 2d 21, 338 P.2d 498 (1959); Kelber v. Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

25. CAL. GOV. CODE § 66410 *et seq.* (West Supp. 1974).

drains; to prevent fraud and exploitation; and to protect both public and purchaser.[26]

The delegation of authority to local agencies to legislate in the area of subdivision controls is found in Government Code section 66411,[27] which provides in part as follows:

> Regulation and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies. Each local agency shall by ordinance regulate and control subdivisions for which this division requires a tentative and final or parcel map. Such ordinances shall specifically provide for proper grading and erosion control, including the prevention of sedimentation or damage to off-site property.

"Design" is defined in Government Code section 66418[28] as follows:

> "Design" means: (1) street alignments, grades and widths; (2) drainage and sanitary facilities and utilities, including alignments and grades thereof; (3) location and size of all required easements and rights of way; (4) fire roads and fire breaks; (5) lot size and configuration; (6) traffic access; (7) grading; (8) land to be dedicated for park or recreational purposes; and (9) such other specific requirements in the plan and configuration of the entire subdivision as may be necessary or convenient to insure conformity to or implementation of the General Plan required by Article 6 (commencing with § 65300) of Chapter 3 of Division 1 of this title, or any Specific Plan adopted pursuant to Article 8 (commencing with § 65450) of Chapter 3 of Division 1 of this title.

"Improvement" is defined in Government Code section 66419[29] as follows:

> (a) "Improvement" refers to such street work and utilities to be installed or agreed to be installed by the subdivider on the land to be used for public or private streets, highways, ways, and easements, as are necessary for the general use of the lot owners in the subdivision and local neighborhood traffic and drainage needs as a condition precedent to the approval and acceptance of the final map thereof.
>
> (b) "Improvement" also refers to such other specific improvement or types of improvements the installation of which either by the subdivider, by public agencies, by private utilities, by any other entity approved by the local agency or by a combination thereof, is necessary or convenient to insure conformity to or implementa-

26. Pratt v. Adams, 229 Cal. App. 2d 602, 605-06, 40 Cal. Rptr. 505, 508 (1964).
27. CAL. GOV. CODE § 66411 *effective* March 1, 1975.
28. CAL. GOV. CODE § 66418 *effective* March 1, 1975.
29. CAL. GOV. CODE § 66419 *effective* March 1, 1975.

tion of the General Plan required by Article 6 (commencing with § 65300) of Chapter 3 of Division 1 of this title, or any Specific Plan adopted pursuant to Article 8 (commencing with § 65450) of Chapter 3 of Division 1 of this title.

A reading of these sections alone would seem to imply that no conditions can be imposed upon the approval of subdivisions except as expressly provided for by the Subdivision Map Act[30] or by local ordinances in conformance therewith. This assumption is not entirely correct, for the landmark case of *Ayres v. City of Los Angeles*,[31] expanded the scope of regulation to a considerable degree. The *Ayres* case will be discussed more fully in the section dealing with the scope of regulation, *infra*, but basically, the impact of the case was to tie the regulation of subdivisions to the police power rather than solely to the approval of map or plat specifications. The court, in *Ayres*, held that conditions which are not inconsistent with the statute and are reasonably required by the subdivision type and use as it relates to the character of the local neighborhood and to planning and traffic conditions would be lawful even though such conditions were not expressly provided for in the statute or in the local ordinance.[32]

The cases decided subsequent to *Ayres* have followed the court's decision, but, with one exception, have narrowly construed its application.[33] These cases have accepted the rule of the court which would permit the imposition of conditions not expressly provided for in the Subdivision Map Act[34] or in the local ordinances enacted in conformance therewith, but have limited these conditions to conditions which are consistent with the Subdivision Map and which are required by the proposed use of the land as it relates to the character and planning of the neighborhood.

For example, in *Kelber v. Upland*,[35] the court invalidated local ordinances which required payments into special funds as a prerequisite to approval by the City of the final map of any subdivision. The funds were to be used for the purpose of acquiring park and school sites and for the purposes of subdivision drainage construction outside of the limits of the subdivision. The court found that the provisions in question were not local ordinances regulating the "design and improvement" of subdivisions as defined in the Subdi-

30. CAL. GOV. CODE § 66410 (West Supp. 1974).
31. 34 Cal. 2d 31, 207 P.2d 1 (1949).
32. *Id.* at 37, 207 P.2d at 5.
33. *See supra* note 30. The one exceptional case may be Associated Homebuilders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).
34. CAL. GOV. CODE § 66410 *et seq.* (West Supp. 1974).
35. 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

vision Map Act,[36] but were clearly fund-raising methods for the purpose of helping to meet the future needs of the *entire* city for park and school sites and drainage facilities and that as such, they were not reasonable requirements for the design and improvement of the subdivision itself. The court found that the fund-raising method was not related to the needs of the particular subdivision or to the matter of making proper connections between the subdivision and the adjoining areas and, therefore, was inconsistent with and in conflict with the provisions of the Act.[37]

Similarly, in *Newport Building Corp. v. Santa Ana*,[38] a city ordinance imposing a per lot fee of $50.00 as a business tax on subdivisions, the proceeds from which were to be used for the purpose of fire protection and park and recreational facilities, was found to be invalid as a tax tied to the Subdivision Map Act[39] which was not related to the design, improvement or consideration of areas adjacent to the subdivision. This line of decisions was continued in *Santa Clara County Contractors and Homebuilders Association v. Santa Clara*,[40] wherein the court disallowed the imposition of a flat per lot fee as a condition of approval of subdivisions within the city. The court expressly stated that a municipality may not use the Subdivision Map Act[41] for general revenue-producing purposes and the imposition of such fees is contrary to the terms of the Act.[42]

It should be noted that subsequent to the decision of many of these cases limiting the power of local entities to impose fees or require dedications for certain purposes, the Subdivision Map Act has been amended to provide for the collection of fees and the requirement of dedications for similar objects, but, in each instance, the required fees or dedications had been carefully limited to the needs emanating from the proposed subdivision itself rather than general municipal needs.[43]

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36. CAL. GOV. CODE § 66410 *et seq.* (West Supp. 1974).
37. Kelber v. Upland, 155 Cal. App. 2d 631, 638, 318 P.2d 561, 565 (1957).
38. 210 Cal. App. 2d 771, 26 Cal. Rptr. 797 (1962).
39. CAL. GOV. CODE § 66410 *et seq.* (West Supp. 1974).
40. 232 Cal. App. 2d 564, 43 Cal. Rptr. 86 (1965).
41. CAL. GOV. CODE § 66410 *et seq.* (West Supp. 1974).
42. 232 Cal. App. 2d at 575-76, 43 Cal. Rptr. at 94.
43. *See* CAL. BUS. & PROF. CODE § 11546 (*effective* through Feb. 28, 1975) (Park Dedication Requirements).

Where the courts have found that the imposed ordinance or conditions are, however, consistent with the Subdivision Map Act,[44] the question becomes one of a proper exercise of police power, the limits of which are delineated in the following section.

Scope of Permissible Regulation—The Police Power

As noted above, the scope of permissible land development controls is limited, in general, by the scope of the agency's police power. Most of the following cases deal with conditions imposed upon the approval of subdivision. The reason for the paucity of cases in the areas of changes, use permits and variances may be that the benefit to a particular developer and the burden on the community is most obvious at the subdivision level and, thus, government has felt justified in extending its police power exactions and regulations to the greatest extent. The basic challenge faced by the courts as a result of this muscle flexing has been stated by Professor Van Alstyne as follows:

> Courts considering constitutional challenges to dedicatory conditions have generally sought to strike a balance between the regulatory purposes sought to be achieved and the constitutional protections embodied in the just compensation clauses. Cases occasionally approving such exactions on the fictive theory that the developer, being under no compulsion to improve and sell his land, acts "voluntarily" when he consents to dedications in order to obtain the "privilege" of official project approval are both unrealistic and opposed in principle to the "unconstitutional conditions" doctrine. A California court recently articulated a more acceptable judicial approach: "Not all conditions are valid. . . . An arbitrarily conceived exaction will be nullified as a disguised attempt to take private property for public use without resort to eminent domain or as a mask for discriminatory taxation."[45]

For the purposes of this paper the discussion of the judicial struggle with this concept will be divided into pre 1970 judicial decisions and post 1970 decisions.

Pre 1970—A period of Relative Certainty

Prior to 1970 California courts scrutinized land use regulations from the standpoint of their reasonableness in the light of the needs or burdens being created by the proposed use of land with the overall limitation that the regulating agency could not be acting in an arbitrary or discriminatory manner. The attitude of the courts is perhaps best exemplified by the decision of *Ayres v. City of Los*

44. Cal. Gov. Code § 66410 *et seq.* (West Supp. 1974).

45. A. Van Alstyne, *Taking or Damaging By Police Power: The Search For Inverse Condemnation Criteria*, 44 So. Cal. L. Rev. 1, 61 (1971).

Angeles,[46] noted above. The holding of the courts can be summarized to be that so long as some reasonable relationship exists between the needs normally generated by a particular use and the conditions imposed upon that use, the condition is within the scope of the police power even though the community as a whole is also benefited by the imposition of the conditions. As the court stated:

> It is no defense to the conditions imposed in a subdivision map proceeding that their fulfillment will incidentally also benefit the city as a whole. Nor is it a valid objection to say that a condition contemplates future as well as more immediate needs. Potential as well as present population factors affecting the subdivision and the neighborhood generally are appropriate for a consideration.[47]

and further:

> It is the petitioner who is seeking to acquire the advantages of lot subdivision and upon him rests the duty of compliance with reasonable conditions for design, dedication, improvement and restrictive use of the land so as to conform to the safety and general welfare of the lot owners in the subdivision and of the public.
>
> . . . [Where the condition imposed is] reasonably related to increased traffic and other needs of the proposed subdivision, it is voluntary in theory and not contrary to Constitutional concepts.[48]

But even as local government and land developers became accustomed to the parameters as thought to have been established in the *Ayres* decision the seeds of change were being sown.

One of the first non-California courts to follow the *Ayres* decision was the Illinois Supreme Court in *Rosen v. Village of Downers Grove*.[49] That case involved efforts by a Planning Commission to exact fees in lieu of dedication requirements which were to be used for general education purposes. The court found that "general education purposes" were not related to the need within the subdivision but to those of the community as a whole and, therefore, were invalid exactions, citing *Ayres* as authority. *Rosen* was followed in Illinois in a subsequent case, *Pioneer Trust and Savings Bank v. Village of Mount Prospect*.[50] The case in *Pioneer* involved a local ordinance which required the dedication of land for a school site. The ordinance was held invalid because there was no showing that

46. 34 Cal. 2d 31, 207 P.2d 1 (1949).
47. *Id.* at 41, 207 P.2d at 7.
48. *Id.* at 42, 207 P.2d at 7.
49. 19 Ill. 2d 488, 167 N.E.2d 230 (1960).
50. 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

the exaction was related to the activities of the subdivider. The court stated the rule as follows:

> If the requirement is within the statutory grant of power to the municipality and if the burden case upon the subdivider is *specifically and uniquely attributable* to his activity, then the requirement is permissible; if not, it is forbidden. . . .[51]

The Wisconsin Supreme Court, in *Jordan v. Village of Menominee Falls*,[52] adopted the "specifically and uniquely attributable"[53] test of *Pioneer* with the caveat that it should not be so restrictively applied as to cast an unreasonable burden of proof upon the municipality. Several other jurisdictions soon followed suit.[54]

Similar results have developed independently from the *Ayres* lines of cases, among them the Oregon case of *Haugen v. Gleason*.[55] This case involved a per lot fee as a condition to the approval of a subdivision map. The fees were to be used for the acquisition of park land throughout the city. The Supreme Court of Oregon held the statute invalid on the grounds that there was no requirement that the fees collected be expended for the benefit of the land being subdivided and, therefore, amounted to a tax and exceeded the constitutional bounds of the police power.[56]

Other cases have combined the *Ayres* line of cases with the benefit cases to formulate an approach which provides the most protection for the developer.[57] This approach requires that not only must there be a direct relationship between the need created by the subdivision and the condition imposed but, also, the condition must be for the direct benefit of the regulated subdivision.

By far the most liberal approach taken by any court prior to 1970 is that of the New York Court of Appeals in *Jenad v. Village*

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51. *Id.* at 380, 176 N.E.2d at 802 (Emphasis added.).

52. 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *app. dism.* 385 U.S. 4 (1966).

53. Pioneer Trust and Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961).

54. *See, e.g.*, Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964); Frank Ansuini Inc. v. City of Cranston, 264 A.2d 910 (R.I. 1970); Baltimore Planning Commission v. Victor Development Co., 261 Md. 387, 275 A.2d 478 (1971).

55. 226 Ore. 99, 359 P.2d 108 (1961).

56. *See, e.g.*, Gulest Associates, Inc. v. Town of Newburgh, 225 Misc. 2d 1004, 209 N.Y.S.2d 729 (Sup. Ct. 1960), *aff'd* 15 App. Div. 2d 815, 225 N.Y.S. 2d 538 (1962), *overruled by* Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966). The effect of this line of cases is to tie the condition to the *benefit* to be conferred on the subdivision as distinguished from the Ayres line of cases relying on the need created as the criteria.

57. *See, e.g.*, Aunt Hack Ridge Estates v. Planning Commission, 27 Conn. Supp. 74, 230 A.2d 45 (Super. Ct. 1967); Longridge Builders, Inc. v. Planning Board, 52 N.J. 348, 245 A.2d 336 (1968).

of Scarsdale.[58] The New York Court validated a per lot fee required in lieu of a dedication of land which was to be collected and credited to a separate fund to be used for parks, playgrounds and recreational purposes as may be determined by the Village Board of Trustees. The court implicitly overruled the *Gulest* decision, *supra*, which had invalidated such fee requirements. Apparently, under the approach taken by the court, one must only establish a need emanating from the creation of the subdivision and a municipality may exact a fixed fee without regard to any direct relationship between the fee and the need.

The judicial formulation of the criteria of reasonableness in other jurisdictions as described above has been said to have taken four basic courses, summarized as follows:

(1) *Correlative Need*—A one-to-one relationship between the exaction or condition and the need created by the proposed development.[59]

(2) *Correlative Benefit*—A one-to-one relationship between the exaction or condition and the benefits conferred upon the subdivision.[60]

(3) *Need/Benefit*—A combination of the correlative need and correlative benefit theories requiring the existence of both in order to justify the imposition of a condition or exaction.[61]

(4) *Incidental Need*—Requires only that an incidental relationship be established between the exaction or condition and the need generated by the subdivision.[62]

In California, however, the courts consistently adhered to the correlative need or burden theory and had uniformly rejected the incidental need approach prior to 1970.[63]

58. 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).

59. *See, e.g.*, Rosen v. Village of Downers Grove, 19 Ill. 2d 488, 167 N.E. 2d 230 (1960); Pioneer Trust and Saving Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 196 N.E.2d 799 (1961).

60. *See, e.g.*, Haugen v. Gleason, 22 Ore. 99, 359 P.2d 108 (1961); Gulest Associates, Inc. v. The Town of Newburg, 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (Sup. Ct. 1960), *aff'd.*, 15 App. Div. 2d 815, 225 N.Y.S.2d 538 (1962).

61. *See, e.g.*, Aunt Hack Ridge Estates, Inc. v. Planning Commission, 27 Conn. Super. 74, 230 A.2d 45 (Super. Ct. 1967).

62. *See, e.g.*, Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); Associated Homebuilders, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971) (*dicta*).

63. *See, e.g.*, Santa Clara County Contractors and Homebuilders As-

Perhaps the most definitive statement of the limitation of regulation was set forth by the court in *Mid-Way Cabinet Fixture Mfg. v. County of San Joaquin.*[64] This case involved the imposition of conditions on the granting of a use permit requiring the developer to convey access rights to existing roads and land for a return road to a future expressway without compensation. The court noted that the record of the hearings before the Planning Commission and the Board of Supervisors gave not the slightest hint that the proposed use would cause an appreciable increase in traffic and that it was apparent that the County was attempting to avoid the constitutional guarantee of payment of just compensation. In making its finding, quoting in part from Professor Michelman, the court ruled as follows:

> [A]ny measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all. The purpose which [the County seeks] to accomplish here is not the purpose for which zoning ordinances are properly designed; the cases relied upon by respondents do not give an unrestrained power to impose "conditions." Justification of conditions depends upon there being some real relationship between the thing wanted by the landowner from government and the quid pro quo exacted by government therefor.[65]

Post 1970—California Joins The Trend

Since 1970 we have found that the concept of government land use regulation is currently in a state of radical change. Concerns for the environment and a general trend toward the regionalization of government have caused significant reactions both in the courts and in the legislature.

Judicial Legislation

Recent decisions of the California courts have indicated a willingness to expand the traditional judicial concepts of police power and legislative interpretation to encompass areas deemed to be critical

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sociation v. Santa Clara, 232 Cal. App. 2d 564 (1965) (invalidated fee where funds benefit community as a whole rather than a particular subdivision); Newport Building Corp. v. Santa Ana, 210 Cal. App. 2d 771 (1962) (per lot fee described as a business tax invalidated); Kelber v. Upland, 155 Cal. App. 2d 631 (1957) (invalidated fee as general fund raising). Bringle v. Board of Supervisors, 54 Cal. 2d 86 (1960) (finding of additional traffic burden); Southern Pacific Company v. City of Los Angeles, 242 Cal. App. 2d 38 (1966) (noting the increased traffic which would occur as a result of the construction of the building); Sommers v. City of Los Angeles, 254 Cal. App. 2d 605 (1967) (traffic interruptions and complications reasonably justified the requested dedications).

64. 257 Cal. App. 2d 181, 65 Cal. Rptr. 37 (1967).

65. *Id.* at 192, 65 Cal. Rptr. at 44.

by the judiciary.[66] These efforts have been on a piecemeal basis, but the overall trend can be discerned. Where critical environmental concerns are involved, the court has indicated that it will go far to uphold the regulations, particularly when they concern the elimination of open space which the court has described as, "a melancholy aspect of the unprecedented population increase which is characterized in our state in the last few decades."[67]

The landmark decision in this regard is the decision of the California Supreme Court in *Associated Homebuilders of the Greater East Bay, Inc. v. The City of Walnut Creek.*[68] This case involved a challenge by homebuilders in the Bay Area of the Quimby Act[69] which provides for the dedication of land or an in lieu fee for park and recreational purposes as a condition to the approval of a subdivision map. This Act and the local ordinance enacted pursuant thereto were challenged by the developers on a number of grounds, including the following:

1. The Quimby Act is violative of the equal protection and due process clauses of the federal and state constitutions in that it deprives a subdivider of his property without just compensation.
2. The exaction is for the purpose of meeting future needs, not just the needs created by the present population.
3. The exaction is a form of double taxation since the cost will be passed on to the new subdivision users who will be property tax payers.
4. The exaction is a special assessment enacted without compliance with statutory requirements.
5. The exaction constitutes a denial of equal protection of the laws since it is not imposed upon other development such as apartment construction.
6. The exactions tend to raise the cost of housing and, therefore,

66. *See* Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 513, 104 Cal. Rptr. 705 (1972).
67. Associated Homebuilders v. City of Walnut Creek, 4 Cal. 3d 633, 638, 484 P.2d 606, 610, 94 Cal. Rptr. 630, 634 (1971).
68. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).
69. CAL. BUS. & PROF. CODE § 11546 (West Supp. 1974).

to exclude the poor.[70]

The primary contention, of course, was that the local ordinance and the Quimby Act[71] were not within the permissible scope of the police power but were nothing more than a veiled form of eminent domain without the necessary ingredient of just compensation.

The court in disposing of this argument first rejected the contention by the developer that the exaction can only be justified if the *need* emanates from the subdivision. The court specifically stated that the *Ayres* decision does not stand for the proposition that this is the *only* justification.[72] The court expressed grave concern over the effects of rampant development on available recreational areas, noting that:

> The elimination of open space in California is a melancholy aspect of the unprecedented population increase which has characterized our state in the last few decades.[73]

In prefacing its opinion, the court points out the recognition of the need for open space in the recently adopted Article XXVIII of the California Constitution[74] which provides that it is in the best interest of the state to maintain and preserve open space so as to insure the enjoyment of natural resources and scenic beauty for the well-being of the state and its citizens, and states that, "Statutes which further the underlying policy expressed in the constitutional section must be upheld whenever possible in order to effectuate its salutary purposes."[75]

Similarly where other areas of grave concern are involved the court has gone far to uphold legislative enactments designed to address those concerns. In the recent California Supreme Court case of *Builders Association of Santa Clara—Santa Cruz Counties v. Superior Court of Santa Clara County*[76] the court in upholding a residential zoning moratorium which authorized the rezoning of property to residential during a period of two years only when the School District certifies that binding agreements have been entered into with the School District to provide satisfactory temporary alternatives to permanent school construction, and further stating that if in subsequent years the School District protests a change of zone to residential uses, a five-seventh vote by the City Council

70. Associated Homebuilders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

71. CAL. BUS. & PROF. CODE § 11546 (West Supp. 1974).

72. Associated Homebuilders v. City of Walnut Creek, 4 Cal. 3d 633, 638, 484 P.2d 606, 610, 94 Cal. Rptr. 630, 634 (1971).

73. *Id.*

74. *Id.* at 639, 484 P.2d at 611, 94 Cal. Rptr. at 635.

75. *Id.*

76. 13 Cal. 3d 225, 529 P.2d 582, 118 Cal. Rptr. 158 (1974).

would be required to effect such change, states in a footnote[76a] that school sites may be required to be dedicated in conjunction with zone changes in the State of California and that such dedication requirements may not necessarily be related to need. This represents a substantial departure from what was considered to be pre-existing law particularly in view of Government Code section 66478[77] which provides that while certain sites may be delineated at the time of the consideration of Subdivision Maps but that compensation must be paid for the acquisition thereof. Similarly the entire school financing system contemplates the acquisition of school sites which are paid for out of the general tax revenues of the district or jurisdiction.

As the above cases demonstrate, the California court has indicated that it will not be bound by the pre-1970 parameters of correlative need, but at least where an area of critical concern is involved that it will look to all theories of justification in sustaining legislation addressing such concerns.

PENDING LEGISLATION

There have been many bills pending in both Congress and in the California State Legislature in each of the past several years which could have a dramatic affect on land-use regulation both nationwide and in the State of California. Most of this legislation has been patterned after the American Bar Association Model Land-use Development Code[78] and its thrust for the regionalization of the planning function.[79] Currently the California Coastal Commission is considered the adoption of a plan for submission to the Legislature during its 1976 legislative session which includes a detailed statement with respect to continuation of the general format established by the California Coastal Zone Conservations Act[80] of 1972 with some modifications in the direction of the Model Land-

76a. *Id.* at 232 n.6, 529 P.2d at 587 n.6, 118 Cal. Rptr. at 163 n.6.

77. CAL. GOV. CODE § 66478 *effective* March 1, 1975.

78. *See* J. Krasnowiecki, *Model Land Use and Development Code*, 1971 URBAN LAW ANNUAL 101 (1971).

79. *See* A.B. 2978 (Priolo 1973-74); THE COASTAL ZONE CONSERVATION ACT of 1972 (CAL. PUB. RESOURCES CODE § 27000 *et seq.*, West Supp. 1974) The Clean Air Act (42 U.S.C. 1857 *et seq.*).

80. CAL. PUB. RESOURCES CODE § 27000 *et seq.* (West Supp. 1974).

use Code[81] which provides for somewhat more local autonomy than exists under the current provisions of the Act. Regionalization however remains the key ingredient. There is considerable uncertainty as to whether any of the pending legislation if enacted will in its final form contain new planning and land-use regulatory tools or whether they will simply impose new levels of government administering the traditional tools. The opportunity for innovation is there in view of the expanding concept of the police power but naturally there is a considerable amount of reluctance to accept new ideas and innovative techniques in view of the fact that we have only just entered the period of uncertainty and change. There is no question but that innovative techniques do stand a good chance of being upheld because of the dramatic changes which have occurred in our urban environment in recent years. One of the most striking examples is the utilization of timing and sequential controls in order to avoid the burdens of rapid urbanization.[82] A detailed review of the proposed and pending legislation would serve no purpose here since although the passage of some type of land-use regulation is inevitable the lack of success of the existing proposals has been considerable.

Conclusions and Recommendations

The expansion of the arsenal of land-use regulatory tools is an inevitable consequence of our rapidly expanding urban environment. Some form of regional land-use planning will be enacted either at the state or federal level if not this coming year certainly in the next subsequent legislative session. The danger that exists is not that changes will be forthcoming but that legislative changes will come too late and fall short of their objectives, thereby encouraging and perhaps even demanding judicial legislation on a case-by-case basis and that by the time the Legislature is prepared to act the concerns will be so great that the pressure for a solution will subordinate traditional concepts of due process and just compensation so imbued in our system. A judicial resolution of these concerns is fraught with perils. The judicial system is not designed to implement legislative programs and inequities inherently arise. It is the responsibility of the Legislature to resolve these problems in a comprehensive manner taking into account policies which affect all of the citizens of the State from both a social and economic

81. *See supra* note 79.

82. T. Clark, Jr. & R. Grable, *Growth Control In California: Prospects for Local Government Implementation of Timing and Sequential Control of Residential Development*, 5 Pacific L.J. 570 (1970).

standpoint. The solution lies in a quick and responsive legislative land-use program which addresses these concerns which are becoming more and more critical but which retains the broad picture and which carries forth with traditional concepts of due process and just compensation.