150 YEARS of LAND USE

California Sesquicentennial
1850 – 2000

a brief history of land use regulation

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A BRIEF HISTORY
of
CALIFORNIA LAND USE

Introduction to Land Use

Land use law is a recent term describing the public regulation of land through zoning, planning, subdivision, building and environmental controls. It is the law pertaining to the physical development of cities. The practice frequently involves constitutional law principles requiring a two-part approach: 1) analysis of the government’s power to regulate, and 2) analysis of limitations on this power, including protections of individual rights. The U.S. and California Supreme Courts visit the land use area frequently.

The land use field is political, involving socio-economic policy issues at all government levels. Some legislation is federal—most notably anti-pollution and housing laws. Most legislation is at the state and local (ordinance) levels. Almost all permit decision-making is by cities and counties because of the uniqueness of communities and of the land itself. Although the California courts handle the majority of land litigation, the federal courts also litigate land use cases involving constitutional issues. And, as we shall see, the law strongly favors public agencies, especially in defending its regulations.

The history of land use regulation in the U.S. and California has evolved from a long period of static inactivity to the current period of dynamic regulation, with emphasis on comprehensive planning and environmental protection. Land use litigation has increased dramatically since 1970. The growth in reported cases has developed an increasingly logical and stable body of law.
PART 1
FROM STATEHOOD THROUGH THE 1960s
(1850–1970)

The Early Years (1850–1900). Public Nuisance Principles Control

When viewed in perspective to the development of our nation, the history of land regulation is logical and understandable. In the 1850s and early 1900s, industrial development was favored and the private ownership and use of land was given much deference by the government. At that time, the only public controls on land use and development were based upon common law concepts of public nuisance. That is, the private use of land was uncontrolled except where the use became dangerous or obnoxious to adjoining residents and the public. Although public nuisance law continues to be a tool of land use control, its importance has lessened as it takes its place among modern development regulation through planning, zoning, subdivision and environmental controls.

The Middle Years (1900–1950). Zoning Comes of Age

Around the turn of the century the public conscience took a turn toward reform in a movement called Progressivism. Economic development still carried primary importance, but the need to control its abuses became apparent. The country was engaged in a search for order and civility, and it had faith in the power of scientific planning and administrative control to solve social ills. This attitude ushered in the concept of zoning. In its original and primary sense, zoning means simply dividing a city into districts and applying specific regulations to each district. The regulations are generally divided into two classes: 1) those that regulate the height and bulk of buildings, and 2) those that prescribe the use of property within designated districts.

Most large cities began early attempts at zoning within limited areas of their geographical jurisdictions. New York City in 1916 adopted the first comprehensive zoning ordinance by which the entire city was divided into different use districts. Shortly thereafter, both the California and U.S. Supreme Courts upheld comprehensive zoning regulations as a valid exercise of the police power (now Cal. Const., Art. XI, §7). See Miller v.
Board of Public Works (1925) 195 C 477, 486, and City of Euclid v. Ambler Realty Co. (1926) 47 SCt 114.

From the '20s through the '60s, zoning regulation was the primary technique for controlling land use and development in California. However, until we reached the modern era of regulation, commencing about 1970, the evolution of the zoning power was unremarkable and zoning litigation was sparse.


Following World War II, California grew rapidly and the building construction industry flourished. Mass-produced housing techniques were employed and the modern savings and loan business provided home mortgages for the middle class in California like nowhere else. Commercial and industrial growth boomed. Government at that time was generally pro-development. Growth held the vision of economic opportunity and fueled itself to become a self-fulfilling prophecy.

Development abuses were inevitable, and urban sprawl soon became a reality. The growth machine chewed deep into the valleys, deserts and mountains surrounding major urban areas. Cookie-cutter subdivisions became common, creating “houses of ticky-tacky, row on row.” Regional problems such as smog and traffic congestion emerged quickly. The populace was grumbling and demanding change.

PART 2


Introduction

In a sense, the development abuses of the 1950s and 1960s brought about the modern era of expanded regulatory controls. But other elements contributed. The urban planning profession was coming of age. Famous urban architects designed large-scale communities using comprehensive planning techniques. Their designs were implemented on a private basis, and they
were a financial success (e.g. Irvine Ranch and Westlake Village). Soon city planning departments were developing master plans that were sometimes implemented by the city council.

Also in the '60s, the environmental movement emerged as a political force (later to be joined by the growth controllers of the '70s). At the federal level, LBJ's vision of a Great Society started a fury of progressive environmental legislation, including the various anti-pollution statutes and NEPA. It can now be seen that a period of development abuses combined with a new attitude of comprehensive planning and environmental protection emerged to usher in this modern era of expanded regulatory controls.

Comprehensive Planning Mandated. Consistency Required

The year 1972 contained the most dynamic one-two punch of the modern era. In that year, California mandated comprehensive long-term planning and required zoning and subdivision consistency with the plan. This was followed by the blockbuster judicial decision of Friends of Mammoth, mandating environmental review of private projects. First, the planning requirement.

In 1972, the general plan became a city's basic planning and land use document. State legislation (McCarthy, Stats. 1971, Chap. 1446) mandated comprehensive general plans and imposed the requirement that zoning and subdivision ordinances be consistent with such plans. The general plan now provides the blueprint for development of a community. It requires that all elements of development be addressed, including land use, traffic, housing, open space and public facilities. GovC 65300-65303. Before 1971, the general plan was considered an advisory document. Cities were neither mandated to prepare general plans, nor was there any requirement that land use approvals be consistent with the plan.

The courts have given a powerful interpretation to the general plan, placing it atop the hierarchy of laws regulating land use. Subordinate to the general plan are zoning and other land use laws. And virtually any decision or approval affecting land use must conform to the adopted plan. The consistency requirement has elevated the general plan from an "exhortation" to a "com-
mandement”. It is the linchpin of California’s land use and development laws. It is the principle that infused the concept of planned growth with the force of law. See de Bottari v. City of Norco (1985) 171 CA3d 1204, and Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 C3d 531, 540.

Environmental Review Mandated (CEQA)

The 1970s contained the greatest output of environmental legislation in history. In California, the most potent of them was the California Environmental Quality Act (CEQA). It was the first state act patterned after the National Environmental Policy Act (NEPA). Although CEQA was enacted in 1970, its initial effect on land development was slight, because public agencies interpreted CEQA as only applying to projects constructed by governmental agencies. However, in 1972, the California Supreme Court determined that the term “project” included the granting of approvals by a public agency for a private project. Friends of Mammoth v. Board of Supervisors (1972) 8 C3d 247. Following Mammoth, CEQA’s importance as a land use and development control became monumental. Today, local agencies must follow procedures in land use decision-making that ensure consideration of and response to the environmental effects of their proposed decisions. Judicial interpretation of CEQA has been demanding. The courts have consistently given teeth to CEQA by frequently invalidating project approvals in cases where the agency failed to comply with CEQA procedures, especially the EIR process. CEQA has consistently been interpreted to afford the fullest possible protection of the environment within the reasonable scope of its statutory language. Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal. (1988) 47 C3d 376. Today, CEQA is the most litigated land use control. One reason is the liberal standing requirements, coupled with the liberal award of attorney fees to successful group litigants under the private attorney general rule (CCP 1021.5). See Woodland Hills Residents Ass’n, Inc. v. City Council (1979) 23 C3d 917, 935-942, and Citizens Ass’n v. County of Inyo (1985) 172 CA3d 151.

The Coastal Act

Proving that 1972 was the watershed year for land use regulation, environmentalists succeeded in passing Proposition 20, the California coastal initiative (later to become the Coastal Act
of 1976 (Pub Res Code 30000 et seq.). The Coastal Act established policies for public access to and development control of the state’s coastal resources. It imposed obligations on cities and counties in the coastal zone, requiring the preparation of local coastal plans to be implemented through a rigorous permit and exaction process. Much of the law relative to the imposition of exactions came directly out of Coastal Commission regulation. See Grupe v. California Coastal Comm’n (1985) 166 CA3d 148, and Nollan v. California Coastal Comm’n (1987) 107 Sct 3141.

The Pollution Control Acts

In the 1970s, both the federal and state governments enacted a flurry of legislation to counter environmental pollution of all types.

**Water.** The federal Water Pollution Control Act of 1972 (33 USC 1251 et seq.) comprehensively controls discharges of pollutants into the nation’s waters. The Act establishes water quality standards for bodies of water and imposes effluent limitations on discharges to waters. Its §404 permit process provides extensive wetlands protection. The state responded with various amendments to the Porter-Cologne Act providing a comprehensive scheme for controlling the discharge of effluents through regional water quality control plans. Water Code 13240 et seq.

**Air.** The Clean Air Act amendments of 1977 constitute the major law on air pollution control. The Act establishes ambient air quality standards throughout the nation, giving the states the primary responsibility for maintaining the standards through their own control strategies. 42 USC 7401 et seq.

**Waste.** The 1970s marked the beginning of significant federal and state legislation designed to manage solid waste, including the recovery of reusable resources, and to clean up toxic waste. In 1970, congress enacted the Resource Recovery Act of 1970 (42 USC 6901 et seq.), which was followed by the California Solid Waste Management and Resource Recovery Act (GovC 66700 et seq.), to establish a comprehensive state solid waste management and resource recovery policy. Other measures soon adopted included the Resource Conservation and Recovery Act of 1976 (RCRA) (42 USC 6901 et seq.) and the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)
(42 USC 9601 et seq.) funded by the $3 billion Superfund (26 USC 9507). Eventually the legislature enacted the California Integrated Waste Management Act of 1989 (Pub Res Code 40000 et seq.), which comprehensively reorganized the solid waste management process.

**Noise.** Yes, even noise pollution could not escape our national clean-up. The federal Noise Control Act of 1972 (42 USC 4901 et seq.) declares a policy to promote an environment free from noise that jeopardizes public health and welfare and authorizes regulation by noise emission standards. California followed with its Noise Control Act of 1973 (Health & Saf. Code 46000 et seq.), requiring, among other things, a noise element of local general plans.

**Subdivision and Exaction Power Expanded**

Although California enacted a subdivision mapping act as early as 1907 and made several amendments through 1943, by the late '60s the Subdivision Map Act was little more than an official method for platting subdivisions in order to assure good title to the resulting parcels. Although local government could then regulate the "design" and "improvement" of subdivisions, it was not until the early '70s that this power was significantly expanded. In 1974, the Subdivision Map Act, then codified in Business & Professions Code (§§11500 et seq.), was recodified in the Government Code (§§66410 et seq.) (Stats. 1974, Chap. 1536). Today, the Subdivision Map Act is the primary permit control for new residential development in California. It requires a subdivider to design the subdivision in conformity with applicable general and specific plans and local ordinances, to construct required public improvements, and to dedicate land or pay money for other public uses such as parks and schools.

The new Map Act, now coupled with the general plan consistency legislation and the CEQA environmental protection requirements, provided local government with a fool-proof method of imposing conditions and exactions on new development to ensure compliance with its community goals. Subdivisions now must be consistent with local general and specific plans. To ensure such consistency, local agencies now were given the authority to impose conditions on subdividers, some of which may even pertain to a community’s economic and social policies
(e.g. low-income housing conditions). Also, local agencies could now deny or condition map approval based on the design’s potential to cause environmental damage. GovC 66474(e). Since CEQA now required full environmental disclosure, local agencies had the complete tools for environmental protection through review and mitigation conditioning. Codified in the Government Code, the Subdivision Map Act is now a major land use control vehicle for urban planning and environmental protection. See 64 Ops. Cal. Atty. Gen. 762, 765 (1981).

Zoning Police Power Expanded

During the early ’70s we witnessed a major expansion of land use regulatory powers with the advent of the general plan, CEQA and the expansion of the subdivision and exaction powers. And the courts also continued to provide local government with a broad, and even expanded zoning police power. The U.S. Supreme Court in Village of Belle Terre v. Boraas (1974) 94 Sct 1536, 1541 stated:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. The goal is a permissible one within Berman v. Parker. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

The courts also gave wide deference to public decision-makers, noting that it was not the court’s function to appraise the wisdom of such decisions, that a city’s interest in attempting to preserve the quality of life is one that must be accorded high respect, and that cities must be allowed a reasonable opportunity to experiment with solutions to urban problems. Young v. American Mini Theaters, Inc. (1976) 96 Sct 2440, 2452 (upholding zoning control of adult theaters by either spacing or confining). Judicial restraint in the area of zoning regulations was further amplified by the presumption of the validity of such regulations. The courts noted that the legislation is upheld if it bears a rational relationship to a legitimate government interest. Associated Home Builders, Inc. v. City of Livermore (1976)
18 C3d 582. The California Supreme Court has stated on several occasions that the zoning police power of a city or county is as broad as the police power exercised by the state legislature itself. *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 C3d 878, 885.

During this period, the courts gave broad latitude to cities in exercising aesthetic control, such as design review. A city’s interest in community appearance is a substantial government interest and a legitimate basis in itself for zoning regulations. *Metromedia, Inc. v. City of San Diego* (1981) 101 Sct 2882. Rarely did the courts deny government exercise of the zoning police power, allowing cities excursions into such matters as rent control (*Birkenfeld v. City of Berkeley* (1976) 17 C3d 129, and *Pennell v. City of San Jose* (1988) 108 Sct 849, 857), and condominium conversion regulations (*Griffin Dev. Co. v. City of Oxnard* (1985) 39 C3d 256). Nor did the courts give much credence to landowners’ complaints when downzoning severely diminished property valuation. The California Supreme Court held that mere diminution of market value does not constitute a taking (*H.F.H., Ltd. v. Superior Court* (1975) 15 C3d 508, 518); only when the effect of a regulation deprives the landowner of “substantially all reasonable use of his property” is the regulation unconstitutional and subject to invalidation. *Agins v. City of Tiburon* (1979) 24 C3d 266, 277.

**Coordinating Development. Regional Controls**

California has always followed strong “home rule” policies in regulating land development, with practically all control and decision-making at the local county and city level. Cal. Const., Art. XI, §7. However, by the 1960s, it became apparent that certain problems associated with urban sprawl could not be properly handled by one contained community. Polluted air and bad traffic planning simply do not stop at city limits. The need for coordinated controls by cooperating government agencies was now due.

**Area planning agencies.** Starting in the 1960s, cities and counties within certain urban areas created regional planning agencies pursuant to the joint power authority of GovC 6500. Most were organized as councils of government (COGs). They
have no direct land use control power. 77 Ops. Cal. Atty. Gen. 13 (1994). Rather, they perform planning and coordinating functions for their member agencies, most notably in the areas of traffic planning and housing issues. The largest COGs are the Association of Bay Area Governments (ABAG) (9 counties/91 cities) and Southern California Association of Governments (SCAG) (6 counties/125 cities).

**Regional control agencies.** Since 1965, the state has created four regional public agencies that have direct land use authority to control development within specific geographical regions of the state. In each case, the purpose of the regional control is to preserve specified natural resources. The San Francisco Bay Area Conservation and Development Commission (BCDC) was established in 1965 with jurisdiction over development in and adjacent to San Francisco Bay. GovC 66000 et seq. The Tahoe Regional Planning Agency (TRPA) was created in 1968 by an interstate compact between California and Nevada with jurisdiction over development around Lake Tahoe. GovC 66801. In 1976, the Coastal Act replaced the Coastal Initiative of 1972, establishing the Coastal Commission with development jurisdiction over most coastal resources. Pub Res Code 30000 et seq. And, finally, in 1992, the Delta Protection Act created the Delta Protection Commission with jurisdiction over the Sacramento-San Joaquin Delta water-related resources. Pub Res Code 29700 et seq.

**Annexation and new cities.** Starting in 1965, the state enacted a comprehensive statutory scheme that must be followed by cities and counties concerning annexations, detachments and formation of new cities. The current law is the Local Government Reorganization Act of 1985 (GovC 56000 et seq.). The primary goal of the Act is to prevent urban sprawl and promote orderly growth and development. A major feature is the creation in each county of a Local Agency Formation Commission (LAFCO), which has approval power over annexations and other organization changes.

**Strict Vested Rights. The Avco Case**

As if all the expanded land use powers granted to public agencies in the early '70s were not enough, the 1976 California Supreme Court handed another major defeat to landowners and
developers. It reaffirmed the common law vested rights rule that a property owner cannot claim a vested right to build out a project without first obtaining a building permit and performing substantial work in good faith reliance upon the permit. The facts were harsh. Avco owned 8,000 acres of land in Orange County, a small portion of which was in the coastal zone, when the Coastal Act permit requirement became effective in 1973. At that time Avco had obtained zoning and subdivision approval for a multi-phase planned community project. It had expended about $3 million on infrastructure, including storm drains and utilities. However, it had obtained no building permit for any unit construction. The court sacrificed the developer on the altar of public policy, holding that Avco was subject to the Coastal Act permit requirement, and did not have a vested right to proceed despite prior approvals. *Avco Community Developers, Inc. v. South Coast Regional Comm'n* (1976) 17 C3d 785.

Similarly, the courts have made it difficult to establish an estoppel against a public agency in a land use case, holding that estoppel will not be applied when the outcome would nullify public policy. The courts have noted that public interest in preserving community patterns established by zoning laws outweighs the occasional injustice that may be incurred by an individual relying upon an invalid permit issued in violation of the zoning laws. *Strong v. County of Santa Cruz* (1975) 15 C3d 720, and *Pettit v. City of Fresno* (1973) 34 CA3d 813.

**Challenging Land Use Regulations. The Procedural Thicket**

Over the years judicial procedures have been protective of the government in challenging regulations generally. This was particularly true in challenging public agency land use regulations since 1970.

**Premature claims. Ripeness problems.** Strict application of the ripeness doctrine by the courts has been and continues to be one of the biggest procedural hurdles for a landowner to overcome in constitutional challenges to overregulation, especially takings claims. The ripeness doctrine has been rigorously applied by the courts, requiring landowners to first exhaust all available remedies before the local agency and to exhaust available state judicial remedies, such as seeking mandamus, before seeking damages.
Williamson County Planning Comm’n v. Hamilton Bank (1985) 105 SCt 3108, and MacDonald, Sommer & Frates v. Yolo County (1986) 106 SCt 2561. In Williamson County and MacDonald, the court required the submission and resubmission of rejected development plans before a taking claim would be “ripe” for adjudication, unless such submissions would be futile.

Short statutes of limitation. Legal challenges to various land use regulatory action must generally be initiated within a short time period following an action; otherwise it is subject to dismissal. 1970s and 1980s legislation and judicial interpretation established short and strict requirements. For example, most zoning, general plan, subdivision and permit decisions must be challenged, usually by administrative mandamus, within 90 days of the agency action. See GovC 65009, 65860(b), 65907(a), 66475.4(c) and 66499.37.

Strict judicial review and limited remedies. During this period the courts clarified that mandamus is usually a required and frequently an exclusive remedy for challenging land use decisions by public agencies. See Arnell Dev. Co. v. City of Costa Mesa (1980) 28 C3d 511, 518. The common mandamus challenge to a permit decision, agency abuse of discretion (CCP 1094.5), is difficult to prove because of judicial deference to public agency decision-making. Challenges to an agency’s legislative actions, such as rezonings and general plan amendments, are even more difficult because they must be filed under traditional mandamus (CCP 1085). In such case, the court’s inquiry is limited to whether the agency action was arbitrary, capricious or without evidentiary support. See Arnell, above. Even in the rare instance when a landowner can establish arbitrary action or abuse of discretion, the remedies are limited. Generally, the agency is required to reconsider its decision in light of the court’s opinion. Occasionally the court may order the agency to take action specifically required by law. But mandamus judgments may not control the discretion vested in the agency. CCP 1094.5(f). So rarely are damages awarded in a land use action, that the occasional appellate award has become an aberration. See, e.g., Herrington v. County of Sonoma (9th Circ. 1987) 834 F2d 1488, and Del Monte Dunes v. City of Monterey (9th Circ. 1996) 95 F3d 1422 (now before U.S. Supreme Court). Usually, an award of attorney fees to the prevailing party is the worst monetary setback suffered by a public
agency in a losing case. See, e.g., Harris v. County of Riverside (9th Circ. 1990) 904 F2d 497.

Mooting litigation by amending regulations. During this period the California Supreme Court also recognized the authority of an agency to amend potentially invalid regulations by enacting appropriate valid regulations, even during and after commencement of litigation challenging the regulation, thereby frequently mooting the litigation. Selby Realty Co. v. City of San Buenaventura (1973) 10 C3d 110, 125, and Building Industry Ass’n v. City of Oxnard (1975) 40 C3d 1.

In summary, as we review this period of expanded regulatory power and controls, coupled with the procedural difficulties in challenging the government, it is easy to understand the great success by local agencies in defending land use challenges, especially those of landowners and developers.

Growth Control Initiatives. Ballot Box Planning

The concept of growth control began in the 1960s when cities sought to limit new housing to preserve their small-town character. The first important judicial validation was Golden v. Planning Bd. of Town of Ramapo 30 NY 2d 359, 285 NE 2d 291, 93 SCt 436 (1972). In this case the highest court of New York upheld a city ordinance limiting growth until there was an appropriate availability of public services. This was followed in California when the U.S. Court of Appeals upheld the Petaluma plan fixing the housing growth rate at 500 dwelling units per year. Construction Industry Ass’n v. City of Petaluma (9th Circ. 1975) 522 F2d 897, cert. denied, 96 SCt 1148 (1976).

Both the Ramapo and Petaluma plans were city council ordinances, adopted following an extensive planning process. However, in the 1970s and 1980s, growth control started to become a tool of the electorate, enabled by a liberal judicial construction of the initiative process. The California Supreme Court led the way with several key decisions. The constitutional power of initiative reserved to the people must be construed liberally. Associated Home Builders, Inc. v. City of Livermore (1976) 18 C3d 582, 591. Rezoning, even if site-specific in nature, is a legislative act, and may be enacted by initiative. Arnell Dev. Co. v. City of Costa Mesa (1980) 28 C3d 511, 514. The adoption or amendment

Statistics from a study by the California Association of Realtors show that 564 land use measures were placed on local ballots in California between 1971 and 1992. About half were citizen-sponsored initiatives, with the remainder placed before the voters by a city council, frequently as countermeasures to proposals by citizen groups. Today, both city councils and the voters in cities of all sizes are taking steps to limit new housing and commercial and industrial activity in an attempt to restrict and direct community growth, probably most frequently to counter traffic congestion. The most popular growth control methods employed today are downzoning, building height restrictions, and ordinances that permit development only where adequate infrastructure, utilities and levels of service are present.

**PART 3**

**THE PENDULUM SWINGS BACK—A BIT**

**Introduction**

The 1970s and 1980s were truly prolific years for public control of land development. The legislature provided new and expanded regulatory tools, and the courts gave wide deference to the land use police power. Environmentalists and growth control advocates were being heard. Although there was much development activity during this period, the government was clearly in control. But the exercise of this great power led to some abuse in land use procedures and decision-making. Long delays became common. Severe downzonings and permit denials
following large planning expenditures were not unusual. Many individual developers and landowners caught in the web of the citizenry’s change of mind about new development suffered devastating financial losses. Further, this new, more extensive planning and land use regulation, coupled with an inflationary real estate market, sent the cost of housing soaring. Low- and moderate-income families were priced out of the market.

Naturally, some groups suffered and fought back. Homeowners, burdened by high real estate tax assessments, started a property tax revolt and passed Proposition 13. Affordable housing advocates successfully obtained new legislation enabling and directing cities to provide housing opportunities for all economic segments of the community. And developers and landowners fought back, with mild success, in the areas of vested rights, permit streamlining, sensible environmental review, and reasonable development exactions. They even gave cities a scare on the takings issue. Importantly, through this entire period of judicial deference to land use regulations, the courts continued to strongly recognize individual rights to procedural due process and other constitutional protections.

Proposition 13—the Taxpayers’ Revolt

In 1978, California voters approved Proposition 13, which reduced property taxes statewide by imposing an annual cap of 1 percent of assessed value and permitting reassessment only when property was sold. It also prohibited local government from imposing “special taxes” without a two-thirds vote of the local electorate. Proposition 13 was the culmination of two decades of growing voter unrest concerning rising property taxes. The times were inflationary. Reassessments were common in response to speculatively rising property values, caused in part by rising development costs due to more extensive planning and environmental regulation.

Proposition 13’s effect on local government was devastating, because its main source of revenue, the property tax, was cut by two-thirds. This changed the focus of the city’s fiscal incentive in land use planning. Residential development, generating only future property tax revenue, became less favored. Retail commercial use, generating sales tax, became more favored. Since local land use decisions are driven to some extent by revenue concerns,
local planning policies began to favor the development of auto malls, outlet malls and other large retail centers. Although fiscal zoning and competition between cities for sales tax revenues was not new, it reached new heights in the post-Proposition 13 era.

In addition to engaging in policies favoring the production of sales tax revenue, cities quickly learned to significantly increase the front-end fees on residential development. New development fees were created, assessment districts formed, and other revenue-raising methods implemented that did not require voter approval. See, for example, infrastructure financing districts, which utilize a method of tax increment financing from property tax revenues attributable to increases in assessed valuation of property. GovC 53395 et seq.

Rent Control—the Tenants' Revolt

In 1976, the California Supreme Court validated a city's authority to enact rent control regulations. Birkenfeld v. City of Berkeley, 17 C3d 129. Two years later, in 1978, the voters passed Proposition 13, effectively freezing property tax rates. Many tenants voted for Proposition 13, believing that landlords would pass on the tax savings to the tenants by lowering rent. However, inflation and development costs, coupled with some landlord greed, actually escalated rents, causing a flurry of rent control ordinances statewide. By 1990, approximately one-third of the state's residential tenancy units were under some type of rent regulation. Some cities, most notably Berkeley and Santa Monica, established strict control systems governed by elected rent boards, usually pro-tenant.

Rent control has always been a controversial policy involving divisive ideological issues. The battle continues in the state legislature with attempts to curtail rent control, and in the courts, usually over landlord "fair return" issues. 1995 legislation will gradually phase out strict rent control by requiring decontrol, which allows rents to return to market levels upon a tenant vacancy. Civ Code 1954.50 et seq.

Affordable Housing

In response to the dramatic inflationary rise in the cost of housing in the 1970s, the 1979 state legislature expressed its
intent to provide housing to Californians of all economic segments. The legislature recognized a serious inadequacy of safe and sanitary dwellings for persons of low income, and designated the early attainment of decent housing and a suitable living environment for every California family a priority of the highest order, requiring the cooperation of all levels of government. See Stats. 1979, Chap. 1207, GovC 65580 and Health & Saf. Code 33250. This statewide housing policy would now be balanced against the goals of preventing environmental damage in CEQA decision-making. Pub Res Code 21000(g) and 21001(d).

In an attempt to implement its goal of affordable housing for all economic segments, the legislature enacted various statutes in the 1980s providing local agency housing obligations and incentives. Foremost was legislation providing special status for the housing element as part of the general plan. The state now specified in detail the content of each local housing element, along with a special five-year review and amendment requirement following adoption. It required a determination of regional housing needs, with each locality’s share to be determined by a regional council of governments. Each city was required to commit itself to attaining its fair share of housing needs. The State Department of Housing and Community Development was given a major role in the housing element process, including the preparation of guidelines to be used by cities and counties. GovC 65580–65589.5.

In addition to the new housing element requirements, local agencies were now required to justify, by specific findings, any actions limiting the housing supply within the community or region. See GovC 65302.8 (general plan amendment reducing housing units), GovC 66412.2 and 65913.2 (regulations must consider regional housing supply), GovC 65863.6 and Evid. Code 669.5 (growth control ordinances), and GovC 65589.5 and 65589.6 (housing project disapproval findings).

Some courts noted that each community has a responsibility to provide a fair share of housing for all economic segments of a region and some invalidated regulations considered exclusionary or discriminatory against low-income housing. See Stocks v. City of Irvine (1981) 114 CA3d 520, 534; Arnell Dev. Co. v. City of Costa Mesa (1981) 126 CA3d 330, 337; and Building Industry Ass’n v. City of Oceanside (1994) 27 CA4th 744.
Cities were given additional powers to facilitate the production of affordable housing, including the authority to provide density bonuses and other incentives for the construction of low- and moderate-income housing. See GovC 65008(e), 65913.4 and 65915 et seq. They were authorized to issue special permits for small second dwellings for the elderly on residential lots (granny flats) (GovC 65852.1). They were also authorized to provide a CEQA exemption for small affordable housing developments in urban areas (Pub Res Code 21080.14) and to approve projects in spite of significant environmental effects where socio-economic conditions make infeasible project alternatives or mitigation measures (Pub Res Code 21002).

Developers Respond

The great regulatory sweep of local government in the '70s and '80s took its toll on landowners and developers. Not only was it impacting housing costs, the unfairness to particular individuals caught in the thicket of regulation could not go unnoticed. Bankruptcy came quickly to the developer caught in the maze of an environmental fight, a change in planning policy, or simply bureaucratic delay. The building development industry fought back on several legislative and judicial fronts.

Vested rights relief. In an attempt to soften the harsh impact of the Avco decision, the legislature enacted two statutes providing development vested rights in certain circumstances. In 1979, a property development agreement procedure was enacted whereby a city and developer could agree to insulate the developer against future city regulations that would otherwise prevent the developer from completing an approved development. GovC 65864 et seq. Later, in 1984, the legislature enacted a vesting subdivision map procedure, providing vested rights to a subdivider upon tentative map approval. GovC 66498.1 et seq.

Permit streamlining. The 1977 legislature enacted the Permit Streamlining Act to ensure a clear understanding of the requirements of the development approval process and to expedite government decisions on projects. Toward such ends, the Act sets forth rules governing the exchange of project information and, importantly, imposes time limits on the permitting agencies to either approve or deny a project application. GovC 65920 et seq.
**Reasonable exactions.** In determining the validity of an exaction (usually land dedication or fees payment) imposed as a permit condition to a development project, the courts now impose a rigorous reasonable relationship nexus between the condition and the public burden the proposed development would create. *Nollan v. California Coastal Comm’n* (1987) 107 SCt 3141. Following *Nollan*, the state legislature enacted a Mitigation Fee Act, which codified the reasonable relationship nexus requirements for most development fees. GovC 66000 et seq.

**Balanced CEQA policies.** In response to abuses of the CEQA process, the California Supreme Court stated that rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social and economic development. The court emphasized a balanced approach to the preparation of an EIR and employed a “rule of reason” that requires analysis only of those project alternatives that are reasonable and feasible. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 C3d 553, 576.

**Due process required.** Although the courts gave wide deference to the land use police power in the ’70s and ’80s, the same courts jealously guarded individual rights to constitutional protections, especially procedural due process. The California Supreme Court ensured that cities give citizens adequate notice and opportunity to be heard when a decision will affect their property rights. *Horn v. County of Ventura* (1979) 24 C3d 605. The same court required the city to explain most land use decisions through the adoption of findings. The court defined findings, explained their purposes, and stated precisely when they are required. *Tbpanga Ass’n for a Scenic Community v. County of Los Angeles* (1974) 11 C3d 506.

**The First Amendment.** The courts continued to give broad protective interpretations to the First Amendment, invalidating many zoning ordinances that failed to apply narrow and objective standards or constituted a prior restraint on expression. See, for example, *City of Ladue v. Gilleo* (1994) 114 SCt 2038 (ordinance banning all residential signs within city invalid as to homeowner displaying political protest sign in backyard), and *City of Lakewood v. Plain Dealer Publishing Co.* (1988) 108 SCt 2138 (city ordinance giving mayor unlimited discretion to approve or deny placement of newsracks held unconstitutional).
Other constitutional rights were also protected. For example, a zoning ordinance that limits occupancy to five unrelated adults but allows an unlimited number of related family members was held to violate the state constitutional right to privacy. *City of Santa Barbara v. Adamson* (1980) 27 C3d 123.

**The takings issue.** The U.S. Supreme Court continues to visit and revisit the takings issue. In 1978, it decided that only a government restriction that has an unduly harsh impact upon the owner’s use of his property and frustrates distinct investment-backed expectations may amount to a taking (*Penn Central Transp. Co. v. City of New York* (1978) 98 SCt 2646, 2659). In 1999, it will determine whether a city effected a taking by imposing harsh restrictions and whether a jury award of $1.5 million is excessive. *Del Monte Dunes v. City of Monterey*. During this 20-year period, the Supreme Court has visited the takings issue 14 times. (The California Supreme Court has visited this issue 12 times.) Frequently, the court has faulted the government action. In *Nollan* and *Dolan*, the courts required a nexus between a legitimate state interest and the permission exacted by the agency, otherwise a taking. *Nollan v. California Coastal Comm’n* (1987) 107 SCt 3141, 3148, and *Dolan v. City of Tigard* (1994) 114 SCt 2309, 2318. But the court’s most powerful statement on takings was in 1987, when it held that damages is a constitutionally required remedy when a land use regulation goes too far and effects a temporary taking of property. The court held that later invalidation alone does not address the loss suffered by a landowner during the period the regulation was applied to the property. *First English Evangelical Lutheran Church v. Los Angeles County* (1987) 107 SCt 2378, 2385-2389. However, even after *First English*, the majority of reported cases have been favorable to cities, and courts are reluctant to award damages. Recently, the California Supreme Court refused temporary damages for a two-year delay in permit issuance caused by government error in determining its own jurisdiction. *Landgate Inc. v. California Coastal Comm’n* (1998) 17 C4th 1006.
PART 4
THE FUTURE: FINDING FAIRNESS IN A NEW REGULATORY PARADIGM

Before 1970, public control of land use in California was primarily by zoning. Now we have a new, broader paradigm of land use control. It utilizes general and specific plans, zoning, subdivisions and environmental review, all as tools in the public control of land development. This new "police power" of land use control has stabilized in legislation and judicial decision-making. It has also become self-balancing, like the stock market, because there are more important players (e.g. environmentalists, housing advocates) contributing to a healthy market of competing interests. And it is clearly here to stay. Population increases, not decreases. Land resources decrease, not increase. Comprehensive coordinated planning is needed to manage the urban scene. The modern regulatory tools are now adequate for the task. Innovative techniques will continue to develop as necessity creates their invention.

Even as the solutions to increasingly complex regulatory problems must themselves be more complex, the regulatory scheme must become simpler. Land use controls grew up quickly in the last 30 years, primarily by legislative and judicial reaction to development and regulatory abuses. As a result, much piece-meal land use legislation is sprinkled through various statutes and codes. Also, the categories of controls sometimes engage in a battle for hierarchy in their application (e.g. general plan vs. zoning). These problems of inefficiency can be confusing and wasteful. It is time for a comprehensive reform and clean-up of land use regulatory controls. The primary goal should be one of simplicity and clarity, hopefully providing one comprehensive land use control document with multiple facets.

New issues in land use will arise as the competing participants struggle to find fairness in this modern regulatory era. The tension that exists between the building/development industry and the regulatory agencies is an example. We have observed that abusive regulatory practices have brought some legislative and judicial response in the area of development vested rights, permit streamlining, balanced CEQA policies, and a rational nexus requirement in imposing development exactions. Such issues will
continue to be resolved on fairness principles, with pendulum swings back and forth, depending upon current socio-economic policies.

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