

PRESERVING RURAL LAND RESOURCES: THE CALIFORNIA WESTSIDE

Open space lands are a limited resource. Once virgin lands are committed to a developed use, even an agricultural use, they can never be returned to their natural state. In California, in the Westside region of the San Joaquin Valley, federal and state water and highway projects have stimulated such development, with no corresponding government programs or controls to protect adequately land resources from wasteful developments. Local discretion, favoring development for its purely local benefits, defeats the interests of our entire population in saving open areas. Statewide intervention and regional agencies are a means of injecting a wider spectrum of interests into the local processes affecting land use, thereby saving vanishing open space.

Individuals welcome economic growth and development because they hold the promise of increased wealth, but society should fear growth because of its potential for imposing permanent harm upon our environmental resources. Development of our land for urban, industrial, or even agricultural purposes, if misdirected or left to travel its own course, can be a wasteful use of limited land resources. Fertile lands may be covered with pavement;¹ cultivation of virgin lands can upset delicate biological balances;² and urban encroachment can make farm activity into a nuisance.³ If growth is inevitable man would be wise at least to shape it such that all of its costs are considered in development decisions. This process, known as cost internalization, is very important because land is a finite resource that is being exhausted by man and his construction.⁴ Once land has been allocated to a freeway or a subdivision it can be returned to its former state only at great cost, if it can be returned at all. "The fertile cropland once

1. See text accompanying note 80 *infra*.

2. R. RIENOW & L. RIENOW, *MOMENT IN THE SUN* 64 (1967).

3. See *Mitchell v. Hines*, 305 Mich. 296, 9 N.W.2d 547 (1943). *But see* Clark v. Wambold, 165 Wis. 70, 160 N.W. 1039 (1917).

4. The fundamental quality of our physical landscape depends upon the proportionate relations in it between construction and open space, man-made and natural elements, pedestrians and motor vehicles, through the entire range in scale zones. . . . Man-made construction (including vehicles) is regarded as the symbol and the gauge of the march of progress toward higher standards of living. Open space is raw land waiting for construction; nature is a source of materials and of decoration for construction; pedestrians are tolerable as long as they keep out of the way of vehicles.

Eckbo, *Diversity In The Needs of Man*, in UNIVERSITY OF CALIFORNIA, WATER RESOURCES CENTER REPORT NO. 11, *MAN AND HIS TOTAL ENVIRONMENT* 86, 88 (Conference Proceedings, Mar. 22-23, 1967) [hereinafter cited as WATER RESOURCES REPORT No. 11].

hard-topped, the wilderness once chain-sawed, the river-bank once scarred by factory sites, the mountain top once skinned, these are decisions you don't unmake. Appreciation of this fact is difficult for Americans to come by."⁵

The Westside region of California's San Joaquin Valley will serve as a microcosm of statewide and national development problems and their legal solutions in this Comment. The Westside is unique because of its impending development potential, which is stimulated by government water and transportation projects.⁶ This promise of rapid economic development promises to increase the visibility of the hazards of growth, thereby making the Westside an appropriate subject for a legal analysis of the available tools that can be used to control growth. This Comment will focus upon state legislation, including subdivision acts, open space and easement legislation, and the Williamson Act, and upon the programs of local government, including planning, zoning, taxing, and structural powers, which can be used as tools to shape land use decisions and patterns. The analysis of the legal tools of land use will culminate in recommendations for changes in structure and in jurisdiction to expand the scope of interests to be reflected in land use policies throughout California.

I

PRESSURES OF GROWTH ON DEVELOPMENT

A. *The Westside Example*

The San Joaquin Valley comprises the southern portion of California's Central Valley. It is a vast agricultural area with most economic activity centered along the eastern side of the valley in urban commercial centers such as Fresno and Bakersfield. The Westside, the western region of the San Joaquin, includes parts of six counties,⁷ with their seats of government and centers of agricultural and commercial activity on the eastern side of the valley. Historically, the Westside has been sparsely populated⁸ and farming activity is dependent upon a

5. R. RIENOW & L. RIENOW, *supra* note 2, at 59.

6. See pt. I, *B infra*.

7. These six counties are Stanislaus, Merced, Fresno, Tulare, Kings, and Kern. UNIVERSITY OF CALIFORNIA, PUBLIC POLICY RESEARCH ORGANIZATION, REPORT ON PHASE I, WEST SIDE SAN JOAQUIN VALLEY PROJECT (W187) app. B-1 (1970) [hereinafter cited as PHASE I REPORT].

8. Over 90 per cent of the 1960 San Joaquin Valley population lived in the eastern sections, and trends indicate that this percentage has increased since. The concentration of people and capital in these cities has attracted an increasing diversity of non-agricultural and nonextractive industries and wholesale and retail business. At present the people, wealth, and power of the San Joaquin Valley concentrate in the east. The West Side therefore is closely tied to it.

Id. at app. B-5.

small groundwater water supply⁹ which limits the crop choice alternatives available to farmers. The limited Westside agricultural activity leaves much land uncultivated and undeveloped because limited water and transportation restrict the profitability of cultivation.¹⁰

The introduction of cheap water into the Westside,¹¹ coupled with a modern Interstate freeway,¹² promises to change the pattern of living, agriculture, land ownership, economics, and land use in the area.¹³ Dry agriculture will shift to irrigated agriculture as a result of the availability of water, and the number of cultivated acres will increase.¹⁴ A shift in agricultural production from the populous coastal areas of California will stimulate further economic activity,¹⁵ with the undeveloped Westside offering the greatest potential for agricultural expansion.¹⁶ Interstate Highway 5, the New Westside freeway, will become a major artery for the flow of goods from the Westside with agricultural processing plants, produce distribution

9. Westside rainfall varies from 15 inches per year in the northern portion of the area to about 5 inches per year in the south. Natural surface water supplies are non-existent and groundwater supplies are inadequate in amount as well as rather saline and high in boron. "This lack of water contrasts sharply with the East Side where the waters from the Sierra Nevada have so strikingly transformed lands in other respects quite similar to the West Side." *Id.* at app. B-2.

10. Both cost and quantity factors now limit agricultural practices and crop choices. Cotton is the only crop with a major market that Westside farmers can exploit under current practices and yields to make a profit through irrigation farming. Hedges, *Water On West Side Lands And Towards The Ocean*, in WATER RESOURCES REPORT No. 11, at 29.

11. "The water is to come from two main sources: The California Aqueduct, a little short of 1.5 million acres [sic] feet, and the San Luis Project, another million acre feet." *Id.* at 30. These state and federal water projects, combined, will increase the current water supply by a factor of about 2.25. *Id.* For a complete discussion of the federal water project see text accompanying notes 30-50 *infra*. For a complete discussion of the state water project, see text accompanying notes 51-71 *infra*.

12. See text accompanying notes 72-83 *infra*.

13. "The whole range of production patterns, farm organization, and resource use, even tenure relationships, will have to be changed throughout this entire area." Hedges, *supra* note 10, at 32.

14. Westside water projects will add about one million acres of irrigated land to the California total. This would be an increase of about 14 percent over the state's current amount of irrigated land. *Id.* at 29. There is a very real danger that the water project may cause huge surpluses in specialty crops and a consequent slump in farm prices. S.F. Chronicle, Aug. 19, 1970, at 10, col. 1.

15. UNIVERSITY OF CALIFORNIA, WATER RESOURCES CENTER REPORT NO. 9, IMPACT OF WATER ON LAND 51 (D. Todd ed., 1966) (proceedings of the San Joaquin Study Group Conference, Solvang, Calif., Mar. 9-11, 1966) [hereinafter cited as IMPACT OF WATER].

16. The Westside has fallen short of achieving its potential in farm or industrial production and in supporting industries. "According to any sort of criteria you choose to apply, the West Side is below its potential. This imbalance, of course, relates directly to the lack of water to use the potentially productive land." Hedges, *supra* note 10, at 30.

centers, and residential areas growing along the route.¹⁷ Population will expand as the demand for workers to serve the agro-industry increases and people find that the Westside offers a pleasant place to live.¹⁸

Unchecked growth can result in misallocations of land resources on the Westside. The economic factors which determine development decisions can be distorted by the availability of subsidized water and by a transportation system financed with state and national resources.¹⁹ It is possible that land that formerly could not feasibly be cultivated will be put to agricultural use and prime agricultural lands will be covered by freeways, factories, and housing developments. Farmers might sell their lands, take the profits, and move to less productive lands without considering that society is not making the best use of its resources.²⁰ Westside residents may joyfully welcome the subdivisions and processing plants in the hope of increasing the tax base, only to find that the burden of added municipal services equals or exceeds the added tax revenues.²¹ There is considerable danger that urban centers will expand to engulf more prime land, and as more land is developed without adequate planning, there will be the increasing congestion, inadequate housing, absence of open spaces, incompatible land uses, long journeys to jobs, obsolete subdivision patterns, and

17. The Westside freeway avoids most established Westside municipalities. The only community even close to the freeway is Kettlemen City. *IMPACT OF WATER*, *supra* note 15, at 44. The growth of secondary and remotely related economic activities and services, such as food processing and worker housing, will be an important part and perhaps the greater portion of projected economic activity in the area. Hedges, *supra* note 10, at 30. The location of the freeway will influence the location of industries that support agriculture. *IMPACT OF WATER*, *supra* note 15, at 124.

18. *IMPACT OF WATER*, *supra* note 15, at 57.

19. The price of water determines how much water will be used if the characteristics of demand are assumed to be fixed. If the price reflects the costs of the water, including the social costs of removing it from formerly wild rivers and the project costs of delivering the water, then the amount of water used will be an economically efficient use of the water resources. If this price is too low, however, because of government subsidies, then more water will be used than the economic return it generates, in the form of crops, can justify. This is an economically inefficient use of water resources because a portion of the water used would be more valuable to society if used for another purpose. See text accompanying note 29 *infra*.

20. The utility of a freeway, for example, is not enhanced by building it on prime agricultural lands, as compared to lands which are less productive. Routing and building costs are factors which might cause a road to be built across prime lands anyway, but these factors could be balanced by adding to the price of land its value to society as a source of future food supplies and aesthetic enjoyment. These latter values are not likely to be reflected in the market price of the land. See text accompanying note 28 *infra*.

21. A study in Palo Alto, California, indicated that residential development would impose burdens on municipal services exceeding the additions they brought to the local tax base, and that open space use would save the city money. Livingston & Blayney, Palo Alto Foothills Environmental Design Study, 1970.

pollution that have become the hallmarks of American life.²² Westside residents will pay part of the price of such misdirected progress, but the people of California and of the entire nation will be paying the price as well.²³ The depletion of our country's resources hurts everyone.

B. Government Projects

Planning and other legal tools can be utilized to shape land development in a manner that reflects the importance of environmental and aesthetic values. Development, however, is often left to natural market forces. This lack of attention to future development and failure to utilize the tools at hand can be seen in two major projects on the Westside—the federal and state water system and the new Westside freeway. These projects could have been located and organized in a manner which utilized their potential as a tool for effecting systematic and rational development on the Westside. This potential has gone unused.

The factors which give rise to economic growth and the accompanying development of land are influenced by the marketplace. These factors may be varied,²⁴ but their influence on the demand for land in the affected geographic area should be anticipated by government.²⁵ Developers, seeking to maximize profits, respond to market forces and seize upon the opportunities of increased economic activity by providing factory sites, residential areas, commercial centers, and public facilities. The controls which government could exert to shape market pressures to save land resources and promote environmental considerations are often unused.²⁶ Ironically, the factors effecting in-

22. J. BEUSCHER, *LAND USE CONTROLS* 159-60 (3rd. ed. 1964).

23. Planning decisions reflect local values and interests, while all Californians have an interest in seeing planned development. CALIFORNIA STATE OFFICE OF PLANNING, *CALIFORNIA STATE DEVELOPMENT PLAN PROGRAM—PHASE II REPORT 103* (1968) [hereinafter cited as *PLANNING*].

24. Growth factors include government projects in the area, the discovery of new and valuable resources, such as minerals, and the development of technology which allows the productivity of a region to be increased. The investment of capital, perhaps stimulated by growth of the entire nation's economy, is a stimulus to growth. For a discussion of the determinants of investment behavior see Jorgenson, Hunter, and Nadiri, *A Comparison of Alternative Econometric Models of Quarterly Investment Behavior*, 38 *ECONOMETRICA* 187 (1970).

25. The rationale underlying the development of new agricultural lands, at a time when agricultural markets are weak, is of concern. This concern is largely that there exists the possibility that the state and federal water projects may offer to supply more water than is economically desirable for the near-term future or that, alternatively, the rather immediate full scale development of the project and its facilities may be such as to induce sharp increases in production with the consequence that product markets may be adversely affected.

PHASE I REPORT, *supra* note 7, at 7-6.

26. The squandering of open space can be avoided by preserving certain lands from

creasing economic activity on the Westside are traced to government. Federal and state water and highway programs in the sparsely populated and largely undeveloped area have created a dynamic potential for growth. The programs, however, have not provided guidance for shaping the quality of that growth in terms of land use.²⁷ Through project planning or through land use controls, aesthetic and environmental values should be preserved. Quantifying these values, including them in project accounting, and subjecting all project costs to the goal of economic efficiency might be an answer.²⁸ Economic efficiency is not, however, the only goal which project planning can pursue in trying to serve the social welfare.²⁹ Aesthetics, environmental values, and resource preservation, as primary project goals, would insure project planning which anticipates future land development patterns.

1. *The Federal Water Project*

The federal water project on the Westside³⁰ was initiated and constructed by the Bureau of Reclamation to bring water to otherwise arid lands.³¹ Increased land values,³² excessive water use,³³ and an in-

development and by planning development with environmental values such as forested hillsides and stocked lakes as a part of the development plan. *Id.* at 3/4-9.

27. The West Side San Joaquin Valley Coordinating Council of the University of California Water Resources Center has made complete and constructive recommendations for research into Westside development problem areas such as intergovernmental relations, economic development, land development, environmental quality, agricultural development, water allocation, job development, education, and health services. *See id.* These Phase I research proposals, sponsored by Fresno, Kern, Kings, and Merced Counties, various municipalities, the State of California, and the federal government, have as yet no financing to undertake the recommended research. UNIVERSITY OF CALIFORNIA, WATER RESOURCES CENTER REPORT NO. 20, INFORMATION FOR THE FUTURE 1 (1970).

28. Tricks of accounting threaten the social utility of this approach. The present value to society of an open field thirty years hence, discounted at a high interest rate, can be an insignificant amount among all the costs of a project.

29. "It is generally accepted that social welfare . . . is a function of a number of variables among which economic efficiency, the distribution of income, and national defense are most often included." Lind, *Benefit-Cost Analysis: A Criterion For Social Investment*, in WATER RESOURCES MANAGEMENT AND PUBLIC POLICY 44, 45 (1968).

30. Merced, Fresno, and Kings Counties are, in part, included in the federal San Luis Unit service area. San Luis Unit Authorizing Act, Pub. L. No. 86-488, § 1(a), 74 Stat. 156 (1960).

31. Our national policy is highly inconsistent, spending much money to get farmers to retire cropland from production while spending even more to create new croplands through water projects in the West. W. WHYTE, *THE LAST LANDSCAPE* 307 n. (1968).

32. See Hansen, *Central Valley Project, Federal or State?* in 13 CALIFORNIA ASSEMBLY INTERIM COMM. REPORTS 1953-1955, at 210 (no. 6, 1955) (prepared by Bureau of Public Admin.) for a discussion of the need for anti-speculation measures in reclamation legislation. Congress, in passing the Reclamation Act of 1902, imposed a 160 acre limitation on the size of land units eligible for federal water in order to achieve a wider distribution of project benefits. *Id.*

Professor Paul Taylor found, however, that while federal reclamation was originally

efficient use of land resources can result in areas affected by the reclamation project.³⁴

The costs of a reclamation project, while initially paid by the federal government, are to be repaid by the water users through a local district organized to act as a water wholesaler. This district contracts with the United States for the water in bulk and then sells to individual users for delivery of project water.³⁵ The contract allows the local district to repay the allocated project costs on an interest free basis, with the first payments delayed for as long as ten years after the first water delivery.³⁶ The principle amount of this loan is less than the full project cost, with revenues from benefits of water such as power generation offsetting the cost,³⁷ and a portion of the total cost being allocated to non-agricultural benefits such as flood control or navigational aid.³⁸ The net result of the financing and pricing policy is a subsidy to the agricultural water user resulting in a water-intensive use of land which would not be the most profitable use for the land without the federal subsidy reflected in the price of water.³⁹ The basic criterion for federal water projects does not demand the best use of federal resources in evaluating a project, but only that the benefits exceed the costs of the project.⁴⁰ Thus there is no assurance that either the affected land or the federal investment is being put to its best use.

The federal subsidy is a stimulus to cultivation and water use that takes water away from other beneficial uses. This is because the low

intended as a means of helping the many, it has become a subsidy to large landowners. At Westlands, the contracting district on the Westside, the 160 acre limit is allegedly being violated on a large scale. Taylor, *Excess Land Law: Calculated Circumvention*, 52 CALIF. L. REV. 978 (1964). Others feel that the 160-acre limit is totally without economic meaning in determining the size of the economic farm unit. "Any relation or agreement that this acre size has with a viable economic unit is purely accidental." Hedges, *supra* note 10, at 36.

33. See text accompanying note 43 *infra*.

34. See text accompanying note 42 *infra*.

35. J. SAX, *WATER LAW* 271 (Prelim. ed. 1965).

36. BROWN, *The Economics of Agricultural Water Use*, in *WATER RESOURCES MANAGEMENT AND PUBLIC POLICY* 30, 37 (1968). Professor Paul Taylor views this interest free loan as a subsidy which equals the amount of the loan itself. Taylor, *supra* note 32, at 979.

37. Brown, *supra* note 36.

38. J. SAX, *supra* note 35, at 284.

39. Crop decisions are directly determined by water pricing. At \$25 per acre foot Westside farmers could profitably produce the cotton and barley crops they now produce. At \$17 per acre foot other crops such as sugar beets and alfalfa become profitable. At \$15 or \$16 per acre foot, farmers can bring in a whole range of crops. Hedges, *supra* note 10, at 37.

40. There has been considerable debate concerning the procedures by which federal water projects are evaluated. The basic criterion was enunciated in the Flood Control Act of 1936. PHASE I REPORT, *supra* note 7, at 6-1. See 33 U.S.C. § 701(a) (1964).

water price causes farmers to use more water than their crop return would justify in a normal market situation where the farmer could take full cognizance of the full water cost.⁴¹ Additionally, water projects tend to be oversized, compounding the resource misallocation,⁴² because the cheap price causes farmers to take more water.⁴³

Local district administration in a reclamation project service area furthers the federal objective of encouraging the cultivation of land. Lands included within the contracting district can be assessed whether they use project water or not.⁴⁴ This fixed cost of owning land, coupled with the cheap price of water, makes the decision not to cultivate and irrigate land a poor economic choice. The fact that everyone within the boundaries of the contracting district is assessed allows water prices within the service area to be substantially lower than the price of federal water outside the contracting area,⁴⁵ adding an additional incentive for agricultural use in the form of competitive cost advantages for lands within the district serviced by the reclamation waters.

The availability of cheap water and the incentives to use it on marginally productive land have a significant impact on land use decisions within the district served by reclamation waters. Agricultural activity and supporting business ventures such as agricultural processing will be stimulated.⁴⁶ Workers will be drawn to farm and service jobs, thereby shifting the pattern of Westside life to an increased level of economic activity. This shift in the pattern of demand for land in the federal contract area and in adjacent localities was ignored by the federal government in planning the project at San Luis on the Westside.⁴⁷

41. For example, water costing \$10.00 per acre foot for society to produce would be sold by a reclamation contractor to a landowner for \$3.50 or less. The \$10.00 figure reflects the scarcity value of the resources used to develop the water for irrigation. Our decision makers regard the difference between this cost and price as the social value of developing new lands. The decision to bear this "social cost" sacrifices the efficiency of an economic allocation based upon true costs in order to achieve the welfare or distribution (from society to farmers) goals of a project. Brown, *supra* note 36. See W. WHYTE, *supra* note 31, at 307 for an Eastern view of the social utility of developing new Western lands.

42. Landowners with holdings near the San Luis Reservoir get a further benefit of free groundwater. For the cost of pumping, waters added to underground water tables may be tapped with no provisions for payment to the Westlands Water District. Taylor, *supra* note 32, at 988-89.

43. Brown, *supra* note 36, at 38.

44. Williston Land Co., 39 L.D. 2, 5 (1910).

45. Payette-Boise Water Users Assoc. v. Bond, 269 F. 159, 172 (S.D. Idaho, 1920).

46. See text accompanying note 17 *supra*.

47. The report of the Secretary of the Interior to President Eisenhower on the San Luis Unit of the Central Valley Project, designed to provide water to land along the Westside, stated the extent of the considerations in planning the project:

Our studies indicate that the Unit is economically justified and that all reim-

The federal government made no statutory attempt to deal with the effects of its program by informing local planners so they could prepare for the change in land use patterns.⁴⁸ While the National Environmental Policy Act⁴⁹ now requires a statement on the environmental impact of a federal project, there is still no duty to put a premium on the value of protecting the resources of an affected region or to cancel or alter a project.⁵⁰

2. *The California Water Plan*

The completion of the California Aqueduct through the Westside, in furtherance of the California Water Plan, will provide state water to Westside agricultural lands that are not eligible for federal reclamation water.⁵¹ Unlike federal reclamation projects, the California Water Plan places a greater share of the burden on the water user to repay the capital costs, interest, and delivery costs associated with water that is contracted by a local district.⁵² An apparent state preference

bursible costs will be returned within 50 years. The Unit is urgently needed to prevent a progressive recession of farming, the major economic activity in the service area. The local people have shown an interest in and support the development.

Letter from Fred A. Seaton, Secretary of the Interior, to the President, Aug. 1, 1956, reprinted in BUREAU OF RECLAMATION, DEPARTMENT OF THE INTERIOR, RECLAMATION PROJECT FEASIBILITIES AND AUTHORIZATIONS 106, 107 (cumulative supplement to the 1957 ed., 1968).

48. San Luis Unit Authorizing Act of 1960 [Pub. L. No. 86-488, 74 Stat. 156] details the allocation of construction costs, the conditions for delivery of water outside the San Luis area, the agreement with the State of California, and other limitations, but says nothing about cooperation with local government regarding the impact of the project on the area.

49. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-47 (Supp. V, 1970).

50. *Id.* § 4332.

The Congress authorizes and directs that, to the fullest extent possible: . . . all agencies of the Federal Government shall— . . .

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for the legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented. . . .

Id.

51. Lands in Kings, Kern, Merced, Tulare, and Stanislaus counties will get state water. See CALIFORNIA DEPARTMENT OF WATER RESOURCES, BULL. NO. 132-70, THE CALIFORNIA STATE WATER PROJECT 8 (1969) [hereinafter cited as STATE WATER PROJECT].

52. In order for the State Water Plan to gain the necessary approval of the voters

for agricultural uses, however, places an excessive cost burden upon non-agricultural users, thereby subsidizing farm water users.⁵³

The availability of surplus waters, in excess of waters contracted by local water districts, sold to agricultural users at a price reflecting only the variable costs of delivery and not the capital fixed costs, reduces the price of farm water substantially.⁵⁴ Cheap water will encourage land development until the surplus waters are exhausted by contractors in 1990.⁵⁵ Advance project construction may be the best economic choice because it minimizes project costs, but the resulting surplus waters should not be permitted to stimulate excessive investment on the Westside through lower water costs. When there are no more surplus waters, farmers will have to pay a substantially higher price for water and profits will decline. Thus some investment and hence land development will not be justified by future returns, although stimulated by current profits. Because surplus water supplies are determinative of land use, surplus water sales should be eliminated. If a policy decision is made to continue selling cheap surplus water to farmers, other land use controls should be introduced to control development of land that is contrary to social goals.⁵⁶ There is a further disruptive subsidy to farmers in the differences in assessment practices between rural and urban areas which effectively shift a part of the repayment burden to urban areas.⁵⁷ The local water district allocates the cost of repayment between district assessments and water tolls, and to the extent that a local district pays for water through assess-

of California, it had to have little in the way of a subsidy. Acreage limitations, in the nature of federal limitation, were omitted because the recipient of state water would be paying the costs of the water he received. Brown, *supra* note 36, at 39.

Agricultural users of state water repay approximately 90 percent of the project costs, while users of federal project water repay only about 28 percent of the costs. Therefore, state pricing is a closer approximation of the costs of the water and therefore there is a lesser distortion of the operation of market forces. *Id.* 40-41.

53. See text accompanying notes 54-57 *infra*.

54. Because the California Water Plan is intended to meet the projected needs of the areas it serves until 1990, there is a present surplus of project water. Agricultural and groundwater replenishment uses have a first call on any available surpluses at a cost that approximates only the electric power and energy costs required to pump the water through the aqueduct system. The combined prices of surplus and contracted waters lowers the total cost of water significantly. See STATE WATER PROJECT, *supra* note 51, at 7.

55. *Id.* at 5. This date might, however, be advanced to 2010, or beyond, because the planned demand for water has recently been found to be off by about 20 years. S.F. Chronicle, Jan. 7, 1971, at 1, col. 8.

56. The current state fiscal crisis noted by California's governor might be eased by maximizing the revenues from the sale of state water, rather than trying to maximize the present use of water.

57. M. Brewer, Economics of Public Water Pricing, May 1961, at 17 (Giannini Foundation Research Rep. No. 244).

ments there is a subsidy to non-urban users.⁵⁸

In forming the California Water Plan, the state's policy was to respond to water need, rather than to allocate the water resource and capital investment in a way that would maximize the total return to the people of California.⁵⁹ The state sought to increase the net productivity of California, but this economic rationale did not include the goal of maximizing productivity in using water and capital resources.⁶⁰ Because there was no state agricultural land use policy, the planners of the water project relied upon the total number of irrigable acres in projecting water requirements and the necessary project size.⁶¹ While the state continually reassesses the water needs and adjusts its plans, the fact remains that the plan was prepared without reference to a state-wide set of policy goals and economic development priorities.⁶² The net result is a massive project responsive only to the interests of the immediate beneficiary, the water user, and totally neglectful of the priorities of the more distant beneficiaries, the people of California. There has been no attempt to utilize the potential of the water plan as a planning tool to shape development generally and land use decisions in particular.⁶³ This is unfortunate since, through pricing and restrictions

58. Charges for water for agricultural uses have traditionally been less than charges for municipal or industrial use. *Id.* at 16.

59. "Estimates of future economic growth, change in land use, and population distribution were geared essentially to an understanding of the probable order of magnitudes of growth and consequent requirements for water." PLANNING, *supra* note 23, at 114.

60. M. Brewer, *supra* note 57, at 32. See text accompanying note 40 *supra*.

61. PLANNING, *supra* note 23, at 142.

62. *Id.* at 114. The state might rationally choose to stimulate agricultural development on the Westside, or it might choose to preserve the area as open space. Whatever the policy choice it should serve to quantify social costs and benefits that the land market does not reflect. In this manner, the water project could be a tool to shape development rather than an inefficient distortion of market forces.

63. M. Brewer, *supra* note 57, at 33. This lack of coordination between state projects and planning to preserve the land resources of California is in part corrected by California's version of the National Environmental Policy Act. 42 U.S.C. §§ 4321-47 (Supp. V, 1970). The California version provides:

All state agencies, boards, and commissions shall include in any report on any project they propose to carry out which could have a significant effect on the environment of the state, a detailed statement by the responsible state official setting forth the following:

- (a) The environmental impact of the proposed action.
- (b) Any adverse environmental effects which cannot be avoided if the proposal is implemented.
- (c) Mitigation measures proposed to minimize the impact.
- (d) Alternatives to the proposed action.
- (e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long term productivity.
- (f) Any irreversible environmental changes which would be involved in the proposed action should it be implemented.

on access to water services, the state could directly shape the form of local development such that developers would find it profitable to utilize land resources in a manner that maximizes the social and economic benefits to society.⁶⁴

In contracting with local water districts⁶⁵ the State of California sets prices for water in terms of a "delta water charge" to cover the costs of project conservation facilities and a "transportation charge" to cover capital and variable costs of delivery to the user.⁶⁶ This state price has an effect on prices set by the local districts,⁶⁷ but is not determinative of the distribution made by the districts between financing by assessments and financing through water toll.

Local water districts which contract with the state project, like the contract district on the federal project, place a significant assessment on lands within their boundaries, whether water is used by the land or not.⁶⁸ This fixed cost must be considered by the landowner as an integral part of water pricing.⁶⁹ Through its close relationship with the water toll, a variable cost, the assessment can indirectly determine how much farm water will be used and where it will be used.⁷⁰ Thus the local water district can exert substantial control over land use decisions through the pricing mechanism as well as through its decision on how much water to buy from the state and which lands are to be included in the district. Furthermore, once formed, the local water district can provide access to low interest state loans which facilitate development of lands by the public agency for, *inter alia*, domestic, muni-

64. The State Office of Planning proposes that "[w]ater development now must be evaluated in terms of its ultimate impact upon the physical characteristics . . . of the state. A significant opportunity exists for State Government to examine various regional growth alternatives, . . . and to permit a more deliberate selection of actions in achieving overall State development goals." PLANNING, *supra* note 23, at 114.

65. For a table of contracted water quantities see STATE WATER PROJECT, *supra* note 51, at 8.

66. Project conservation facilities are those capital components of the delivery system attributed to the contractor's water demand, while the transportation charges are "costs of all project transportation facilities necessary to deliver project water to the contractor, including capital, operation, maintenance, power, and replacement costs." CALIFORNIA DEPARTMENT OF WATER RESOURCES, STANDARD PROVISIONS FOR WATER SUPPLY CONTRACT §§ 22, 23 (1962).

67. M. Brewer, *supra* note 57, at 3.

68. Brewer, *Local Government Assessment: Its Impact On Land And Water Use*, 37 LAND ECONOMICS 209 (1961).

69. *Id.* at 210. The landowner is almost forced to use water and cultivate his land. The assessment is a forced payment with no benefit in return because no water is taken. For very little more money, depending upon the amount of water used, water can be taken and used productively, offsetting a part of the assessment. And as more water is taken, the combination of the fixed assessment cost and the variable water cost results in a declining average cost for water used.

70. *Id.*

cipal, or agricultural purposes.⁷¹

3. *The Highway*

The State of California, with substantial federal funding, is building Interstate Highway 5, the Westside freeway, as a major artery connecting the San Francisco Bay Area and northern California with the southern part of the state. This highway, which duplicates parallel highway facilities and only slightly reduces automobile travel time from San Francisco to Los Angeles,⁷² will bring new people to the Westside and should provide agriculture in the area with a rapid means of access to markets.⁷³ Commercial and residential areas, stimulated by the economic activity of the area, will spring up along the route.⁷⁴ The State Division of Highways planned the Westside route so that it passed near virtually no established Westside communities,⁷⁵ so any urban development will convert prime agricultural land to a non-agricultural use, just as the construction of the freeway itself removes the land it occupies from production. While it is true that agriculture benefits from improved transportation, it is equally true that less productive agricultural lands might be used for highways with no loss of benefits to the Westside.

Scenic considerations have not been adequate in the program to build the Westside freeway, at least in terms of the locational decision.⁷⁶ Steps have been taken by the California Legislature to preserve the area visible from the freeway location through the Westside

71. PLANNING, *supra* note 23, at 246. Local water agencies can get state loans where there is some statewide interest in a local project. CAL. WATER CODE § 12881 (West Supp. 1971). Project is defined as any dam, reservoir or other construction or improvement by a public agency for the diversion, storage, or distribution of water primarily for domestic, municipal, agricultural, industrial, fish and wildlife enhancement, flood control, or power production purposes. *Id.* § 12881.2. Such loans are important because of a substantial capital investment in getting water to the crops from the canal. Westside farmers will have to invest about \$140 million in facilities to get water from canal to farmer, and another \$150 million or more to use it for irrigation. Hedges, *supra* note 10, at 32.

72. PHASE I REPORT, *supra* note 7, at app. B-4.

73. See text accompanying note 17 *supra*.

74. *Id.*

75. See notes 17 & 20 *supra*. Highway planners prefer building across cheaper farm lands as compared to reworking existing roads or building through urban or suburban areas. See W. WHYTE, *supra* note 31, at 285-86.

Farm lands are cheaper only in the sense that the costs of construction and acquisition are less. There is no consideration of environmental value in the price of farm lands because the environmental value usually generates no income.

76. By locating Interstate Highway 5 on the Westside, highway builders had no buildings to demolish, no existing roads to widen or rework, and few irate citizens to question the local decision. See *id.* at 285.

Construction through a sparsely populated area might not seem disruptive, but it can upset the scenic beauty of the area affected. *Id.* at 286.

Park and Freeway Act which permits state agencies to acquire scenic easements on lands located between the freeway and the California Aqueduct along a part of the Westside route.⁷⁷ The success of this provision, however, is contingent upon federal funding.⁷⁸ The state could more adequately deal with environmental needs by making the aesthetics of a highway as important as its locational utility or its safety precautions. If aesthetic criteria are unmet the highway should not be built.

The legislature has not completely overlooked the impact the freeway will have on the use of land adjacent to the route but its response has been minimal and reflects only highway interests, largely neglecting conservation considerations. Land within a one mile radius of major interchanges must be zoned by the local jurisdiction for uses compatible to the needs of freeway travelers.⁷⁹ This legislation, enumerating no aesthetic considerations and recognizing none of the harm the freeway can cause to adjacent land resources, reflects only the concern of the highway agency that a land use near the freeway might be harmful to the freeway.⁸⁰

The California Division of Highways should consider the environmental impact of highway location.⁸¹ Not only should the agency consider the quality of the land it builds upon, but it should also consider the impact of a freeway upon the ecology of the entire region around the freeway so that the most desirable balance of favorable and unfavorable environmental impacts is achieved.⁸² Highways, and other government projects, need not come to a halt whenever potential environmental harm is discovered. If there is a net benefit to society after all environmental costs, including the opportunity costs of all expended resources, are fully considered in the project accounting,⁸³

77. CAL. GOV'T. CODE § 7000 (West 1966).

78. The Department of Public Works may acquire scenic easements along said Westside Freeway, provided that funds for such easements are obtained pursuant to the provisions of Section 319 of Title 23 of the United States Code relating to the purchase of interests in lands adjacent to highway rights-of-way, provided further that the federal government reimburses the State for the costs of such scenic easements, and also provided that the use of money for this purpose will not reduce the amount of funds which would otherwise be available to the State for highway purposes.

Id.

79. *Id.* §§ 66401-02.

80. The legislature's purpose is "[t]o preserve the effective traffic capacity and safety of the Westside Freeway, to maintain and enhance the present character of the landscape abutting said freeway, and to insure compatible land use and development at and near interchanges along said route" *Id.* § 66401. See IMPACT OF WATER, *supra* note 15, at 45.

81. See note 63 *supra*.

82. See note 75 *supra*.

83. A good example of such an environmental cost is the influx of water on the Westside which will create drainage problems. "The drainage facility will have to ex-

then the project is justified. But when the accounting makes no attempt to evaluate the environmental factors, it is highly unlikely that the optimum use of the scarce resources involved will occur.

Given that water and highway projects on the Westside already exist, less harmful alternatives and a consideration of immediate environmental costs are no longer relevant to the Westside. But environmental considerations written into the law can still help to minimize the environmental deprivations of artificially stimulated development by shaping that development in a way that utilizes our land resources in the most efficient manner, given the irreversible harm already incurred.

II

TOOLS FOR CONTROLLING DEVELOPMENT

The dangers of uncontrolled development, such as urban-rural mix and inefficient uses of land, could be tempered if existing legal and structural tools were put to use by state and local governments. State-enacted subdivision controls,⁸⁴ open space statutes,⁸⁵ and provisions for preserving agricultural lands⁸⁶ are useful tools, but the state has assumed no significant responsibilities in implementing these policies itself, leaving their use to the discretion of local governments. The local governments, lacking either funds or desire, need not use these tools. If the local incentive and money necessary to preserve land resources did exist, these state programs, coupled with local zoning and planning powers, could do much to control development. Yet the State of California, which should represent the interests of all Californians in land conservation,⁸⁷ has done little to provide the means or the stimulus necessary for local planning activity, nor has the state provided planning leadership itself.

A. State Created Powers

State legislation which affects local planning and zoning by providing powers, structure, and procedural safeguards, intentionally im-

tend about 300 miles. It is to originate in the southern end of the San Joaquin Valley and ultimately will deliver the used salt-bearing tail water to a point where it will flow into the Pacific Ocean." Hedges, *supra* note 10, at 31. Certainly this environmental cost should have been considered in the accounting.

84. See text accompanying notes 92-104 *infra*.

85. See text accompanying notes 110-28 & 174-98 *infra*.

86. See text accompanying notes 129-73 *infra*.

87. "By balancing demands and requirements on a statewide, rather than a land parcel basis, a policy may be developed whereby some resources will be depleted while others are protected and maintained for use over time. An essential point here is that the management of a single resource should not be viewed in isolation from all other resources." PLANNING, *supra* note 23, at 103.

poses a minimum degree of limitation on the local entities so that they may exercise a high degree of control over local matters.⁸⁸ The State of California sees its function as providing governmental guidance by granting powers and providing administrative machinery to avoid disputes.⁸⁹ The State Office of Planning and Research fulfills a useful but secondary role by assisting in the formation, evaluation, and updating of a state land use policy to protect the state's environment, evaluating state plans and programs in light of these policies, and attempting to coordinate objectives in conjunction with state, regional, and local agencies.⁹⁰ Unfortunately for purposes of uniform planning policy, the role of the State Office of Planning and Research is advisory only.⁹¹

1. Subdivision Controls

California subdivision statutes⁹² provide procedural uniformity in dealing with subdivision plans, but there is no expressed state policy on the location and timing of residential and commercial subdivisions to either guide or bind the California Real Estate Commissioner or local government in the administration of the statutes.⁹³ The bases for the denial of a subdivision proposal to partition land for development center on compliance with procedures outlined by statute rather than the merits of the proposed subdivision.⁹⁴ These procedures reveal a legislative policy to prevent fraud, misrepresentation, and deceit in land sales.⁹⁵ The economic success of a subdivision takes precedence over environmental considerations such as compatibility with surrounding land uses.⁹⁶ Misplaced subdivisions are viewed as a threat to de-

88. "The present legislation reflects in large degree the early philosophy that planning should be kept out of the main stream of government and 'protected' from the political process through the instrument of a lay citizen commission." *Id.* at 257.

89. Planning law limits authority and responsibility, spells out procedures, and sets, or attempts to set, standards for the quality of local planning. *Id.* at 258. See text accompanying notes 209-24 *infra*.

90. CAL. GOV'T. CODE §§ 65040(a), (c), (g) (West Supp. 1971).

91. In creating the State Office of Planning and Research, the legislature stated in the enabling act, "It is not the intent of the Legislature to vest in the Office of Planning and Research any direct operating or regulatory powers over land use, public works, or other state, regional, or local projects or programs." *Id.* § 65035.

92. CAL. BUS. & PROF. CODE §§ 11000-200, 11500-658 (West 1964).

93. "The primary objective of the State Subdivision Map Act is to provide definitions of terms and to outline methods of subdivision filing procedures applicable on a statewide basis." CALIFORNIA DIVISION OF REAL ESTATE, SUBDIVISION MANUAL 8 (4th ed. 1966).

94. Bases for denial of the right to subdivide lands as proposed include no environmental factors. CAL. BUS. & PROF. CODE § 11018 (West Supp. 1971).

95. SUBDIVISION MANUAL, *supra* note 93, at 11.

96. There is serious consideration of the effects that the surrounding environment may have upon the proposed subdivision, through such factors as noise and fumes.

veloper profits, the loan market, and the housing buyer's investment,⁹⁷ but there is no consideration of the social cost of wasted land resources.

Land which should not be developed or which should be developed differently because of adverse conservation or aesthetic consequences is often developed anyway because of low land costs in rural areas.⁹⁸ This problem exists on the Westside where land values are low in relation to urban land. The State Development Plan suggests additional subdivision criteria to prevent such wastes as premature subdivision or conflicting uses.⁹⁹ Currently the sole environmental consideration in subdivision approval relates to flood hazards.¹⁰⁰

Local government may exercise environmental controls in its consideration of proposed subdivision maps,¹⁰¹ but there is neither a specific authorization nor a mandate in the statutes to do so.¹⁰² In the absence of a legislated requirement to preserve certain lands, such environmental protection seems unlikely because local jurisdictions too often treat the privilege of subdivision as a right incident to the ownership of land.¹⁰³ The current legal structure places excessive reliance on local discretion and initiative in utilizing the restrictions of the subdivision statutes.¹⁰⁴

There is no consideration, however, of the detrimental impact that a residential or commercial subdivision might have on surrounding land uses such as farms or open space. *Id.* at 32.

97. *Id.* at 7.

98. PLANNING, *supra* note 23, at 275. For example, lands distant from urban centers are cheaper than urban lands, so suburbs are built, necessitating long journeys to work while simultaneously depriving society of the benefits of virgin or agricultural lands. If all the costs incident to these problems could somehow be reflected in the price of the land, the development probably would not occur.

99. "The kinds of criteria which can be used as a basis for rejection of a subdivision should be expanded beyond the lone reference to flood hazard, to include other hazardous or deleterious conditions; premature subdivision; conflict in kind and character of uses . . ." *Id.*

100. *Id.* See CAL. BUS. & PROF. CODE § 11551.5 (West 1964).

101. CAL. BUS. & PROF. CODE § 11525 (West 1964). A map which does not comply with county ordinances passed pursuant to section 11525 and designating standard specifications to all proposed subdivisions generally, may be rejected by the local governing body. *Metro Realty v. County of El Dorado*, 222 Cal. App. 2d 508, 35 Cal. Rptr. 480 (3d Dist. 1963).

102. The California Division of Real Estate notes that local government can exercise controls over subdivisions even if the policies of these controls are not expressed. SUBDIVISION MANUAL, *supra* note 93, at 8. Trees, lakes, ponds, views and other natural amenities should be preserved because such features improve the quality of the subdivision and stimulate sales. *Id.* at 31.

103. PLANNING, *supra* note 23, at 274. In some areas the right to subdivide is considered by local officials to be an unlimited right, while in others only the minimal procedural safeguards of the State Subdivision Map Act need be met, regardless of the impact the development might have on the best interests of the community or even the local general development plan. *Id.* at 274-75.

104. Local government welcomes subdivisions as additions to the local tax base

When development affects interests outside the local area which evaluates that development, it is impractical for any single local government unit to weigh the factors necessary to insure socially desirable development. Even if local government used its powers and rejected a proposed development, that rejection would be motivated only by the effects of development on purely local interests. The structure of subdivision evaluation should vest discretion at a regional or state level so that the damage and the benefits of development can be allocated in order that no locality is excessively harmed or benefitted by development or by its absence. The benefits of development to the local tax base should be spread among the region's communities, while the environmental harm should be apportioned in a way that spreads its costs equally.¹⁰⁵

The danger of relying on local discretion to preserve land resources is illustrated by events in New York's Hudson River Valley.¹⁰⁶ The Georgia-Pacific Corporation purchased land in Phillipstown on the Hudson River. The people of Phillipstown were overjoyed at the prospect of having an \$8 million plant added to the local tax base. Not only would taxes go down but 300 jobs would be created. The plant location, however, would have pre-empted "what had long been regarded as one of the best potential sites for a state park and marina. . . . [T]he people of Phillipstown could see no aesthetic problem."¹⁰⁷ Governor Rockefeller intervened and caused Georgia-Pacific to select another site, much to the regret of much of the community of Phillipstown.¹⁰⁸ Had the governor not intervened, however, an environmental resource valuable to all the people of New York would have been lost to the pursuit of purely local interests, through its local government, by the people of Phillipstown. The interests of larger geographical units must be reflected in development decisions.¹⁰⁹

without recognizing that the burden on municipal services might outweigh the increase in the local revenues. See note 21 *supra*. In Kern County, large subdivisions must meet an open space requisite, and in two recent developments in th county, over 25,000 acres in size, up to 40 percent of the site was dedicated to the county. Letter from the Kern County Planning Commission to the author, July 28, 1970, on file with *Ecology Law Quarterly*.

105. Environmental harm can be spread by scattering development throughout the region. This process would also serve to avoid concentrations of development that tend to multiply the environmental harm of a single development proposal. For a discussion advocating a regional agency with such powers, see text accompanying notes 296-320 *infra*.

106. W. WHYTE, *supra* note 31, at 20-30.

107. *Id.* at 29.

108. *Id.* at 29-30.

109. Excessive reliance on local discretion is not confined to subdivision controls, but is a recurring theme in California land use controls. See pt. II, A, 2 *infra* for a discussion of California's open space legislation. See pt. II, B *infra* for a discussion of

2. Open Space Legislation

The California Legislature has, since 1959, enacted statutes which enable local governments to take steps to preserve open lands within their jurisdiction. The Open Space Act of 1959,¹¹⁰ the Williamson Act,¹¹¹ and the Easements Act of 1969¹¹² have respectively permitted purchases, contracts, and restrictive easements that can prevent or at least delay land development. This evolution of state provisions has lacked, however, the state involvement necessary to overcome the weaknesses of excessive local government discretion, inadequate funding, and incomplete powers.

a. The Open Space Act of 1959

In the Open Space Act of 1959,¹¹³ the California Legislature recognized the need to preserve open areas near urban centers and to conserve lands characterized by great natural scenic beauty.¹¹⁴ The Act recites a public purpose when local government acquires such lands satisfying a prohibition against the expenditure of public funds for purposes of questionable benefit to the public.¹¹⁵ The Act is of limited utility, however, because of its narrow scope, the degree of local discretion it allows, and the limited powers it confers.

The Open Space Act is narrow in that it applies only to limited kinds of land. Application of the Act to Westside lands could be challenged because agricultural or undeveloped lands must be close to urban areas or possessed of great natural beauty to be covered by the statute.¹¹⁶ There is further doubt about the eligibility of undeveloped portions of partially developed tracts. If this is true, it would reduce the incentive to developers to dedicate parts of a development to local government for open space purposes.¹¹⁷

There is excessive local discretion in the Open Space Act in the

local powers and policies. See pt. III *infra* for a discussion of proposed means of overcoming this problem.

110. The Open Space Act of 1959 is discussed in pt. II, A, 2, a *infra*.

111. The Williamson Act is discussed in pt. II, A, 2, b *infra*.

112. The Easements Act is discussed in pt. II, A, 2, c *infra*.

113. CAL. GOV'T. CODE §§ 6950-54 (West 1966).

114. *Id.* § 6954.

115. *Id.* § 6952. See *City & County of San Francisco v. Ross*, 44 Cal. 2d 52, 279 P.2d 529 (1955), where condemnation of land by the city to be leased to private interests for a parking lot with no city restrictions on rates or charges was held not to be for a public purpose.

116. CAL. GOV'T. CODE § 6951 (West 1966). The State Office of Planning, while noting that coverage of lands not to be directly viewed or used by the public might be questionable, expresses the opinion that coverage of agricultural land resources would be possible. PLANNING, *supra* note 23, at 270-71.

117. *Id.* at 271.

lack of a state mandate to use the Act. The state should establish standards of open space performance, perhaps as a percentage of local undeveloped or agricultural lands, which local open space programs must meet.¹¹⁸ Yet the Open Space Act imposes no obligation upon local government to use the Act's powers¹¹⁹ or to preserve any open space lands at all. This serious flaw has been perpetuated in the Williamson Act¹²⁰ and in the Easements Act.¹²¹

The power inadequacies of the Open Space Act relate to the lack of eminent domain powers in the Act¹²² and the absence of state funding. Eminent domain powers, which can force a landowner to sell lands valuable as open space to the government, are characterized by the State Office of Planning as necessary to the utility of the Act.¹²³ Without eminent domain powers a single unwilling landowner within a tract of open space lands could refuse to sell his property rights,¹²⁴ or could even develop the land, thereby threatening the open space utility of the entire tract.¹²⁵ The absence of adequate funding, however, might be the greatest weakness of the Act because of rising California land prices as well as the limited motivation of local government to spend its own funds to prevent development.¹²⁶ If the people of California wish to preserve undeveloped and agricultural lands, they should bear a large part of the expense of acquisitions.

The Open Space Act, with all its limitations of scope, powers, and financing, has produced some desirable results within certain land de-

118. *Id.* "Descriptive criteria for open space . . . should be developed. . . . The law should require the formation of regional open space standards . . ." *Id.*

119. The statute provides that the "county or city may acquire" rather than requiring any degree of use of the Act's powers. CAL. GOV'T. CODE § 6950 (West 1966). The decision to enforce a restriction if less than a fee interest is acquired appears to have been left to local discretion as well. *Id.* § 6953.

120. See pt. II, A, 2, *b infra*.

121. See pt. II, A, 2, *c infra*.

122. It might be concluded from the language of the Open Space Act that eminent domain powers are granted by permitting acquisitions by purchase, grant, bequest, devise, lease, or otherwise, but such a construction is likely to be incorrect unless the statute expressly conferred eminent domain powers. PLANNING, *supra* note 23, at 271. Other California statutes which confer such powers do so expressly. See Comment, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638, 645-46 (1960). Exercises by the state of its eminent domain power can be challenged if the acquisition is not for a public use. See note 115 *supra*. The public use of open spaces seems settled by the state constitution, however. CAL. CONST. art. 28, § 1.

123. PLANNING, *supra* note 23, at 271.

124. CAL. GOV'T. CODE § 6950 (West 1966) provides for acquisition of the fee or lesser interest.

125. PLANNING, *supra* note 23, at 271.

126. Local government is anxious to see lands developed because they assume that there will be a net increase in revenues because of development. This is not necessarily true. See note 21 *supra*.

velopments. Developers have dedicated lands within a development, which are not suitable for construction, to open space uses, thereby gaining tax benefits¹²⁷ and also enhancing the value of the rest of the lands in the development which surround the open space area.¹²⁸ The Act cannot be used to block developments which are environmentally unsound because the Act includes no eminent domain powers to force a landowner to sell his land. The Act is valuable, however, as a tool that promotes an environmentally desirable configuration in land developments that are likely to occur anyway.

b. *The Williamson Act*

The California Land Conservation Act of 1965¹²⁹ is a logical extension of the Open Space Act. Also known as the Williamson Act,¹³⁰ it enables local government to protect certain lands through the use of restrictive contracts.¹³¹ The California legislature recognizes, in the Williamson Act, the value to the public in preserving agricultural lands as open space¹³² or as sources of food production,¹³³ the utility of certain undeveloped lands,¹³⁴ and the limited supply of such lands.¹³⁵ Yet, with this insightful concern for vanishing land land resources, the usefulness of the Act is still significantly betrayed by its limited scope of application,¹³⁶ its inadequate powers¹³⁷ and funding,¹³⁸ and its reliance on local discretion.¹³⁹

The Williamson Act authorizes cities and counties to enter arrangements with landowners to preserve certain lands which are threatened by urban expansion.¹⁴⁰ Adopted pursuant to the mandate of a

127. The property tax burden is removed by disposing of the land, plus there may be a federal income tax benefit by donation of the land, assuming that it is given rather than sold to the local jurisdiction. W. WHYTE, *supra* note 31, at 71.

128. *Id.* at 96.

129. CAL. GOV'T. CODE §§ 51200-95 (West 1966).

130. *Id.* § 51200.

131. *Id.* § 51240.

132. *Id.* § 51220(c).

133. *Id.* § 51220(a).

134. *Id.* § 51220(d).

135. *Id.* § 51220(c).

136. Open space uses include scenic highway corridors, a wildlife habitat area, a salt pond, a managed wetland area, or a submerged area. *Id.* § 51201 (o). Undeveloped lands without these attributes might arguably not be covered.

137. See text accompanying note 173 *infra*.

138. See text accompanying note 168 *infra*.

139. See text accompanying notes 141-59 *infra*. See text accompanying notes 106-09 *supra*.

140. PLANNING, *supra* note 23, at 142. Stanislaus County, for example, applied Williamson restrictions to 116,150 acres in 1969, for a county total of 161,520 acres. Letter from Stanislaus County planning Commission to the author, June 25, 1970, on file with *Ecology Law Quarterly*.

1965 Amendment to the California Constitution,¹⁴¹ the Act can cover agricultural lands,¹⁴² in general, or open space lands meeting the criteria enumerated in the Act.¹⁴³ Agricultural preserves, which may include undeveloped lands,¹⁴⁴ are formed by local governments, subject to statutory size, contiguity, and ownership restrictions.¹⁴⁵ Restrictive contracts can limit land uses in the agricultural preserve.¹⁴⁶ Land designated as part of the preserve but not under contract must be restricted to compatible uses by zoning or other suitable means.¹⁴⁷ The Act allows local governments to compensate landowners for the restrictive agreements.¹⁴⁸ The more significant compensation, however, lies in the tax relief the Williamson Act promises to owners of restricted agricultural lands. By restricting the use of their lands for terms of 10 years or more, landowners will likely have their land assessed at a value reflecting only the permitted uses rather than the development potential.¹⁴⁹ Such assessments will permit farmers and developers alike to retain land for either agricultural or speculative purposes.¹⁵⁰

Under the Williamson Act, local government determines which lands are to be included,¹⁵¹ what restrictions are to be imposed,¹⁵²

141. CAL. CONST. art. 28.

142. CAL. GOV'T. CODE § 51201(d) (West Supp. 1971) defines an agricultural preserve as "[a]n area devoted to either agricultural use, recreational use as defined in subdivision (n), or open space use as defined in subdivision . . . (o), or any combination of such uses, compatible uses as designated by a city or county, and established by resolution of the governing body of a city or county after a public hearing."

143. See note 136 *supra*.

144. For purposes of this section, where the term 'agricultural land' is used in this chapter, it shall be deemed to include land devoted to recreational use and land within a scenic highway corridor, a wildlife habitat area, a salt-pond, a managed wetland area, or a submerged area, and where the term 'agricultural use' is used in this chapter, it shall be deemed to include recreational open space use.

CAL. GOV'T. CODE § 51205 (West Supp. 1971).

145. Preserves may be less than 100 acres only if the smaller preserve is necessary because of uniqueness in the agricultural enterprises and is consistent with the local general plan. *Id.* § 51230. To meet the 100 acre requirement two or more parcels may be combined if they are contiguous or if they are in common ownership. *Id.*

146. *Id.* § 51240.

147. *Id.* § 51230. These other means might include government purchases of fee interests or easements or tax policies.

148. *Id.* § 51240.

149. Reduced assessments are presumed to result by the State Office of Planning, PLANNING, *supra* note 23, at 255, 271. The Attorney General, however, believes that assessors may continue to look at prices for which lands are selling in the area, if those lands are similarly restricted. 47 OP. CAL. ATT'Y GEN. 171 (1966).

150. See text accompanying note 289 *infra*.

151. CAL. GOV'T. CODE § 51201(d) (West Supp. 1971).

152. *Id.* § 51240. The restrictions applied by Kern County to lands in agricultural preserves are almost exactly the restrictions imposed by agricultural zoning. See Kern County Zoning Ordinance, art. 17.2, § 7159.11 (1969); Kern County Board of Supervisors, Resolution 68-106, app. A (1968).

and what uses shall be compatible to restricted open space or agricultural uses.¹⁵³ With proper notice to nearby property owners¹⁵⁴ and review by the local planning agency,¹⁵⁵ an agricultural preserve may be created by the local governing body. Land uses are restricted by contracts with landowners with the only significant limitation on contract content being a flexible requirement of contract uniformity within the agricultural preserve.¹⁵⁶ There is further local discretion to cancel a contract on a petition of the landowner.¹⁵⁷ Thus a local governing body, wishing to add to its tax base, may cancel a restrictive agreement if it finds that development is in the public interest and there is a reason for the change other than the existence of an alternative use or lack of profits from the permitted uses.¹⁵⁸ The cancellation penalty, included in the statute, can be waived by the local governing body.¹⁵⁹ This waiver is thus a formality when the governing body feels it can benefit from the proposed development.

The Act includes innovative provisions which limit acquisitions of protected lands by local entities, public agencies, and utilities.¹⁶⁰ The power of cities to defeat restrictions by means of annexation¹⁶¹ is limited, so long as the restriction was imposed with proper notice to the city.¹⁶² Public agencies, such as special districts seeking to acquire preserve land for government projects, must consider the value of the lands to the public in calculating project feasibility.¹⁶³ They cannot use preserve lands for a project if their only motivation is the lower cost which results from its restricted use.¹⁶⁴ Such limitations force a consideration of true economic costs, including social costs, which should be present in all development whether it is implemented by the public or the private sector.¹⁶⁵ Certain notable exceptions to these agency restrictions include purely local easements, approved utility improve-

153. CAL. GOV'T. CODE § 51201(e) (West Supp. 1971).

154. *Id.* § 51232.

155. *Id.* § 51234.

156. *Id.* § 51241.

157. *Id.* § 51281. It is noteworthy that only a city or county can enforce a contract restriction. *Id.* §§ 51251, 51252.

158. *Id.* § 51282. The California legislature states, however, that "[i]t is hereby declared that the purpose of this article is to provide relief from the provisions of contracts entered into pursuant to this chapter only when the continued dedication of land under such contracts to agricultural use is neither necessary nor desirable for the purposes of this chapter." *Id.* § 51280 (West 1966).

159. *Id.* § 51283(c) (West Supp. 1971).

160. *Id.* §§ 51290-93.

161. See text accompanying notes 236 & 273-76 *infra*.

162. CAL. GOV'T. CODE § 51235 (West Supp. 1971).

163. *Id.* § 51290(c) (West 1966).

164. *Id.* § 51292 (West Supp. 1971).

165. Projects which distort the true costs of an economic decision through subsidies result in a misallocation of resources. See text accompanying note 39 *supra*.

ments, and improvements, such as highways and water facilities, which have been determined by the legislature to be "compatible" with land in the agricultural preserve.¹⁶⁶ Preserve land may be acquired for such purposes by eminent domain, but fortunately the incentive of a low price in choosing preserve land is diminished by the requirement that the acquiring agency pay the full, unrestricted value of the land.¹⁶⁷

The Williamson Act can be useful in preserving certain lands, but, like the Open Space Act of 1959, its scope is too restrictive, it leaves too much discretion to local government, it lacks eminent domain powers, and it provides no state funds to pay for restrictive contracts.¹⁶⁸ The Act is oriented toward lands already developed for agricultural purposes, so that undeveloped lands are not included unless they fit the open space uses outlined in the Act.¹⁶⁹ The Williamson Act may even provide encouragement for the cultivation of undeveloped lands because the resulting eligibility can bring the tax benefits of the Act. Fortunately, local government can exercise other powers to preserve undeveloped lands.¹⁷⁰ This goal is not, however, stimulated or required by the Act, particularly when one considers the discretion of cities and counties in using the Act and in cancelling restrictive contracts.¹⁷¹ A local entity can ignore a statewide interest in preserving land resources and pursue exclusively local interests in permitting or aiding development. The progressive requirements of social cost analysis and full value consideration imposed on some government projects¹⁷² should be extended to all forms of land development and to other open space provisions. Powers of eminent domain, totally absent from the Williamson Act, would permit contracts to be imposed in preserve areas and would prevent contract terms that favor speculators.¹⁷³

166. CAL. GOV'T. CODE § 51293 (West Supp. 1971).

167. *Id.* § 51295.

168. See pt. II, A, 2, *a supra*. The Williamson Act formerly provided for state payments of \$1.00 per year per acre to counties and cities for administrative costs, and \$.05 per \$1.00 assessed valuation each year to landowners with lands under contracts which limit uses to agricultural uses. PLANNING, *supra* note 23, at 255. These payment provisions were deleted from the Act, however, by a 1969 amendment. CAL. GOV'T. CODE § 51260 (West Supp. 1971). Kern County's program envisions no payments to landowners, and actually imposes fees upon landowners. Kern County Board of Supervisors, Resolution 68-131 (1968).

169. See note 136 *supra*.

170. See text accompanying notes 92-104 & 113-28 *supra*, and notes 174-90 & 253-85 *infra*.

171. See text accompanying notes 151 & 157 *supra*.

172. See text accompanying notes 163, 164 & 167 *supra*.

173. Speculators benefit from the reduced tax burden along with farmers. The ten year term of a contract might coincide with the speculation term that maximizes the profits of holding the land, while the tax breaks make it easier to hold the land for such a term. Eminent domain would permit local governments to control the use of the land

c. *Open space easements*

California's Open-Space Easements Act of 1969¹⁷⁴ permits any county or city with a general plan to accept open space easements.¹⁷⁵ By purchase, gift, or other means of acquisition, local government may preserve open space and scenic resources through the use of easements¹⁷⁶ rather than having to acquire an entire fee interest or having to rely upon the impermanence of a contract. Comparison with the restrictive contracts of the Williamson Act or the purchases of the Open Space Act of 1969 reveals numerous similarities and, on the surface at least, little innovation.¹⁷⁷ The Easements Act does, however, give emphasis to the easement device as an innovative means to stabilizing development patterns in rural areas.¹⁷⁸ While many powers granted by the Easements Act could have been exercised under the Open Space Act,¹⁷⁹ the newer act clarifies the use and expands the application of the easement tool while integrating it with local planning processes.¹⁸⁰

Under the Easements Act, land eligibility is contingent upon consistency with the local general plan,¹⁸¹ acceptance of the grant by the local governing body,¹⁸² and satisfaction of one of the open space pur-

for longer terms which would reduce the speculative value of the land while protecting the desires of farmers to cultivate their lands without tax pressures. See text accompanying note 289 *infra*.

174. Open-Space Easements, CAL. GOV'T. CODE §§ 51050-65 (West Supp. 1971). To avoid confusion with the Open Space Act of 1959, this act will be referred to as the Easements Act.

175. *Id.* § 51050.

176. The power to purchase easements is unclear. Section 51050 permits a city or county to accept a grant of an easement, but says nothing about how this grant is acquired. Section 51065, however, mentions acquisitions by gift, purchase, or otherwise in stating that the Act does not restrict local power to engage in such transaction whether "for the purpose of preserving open space or for any other purpose under any other provisions of law." *Id.* §§ 51050, 51065.

177. All three acts leave much of the quality of restrictions to local government discretion. The decision to make use of open space powers is discretionary in all acts, none provide state funding or eminent domain powers, and all pay lip service to the virtues of saving land resources. For a discussion of the Williamson Act see pt. II, A, 2, *b supra*. For a discussion of the Open Space Act see pt. II, A, 2, *a supra*.

178. This emphasis is the result of delegating easement powers that local government appears to have already possessed. See note 119 *supra*.

179. Local government could purchase less than a fee interest under the Open Space Act, but the lands which could be included under the Act are more narrowly defined. See text accompanying notes 116-17 *supra*.

180. The Easements Act, like the Williamson Act, requires review by local planners of the proposed restrictions. In fact, use of the Easements Act is restricted to cities and counties which have a general plan. CAL. GOV'T. CODE §§ 51050, 51056(a) (West Supp. 1971).

181. *Id.*

182. "No instrument described in Section 51051 shall be effective until it has been accepted by resolution of the governing body of the city or county and its acceptance

poses outlined in the Act.¹⁸³ These purposes, unlike the narrow purposes of the Open Space Act,¹⁸⁴ are broad enough to include most agricultural or undeveloped lands.¹⁸⁵ A local determination that the purposes of the Act are satisfied establishes a conclusive presumption that the conditions for inclusion are satisfied.¹⁸⁶ The kinds of restrictions imposed by easement are largely at the discretion of local government,¹⁸⁷ although the term of an easement must be at least 20 years or may be as long as perpetuity.¹⁸⁸ These restrictions will probably be stringent because of the tax motivation for granting a restrictive easement. Landowners wish to reduce the tax burden of holding agricultural or other lands which results from the assessment of development potential.¹⁸⁹ If the option of commercial or residential development is strictly limited by an easement, assessors are encouraged by the Act to assess only in terms of the value of uses allowed under the restrictive easement.¹⁹⁰

Local government purchases of entire fee interests in open space and other lands will save lands, but the costs of fee acquisitions limit the amount of land that can be preserved unless funding is greatly expanded.¹⁹¹ Easements present cost-saving advantages. They cost less to acquire than a fee interest,¹⁹² they permit the land to be used

endorsed thereon." *Id.* § 51055. *But cf.* *Union Transp. Co. v. Sacramento County*, 42 Cal. 2d 235, 267 P.2d 10 (1954) where the gratuitous gift of a bridge to the public, used by the public, did not have to be formally accepted so long as some responsible public official asserts control, thereby making the county liable for negligence in maintaining the bridge.

183. Purposes include a likelihood of future need as a park or other public use; a scenic value when viewed from a highway or from public or private buildings; a benefit to urban living; a public interest in keeping the land's rural character; a public interest in keeping the land in its natural state because of flood control or watershed needs; proximity to a scenic highway; value as a wildlife preserve; or any condition in which "[t]he public interest will otherwise be served in a manner recited in the resolution and consistent with the purposes of this subdivision and Article XXVIII of the Constitution of the State of California." CAL. GOV'T. CODE § 51056(b) (West Supp. 1971).

184. See text accompanying note 116 *supra*.

185. Westside lands seem well suited for inclusion under the Act as land "which in the public interest should remain rural in character and the retention of the land as open space will help preserve the rural character of the area." CAL. GOV'T. CODE § 51056(b)(4) (West Supp. 1971).

186. *Id.* § 51056(b).

187. *Id.* § 51051, 51054.

188. *Id.* § 51053.

189. See text accompanying note 149 *supra*.

190. Open space easements are enforceable restrictions under Article 28 of the California Constitution. CAL. GOV'T. CODE § 51064 (West Supp. 1971). Land subject to an enforceable restriction is assessed only in terms of permitted uses. CAL. REV. & TAX. CODE § 423 (West Supp. 1971). See accompanying note 272 *infra*. Even agricultural uses may be disallowed by an easement under the Easement Act. CAL. GOV'T. CODE § 51054 (West Supp. 1971).

191. W. WHYTE, *supra* note 31, at 78.

192. In Wisconsin, studies indicated that a dollar could purchase the fee interest

productively,¹⁹³ and the lands involved are not completely removed from the property tax rolls because of public ownership.¹⁹⁴ Landowners are more willing to give up the right to develop their land when they are allowed to continue present uses of the land (such as agriculture) while tax pressures that can force an end to farming are removed.¹⁹⁵ Developed lands also benefit from the Easements Act. Developers are encouraged to restrict portions of a development to open space uses, thereby enhancing the value of remaining development lands.¹⁹⁶ A developer who donates or sells a restrictive easement to a city or county may achieve tax deductions, capital gains treatment on any gain,¹⁹⁷ and stability in the property taxes applied to the restricted land. Easements granted in perpetuity bring planning stability to a developing area that will benefit the developed lands.¹⁹⁸

With proper motivation, local government can preserve almost all types of open lands on the Westside under the Easements Act.¹⁹⁹ This motivation problem is diminished somewhat by an innovation of the Easements Act that permits enforcement of easements either by local government or by local residents or property owners.²⁰⁰ Unlike the Williamson or Open Space Acts' restrictions, enforcement of the Easements Act's restrictions is not left solely to the discretion of local government.²⁰¹ Private enforcement, because of the local discretion involved, could be defeated, however, by the abandonment provisions of the Easements Act.²⁰² The need for local motivation to

to six inches of lake frontage while it could buy 3½ feet through an easement that gave the public access to the land. *Id.* at 92.

193. An agricultural use allowed under the restrictions will probably be a productive use, although the development potential of the land may mean that agriculture is not the most productive use.

194. Publicly owned lands are normally not subject to ad valorem property taxes, although private interests in public lands are taxable. See CAL. CONST. art. 13, § 1.

195. See W. WHYTE, *supra* note 31, at 81-82.

196. *Id.* at 81. The portion of a parcel that is developed will have greater value or will generate more revenue if it is surrounded by open spaces. This proposition is stronger for residential or commercial developments than for industrial or agricultural developments.

197. A restrictive agreement for a term of years may be treated for tax purposes as a lease and thereby be denied capital gains treatment. *Id.* at 83.

198. Perpetual easements are desirable because easements for a term are difficult to renegotiate when expiring, especially when there is a high potential value in development. *Id.*

199. See note 183 *supra*.

200. CAL. GOV'T. CODE § 51058 (West Supp. 1971).

201. See notes 118-19 & 157 *supra*. But cf. *City of Hermosa Beach v. Superior Court*, 231 Cal. App. 2d 295, 41 Cal. Rptr. 796 (2d Dist. 1964) where a taxpayer, not a party to the easement, had standing to enforce an easement by challenging city expenditures for land improvements prohibited by the easement dedicated to the city.

202. "The governing body of any city or county at any time may, by resolution,

preserve land, the lack of state funding, and the absence of eminent domain powers, apparent in other land use legislation²⁰³ are important problems under the Easements Act as well. As with previous measures, there is little state guidance as to when the easement tool should be used and how it is to be integrated with other tools.²⁰⁴ The Easements Act lacks the Williamson Act's insight into eminent domain acquisitions of restricted lands by public agencies.²⁰⁵ The Easements Act could be an effective tool if the necessary powers, state participation, and policy goals were provided by statute.

B. Local Powers and Policies

While California statutes require a planning structure in both city and county governments, there are no policy requirements to govern the goals of a local general plan.²⁰⁶ Zoning, a valuable local tool, can undo the environmental good of a general plan because it need not comply with the policy of the general plan. Just as statewide public improvements such as the California Water Plan need not be coordinated with planning policies, local public works also weaken the effectiveness of planning by easily circumventing the local plan.²⁰⁷ The loopholes of the planning process, coupled with the benefits of development in increasing the local tax base, lead to the conclusion that reliance on local action to save the land and insure efficient use is unwise. There is no guarantee that anything will be done to control development until great environmental losses have already occurred.²⁰⁸

1. Local Planning

Each city and county in California must establish a local planning agency in the form of a planning department, a planning commission, or the legislative body of the city or county.²⁰⁹ Counties are required by the legislature to have a planning commission as part of their plan-

abandon an open space easement, if it finds that no public purpose described in subdivision (b) of Section 51056 will be served any longer by keeping the land as open space." CAL. GOV'T. CODE § 51061 (West Supp. 1971). The abandonment process does include, however, review by the local planning commission and public hearings by both the planning commission and the governing body. *Id.*

203. See note 177 *supra*.

204. Integration with local planning processes is, however, expressed. See notes 180 & 202 *supra*.

205. The Easements Act, like the Williamson Act, does provide that the full value of the fee shall be paid when eminent domain powers are exercised. CAL. GOV'T. CODE § 51063 (West Supp. 1971). Unfortunately, the local entity is not compensated for its lost easement. *Id.*

206. See text accompanying notes 209-24 *infra*.

207. See text accompanying note 250 *infra*.

208. See text accompanying notes 106-09 *supra*.

209. CAL. GOV'T. CODE § 65100 (West 1966).

ning structure.²¹⁰ These planning agencies are to develop a general plan,²¹¹ develop specific plans as necessary, review capital improvement programs of the city or county, and exercise other functions delegated by the city or county,²¹² or enumerated by the state.²¹³

County planning agencies, including the required county planning commission, have planning jurisdiction over all parts of the county not included within a city.²¹⁴ The extent of the county planning effort can vary between counties, with some counties having no permanent staff, and fewer than 20 percent of all counties having up-to-date, effective general plans.²¹⁵ The state created structure for county planning does not insure an adequate consideration of economic and social factors in land use planning,²¹⁶ although conservation factors are a part of a plan.²¹⁷ The many resource considerations so necessary to environmental considerations in urban and rural development are usually lacking.²¹⁸ The absence of a specific state planning requirement imposing goals, such as resource preservation, permits the understaffed and inadequate planning efforts of many California counties to continue.²¹⁹ If there were state criteria to be met, counties would be forced to invest in adequate planning efforts.

California city planning plays a subordinate role in the planning processes of the Westside because the Westside freeway bypasses most

210. *Id.*

211. The general plan must include a land use element which designates the location, distribution, and extent of various land uses and sets population intensity and building density standards for various sectors. *Id.* § 65302(a). Also to be included are a circulation element relating to transportation, a conservation element, and a housing element. *Id.* § 65302. It shall be adopted by the legislative body of the city or county. *Id.* § 65300.

212. *Id.* § 65101.

213. The Williamson Act includes provisions for consistency with a general plan. *Id.* § 51234 (West Supp. 1971).

214. *Id.* § 65300 (West 1966).

215. PLANNING, *supra* note 23, at 260. An example of an inadequate planning effort might be exemplified by the fact that planners in Stanislaus County on the Westside "do not believe that the opening of Interstate Highway 5 or the completion of the California Aqueduct will radically alter the population growth of the land-usage of Western Stanislaus County." Letter from the Stanislaus County Planning Commission to the author, June 25, 1970, on file with *Ecology Law Quarterly*.

216. PLANNING, *supra* note 23, at 260.

217. CAL. GOV'T. CODE § 65302 (West Supp. 1971). By June 30, 1972, every city and county must adopt "a local open-space plan for the comprehensive and long-range preservation and conservation of open-space land within its jurisdiction." *Id.* § 65563. "Every local open-space plan shall contain an action program consisting of specific programs which the legislative body intends to pursue in implementing its open-space plan." *Id.* § 65564. These recent changes in planning law reflect increasing concern for the environment, but they also illustrate a continuing reluctance of the state to set specific planning criteria that local government must meet.

218. PLANNING, *supra* note 23, at 138.

219. *See id.* at 260.

existing municipalities.²²⁰ City planning is an important factor, however, in those cities where growth is most likely to be stimulated, and it will be an important factor in those new communities which are likely to spring up along the freeway route.²²¹ Typically, planning efforts in small cities are characterized by a lack of professionalism that causes even the best of planning efforts to be inadequate.²²² The involvement of city government administrators in the planning process tends to improve the efficiency of the planning process, but their involvement is likely to distort the policy goals served by the plan.²²³ Local political considerations such as improving the city tax base and responding to political expediency would result in planning that takes a very short range view.²²⁴

The general plan, at the city or county level, can be a valuable means of establishing constraints for the shape of development but the need for statewide guidance remains. If the values that planning should seek to protect were enumerated by statewide statute, the adequacy of a plan could be evaluated. Local governments would be less likely to zone in a manner contrary to the plan and thus developers, when making a development proposal to the local governing body, would be more likely to observe the criteria of the general plan in formulating their proposals. Currently, the quality of most general plans makes zoning deviation a likelihood because of plan obsolescence or inadequacy.

2. Jurisdictional Conflicts

A major difficulty attached to the structure of local planning lies in the multiplicity of local government units,²²⁵ including cities, counties, water districts, and irrigation districts,²²⁶ which should co-

220. See note 17 *supra*.

221. See text accompanying note 319 *infra*.

222. PLANNING, *supra* note 23, at 259. "The plans tend to be static, prescriptive, and locational. They also tend to ignore proposals for economic, social, visual, resource, fiscal, service, and jurisdictional matters." *Id.*

223. See *id.*

224. The pressure to produce new tax revenues without having to raise tax rates causes local government to favor development. See W. WHYTE, *supra* note 31, at 29. See text accompanying note 310 *infra*.

225. In 1968 there were 3811 special districts in California. State of California, Office of the Controller, Annual Report of Final Transactions Concerning Special Districts of California, 1968, at vii [hereinafter Special Districts' Financial Transactions].

226. Stanislaus County has 89 special districts, Merced County has 70, Fresno County has 162, Tulare County has 81, Kings County has 52, and Kern County has 134. *Id.* at vi-vii. These figures do not include irrigation districts. Stanislaus County has 6 irrigation districts, Merced County has 4, Fresno County has 12, Tulare County has 19, Kings County has 9, and Kern County has 2. State of California, Office of the Controller, Annual Report of Financial Transactions Concerning Irrigation Districts of California, 1967, at 8-9.

ordinate decisions affecting land use with some central planning authority.²²⁷ The California Legislature has addressed this problem through statutes designed to remove non-essential government units through reorganization,²²⁸ to restrict the formation of new units,²²⁹ and to require some local agency subordination in the areas of zoning and planning.²³⁰

A reduction of the number of local agencies can be approached through the complex machinery of the District Reorganization Act of 1965²³¹ which provides procedures for the dissolution, merger, or consolidation of special districts.²³² Reorganization applications are received and processed by the Local Agency Formation Commission (LAFCO) of each county.²³³ Unfortunately, the complexity of special district formation²³⁴ seems to be carried into the reorganization legislation. The combination of complexity with the lack of incentive for a special district to merge, consolidate, or dissolve itself out of existence results in a process that is not often used.²³⁵

LAFCO has the primary purpose and power to review and bar annexations and the formation of new cities and special districts within the county.²³⁶ Given the likelihood that new cities will be formed along the Westside freeway,²³⁷ LAFCO bodies on the Westside should play a vital role in determining the distribution of planning jurisdiction between new cities, existing counties, and regional planning agencies that might be formed.²³⁸ The formation of cities could subvert county or regional planning policies.²³⁹ On the Westside there is the danger that LAFCO bodies will not do an adequate job of avoiding an excessive number of municipalities because of the inter-county compe-

227. For a discussion of the needs for regional planning on the Westside see text accompanying notes 296-300 *infra*.

228. See text accompanying notes 231-35 *infra*.

229. See text accompanying notes 236-41 *infra*.

230. See text accompanying notes 242-52 *infra*.

231. CAL. GOV'T. CODE §§ 56000-550 (West 1966).

232. *Id.* §§ 56520-22 (consolidations); *id.* §§ 56530-40 (mergers); *id.* §§ 56500-13 (dissolutions).

233. *Id.* § 56250.

234. PLANNING, *supra* note 23, at 244.

235. In 1967-68 there were 3811 special districts reported in California and 55 districts dissolved through resolution or legislation, consolidation, merger, or conversion. Special Districts' Financial Transactions, *supra* note 225, at xi.

236. "Among the purposes of the local agency formation commission are the discouragement of urban sprawl and the encouragement of the orderly formation and development of local government agencies based upon local conditions and circumstances." CAL. GOV'T. CODE § 54774 (West 1966). See *id.* § 54790.

237. See note 17 *supra*.

238. See text accompanying notes 296-300 *infra*.

239. Consider the Santa Clara Valley experience. See text accompanying notes 273-76 *infra*.

tition in the area.²⁴⁰ Each LAFCO body represents the interests of the county it serves,²⁴¹ and it might be anticipated that there will be at least a lack of coordination among the Westside LAFCO bodies.

The Regulation of Local Agencies Law²⁴² was adopted to clarify the respective rights and responsibilities of special districts and local government with regard to city and county zoning and building ordinances.²⁴³ With certain exceptions for school districts,²⁴⁴ local agencies are bound by city or county zoning with rights of appeal once all administrative remedies have been exhausted.²⁴⁵ So long as there is no "[a]rbitrariness, capriciousness, error, or illegality in any decision, order, requirement, permit, or in a determination of an officer, department, board, or bureau of a county or city" the city or county decision will stand.²⁴⁶ Such compliance with a single zoning authority minimizes arbitrary deviations from local zoning and planning policies, so long as the city or county has the desire to seek compliance with its land use policies.²⁴⁷

Local agencies and local government need not, however, comply with the policies of the local general plan.²⁴⁸ Where lands have not yet been zoned, or are zoned favorably, and a city, county, or local agency intends to buy or sell real property or to construct an improvement, the project must be submitted to the local planning agency for review.²⁴⁹ Disapproval by the planning agency is advisory only, however, since the local entity which initiated the project or transaction may overrule the planning agency.²⁵⁰ Even the submission

240. See text accompanying note 307 *infra*.

241. The Commission is composed of five members: Two represent the county, two represent the cities in the county, and one represents the general public and is appointed by the other four members. CAL. GOV'T. CODE § 54780 (West 1966).

242. *Id.* §§ 53090-95.

243. In *Baldwin Park County Water Dist. v. County of Los Angeles*, 208 Cal. App. 2d 87, 25 Cal. Rptr. 167 (2d Dist. 1962), a county attempt to require a filing of special district water system plans with the county as a condition for construction was held to violate the broad powers delegated by the state to special water districts.

244. The governing board of a school district may, by a two-thirds vote, render a city or county zoning ordinance inapplicable to a proposed district use of property for classroom facilities. CAL. GOV'T. CODE § 53094 (West 1966).

245. *Id.* § 53093. Appeals may be made to the state Planning Advisory Committee or with the superior court of the county whose zoning ordinance is involved. There is also provision for appeals from the decisions of the Planning Advisory Committee. *Id.*

246. *Id.*

247. In practice this law has been largely disregarded. Because of the strong demands of competing interests, these sections have been compromised to a great extent. PLANNING, *supra* note 23, at 261.

248. CAL. GOV'T. CODE § 65402(b)-(c) (West 1966). For a discussion of local planning structure see text accompanying notes 209-24 *infra*.

249. CAL. GOV'T. CODE § 65402(b)-(c) (West 1966).

250. *Id.* § 65402(c).

requirement of these statutes is usually flaunted: For cities and counties it is "almost completely inoperative", and for local agencies such interjurisdictional submissions are "rarely observed."²⁵¹ This lack of respect for the general plan can defeat planning policies for entire tracts of land.²⁵²

3. Zoning

City and county governments can shape land use decisions through zoning ordinances.²⁵³ Local zoning can block new uses which threaten existing uses and reduce the overall productivity of land use in the zoned area.²⁵⁴ A manufacturing plant, with its attendant dangers of pollution, for example, can be kept out of an agricultural area where its presence would threaten the productivity of the area.²⁵⁵

Local zoning ordinances are exercises of local government's police power and are subject to some state limitations.²⁵⁶ Zoning is valid so long as it is reasonable as applied,²⁵⁷ is pursuant to a public purpose,²⁵⁸ and leaves the landowner a reasonable use for his land.²⁵⁹

251. PLANNING, *supra* note 23, at 245.

252. See text accompanying note 124 *supra* where non-compliance by a single property owner can destroy the open space value of an entire tract of land.

253. "The power to zone is not limited to the protection of established districts. On the contrary, zoning looks not only backward to protect districts already established but forward to aid in the development of new districts." *People v. Johnson*, 129 Cal. App. 2d 1, 6, 277 P.2d 45, 49 (4th Dist. 1954).

254. "If the nonconforming use does not amount to a nuisance, the courts have generally protected it against retroactive application of the use restriction where the discontinuance would result in a substantial loss to the landowner." S. SATO & A. VAN ALSTYNE, *STATE AND LOCAL GOVERNMENT LAW* 896 (1970). See *Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14 (1930).

255. "The theory in zoning is that each district is an appropriate area for the location of the uses which the zone plan permits in that area, and that the existence or entrance of other uses will tend to impair the development and stability of the area for the appropriate uses." *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 458-59, 274 P.2d 34, 43 (2d Dist. 1954).

256. "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." CAL. CONST. art. 11, § 7. Chapter 4 of Title 7 of the *California Government Code* outlines local procedures and powers to be utilized by California counties and general law cities. CAL. GOV'T. CODE §§ 65800-907 (West 1966). The statutes provide for review by the local planning agency for any new zoning or change in zoning, but the planning commission report may be approved, modified, or disapproved by the governing body. *Id.* §§ 65853-57. Chartered cities are excluded from the statutory provisions. *Id.* § 65803. "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." *Id.* § 65800.

257. Comment, *Control of Urban Sprawl or Securing Open Space: Regulation by Condemnation or by Ordinance?* 50 CALIF. L. REV. 483, 499 (1962).

258. The effects of the zoning plan as a whole, rather than the effects of restrictions on a single holding, are determinative in court evaluations of whether the restric-

Lands can be zoned, *inter alia*, for recreational²⁶⁰ or agricultural²⁶¹ purposes alone, and restrictions may be for aesthetic reasons,²⁶² although in some cases the regulation may be a taking which requires compensation²⁶³ and compliance with state eminent domain provisions.²⁶⁴ A serious weakness of zoning as a device for preserving land resources is its lack of permanence. Local government can change zoning to allow development whenever the local governing body chooses to shift its zoning policy.²⁶⁵ Land use will change, if unrestricted, in the direction of development because it is difficult to undevelop an area. Without this unfortunate inflexibility in one direction, it might be safe to allow local governments to easily change zoning restrictions. The inflexibility, however, makes necessary procedures which will freeze some lands in an undeveloped state.

Zoning which permits agricultural uses only can prevent developments of agricultural lands for residential, commercial, or industrial

tion in dispute promotes the public interest objectives of the police power. *Hamer v. Town of Ross*, 59 Cal. 2d 776, 788, 382 P.2d 375, 383, 31 Cal. Rptr. 335, 343 (1963).

259. Recent California legislation requires cities and counties to adopt an open space zoning ordinance by January 1, 1973. CAL. GOV'T. CODE § 65910 (West Supp. 1971). The legislature indicates some doubt about the validity of such ordinances, however, when it states that its act shall not authorize a city or county to "exercise its power to adopt, amend, or repeal an open-space zoning ordinance in a manner which will take or damage private property for public use without the payment of just compensation therefor." *Id.* § 65912. Zoning for open space uses or for flood water detention purposes, though noted as laudable public purposes, were held in New Jersey to be unconstitutional regulations which were compensable takings of lands because they denied the landowner any worthwhile benefits of land ownership. *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963). Courts are reluctant to allow zoning purely for the sake of aesthetics unless the restriction is based upon strong health and safety considerations. Norton, *Police Power, Planning, and Aesthetics*, 7 SANTA CLARA LAW. 171, 180 (1967).

260. See *McCarthy v. City of Manhattan Beach*, 41 Cal. 2d 879, 264 P.2d 932 (1953), *cert. denied*, 348 U.S. 817 (1954).

261. A zoning ordinance which limits land use in an area to agricultural uses must include provisions for granting variances where soil quality may mean that the zoning imposes undue hardship with respect to certain parcels. See *Bringle v. Board of Supervisors*, 54 Cal. 2d 86, 90, 351 P.2d 765, 768, 4 Cal. Rptr. 493, 496 (1960).

262. *Berman v. Parker*, 348 U.S. 26 (1954). See W. WHYTE, *supra* note 31, at 47-53.

263. See note 259 *supra*.

264. See CAL. CONST. art. 14, § 1.

265. CAL. GOV'T. CODE § 65857 (West 1966). "It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage." CAL. PUB. RES. CODE § 21000(g) (West Supp. 1971). One might consider the impact of the California Environmental Quality Act of 1970 [*Id.* § 21100] upon county zoning and planning, since counties are considered to be agencies of the state. See *Reclamation Dist. No. 1500 v. Superior Court*, 171 Cal. 672, 154 P. 845 (1916).

uses.²⁶⁶ Agricultural zoning, which can be applied only to land adaptable to agricultural uses,²⁶⁷ prevents the rural-urban mix that forces farmers to abandon their farming activities.²⁶⁸ When developers enter a rural area, land values, assessments, and tax burdens increase, the incompatibility of uses prevents certain farm activities,²⁶⁹ and the pressure upon farmers to take a profit and reduce his farming costs often results in sale of the land for development purposes.²⁷⁰ Agricultural zoning restrictions diminish the problem of incompatible uses and may serve to offset the tax burdens that make continuation of farming almost impossible once an area begins to develop.²⁷¹ Yet, while the California Legislature encourages local assessors to consider zoning restrictions which limit land value by limiting land uses, agricultural zoning tends to be such a temporary restriction that the full potential for development is often included in the assessed value of the land.²⁷²

The utility of agricultural zoning as a tool for preserving land resources is severely limited because its restrictions are so easily circumvented by landowners. In Santa Clara County, California, owners of farm lands voluntarily restricted their lands to agricultural uses by placing their lands in agricultural zones, with the result that assessments were reduced.²⁷³ While land hungry cities were unable to annex county lands to defeat the agricultural zoning without landowner consent,²⁷⁴ rising land values caused many owners to consent to annexations.²⁷⁵ Landowners benefited from reduced tax burdens re-

266. *Roney v. Board of Supervisors*, 138 Cal. App. 2d 740, 292 P.2d 529 (1st Dist. 1956).

267. Heyman, *Open Space And The Police Power*, in *OPEN SPACE AND THE LAW* 5, 26 (Herring, ed., Institute of Governmental Studies, University of California at Berkeley, 1965). See note 259 *supra*.

268. Heyman, *supra* note 267, at 27.

269. A use which constitutes a nuisance to surrounding uses may be zoned out of existence, even though the offending use was there first. *Beverly Oil Co. v. City of Los Angeles*, 40 Cal. 2d 552, 254 P.2d 865 (1953); *cf.* *Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14 (1930) where retroactive application of zoning was unreasonable and arbitrary in destroying an established sanatorium business, and hence invalid.

270. PLANNING, *supra* note 23, at 252; W. WHYTE, *supra* note 31, at 23.

271. W. WHYTE, *supra* note 31, at 23. See text accompanying notes 286-95 *infra*, for a complete discussion of tax policies.

272. CAL. REV. & TAX CODE § 402.5 (West 1970). The code required in 1957 that assessors value land in terms of the use permitted by zoning, but the Attorney General of California concluded that the assessor could assess as before because the zoning of land surrounded by subdivisions will foreseeably be changed. 30 OP. CAL. ATT'Y. GEN. 247 (1957); Comment, *supra* note 122, at 642.

273. W. WHYTE, *supra* note 31, at 48-49.

274. CAL. GOV'T. CODE § 35009 (West 1968).

275. W. WHYTE, *supra* note 31, at 49. If a farm was far away from the annexing city, the city boundaries were simply gerrymandered to meet the farm, sometimes snaking out a strip along several miles of road to do it. *Id.* It should be noted that LAFCO, as

sulting from zoning restrictions and yet they could remove the restrictions with minimal effort.²⁷⁶ In other California counties agricultural zoning is even easier to circumvent because such zoning is mainly a matter of nomenclature designed to impress the assessor.²⁷⁷ Certainly if local government has the motive of protecting land resources when embarking upon a program of agricultural zoning, restrictions will not be easily removed, but too often the zoning is changed upon request.²⁷⁸

Greenbelting, a form of agricultural zoning, restricts lands to agricultural uses for a specified term.²⁷⁹ The English Town and Country Act of 1947²⁸⁰ gave the British government broad powers to restrict development in a belt around London in order to contain the city and preserve open lands.²⁸¹ The English experience, with its moderate success,²⁸² has prompted similar American programs, usually in the form of large lot zoning.²⁸³ The size of land units is kept at a large minimum so that housing developments are discouraged and farming will be the only profitable use of the land. The result has usually been an inefficient use of the land and scattered development.²⁸⁴ Greenbelting in California seems destined to disuse unless stronger restrictions can be imposed upon landowners and strong motivations are provided to local governments to make removal of restrictions contrary to the best immediate interests of the local jurisdiction.²⁸⁵

4. Land Tax Policies

Property taxes, based upon land values, are assessed primarily by

well as statutory annexation limitations, now restrict this kind of activity. See text accompanying note 236 *supra*.

276. W. WHYTE, *supra* note 31, at 50.

277. *Id.* In counties other than Santa Clara County, which adopted a master plan before December 31, 1954, land three miles or more from a city when zoned agricultural shall not, while so zoned, be annexed to the city without the consent of two-thirds of the affected landowners. CAL. GOV'T. CODE § 35009 (West 1968). Thus annexations are even easier than in Santa Clara County where unanimous consent is necessary. *Id.* § 35009.

278. W. WHYTE, *supra* note 31, at 50.

279. The Santa Clara County example closely resembles greenbelting. See text accompanying notes 273-76 *supra*. In Merced County, California, one of the counties with territory on the Westside, a landowner can voluntarily greenbelt his land for a period of 10 years. MERCED COUNTY ORDINANCE No. 309 § 5.00 (1959).

280. Town and Country Planning Act of 1947, 10 & 11 Geo. 6, c. 51. See generally D. MANDELKER, GREEN BELTS AND URBAN GROWTH (1962).

281. W. WHYTE, *supra* note 31, at 152-56. See D. MANDELKER, *supra* note 280.

282. In England, much land was saved but the land is neither used by nor accessible to most Londoners. W. WHYTE, *supra* note 31, at 156.

283. *Id.* at 37.

284. *Id.* at 17.

285. California greenbelting lacks permanence even when there is a specified term. Comment, *supra* note 122, at 641. See note 279 *supra*.

local governments.²⁸⁶ Taxes have been stressed as a primary factor in the decisions of farmers to sell their lands to developers.²⁸⁷ Tax policy has potential utility as a means for shaping development patterns because taxes are such a vital factor in development decisions.²⁸⁸ While a reduction in tax pressures, however, may help the farmer to continue his agricultural activity, it also aids land speculators who hold land investments until they can sell for a high price.²⁸⁹ Thus a state imposed limitation on local assessments, if constitutional,²⁹⁰ may give its greatest benefits to speculators with the cost in lost tax revenues absorbed by the public. On the other hand, unless such a limitation is imposed by the state, assessments will continue to reflect the pressure on local assessors to value lands at true value when the lands can be developed without great difficulty.²⁹¹

A solution to speculator abuse in a program which limits assessments of agricultural lands lies in recapturing the taxes saved by the landowner if his land is put to a non-agricultural, developed use. Several states have used the recapture device to make abuses of lower taxes less profitable.²⁹² Recapture provisions can effectively block development by making the decision too costly, but the effectiveness of the tax policy tool in shaping the quality of development that does occur may be harmful.²⁹³ Unless there are exceptions to penalties and recapture provisions for socially desirable land developments, as distinguished from wasteful developments, a recapture policy will discourage efficient as well as inefficient uses of land resources.²⁹⁴ Gov-

286. Revenues from property taxes collected by Merced County, one of the Westside counties, amounted to \$7,424,164, as compared to \$491,445, from other taxes, for the fiscal year 1967-68. State of California, Office of The Controller, Annual Report of Financial Transactions Concerning Counties of California, 1968, at 2. Revenues from property taxes collected by Kern County, another Westside county, amounted to \$29,379,719 while \$2,612,701 was attributed to other taxes for the fiscal year 1967-68. *Id.*

287. See text accompanying notes 149-50, 195 & 271-72 *supra*.

288. See W. WHYTE, *supra* note 31, at 114-15; Comment, *supra* note 122, at 651.

289. W. WHYTE, *supra* note 31, at 115. It is argued that even farmers will want to sell their lands when the price is high enough. *Id.* 116.

290. The constitutions of almost all states contain provisions requiring that real property taxes be uniform. California only allows exemptions which are specifically authorized in the State Constitution. Comment, *supra* note 122, at 649. See CAL. CONST., art. 12, § 1.

291. W. WHYTE, *supra* note 31, at 103.

292. New Jersey had a 2 year recapture while Oregon and Pennsylvania had 5 year recaptures and Texas a 3 year recapture, as of 1965. *Id.* 114. Massachusetts considered in 1959 a percentage recapture of 90 percent to be reduced to 50 percent after six years. Comment, *supra* note 122, at 651. California has no roll back provisions but does provide for penalties when scenic easements or Williamson Act restrictions are terminated. See text accompanying notes 159 & 202 *supra*.

293. Comment, *supra* note 122, at 651.

294. This is, in effect, a distortion of the economic decision making process equal to the subsidies of the federal and state highway and water projects on the Westside.

ernmental discretion to waive penalties and recapture provisions opens the door to abuse.²⁹⁵ Introducing subjective policy elements into a tax program further complicates its application and reduces its effectiveness. If each development is to be subjectively evaluated in terms of its social utility, such evaluation should be made in the sphere of zoning where local government budgets are less directly affected. A tax policy approach with high penalties or an excessive recapture provision may also cause landowners to avoid voluntary land use restrictions because the burden could exceed the tax benefits of limited assessments. By eliminating the abuses, the state might find that it had eliminated the feasibility of voluntary use restrictions, even voluntary and temporary restrictions like greenbelting, Williamson Act contracts, or easements for a term. The recapture remedy to abuses seems too effective. Thus, tax policy, although at the heart of development problems, is not adaptable as an effective tool to control and shape development.

III

PROPOSALS FOR CONTROLLING LAND USE

Deficiencies in state and local programs for controlling the use of land can be corrected through state legislation. Greater state controls over structural and policy factors at the local level, along with state participation in the funding of control programs, can insure a reflection of statewide concern in local actions to preserve land resources.

A. A Regional Agency

The political configuration of the counties of the San Joaquin Valley and the special problems of the Westside make the formation of a regional planning agency, composed of the Westside portions of each county, a desirable structural solution.²⁹⁶ A regional planning

See pt. I, *B supra*: The added costs of recaptured taxes must affect the economic feasibility of any development plan.

295. The discretion to waive penalties or recaptured taxes, if vested in local government, can be subject to purely local interests that favor all development, whether it is wasteful or not. See text accompanying note 310 *infra*.

296. For systematic regional planning to be initiated, however, vigorous political support and action is necessary, and there is little current evidence that this will be forthcoming. . . . Indeed, whatever stimulus for regional planning exists appears to be coming from outside the region from professional groups, including educators, planners, and conservationists—groups whose political strength rests less upon their numerical membership than upon their persuasiveness to sell a politically acceptable program to the people.

Engelbert, *The Politics of Planning the Western San Joaquin Valley*, WATER RESOURCES REPORT No. 11, *supra* note 4, at 109. The State Office of Planning advocates creating regional agencies throughout the state to exercise eminent domain powers in open space programs. PLANNING, *supra* note 23, at 271-72.

body, vested with the power to plan, to zone, and to restrict land use through contracts or easements can reduce the problems of intra-county competition.²⁹⁷ Competition among and within the political subdivisions of a region can disrupt regionalism,²⁹⁸ leading to planning neglect and decisions adverse to efficient resource use. Where the competitor holds the power of population but may lose its political and economic supremacy to a developing part of the county, actions and decisions necessary for orderly and efficient development are not likely to be forthcoming.²⁹⁹ Eastside communities have little incentive to provide the foresight in planning, zoning, and other actions that will effectively shift the center of economic activity of the San Joaquin Valley to the Westside.³⁰⁰

Existing general state legislation for the formation of regional planning bodies meets neither the jurisdictional nor the power needs of a region like the Westside.³⁰¹ Only California's Area Planning Law,³⁰² enacted primarily for use in urban areas,³⁰³ might be adaptable for use on the Westside. Powers of the regional agency would be determined, under the Law, by the participating jurisdictions through an agreement.³⁰⁴ Because this agreement is among cooperating counties as well as cities,³⁰⁵ more than one county can be included. The Law also permits parts of counties to be included in the regional agency's boundaries.³⁰⁶

297. Eastside communities look upon the Westside as an economic competitor. The Eastside is interested in preserving the status quo. *IMPACT OF WATER*, *supra* note 15, at 45.

298. Regional unity is threatened by the issue of which part of the region is to benefit from resource development. *Id.* at 59.

299. See text accompanying notes 7-8 *supra*.

300. The central elements of control for the six Westside counties are toward the east and, to the extent that competition from the Eastside can constrain or hamper Westside development, difficult questions of government jurisdiction are raised. *IMPACT OF WATER*, *supra* note 15, at 108. A partitioning of counties has been suggested for the Westside. *Id.* at 108-09.

301. The Regional Planning Law provides an agency with advisory powers only and does not permit divided counties. See CAL. GOV'T. CODE §§ 65060-69.5, 65601 (West 1966). The District Planning Law provides for a regional body empowered to make a general plan and coordinate the efforts of planning agencies within the region, but only whole counties may join. *Id.* §§ 66241(a), (c), (d), 66105. See *Id.* §§ 66100-390.

302. *Id.* §§ 65600-04.

303. "Area planning as presently established and delineated often operates as an extension of the county planning function, with the focus on proposals for unincorporated areas within the 'sphere of influence' of participating cities." *PLANNING*, *supra* note 23, at 260.

304. CAL. GOV'T. CODE § 65604 (West 1966). See Joint Exercise of Powers Act, *id.* §§ 6500-83. To date, only the Area Planning and Joint Exercise Acts have been utilized in California. *PLANNING*, *supra* note 23, at 260.

305. CAL. GOV'T. CODE § 65601 (West 1966).

306. *Id.* § 65600.

The realization of a regional planning agency under the Area Planning Law is unlikely, however, because of the necessity of agreement by all cities and counties involved.

Composing the Western San Joaquin Valley are six counties and several score of incorporated areas and special districts. To formulate an effective regional plan will require the cooperation and participation of the governing bodies of these local units. Most of the governmental jurisdictions, however, will be jealously guarding their rights of local self-determination as has already been reflected in discussions which have taken place over the past two years among elected representatives from these jurisdictions. Not only will a regional plan encounter much opposition from local governing bodies, but the specific proposals will inevitably become enmeshed in a conflict between county, city, and special districts competing for various resources.³⁰⁷

A single non-participating county could seriously weaken the effectiveness of any regional body.³⁰⁸ There is a lack of necessary stimulus for formation under all existing regional formation statutes and even if formation was achieved, problems regarding inter-governmental relations, powers, and relationships with existing state and federal projects remain to be solved.³⁰⁹ The powers of a regional planning agency are determinative of its success. Too little power can allow counties and cities to make decisions contrary to regional policy, thereby defeating it.³¹⁰

The California Legislature should create a regional planning agency to protect land resources on the Westside.³¹¹ This agency can be

307. Engelbert, *supra* note 296, at 110-11.

308. The benefits of resource exploitation should be shared equally through the region. W. WHYTE, *supra* note 31, at 28. A non-participating county might open itself fully to exploitation by developers, thereby forcing the rest of the region to compete for a share of the benefits of development by lowering its standards.

309. PLANNING, *supra* note 23, at 260.

310. Even with adequate powers, a regional planning agency still has the problem of allocating the benefits of development to the many tax units within the region. So long as there is a multiplicity of tax units (cities, counties, and special districts) there will be competition for development that adds to the local tax base. W. WHYTE, *supra* note 31, at 31.

311. The political composition of a regional agency must reflect more than purely local interests. The agency's governing body should include some members representing the interests of the entire state. The governor, for example might appoint some members of the governing body. Yet if the agency is to have any significant powers, democratic institutions may be threatened by having non-elected members of the governing body. This problem was not faced, however, in a recent proposal for regional planning in the San Francisco Bay Area, where the governing body included single representatives from each of three federal agencies, three state agencies, a regional water quality district, and a regional air pollution control district, as well as nine county representatives, five city representatives, and seven representatives of the public. S.B. 1400, § 21200, Cal. Reg. Sess. (1970).

imposed upon the Westside region in two ways. The legislature can, by special law, designate the boundaries and powers of a regional agency on the Westside alone, neglecting the regional needs of other areas of the state.³¹² Alternatively, the legislature may, by general law, divide the entire State of California into regions, including the Westside region, and provide powers necessary to deal with land use problems.³¹³ Similar regional bodies have been created throughout California to preserve air³¹⁴ and water³¹⁵ resources, with no necessity of local approval.³¹⁶

The jurisdiction of the proposed regional agency should be defined in terms of the land resources it must protect.³¹⁷ To avoid conflict, as well as to temper the damage of adding another level of government, the powers of the proposed regional body should pre-empt local planning and zoning powers to a great degree.³¹⁸ Local units would continue to plan and zone in urbanized areas so that more densely populated areas will develop under the influence of local interests.³¹⁹ Since all land use decisions in agricultural or undeveloped

312. At Lake Tahoe, California, a regional planning agency was created by the state and given substantial powers, through a special law of the legislature. CAL. GOV'T. CODE §§ 67000-130 (West Supp. 1971). Unlike Tahoe, however, the Westside has no striking resource to protect, to which people all over the state have become attached. This reduces the political impetus toward regional planning similar to that adopted at Tahoe. Engelbert, *supra* note 296, at 111.

313. In 1970 the California Legislature failed to pass a bill which would create regional planning councils to formulate environmental quality plans throughout the state. A.B. 2345, Cal. Reg. Sess. (1970). For a discussion of powers this general law agency or the special law agency should have, see text accompanying notes 321-27 *infra*.

314. CAL. HEALTH & SAFETY CODE §§ 39270-75 (West Supp. 1971). See Comment, *California Legislation on Air Contaminant Emissions from Stationary Sources*, 1 ECOLOGY L.Q. 203 (1971).

315. CAL. WATER CODE §§ 13000-908 (West Supp. 1971). See Comment, *Water Quality Control in California: Citizen Participation in the Administrative Process*, 1 ECOLOGY L.Q. 400 (1971).

316. See *Santa Barbara County Water Agency v. All Persons*, 47 Cal. 2d 699, 306 P.2d 875 (1957) where the creation of a water agency by the state legislature was sustained, subject to a test of whether the legislative determination of benefits is arbitrary, capricious, or without factual basis. Local approval was unnecessary so long as the created district is created for a state purpose. *Id.* Preserving land resources for all Californians certainly is a state purpose. See CAL. CONST. art. 28.

317. The San Francisco Bay Conservation And Development Commission (BCDC) jurisdiction is defined in terms of the resources to be protected. CAL. GOV'T. CODE § 66610 (West 1966). County splitting presents no problems because, by analogy, counties can be split in the formation of various types of special districts. Irrigation districts, for example, can include lands from more than one county. See CAL. WATER CODE § 20800 (West Supp. 1971). BCDC includes portions of more than one county. CAL. GOV'T. CODE § 66610 (West 1966). The Tahoe Regional Agency includes parts of two California counties. *Id.* § 67021.

318. See text accompanying notes 225-26 *supra*.

319. Charter cities may be exempt from state legislation that denies them the exercise of zoning powers. See text accompanying note 332-37 *infra*.

areas would be subject to review by the regional body, initial formation of cities would be determined on a regional basis.³²⁰

B. State Zoning

The proposed regional planning body should be given planning and zoning powers that are currently exclusive to local cities and counties.³²¹ The proposed state-created regional planning body,³²² or in its absence, a statewide planning agency, should impose statewide land use policies upon local land use patterns through zoning and planning. The powers of the currently existing State Office of Planning and Research typify the policy of the state to advise local planners on request but to actually require very little in the way of results.³²³ California needs a statewide land use policy³²⁴ created by the legislature and oriented toward preserving undeveloped and agricultural land resources.³²⁵ Local or regional planning performance must be evaluated in terms of a statewide policy. If local or regional planning and zoning fail to meet the state criteria, the state must be empowered to zone and plan within the local jurisdiction.

The proposed shift of zoning power and policy to the proposed regional agency or to the state itself would require new legislation at the state level. State zoning would interfere with local police powers,

320. This power must be reconciled with LAFCO jurisdiction in each county. Otherwise, the approval of both LAFCO and the regional planning body would be necessary. See text accompanying notes 236-41 *supra*.

321. For discussions of current planning and zoning see text accompanying notes 209-24 & 253-85 *supra*.

322. See text accompanying notes 296-320 *supra* for a discussion of the proposed regional planning body.

323. Indeed the State Office of Planning declared that "[p]lanning law at present does not contain a statement of the general purposes or goals of the planning function. Such a statement would be useful not only for the purposes of interpretation by lawyers, judges, administrators, and planners, but would also provide a frame of reference for future amendment." PLANNING, *supra* note 23, at 258. A 1970 measure abolished the State Office of Planning, creating a State Office of Planning and Research to develop a statewide plan for resources development and a state land program. CAL. GOV'T. CODE §§ 65037, 65041 (West Supp. 1971).

Statewide zoning and planning would be preferable to county zoning and planning because of the broad spectrum of public interests the state represents. Regional planning and zoning, subject to state criteria, would produce the most desirable results because greater expertise would develop concerning regional needs and characteristics.

324. "The lack of deliberate, comprehensive policy commits California to reacting to growth patterns it does not consciously control and, in effect, becoming a party to urban and economic development patterns which have emerged out of a policy vacuum." PLANNING, *supra* note 23, at 105.

325. The State Office of Planning defined resources goals for California as (1) achieving an optimum balance between economic and social interests; (2) gaining a wide distribution of resource benefits; and (3) making the fullest use of resources without denying future generations the benefits of their use and enjoyment. *Id.* at 103.

but the interference would not violate the California Constitution, largely because of the significant statewide interest in preserving land resources.³²⁶ Zoning, as an exercise of the local police power granted by the state constitution,³²⁷ is subject to the general laws of the state.³²⁸ Therefore, any interference with local zoning power must be done by general law rather than by special legislation that singles out the Westside.³²⁹ The legislature has already enacted general laws defining certain zoning procedures which are binding upon California general law cities and counties,³³⁰ as well as California charter counties.³³¹ There is some doubt, however, in state pre-emption of the zoning powers of California Charter cities.³³² "Municipal affairs" are the exclusive domain of charter cities,³³³ and the subject of state legislation is binding upon a charter city only if it deals with a matter of statewide concern, beyond the exclusive control of the city.³³⁴ The

326. Notwithstanding any other provision of this constitution, the Legislature may by law define open space lands and provide that when such lands are subject to enforceable restriction, as specified by the Legislature, to the uses thereof solely for recreation, for the enjoyment of scenic beauty, for the use of natural resources, or for the production of food and fiber, such lands shall be valued for assessment purposes on such basis as the Legislature shall determine to be consistent with such restriction and use.

CAL. CONST. art. 28, § 2.

327. "County zoning regulations are a manifestation of the local police power conferred by article XI, section 11 [now article 11, section 7] of the State Constitution, not an exercise of authority delegated by statute." *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 417, 79 Cal. Rptr. 872, 876-77 (3d Dist. 1969).

328. "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." CAL. CONST. art. 11, § 7.

329. *Id.* See *id.* art. 1, § 11.

330. CAL. GOV'T. CODE § 65800 (West Supp. 1971). "It is the purpose of this chapter to provide for the adoption and administration of zoning laws, ordinances, rules and regulations by counties and cities, as well as to implement such general plan as may be in effect in any such county or city." *Id.* Section 65854, for example, provides for a public hearing on zoning ordinances or amendments. *Id.* § 65854 (West 1966).

331. In *Kappadahl v. Alcan Pacific Co.*, 222 Cal. App. 2d 626, 35 Cal. Rptr. 354 (1st Dist. 1963) a charter county was held to be bound by the state zoning statutes in granting zoning variances.

332. The legislature has exempted charter cities from coverage by the state zoning statutes. CAL. GOV'T. CODE § 65803 (West 1966). But urban areas are not involved in the proposed regional agency. See note 294 *supra* and accompanying text.

333. "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs" CAL. CONST. art. 11, § 5.

334. Legislative intent is extremely important in such disputes. Since municipal affairs are not defined in the constitution, the court must decide, under the facts of each case, whether the matter is one of statewide concern or municipal concern. "In exercising the judicial function of deciding whether a matter is a municipal affair or of statewide concern, the courts will of course give great weight to the purpose of the Legislature in enacting general laws which disclose an intent to pre-empt the field to the exclusion of local regulation." *Bishop v. City of San Jose*, 1 Cal. 3d 56, 63, 460 P.2d 137, 141, 81 Cal. Rptr. 465, 469 (1969). Of course, the legislative statement is not conclusive. *Id.*

status of zoning as a municipal affair is unclear. Where local zoning ordinances affect governmental projects, such as school construction, where the state has occupied the field, the local zoning ordinance is ineffective.³³⁵ In one case state zoning procedures were held inapplicable to a charter city,³³⁶ but this result is explained by the purely local interest in zoning procedures.³³⁷ Should the California Legislature act to occupy the zoning field, either by placing the zoning power in a regional or state agency, or by setting statewide zoning and planning performance standards, the statute should be valid as a necessary response to a legitimate statewide concern for endangered land resources.

CONCLUSION

The high degree of local discretion in using development control devices to meet the environmental challenges posed by development may be fatal to efforts to preserve our limited land resources. The lure of the tax base is too strong to allow more than a sporadic local attempt to save the land. The state, less concerned with the tax base aspect of location, must play a greater role in imposing the interests of all Californians upon local jurisdictions, and in acting to see that land resources are used efficiently. The potential problems of the Westside, stimulated by government projects, illustrate the problems state neglect can cause and the need for state action.

Current state laws, including the Subdivision Laws, the Open Space Act of 1959, the Williamson Act, and the Easements Act, provide a means for an effective local program to preserve land resources. These state laws complement other local powers, including planning, zoning, and taxation, which can also be utilized as effective local deterrents to land resource abuse. Both existing state laws and local powers depend, however, upon the discretion of local government if they are to be utilized to serve environmental interests. The state must remove this discretion by setting land use criteria that will serve as performance standards for evaluating local efforts. The state must create regional agencies to exercise these powers so that the harms of selfish local interests are minimized. The state must plan and zone in the place of local or regional bodies when they fail to meet state performance criteria, so that open space values are preserved for the future.

Jerald W. Hunter

335. *Town of Atherton v. Superior Court*, 159 Cal. App. 2d 417, 324 P.2d 328 (1st Dist. 1958).

336. *Brougner v. Board of Public Works*, 205 Cal. 426, 271 P. 487 (1928).

337. The state statute was found to have no application in so far as it prescribed procedures. *Id.*