

When Planning Fails: Protecting the Neighborhood in Vested Development Rights Disputes

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I. INTRODUCTION

In recent years, the California courts and Legislature have expressed increasing concern with local planning. This renewed emphasis on planning has generated new questions in the area of vested rights. The vested rights rule¹ protects developers from government attempts to revoke prior express or inferred permission to proceed with a particular development project.²

The California Supreme Court in *Avco Community Developers, Inc., v. South Coast Regional Commission*³ set forth the basic test:

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1. See generally, Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 SW. U. L. REV. 545 (1979) [hereinafter Hagman, *Estoppel & Vesting*]; Hagman, *The Vesting Issue: The Rights of Fetal Development Vis-a-Vis the Abortions of Public Whimsey*, 7 ENVTL L. 519 (1977) [hereinafter Hagman, *The Vesting Issue*]; Cunningham and Kremer, *Vested Rights, Estoppel and the Land Development Process*, 29 HASTINGS L.J. 623 (1978) [hereinafter Cunningham & Kremer].

2. As the vested rights rule currently operates, a municipality will be precluded, or "estopped" from challenging the validity of the initial development permission when it makes a representation, such as in issuing a building permit, which the permittee then relies on to its detriment. However, unlike the doctrine of equitable estoppel, this process normally looks only at the harm to the developer, not the countervailing public interest. As a result, it is also referred to as "zoning estoppel" to distinguish it from the traditional rule of equity. See Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63. See also *infra* notes 10-23 and accompanying text.

3. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977). There the county, at the request of the developer, had zoned a large tract of land as a "Planned Community Development" containing a stated number of residential units. The developer later entered into an agreement to sell and dedicate portions of the land to the county for use as a park. Acting on various governmental

[I]f a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit.⁴

State and municipal authorities often view the current rule as disrupting their best efforts to regulate land use by permitting a developer to proceed with a project that does not conform to legislative policy. Developers are often equally distrustful of the rule because, in their opinion, it does not always protect what they believe to be their legitimate expectations. They see the rule as overly rigid and not in tune with the realities of modern financing and construction practices.

In this article, we explore the issue of vested rights from a third point of view, that of the residents of the neighborhood in which the project is to be built. Often, residents involved in the community planning process become extraordinarily outraged when the local government approves projects which are inconsistent with the residents' planning efforts. Despite the emerging view that land use decisions should be consistent with adopted general plans, developers may be able to successfully assert vested rights to complete their projects even in these circumstances. How to protect the community while recognizing the legitimate rights of the developer is the focus of this article.

II.

VESTED DEVELOPMENT RIGHTS AND THE NEIGHBORHOOD

Typically, in cases involving developers' claims of vested rights, the city or county realizes at some point either that it made an "administrative error"⁵ by approving a development which was not in accordance with existing law or that its approval was contrary to good planning practice. In the latter case, the city or county sometimes seeks to correct its "policy error"⁶ by changing the applicable

approvals, the developer commenced grading and installing subdivision improvements and incurred other substantial liabilities prior to the effective date of the California Coastal Zone Conservation Act, which required a permit from the Coastal Zone Commission for any construction. The developer applied for and was denied an exemption under the Act and thereafter unsuccessfully sought a writ of mandate to compel approval of its application. The California Supreme Court held that no vested rights could be asserted since the developer had not obtained a building permit.

4. *Id.* at 791, 553 P.2d at 550, 132 Cal. Rptr. at 389.

5. *See infra* notes 35-47 and accompanying text.

6. *See infra* notes 25-34 and accompanying text.

planning and land use regulations to forbid that type of development. In either case, when the city or county then attempts to revoke its permission, the developer will likely insist that, notwithstanding the government's "mistake," it has acquired constitutionally protected "property" rights which must be honored.

The neighborhood enters the dispute when aggrieved residents organize to stop the project. Opposition to the project usually focuses on the developer, who is perceived as a threat to the area's quality of life, rather than on the local government that approved the project. However, in many cases the developer may be just as much a victim of the government's mistake as the neighborhood.

If and when the dispute reaches the courts, the application of the current rule leads to an all-or-nothing result. If the developer cannot meet all the elements of the *Avco* test, it may lose a considerable investment.⁷ On the other hand, if vested rights are established and the developer is allowed to proceed, the neighborhood will end up bearing the brunt of the impact from the development.

Recently, a new set of vested rights issues have emerged which must be addressed. These issues have arisen because of the establishment, through combined legislative and judicial action, of the requirement that localities adopt adequate plans and that land use regulations conform to those plans.⁸ When the government issues a permit pursuant to regulations which are not supported by an adequate plan or which do not conform to the new planning effort, it commits what can be termed a "legislative error."⁹

The vested rights issue in this instance has been particularly difficult for courts to resolve. The developer acts in reliance upon what it believes to be a valid permit issued pursuant to existing regulations. The citizens, particularly if they have participated in the planning process, cannot see how a permit issued in violation of the plan could be valid.

Thus far, the Courts of Appeal have split dramatically over the question of whether local residents have the right to challenge particular projects as being inconsistent with the community's land use plan and, if so, what relief they should receive. This developing

7. In *Avco* the developer had spent over two million dollars on the project. See *supra* note 3. In *Spindler Realty Corp. v. Monning*, 243 Cal. App. 2d 255, 53 Cal. Rptr. 7, cert. denied, 385 U.S. 975 (1966) the developer spent several hundred thousand dollars for plans and grading operations but was denied a vested right because he had not obtained a building permit.

8. See *infra* notes 57-77 and accompanying text.

9. See *infra* notes 48-56 and accompanying text.

area of the law awaits guidance from the California Supreme Court, to diminish the uncertainty which developers face, and to respond to a growing sense of neighborhood frustration.

In light of these conflicts, we propose that courts begin to take a community based approach to vested development rights disputes. In short, consistent with the legislative and judicial trend, localities should be required to engage in more and better "planning." At its most basic level, that connotes a process of evaluating and attempting to reconcile competing interests over the distribution and use of society's scarce resources, be they air, water or urban land, rather than merely recognizing winners and losers.

We will argue in this article that if the government errs and the neighborhood would be damaged by allowing the project to be completed, the cost of that error should be borne by the city as a whole and not just by the neighborhood adjoining the project. This could mean either that: (1) the developer should be compensated rather than being allowed to complete the project; or (2) that the neighborhood should receive relief in the form of other mitigation measures.

It is not our desire to open the public coffers to neighborhood action, but rather to find an effective enforcement mechanism consistent with the present trend in the law. If rights are found to lie in the neighborhood in vested rights cases, governmental entities will have to be more careful in ensuring that their actions conform with their plans and that their plans are up to date.

III.

SOME BASIC CONCEPTS OF VESTED DEVELOPMENT RIGHTS

Generally speaking, a property owner's mere expectation as to the future uses to which his or her property may be put are subject to the government's police power to regulate land use in furtherance of the public health, safety and general welfare.¹⁰ Thus, a property owner has no right to expect that any particular use or uses permit-

10. In California, the legal basis for land use regulation lies ultimately in the local legislative body's exercise of police power granted it by the state Constitution: "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. XI, § 7. Zoning ordinances which are reasonable in object and not arbitrary in operation constitute a justifiable exercise of the police power. *Livingston Rock & Gravel Co. v. Los Angeles*, 43 Cal. 2d 121, 126, 272 P.2d 4, 8 (1954); *Miller v. Board of Public Works*, 195 Cal. 477, 487, 234 P. 381, 384 (1925), *cert. dismissed*, 273 U.S. 781 (1926); *Paramount Rock Co. v. County of San Diego*, 180 Cal. App. 2d 217, 4 Cal. Rptr. 317 (1960).

ted by existing zoning or other land use regulations (or lack thereof) will continue to be allowed indefinitely.¹¹ If the governing law is changed, then the property will be subject to the new conditions. If, however, the owner is currently making a particular use of the property which would be rendered unlawful under the new ordinance, he or she will normally be permitted to continue the operation as a "nonconforming use"¹² (so long as it is not a public nuisance¹³). The property owner may be said to have acquired a vested right in the use which cannot be taken away without the payment of just compensation.¹⁴ The owner may, however, be prohibited from expanding the use¹⁵ and the use may even be terminated after an appropriate amortization period.¹⁶

Whether to allow a developer to complete a project as planned becomes an important issue when it is apparent that the project does not comply with, for example, the general plan, existing zoning, or current building codes. The property owner can argue that the project has proceeded so far that he or she already has a "vested right" in the project, and therefore, the project should be treated as if it were already an existing nonconforming use.¹⁷ Or, the owner

11. *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 515-16, 542 P.2d 237, 125 Cal. Rptr. 365 (1975); *Oceanic California, Inc. v. City of San Jose*, 497 F. Supp. 962 (N.D. Cal. 1980); *Morse v. County of San Luis Obispo*, 247 Cal. App. 2d 600, 602, 55 Cal. Rptr. 710, 712 (1967); *Anderson v. City Council*, 229 Cal. App. 2d 79, 88-90, 40 Cal. Rptr. 41, 46-48 (1964).

12. *Livingston Rock & Gravel Co. v. Los Angeles*, 43 Cal. 2d 121, 127, 272 P.2d 4, 8 (1954) ("... a provision which exempts existing nonconforming uses is ordinarily included in rezoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses."); *McCaslin v. Monterey Park*, 163 Cal. App. 2d 339, 329 P.2d 522 (1958); *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 274 P.2d 34 (1954).

13. *Livingston Rock & Gravel Co. v. Los Angeles*, 43 Cal. 2d 121, 128, 272 P.2d 4, 9 (1954); *Jones v. Los Angeles*, 211 Cal. 304, 259 P. 14 (1930); *McCaslin v. Monterey Park*, 163 Cal. App. 2d 339, 347, 329 P.2d 522, 529 (1958).

14. *Jones v. Los Angeles*, 211 Cal. 304, 259 P.2d 14 (1930) (a retroactive ordinance which causes substantial injury to a business which is not a nuisance is unreasonable, arbitrary and an unjustified exercise of the police power).

15. *County of San Diego v. McClurken*, 37 Cal. 2d 683, 687, 234 P.2d 972, 975 (1951) ("Given the objective of zoning to eliminate nonconforming uses, courts throughout the country generally follow a strict policy against their extension or enlargement."); *Rehfield v. San Francisco*, 218 Cal. 83, 21 P.2d 419 (1933); *Paramount Rock Co. v. County of San Diego*, 180 Cal. App. 2d 217, 4 Cal. Rptr. 317 (1960).

16. *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 274 P.2d 34 (1954).

17. *See, e.g., Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, 327 P.2d 10 (1958); *Griffin v. County of Marin*, 157 Cal. App. 2d 507, 321 P.2d 148 (1958). The use of the term "vested right" to describe this outcome is somewhat misleading since it implies that the court is protecting a right inherent in the ownership of the property, whereas in fact this so-called right is simply the end result of a judicial process undertaken to determine whether, under the circumstances, it would be unfair to prevent the

could argue that the government should be estopped from asserting the invalidity of the project because the owner relied to his or her detriment on some act or representation of the government (such as granting a building permit) in commencing the project, and that it would be unfair to prevent its completion.¹⁸ The doctrine of vested development rights finds support in both of these theories.¹⁹ As set forth in *Avco*, California has a "late, hard"²⁰ vesting rule which requires the developer to first obtain a building permit,²¹ incur sub-

owner from going ahead with the project. See *Cunningham & Kremer*, *supra* note 1, at 629-48. See also note 18 *infra*.

18. See *Cunningham & Kremer*, *supra* note 1, at 648-60. Normally, the equitable defense of estoppel cannot be asserted against a governmental entity. One explanation is that if administrative officials could by their conduct estop a city or county from enforcing a zoning ordinance, that would in effect permit the ordinance to be amended by administrative action. *Markey v. Danville*, 119 Cal. App. 2d 1, 6-7, 259 P.2d 19, 22 (1953).

Courts have declared that the defense will rarely be invoked to defeat a policy adopted to protect the public. *Long Beach v. Mansell*, 3 Cal. 3d 462, 493, 476 P.2d 423, 445, 91 Cal. Rptr. 23, 45 (1970); *People v. Dep't of Hous. and Community Dev.*, 45 Cal. App. 3d 185, 196, 119 Cal. Rptr. 266, 273 (1975). However, a government may be bound by equitable estoppel in the same manner as a private party:

when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.

3 Cal. 3d at 496-97. As the rule has developed, a local governmental entity attempting to exercise its police powers to regulate the use of land within its jurisdiction may be estopped when a property owner:

- (1) relying in good faith;
- (2) on some act or omission of the government;
- (3) has made such a substantial change in position or incurred such extensive obligations that it would be unjust and inequitable to destroy the rights which he had ostensibly obtained.

Heeter, *supra* note 2, at 66.

19. Some authors purport to draw a distinction between vested rights and equitable estoppel, explaining that the defense of estoppel is derived from equity while the defense of vested rights reflects principles of common and constitutional law. *Heeter*, *supra* note 2, at 64-65. Estoppel focuses upon whether it would be inequitable to allow the government to repudiate its prior conduct whereas vested rights rests upon whether the owner acquired real property rights which cannot be taken away by governmental regulation. *Id.*

20. It is considered "late" because the developer must first obtain a building permit. *Avco Community Developer's, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977). It is "hard" because courts require evidence of actual construction and substantial liabilities incurred in reliance on the permit. *Id.* See generally, *Hagman, The Vesting Issue*, *supra* note 1.

21. In *Avco*, the court acknowledged that the building permit might not be an absolute requirement in all cases, and that some other type of permit, such as a conditional use permit, which affords the same specificity and definition to a project as a building permit could be the basis of reliance for a developer's claim of vested rights. But the

stantial expenditures, and commence actual construction before the development rights will be treated as vested. Under *Avco* and cases following it,²² the test has become fairly rigid and leaves little room for the kind of careful weighing and balancing of interests normally engaged in by a court of equity.²³

IV.

TYPES OF VESTED DEVELOPMENT RIGHTS CASES

There are a number of situations in which a potential vested development rights claim may arise. The two most common types of cases can be categorized as those in which the building permit for the project was clearly valid at the time it was issued and those where it was clearly invalid.²⁴ By "clearly valid," we mean that the permit as issued complied with all applicable building and zoning codes, and the zoning conformed to all general and specific land use plans, which in turn, complied with all the requirements of state law governing such plans. We term these Category One permits.

In Category Two we place all the "clearly invalid" permits—those which, when issued, failed to comply with the local zoning and/or building regulations. Between these two extremes is a "hybrid" third category of situations where: (1) the permit conformed

court did not decide the issue since none of the permits obtained related to an identifiable building. 17 Cal. 3d at 797.

22. See, e.g., *Raley v. Cal. Tahoe Regional Planning Agency (CTRPA)*, 68 Cal. App. 3d 965, 137 Cal. Rptr. 699 (1977); *Oceanic California, Inc. v. North Central Coast Regional Comm'n*, 63 Cal. App. 3d 57, 133 Cal. Rptr. 664 (1976), *cert. denied*, 431 U.S. 951 (1977). See also *Spindler Realty Corp. v. Monning*, 243 Cal. App. 2d 255, 53 Cal. Rptr. 7 (1966), *cert. denied*, 385 U.S. 975 (1966); *Anderson v. City Council*, 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (1964).

23. See Heeter, *supra* note 2, at 88; Cunningham & Kremer, *supra* note 1, at 704-08; Comment, *Developer's Vested Rights*, 23 URBAN L. ANN. 487, 494-95 (1982).

24. We deal here with the common situation where the developer has a building permit. Where there is no permit but the developer relies on some other governmental act, courts generally hold that there is no basis for relief. See, e.g., *Raley v. Cal. Tahoe Regional Planning Agency*, 68 Cal. App. 3d 965, 137 Cal. Rptr. 699 (1977); *Anderson v. City Council*, 229 Cal. App. 2d 79, 89-90, 40 Cal. Rptr. 41, 47-8 (1964). *But cf.* *Santa Monica Pines, Ltd. v. Rent Control Bd. of Santa Monica*, 35 Cal. 3d 858, 679 P.2d 27, 201 Cal. Rptr. 593 (1984) (the California Supreme Court ruled that even assuming *arguendo* that tentative tract map approval was deemed tantamount to permission to withdraw certain rent controlled apartments from the rental market, since no building permit was required, the developer had nonetheless not shown substantial reliance); *Aries Dev. Co. v. Cal. Coastal Zone Conservation Comm'n*, 48 Cal. App. 3d 534, 544, 122 Cal. Rptr. 315 (1975), *cert. denied*, 431 U.S. 951 (1977) (court noting, but not deciding, that a building permit may not be the *sine qua non* of a vested right). Our concern is with the right to develop; if the developer is entitled to a vested development right on some basis other than having obtained a building permit it would not affect the substance of our position.

to the zoning but the zoning was not consistent with the general plan; or (2) the plan was inadequate under state law; or (3) there simply was no plan. The courts' treatment of vested development rights claims in each of these three categories is somewhat different. The law in the third category is less developed than in the other two.

A. *Category One: The Valid Permit*

Vested development rights issues often arise when public outcry about development causes government to change the land use regulations under which the initial approval was given and then attempt to revoke that approval²⁵ or enjoin the project²⁶ based on the new law. In these circumstances, the courts have little difficulty in upholding the developer's right to proceed, based on the principles outlined in the *Avco* decision.²⁷ For instance, in *Griffin v. County of Marin*²⁸ the county planning commission approved plans for a gasoline service station and the building department issued a building permit. Thereafter, the commission rezoned the property in question for single-family use in anticipation of condemnation proceedings by the state, and subsequently revoked the owners' permit. The Court of Appeal held that the property owners' activities in performing minor grading were sufficient to establish good faith reliance on the permit and to establish their vested rights.

In *San Diego Coast Regional Commission v. See the Sea, Ltd.*,²⁹ the developer went further by demolishing an existing structure, spending \$79,000 on construction, and incurring other obligations in reliance on a building permit issued by the local government for his condominium project. The California Supreme Court held that the developer did not have to obtain a coastal permit since he had substantially relied on the local building permit before the date after which the California Coastal Zone Conservation Act of 1972 required coastal permits for new development.

At least where the project will not amount to a public nuisance,³⁰

25. See, e.g., *Griffin v. County of Marin*, 157 Cal. App. 2d 507, 321 P.2d 148 (1958).

26. See, e.g., *San Diego Coast Regional Comm'n v. See the Sea, Ltd.*, 9 Cal. 3d 888, 513 P.2d 129, 109 Cal. Rptr. 377 (1973).

27. See *supra* notes 17-23 and accompanying text.

28. 157 Cal. App. 2d 507, 321 P.2d 148 (1958).

29. 9 Cal. 3d 888, 513 P.2d 129, 109 Cal. Rptr. 377 (1973).

30. Although there appear to be no reported cases where vested development rights were denied on the grounds that the proposed use would have been a nuisance, it seems unlikely that any court would reach a different result inasmuch as local governments have the authority under the police power to abate *existing nuisances*. See cases cited

courts will typically look only at the harm to the developer in deciding whether to uphold the defense of estoppel or the claim of vested rights, and will largely ignore the harm to the "public interest."³¹ One notable exception occurs when environmental concerns are at issue. For instance, in *Raley v. California Tahoe Regional Planning Agency*³² where a developer of a 26-acre regional shopping center sought to restrain the Agency from revoking its preliminary approval of his project, the Court of Appeal held that the trial court should have balanced "the relative harm suffered by the developer, on the one hand, and . . . the policy of environmental equilibrium on the other."³³ However, since the developer had not obtained a building permit, as required by *Avco*, and had spent no money on actual construction, the appellate court reluctantly concluded that, in any event, the developer was not entitled to a vested right.³⁴

B. *Category Two: The Invalid Permit*

Unlike the situation in Category One where the government attempts to change the law *after* a permit has been issued, in Category Two the government, through some inadvertence or mistake on the part of an administrative official, issues a permit which allows development in excess of what is permissible under the applicable zoning. In these circumstances, the case for recognizing vested development rights becomes much weaker and, generally speaking, the courts will prohibit the government from revoking the permit only in unusual circumstances.³⁵ The courts have shown more sensitivity to neighborhood interests in these situations, reasoning that the public

supra note 13 and accompanying text. See also *Trans-Oceanic Oil Corp. v. City of Santa Barbara*, 85 Cal. App. 2d 776, 788-89, 194 P.2d 148, 155 (1948).

31. *Cunningham & Kremer*, *supra* note 1, at 651, 714.

32. 68 Cal. App. 3d 965, 137 Cal. Rptr. 699 (1977).

33. *Id.* at 976, 137 Cal. Rptr. at 706. See also *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970); *People v. Dep't of Housing and Community Dev.*, 45 Cal. App. 3d 185, 119 Cal. Rptr. 266 (1975).

34. Still, the court believed the developer to be a victim of "administrative vacillation" and took a verbal swipe at the vested rights doctrine. The court explained that it considered the rule to be merely a special expression of the general estoppel doctrine and not a separate rule of law. Then, decrying the rule's failure to consider the developer's interest, the court stated:

[T]he plasticity of equitable estoppel has been replaced by the rigidity of the vested rights rule. Doctrinal evolution has come full circle—from the formal, unmoral rigidities of medieval common law to the individualized humanity of equity and back again to the fixed demands of the vested rights rule.

68 Cal. App. 3d at 985, 137 Cal. Rptr. at 712. The rule is a source of continuing controversy, see *supra* note 1 and accompanying text.

35. See, e.g., *Markey v. Danville Warehouse & Lumber, Inc.*, 119 Cal. App. 2d 1, 7, 257 P.2d 19, 22 (1953) (building permit granted in violation of ordinance by building

should be protected from development which does not comply with existing law. For example, in *Pettitt v. City of Fresno*,³⁶ the plaintiffs purchased property located in a single family zone in reliance on the city's representation that the entire building (which had two separate addresses, only one of which had a designation for nonconforming retail commercial use) could be used for retail commercial purposes. Plaintiffs applied for and received a building permit for both addresses which allowed the building to be altered for use as a beauty salon.

The appellate court rejected the plaintiffs' claim that they had acquired a vested right, based on the city's conduct, to operate the salon. Although there was substantial evidence to sustain the trial court's finding that the plaintiffs spent substantial sums in reasonable reliance on the issuance of the building permit for the entire premises, it nevertheless held that *as a matter of law* the city could not be estopped to deny the validity of the permit because it was clearly "issued or made in violation of the express provisions of a zoning ordinance."³⁷

Declaring that estoppel will not be invoked against a government agency "where it would defeat the effective operation of a policy adopted to protect the public,"³⁸ the court continued:

In the area of permits and zoning law we do not write on a clean slate. The balancing process between the avoidance of manifest injustice to the individual and the preservation of the public interest has already been undertaken in the factual context of the case at bench, and in this situation the courts have expressly or by necessary implication consistently concluded that the public and community patterns established by zoning laws outweigh the injustice that may be incurred by the individual in relying on an *invalid* permit to build issued in violation of zoning laws.³⁹

The *Pettitt* court did not engage in any careful weighing of the harm to the neighborhood of a beauty salon against the cost to the Pettitts of adapting their building to another use. Still, it did recognize the strong general interest of the community in having its zon-

inspector could "no more influence the force of the ordinance or cause a vested right in appellants or an estoppel than an invalid permit of the Board of Supervisors itself").

36. 34 Cal. App. 3d 813, 110 Cal. Rptr. 262 (1973).

37. *Id.* at 819, 110 Cal. Rptr. at 265.

38. *Id.* at 822, 110 Cal. Rptr. at 268. See *Magruder v. City of Redwood*, 203 Cal. 665, 265 P. 806 (1928); *Millbrae Assn. for Residential Survival v. City of Millbrae*, 262 Cal. App. 2d 222, 69 Cal. Rptr. 251 (1968); *Markey v. Danville Warehouse & Lumber, Inc.*, 119 Cal. App. 2d 1, 257 P.2d 19 (1953); *In re Application of Ruppe*, 80 Cal. App. 629, 252 P. 746 (1927).

39. 34 Cal. App. 3d at 820, 110 Cal. Rptr. at 266.

ing laws enforced. The court drew a clear distinction between this situation and cases like those in Category One, where the government would be prohibited from revoking a permit that is valid when issued and on which the permittee relies to its detriment.

A similar result was reached in *Millbrae Association for Residential Survival v. City of Millbrae*,⁴⁰ a case in which an unincorporated association filed suit to compel rescission of certain changes to a precise plan for a planned development, contending that the changes violated the developer's plan which had been filed with the application for the planned development designation. The Court of Appeal agreed that the changes amounted to a rezoning, which could only be accomplished validly pursuant to procedures set out in state statutes and the local zoning ordinance. Rejecting a claim of vested rights by the developers, the court likewise distinguished the case from those where the permittee proceeds pursuant to a *valid* permit, since here the developers "proceeded under a permit which was invalid when issued because it violated the zoning ordinance."⁴¹

Where the permit in question plainly violates the local zoning there is a strong case for denying relief to the developer, even if the project is already under construction. This protects the general public from mistakes and unauthorized acts by government employees. While it also means that the developer must to some degree supervise the jobs done by permit grantors, in general that does not seem unreasonable.

On the other hand, where the impact from an illegal permit is clearly *minimal* the courts appear to relax this general rule to consider both the conduct of the city and the harm imposed on the developer. Thus, in *Anderson v. City of La Mesa*,⁴² the city was prohibited from requiring certain property owners to remove from their house a two foot wide section which violated the setback provisions in a local specific plan. The violation had been pointed out by the city only after construction was completed and after six previous inspections.

Although the permit under which the house was built was techni-

40. 262 Cal. App. 2d 222, 69 Cal. Rptr. 251 (1968).

41. *Id.* at 246, 69 Cal. Rptr. at 268. According to the court, the fact that the developers claimed to have spent \$600,000 in developing the property was unimportant, inasmuch as there were no specific findings requested regarding damages, and the general finding that the sum was expended was at least susceptible to the inference that these expenditures were for improvements consistent with the general plan.

42. 118 Cal. App. 3d 657, 173 Cal. Rptr. 572 (1981).

cally illegal, the court refused to order removal of the offending portion of the house, declaring that the impact on the property owners was substantial (removal would have cost \$6,000) whereas the effect on the community was trivial. The court specifically found that the "seven foot setback created no special problem for the area or adjacent landowners" and that there was no evidence that granting a variance would "create any hardship on any other persons."⁴³

Similarly, in *People v. Department of Housing and Community Development*,⁴⁴ the Court of Appeal applied the doctrine of laches to a five and one-half month delay on the part of the government in attempting to rescind a state permit issued without an environmental impact report (EIR). The court noted that the developer had made substantial expenditures which were "largely irrecoverable" while the project was one that had "conformed with local land use regulations at its inception [and] hence [was] not recognizable as a gross despoilation of the environment."⁴⁵ The proposed project was noncontroversial and there was no apparent local opposition. Moreover, the state's failure to commence suit before the developer incurred heavy losses created an injustice which "outweighed any adverse effect of the state's failure to make timely environmental inquiries."⁴⁶

These cases illustrate that where the initial permit is clearly invalid the developer has a heavy burden in establishing an equitable defense to permit revocation. Note, however, in both of the above-discussed cases in which the developer won, there was some question as to whether the permit was truly invalid, at least under our definition. In *Anderson*, the setback complied with the local zoning although not the local specific plan, and in the *HCD* case, the permit complied with the zoning but was issued without an environmental assessment.

Where the initial permit is only arguably invalid, the courts appear more inclined to engage in an explicit assessment of the relative harm to the community and to the developer in ruling on a claim of vested rights. Certainly, where the courts are convinced that the impact on the community is *de minimus*, they seem more willing to consider the developer's claim of injustice. Thus, while the *Pettitt* and *Millbrae* courts looked primarily at the general public interest in protecting and enforcing zoning regulations, the *An-*

43. *Id.* at 661, 173 Cal. Rptr. at 575.

44. 45 Cal. App. 3d 185, 119 Cal. Rptr. 266 (1975) [hereinafter the *HCD* case].

45. *Id.* at 200, 119 Cal. Rptr. at 276.

46. *Id.*

derson and *HCD* courts took a closer look at the actual impact on the adjoining neighborhoods from the proposed projects. Importantly for this article, each court also recognized a tension between the government's action and the rights of the neighborhood. These courts refused to make the neighborhood suffer for an administrative mistake on the part of the government. Only where the impact on the community was insignificant did permitting the injured developer to complete the project seem reasonable.

In all of the Category One or Category Two cases discussed above, the end result was an all-or-nothing decision in favor either of the developer or the city and the complaining neighborhood. That courts experience discomfort in declaring the winner or loser in many of these cases is clear. This is even more true in Category Three situations where the legal status of the permit is ambiguous. We turn next to this hybrid category.

C. *Category Three: Invalid Zoning or Plan*

In the Category One situation, the city or the neighborhood has the task of showing that the proposed project will cause such a serious impact on the public that applying the new law is justified.⁴⁷ In the Category Two situation, it is the developer who has the burden of showing that the impact of the development on the community will be minimal.⁴⁸ We suggested above that distributing the burdens in this manner is not entirely unreasonable. However, we will reexamine Category One at the end of this article.

In what we are calling the Category Three situation, we enter a somewhat "gray" area between these two polar extremes. Here, we deal not with a category of administrative or policy errors, but rather with a problem of *legislative* error. The government issues a permit which appears to comply with existing zoning, however, the zoning is found to be inconsistent with the general plan, or the general plan upon which the zoning is based fails to conform to the requirements of state law.⁴⁹ The legal effect of such an invalid ordinance or plan on the developer's rights is not entirely clear.

First, it is important to realize that planning and zoning are two different things. Planning is a process aimed at assessing the community's needs and goals and providing the basic standards for physical, social and economic development within the boundaries of

47. See *supra* notes 25-34 and accompanying text.

48. See *supra* notes 35-46 and accompanying text.

49. See *infra* notes 81-100 and accompanying text.

the planning jurisdiction.⁵⁰ Zoning and other similar land use regulations implement the general plan by regulating physical structures in terms of their height, bulk, setback and permissible uses.⁵¹

In the past, many courts confused zoning regulations with the general plan (sometimes also called the master plan).⁵² These courts would approve any zoning ordinance which was not arbitrary or unreasonable, regardless of whether it conformed to a separate master plan. Zoning ordinances would also be approved even if the community had not prepared a general plan.⁵³ At present, however, the emerging trend in the law is to view land use regulations as valid only if they are adopted "in accordance with a comprehensive plan"⁵⁴ or if they are "consistent with the general plan"⁵⁵ where the plan is a separate document which meets certain specific requirements. This new "consistency doctrine" has been responsible for creating the third category of vested rights cases. How courts han-

50. Friedmann, *A Response to Altshuler: Comprehensive Planning as a Process*, 31 J. AM. INST. PLANNERS 195 (1965).

51. PRINCIPLES AND PRACTICE OF URBAN PLANNING, 403 (W. Goodman & E. Freund 4th ed. 1968) [hereinafter PRINCIPLES & PRACTICE].

52. See Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1157 (1955); DiMento, *Developing the Consistency Doctrine: The Contribution of the California Courts*, 20 SANTA CLARA L. REV. 285, 286 (1980).

53. Even before the recent consistency legislation, some California courts recognized the importance of planning to land use regulation. One court described the relationship in the following terms:

It is apparent that the plan is, in short, a constitution for all future development within the city. No mechanical reading of the plan itself is sufficient. To argue that property rights are not affected by the general plan (as the city so asserts) as adopted ignores that which is obvious. Any zoning ordinance adopted in the future would surely be interpreted in part by its fidelity to the general plan as well as by the standards of due process. Frequently it has occurred that when a general plan was adopted, and later a zoning change was made which appeared to be in accord with the plan, that fact in and of itself was some evidentiary weight in the determination as to whether the zoning ordinance was proper or otherwise.

O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 782-83, 42 Cal. Rptr. 283, 288 (1965).

54. This language derives from the Standard Zoning Enabling Act [SZEA] issued in 1926 by the U.S. Department of Commerce. Unfortunately, the model act neither defined the term "comprehensive plan" nor did it discuss the preparation and adoption of such a plan. Two years later the Department published a model Standard City Planning and Enabling Act which did discuss the preparation of a master plan, but it did not state whether the master plan was the foundation on which other land use regulations should be based, nor did it discuss whether it was to be the comprehensive plan referred to in the SZEA. Rosenberry, *Master Plans and Local Land Use Regulation*, 2 ZONING & PLAN. L. REP. 113, 114 (1979). See also DiMento, *Improving Development Control Through Planning: The Consistency Doctrine*, 5 COLUM. J. ENVTL. L. 1 (1978).

55. See, e.g., CAL. GOV'T CODE §§ 65860, 66473.5, 66474 (West 1983). See also Diener, *Defining and Implementing Local Plan-Land Use Consistency in California*, 7 ECOLOGY L.Q. 753 (1979).

dle these situations will have a considerable long term impact on neighborhood development.

The problem is a difficult one for both the developer and the community which will suffer negative impacts from the development. Permits are not usually reviewed for conformity to general plans before being issued.⁵⁶ If the developer acquires a vested right for a project which does not conform to the general plan, then the local residents are deprived of the benefits, guaranteed by state law, of an orderly, planned community. If, instead, the permit is treated as invalid, the developer stands to suffer a great loss even though it has followed the instructions of the city and has a permit apparently issued pursuant to city regulations.

In the next section, we turn to an examination of the development of the consistency doctrine in California, and to an examination of how far the courts have come in resolving the dilemma of Category Three cases.

V.

PLANNING AND THE CONSISTENCY DOCTRINE

California's Planning and Zoning Law⁵⁷ now requires all counties, general law and chartered cities to adopt a comprehensive, long-term general plan for the physical development of the county or city, and for any land outside its boundaries which, in the planning agency's judgment, bears relation to its planning.⁵⁸ The local

56. The issuance of building permits is generally considered a ministerial act and therefore does not usually require a public hearing. Where the developer does not request any action requiring a hearing, such as a zone change or special use permit, the neighborhood may remain unaware of a potentially inconsistent project until well after the construction permit has been issued and work has begun. At that point, even if the city does grant the neighborhood a hearing on the permit, the issues may be limited to whether proper procedures were followed in issuing the permit and exclude any substantive consideration of the project's impact.

57. Title VII of the California Government Code. Division 1 (CAL. GOV'T CODE § 65000 et seq.) deals specifically with planning and zoning. Chapter 3 of Division 1 (CAL. GOV'T CODE § 65100 et seq.) covers local planning while Chapter 4 (CAL. GOV'T CODE § 65800 et seq.) treats zoning matters. Division 2 (CAL. GOV'T CODE § 66410 et seq.), also known as the Subdivision Map Act, regulates subdivisions, including condominium conversions. Unless otherwise indicated all section references in the text are to the Government Code.

58. CAL. GOV'T CODE § 65300 (West Supp. 1986). In 1915, the Legislature adopted legislation which *allowed* cities to establish a city planning commission. 1915 Cal. Stat. ch. 428. In 1927, new legislation allowed counties to establish their own planning commissions. 1927 Cal. Stat. ch. 874. Two years later, counties were *required* to set up planning commissions. 1929 Cal. Stat. ch. 838 § 1. By 1947, the law had been amended to read: "Every city and every county shall adopt . . . a master plan." 1947 Cal. Stat. ch. 807, *amended* 1947 Cal. Stat. ch. 868. But, in 1951 this was again changed so that

general plan must meet certain state-mandated criteria⁵⁹ and must constitute an "internally consistent and compatible statement of policies."⁶⁰

After the local legislature adopts a general plan, it may adopt specific plans for the systematic implementation of the general plan.⁶¹ The specific plan must, however, include a statement of the relationship of the specific plan to the general plan.⁶²

Since 1971, the California Legislature has required local zoning,

general plans were required only when a governmental entity was *required* to have a planning commission, the effect being that only counties had to develop master plans. 1951 Cal. Stat. ch. 334. In 1965, *general law cities and counties* were required to establish a planning agency and to prepare plans. 1965 Cal. Stat. ch. 1880 § 6. Finally, in 1984, *chartered cities* were also required to adopt general plans containing the mandatory elements specified in Government Code § 65302. 1984 Cal. Stat. ch. 1009 § 3. For a full discussion, see Pach, Hookano & Fischer, *Adoption of the General Plan in California: Prelude to a Permanent Constitution*, 3 PEPPERDINE L. REV. S63 (1976).

59. The plan must contain a statement of development policies and include diagrams and text setting forth "objectives, principles, standards and plan proposals." CAL. GOV'T CODE § 65302 (West Supp. 1986). In addition, it must contain seven mandatory elements: land use, circulation, housing, conservation, open space, noise, and seismic safety and geologic hazards. *Id.* The plan must address each of these elements to the extent that the subject of the element exists in the planning area. The degree of specificity and level of detail of the discussion of each such element should reflect local conditions and circumstances. CAL. GOV'T CODE § 65301(c) (West Supp. 1986). Any other elements related to the physical development of the county or city which the legislative body deems appropriate may also be included in the plan. CAL. GOV'T CODE § 65303 (West Supp. 1986).

60. CAL. GOV'T CODE § 65300.5 (West 1983). The general plan may be adopted in any format deemed appropriate or convenient by the legislative body. CAL. GOV'T CODE § 65301(a) (West Supp. 1986). The local legislature may adopt a general plan as a single document or a group of documents with relation to particular subjects or geographic sections of the planning area. CAL. GOV'T CODE § 65301(b) (West Supp. 1986). The plan may be amended up to four times during each year. CAL. GOV'T CODE § 65358(b) (West Supp. 1986). The legislative body must adopt a resolution to amend the General Plan. CAL. GOV'T CODE § 65356 (West Supp. 1986).

61. CAL. GOV'T CODE § 65450 (West Supp. 1986). The specific plan must include: (1) the distribution, location and extent of land uses including open space; (2) the proposed distribution, location, extent and intensity of major components of public and private transportation, sewage, water drainage, solid waste disposal, energy and other essential facilities needed to support the land uses described in the plan; (3) standards and criteria by which development will proceed; and (4) a program of implementation measures including regulations, programs, public work projects, and financing measures necessary to carry out (1), (2) and (3). CAL. GOV'T CODE § 65451 (West Supp. 1987). The specific plan is adopted and amended in the same manner as the general plan except that a specific plan may be adopted by resolution or ordinance and may be amended as often as deemed necessary by the local legislative body. CAL. GOV'T CODE § 65453 (West Supp. 1987).

62. CAL. GOV'T CODE § 65451 (West Supp. 1986). As with the general plan, the specific plan may also address any other subjects which the planning agency deems necessary or desirable for implementing the plan. CAL. GOV'T CODE § 65452 (West Supp. 1987).

subdivision map approvals, and certain other individual land use decisions to be "consistent with" the adopted local general and specific plans.⁶³ Chartered cities, other than the City of Los Angeles, are generally exempt from these requirements.⁶⁴

Under Government Code section 65860, as amended in 1971, counties and general law cities had until January 1, 1974 to achieve consistency.⁶⁵ The City of Los Angeles was required to bring its zoning into compliance by July 1, 1982.⁶⁶ After initial compliance is achieved, any zoning which becomes inconsistent by reason of an amendment to the general plan must be amended "within a reasonable time" to be consistent with the general plan as amended.⁶⁷

63. See, e.g., CAL. GOV'T CODE §§ 65860, 65567, 65455, 66474, 66473.5 (West 1983 & Supp. 1987). In 1970, the Legislature mandated that building permits, subdivision maps and open space zoning must be consistent with the local open space plan. CAL. GOV'T CODE § 65567 (West Supp. 1987). Any action by a county or general law city by which any interest in open space land is acquired or disposed of or its use restricted or regulated must also be consistent with that plan. CAL. GOV'T CODE § 65566 (West 1983).

In 1971, the Legislature expanded the consistency requirement to mandate that *all* zoning regulations be consistent with the general plan. CAL. GOV'T CODE § 65860 (West 1983). Subdivision approvals must also now be consistent with the adopted general plan. CAL. GOV'T CODE §§ 66473.5 (West Supp. 1987) & 66474 (West 1983). Public works projects, tentative map approvals (or parcel map approvals for which a tentative map is not required), and zoning ordinances within an area covered by a specific plan must be consistent with any adopted specific plan. CAL. GOV'T CODE § 65455 (West Supp. 1987). For a summary of all consistency requirements currently contained in state law, see the General Plan Guidelines, Office of Planning and Research, State of California (1982) at 75-77. The courts have interpreted the statutory scheme to contain some additional consistency requirements. See *infra* notes 88-100 and accompanying text.

64. Government Code § 65803 (West 1983) provides that the provisions of Chapter 3 of Division 1 of the Planning and Zoning Law, including the zoning consistency requirement, do not apply to charter cities, except to the extent that they may be adopted by charter or ordinance of the city. *Verdugo Woodlands Homeowners and Residents Ass'n v. City of Glendale*, 179 Cal. App. 3d 696, 224 Cal. Rptr. 903 (1986) (charter city may issue building permits in areas for which lower density zoning has been proposed). However, the zoning consistency requirements do apply to charter cities over 2 million in population. CAL. GOV'T CODE § 65860(d) (West 1983). Only the City of Los Angeles currently exceeds this limit.

65. CAL. GOV'T CODE § 65860(a) (West 1983). Prior to being amended in 1971 this section provided: "No city or county shall be required to adopt a general plan prior to the adoption of a zoning ordinance." CAL. GOV'T CODE § 65860 (1965) (amended 1971 Cal. Stat. ch. 1446, p. 2858, § 12). The Attorney General has opined that the amendment necessarily required all cities and counties to adopt adequate plans by the mandated deadlines for consistency. 58 Op. Att'y Gen. 21 (1975).

66. CAL. GOV'T CODE § 65860(d) (West 1983) (upheld and interpreted to require that all zoning ordinances adopted after January 1, 1979 in such cities also be consistent with the plan in *City of Los Angeles v. State of California*, 138 Cal. App. 3d 526, 187 Cal. Rptr. 893 (1982)).

67. CAL. GOV'T CODE § 65860(c) (West 1983).

Prior to these statutory reforms, local general plans had been "generally permissive in nature with 'a relatively broad, amorphous scope and content'"⁶⁸ and with no requirement for implementation through zoning or subdivision approvals.⁶⁹ This legislation transformed the general plan "from just an 'interesting study' to the basic land use charter governing the direction of future land use in the local jurisdiction."⁷⁰ As a result, general plans now embody fundamental land use decisions that guide the future growth and development of cities and counties.⁷¹ One court has gone so far as to state that "[u]nder state law, the propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements."⁷²

As interpreted by the courts, the consistency doctrine does not call for an exact match between land use regulations and the plan.⁷³ The law does, however, require that there be some logical connection between the two.⁷⁴ Courts have interpreted the consistency

68. *City of Santa Ana v. City of Garden Grove*, 100 Cal. App. 3d 521, 531-32, 160 Cal. Rptr. 907, 913 (1979).

69. *Id.* at 532, 160 Cal. Rptr. at 913.

70. *Id.*

71. *Id.* The comprehensive or general plan has been defined as an "official public document adopted by a local government as a policy guide to decisions about the physical development of the community. It indicates in a general way how the leaders of the government want the community to develop in the next 20 or 30 years." *PRINCIPLES & PRACTICE*, *supra* note 52, at 349. It has also been defined as the "official statement of a municipal legislative body which sets forth its major policies concerning desirable future physical development; . . ." KENT JR., *THE URBAN GENERAL PLAN* 18 (1964).

72. *Resource Defense Fund v. County of Santa Cruz*, 133 Cal. App. 3d 800, 806, 184 Cal. Rptr. 371, 373 (1982). This marks a fundamental shift away from traditional planning theory which held that the plan was merely meant to be an advisory statement. As one standard textbook put the matter: "The plan is long-range and general, it has no legal effect on property, the ordinance is short-range and precise, it does have legal effect." *PRINCIPLES & PRACTICE*, *supra* note 52, at 353.

73. *Greenebaum v. City of Los Angeles*, 153 Cal. App. 3d 391, 406-8, 200 Cal. Rptr. 237, 244-6 (1984).

74. The *Planning and Zoning Law* defines consistency between planning and zoning as follows:

A zoning ordinance is consistent with a city or county general plan only if: (i) the city or county has officially adopted such a plan; and (ii) the various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in such a plan.

CAL. GOV'T CODE § 65860(a) (West 1983). A 1975 opinion of the State Attorney General attempted to further define the meaning of consistency in relation to zoning and planning:

Apparently, the term "consistent with" is used interchangeably with "conformity with." (The Random House Dictionary 1966, p. 300.) The courts have held that the phrase "consistent with" means "agreement with; harmonious with;" *Shay v. Roth*, 64 Cal. App. 314, 318 (1923). Webster defines "conformity with," as meaning "harmony, agreement when used with 'with'." Webster's Third International Dictionary

language to require, at a minimum, that the city have adopted an "adequate" plan, one meeting all the state criteria, before any regulations can be considered consistent with it.⁷⁵ The courts have been reluctant to directly intervene into the legislative process, and have tended to leave the initial determination of consistency to the local governing body, subject to judicial review for arbitrariness.⁷⁶ The courts, however, have insisted that the local legislature make specific findings on the question of consistency.⁷⁷

1961, p. 475. The term "conformity" means in harmony therewith or agreeable to. *Mielcarek v. Riske*, 21 N.W.2d (ND) 218, 221 (1946).

However, it is quite apparent that the "consistency" or "conformity" need not require an exact identity between the zoning ordinance and the general plan. See, e.g., Anno. 40 A.L.R.3d 372, *Udell v. Haas*, 21 N.Y.2d 463, 235 N.E.2d 897, 901 (1968). . . .

58 Op. Att'y Gen. 21, 25 (1975). The General Plan Guidelines state that an "action, program, or project is consistent with the general plan if it, considering all its aspects, will further the objectives and policies of the general plan and not obstruct their attainment." OFFICE OF PLANNING AND RESEARCH, STATE OF CALIFORNIA, GENERAL PLAN GUIDELINES 77 (1982).

75. See, e.g., *Save El Toro Ass'n v. Days*, 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977) (subdivision approval held invalid since it was not consistent with the open space plan as required by section 65567, where the open space plan could not be considered an element of a valid general plan since the purported general plan contained only four of the required elements); *Camp v. Board of Supervisors*, 123 Cal. App. 3d 334, 352, n.10, 176 Cal. Rptr. 620, 632 n.10 (1981) (subdivision approval held invalid; since the subdivision map "was approved at a time when there existed no adequate general plan the Board . . . could not have legally found the subdivision consistent with the requisite general plan and thus that approval was unlawful and must be set aside."); *Resource Defense Fund v. County of Santa Cruz*, 133 Cal. App. 3d 800, 184 Cal. Rptr. 371 (1982) (subdivision approvals granted before the county had received an extension of time from the Office of Planning Research to approve a general plan held void). The absence of a valid general plan does not preclude all development activity. The Planning and Zoning Law establishes a procedure whereby local governments can proceed with development pending completion of a valid general plan. However, developments approved during the period of extension provided by the statute must conform with both the existing general plan and the proposed revision. CAL. GOV'T CODE §§ 65360-65362 (West 1983 & Supp. 1986).

76. *Karlson v. City of Camarillo*, 100 Cal. App. 3d 789, 161 Cal. Rptr. 260 (1980); *Greenebaum v. City of Los Angeles*, 153 Cal. App. 3d 391, 200 Cal. Rptr. 237 (1984); *Bownds v. City of Glendale*, 113 Cal. App. 3d 875, 170 Cal. Rptr. 342 (1980). In *Bownds*, representatives of an unincorporated association of tenants in an apartment building unsuccessfully sought to set aside city approval for conversion to condominiums for failure to comply with published state guidelines. The Court of Appeal declared:

Except for mandating development of a plan, specifying the elements to be included in the plan and imposing on cities and counties the general requirement that land use decisions be guided by that plan, the Legislature has not preempted the decision making power of the local legislative bodies as to the specific contours of the general plan or action taken thereunder.

Id. at 880, 170 Cal. Rptr. at 345.

77. *Woodland Hills Resident's Ass'n, Inc., v. City Council of Los Angeles*, 44 Cal.

The Legislature has declared that the legal basis for all zoning, subdivision and various other types of land use regulation lies in a statutorily complete and adequate general plan.⁷⁸ Since, as we have seen, valid development permission depends on compliance with the governing zoning ordinances,⁷⁹ and if these ordinances must, in turn, now be consistent with the *general plan*, it should follow that an inconsistent ordinance should not legally support a permit issued under it, even if the ordinance is otherwise a valid exercise of the police power. A contrary holding would seem to threaten the integrity of the entire planning process.⁸⁰ Thus far, the courts have not been consistently willing to go in this direction.

Indeed, where neighborhood groups have questioned the propriety of specific projects on grounds that development permission was given under an ordinance inconsistent with the general plan, the courts have reached rather inconsistent and inconclusive results. We turn to the case law.

A. *Consistency Between Development Permits and General Plans*

Nothing in the Planning and Zoning Law purported to restrict the authority of a governmental entity to issue development permits during the time within which compliance with the consistency requirements was to have been achieved. Once achieved, however, the obvious intention of the law was that development proceed only in conformity with land use regulations that are consistent with the applicable local plans.⁸¹ There are, however, few statutory reme-

App. 3d 825, 118 Cal. Rptr. 856 (1975), *rev'd on other grounds*, 23 Cal. 3d 917, 593 P.2d 200, 154 Cal. Rptr. 503 (1979). There, local residents brought suit after the City approved a tract map for a subdivision, contending that the approval was unlawful. The Court of Appeal held that the procedure to approve the map, a series of tie votes before the planning commission and the council, was insufficient.

78. The Legislature considers orderly growth and planning of vital importance to the state. It has declared that "[t]he people of California have a fundamental interest in the orderly growth and development of the urban regions of the State in which large segments of the State's population are concentrated." CAL. GOV'T CODE § 65060.1. To this end, the Legislature has specified how orderly development is to be attained: "[D]ecisions involving the future growth of the State, most of which are made and will continue to be made at the local level should be guided by an effective planning process, including the local general plan, and should proceed within the framework of officially approved statewide goals and policies. . . ." CAL. GOV'T CODE § 65030.1.

79. See *supra* notes 35-41 and accompanying text.

80. Woodland Hills Resident's Ass'n, v. City Council of Los Angeles (Woodland Hills II), 23 Cal. 3d 917, 936, 593 P.2d 200, 210, 154 Cal. Rptr. 503, 513 (1979).

81. The Legislature's determination that cities and counties comply with the law is reflected in the fact that, as originally enacted, Government Code § 65860(b) provided that actions to enforce compliance be brought within six months of the deadline for compliance. This language was subsequently removed after the limitations period

dies specifically prescribed in the event a city or county failed to achieve, or fails to maintain, consistency between its plans and regulations.

An aggrieved party may bring a petition for a writ of mandate to challenge the validity of any general plan.⁸² If the plan is found inadequate, the government must bring it into compliance with state law within 120 days⁸³ and must thereafter bring its zoning into compliance within another 120 days.⁸⁴ Section 65860 authorizes actions to "enforce consistency" between zoning and plans.⁸⁵ Otherwise, the Planning and Zoning Law is silent on enforcement.

To our knowledge, the only legal actions where neighborhoods have challenged *building* permits on the grounds that the general plan prohibited the particular project in question have been lost either at the trial⁸⁶ or appellate level. In its 1986 decision in the case of *Elysian Heights Residents Association v. City of Los Angeles*,⁸⁷ the Second District Court of Appeal ruled that building permits need not be scrutinized for consistency with the general plan. The court refused to declare void a building permit which complied with the local zoning at the time of issuance even though the project would not have been permitted under the local community plan then in effect.

Still, in a variety of analogous circumstances, the courts have begun to recognize the right of a community to insist on having its plans adhered to. For instance, in a 1980 case entitled *Friends of "B" Street v. City of Hayward*,⁸⁸ the Court of Appeal ruled that local public works projects must be consistent with the local general plan. There, an unincorporated citizens group sought to enjoin the City of Hayward from proceeding with a proposed street widening project which would have removed residential and commercial units, and 150 mature trees, until the general plan of the city met the requirements of state law. The group argued, among other things, that: (1) the project was not consistent with the circulation

passed, and such actions can now be brought only after a new zoning ordinance is enacted or an amendment to the general plan renders an existing ordinance inconsistent.

82. CAL. GOV'T CODE § 65751 (West Supp. 1986).

83. CAL. GOV'T CODE § 65754(a) (West Supp. 1986).

84. CAL. GOV'T CODE § 65754(b) (West Supp. 1986).

85. CAL. GOV'T CODE § 65860(b) (West 1983).

86. *Friends of Westwood, Inc. v. City of Los Angeles*, Los Angeles Super. C. No. C587900; *Wilmington Homeowners Ass'n v. City of Los Angeles*, Los Angeles Super. C. No. SOC81192.

87. 182 Cal. App. 3d 21, 227 Cal. Rptr. 226 (1986).

88. 106 Cal. App. 3d 988, 165 Cal. Rptr. 514 (1980).

element and the "strip development" policy provisions of the general plan; and (2) the plan lacked a noise element entirely.

The court reasoned that since Section 65302 requires charter cities as well as general law cities to adopt a general plan containing specified mandatory elements,⁸⁹ the Legislature must have intended that the city would comply with whatever general plan elements it adopted:

The Legislature did not limit this policy to decisions regarding proposed private developments; it encompasses *all* decisions involving future growth of the state, which necessarily includes decisions by a city to proceed with public works projects. All such decisions are to be guided by an effective planning process that includes the local general plan.⁹⁰

The court concluded that this "implied" consistency requirement had no less effect than the express statutory requirements invoked in *Save El Toro Association v. Days*⁹¹ and *Woodland Hills Resident's Association v. City Council of the City of Los Angeles (Woodland Hills I)*.⁹² Both of these cases invalidated subdivision approvals as inconsistent with the local general plan.⁹³

Other courts have adopted a less expansive reading of the general plan process mandated by Section 65302. In *Hawkins v. County of Marin*,⁹⁴ a case relied on heavily by the court in *Elysian Heights*, the First District Court of Appeal declared in dictum that conditional use permits need not be scrutinized for consistency with the general plan under the Planning and Zoning Law's basic consistency requirement, and that only the ordinance section authorizing issuance of the permits need be consistent with the plan.

In *Hawkins*, appellants filed suit soon after the effective date of Section 65860 but almost two years after the county granted a conditional use permit for a federally subsidized housing facility for the elderly. Appellants contended that: (1) the project was impermissible under the property's zoning; and (2) if permissible, then the zon-

89. See *supra* note 59.

90. 106 Cal. App. 3d at 998, 165 Cal. Rptr. at 520.

91. 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977). There, the appellate court authorized enjoining a public works project on the basis of its relationship to a proposed private subdivision that was inconsistent with the local general plan. See *supra* note 75.

92. 44 Cal. App. 3d 825, 118 Cal. Rptr. 856 (1975), *rev'd on other grounds*, 23 Cal. 3d 917, 593 P.2d 200, 154 Cal. Rptr. 503 (1979). See *supra* note 77.

93. Subdivision approvals must be consistent with the general plan. CAL. GOV'T CODE § 66473.5 (West Supp. 1987). The requirement also applies to cities having a population of more than 2,800,000 (i.e. Los Angeles). CAL. GOV'T CODE § 66474.61 (West 1983).

94. 54 Cal. App. 3d 586, 126 Cal. Rptr. 754 (1976).

ing regulations were inconsistent with the general plan, violating Section 65860. The Court of Appeal never reached the merits of the first contention, holding instead that the appellants had waited too long to challenge the issuance of the use permit.⁹⁵ While the court declined to apply the same statute of limitations to the cause of action brought under Section 65860, it nevertheless stated that Section 65860 was not directly applicable to a review of the permit since, by its terms, the section did not apply to use permits.

In contrast, the Third District Court of Appeal declared in *Neighborhood Action Group v. County of Calaveras*⁹⁶ that a conditional use permit issued to a construction company for the processing of hydraulic mining tailings for sand and gravel production would be *ultra vires* if the county had not adopted a general plan containing elements conforming to the mandatory statutory criteria relevant to the *uses* sought by the permit. A group of taxpayers had brought suit to invalidate the permit on the basis that the noise, seismic safety and safety elements of the county general plan did not comply with the state statutes.

According to the appellate court, the general plan is "atop the hierarchy of local government law regulating land use. It has been aptly analogized to a 'constitution for all future developments.'" ⁹⁷ The court further discussed the relationship between use permits, zoning and the plan as follows:

Although use permits are not explicitly made subject to a general plan meeting the requirements of state law, that condition is necessarily to be implied from the hierarchical relationship of the land use laws. To view them in order: a use permit is struck from the mold of the zoning law (§ 65901); the zoning law must comply with the adopted general plan (§ 65860); the adopted general plan must conform with state law (§§ 65300, 65302). The validity of the permit process derives from compliance with this hierarchy of planning laws. . . .

Zoning ordinances are regulations governed by the superior enactments in the hierarchy of planning laws. Thus, the validity of a conditional use permit, which is governed by the zoning regulations, depends (derivatively) on the general plan's conformity with statutory

95. *Id.* at 592, 126 Cal. Rptr. at 758-59. Government Code § 65907 bars any action to "attack, review, set aside, void, or annul" a decision approving a conditional use permit unless commenced within 180 days after the date of such decision. In this case, the action was barred, as it was filed nearly two years after the permit was granted.

96. 156 Cal. App. 3d 1176, 203 Cal. Rptr. 401 (1984).

97. *Id.* at 1183, 203 Cal. Rptr. at 406 (quoting from *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774, 782, 42 Cal. Rptr. 283, 288 (1965)). See *supra* note 53.

criteria. Where the adopted general plan lacks elements required by state law, relevant to the uses sought, the ordinance fails to provide criteria mandated by such law for the measurement of the propriety of the uses to be authorized by the permit. These criteria are essential to evaluation of proposed uses and the conditions which should be imposed.⁹⁸

The court's opinion directly criticized the *Hawkins* court for assuming that if a zoning ordinance is kept consistent with the general plan then use permits issued under it will necessarily be consistent with the plan. In contrast, the *Neighborhood Action* court reasoned, if the general plan is not consistent with the state law, the zoning ordinance may fail to provide proper criteria to measure the propriety of the uses sought by the permit. The court specifically rejected the *Hawkins* dictum on this point, declaring:

The *Hawkins* reasoning opens the door to defeat of the purpose of a general plan to provide enforceable standards by which the administering agency must measure the propriety of the permits.⁹⁹

Similarly, in *Buena Vista Gardens Apartments Ass'n v. City of San Diego Planning Department*,¹⁰⁰ the Fourth District Court of Appeal directed the trial court to refuse approval of a planned residential development permit which would have allowed the developers to demolish apartments and replace them with condominiums, until the city corrected specified defects in its physical development plan so that it substantially conformed to the statutory requirements for the mandatory housing element.

Thus, in several different contexts, courts have refused to sanction projects, both public and private, which did not conform to an adequate general plan. However, in *Elysian Heights*, the Second District Court of Appeal refused to grant the neighborhood relief. Due to its particular relevance to the issues herein that case is worth treating at some length.

B. The *Elysian Heights* Case

In *Elysian Heights*, the Court of Appeal affirmed the trial court's refusal to issue a writ of administrative mandamus to compel the City of Los Angeles to revoke a building permit for a project which did not comply with the local community plan. Appellants had argued that the permit was *void ab initio* because the zoning upon which it was based was inconsistent with the general plan. The ma-

98. 156 Cal. App. 3d at 1184, 203 Cal. Rptr. at 407.

99. *Id.* at 1186, 203 Cal. Rptr. at 408.

100. 175 Cal. App. 3d 289, 220 Cal. Rptr. 732 (1985).

jority declared that neither the language of Subdivision (d) of Section 65860 (mandating consistency between zoning and the general plan of Los Angeles by July 1, 1982) nor the statutory scheme in general mandated that building permits be scrutinized for plan consistency. In the absence of such explicit instruction, the court would not exercise its powers to invalidate the permit.¹⁰¹

In a short, albeit stinging, dissent, Justice Gates expressed shock that the judiciary's use of an ordinary legal remedy to enforce a statutory mandate expressly drafted by the Legislature, should be held to constitute a violation of the separation of powers doctrine. He added:

It is difficult . . . to imagine why our lawmakers would have insisted upon such consistency if they had not intended it to impact upon all developments undertaken after the dates designated.¹⁰²

In *Elysian Heights*, an association of neighborhood residents had sought the writ after construction had commenced on a three-story, 45-unit apartment complex on Morton Avenue in the Silver Lake-Echo Park area of Los Angeles. Under existing zoning a maximum of 46 units could have been constructed on the property. However, according to the local community plan for the area, the developer would have been permitted to construct only a 12-unit apartment building.

Under pressure from the residents of Morton Avenue and residents in the neighborhoods adjoining similar projects in the area that did not comply with the community plan, the City adopted a local building moratorium. The moratorium applied to all projects then under construction, and, pursuant to the moratorium, the Department of Building and Safety ordered the Morton Avenue project halted. At the developer's request, the Board of Building and Safety Commissioners conducted a hearing to determine whether he had a vested right to continue the construction despite the building moratorium. After the hearing, the commissioners found that vested rights had accrued. The residents then filed their lawsuit seeking the writ together with injunctive relief against the project.

The trial court ruled that because of the City's conduct in granting the permit, and the amount of expenditures made by the developer prior to the commencement of the litigation, it would not be equitable to terminate the project. The developer had demolished

101. *Elysian Heights Residents Ass'n v. City of Los Angeles*, 182 Cal. App. 3d 21, 227 Cal. Rptr. 226 (1986).

102. *Id.* at 33, 227 Cal. Rptr. at 223 (Gates, J., dissenting).

three existing structures on the property, commenced grading operations, excavated and recompacted the soil in accordance with plans submitted to the Department of Building and Safety, and began pouring the concrete footings for the foundation. The developer had also entered into various contracts with construction contractors and subcontractors for labor and materials needed for the project, the value of which represented approximately one-half of the total construction costs.

The trial court specifically declined to rule that the lack of conformity between the project and the applicable community plan rendered the permit *void*. In its minute order the court attempted to balance the parties' respective interests, stating:

The record supports [the developer's] claim that it had spent substantial sums of money prior to this litigation and indeed prior to the moratorium. The harm to the petitioners from the existence of the structure is of a more intangible sort.¹⁰³

On appeal, the appellate court affirmed the trial court decision, giving three primary reasons. First, the court stated correctly that, whereas elsewhere in the Government Code the Legislature has specifically prohibited the issuance of building permits which are inconsistent with open space plans,¹⁰⁴ Section 65860 contains no mention at all of building permits. Noting that the City is currently in the process of bringing its planning and zoning into conformity, the court took this omission as clear evidence that the Legislature never intended to prohibit the issuance of building permits during the period in which the consistency process is being implemented.¹⁰⁵ Here, the court found the language from *Hawkins* to be controlling and distinguished *Neighborhood Action Group* on the ground that there the plan itself was invalid, whereas in *Elysian Heights* the City of Los Angeles had a valid plan and was in the process of bringing its zoning into conformity with that plan. In doing so, the court ignored the fact that the City's actions came eight years after the adoption of Government Code section 65860(d), four years after the legislative mandate for compliance, and only while under the threat of litigation in the *Federation of*

103. *Id.* at 26 n.5, 227 Cal. Rptr. at 229 n.5.

104. *See* CAL. GOV'T CODE § 65567 (West 1983).

105. Having mandated consistency, there is no reason to expect the Legislature to spell out what should happen to building permits in the event that local governments refuse to comply with the law, nor is there any justification to reading that oversight as indicative of any legislative intent that building permits need not conform to the general plan.

Hillside and Canyon Associations, Inc. v. City of Los Angeles case.¹⁰⁶

Second, the court reasoned that adopting appellant's contention that the City lacked authority to issue building permits where the zoning was inconsistent with the plan would "bring new construction in the city to a grinding halt and cause economic havoc."¹⁰⁷ The court ignored the possibility, ordered as part of the settlement in the *Hillside* case, that the City could continue to issue permits while the zoning laws were brought into compliance, so long as the permits were consistent with both the plan and the existing zoning.¹⁰⁸ Projects which failed to conform to the zoning and the plan should await a legislative determination as to which land use designation should prevail.¹⁰⁹

Finally, the court stated that the developer's permit was issued in complete compliance with the City's land use regulations since, at the time, nothing in the Los Angeles Municipal Code required consistency between building permits and the general plan; only conformity between building permits and the applicable zoning ordinance was mandated. In addition, the court noted that the City's interim consistency ordinance, adopted in response to the

106. Los Angeles Super. C. No. C526616. There, a federation of about 40 individual homeowner associations claiming to represent a total membership of between 200,000 and 250,000 homeowners in the City of Los Angeles, filed suit in December 1984 to compel the City to bring its zoning into conformity with the 35 community plans which together comprised its general plan. City officials estimated that between 150,000 to 200,000 of the City's approximately 800,000 parcels of land remained zoned inconsistently with the plan nearly five years after the law requiring consistency went into effect. Of these, about 109,000 parcels were said to require "down-zoning" to less intensive uses. Despite the City's claim that compliance with the statute would result in severe financial strain, the superior court ruled that the City had 120 days to bring its zoning into conformity with the general plan. The parties ultimately settled, agreeing that the City would undertake a three year program to revise all 35 of its community plans and simultaneously bring its zoning into conformity with them.

107. 182 Cal. App. 3d at 29, 227 Cal. Rptr. at 231.

108. Los Angeles Super. C. No. C526616, Judgment Pursuant to Stipulation ¶ 8. The City enacted an emergency ordinance which "grandfathered" in any permits for which plans sufficient for a plan check were accepted before the effective date of the ordinance. The petitioners strenuously objected to the provision exempting permits that were "in the pipeline." As part of the settlement, the City agreed to undertake a survey of all potentially inconsistent projects falling in this category to determine whether they would create "spot" zones that might wreak havoc with the general plan or constitute mere "in-filling" compatible with the existing character of the neighborhood, and report its findings to the court, which retained jurisdiction over the consistency program. The settlement contemplates that the court will refer any project which threatens to undermine the general plan to the City for a formal consistency review.

109. The government may decide that the general plan should be amended to conform to existing conditions or zoning. *Mountain Defense League v. Bd. of Supervisors*, 65 Cal. App. 3d 723, 733, 135 Cal. Rptr. 588, 593 (1977).

Hillside litigation, which mandated permit/plan consistency, was to be given prospective application only and therefore did not affect the developer's permit.¹¹⁰ Clearly, though, a city does not have the authority to exempt permits from state-mandated consistency legislation by mere legislative fiat, much less by inaction.

One cannot read the *Elysian Heights* case without thinking that this court saw the City, which had delayed so long, at fault. But, the court also saw the City as finally moving to solve the consistency problem and, facing a win/lose choice under the current doctrine of vested development rights, simply did not want to leave the developer without protection for its admittedly substantial investment. What the court would have done if the City had not been moving to solve the problem is hard to predict, and it is important to see this case in its limited context.¹¹¹

Justice Gates, who had more sympathy than the majority for the neighborhood's plight ("a residential neighborhood with winding narrow streets" forever marred "by constructing therein a massive building"¹¹²) in a city which refused to plan, stated in his dissent:

Therefore, in my view, the fundamental question that engages us should not be resolved by focusing upon the fact that even when zoning is inconsistent, it is mechanically possible to obtain a document captioned: "Building Permit." What we must decide is whether or not our legislators intended concrete and steel buildings to continue to be erected in locales wherein it had long been determined they had no place. For my part, I believe our lawmakers were not striving for paper consistency, but compatibility among living people, their structures and their neighborhoods.¹¹³

110. The *Hillside* petitioners never challenged any actual pending project, but confined their requested relief to the prospective issuance of inconsistent permits. Although the superior court ruled that the City had to bring its zoning into conformity with its general plan, it declined *at that time* to enjoin the City from continuing to issue building permits where local zoning exceeded the densities permitted in the general plan, based on the City's representation that it was prepared to adopt an emergency ordinance requiring all *future* building permits for projects in these areas to be submitted to a special "plan review" process. See *supra* note 108.

111. Even limited to this narrow reading, the opinion still sweeps too broadly and we disagree with it. The trial court seems to have taken the better approach, having simply held that it would be inequitable under these particular circumstances not to estop the City from revoking the permit. By contrast, the appellate court gave blanket protection to any development permits issued between the July 1, 1982 deadline for compliance and the effective date of the interim consistency ordinance. Even if not "clearly invalid" or "void," these permits are certainly defective and should at least be subject to case by case review, a possibility apparently foreclosed by the appellate court's decision.

112. 182 Cal. App. 3d at 34, 227 Cal. Rptr. at 234 (Gates, J., dissenting).

113. *Id.* at 33-34, 227 Cal. Rptr. at 233-34 (Gates, J., dissenting).

The majority's focus in this case on the validity or invalidity of the permit is misplaced. In situations where there has been a failure of planning, the neighborhood should at least have the right to place the harm to the neighborhood on the scales of equity.

C. *Vested Rights and the "Inconsistent" Permit*

We find ourselves in agreement with Justice Gates on the issue of the potential damage to the neighborhood. The trial court in *Elysian Heights* saw the damages as "intangible," but it is these intangibles with which planning is concerned. A single inappropriate project can have potentially serious consequences on the quality of life for local residents in terms of traffic, noise, safety, overcrowding and scenic views as well as property values. The *Pettitt* case described the problem in discussing the impact of failing to comply with local zoning:

In the field of zoning laws we are dealing with a vital public interest—not one that is strictly between the municipality and the individual litigant. All the residents of the community have a protectable property and personal interest in maintaining the character of the area as established by comprehensive and carefully considered zoning plans in order to promote the orderly physical development of the district and the city and to prevent the property of one person from being damaged by the use of neighboring property in a manner not compatible with the general location of [the property in issue]. These protectable interests further manifest themselves in the preservation of land values, in aesthetic considerations, and in the desire to increase safety by lowering traffic volume Thus, permitting the violation to continue gives no consideration to the interest of the public in the area nor to the strong public policy in favor of eliminating nonconforming uses and against expansion of such uses.¹¹⁴

The void permit cases involving the *administrative* error of issuing an invalid building permit are likely to be infrequent and to involve only one project. The inconsistency cases which involve the *legislative* error of failing to plan, or to implement plans through appropriate legislation, could potentially be far more serious from a neighborhood point of view. The failure to plan could result in construction of a substantial number of projects inconsistent with good planning practice, and in substantial changes in the character of neighborhoods.

From the community perspective it is clear that the neighborhood has a great deal to lose through no fault of its own. Again, in

114. *Pettitt v. Fresno*, 34 Cal. App. 3d 813, 822-23, 110 Cal. Rptr. 262, 268 (1973).

the *Pettitt* case, in which the permittees acted to their detriment on permits *invalid* when issued, the court concluded:

To hold that the City can be estopped would not punish the City but it would assuredly injure the area residents, who in no way can be held responsible for the City's mistake.¹¹⁵

If one acknowledges that neighborhoods as well as developers can and do suffer substantial damage in consistency cases, the win/lose approach of the court in *Elysian Heights* seems lacking.

The consistency cases have typically focused on the question: Who should suffer—the developer or the public—when planning fails? The answer depended on whether the general plan was viewed as the ultimate legal basis for all land use regulation or merely as an “interesting study”¹¹⁶ to guide the decision making process (or be put on a shelf and forgotten), an issue now largely resolved by the Legislature. But the real question should not be which damaged party should suffer. Why should either the neighborhood or the developer be forced to absorb the full cost of the government's mistake? A mechanism which protects both the neighborhood's rights and the developer's legitimate expectations is infinitely preferable. Suggesting a possible approach is the task of the remainder of this article.

VI. THE THIRD PARTY

As discussed above, vested development rights cases typically arise when the government, realizing it has made an administrative or policy error, moves to revoke an individual development permit, or, as was the case in *Elysian Heights*, imposes a building moratorium on all development in an area pending changes to the relevant plans or land use regulations. Although the legal dispute usually centers on the rights of the owner and the local government, the ‘real parties in interest’ in such disputes are the neighborhood residents adjoining the project who may suffer significant damages and whose interests often vary from those of the governmental entity.

Today, citizen groups everywhere are actively involved in the planning process.¹¹⁷ For example, the members of the group fighting the Morton Avenue project in *Elysian Heights* worked closely with the city for a number of years to draw up the community plan

115. *Id.* at 823, 110 Cal. Rptr. at 268.

116. *City of Santa Ana v. City of Garden Grove*, 100 Cal. App. 3d 521, 532, 160 Cal. Rptr. 907, 913 (1979).

117. H. BOYTE, *THE BACKYARD REVOLUTION* (1980).

which was overlooked by the city in granting the developer a permit. Indeed, state law requires that during the preparation or amendment of the general plan the planning agency must provide opportunities for the involvement of citizens and community groups through public hearings and any other means the city or county deems appropriate.¹¹⁸

The state's General Plan Guidelines urge that cities and counties go "well beyond" the statutory requirements since "[a]s a practical matter, the general plan will be an effective guide for future development only if it has been prepared with the active involvement of the public and adopted with the support of broad public consensus."¹¹⁹ We believe that not only should the general plan be seen as a "constitution for all future development," but that it should also serve as an affirmative "Bill of Rights" guaranteeing to neighborhoods protection from the unplanned effects of new development.¹²⁰

Importantly, the Legislature has recognized the beneficiary status of local residents in the Planning and Zoning Law by providing them with standing to enforce the consistency requirements. Section 65860 provides that any resident or property owner within a city or a county may bring an action in the superior court to enforce the consistency requirement within 90 days after a zoning ordinance is enacted or amended.¹²¹

The exact breadth of this grant of authorization to litigate is as yet undetermined and has been a matter of conflicting opinion in the California Courts of Appeal. In the *Hawkins* case, one Court of Appeal limited application of Section 65860 to the general plan-zoning consistency issues and would not apply it to other matters such as the issuance of conditional use permits.¹²² However, in *Neighborhood Action Group*, another Court of Appeal found that conditional use permits could be challenged independently of Section 65860 where the general plan was inadequate, provided the ac-

118. CAL. GOV'T CODE § 65351 (West Supp. 1987).

119. GENERAL PLAN GUIDELINES, STATE OF CALIFORNIA, OFFICE OF PLANNING AND RESEARCH 29 (1982).

120. In *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 517, 522 P.2d 12, 19, 113 Cal. Rptr. 836, 842-43 (1974), Justice Tobriner, writing for a unanimous court, analogized zoning ordinances to a contract between neighboring property owners and held that courts must afford meaningful review to all decisions granting variances to such ordinances. Where the community has been involved in the planning process, the resulting plan should be viewed in a similar fashion.

121. CAL. GOV'T CODE § 65860(b) (West 1983).

122. *Hawkins v. County of Marin*, 54 Cal. App. 3d 586, 126 Cal. Rptr. 754 (1976).

tion was timely filed.¹²³ That court discussed at length the 'hierarchical relationship' between plans and regulations under the California legislation, and the case can be taken to stand for the proposition that any defects in the consistency requirements should be reviewable in an action challenging a particular permit.

Until the California Supreme Court rules on the question, we will not know which decision is 'correct,' but the clear overall intent of the Planning and Zoning Law and the strength of reason stands behind *Neighborhood Action Group*.¹²⁴

It is interesting to note that in Los Angeles, where the planning process broke down, the result of the settlement approved by the superior court in the *Hillside* case has been to greatly open up the permit issuing process. Pending the enactment of new zoning laws, there is now a permit-by-permit review of the consistency of projects with the plan, complete with neighborhood notice and a public hearing.¹²⁵

VII.

RELIEF FOR THE NEIGHBORHOOD

Unfortunately, although the Planning and Zoning Law clearly sets the neighborhood in the vicinity of a proposed project as the real party in interest, it does not detail any specific relief such a party may receive. Again the Court of Appeal decisions are divided. The courts in *Hawkins* and *Elysian Heights* both had difficulty finding a right to relief due to the absence of specific language in the statutes, while those in *Neighborhood Action Group*, *Friends of "B" Street*, *Save El Toro* and *Buena Vista* found no such obstacle to granting relief.

In the *Friends of "B" Street* case, the court held that the fact that the Government Code does not provide for injunctive relief where a proposed public works project is not consistent with a general plan does not deprive a trial court of authority to employ any legal or

123. *Neighborhood Action Group v. County of Calaveras*, 156 Cal. App. 3d 1176, 203 Cal. Rptr. 401 (1984).

124. The extraordinary reliance the Legislature has placed on the planning process is also demonstrated by its exempting ministerial approvals from the environmental impact report (EIR) requirements of the California Environmental Quality Act. CAL. PUB. RES. CODE § 21080(b)(1) (West Supp. 1987); CEQA Guidelines § 15369. The assumption is clearly that EIR's would have been prepared in the planning process for both relevant plans and zoning, and it would be redundant to further burden the development process with additional analysis.

125. Los Angeles, Cal., Ordinance 159,748. See *infra* note 165.

equitable remedy at its disposal.¹²⁶ Similarly, the decision in *Save El Toro Assn. v. Days* approved enjoining a public works project on the basis of its relationship to a proposed private subdivision that was inconsistent with the local general plan, although no statute authorized injunctive relief.¹²⁷

We must await a definitive ruling of the California Supreme Court, but it would be unusual to so restrict a court in equity where, as here, the harm may be the very wrong targeted by the guiding statute. In this regard, it is important to note that limiting the relief a neighborhood may have to requiring the government to *commence* the planning process leaves little incentive for government to meet the requirement of the law until after an action is brought demanding consistency.

It has long been established that the development community puts substantial pressure on local government to bend planning laws to facilitate development.¹²⁸ Without risk or exposure on the city's or county's part to counterbalance this pressure, a great deal of harm can result before sufficient neighborhood organization can take place to support major litigation, such as brought in the *Hillside* case, needed to force compliance with the law.

Beyond this, the law has for some time been moving in the direction of granting relief to particular injured parties by imposing the costs of such activities on the wider community. First in products liability¹²⁹ and then in real property cases,¹³⁰ the courts found it important to protect the hapless consumer by spreading the risk of damage throughout society. The California Supreme Court has summarized this position as follows:

126. *Friends of "B" Street v. City of Hayward*, 106 Cal. App. 3d 988, 998-99, 165 Cal. Rptr. 514, 520 (1980). The court noted, however, that whether injunctive relief was available on appellant's contention that the general plan did not contain a noise element as required by Government Code § 65302(g) was to be determined by the trial court on remand, in light of the availability of a direct action to compel the city to adopt the mandated noise element. *Id.* at 999, 165 Cal. Rptr. at 521.

127. 74 Cal. App. 3d 64, 70-74, 141 Cal. Rptr. 282, 285-88 (1977).

128. R. BABCOCK, *THE ZONING GAME* (1969).

129. *See, e.g., Price v. Shell Oil Co.*, 2 Cal. 3d 245, 455 P.2d 722, 85 Cal. Rptr. 178 (1970); *Vandemark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

130. *See, e.g., Becker v. IRM Corp.*, 38 Cal. 3d 454, 698 P.2d 116, 213 Cal. Rptr. 213 (1985); *Golden v. Conway*, 55 Cal. App. 2d 948, 128 Cal. Rptr. 69 (1976); *Stuart v. Crestview Mutual Water Co.*, 34 Cal. App. 3d 802, 110 Cal. Rptr. 543 (1973); *Fakhoury v. Magner*, 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972); *Avner v. Longridge Estates*, 277 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969); *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 22, 74 Cal. Rptr. 749 (1969).

Essentially the paramount policy to be promoted by the rule is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them.¹³¹

Similarly, in vested development rights/consistency cases, while the wrong is committed by the government at large, the harm is felt by a particular neighborhood whose political capacity to win full redress from the local administration is probably rather limited. The neighborhood affected by the violative projects is usually only a small segment of the population of the local governmental unit. For example, in the extreme case of Los Angeles, those impacted may be a only few hundred residents in a city of 3 million.

The better rule, consistent with this evolving judicial policy of risk spreading, would seem to be making the consistency issue the responsibility of the whole city or county, rather than just the problem of the few most seriously affected. Imposing some limited form of governmental liability would make vested development rights cases an issue for all residents of a jurisdiction and encourage the public officials to take their planning responsibilities seriously.

VIII.

A PROPOSAL FOR REFORM

We do not advocate creating a tort recovery for aggrieved neighborhoods that suffer damages from errors in their city's or county's planning and zoning practices to accomplish our end. Rather, our position is that the remedy should be to make the government go back and do what it should have done initially, namely, to "plan." That is, to consider the potential impacts from the proposed project on the neighborhood from a planning perspective and to prepare an appropriate program for dealing with them.

In vested development rights cases, the court should, in our view, require the governing jurisdiction to first make a determination as to which category of cases is before it: a change in the governing regulations (Category One); an illegal permit (Category Two); or a case of an inadequate plan or inconsistent zoning (Category Three). Where the dispute concerns one of the first two categories, the court, in most instances, can simply proceed to evaluate the developer's vested rights claim under the existing rules.¹³²

131. *Price v. Shell Oil Co.*, 2 Cal. 3d at 251, 466 P.2d at 725-26, 85 Cal. Rptr. at 181-82 (1970).

132. *See supra* note 3 and accompanying text. As long as there is an opportunity for judicial review, an administrative agency can make the initial determination of when a

However, in a Category Three situation, the court should also require the government to make a further determination of whether the project would have a significant adverse effect on the neighborhood adjacent to the proposed project.¹³³ This amounts to adding a fifth finding to the four elements of the test set out in the *Avco* case. A determination that there would be no significant effects, if approved by the court, would act like a negative declaration and permit the development to proceed as planned. If, however, the city or county determines that the project would have significant adverse impacts, the relief granted would be that determined by the governing jurisdiction to be appropriate to mitigate the effects of the project on the neighborhood.

After all, the essence of the planning function is to manage the effects of growth in relation to the needs and concerns of the community.¹³⁴ Had the local officials initially done what the law now requires them to do, either the project would have been turned down, or it would have been approved only if it could be adequately accommodated.

As with any new proposal, a number of definitional questions arise. Here they are: What is a "neighborhood adjacent to the proposed project?" What is a "significant adverse impact?" What type of relief is likely to be appropriate for mitigation? What is the courts' scope of review of the governing jurisdiction's determinations? How much will it cost? We will attempt to address each question in turn.

right to develop vests. Although the concept of "vested rights" is generally rooted in the Constitution, a statute can authorize an agency to adopt regulations providing guidelines in making the factual determination. *El Patio v. Permanent Rent Control Bd.*, 110 Cal. App. 3d 915, 168 Cal. Rptr. 276 (1980).

133. The California Environmental Quality Act (CEQA) already requires cities and counties to prepare an environmental impact report whenever there is a likelihood of significant environmental impact from a land use decision. Cities must prepare an EIR together with the adoption of any general plan, community plan, or zoning amendment. CAL. PUB. RES. CODE § 21080 (West 1986).

CEQA provides a limited exemption for residential projects consistent with zoning or the community plan for which an EIR was certified for the zoning or planning action. While a "mini EIR" is still required, it is limited to the effects upon the environment which are peculiar to the parcel or to the project and which were not addressed as significant effects in the prior EIR, and any cumulative impacts of the development not discussed there. CAL. PUB. RES. CODE § 21083.3 (West 1986).

An effect is not considered "peculiar" if uniformly applied development policies or standards have been previously adopted by the city or county, with a finding that the development policies or standards will substantially mitigate that environmental effect when applied to future projects. *Id.*

134. PRINCIPLES AND PRACTICE, *supra* note 52, ch. 13.

A. *What is a neighborhood?*

If a neighborhood is entitled to redress for planning mistakes, it is important to have an understanding of what the neighborhood is. There is no single definition of neighborhood. The word "neighborhood" can have different meanings for different persons depending upon their respective interests. The neighborhood can be viewed from the perspective of an insider trying to define the geographic limits within which he or she feels comfortable, or, it can be seen from the viewpoint of an outsider, as a city planner might see it in trying to create manageable neighborhood units. The first view connects the individual to the neighborhood, while the second sees the neighborhood in relation to the whole city.¹³⁵

In size, the neighborhood is usually thought of as a social group larger than the individual household but smaller than the city, though its boundaries are often vague and ill-defined. It may be as small as a few houses or a block, or the distance one can easily walk, or as large as a school district.¹³⁶

Clearly, there are many ways to conceptualize a neighborhood, although the most common approaches retain some notion of a geographic unit within which certain social relations exist. For our purposes, the definition of the aggrieved neighborhood must remain fluid and contingent. It will have to be defined contextually depending on the nature of the particular controversy and the impact of the project in question on the social life of the community. It might not be limited to those households in the immediate vicinity of a project. For example, a particularly large project might generate traffic problems for residents several blocks away who might not be directly affected by other aspects of the project.

The problem of neighborhood definition was faced in *Residents of Beverly Glen v. City of Los Angeles*.¹³⁷ In that case a non-profit civic organization whose membership consisted of approximately 300 families residing in the canyon community of Beverly Glen in Los Angeles challenged the validity of a conditional use permit granted by the city. The residents alleged that granting the permit would allow population densities beyond those permitted in the master plan for the area and would result in a widening of the canyon road and the destruction of the members' residential community.

135. A. DOWNS, NEIGHBORHOODS AND URBAN DEVELOPMENT 15 (1981).

136. WARREN & WARREN, THE NEIGHBORHOOD ORGANIZER'S HANDBOOK (1977).

137. 34 Cal. App. 3d 117, 109 Cal. Rptr. 724 (1973).

The Court of Appeal held that the plaintiff organization had standing because: (1) the members of the organization lived in the affected area and (2) the members would suffer injury if the challenged project was constructed. The court noted that the fact that "particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."¹³⁸ There should, therefore, be no particular obstacles to defining the appropriate scope of the area entitled to relief.

B. *What is a Significant Adverse Impact?*

In Category One cases the courts have found that the complaining developer who meets the *Avco* tests will receive a vested right.¹³⁹ In Category Two cases the courts have said that the complaining developer loses unless the damage inflicted by the project on the surrounding community would be *de minimis*.¹⁴⁰ In Category Three cases we have proposed a rule of significance. Clearly this is damage somewhere between the extremes of nuisance and *de minimis*.

In *Friends of "B" Street*,¹⁴¹ the court held that the city had abused its discretion by dispensing with the preparation of an EIR and by adopting a negative declaration instead, where an argument could *fairly* be made that the project might have a significant environmental impact. The court described some of the neighborhood impacts, illustrating the sort of review we propose the city or county should be required to undertake when it issues an inconsistent permit:

Two neighborhood stores would be removed, and 12 families would be displaced due to the removal of residential structures. The project would result in the loss of the residential community characteristic of the area, and a decrease in residential property values. The residential desirability of adjacent properties would be adversely affected by the increased noise and exposure to traffic, reduced setbacks of the structures from the street, and the loss of on-street parking. The conversion of single-family dwellings to commercial or multi-family use would be accelerated. The project would also result in a decreased visual or aesthetic quality of the area due to the removal of the trees,

138. *Id.* at 122, 109 Cal. Rptr. at 727 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)).

139. *See supra* notes 25-34 and accompanying text.

140. *See supra* notes 35-46 and accompanying text.

141. *Friends of "B" Street v. City of Hayward*, 106 Cal. App. 3d 988, 165 Cal. Rptr. 514 (1980).

grass and garden areas, and the decrease in the setback of structures from the street. This evidence indicated that a finding of significant environmental effect was mandatory.¹⁴²

In the broad range of possible impacts, the significance of the effects is a matter of degree. The question of the degree of significance, however, is a matter best taken into account when answering our third question regarding the appropriate mitigating measures.

C. *What is an Appropriate Mitigating Measure?*

In our proposal, if the governing jurisdiction finds that a project would have a significant neighborhood impact, it would be required to address the question whether the impact can be relieved by mitigating measures. The amount of mitigation required would vary depending on the severity and type of the harm. Mitigation can range from improving traffic control in the neighborhood to purchasing the site of the development.

The California Environmental Quality Act (CEQA) already requires each public agency to mitigate or avoid the significant effects on the environment of any projects it approves or carries out, whenever it is feasible to do so.¹⁴³ While the courts' role in the EIR process is limited to determining whether there has been an abuse of discretion,¹⁴⁴ they will review the EIR to assure that the local agency makes findings concerning the avoidance or mitigation of any significant environmental effects identified in the EIR.¹⁴⁵

The decision regarding appropriateness is clearly a legislative one to be made by the governing jurisdiction. However, simple rules of economics would seem to dictate a least-cost, plan-supporting approach. If the project's impact, no matter how severe, can be mitigated with minimum public expenditure, there seems to be no reason to stop the developer from completing the project. If no public improvement would effectively mitigate the impact, or the cost of such mitigating measures would be extraordinary, purchasing the non-conforming development rights in the property or, in the extreme, the property in fee, appears appropriate.

The government may condemn or "take" private property for

142. *Id.* at 1003, 165 Cal. Rptr. at 523-24.

143. CAL. PUB. RES. CODE § 21081 (West 1986).

144. *See supra* note 141.

145. *Cleary v. County of Stanislas*, 118 Cal. App. 3d 348, 173 Cal. Rptr. 390 (1981). The court held that the county acted improperly in approving a final EIR which identified significant effects of a proposed project where the county did not make findings concerning the avoidance or mitigation of those effects.

public use. This power of eminent domain may be used to acquire *any* interest in property.¹⁴⁶ The chief limitations are that public interest and necessity require it.¹⁴⁷ While early cases leaned toward a restrictive definition of what constituted a 'public use,' the modern trend is toward a more expansive interpretation. Condemnation has been permitted even where no physical use of the land by the public is contemplated. The United States Supreme Court has long approved the exercise of the power of eminent domain where the purpose is to create a community that is "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."¹⁴⁸ On the other hand, the power of eminent domain can never be used "just because the public agency considers that it can make a better use or planning of an area than its present use or plan."¹⁴⁹

D. *What is the Scope of Review?*

The determination of consistency, significance of the impact, and appropriateness of the mitigating measures are all proper subjects for the regulating jurisdiction. We are not proposing that these findings be subject to any greater review than would ordinarily be applied to such legislative matters. Short of arbitrary and capricious action by the regulating jurisdiction the court should not intervene in the planning function.¹⁵⁰ Only in the case of the recalcitrant governmental entity might the court justifiably substitute its wisdom for that of public officials.¹⁵¹ The main role of the courts should be to assure that government officials take their planning responsibilities seriously.¹⁵²

Our intent is not, then, to encourage aggressive court intervention into planning matters better left to the legislative and administrative branches of government. The thrust of our proposal is rather to ensure that a readily accessible forum is provided to address the problems created by the failure of planning as mandated

146. CAL. CODE CIV. PROC. §§ 1235.170 & 1240.010 (West 1982).

147. CAL. CODE CIV. PROC. § 1240.030 (West 1982).

148. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

149. *Redevelopment Agency of San Francisco v. Hayes*, 122 Cal. App. 2d 777, 812, 266 P.2d 105, 127 (1954).

150. *See supra* note 76 and accompanying text.

151. *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*, 92 N.J. 158, 456 A.2d 390 (1983).

152. The courts already have experience with reviewing local authorities' consistency determinations under the Planning and Zoning Law, as well as reviewing findings as to significant environmental impacts and appropriate mitigation measures under CEQA.

by the Legislature. It is, of course, possible for a governmental entity to address the problems we have raised on its own. Unfortunately, there is little evidence that they have, or will choose to do so. Apparently, in all but the most extraordinary situations, government entities must be compelled to address these problems.

The importance of a forum to hear substantive community complaints in situations such as vested development rights/consistency cases to the maintenance of our social fabric cannot be overstated. The Legislature, as discussed earlier, has specifically called for public participation in planning matters. This requirement would become a cruel hoax on the public if their participation were not to be taken seriously. A citizen who responds to the call for participation and is then told that there is no forum to provide relief for violations of that plan can only develop the kind of cynicism about government all too common in our society, further decreasing the level of political participation in the country's affairs.¹⁵³

E. *How Much Will It Cost?*

The prospect that a city or county might have to provide mitigating measures for any development projects approved when the zoning is not consistent or the plan inadequate raises the question of how much this will cost the government. Several factors would serve to lessen the financial impact of such a rule. First, statutory periods of limitation on actions challenging development permits would reduce the number of projects which could be attacked. Under Cal. Gov't Code Section 65860, actions to enforce compliance must be brought within 90 days of the enactment of any new zoning ordinance or the amendment of any existing ordinance.¹⁵⁴ Actions to attack conditional use and other permits and appeals from the decision of zoning appeals boards or zoning administrators must be brought within 90 days,¹⁵⁵ and any petition for a writ of administrative mandate challenging the adequacy of the plan must also be filed within 90 days from the date of adoption of the plan.¹⁵⁶

Where the statutory limitations periods do not apply or would be manifestly unfair we would suggest the courts adopt a rule of reasonableness. Since we are dealing in the field of equity, appropriate

153. B. BARBER, *STRONG DEMOCRACY* (1984).

154. CAL. GOV'T CODE § 65860(b) (West 1983).

155. CAL. GOV'T CODE § 65907 (West Supp. 1987).

156. CAL. CODE CIV. PROC. § 1094.6 (West Supp. 1987). The adoption or amendment of the general plan is a legislative act which is reviewable by mandamus under § 1085 of the Code of Civil Procedure. CAL. GOV'T CODE § 65301.5 (West 1983).

consideration should be given in those situations to the doctrine of laches.¹⁵⁷

Second, in contrast to a recent ruling by the United States Supreme Court that the government may be held liable for "temporary takings" under harsh land use regulations which are later invalidated,¹⁵⁸ (exposing it to enormous damage awards for every miscalculation in judgment in adopting regulations, and encouraging timid planning¹⁵⁹), our proposal allows a city or county to avoid liability by simply maintaining consistency between its planning and land use regulations, a requirement already mandated by state law.

Third, as noted above, the city or county would only be obligated to pursue the most cost effective mitigation measures. Only where the cost of these measures exceeded the value of the developer's property interest would the city or county be obligated to purchase any part of the developer's interest in the property. Even in such cases it might be preferable to acquire only a portion of the development rights rather than the entire fee. Courts have accepted the concept of transferable development rights as a means of partially compensating landowners for strong land use restrictions.¹⁶⁰ It should present no conceptual problem for a court to also recognize the power of government to condemn some but not all of a landowner's development rights, provided the portion not taken has economic value.

Even assuming it were necessary to take the developer's entire interest, a strong case can be made for limiting the award of damages to that required to make the developer whole, rather than basing it on the value the project would have if constructed. The Constitution requires that "just compensation" be paid for property taken. In vested rights situations the nature of the award will de-

157. See *Holt v. County of Monterey*, 128 Cal. App. 3d 797, 180 Cal. Rptr. 514 (1982); *Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors*, 38 Cal. App. 3d 257, 265-66, 113 Cal. Rptr. 328, 333-34 (1974); *Millbrae Ass'n for Residential Survival v. City of Millbrae*, 262 Cal. App. 2d 222, 235-36, 69 Cal. Rptr. 251, 268-69 (1968).

158. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, — U.S. —, 107 S. Ct. 2378 (1987); see *Agins v. Tiburon*, 447 U.S. 257 (1980); *San Diego Gas and Electric v. City of San Diego*, 450 U.S. 621 (1981); *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, — U.S. —, 106 S. Ct. 2561, *reh'g denied*, —U.S.—, 107 S. Ct. 22 (1986).

159. See *Williams, et al., The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984). We generally agree with the opinions expressed therein, particularly those comments dealing with neighborhoods.

160. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

pend to a significant extent on the scope of the development right granted by the court, as this affects the valuation of the property taken. In the usual case where the court permits the developer to build the project as originally planned, the owner is guaranteed, in effect, not only its out of pocket expenses but all its potential profit. If, on the other hand, courts were to accept the premise that the developer's vested rights should extend only so far as necessary to hold it harmless, the cost to the government of any complete or partial taking could be greatly reduced.

While it is beyond the scope of this article to address all the problems of valuation in eminent domain proceedings, the work of Richard Cunningham and the late Donald Hagman may be usefully consulted in this regard. Each legal scholar has proposed reforms to the vested rights rule that would limit the scope of the vested rights granted to the developer. While they were not speaking specifically to what we have called Category Three cases, their schemes appear to have particular application where, as here, the developer can rarely be seen as totally unaware of the inconsistency between the zoning and the plan, if not the inadequacy of the plan itself.

Cunningham's proposal,¹⁶¹ which is specifically intended, at least in part, to quantify developer's vested rights claims, draws heavily on amortization concepts employed frequently in nonconforming use cases to protect the property owner's reasonable economic expectations, but only to the extent of recovering its initial investment. Cunningham would similarly limit the developer who qualifies for a vested right to recovering only some reasonable approximation of the investment *actually made* in the project, as represented by the sum of monies in fact expended or obligated on the project up to the time development permission is revoked.¹⁶²

Hagman would have similarly protected the developer's expectation interests only to the extent necessary to make "economic use" of the construction already completed.¹⁶³ He argued that the scope

161. Cunningham & Kremer, *supra* note 1, at 710-29. According to Professor Cunningham, his approach is consistent with the emerging view that it is government which creates development rights and determines how they become vested, rather than the older view that these rights are inherent in property ownership and that only minimal interference in such rights should be tolerated. Where a project appears to contravene the public welfare, Cunningham believes that development rights can be restrained and restricted to that minimum quantum represented by the developer's economic investment. *Id.* at 713.

162. *Id.* at 722-28.

163. Hagman, *Estoppel & Vesting*, *supra* note 1, at 594, § 66499.80. If a developer could earn a profit far in excess of ordinary expectation by virtue of the protected non-conforming use status granted the project, Hagman felt that the developer could be

of the development right should not necessarily be all that the developer intended:

To the extent the preliminary expenditures would not be wasted, that is, to the extent the landowner-developer could earn a fair return on investment made thus far and economic resources would not be wasted, it would not be unjust or contrary to the public interest to limit that vesting right to a project of smaller scope.¹⁶⁴

Insofar as the courts are prepared to adopt either of these approaches and limit the developer's recovery to its out of pocket expenses, the cost of mitigation could be significantly reduced.

Finally, consistent with the above discussion, the city might also reduce the financial expense of providing relief to the neighborhood by shifting some of the costs of mitigation directly onto the developer, provided the developer could still earn a fair return on its initial investment. This could mean having the developer pay for traffic improvements, additional landscaping, or other community facilities.¹⁶⁵

IX.

APPLYING THE PROPOSAL TO CATEGORY ONE CASES

We have argued that the case for neighborhood relief in Category Three situations, where clear violations of legal requirements exist, is well founded. Here we raise the question of whether the same argument applies to at least some Category One situations where the governmental entity changes the relevant land use controls *after* the permit is issued.

In some situations, the decision to change the plan and regulations is really an admission that the previously existing plan was substantively inadequate as a basis for making correct land use decisions. From the community point of view, it should be apparent from our discussion that the impact on the neighborhood does not

required to limit sales prices, dedicate property to the public, pay in lieu fees or make other arrangements to reduce windfall gains to ordinary profit. *Id.* at 595, § 66499.86. Hagman's ideas were put forth in the form of a model statute intended to add a Division 4 to Title 7 of the Government Code. The foregoing section references are to that model.

164. *Id.* at 560.

165. Under the consistency review process approved in the *Hillside* settlement, notice of pending applications is given to the local neighborhood residents who can file objections to the proposed project. The result has been that developers have been negotiating with the residents of the surrounding community and paying for mitigation measures in order to have their projects approved. *See supra* note 25 and accompanying text.

depend on whether the government erred by failing to meet the formal requirements of the planning laws, or whether it failed to recognize the need to amend its regulations in time to stop a project inconsistent with its new found wisdom. Since our proposal is designed to protect the developer,¹⁶⁶ there should be no real objection to also protecting the neighborhood, at least in carefully limited circumstances.¹⁶⁷

The problem is accentuated by the long time it takes to make a change in the planning process as opposed to the much shorter time it takes to make expenditures sufficient to vest a previously obtained permit. Some jurisdictions have dealt with this problem by limiting reliance expenditures to those made prior to notice of pending legislative change.¹⁶⁸ This approach, however, still generates a win/lose situation.

It was not our purpose in this article to take our proposal this far; many other questions would have to be explored. It is enough here to question the wisdom of the present win/lose situation of the current vested rights rule.

X. CONCLUSION

In this article we have attempted to set forth a case for protecting the neighborhood in those situations where the governing authority fails in its legal responsibility to plan for the area. We noted that the courts have heretofore been understandably reluctant to charge

166. The developer either receives compensation or is allowed to complete the project with the city paying for mitigation.

167. The General Plan Guidelines suggest that plans be updated every five years. OFFICE OF PLANNING AND RESEARCH, STATE OF CALIFORNIA, GENERAL PLAN GUIDELINES 68 (1982). Perhaps this could be taken as a benchmark; if the plan had not been revised within that time period then a presumption could be raised that the city had not met its responsibility to the neighborhood to plan. In addition, if the neighborhood could point to significant changes in circumstances since the plan was prepared, this could also demonstrate that the plan had become obsolete.

168. The Oregon courts appear to follow such an approach. The Oregon Supreme Court has set out a multi-factor test which includes the following criteria:

- (1) the substantiality of expenditures;
- (2) the presence or absence of good faith;
- (3) the presence or absence of notice of the proposed zone changes or interim ordinances;
- (4) the type, location and cost of the project.

Clackamas County v. Holmes, 265 Or. 193, 508 P.2d 190 (1973). This test has been criticized for not stating the relative significance of the factors and the weight to be applied to each factor. See Note, *Vested Rights and Land Use Development*, 54 OR. L. REV. 103 (1975).

the development community with the local authority's mistake, but that, as a consequence, the local residents near the project are often called upon to bear the brunt of unmitigated development. Our solution, shifting the responsibility back to the responsible governmental entity while at the same time protecting the legitimate expectations of the landowner, seems to us to be both fair to all concerned and in accordance with the intent of the Legislature in enacting the Planning and Zoning Law.

