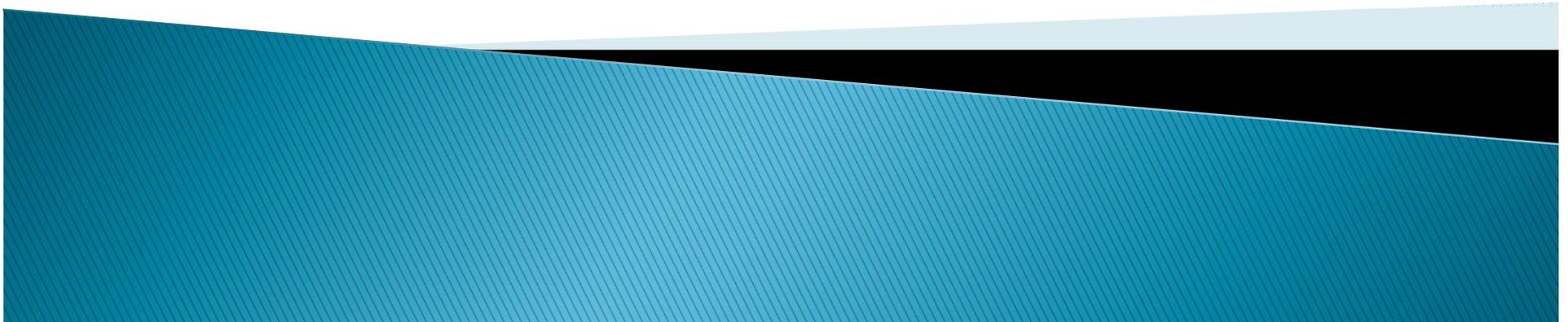




# California Planning and Land Use Laws for LAFCo Staff

April 5, 2011  
Ventura



# Welcome

# Introductions

# Overview of Course

- ▶ Kate McKenna, AICP, Executive Officer, Monterey LAFCo and Deputy Executive Officer, CALAFCO
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# Land Use Essentials

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# Overview

- Police Power
- General Plans
- Zoning
  - Zoning by Initiative
  - Non-Conforming Uses
  - Conditional Use Permits & Variances
- Subdivision Map Act
- The Takings Clause
  - Eminent Domain, Regulatory Takings, Exactions



# Police Power – Overarching Rule

- A city or county controls every land use decision.
- Except if
  - Federal law controls.
  - California law controls.
  - A special district controls.



# Federal Preemption

- 11<sup>th</sup> Amendment of the United States Constitution. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”
  - California law controls unless preempted by federal law.
  - Sometimes Congress only partially regulates Land Use decisions.



# Example #1 of Federal Land Use Regulations – ESA

- Endangered Species Act. (16 USC 1531 *et seq.*)
  - US Fish & Wildlife Service administers ESA.
  - Lists threatened or endangered species. 16 USC 1533
  - Federal agencies must consult with USFWS for approvals. 16 USC 1536
  - Prohibits “taking” listed species, but allows incidental takes. 16 USC 1536, 1538, 153
- 

# Example #2 of Federal Land Use Regulation – Navigable Waters

- USCOE has jurisdiction over “navigable waters.” 33 U.S.C. 402–403
- This has dramatically expanded. (33, U.S.C. 1362(7); *See* 33 CFR 329)
  - Waters subject to the ebb and flow of the tide.
  - Waters used for commerce.
  - Waters formerly used for commerce.
  - Waters reasonably susceptible to interstate or foreign commerce.



# Example #2, Navigable Waters, continued.

- Section 404 Permits– USCOE regulates “dredged materials” and “fill” into waters of the U.S. Even though USCOE issues the 404 Permits, the EPA can veto any 404 permits.
- Section 401 of Clean Water Act. (33 USC 1341 *et seq.*) – dredging/filling must comply with water effluent requirements of Regional Water Quality Control Board.



# Additional Federal Examples

- Telecommunications Act of 1996.
- National Historic Preservation Act of 1966. (16 USC 470). Advisory council comments on potential impacts.
- Coastal Zone Management Act. (16 USC 1456(c)). CA Coastal Commission Controls.
- National Environmental Policy Act (33 U.S.C. 4321 *et seq.*). Environmental disclosure required.
- Airport Land Use Commissions.
- 1<sup>st</sup> Amendment – RLUIPA – see *infra*.



# Cities or Counties Have Police Power. Special Districts Do Not.

- Cal Const. Art XI sec 7: “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.”
- Cities and Counties have equal power. Special Districts obtain limited powers that directly from the state.



# But the State Can Preempt.

- Cal Const. Art XI sec 7: “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.”
- Except where preempted, “a city or county’s police power is as broad as the police power exercisable by the Legislature itself. *Candid Enterprises, Inc. v. Grossmont Union High School District* (1985) 29 Cal.3d 878, 885.



# Examples of State Preemption

- Planning and Zoning Law. ( 65000)
- California Building Standards Code. (Code of Regulations Title 24.)
- California Endangered Species Act. (Fish & Game Code 2050–2098) [also protects plants].
- Coastal Act. (Pub. Res. Code 30000.)



# The Police Power is Very Broad

- Local government has broad discretion over land use issues.



# Land Use: Via General Plans and Zoning

- In California, land use and development is controlled through laws requiring counties and cities to enact general plans, zoning, subdivision and other planning laws and to abide by state mandated environmental laws
- The correlation of these laws and the interrelationship of local ordinances and state mandates forms the framework for development in California



# General Plans

## General plan as the constitution

- Since 1971, California law has required that a city's zoning and subdivision approvals be consistent with an adopted general plan. *See* 65300.
- Any subordinate land use action, such as zoning, tentative maps or development agreements that are inconsistent with the general plan are void at the time they are acted upon.



# ***LESHER COMMUNICATIONS, INC.***

- The General Plan is the “constitution,” and zoning amendments must comply. *Leshar Communications Inc. v. City of Walnut Creek* (1990) 52 Cal. 3d 553, 570–71.
- The involved voter initiative was a regulation, not an amendment to the general plan. As such, it was invalid because it did not comply with the General Plan.



# Purpose of General Plan

- Identify various goals of community.
- Provides “long-term” basis for decision making. *See* 65300.
- Provide for citizen involvement in planning process.
- Inform all parties of development rules.



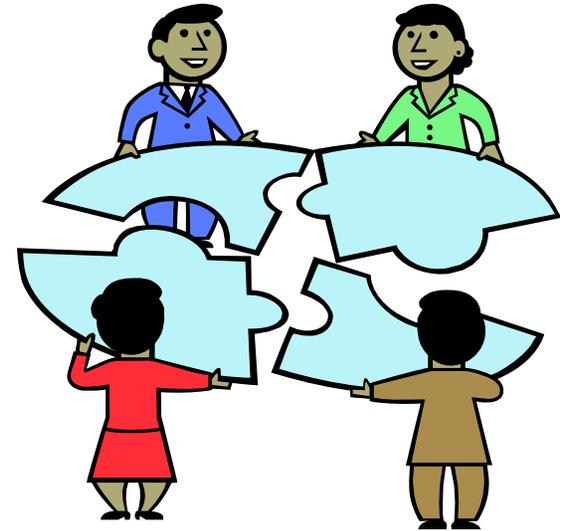
# Mandatory General Plan Elements

- Land Use
- Circulation
- Housing
- Conservation
- Open Space
- Noise
- Safety



# Permissive General Plan Elements

- Any subject is appropriate where there is a concern in the community to study and plan regarding an issue that is not included in the mandatory elements.



- Permissive elements might include Resource Management, Endangered Species Protection, Air Quality, Growth Management, Artistic Resources, Cultural Resources, Economic Development.



# Examples of Permissive General Plan Elements

- Administration, Aesthetics, Agriculture, Air Quality, Airport, Archeological, Bicycle, Biological, Child Care, Coastal, Commerce, Community, Cultural, Design, Economic, Education, Emergency, Energy, Environment, Fire, Fiscal, Flood Control, Forestry, Geothermal, Governance, Growth Management, Hazardous Waste, Historic Preservation, Implementation, Military Facilities, Mineral Resources, Parking, Parks & Recreation, Public Facilities, Public Services, Redevelopment, Regionalism, Resource Conservation, Scenic Highway, Seismic, Social Services, Trailways, Transportation, Urban Boundaries, Waste, Water Resources



# Policy Objectives and Policies

- General Plans must include Policy Objectives and Policies.
- City of Palm Springs Policy Objective 6.11 “quality service levels of law enforcement and fire protection at reasonable cost to Palm Springs citizens, workers and visitors.”



# Examples of Policies

- Policy 6.11.5: “New developments shall provide ease of access for all emergency vehicles. Minimum street widths shall comply with section 7. All structures shall maintain a minimum five-foot clearance.”
- Policy 6.11.10: “The Fire Department shall strive to maintain fire losses at a dollar level not to exceed the 10 year annual fire loss average adjusted by inflation.”



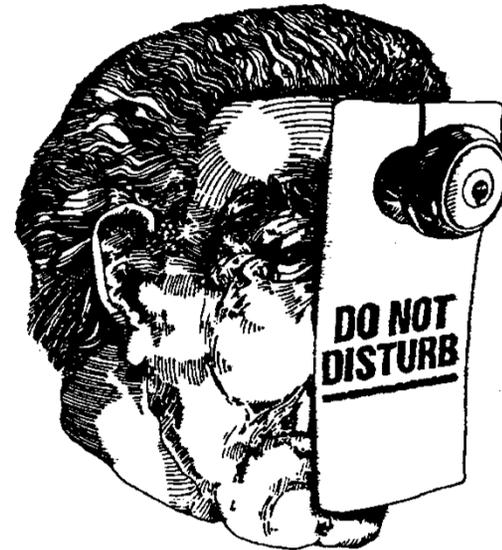
# Failure To Have A Legally Adequate General Plan

- New zoning ordinances are void.
- Land use approvals, including permits are void because the City lacks the power to approve.
- Compliance with the California Environmental Quality Act may be impossible – cannot complete the EIR. *See Guardians of Turlock's Integrity v. City Council* (1983) 149 Cal.App.3d 584.
- New development may be delayed or prohibited.



# Updates Are Good

- It is very easy to be tied to old ideas and closed to new ones.



# Housing Element.

## Housing Element Adoption

- The housing element must comply with state law with regard to low and moderate income housing requirements.
- Housing, according to the Legislature, is “a matter of vital statewide importance” and “the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order.”
- Low and moderate housing allocations are determined by SBCAG and must include existing and projected housing needs of the locality.



# Affordable Housing Requirements

- State Housing Element Law Requires an update to the housing element “as frequently as appropriate” which must be at least every 5 years. 65588.
- Affordable housing is a matter of “statewide importance.”



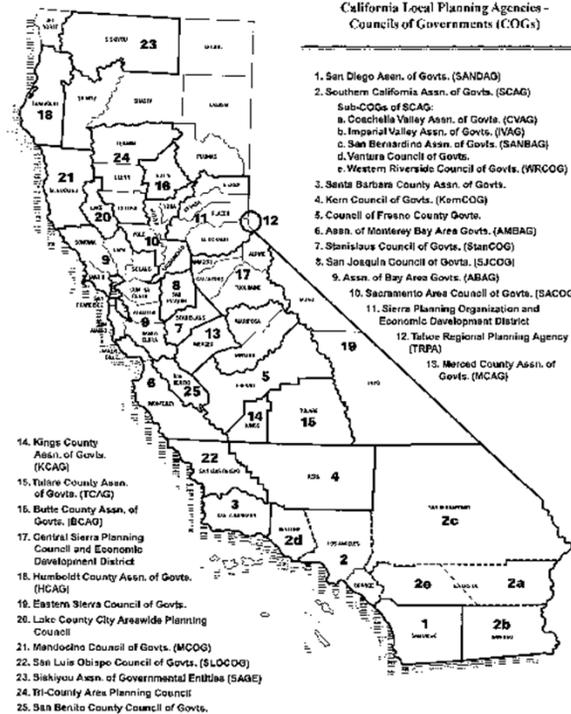
# Regional Housing Need Assessment

- The Housing element must demonstrate that it has “land suitable for residential development” equal to the City’s “fair share” of the regional housing need allocation (RHNA).
- There are 4 income levels: Very low income, low income, moderate income, above moderate income.
- A housing element need only “substantially comply” with state law.



# There are 25 Councils of Government (COGs) in California

Directory of California Local Planning Agencies - Councils of Governments (COGs)



# Procedure For Certification Of A Housing Element

- California Department of Housing & Community Development (HCD) should be requested to certify the housing element.
- HCD issues an advisory compliance report.
- As of September 1, 2004 only 60% of the required cities and counties were in compliance.



# Other Affordable Housing Laws

- Least Cost Zoning Law. 65913.1. [Must zone low income areas].
- Density bonus law. 65915 [must provide density bonuses for low and moderate income and senior housing].
- Second dwellings must be allowed. 65852.150



# Specific Plans

- A specific plan is a step below the general plan in the land use approval hierarchy.
- A specific plan must be consistent with the general plan.
- Zoning, subdivisions, public works projects and development agreements must be consistent with any adopted specific plan.



# Specific Plan Elements

- Contents
  - Distribution, location and extent of the uses of land, including open space.
  - Location and extent of proposed public and private transportation, sewage, water, drainage, solid waste disposal, energy and other essential facilities to be located within the plan area.
  - Standards and criteria for development and conservation of natural resources.
  - Program of implementation.



# More Thoughts

- Developers may wish to avoid the time consuming Specific Plan process.



# Zoning



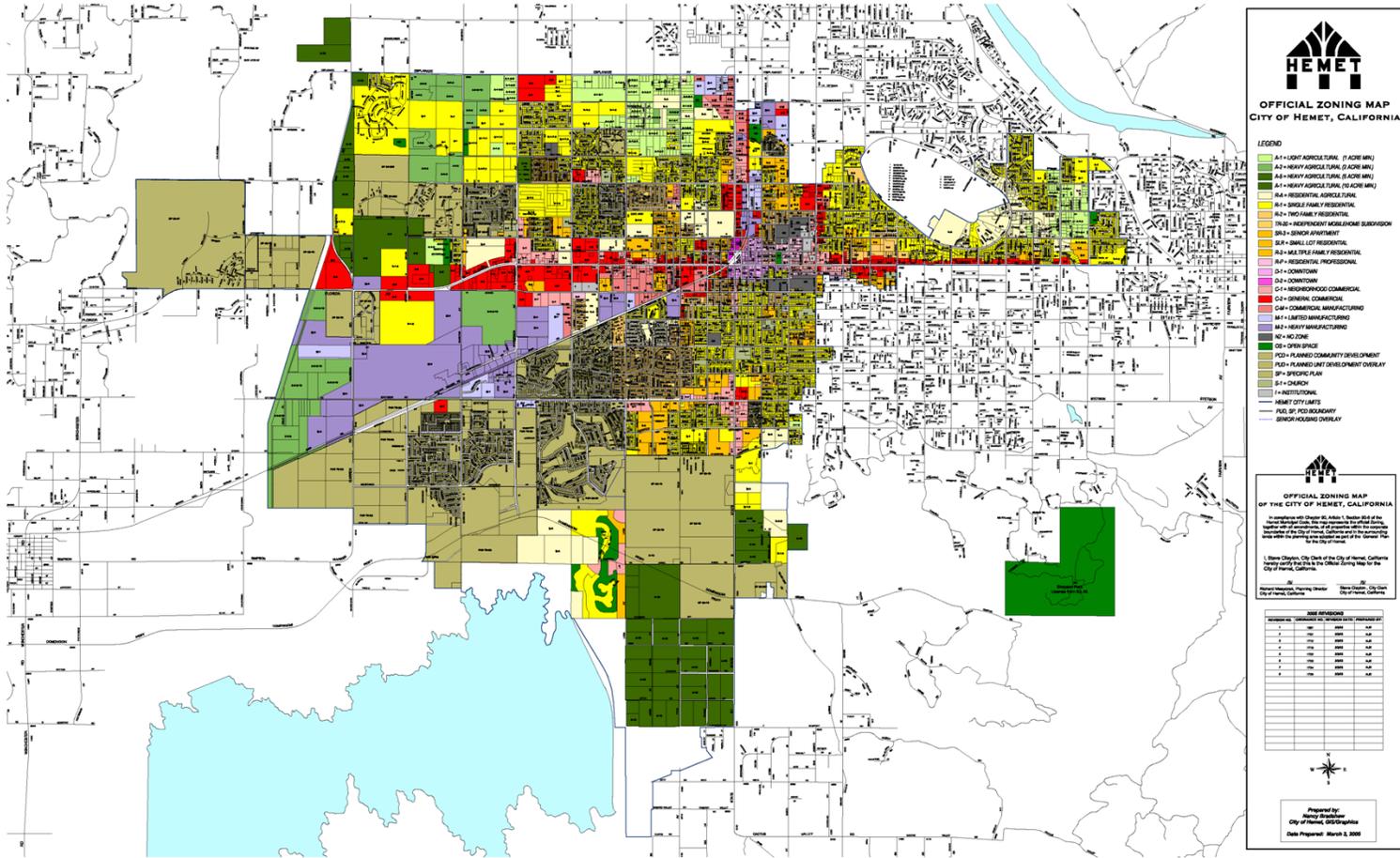
# Zoning

## What is Zoning?

- Zoning divides a city into districts each of which contains different regulations for development and land use.
- Zoning is undertaken by cities through the use of the police power which allows cities to adopt measures that relate to health, safety and the public welfare.
- Two kinds of zoning: types of uses & locations of uses.



# Example - Hemet Zoning Map



# Enactment of Zoning Regulations

- The City Council controls zoning and rezoning of property.
- Specific property may be re-classified from one zone (A-1) to another (Commercial) by rezoning.
- Uses allowed on property may be changed by zoning text amendments.



# Zoning Changes And Due Process

- Under California law, changes in zones for property or the deletion or addition of regulations require notice and a public hearing even though they are legislative acts.
- Zoning regulations require review by the Planning Commission as well as the City Council and are subject to environmental review under CEQA.



# Zoning By Initiative

- All zoning ordinances are subject to referendum. *Arnel Dev. Co v. City of Costa Mesa* (1981) 126 Cal.App.3d, 336.
- A referendum is equal to a zoning ordinance. Thus, it must be consistent with a general plan. *See deBottari v. City Council* (1985) 171 Cal.App.3d 1204, 1213.



# When Is Zoning Permissible?

- Zoning must be consistent with the general plan, any applicable specific plan.
- Zoning must also be consistent with any Airport Land Use Plan (ALUP) unless overruled by the City on a 2/3 vote. 21676(b).
- If the adoption of a general plan or specific plan creates an inconsistency with existing zoning, the zoning must be brought into conformity within one year.



# When Is Zoning Permissible?

## Permissible Regulations

- Types of land uses: residential, commercial, industrial, agricultural, recreation.
- Aesthetics: building height, size, design, signage, fencing, landscaping, etc.
- Planned Unit Development
  - Imposes consistent development standards.
  - Allows consolidation of density to maximize open space.



# Nonconforming Uses

- When property has been developed under zoning regulations that are later changed, the resulting use is called a “legal nonconforming use”.
- This frequently occurs when cities annex unincorporated areas where development has occurred under county jurisdiction.
- It also occurs as cities upgrade and change their own zoning regulations.



# Non Conforming Uses

## Upgrading Nonconforming Uses

- Legal nonconforming uses are allowed to continue but not be expanded until some new use is requested.
- Zoning ordinances usually provide standards for allowing limited expansion or rehabilitation of nonconforming uses under some circumstances.
- Nonconforming uses that are abandoned must conform to new zoning requirements.



# When Is Zoning Permissible? Amortizing Nonconforming Uses

- The City may terminate non-conforming uses so long as a reasonable amortization period is allowed the landowner consistent with the investment involved and reasonable expectations of return on that investment.
- The key is determining the value of the investment and what constitutes a reasonable return on that investment.



# Amortizing Nonconforming Uses (continued)

- The California Supreme Court has noted:  
“The California cases have firmly declared that zoning legislation may validly provide for the eventual termination of nonconforming uses without compensation if it provides a reasonable amortization period commensurate with the investment involved.” *Metromedia, Inc. v. City of San Diego* (1980) 26 Cal. 3d 848



# Constraints On Zoning

## Free Speech – Adult Businesses

- The First Amendment limits the police power, as the first amendment limits regulation of free speech.
- Regulation is permissible if it is:
  - Content-neutral “time, place, manner” regulation.
  - Designed to serve a substantial governmental interest.
  - Allows for reasonable alternative avenues of communication.



# Constraints on Zoning Free Exercise Of Religion

- First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”



# Constraints On Zoning

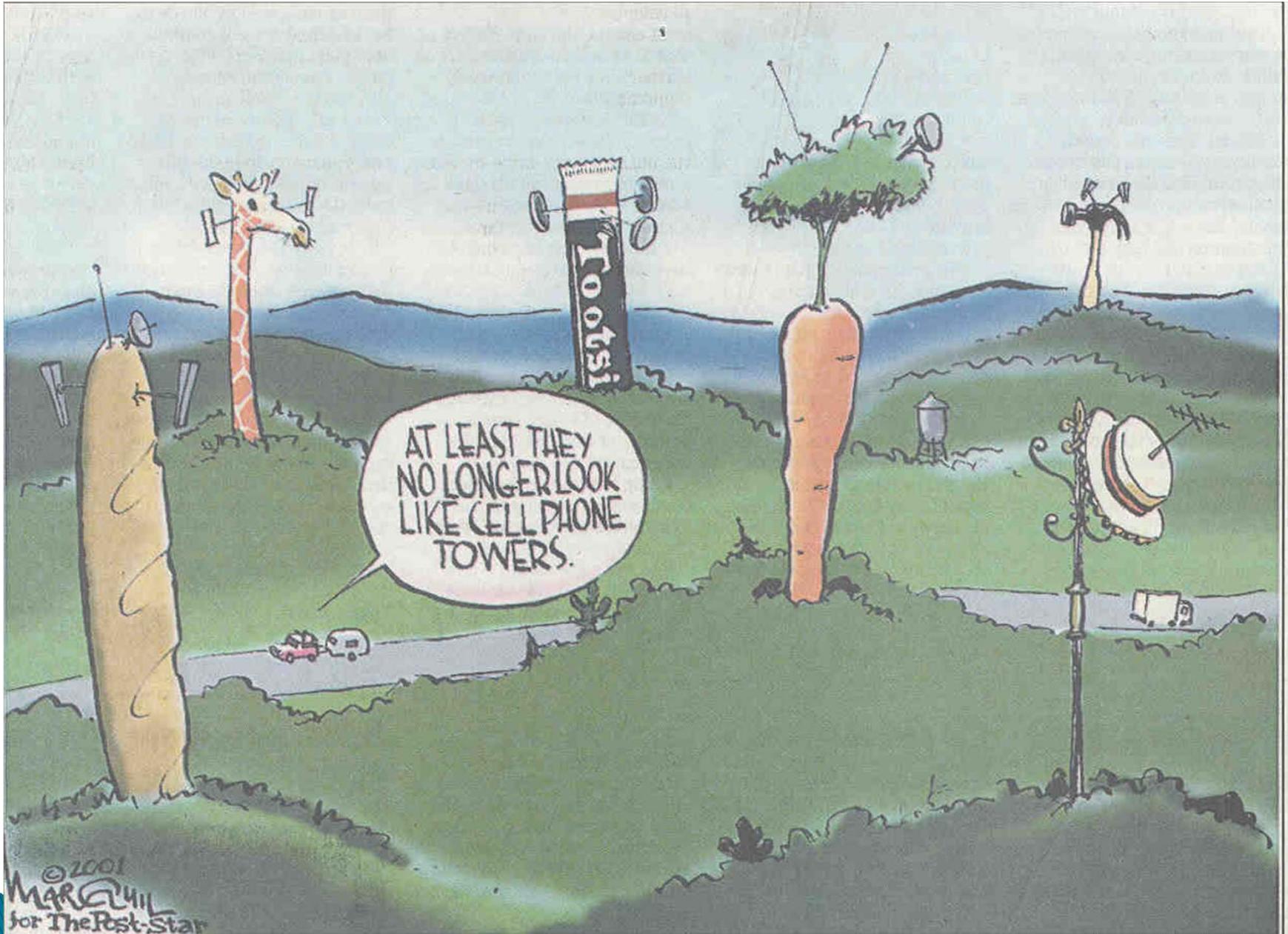
## Free Exercise Of Religion – RLUIPA

- RLUIPA – Religious Land Use and Institutionalized Persons Act. 42 USC 2000cc *et seq.*
  - Government cannot impose a “impose or implement a land use regulation in a manner that imposes a substantial burden” on religious exercise, unless it is to meet a “compelling governmental interest” and is “the least restrictive means” of furthering that interest.
  - A City is strictly liable for any violation.
- 

# Constraints On Zoning Public Utilities Code 7901

- Sprint Telephony PCS v. County of San Diego (2008)
- Sprint PCS Assets v. City of Palos Verdes Estates (2009)





# Constraints On Zoning – Other Laws

- Sometimes zoning ordinances can be overruled.
- By a 2/3 vote school districts can overrule zoning regulations (except those relating to grading, streets, drainage). Gov't Code 53094, 53097.
- Generally, reservations are not subject to local regulation. Lands outside reservations may be regulated.



# Interim Urgency Zoning Ordinances / Moratorium

- Government Code Section 65858 authorizes cities to adopt interim urgency ordinances to prevent *uses* of property that would violate a pending zoning change. This requires a 4/5 vote.
- This gains a city time to consider potential zoning ordinances.
- The initial urgency ordinance takes effect for only 45 days. It may be extended by 10 months 15 days and again by one year for a maximum effective period of 2 years.
- Note: This does not cause land to be “taken.” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency* 535 U.S. 302 (2002).



# CUPs And Variances Offer Options

HERMAN®

by Jim Unger



- Variances and conditional use permits offer options that can lead to a happier relationship with a developer.

# CUPs, Variances And Non-Conforming Uses. CUPs

- Zoning ordinances allow for relief from regulation through the conditional use permit (CUP), and variance process.
- Variances and CUPs run with the land.
- These are quasi-judicial actions.



# Variations

## What Are They?

- A variance is a permit issued to a landowner to construct a structure or engage in an activity not permitted in the zoning regulations applicable to his land.
- Variations require a showing of some physical condition affecting the land that makes it impossible for the landowner to enjoy the same benefits allowed others whose property is similarly situated.



# Variations When Permitted

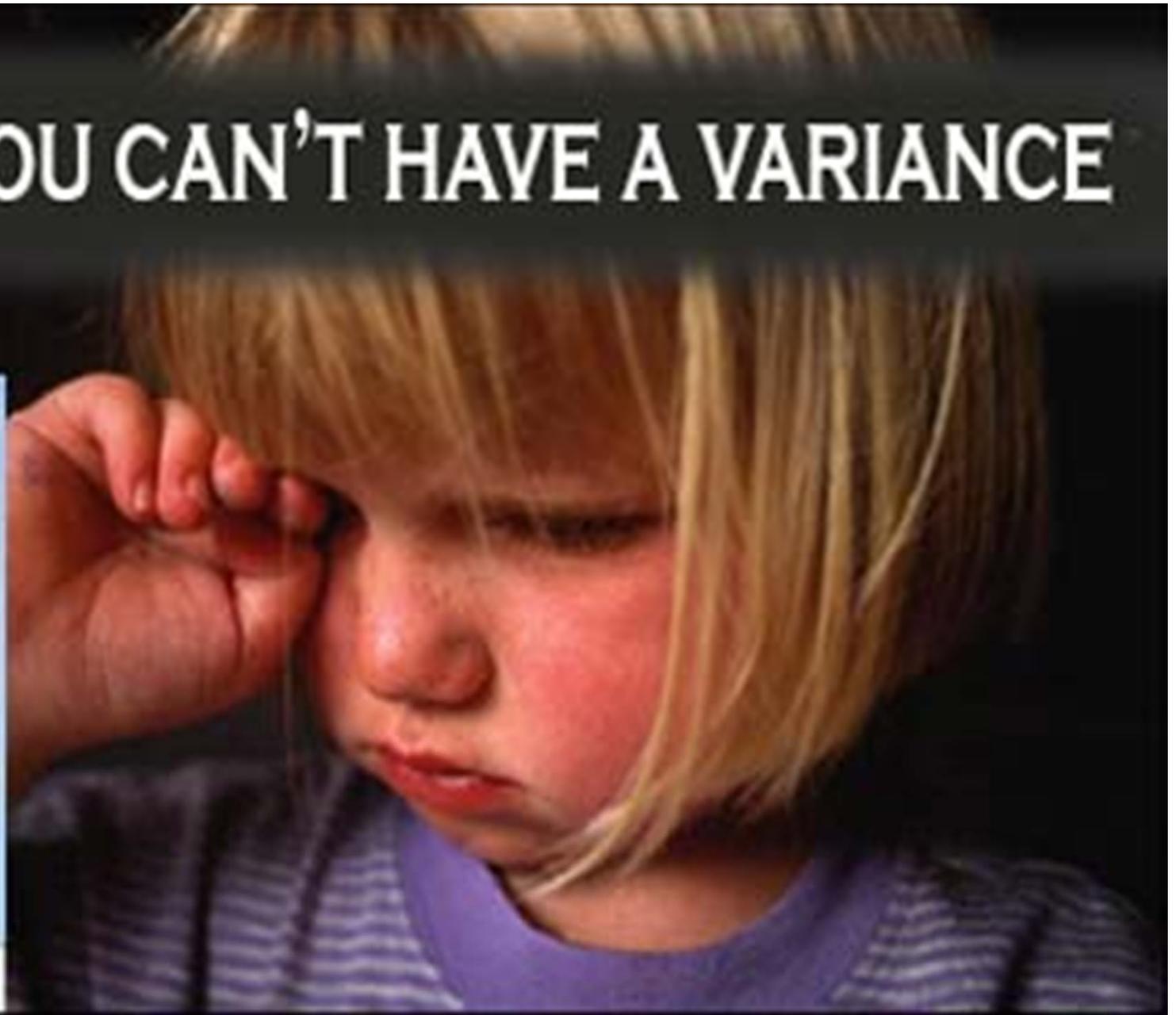
- 65906 provides rules for variations.
- Variations must be consistent with the General Plan and the zoning ordinance.
- Variations must be tailored to the unique circumstances of the property.
- No special privileges allowed.
- Cannot grant variance if it will adversely affect the interests of the public or the neighbors.



# NO, YOU CAN'T HAVE A VARIANCE



NOT YOURS



# Conditional Use Permits

- Local Ordinances establish rule for issuing conditional use permits (CUPs).
- CUPs add flexibility to established uses in particular zones.
- CUPs allow greater governmental review over uses that may be controversial.



# Change Can Be Difficult

- Sometimes people are reluctant to accept suggestions even from their neighbors.



<http://www.theonion.com/content/node/39683>



# Subdivision Map Act

- Every City must have a subdivision ordinance.  
Government Code 66411.
- That Ordinance must not violate the Subdivision Map Act.  
Gov't Code 66410  
*et seq.*



# Applicability To Counties And Cities

- Police Power. Local Government can impose conditions in excess of the Subdivision Map Act, so long as they do not violate the Act. *Soderling v. City of Santa Monica*, 142 Cal.App.3d 501 (1983); *Griffin Dev. Co. v. City of Oxnard*, 39 Cal.3d 256 (1985).
- Charter Cities. The Map Act applies to Charter Cities. *Santa Clara County Contractors & Homebuilders Ass'n v. City of Santa Clara*, 232 Cal.App.2d 564 (1965).



# General Plan Consistency

- All map approvals must be consistent with the General Plan & Specific Plan. *See Leshar Communications.*
- All map approvals must also be consistent with the applicable zoning regulations.



# What Is Subject To The Act?

- Gov't Code 66424 defines Subdivision as:
  - “[T]he division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or contiguous units for the purpose of sale, lease, or financing, whether immediate or future.”



# What Map Is Required?

- Subdivisions of less than five parcels generally require parcel maps, whereas divisions of 5 or more require tentative and final maps. (Gov't Code 66426).
  - It is a crime to attempt to get around the Act; 66499.31; Bus & Prof Code 11000 *et seq.* *See also Pratt v. Adams*, 229 Cal.App.2d 602 (1964).
  - Lot line adjustments are exempt from the Map Act. Gov't Code 66412(d).
- 

# Tentative Map Process

- Certain time limits apply
  - 30 days to make “completeness” determination
  - CEQA Time Frames (depends on document; EIR is 1 year).
  - Automatic approval *might* be required.
- Due Process, Notice and Hearings are required.
  - *Horn v. County of Ventura* 24 Cal.3d 605 (1979).



# Permit Streamlining Act

- Government Code 65920, 65921.1.
- Generally, action within 180 days from an EIR or 60 days from a negative declaration.
- No right to waive Permit Streamlining Act requirements.



# Vitality Of Tentative Maps

- Tentative maps are valid for an initial period of 2 years plus up to 1 year permitted by local ordinance for a total of 3 years. (66452.6)
- Automatic extension of 3 years occurs upon filing of each phased map.
- Discretionary extensions may be granted for up to 5 years.
- Maps may be extended by enactment of a development moratorium, statutes, or litigation.
- Development Agreements self-expire.



# Conditioning A Map Extension

- Extension of a map is discretionary, but that discretion has been held to relate only to questions of time. *See El Patio v. Permanent Rent Control Bd.* 110 Cal.App.3d 915, 928 (1980).
- Once a tentative tract map is approved, the city may not impose substantive new conditions, although a developer may voluntarily agree to new conditions.



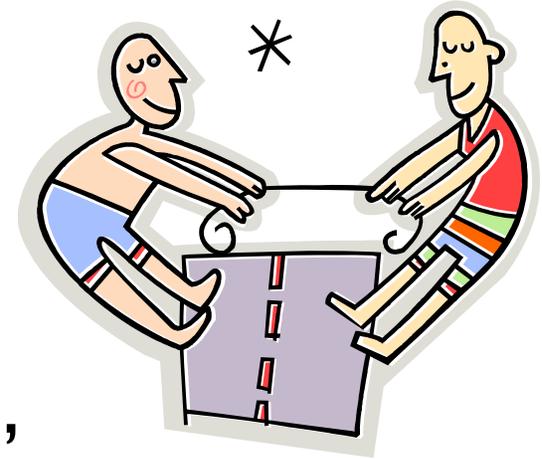
# Final Maps

- Final map approval is a ministerial act. It confirms that the conditions imposed by the tentative tract map have been met. If those conditions have been met, the City Council must approve the final map.



# Vested Rights

- A developer has no vested right to proceed with development of a project after approval of a final map or parcel map.
- Zoning can still be changed or other police power ordinances can be adopted after final map, CUP, PUD, zoning, rezoning, grading or other permits have been granted.



# Rights Only Vest With Building Permits

- A vested right to develop arises only after building permits have been issued and substantial work has been done in reliance on those permits. *Avco Community Developers, Inc. v. South Coastal Regional Commission* (1976)



# Vesting Tentative Maps

- To resolve the issue of vesting rights, a procedure exists allowing a developer to obtain a vesting tentative tract map to assure that regulation enacted after tentative tract map approval will not apply. *See 66498.1 et seq.*
- Cities retain the right to impose additional health, safety and general welfare conditions on permits, approvals or extensions of vesting maps.



# Development Agreements

- Development Agreements allow cities and developers to create vested rights and to demand greater contributions to infrastructure needs.
- For major developments, a Development Agreement can provide significant commitments to build bigger and better public improvements in exchange for a vesting agreement.



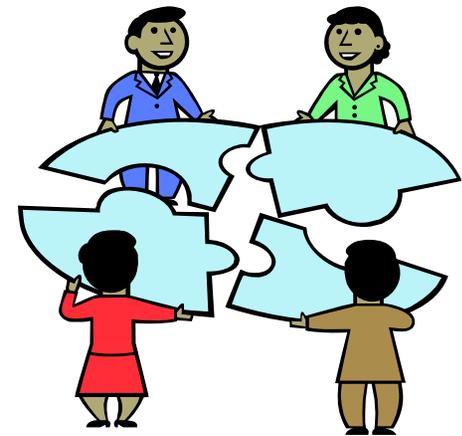
# CEQA Requires Mitigation

- In most cases, CEQA requires mitigation of environmental impacts of a project to less than a significant impact.
- City must issue a determination, based upon a sufficient amount of evidence in the record, whether the conditions are adequate to mitigate the impacts of the project.



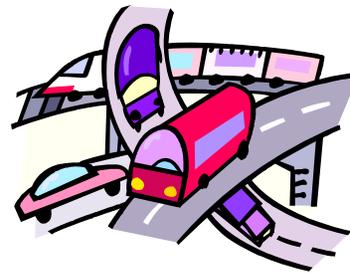
# When Conditions May Be Imposed

- Whenever a city has the authority to approve or deny a project, it also has the authority to approve it with conditions.
- Conditions must relate, however, to the actual impact of the development on the community.
- There must be a nexus between the condition imposed and the problem to be solved.



# Examples Of Generally Permissible Conditions

- Groundwater recharge facilities.
- Soils investigations and reports.
- Major Bridges and Thoroughfares.
- Street and bicycle paths.
- Local transit facilities.
- Soils investigations and reports.



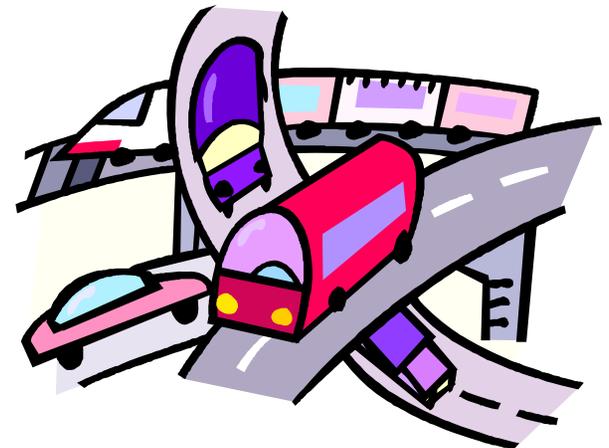
# Off-Site Improvements

- A development may be required to install oversized and off-site public facilities to meet the needs of future development in addition to the needs of the development itself.
- To do this a reimbursement agreement is required which provides for reimbursement from adjacent benefited development as it occurs.



# Eminent Domain *Kelo v. City of New London*

- Rush Limbaugh: “The Constitution is being rendered meaningless.”
- Gov. Jodi Rell (CT) “The issue is the 21<sup>st</sup> century equivalent of the Boston Tea Party.”
- Ralph Nader: “The U.S. Supreme Court’s decision in *Kelo v. City of New London* mocks common sense, tarnishes constitutional law and is an affront to fundamental fairness.”



***Kelo v. City of New London***  
**125 S. Ct. 2655 (2005)**



# How Eminent Domain Decisions Can Be Challenged

- CCP 1240.030 lists the requirements for eminent domain.
- There must be a public interest involved.
- There must be the greatest public good and the least private injury.
- Eminent domain must be “necessary” to the project.
- CEQA applies. Environmental review is required. Generally, the project must be the least environmentally damaging alternative.



# Regulatory Taking Rule *Penn Central v. City of New York*

- 438 U.S. 104 (1978).
- All analyses of takings require an *ad hoc* decision making process. These factors include:
  - (1) “the economic impact of the regulation on the claimant,” and especially “the extent to which the regulation has interfered with distinct investment backed expectations.
  - (2) the “character of the governmental action.” Physical takings are most egregious.



# Numerous Other Factors Exist – *See Kavanau v. Santa Monica*

- (1) Whether the regulation “interfere[s] with interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes...”
- (2) Whether the regulation affects the existing or traditional use of the property and thus interferes with the property owner's “primary expectation.”



# Numerous Other Factors Exist – See *Kavanau v. Santa Monica*

- (3) “The nature of the State's interest in the regulation.”
- (4) Whether the property owner's holding is limited to the specific interest the regulation abrogates or is broader.
- (5) Whether the government is acquiring “resources to permit or facilitate uniquely public functions,” such as government's “entrepreneurial operations.”



# More Factors Listed In *Kavenau*

- (6) Whether the regulation allows the landowner profit and a 'reasonable return' on investment.
- (7) Whether the regulation provides the property owner benefits or rights that "mitigate whatever financial burdens the law has imposed."
- (8) Whether the regulation "prevent[s] the best use of [the] land."



# More Factors Listed In *Kavenau*

- (9) Whether the regulation "extinguish[es] a fundamental attribute of ownership,"
- (10) Whether the government is demanding the property as a condition for the granting of a permit.
- *Kavenau v. City of Santa Monica* (1997) 16 Cal. 4<sup>th</sup> 761.



# *Penn Central* Factor #1 – Economic Impact on Claimant (Distinct Investment Backed Expectations)

- The question is how much *remains* usable, not how much was lost. *Keystone Bituminous Coal Ass'n v. DeBenedictis* 480 U.S. 470 (1987).
- Must show that the “reasonable investment backed expectations” were materially affected.
- *See Carson Harbor Village, 37 F.3d 468* (9<sup>th</sup> Cir 1994) – No standing to challenge rent control if the ordinance existed at the time of purchase – no investment backed expectations.



# *Penn Central* Factor #2 – Character of the Governmental Action

- “A physical taking is more onerous than a regulatory taking.” *Keystone Bituminous Coal Ass’n v. DeBenedictis* (1987) 480 U.S. 470.
- Permanent barring of all construction is a taking. *Lucas v. South Carolina Coastal Council* 505 U.S. 1003 (1992).
- Landmark Preservation is permissible. (*Penn Central*)



# Examples Of “No Taking”

- *Long Beach Equities Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016 [substantially downzoning unannexed land is permissible].
- *Hotel & Motel Ass’n of Oakland* 344 F.3d 959 (9<sup>th</sup> Cir. 2003) [to avoid prostitution, city can require improvements or permit revocation].



# Examples Of “No Taking”

- Rent control did not constitute a taking because it “leaves the property owner some economically beneficial use of his property.” *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal. 4<sup>th</sup> 761.
- *Landgate v. California Coastal Comm’n* 17 (1998) Cal.4th 1006. No taking for a regulatory delay.



# Examples Of “Taking”

- A total temporary inability to rebuild property – distinguished from a request for permits. *First English Church v. City of LA* (1987) 482 US 304
- The unreasonable delay was for the sole purpose of an intent to delay. *Ali v. City of LA* (1999) 77 Cal.App.4th 246.



# Exactions

## *Nollan and Dolan*

- An exaction is where the government permits a land use on the condition of a payment or dedication to the government.



# Two Prongs To The “Exaction” Test

- The ad hoc determination is unconstitutional unless both:
  - Nexus. There must be a “reasonable relationship” between the conditions imposed and the impacts to be mitigated. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).
  - Rough Proportionality. Also, there must be “rough proportionality” between the exactions and the projected impact. *Dolan v. City of Tigard* 512 US 374 (1994).
- 

# Applicability Of Exactions Test

- The *Nollan/Dolan* requirement applies only to ad hoc exactions – not generally applicable regulations.
  - *City of Monterey v. Del Monte Dunes*. (1999) 526 US 687.
  - *Ehrlich v. City of Culver City* (1996) 12 Cal. 4<sup>th</sup> 854 [\$33,200 generally applicable art fee is permissible];
  - *Blue Jeans Equities W. v. SFO* (1992) 3 Cal.App.4<sup>th</sup> 164. [Generally applicable \$5 per square foot exaction is permissible].



# Prong #1 – Nexus

- There must be a nexus between the burdens created by the development and the government regulation. *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 [no nexus -- building height is unrelated to coastal access easement].
- Example of sufficient nexus: *Dolan*. [parking lots creating runoff is related to need for flood control].



# Prong #1 – Examples of Insufficient Nexus

- *Rohn v. City of Visalia* 214 Cal.App.3d 1475. [Street dedication requirement impermissible without a finding that the project would create more traffic].
- *Surfside Colony Ltd v. California Coastal Commission* 226 Cal.App.3d 1260 [Generic erosion finding is insufficient to require an easement – it must be linked to the specific property].



# Prong #2 – Rough Proportionality

- There must be “rough proportionality” between the impact and the amount of the exaction. *Dolan*.
- “No precise mathematical computation is required, but the City must make some sort of individualized determination . . .”



# Examples of Insufficient “Rough Proportionality”

- *Dolan*. The amount of water runoff was insufficient to require dedicating land.
- *Bixel Assocs. v. City of Los Angeles* (1989) 216 Cal.App.3d 1208 [poor fee study].



# Examples of Sufficient “Rough Proportionality”

- *Russ Bld. Partnership v. City and County of San Francisco* 199 Cal.App.3d 1496 (1987) [good fee study].



# Recommendations to Government on How to Obtain More Exactions

- Consider development agreements.
- Instigate generally applicable fees (complying with Propositions 13, 62 and 218, 26).
- If necessary, do exactions, but with sufficient nexus/fee studies.



# Conclusion of Land Use 101

- Counties and cities have substantial power and authority to regulate land use and development within their boundaries.
- The rights of private landowners to use their land in the way they see fit must be balanced against the interests of the community and the legacy that will result from every land use decision made.



# Questions ?

Colantuono  
& Levin, PC



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**Break**



# Overview Of The CEQA Process

Fernando Avila, Esq.  
Best Best & Krieger, LLP

# A Little History . . .

- ▶ The California Environmental Quality Act ("CEQA") was adopted in 1970 and signed into law by Governor Reagan.
- ▶ Regarded as the foundation of environmental law and policy in California.
- ▶ Modeled after the National Environmental Policy Act ("NEPA"). The Federal Act was adopted in 1969 and signed into law by President Nixon. CEQA has become more restrictive than NEPA, which is more procedural than substantive.



# There Are Four “Parts” To CEQA:

1. The Statute: located at Public Resources Code section 21000 et seq.
2. State CEQA Guidelines: located at 14 California Code of Regulations section 15000 et seq. The State Guidelines are prepared by the State Resources Agency to implement CEQA and reflect case law.
3. Local CEQA Guidelines: Public Agencies are required to adopt their own local CEQA guidelines or to adopt the State CEQA Guidelines.
4. Case Law. CEQA is constantly interpreted by the Courts.



# Objectives Of CEQA (State CEQA Guidelines § 15002)

- ▶ Disclose Significant Effects.
- ▶ Disclose Reasoning.
- ▶ Identify Alternatives and Mitigation.
- ▶ Implement Alternatives & Mitigation.
- ▶ Foster Agency Coordination.
- ▶ Enhance Public Participation in the Planning Process.



# The Players



# The Lead Agency

- ▶ Public agency with principal responsibility of carrying out or approving a project.
- ▶ Decides what CEQA document to prepare.
- ▶ First, a public agency is the lead agency for its own projects, even if within another agency's jurisdiction. (Examples: City to build sewage treatment plant or school district to build new high school.)
- ▶ Second, for private projects, the agency with general governmental powers is the lead agency. (Example: developer wishes to build 5,000 houses and needs land use approvals from City.)
- ▶ Lastly, if all else is equal, it is the agency that acts first.
- ▶ Agency squabbles can be resolved by the OPR.



# Responsible Agencies

- ▶ A public agency that has some discretionary approval or permitting power over the project. Usually much narrower authority, such as California Department of Fish & Game or the Regional Water Quality Control Boards.
- ▶ Supposed to actively participate in the CEQA process.
- ▶ Must rely on lead agency's CEQA document but issues its own findings regarding the project.
- ▶ Must also impose all feasible mitigation measures.



# LAFCOs: Lead Or Responsible Agencies?

- ▶ LAFCOs seem to usually act as responsible agencies, because 1) they don't have general governmental powers (rather, they are single-purpose agencies) and 2) they often don't act first.
  - ▶ Prezoning: CEQA Guidelines state that the city doing the prezoning is the lead agency. (15051b2)
  - ▶ Landowner-initiated boundary change petitions: LAFCO is lead agency. (*People ex rel Younger v. LAFCO* (1978) 81 Cal.App.3d 464.)
    - However, this would change if the petition is part of a larger project for which traditional land use approvals are sought from an agency with general government powers.
- 

# Real Party In Interest

- ▶ For private projects, the project developer is the real party in interest.
- ▶ General financial responsibility for project.
- ▶ Usually indemnifies the lead agency.



# The Public

- ▶ Public participation is an essential feature of CEQA, with members of the public holding a "privileged position" in the CEQA process.
- ▶ CEQA allows numerous opportunities for the public to review and comment on CEQA documents.
- ▶ Also contains a citizen enforcement provision allowing the public and other agencies to file lawsuits to ensure compliance with the law.



# ENVIRONMENTAL IMPACTS

A Substantive Question



# What Constitutes An Environmental Impact?

- ▶ Substantial or potentially substantial adverse change in the physical environment. Includes both direct impacts (i.e., occurring at the same time/place as the project) and reasonably foreseeable indirect impacts (i.e., occurring some distance or at a later time but are still foreseeable). (State CEQA Guidelines 15358.)
- ▶ Must impact the “physical environment” (ex.: issuance of permit to remodel the interior of a home in a historic neighborhood did not impact the physical environment).



# Identifying Significant Impacts On The Environment

- ▶ Additionally, a lead agency may find that a project has a significant environmental impact based on:
  - Model Initial Study Checklist.
  - CEQA's Mandatory Findings of Significance.
  - Agency Adopted Regulatory Standards.
  - Consultation with Other Agencies.
  - Agency Thresholds of Significance (CEQA encourages public agencies to adopt thresholds of significance for whole jurisdiction).
  - Expert testimony (battle of the experts).



# CEQA's Three Part Process



# Three Questions

- ▶ Is it a Project?
- ▶ Is it Exempt?
- ▶ What Level of Review is Required?



# Do You Have A “Project?”

The First Question



# Project (Public Resources Code § 21065)

- ▶ The whole of an action, which has the potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment, and that is any of the following:
    1. **Direct Public Agency Action** such as construction activities and adoption/amendment of general plans;
    2. **Agency Supported Action** through public contracts, loans, grants, etc.;
    3. **Agency Approved Action** such as issuance of lease, permit, license or other entitlement for use by a public agency. (State CEQA Guidelines, § 15378.)
- 

# A Project Is A Discretionary Act

- ▶ Generally requires an exercise of judgment or deliberation, as opposed to a ministerial action. (State CEQA Guidelines, § 15357.)
- ▶ Discretionary actions would include approvals of general plans or conditional use permits. Ministerial actions are exempt from CEQA. (State CEQA Guidelines, 15268.)



# No Discretion = Not A Project

- ▶ Drilling a well in backyard in most areas (unless discretionary approval is needed).
- ▶ The following actions are presumed to be ministerial and therefore exempt from CEQA:
  1. Issuance of building permits;
  2. Issuance of business licenses;
  3. Approval of final subdivision maps;
  4. Approvals of individual utility service connections and disconnections.



# Non-Projects

- ▶ Proposals for legislation to be enacted by the State Legislature.
- ▶ Certain continuing administrative or maintenance activities, such as purchasing supplies.
- ▶ Submissions of proposals to a statewide or local vote.
- ▶ Creation of government funding mechanisms or other government fiscal activities that do not involve commitment to specific projects that may result in physical environmental impacts.
- ▶ Organizational or administrative activities of governments.

(State CEQA Guidelines section 15378)



# Examples Of LAFCO Actions

- ▶ That are “Projects”
  - An annexation. (*Bozung v. LAFCO* (1975) 13 Cal.3d 263.)
  - A deannexation. (*People ex rel Younger v. LAFCO* (1978) 81 Cal.3d 464.)
  - New LAFCO sphere of influence guidelines. (*City of Livermore v. LAFCO* (1986) 184 Cal.App.3d 531.)



# Examples Of LAFCO Actions (cont'd.)

- ▶ That are not “Projects”
  - Detachment. (*Simi Valley Recreation & Park Dist. v. LAFCO* (1975) 51 Cal.App.3d 648.)
  - Adoption of sphere of influence. (*City of Agoura Hills v. LAFCO* (1988) 198 Cal.App.3d 480.)



# Caveat!

- ▶ There's no bright line rule that a specific action is always or never a "project" under CEQA.
  - Note that in the cases just cited, an annexation and adoption of SOI guidelines were subject to CEQA, whereas the adoption of an actual SOI was not.
- ▶ It's a highly fact-specific, case-by-case inquiry.
- ▶ Whether "the whole of the action would have a potential to result in a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment" is our lodestar.



# Breaking It Down Further

- ▶ In looking at whether our lodestar question is fulfilled, need to consider the “whole of the action.”
  - The entire underlying activity of which an approval is a part, and not each approval viewed separately.



# Breaking It Down Further

- ▶ What is a “reasonably foreseeable indirect effect”?
  - If the agency’s action is a necessary step that starts in motion a chain of events that will foreseeably result in impacts on the physical environment, the action is subject to CEQA.
  - However, if the action only establishes the ability of an agency to take further future action, but does not commit that agency to take that course, that further action and its impacts are not part of the same “project” as the original action.
- ▶ This can be subjective, and inconsistent case law exists applying these tests.



# EXEMPTIONS

The Second Question:  
If it is a Project, is it exempt?



# Statutory Exemptions (State CEQA Guidelines § 15260 et seq.)

- ▶ These exemptions are enacted by the Legislators. As such, even if the actions may have environmental impacts, the exemption is mandatory. Many of the statutory exemptions are listed in the State CEQA Guidelines section 15260 et seq. They are also located in other codes.



# Examples of Statutory Exemptions:

- ▶ Ministerial Projects;
- ▶ Preparation of UWMP;
- ▶ Emergency Projects; and
- ▶ Feasibility or Planning Studies for possible future action.



# Categorical Exemptions

- ▶ Categorical exemptions are found in the State CEQA Guidelines section 15301 et seq. Developed by the Resources Agency as classes of projects that will not have a significant effect on the environment.



# Examples Of Categorical Exemptions:

- ▶ Replacement or Reconstruction of Facilities;
- ▶ Changes in organization of local agencies;
- ▶ Installation of small new equipment; and
- ▶ Actions by regulatory agencies to protect the environment.



# Two LAFCO Categorical Exemptions

- ▶ Section 15320. Governmental reorganizations are exempt if they do not change the area in which previously existing powers were exercised, including establishment of a subsidiary district, consolidation of two districts, or merger of a district within a city into that city.



# Two LAFCO Categorical Exemptions (cont'd.)

- ▶ Section 15319.

- Subsection (a): Annexations of areas containing structures developed to the density allowed by current zoning are exempt as long as any utility services are designed to serve only the existing development.
- Subsection (b): Annexation of individual small parcels for construction of minimum-size facilities that are exempt from CEQA under Section 15303.



# Point Of Distinction: Statutory vs. Categorical Exemptions

- ▶ Although Statutory Exemptions are Mandatory, Categorical Exemptions are NOT and Will Not Apply In Certain Circumstances
  - Historical resources.
  - Endangered Species.
  - Environmentally Sensitive and Unique.



# The "Catchall" Exemption

- ▶ “Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.” (Section 15061, subd. (b)(3).)
- ▶ Cautionary note: This is hard to defend in court because the burden is on the lead agency to prove the exemption applies, and not on the petitioner to prove that it does not.



# Notice Of Exemption

- ▶ Filed with the County Clerk or Clerk of the Board of Supervisors following Agency approval of the project. Starts 35-day statute of limitations period for legal challenges – if not filed and posted by the County, the statute of limitations is 180 days. (Guidelines § 15026(d))
- ▶ Generally, the filing of a Notice of Exemption is not required.
- ▶ Any staff member can fill it out.





# INITIAL STUDY

The Third Question

If it is a Project, and it's not exempt,  
what is required?



# Purpose Of The Initial Study (State CEQA Guidelines § 15063(a))

- ▶ Allows the lead agency to determine whether to prepare a Negative Declaration, Mitigated Negative Declaration, Addendum or EIR.
- ▶ Helps the lead agency refine the issues that need to be discussed in an EIR.
- ▶ An Initial Study is not required if the Lead Agency elects to prepare an EIR.



# Form Of Initial Study

- ▶ Checklist with explanatory answers is okay. Appendix G of the State CEQA Guidelines can be used.
- ▶ Local CEQA Guidelines.
- ▶ No "naked" checklist allowed.
- ▶ Incorporation of other reports permitted.
- ▶ Can be prepared by staff or a consultant.



ENVIRONMENTAL CHECKLIST FORM

1. Project Title: \_\_\_\_\_
2. Lead Agency Name and Address:  
\_\_\_\_\_  
\_\_\_\_\_
3. Contact Person and Phone Number: \_\_\_\_\_
4. Project Location: \_\_\_\_\_
5. Project Sponsor's Name and Address:  
\_\_\_\_\_  
\_\_\_\_\_
6. General Plan Designation: \_\_\_\_\_ 7. Zoning: \_\_\_\_\_
8. Description of Project: (Describe the whole action involved, including but not limited to later phases of the project, and any secondary, support, or off-site features necessary for its implementation. Attach additional sheet(s) if necessary.)  
\_\_\_\_\_  
\_\_\_\_\_
9. Surrounding Land Uses and Setting: (Briefly describe the project's surroundings.)  
\_\_\_\_\_  
\_\_\_\_\_
10. Other public agencies whose approval is required (e.g., permits, financing approval, or participation agreement):  
\_\_\_\_\_  
\_\_\_\_\_

ENVIRONMENTAL FACTORS POTENTIALLY AFFECTED:

The environmental factors checked below would be potentially affected by this project, involving at least one impact that is a "Potentially Significant Impact" as indicated by the checklist on the following pages.

- |  |   |   |
|--|---|---|
| <input type="checkbox"/> Aesthetics                    | <input type="checkbox"/> Agriculture Resources              | <input type="checkbox"/> Air Quality              |
| <input type="checkbox"/> Biological Resources          | <input type="checkbox"/> Cultural Resources                 | <input type="checkbox"/> Geology / Soils          |
| <input type="checkbox"/> Hazards & Hazardous Materials | <input type="checkbox"/> Hydrology / Water Quality          | <input type="checkbox"/> Land Use / Planning      |
| <input type="checkbox"/> Mineral Resources             | <input type="checkbox"/> Noise                              | <input type="checkbox"/> Population / Housing     |
| <input type="checkbox"/> Public Services               | <input type="checkbox"/> Recreation                         | <input type="checkbox"/> Transportation / Traffic |
| <input type="checkbox"/> Utilities / Service Systems   | <input type="checkbox"/> Mandatory Findings of Significance |   |



DETERMINATION (To be completed by the Lead Agency):

On the basis of this initial evaluation:

- I find that the proposed project COULD NOT have a significant effect on the environment, and a NEGATIVE DECLARATION will be prepared.
- I find that although the proposed project could have a significant effect on the environment, there will not be a significant effect in this case because revisions in the project have been made by or agreed to by the project proponent. A MITIGATED NEGATIVE DECLARATION will be prepared.
- I find that the proposed project MAY have a significant effect on the environment, and an ENVIRONMENTAL IMPACT REPORT is required.
- I find that the proposed project MAY have a "potentially significant" or "potentially significant unless mitigated" impact on the environment, but at least one effect 1) has been adequately analyzed in an earlier document pursuant to applicable legal standards, and 2) has been addressed by mitigation measures based on the earlier analysis as described on attached sheets. An ENVIRONMENTAL IMPACT REPORT is required, but it must analyze only the effects that remain to be addressed.
- I find that although the proposed project could have a significant effect on the environment, because all potentially significant effects (a) have been analyzed adequately in an earlier EIR or NEGATIVE DECLARATION pursuant to applicable standards, and (b) have been avoided or mitigated pursuant to that earlier EIR or NEGATIVE DECLARATION, including revisions or mitigation measures that are imposed upon the proposed project, nothing further is required.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

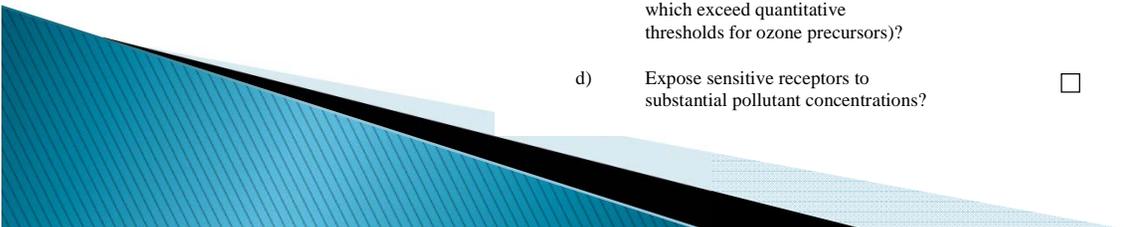
\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
For

EVALUATION OF ENVIRONMENTAL IMPACTS:

- 1) A brief explanation is required for all answers except "No Impact" answers that are adequately supported by the information sources a lead agency cites in the parentheses following each question. A "No Impact" answer is adequately supported if the referenced information sources show that the impact simply does not apply to projects like the one involved (e.g. the project falls outside a fault rupture zone). A "No Impact" answer should be explained where it is based on project-specific factors as well as general standards (e.g. the project will not expose sensitive receptors to pollutants, based on a project-specific screening analysis).
- 2) All answers must take account of the whole action involved, including off-site as well as on-site, cumulative as well as project-level, indirect as well as direct, and construction as well as operational impacts.
- 3) Once the lead agency has determined that a particular physical impact may occur, then the checklist answers must indicate whether the impact is potentially significant, less than significant with mitigation, or less than significant. "Potentially Significant Impact" is appropriate if there is substantial evidence that an effect is significant. If there are one or more "Potentially Significant Impact" entries when the determination is made, an EIR is required.
- 4) "Negative Declaration: Less Than Significant With Mitigation Incorporated" applies where the incorporation of mitigation measures has reduced an effect from "Potentially Significant Impact" to a "Less than Significant Impact." The lead agency must describe the mitigation measures, and briefly explain how they reduce the effect to a less than significant level (mitigation measures from Section XVII, "Earlier Analyses," may be cross-referenced).

- I. AGRICULTURE RESOURCES. In determining whether impacts to agricultural resources are significant environmental effects, lead agencies may refer to the California Agricultural Land Evaluation and Site Assessment Model (1997) prepared by the California Dept. of Conservation as an optional model to use in assessing impacts on agriculture and farmland. Would the project:
- a) Convert Prime Farmland, Unique Farmland, or Farmland of Statewide Importance (Farmland), as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Resources Agency, to non-agricultural use?
  - b) Conflict with existing zoning for agricultural use, or a Williamson Act contract?
  - c) Involve other changes in the existing environment which, due to their location or nature, could result in conversion of Farmland, to non-agricultural use?
- II. AIR QUALITY. Where available, the significance criteria established by the applicable air quality management or air pollution control district may be relied upon to make the following determinations. Would the project:
- a) Conflict with or obstruct implementation of the applicable air quality plan?
  - b) Violate any air quality standard or contribute substantially to an existing or projected air quality violation?
  - c) Result in a cumulatively considerable net increase of any criteria pollutant for which the project region is nonattainment under an applicable federal or state ambient air quality standard (including releasing emissions which exceed quantitative thresholds for ozone precursors)?
  - d) Expose sensitive receptors to substantial pollutant concentrations?



# Consultation

- Other agencies.
- Project applicant.
- Consultants and Experts.
- Public.



# Initial Study

- ▶ Timing: Generally 30 days for a private project.
- ▶ Notice: No notice requirement for IS (\*\*\*)however, must provide notice for ND, MND or EIR.)
- ▶ Funding: Can charge applicant a “reasonable fee” for estimated cost of preparing an initial study.



# Types of CEQA Documents

- ▶ Negative Declaration.
- ▶ Mitigated Negative Declaration.
- ▶ Environmental Impact Report.



# NEGATIVE DECLARATION

(State CEQA Guidelines §§  
15063(b)(2), 15070))

- ▶ A negative declaration is appropriate if the initial study concludes that there is no substantial evidence, or reasonable inference there from, that the project may have significant adverse environmental impacts.
  - ▶ The Negative Declaration form can be prepared by staff, but only the decision-making body or person can adopt it. Staff can file the adopted Negative Declaration.
- 

# Public Review (State CEQA Guidelines § 15073)

- ▶ Typically 20 days.
- ▶ 30 days if the project is of statewide, regional or area wide significance.
- ▶ 30 days if State agency review is required.  
(See State CEQA Guidelines section 15206.)



# Consideration And Adoption (State CEQA Guidelines § 15074)

- ▶ The lead agency considers the Negative Declaration at a noticed public meeting. Responses to any comments received not required but should be done anyway if controversial project.
- ▶ Standard for Adoption – If the decision making body determines in light of the whole record that the project will not have a significant effect on the environment, it adopts the Negative Declaration/Mitigated Negative Declaration. If the project "MAY" have a significant effect, then an EIR is required.



# Approval Of Project

- ▶ Only after adoption of Negative Declaration.
- ▶ Then, file a Notice of Determination (NOD) within five business days in order to start the statute of limitations.
- ▶ Staff may prepare, execute and file the NOD.



**NOTICE OF DETERMINATION**

TO:	<input type="checkbox"/> Clerk of the Board of Supervisors or	FROM:	City of:
	<input type="checkbox"/> County Clerk		Address:
	County of:		Contact:
	Address:		Phone:

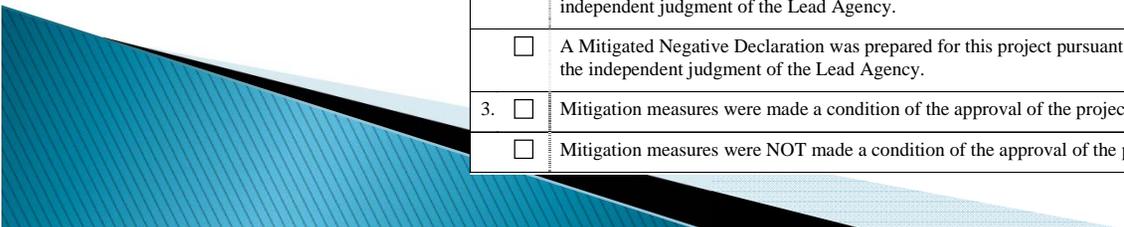
TO:	<input type="checkbox"/> Office of Planning and Research P.O. Box 3044 (U.S. Mail) Sacramento, California 95812-3044  1400 Tenth Street, Room 222 (overnight delivery) Sacramento, California 95814
-----	--

SUBJECT: Filing of Notice of Determination in Compliance with Section 21108 or 21152 of the Public Resources Code.

Project Title:		
State Clearinghouse Number (If submitted to SCH):	Contact Person:	Telephone Number:
Specific Project Location – Identify street address and cross street or attach a map showing project site (preferably a USGS 15' or 7 1/2' topographical map identified by quadrangle name):		
General Project Location (City and/or County):		
Project Description:		

This is to advise that the ( Lead Agency or  Responsible Agency) approved the above described project on: \_\_\_\_\_ and made the following determinations:

1.	<input type="checkbox"/> The project will have a significant effect on the environment.
	<input type="checkbox"/> The project will NOT have a significant effect on the environment
2.	<input type="checkbox"/> An Environmental Impact Report was prepared and certified for this project pursuant to the provisions of CEQA and reflects the independent judgment of the Lead Agency.
	<input type="checkbox"/> A Negative Declaration was prepared for this project pursuant to the provisions of CEQA and reflects the independent judgment of the Lead Agency.
	<input type="checkbox"/> A Mitigated Negative Declaration was prepared for this project pursuant to the provisions of CEQA and reflects the independent judgment of the Lead Agency.
3.	<input type="checkbox"/> Mitigation measures were made a condition of the approval of the project.
	<input type="checkbox"/> Mitigation measures were NOT made a condition of the approval of the project.



# MITIGATED NEGATIVE DECLARATION

- ▶ A Mitigated Negative Declaration is appropriate if there is substantial evidence that significant impacts might occur, but the project can be modified to eliminate all of the significant impacts or reduce them to below a level of significance.



# Mitigation Measures

- ▶ Consider economic, environmental, legal, social, and technological factors.
- ▶ **Mitigation measures must be fully enforceable.**
- ▶ "Takings" clause is a constraint – nexus and rough proportionality .



# Approval Of Project

- ▶ Only after adoption of Negative Declaration.
- ▶ Distinct from approval of Project involving Negative Declaration, approval of Project for which MND is prepared must include adoption of Mitigation Monitoring and Reporting Plan:
  - Specify what the mitigation is.
  - Must be enforceable (shall/must/will not should/may/might.)
  - Specify when mitigation will take place and who will verify.



# ENVIRONMENTAL IMPACT REPORTS

## Standard of Preparation

- ▶ Rather low threshold – there is a presumption in CEQA in favor of preparing EIR's.
- ▶ Standard – If there is any substantial evidence to support a fair argument that the project may have significant environmental impacts.



# Types Of EIRs

- ▶ Project EIR. Most common type of EIR, analyzes impacts of an individual activity or specific project.
- ▶ Program EIR. First tier document for an agency program or series of actions that can be characterized as one large project. Subsequent activities are evaluated in comparison with the project to see if additional CEQA documents must be prepared.
- ▶ Master EIR. Type of first tier document prepared for certain types of actions. Intended to streamline the process, but "expires" after 5 years.
- ▶ Focused EIR. EIR for a subsequent project identified in a Master EIR.
- ▶ Staged EIR. Similar to a program EIR but contemplates additional EIRs to supplement the first.
- ▶ Tiered EIR. Separate but related projects. Later tiers move from general to specific analysis of projects.



# Additional Types Of EIRs

- ▶ Subsequent/Supplemental EIR.: Need contain only the information necessary to make the previous EIR adequate. Given the same notice and public review as is given to a draft EIR under Section 15087. Supplemental EIRs may be circulated without re-circulating the previous draft or final EIR.
- ▶ Addendum: The Lead or Responsible Agency should prepare an addendum if only “minor technical changes” or additions are necessary to make the document adequate, and the changes made by the addendum do not raise important new issues about the significant effects on the environment. Need not be circulated for public review. However, the decision-making body must consider the addendum with the final EIR or Negative Declaration prior to making a decision on the project.



# MITIGATION

## Requirements for Discussing Mitigation Measures in EIRs

- ▶ For each potentially significant impact, the lead agency must:
  - Discuss whether the measure avoids or substantially reduces significant environmental effect.
  - Distinguish measures proposed by project proponents.
  - Identify responsibility for implementation.
  - Discuss basis for selecting particular measure.
  - Discuss significant side effect associated with implementation of each mitigation measure.



# Purpose Of An EIR

- ▶ Informational.
- ▶ Demonstrational.
- ▶ Accountability.



# Who May Prepare An EIR?

- ▶ Lead Agency staff.
  - ▶ Other public or private entity.
  - ▶ Project applicant or its consultant.
  - ▶ Third party consultant.
  - ▶ Note – Before using a draft prepared by another person, the Lead Agency must subject the draft to the agency's own review and analysis. The draft EIR which is sent out for public review must reflect the independent judgment of the Lead Agency. The Lead Agency is responsible for the adequacy and objectivity of the draft EIR. (State CEQA Guidelines section 15084.)
- 

# Lead Agency Responsibilities

- ▶ Review & Analysis – Must exercise its Independent Judgment.
- ▶ Consultant contract execution – within 45 days of decision to prepare an EIR.
- ▶ Must make findings before approval of Project.



# Responsible Agency Responsibilities

- ▶ Agency with some discretionary approval authority.
- ▶ Must actively participate in the Lead Agency's CEQA process, review the CEQA documents and use the document when making a decision on the project.
- ▶ Must prepare own findings and file an NOD.
  - Don't need to certify the EIR, just consider it and make findings as to significant impacts that are within the responsible agency's jurisdiction.



# Responsible Agency Pitfalls

- ▶ Statutes give a responsible agency limited means to address inadequate lead agency analysis.
- ▶ First, if consulted with, the responsible agency must comment on the lead's document.
  - If it still doesn't like the document after project approval, it must file suit or forever hold its peace.
  - If the SOL has run and it was consulted with, the responsible agency is bound to treat the lead's CEQA document as 100% valid, unless...



# Responsible Agency Pitfalls

- ▶ Second, if the responsible agency can show that changes to the project, the circumstances under which it is undertaken, or the revelation of “new significant information that couldn’t have been previously known show that a Subsequent EIR (or ND/MND) must be prepared....
  - ...then, the responsible agency may prepare a SEIR (or SND/SMND) and deal with the changes.



# Responsible Agency Pitfalls

- ▶ Third, if the lead agency never consulted with the responsible agency when the original CEQA document was processed and the SOL has expired, the responsible agency can assume lead agency status and restart the CEQA process.
- ▶ As an aside, it should also be noted that if a lead agency's CEQA document is being litigated against, responsible agencies must treat it as a valid CEQA document until the litigation is resolved.



# Public Review

- ▶ 30 day minimum.
- ▶ 45 days required for projects of statewide, regional or area wide significance, or projects that need state agency approval (most projects.)



# Commenting On An EIR

- ▶ **Authority to Comment:** Any person or entity other than a Responsible Agency may submit oral or written comments to a Lead Agency concerning any environmental effects of a project being considered by the Lead Agency. (State CEQA Guidelines, § 15044)
- ▶ **Timing:** May comment during the public review periods or before the close of the public hearing.



# Commenting On An EIR (cont.)

- ▶ **E-mail** (Public Resources Code, § 21091[d][3])  
The Lead Agency must accept comments on a DEIR, Negative Declaration, Mitigated Negative Declaration or any CEQA notice via e-mail and must treat e-mail comments as equivalent to written comments.
- ▶ **Responsible Agencies:** A Responsible Agency should review and comment on draft EIRs and Negative Declarations for projects that the Responsible Agency will later be asked to approve. Comments should be as specific as possible and supported by either oral or written documentation.



# Responses To Comments

- ▶ Must respond to each comment received during the comment period. May respond to late comments. It is highly recommended that the lead agency respond to all comments received.
- ▶ Responses may be incorporated as revisions to the draft EIR or as a separate section in the Final EIR. (State CEQA Guidelines, § 15088.)



# “10 Day Rule”

- ▶ At least ten (10) days prior to certifying the Final EIR, the lead agency must provide a written response to any agency which has submitted timely comments on the Draft EIR. But typically lead agency will send the entire final EIR to all commenters. (21092.5/15088)



# Recirculation

- ▶ Lead agency must recirculate an EIR when "significant" new information is added to the EIR, or if the Draft EIR is so inadequate and conclusory that meaningful public review and comment were precluded. (State CEQA Guidelines, § 15088.5.)
  - ▶ Recirculation not required where information added to the EIR merely clarifies or amplifies or makes insignificant modifications in an adequate EIR. If the revision is limited to a few chapters or portions of the EIR, the Lead Agency need only recirculate the chapters or portions that have been modified.
  - ▶ A decision to not recirculate an EIR must be supported by substantial evidence in the record.
- 

# Final EIR

The Final EIR consists of the Draft EIR,  
any comments and responses to  
comments.



# Public Hearing

- ▶ Not required under CEQA but may be required for the underlying action.
- ▶ However, agencies are *encouraged* to include environmental review as a topic when the agency holds a hearing on a project. A public hearing on the environmental impact of a project *should* be held if the Lead Agency determines it would facilitate the purposes and goals of CEQA. A draft EIR, MND or ND *should* be used as a basis for discussion. (CEQA Guidelines Section 15202).



# EIR Certification

- ▶ Staff considers the Final EIR and makes a recommendation to the decision making body regarding whether the Final EIR is in order and whether it has been completed in compliance with CEQA, the State Guidelines and the lead agency's local guidelines.
- ▶ Before approving a project, a lead agency must certify that the final EIR was prepared in compliance with CEQA and was presented to the lead agency's decision making body for review and consideration before approving the project. Lead agency must also certify that the EIR reflects the independent judgment of the lead agency.



# Copy Of Final EIR

- ▶ Guidelines Section 15095 *requires* the lead agency to file a copy of the final EIR with the planning agency of any city or county where significant environmental effects may occur. In addition, the applicant must be required to provide a copy of the certified final EIR to each responsible agency (PRC Section 21092.5(a)).



# Findings

## (PRC § 21156; Guidelines § 15091)

- ▶ Lead and responsible agencies must prepare written findings of fact for each significant environmental impact identified in the EIR. A finding is a written statement made by the decision making body that explains how it dealt with each significant impact and alternative.
  - ▶ An agency must make findings for each significant impact if the project has been changed, including adoption of mitigation measures to avoid or substantially reduce the magnitude of the impact. The agency must ensure that adopted measures are fully enforceable through permit conditions, agreements or other measures.
- 

# Findings (cont.)

- ▶ If lead or responsible agency cannot make these findings, it must find that (i) changes to the project are within another agency's jurisdiction and such changes have been made or should be adopted or (ii) specific economical/social/legal/technical/other considerations make mitigation measure or alternative infeasible.
- ▶ Findings must be well-organized and allow reader to understand how the lead agency addressed every significant impact and alternative. If mitigation measure or alternative is found infeasible, must explain specific reasons for rejection. The mere fact that an alternative may be more expensive does not necessarily make it infeasible.



# Statement Of Overriding Considerations

- ▶ A Lead Agency cannot approve a project if it will have significant effects on the environment unless it finds that the benefits outweigh the unavoidable adverse environmental effects.
- ▶ The statement of overriding considerations is a written statement explaining why the City is willing to accept each significant effect. The statement states forth the specific overriding social, economic, legal, technical or other beneficial project aspects supporting the City's decision and must be based on substantial evidence in the final EIR or elsewhere in the record.



# Statement of Overriding Considerations (cont.)

- ▶ Typically, a statement of overriding considerations begins with a summary of the unavoidable impacts and then lists the factors that justify approving the project despite these impacts. For example, if a development project would result in unavoidable impacts, potential benefits would include: creation of local jobs, construction of a new school, and/or increase to the tax base.
- ▶ Findings required – benefits outweigh impacts.



# Approval Of Project

- ▶ Only AFTER the EIR is certified. (Certification based on findings, Overriding Considerations, MMRP, Approval).



# Notice Of Determination (Negative Declarations, MNDs, EIRs)

- ▶ Within five working days of project approval, staff files a Notice of Determination with the County Clerk. The Clerk must post the Notice within 24-hours of receipt. If lead agency is state agency, or if any state agency approval is required, NOD must also be filed with Office of Planning and Research.
- ▶ A 30-day statute of limitations for legal challenges begins to run once the NOD has been filed with, and posted by, the County Clerk. If NOD is not filed, the statute of limitations is 180 days.
- ▶ Staff simultaneously and conspicuously posts the Notice at lead agency offices.



# Climate Change & CEQA

## ▶ SB 97

- Led to amendments to the State CEQA Guidelines, which were effective in 2010.
- Requires conclusions as to Greenhouse Gas (GHG) impacts of projects.
  - First, need a quantitative analysis. Thresholds have been adopted by BAAQMD and SCAQMD, but still controversial.
  - Second, qualitative analysis: would project conflict with a GHG emission reduction plan?



# Climate Change & CEQA

- ▶ SB 97 amendments allow for streamlining of GHG analysis for future projects using a Climate Action Plan (CAP).
- ▶ Essentially, a CAP is a jurisdiction-wide document for the achievement of AB 32's goal.
  - I.E., 2020 emissions reduced to 1990 levels (or, in other words, a reduction of 15% from 2008 GHG emission levels).
- ▶ If a project is CAP-consistent, it can be less than significant with regard to GHG impacts.



# Climate Change & CEQA

## ▶ SB 375

- Addresses housing, transportation, and land use policies, which ultimately determines VMT. Vehicular emissions are a large component of state's overall emissions.
- Plugs a hole (somewhat) that was left by AB 32, which did not get into housing/transportation/land use type issues.



# Climate Change & CEQA

## ▶ SB 375

- Each Metropolitan Planning Organization (MPO) is required to prepare for approval by CARB a Sustainable Communities Strategy (SCS).
- SCS will set out a forecasted development pattern for the region, which, when integrated with the transportation network, will reduce GHG emissions from vehicles such that the region's reduction goal (set by CARB) is met.



# Climate Change & CEQA

## ▶ SB 375

- Compliance with the SCS is not mandatory.
- However, if a project is SCS-consistent, there are CEQA streamlining advantages that are available.
- Categories of streamlining provisions:
  - Exemptions for Transit Priority Projects (TPPs).
  - Sustainable Communities Environmental Assessment or Limited EIR for TPPs.
  - Limited Analysis for Mixed Use Residential Projects.





# Questions ?



**BEST BEST & KRIEGER**<sup>LLP</sup>  
ATTORNEYS AT LAW



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# Understanding Growth and the Role of Planning

## Oxnard Case Study 1900–2010

Dr. Christopher Williamson, AICP  
City of Oxnard

# UNDERSTANDING GROWTH

- ▶ Ten types of growth
- ▶ Each can generate change independent of others
- ▶ Each can lead to spatial expansion
- ▶ Combinations are typical
- ▶ Some combinations are better, some worse

(American Planning Association, PAS No. 558)

- ▶ California history is skewed in one direction
- ▶ The American gospel of growth:
  - Always good
  - Inevitable and unavoidable
  - To not grow is to die
  - Sustainable Growth is the newest hymn
  - Opposing growth is misguided (heresy)



# ROLE OF PLANNING ?

## ▶ Rationale version

- Decide on a plan, implement it with zoning

VISION VS. ACCOMODATION VS. ENVIRONMENTAL CAPACITY

## ▶ Reality version

- Protect homeowners' values

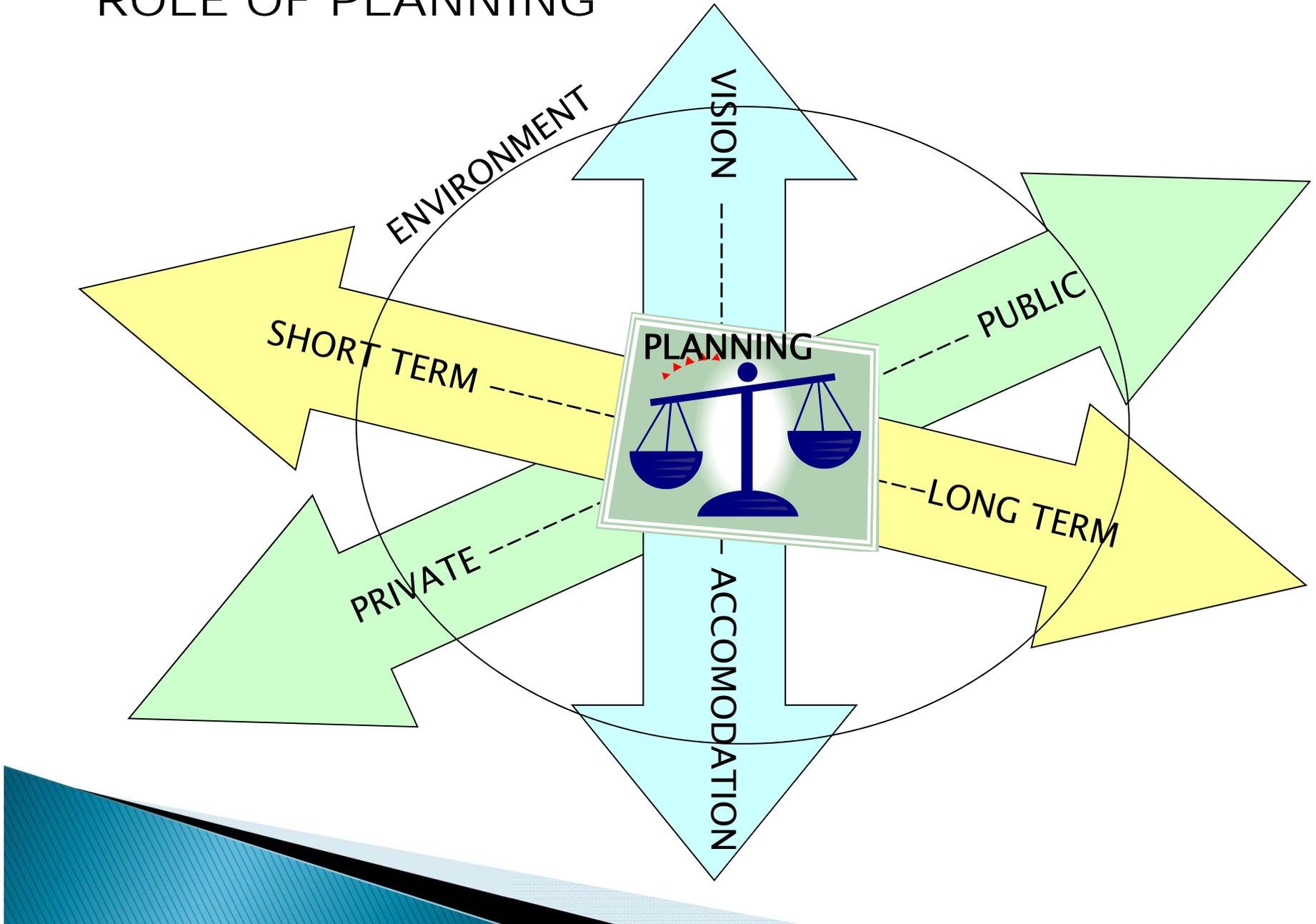
## ▶ Somewhat of a “Monopoly” game

- Rules
- Players
- Chance
- Community Chest
- Strategies to win
- Utilities play big role

Richard Babcock  
“The Zoning Game”  
1973, UC Berkeley



# ROLE OF PLANNING



Ten Types of Growth

# Type 1: Longer Lives

Death rate declines

Life expectancy / Survival Rate extended

Infant mortality decreases

Effect is larger adult older population

Stay in houses longer, not working, medical needs extended, special housing and transportation

Began in mid-1700's with Industrial Revolution, science, sanitation

Fewer pandemics (last biggies was 1918-1920)



Ten Types of Growth

## Type 2: More Births

Higher birth rate

Higher survival rate of infants

Higher household sizes (misleading?)

No immediate big spatial impact

Medical and day care needs, then schools

Impact is 'down the road'



Ten Types of Growth

# Type 3: Migration

Hardest to forecast

Economic, Lifestyle, and Family needs

Immediate needs: housing, schools, utilities

Planning based on past Migration trend is problematic

Types 1 to 3 are the Demographic Equation

$$\text{Future Pop} = \text{Beg. Pop} + (\text{Births} - \text{Deaths}) + (\text{In-migration} - \text{Out})$$


# Type 4: Household Size

Household formation rate  
-When does Jr. leave home?

Household size change  
25% + are single persons

Largely economic driven  
Can fluctuate quickly  
Immediate impact on the ground



## Type 5: Unit and land size

Long trend in larger houses  
Lots much smaller in CA than elsewhere  
Economic and lifestyle driven  
Big impact on the ground, unexpected?  
Can occur without any other changes..



Ten Types of Growth

# Type 6: Increased Vacancies

Quick to react to economy

Very local

High rates could lead to 'triage' of  
properties

Low rate leads to developer 'sniffing'



Ten Types of Growth

## Type 7: Group Quarters

Jails, barracks, dorms, retirement homes,  
shelters, etc.

2 to 5 % of the population

Sometimes significant (college town, prison,  
etc.)



# Type 8: New Construction

What we think of as “growth”

Expensive, long lead time, land-hungry

Green-field cheaper than redevelopment

Long history of ‘no problem’

Housing Unit Equation

$$\text{Unit Change} = (\text{New} - \text{Demos}) + (\text{Conversion} - \text{Mergers})$$



Ten Types of Growth

# Type 9: Household Income and Wealth

Higher wages income

More wage earners in household

Higher return on assets

Lower costs has income effect

Wealth (used to be home equity!)

Change in housing unit consumption

Change in lifestyle consumption: shopping,  
Recreation, travel, civic uses, medical care, etc.



Ten Types of Growth

# Type 10: Community Income and Wealth

Taxes and other incomes

More services and amenities: parks, etc.

Civic wealth: foundations, non-profits, etc.

Could lead to museums, open space preserves, private schools, etc.



Ten Types of Growth

# Combinations

Some are better than others..

Longer life and greater wealth – ok..

High in-migration, high birth rate, and dropping  
income – probably not good



Dr. KnowGrowth says:

## **Know Your Growth!**

**Some growth is inevitable, plan for it.**

**Some growth is desirable, find it.**

**Some growth should be avoided, fight it.**

**The market will eventually destroy  
a desirable community.**



.

Ten Types of Growth

# City of Oxnard

Classic California example

Founded, followed by slow 'natural' growth

Economic and baby-boom after WWII

High in-migration in 60's and 70's

High birth rate in late 80's and early 90's

Now slowing somewhat, but life span increasing

Most growth occurred on surrounding farmland in  
20 and 40-acre subdivisions.

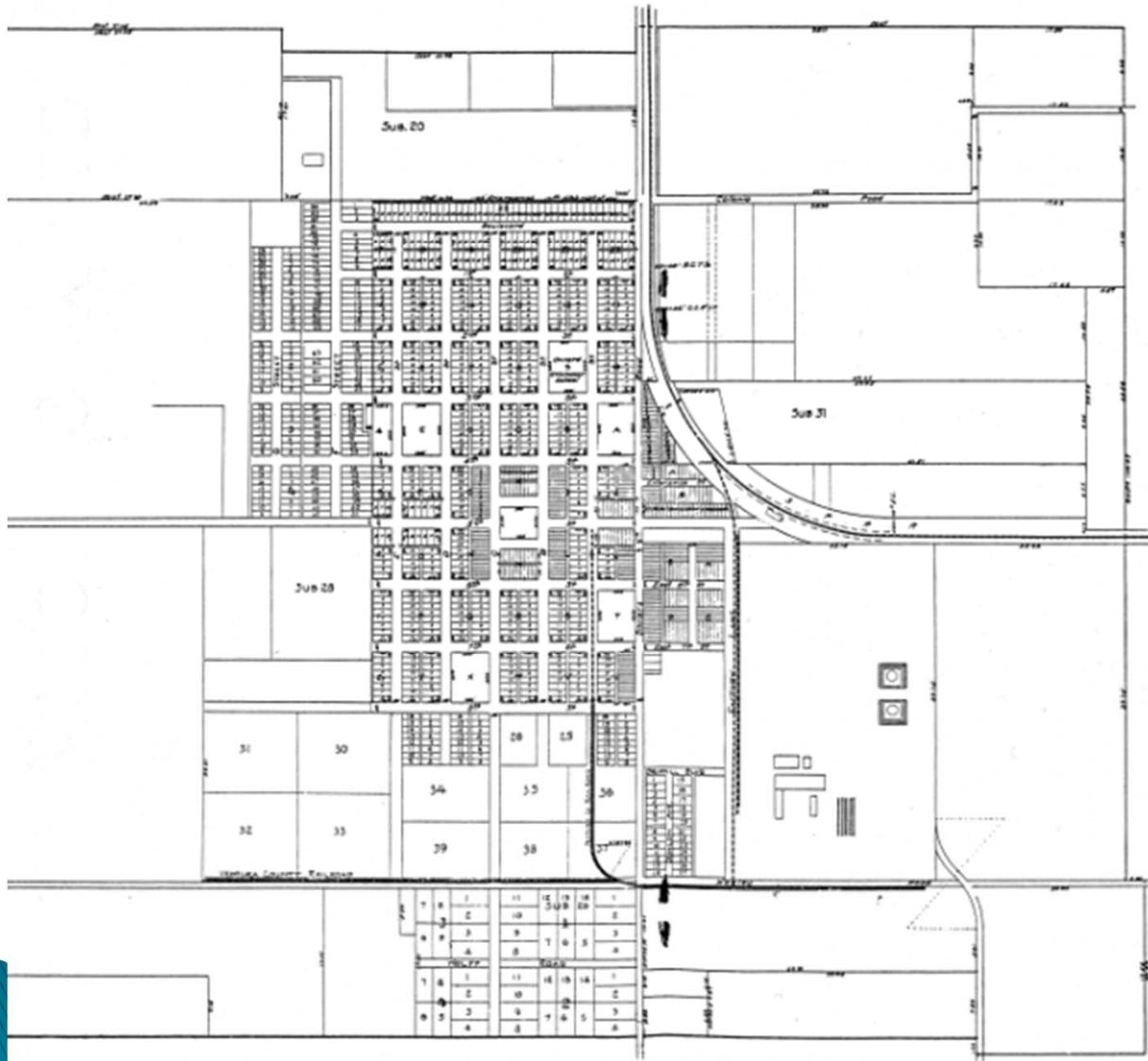
Residents reacted in 1970's and again in 1990's



# CITY OF OXNARD

VENTURA COUNTY CALIFORNIA

*Incorporated June 30<sup>th</sup> 1903*

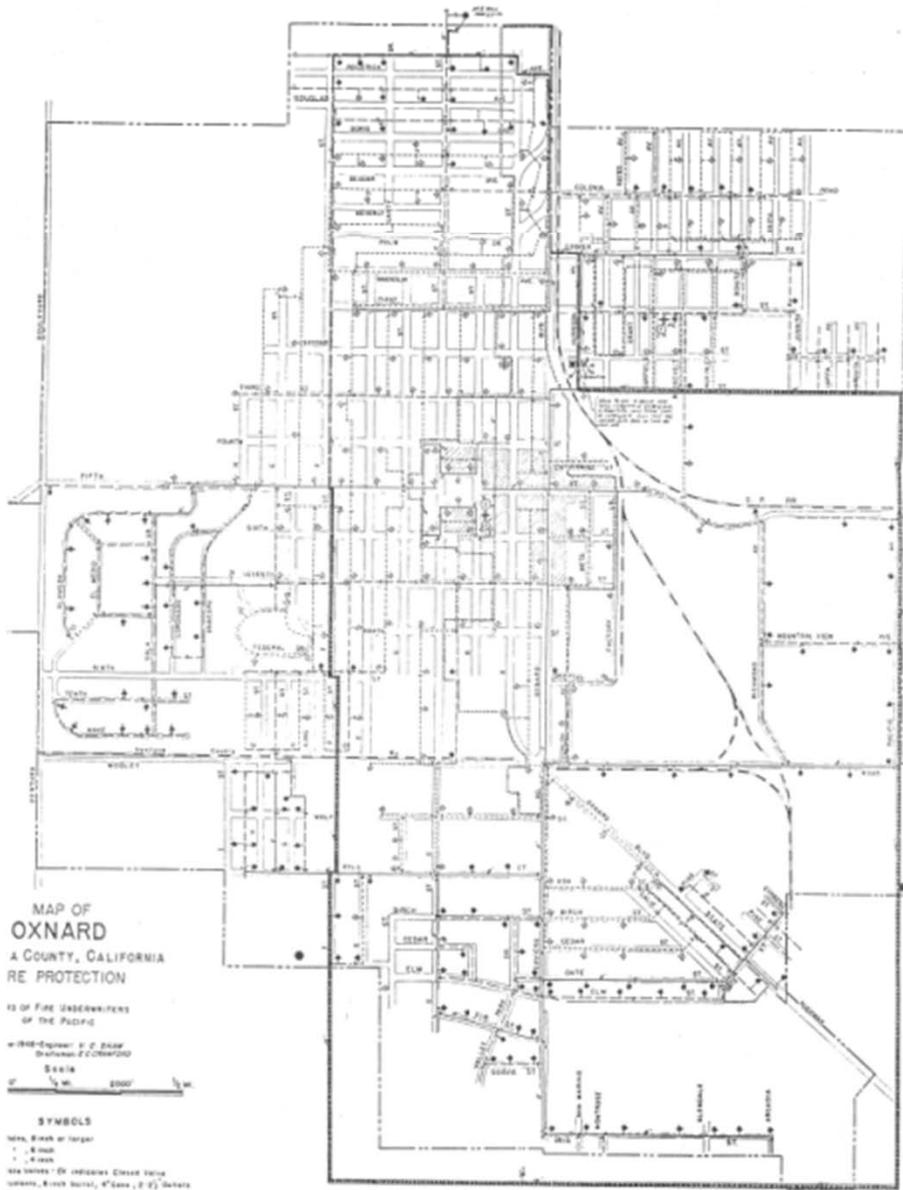


1903

Sugar beet factory



THE MASTER PLAN OXNARD CALIFORNIA  
JULY 1949



1949

Postwar Growth south





# Oxnard

26 square miles

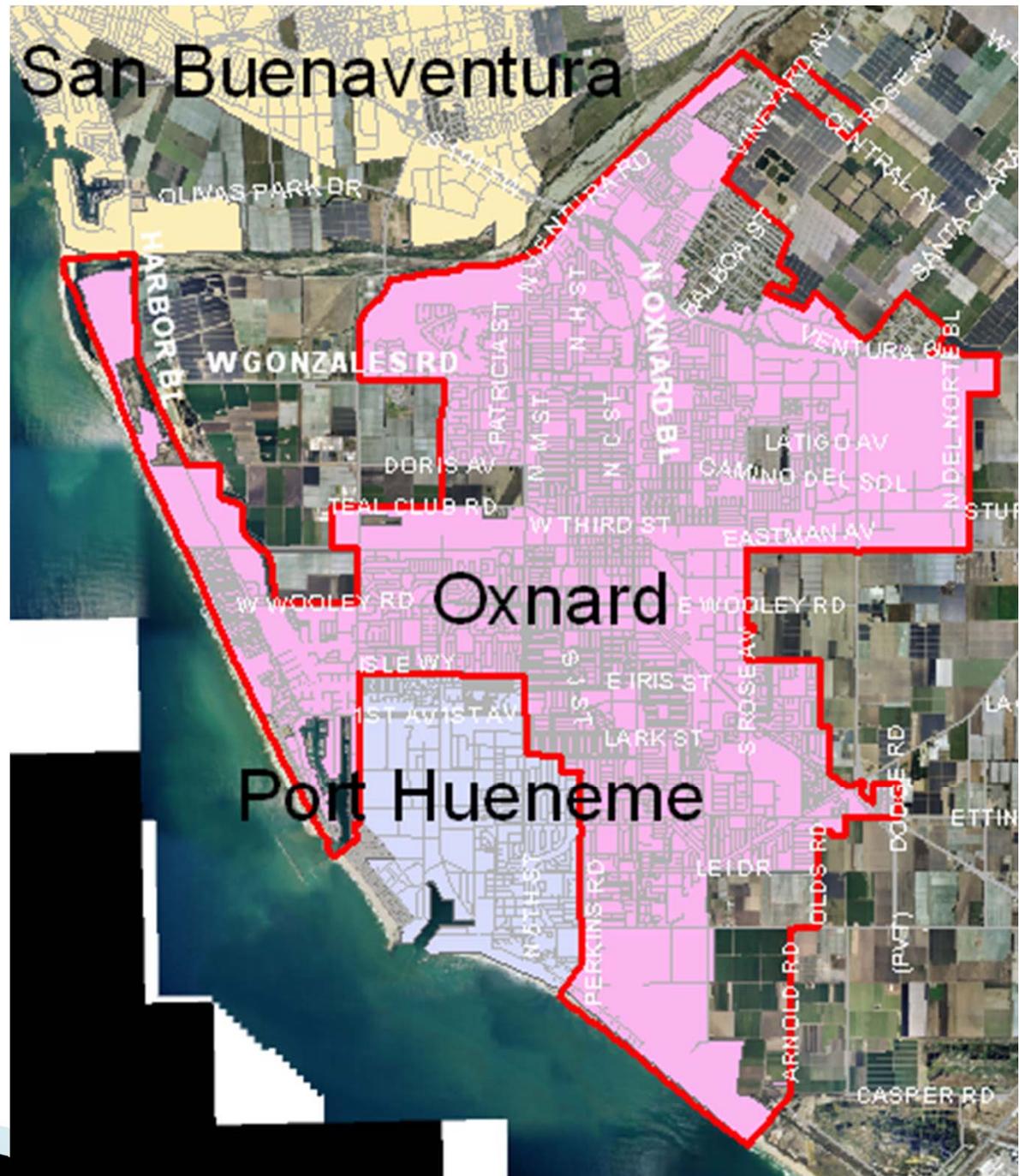
2010 pop 197,899

71.2 % Hispanic  
50,721 households  
avg HHld = size 3.9  
a young population

farming, blue-collar,  
Navy, services

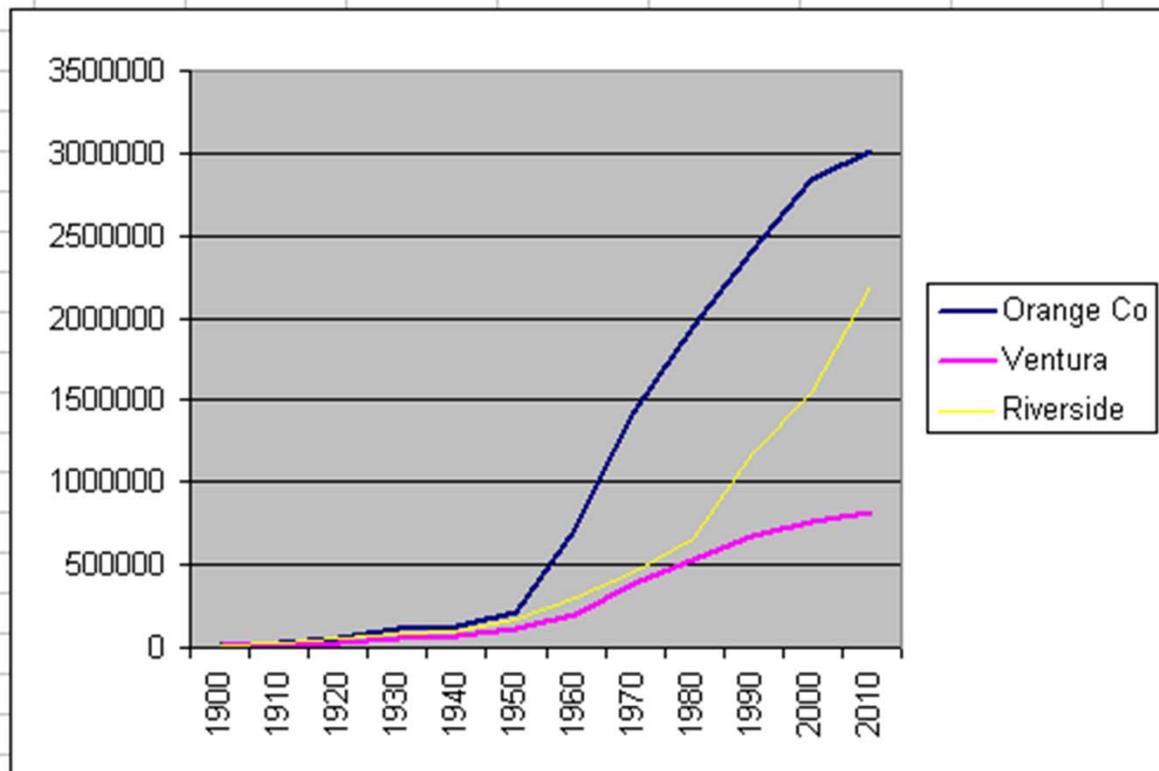
5 mile beach  
Channel Islands Harbor  
2,150 slips  
fishing industry

19<sup>th</sup> largest city  
16.2% growth



## 110 YEARS OF GROWTH: ORANGE AND VENTURA COUNTIES

1900	1910	1920	1930	1940	1950	1960	1970	1980	1990	2000	2010
19696	34436	61375	118674	130760	219,900	719,500	1,431,900	1,944,800	2,412,000	2,846,289	3,010,232
14367	18347	28724	54976	69685	115,600	203,100	381,400	532,200	669,100	753,197	823,318
17897	34969	50297	81024	105524	170046	306191	459074	663166	1170413	1553800	2,189,641



Sources: CA DOF and Census Bureau

Classic California city with expansion boom 1960 to 1980

H34. YEAR STRUCTURE BUILT [10] - Universe: Housing units  
Data Set: Census 2000 Summary File 3 (SF 3) - Sample Data

NOTE: Data based on a sample except in P3, P4, H3, and H4. For information on confidentiality and count corrections see <http://factfinder.census.gov/home/en/datanotes/expsf3.htm>.

	Oxnard city, California
Total:	45,183
Built 1999 to March 2000	811
Built 1995 to 1998	1,900
Built 1990 to 1994	2,471
Built 1980 to 1989	6,890
Built 1970 to 1979	12,644
Built 1960 to 1969	10,525
Built 1950 to 1959	6,715
Built 1940 to 1949	2,122
Built 1939 or earlier	1,105

U.S. Census Bureau  
Census 2000

**THE GENERAL PLAN  
A CONCEPT FOR CHANGE**

That change will occur in Oxnard is not disputed; already the forces which cause change are apparent. The question is not whether it will occur, but what the quantities and qualities of the pressure for change will be and how the City should respond — if at all — to those pressures.

The possibilities for change in the Oxnard area were measured statistically in an economic base study; the physical factors which will influence the quantity and quality of change were also identified.

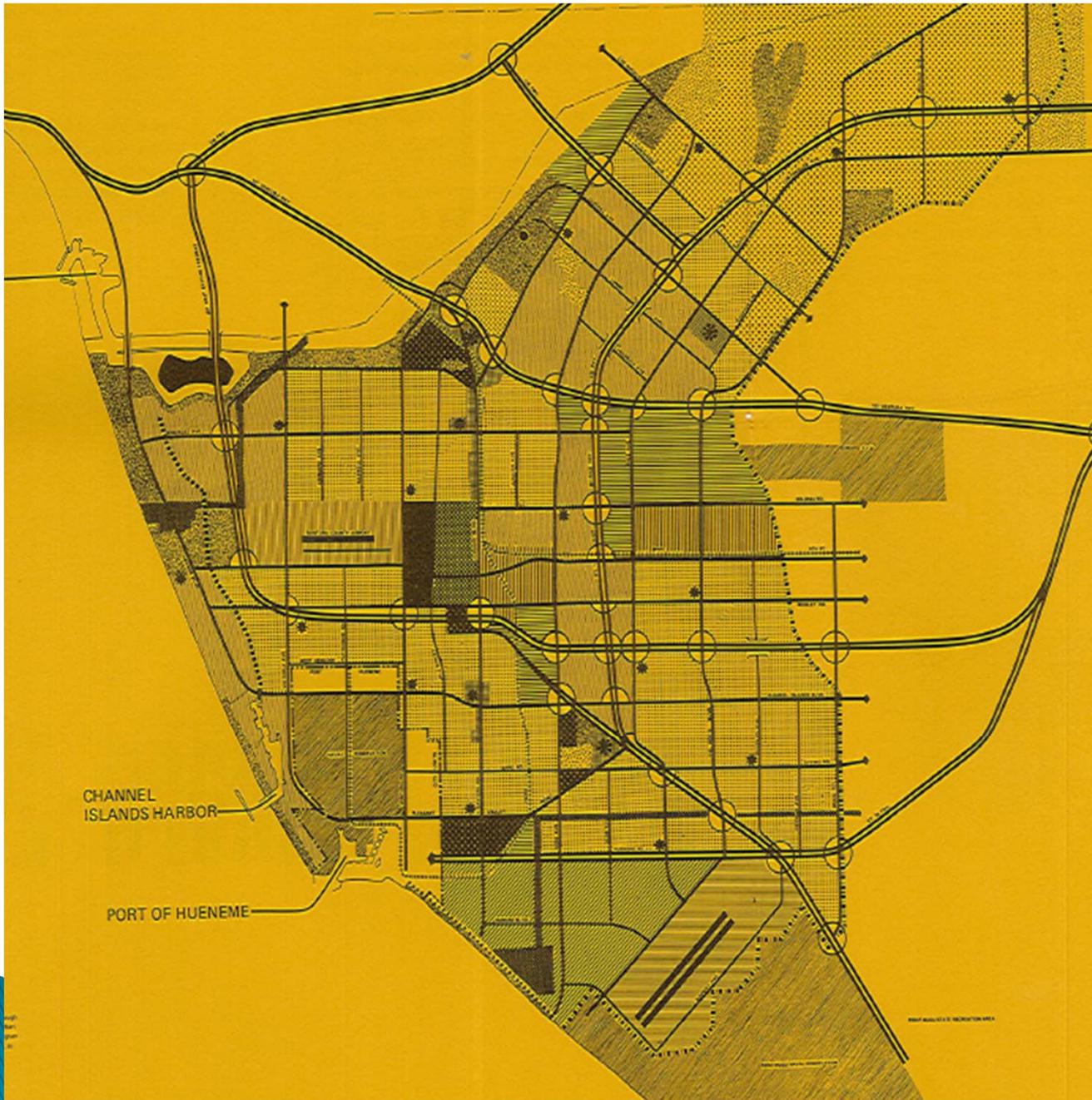
This Plan is based on the conviction that Oxnard citizens do have the responsibility to respond to the pressures for change — a response of accommodation rather than restriction, of aggressive promotion rather than passive acceptance. Most important, the Plan stresses capitalization on the opportunity to build a truly great City.

**Oxnard - 2000**

**The General Plan  
for  
The City Of Oxnard, California**

GRUEN ASSOCIATES

**1970**



## BASIS FOR PLANNING

June 1967

Pop projections

County =  
2.3 million

Oxnard =  
700,000

# Questions ?



# City of Oxnard Contact Information

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# Summary and Evaluation



**CALAFCO**  
University

