Potential Immunity of Land Use Control Systems from Civil Rights and Antitrust Liability

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Introduction

In the last few years the United States Supreme Court has issued a number of decisions dramatically affecting the operations of local government. In *City of LaFayette v. Louisiana Power & Light Co.*,[1] the Court ruled that local governments are responsible for compliance with federal antitrust laws. In *Monell v. Department of Social Services*,[2] the Court ruled that local governments are subject to suit under section 1983 of the Federal Civil Rights Act.[3]

These two cases are likely to stimulate much litigation against local governments. The many ramifications of this new liability affect a wide range of governmental services and facilities. Decades will be required to fully explore and resolve all of the unanswered questions left open by these cases.

This article deals with one municipal function that is a source of potential liability under both antitrust and civil rights laws: the function of land use control. This article deals with only one aspect of the potential liability: the extent to which local governments may claim protection under the umbrella of immunity granted to the states under both civil rights and antitrust laws.

Land use control is a function of local government in each of

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1. 435 U.S. 389 (1978).
2. 436 U.S. 658 (1978).
3. 42 U.S.C. § 1983 (Supp. 1980).

the fifty states. In the nineteenth century local governments enforced a wide variety of police power regulations to control specific types of land use and regulate various categories of buildings and structures.[4] Early in the twentieth century this pattern of regulation evolved into standardized systems of planning and zoning that attempted to regulate comprehensively such factors as the type and density of land use.[5] Regulation of new subdivisions also became common.[6]

Until the mid-1960's the regulation of land use by most local governments followed a common pattern. A zoning ordinance and a subdivision ordinance were the typical regulatory tools and these ordinances showed only minimal evolution beyond those used earlier in the century.[7]

In the last decade and a half, however, land use control has witnessed a blossoming of new techniques in which planning has assumed a much more important role.[8] Experimental systems of growth management and environmental regulation appear regularly.[9]

This increased experimentation with new land use control systems has been accompanied by a trend towards revised state legislation. Whereas the legislation of the 1920's merely provided enabling authority for local governments to engage in planning, zoning and subdivision control, and established certain procedural safeguards, the new legislation tends to be more complex.[10] Many states now make local land use planning and regulation mandatory for some or all units of local government.[11] Other states require

4. *See, e.g., Ex parte* Fiske, 72 Cal. 125, 13 P. 310 (1887); Wadleigh v. Gilman, 12 Me. 403 (1835); Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55 (1846); Brick Presbyterian Church v. City of New York, 5 Cow. 538 (N.Y. 1826).

5. *See* E. BASSETT, ZONING 27.29 (2d ed. 1940); S. TOLL, ZONED AMERICAN, 201-03 (1969).

6. E. YOKLEY, THE LAW OF SUBDIVISIONS 1-2 (1963).

7. *See* AMERICAN LAW INSTITUTE, A MODEL LAND DEVELOPMENT CODE 28 (1976); S. TOLL, *supra* note 5, at 296.

8. *See* Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation,* 74 MICH. L. REV. 899 (1976).

9. *See* URBAN LAND INSTITUTE, MANAGEMENT AND CONTROL OF GROWTH, vols. I-III, (R. Scott ed. 1975); N. WILLIAMS, 5 AMERICAN LAND PLANNING LAW 423-31 (1974).

10. *See generally* N. WILLIAMS, *supra* note 9, at 388-415; DeGrove, *The Political Dynamics of the Land and Growth Management Movement,* 43 LAW & CONTEMP. PROB. 111 (1979).

11. *See* Mandelker, *supra* note 8, at 956-65.

that local plans and regulations comply with standards that are substantive as well as procedural.[12] A number of the states experiencing rapid population growth have established new land use control responsibilities for state or regional agencies.[13] In addition, the state courts in a number of influential states have imposed significant substantive responsibilities upon local governments.[14]

To the extent that local land use control powers become increasingly constrained by more detailed requirements of state law, the burdens imposed by state mandates may be offset by a significant benefit. The more clearly a local government can show that its land use controls are part of a system that provides statewide standards and statewide supervision, the better it can argue that it should be entitled to share the state's immunity from liability under both the antitrust and civil rights laws.

This article will not attempt to survey the wide range of varieties of new state land use legislation; it will examine the laws of three states: California, Nevada and Oregon, which span the spectrum of state involvement. Oregon has undertaken a complete reform of its land use control regulations, establishing detailed substantive standards with which local governments must comply and giving significant enforcement powers to state-level agencies. Nevada relies heavily on the 1920's model of land use control powers: planning has become mandatory for larger local governments, but local regulation is subject to few state-level standards. California has a complex system of land use control with less state involvement than in Oregon, though more than in Nevada. Planning is mandatory for most jurisdictions and the state has established detailed content requirements. In the coastal zone the state's role is enhanced by substantive policies and oversight responsibilities of a state agency.

In examining the extent to which local governments in each of these three states may argue that they share the immunity of the state government itself, this article will attempt to analyze the rationale behind such immunity and to provoke further thought on patterns of state legislation that will tend to distribute this immunity in an equitable fashion.

12. *See, e.g.*, HAWAII REV. STAT. §§ 225-1 to -26 (1980).
13. *See* FLA. STAT. ANN. §§ 380.012-.25 (West 1974 & Supp. 1981).
14. *See* N. WILLIAMS, *supra* note 9, at 107-11.

I. Potential Civil Rights Liability: Background

Section 1983 of the Civil Rights Act was one of the laws passed during the Reconstruction period by a northern-dominated Congress concerned that public officials in the South would not respect the rights of the newly-freed slaves.[15] Section 1983 has since evolved into a broad-ranging remedy under which the plaintiff need only show (1) he has been deprived of some right under the Federal Constitution or statutes; and (2) the action causing the deprivation was taken under color of state law.[16]

Prior to the *Monell* decision local governments were held exempt from the reach of section 1983 because they were not "persons" within the meaning of the statute as evidenced by legislative intent.[17] Nevertheless, local governments found themselves enmeshed in section 1983 litigation through suits brought against individual officers of local governments.[18] As a practical matter, the local governments had to defend the actions of their officials, but the fact that local governments could not be sued directly often made it difficult for plaintiffs to recover.[19] Moreover, the absence of local government from the litigation lent an aura of artificiality to the proceedings and made many cases depend on the extent to which the individual defendants could prove a qualified immunity by showing they had acted in good faith.[20]

The *Monell* decision reversed the long standing interpretation of the statute and held that Congress had intended to allow suits against local governments directly.[21] The number of final appellate

15. *See* Monell v. Department of Social Servs., 436 U.S. 658, 665-69 (1978).

16. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

17. *See* City of Kenosha v. Bruno, 412 U.S. 507 (1973); Monroe v. Pape, 365 U.S. 167, 191 (1961).

18. One circuit judge has said that "[a] judge is tempted to conclude that the chief weapon expected to forestall Orwell's *1984* is the United States Code's § 1983." Coffin, *Justice and Workability: Un Essai*, 5 SUFFOLK U.L. REV. 567, 570 (1971). *See also* Maine v. Thiboutot, 100 S. Ct. 2502, 2515 n.16 (1980) (Powell, J., dissenting); Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC'L ORDER 557, 563.

19. Owen v. City of Independence, 445 U.S. 622, 651 n.33 (1980).

20. Monell v. Department of Social Servs., 436 U.S. 658, 705-07 (1978) (Powell, J., concurring).

21. *Id.* at 690. Moreover, in *Owen v. City of Independence*, the Supreme Court ruled that local governments were absolutely liable for all unconstitutional actions representing municipal policy or custom and could not defend on the basis of good faith immunity. 445 U.S. 622, 638 (1980).

decisions applying section 1983 to local land use regulations is still relatively limited because of the short time that has elapsed since the *Monell* decision. However, prior to *Monell* a number of circuits had ruled that local governments could be sued directly under the Fourteenth Amendment for constitutional deprivations.[22] While relatively few cases were brought on this theory, they do offer an example of the type of litigation that may be anticipated under section 1983 as applied to land use controls.

Probably the most ominous decision for local governments is the Sixth Circuit opinion in *Gordon v. City of Warren.*[23] The case began when the City sought to enforce its "master thoroughfare plan" against Mr. Gordon, who was in the process of constructing an apartment building. The City found that he had built within the area of setback established by the city plan for the purpose of facilitating the future widening of streets. Mr. Gordon defended by arguing that the City's thoroughfare plan was an unconstitutional attempt to widen the streets without paying appropriate compensation. The Michigan Supreme Court ruled in favor of Mr. Gordon. The court recognized that similar setback lines could have been imposed for reasons other than facilitation of future street widening. The court also recognized that the courts of some jurisdictions upheld the municipal power to establish setback lines for future street widening but concluded that the better view was that such plans were unconstitutional. The court held that the setback line was invalid and that Mr. Gordon's building was lawfully constructed.[24]

Mr. Gordon then brought a new action in the federal court seeking damages for the injuries caused him by the unconstitutional action of the City of Warren.[25] The Sixth Circuit ruled that

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22. *See generally* Comment, *Municipal Liability for Constitutional Violations: Can You Fight City Hall? A Survey of the Circuits,* 16 DUQ. L. REV. 373 (1978).

23. 579 F.2d 386 (6th Cir. 1978).

24. Gordon v. Warren Planning & Urban Renewal Comm'n, 388 Mich. 82, 199 N.W.2d 465 (1972).

25. Plaintiffs under section 1983 need not claim any discrimination on the basis of race or color; any unconstitutional deprivation of property is sufficient to form the basis of a claim. Lynch v. Household Fin. Corp., 405 U.S. 538 (1972). Judge Friendly has noted the irony of this interpretation. "[T]he framers of the [Civil Rights Act], whose concern, as the references show, was with the rights of the freedmen in the South, would have been no end surprised to find that it encompassed an attack on a Connecticut garnishment statute and still more so to find it was applicable to a creditor's claim for impairment of the obligation of a contract." H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 91 (1973). Compare,

the plaintiff had stated a cause of action and remanded the case to the trial court for a hearing on the amount of damages to be awarded.[26]

The *Gordon* case poses a serious threat to local land use controls. Many of the constitutional standards that local governments must meet are imperfectly defined. The taking clause, which was relied upon in the *Gordon* case, is a good example. The courts have emphasized that no clear line may be drawn between permissible regulation and invalid taking, but each case must be evaluated on its merits by weighing a series of countervailing factors, many of which are intangible.[27]

In addition, cases like *Gordon* may impose liability for actions that could not have been determined to be unconstitutional at the time they were taken.[28] Moreover, plaintiffs may claim rights under other federal laws whose reach could not easily be forecast.[29] This imposes a heavy burden on municipal attorneys advising clients about the potential validity of actions they seek to take.

Given the perils of exercising land use controls under these circumstances, local governments may welcome opportunities to trade some degree of state supervision for a share of the state's immunity. The Supreme Court has held that Congress did not intend to apply section 1983 against the states themselves, and thus any activities such as land use control that were undertaken by the

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however, the view of Judge Oakes of the same circuit that the *Lynch* case properly remedied an overreaction to the reasoning employed in Lochner v. New York, 198 U.S. 45, 53 (1905). Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U.L. REV. 911, 917 (1979). *See also* McClendon v. Rosetti, 460 F.2d 111, 112-13 (2d Cir. 1972).

26. 579 F.2d at 392. *Cf.* Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081, 1096 (6th Cir. 1978).

27. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979); Andrus v. Allard, 444 U.S. 51 (1979); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

28. An argument based on retroactivity was raised in Owen v. City of Independence, 445 U.S. 622, 628 n.18 (1980), in which the action was alleged to be unconstitutional on the basis of a Supreme Court decision that came down after the action was taken. However, the Court rejected any requirement of intent and held that local governments were absolutely liable for any action found to be unconsitutional. 445 U.S. at 638. *See, e.g.*, Huemmer v. Mayor of Ocean City, 632 F.2d 371 (4th Cir. 1980), in which the court found unconstitutional a city ordinance giving a property owner the authority to call an authorized towing agency to remove any vehicle illegally parked on his property. Citing *Owen*, the court rejected the municipal defendants' good faith defense that they had relied "on an apparently regular ordinance whose constitutionality had never been questioned." *Id.* at 372. *See also* Monroe v. Pape, 365 U.S. 167, 187 (1961); Note, *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1204-05 (1977).

29. *See* Maine v. Thiboutot, 100 S. Ct. 2502 (1980).

state would be immune from suit for damages under section 1983.[30] A state acts through many subdivisions and entities. However, it is not always easy to determine when an action may be considered one by the state itself rather than one by an independent entity.[31]

II. Potential Antitrust Liability: Background

The application of the federal antitrust laws to local governments follows a history that is remarkably similar, though coincidentally so, to the history of the application of the federal civil rights laws. In both areas the seminal decision was a 1978 ruling of the United States Supreme Court holding local governments liable. In the antitrust field the case was *City of Lafayette v. Louisiana Power & Light Co.*[32]

The major federal antitrust laws were enacted in the late nineteenth and early twentieth centuries in an attempt to counter perceived abuses of monopoly power and to encourage free competition among business enterprises.[33] Although the statutes themselves are relatively brief and simple, a large and complex body of judicial decisions interpreting them has developed over the years.[34]

In 1943 the Supreme Court held definitively that actions of state government would not be subject to federal antitrust laws. Because the states are sovereign, said the Court, it would not lightly interpret congressional intent as designed "to restrain state action or official action directed by a state."[35]

After *Parker v. Brown*,[36] some federal courts tended to inter-

30. Quern v. Jordan, 440 U.S. 332 (1979). The Court concluded that Congress did not intend "to override the traditional sovereign immunity of the States." *Id.* at 341. In the absence of a specific congressional intent to authorize damage suits against a state the Eleventh Amendment operates as a bar to bringing such suits in the federal courts. Marrapese v. Rhode Island, 49 U.S.L.W. 2275 (U.S.D.C. R.I. Oct. 10, 1980); Hutto v. Finney, 437 U.S. 678 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). *See* Thornton, *The Eleventh Amendment: An Endangered Species*, 55 IND. L.J. 293, 324-27 (1980).

31. *See* discussion in Section III(A) *infra*.

32. 435 U.S. 389 (1978).

33. *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); Standard Oil Co. v. United States, 221 U.S. 1 (1911).

34. *See generally* P. AREEDA & D. TURNER, ANTITRUST LAW, vols. I-V (1978).

35. Parker v. Brown, 317 U.S. 341, 351 (1943). An earlier case had suggested the possibility that states were immune from the Sherman Act. *See* Olsen v. Smith, 195 U.S. 332 (1904). *See also* Kennedy, *Of Lawyers, Lightbulbs, and Raisins: An Analysis of the State Action Doctrine under the Antitrust Laws*, 74 NW. U.L. REV. 31, 35-38 (1979).

36. 317 U.S. 341 (1943).

pret the states' immunity broadly, exempting a wide variety of actions on the ground that they were subject to state regulation.[37] Beginning in 1975, however, the Supreme Court began to interpret the state action doctrine more narrowly. In *Goldfarb v. Virginia State Bar*,[38] the Court held that anticompetitive activities (*i.e.*, a minimum fee schedule established by the bar) were immune only if they were compelled by the state acting in its sovereign capacity.[39]

In the *Lafayette* case the Court applied similar principles in determining the extent to which local governments could claim the state action exemption. Although the Court lacked a majority, the opinion suggested at least a risk of liability for any local action that was not absolutely mandated by state law.[40]

The Court expanded further on the new state action doctrine in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*[41] It said that its recent decisions established two basic standards for immunity under the state action doctrine. The anticompetitive action must be clearly articulated and affirmatively expressed as state policy, and the policy must be actively supervised by the state itself.[42] The *Midcal* case involved a state law which required each liquor wholesaler to establish a uniform wholesale and retail price for each of its brands of liquor and prohibited the sale of liquor below the established price. The Court held that the system met the first half of the test but failed the second. There was a clearly articulated state policy in favor of price fixing, said the Court, but the state made no attempt to supervise the implementation of that policy itself because it had delegated the power solely to the individual manufacturers and distributors of liquor.[43]

Subsequent to the *Lafayette* decision a number of lower courts have explored the potential application of the antitrust laws to local land use control decisions.[44] Under the antitrust laws, as

37. *See, e.g.*, Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248 (4th Cir. 1971).

38. 421 U.S. 773 (1975). *See also* Bates v. State Bar, 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

39. 421 U.S. at 790.

40. 435 U.S. at 413-17. *See also id.* at 434-38 (Stewart, J., dissenting).

41. 445 U.S. 97 (1980).

42. *Id.* at 105.

43. *Id.* at 105-06.

44. *See* Whitworth v. Perkins, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911

under section 1983 of the Civil Rights laws, potential municipal liability has been greatly expanded. This expansion has not been accompanied by clear limitations or standards. The ultimate extent of this liability will be defined only gradually and at great cost to local governments, given the complex and time-consuming nature of this type of litigation.

This cost can be substantially reduced if local governments can devise means of exercising their responsibilities in a manner that will fall under the umbrella of the states' immunity from both the civil rights and antitrust laws. The next section of this article will examine in more detail the factors that the courts have considered in determining whether an activity is entitled to the states' immunity.

III. Delegation of the States' Immunity

A. Criteria for Finding Immunity from Section 1983 Actions

As previously discussed, the Supreme Court held in *Monell v. Department of Social Services* that Congress had intended to permit suits against local governments under section 1983 of the Federal Civil Rights Act. This conclusion was tempered, however, by the Court's reminder that its holding was "of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes."[45] It is this important qualification in *Monell*, and the Court's subsequent holding in *Quern v. Jordan*,[46] that states are not "persons" within the meaning of section 1983, which serve as the starting point for our discussion of

(1979); Mason City Center Assocs. v. Mason City, 468 F. Supp. 737 (N.D. Iowa 1979); Cedar Riverside Assocs., Inc. v. United States, 459 F. Supp. 1290 (D. Minn. 1978), *aff'd*, 606 F.2d 254 (8th Cir. 1979). Most of these opinions have been rendered at the motion to dismiss stage and have tended to support the plaintiff's right to maintain the action, though sometimes expressing skepticism about his ability to prove the alleged facts. The result of these decisions has been to expose local governments to potential litigation over a wide variety of land use regulations that might be thought to have anticompetitive effects. Thus, for example, *Whitworth* involved a small town's use of zoning to allegedly maintain a monopoly for the mayor on the sale of liquor by denying requested zoning to a competitor. The *Mason City* case involved an alleged agreement between the City and a downtown redeveloper under which the City agreed not to permit the competitive shopping centers. The *Cedar Riverside* case involved the allegedly anticompetitive use of urban renewal powers.

45. 436 U.S. at 690 n.54.

46. 440 U.S. 332 (1979).

the criteria which determine whether local governments qualify for immunity under state land use planning statutes.

To date, courts have considered the question of whether or not a state has delegated its immunity largely in terms of whether the governmental body exercising power can be viewed as either the "alter ego" or "arm" of the state,[47] or whether the political entity is more similar to a municipality or county.[48] The consistent position of the courts has been to deny Eleventh Amendment protection to political subdivisions such as counties and municipalities even if they possess a "slice of state power."[49]

Recently, the courts have looked to a number of factors in deciding whether a governmental activity is entitled to a state's Eleventh Amendment immunity. The analysis always begins with a review of the applicable state law.[50]

In *Mt. Healthy City School District Board of Education v. Doyle*,[51] the Supreme Court considered whether a school district was "to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or [was] to be treated as a municipal corporation or other political subdivision." The answer, commented the Court, "depend[ed], at least in part, upon the nature of the entity created by state law."[52] The Court considered the following characteristics of school boards under Ohio law: (1) Ohio school boards are subject to guidance from the State Board of Education, (2) school boards receive a significant amount of money from the state, (3) the term "state" does not include "political subdivisions" and school districts were included in the term "political subdivisions," and (4) local school boards have extensive powers to issue bonds and levy taxes within certain restrictions of state law. On balance the Court concluded that an Ohio school board was not an arm of the state entitled to share its immunity.

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47. *See, e.g.*, Moor v. County of Alameda, 411 U.S. 693, 717-18 (1973).

48. *See, e.g.*, Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

49. *See* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401 (1979); Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974); Hander v. San Jacinto Junior College, 519 F.2d 273, 278 (5th Cir. 1975), *aff'd per curiam on rehearing*, 522 F.2d 204 (5th Cir. 1975).

50. Kramer, *Section 1983 and Municipal Liability: Selected Issues Two Years After Monell v. Department of Social Services*, 12 URB. LAW. 232, 259 (1980).

51. 429 U.S. 274 (1977).

52. *Id.* at 280.

In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,[53] the Court overturned the Ninth Circuit Court of Appeals' ruling that California and Nevada had delegated Eleventh Amendment immunity to the Tahoe Regional Planning Agency (TRPA), which was "exercising a specially aggregated slice of state power."[54] The Supreme Court pointed out that both California and Nevada had filed briefs disclaiming any intent to confer immunity on the TRPA. The Court focused on the provisions of the Interstate Compact creating the TRPA, under the terms of which the Agency was described as a "separate legal entity" and a "political subdivision." Six of the ten governing members of the Agency were appointed by counties and cities; funding under the Compact was to be provided by the counties; and state treasuries were not liable for obligations of the Agency.

Commenting that the regulation of land uses is traditionally a function of local governments, the Court concluded that:

> [W]hile TRPA, like cities, towns, and counties, was originally created by the States, *its authority to make rules within its jurisdiction is not subject to veto at the state level.* Indeed, that TRPA is not in fact an arm of the State subject to its control is perhaps most forcefully demonstrated by the fact that California has resorted to litigation in an unsuccessful attempt to impose its will on TRPA.[55]

The Court held, however, that the individual members of the TRPA had absolute immunity for their legislative actions.[56]

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53. 440 U.S. 391 (1979).

54. Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1359 (9th Cir. 1977).

55. 440 U.S. at 402 (emphasis added).

56. *Id.* at 402-06. The Court did not have occasion to consider whether the TRPA itself, in addition to its individual members, might also be immune for legislative acts. In a subsequent case, however, the Court held that in some cases agencies "who exercise delegated legislative power" may "enjoy legislative immunity," and denied that the *Lake Country Estates* opinion contained any contrary implication. Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 733 n.11 (1980). In Owen v. City of Independence, 445 U.S. 622 (1980), the Court ruled that a local government was not entitled to claim the so-called "qualified" or "good faith" immunity that protects individual public officials who actually and reasonably believe that their actions are lawful. The question whether a local government could claim *absolute* immunity for legislative actions was not before the Court, although the opinion contains dicta that seems unsympathetic to such immunity. *Id.* at 649-50. If the state may delegate immunity to the TRPA or its supreme court by delegating legislative power to it, then it is hard to see why the delegation of legislative power to a local government to exercise land use control functions should not carry with it absolute immunity for those actions that are legislative in nature, such as rezonings. *See* Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 611 (8th Cir. 1980). If legislative immunity were available to local

The principles established by the Supreme Court for testing delegation of immunity have been applied by lower federal courts to a variety of governmental agencies, most frequently universities, school districts, state review boards and social service agencies. A series of cases arising in Texas has explored the relative position of a number of different public institutions of higher education.

In both *Goss v. San Jacinto Junior College*[57] and *Hander v. San Jacinto Junior College*,[58] the Fifth Circuit Court of Appeals concluded that Texas junior colleges were not entitled to the state's immunity. The court looked to the nature of the entity under state statutes controlling the establishment, funding and operation of junior colleges. The court found that while the statutory scheme governing public junior colleges authorized a system-wide "coordinating board" to "exercise general control" over such institutions, it explicitly provided that all residual administrative authority would be retained in the individual junior colleges. Moreover, under the Texas scheme, the establishment of a junior college district began with local initiative. The local district's electorate selected a board of trustees to operate the college, and the trustees, in turn, were empowered to issue revenue bonds and to levy annual ad valorem taxes. State funds issued to junior college districts were intended merely to supplement local funding. Finally, Texas case law had long and consistently recognized that school districts were independent political corporations. The court concluded:

> In Eleventh Amendment cases, the question of whether or not the state is "the real party in interest" is one of federal law, but federal courts must examine the powers, characteristics and relationships created by state law in order to determine whether the suit is in reality against the state itself.[59]

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governments it would strengthen the already strong incentive to use legislative techniques for making land use decisions. *See* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976). However, *Owen's* rejection of the qualified immunity for local government makes the possible existence of a delegated absolute immunity for local government very speculative. *Compare* Owen v. City of Independence, 445 U.S. 622, 653 n.37, *with* Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 733 n.11.

57. 588 F.2d 96 (5th Cir.), *modified on other grounds*, 595 F.2d 1119 (5th Cir. 1979).

58. 519 F.2d 273 (5th Cir. 1975). *See also* the Texas cases analyzed in Kramer, *supra* note 50, at 259-61.

59. Hander v. San Jacinto Junior College, 519 F.2d at 279. In Gay Student Servs. v. Texas A&M Univ., 612 F.2d 160, 164 (5th Cir. 1980), the court reaffirmed its reasoning in *Goss*, but found it unnecessary to decide whether Texas A&M University was an arm of the state. *Id.* at 165 n.5.

More recently, in *Hillis v. Stephen F. Austin University*,[60] the court used the analysis in *Goss* and *Mt. Healthy* in concluding that the defendant University was not entitled to Eleventh Amendment damages immunity. The court noted that the University's bonding authority was even more extensive than that of the Texas junior colleges, and that revenue bonds issued by the University were not general obligations of the state. The University's board of regents also had more extensive administrative powers, such as the power to make employment decisions irrespective of the state public employment scheme.[61]

However, district court decisions in Texas have concluded that state universities with a statewide base are entitled to immunity. In *Henry v. Texas Tech University*,[62] an employment discrimination suit was brought against Texas Tech University and Texas Tech Medical School. Finding that the defendants were "alter egos" of the state, and thus entitled to Eleventh Amendment immunity, the district court acknowledged the guidance provided by *Hander* and analyzed the powers and relationships created by state law. The court was influenced by the fact that Texas law provided for the governance, control and direction of policies of the University by a state board of regents appointed by the governor and possessing eminent domain power. State funds were used to acquire and operate the University and a Coordinating Board had been given management power over a broad range of policy decisions such as curricula, financial appropriations, construction plans and degree programs. Furthermore, the court noted, in addition to the statutory factors considered, it was important to consider whether a judgment would have to be paid from state funds.[63]

A similar conclusion was reached in *Bailey v. Ohio State University*,[64] in which an Ohio court, using *Mt. Healthy* as a guide, concluded that Ohio State University was the alter ego of the state.[65]

60. 486 F. Supp. 663, 667-72 (E.D. Tex. 1980).

61. *Id.* at 671.

62. 466 F. Supp. 141 (N.D. Tex. 1979). *See also* Hart v. University of Tex., 474 F. Supp. 465 (S.D. Tex. 1979), holding the defendant hospital to be "an instrumentality of the State of Texas for Eleventh Amendment and 1983 purposes." *Id.* at 467.

63. 466 F. Supp. at 145-46.

64. 487 F. Supp. 601 (S.D. Ohio 1980).

65. *Id.* at 604-06. *See also* Skehan v. Trustees of Bloomsburg State College, 590 F.2d 470 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979) (holding that state colleges in Penn-

Since *Mt. Healthy,* a number of courts have used the Supreme Court's analysis to conclude that school districts do not share a state's immunity. In *Unified School District No. 480 v. Epperson,*[66] the Tenth Circuit Court of Appeals focused on two factors in determining whether the defendant school district was protected by the Eleventh Amendment: "(1) To what extent does the board, although carrying out a state mission, function with substantial autonomy from the state government and, (2) to what extent is the agency financed independently of the state treasury."[67]

Looking to Kansas law, the court noted that school districts could sue and be sued, execute contracts, hold real and personal property, exercise the powers of a corporation, prepare their own budgets, levy and collect taxes to fund their budgets, and be treated as municipalities for tax purposes. Though the Kansas Constitution gave the state "general supervision" over school districts, such supervision could not be considered "control." Moreover, any judgment awarded the plaintiffs would not come from state funds, but from monies raised by special levy within the school district.[68]

An analysis similar to that used in the school district cases was set out in *Savage v. Pennsylvania,*[69] in which a former hearing examiner for the Pennsylvania Liquor Control Board (LCB) brought suit against the Board and other state officials in their governmental capacities. Looking to the Pennsylvania statutes for guidance the court articulated the following standard: "[W]hether a government agency partakes of the state's Eleventh Amendment immunity depends upon whether its powers are 'sufficiently distinct and

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sylvania are agencies for which Pennsylvania claims sovereign immunity); Korgich v. Regents of New Mexico School of Mines, 582 F.2d 549, 551 (10th Cir. 1978) (holding that a personal injury suit against the School of Mines was in effect against the state, and therefore barred by the Eleventh Amendment).

66. 583 F.2d 1118 (10th Cir. 1978).

67. *Id.* at 1121-22.

68. *Id.* at 1122-23. For other cases in which courts have concluded that a school district is not entitled to the state's immunity *see* Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980) (Texas school district); Kingsville Independent School Dist. v. Cooper, 611 F.2d 1109, 1112 (5th Cir. 1980) (Texas school district); Moore v. Tangipahoa Parish School Bd., 594 F.2d 489, 493-94 (5th Cir. 1979) (Louisiana school board); Cline v. School Dist. No. 32, 476 F. Supp. 868, 870 (D. Neb. 1979) (Nebraska school district); Stoddard v. School Dist. No. 1, 429 F. Supp. 890, 892-93 (D. Wyo. 1977), *aff'd,* 590 F.2d 829, 835 (10th Cir. 1979) (Wyoming school district).

69. 475 F. Supp. 524 (E.D. Pa. 1979), *aff'd,* 620 F.2d 289 (3d Cir. 1980).

independent from the state as not to be considered a part of the state.' "[70] Holding that the LCB and its members were entitled to share the state's immunity, the court noted that the LCB was an administrative board subject to the State Administrative Code, its powers were statutorily defined, the financial affairs of the Board and the state liquor stores were monitored by the State Department of the Auditor General, the Board was funded totally by the state, and that the state legislature had specifically waived its sovereign immunity with respect to damages caused by the sale of liquor at state liquor stores under certain circumstances.

In *Holley v. Lavine,*[71] the defendants argued that a county social service agency was an arm of the state for purposes of the Eleventh Amendment and section 1983 because it was part of, and was supervised by, the New York State Department of Social Services. Citing provisions of the state constitution and statutes, the defendants further contended that the state legislature, not the local county agencies, had the power to control the public welfare system and to determine the manner and means of providing public assistance to the citizens of the state. They argued, in other words, the state makes the policy, the locals merely administer it.

Though the court found these to be "substantial arguments," it nevertheless concluded that state control of county policy was not decisive on the Eleventh Amendment issue. More persuasive to the court was the fact that the county, and not the state, had the primary obligation to make payments to public assistance recipients.[72]

In an earlier case, *Mackey v. Stanton,*[73] the Seventh Circuit Court of Appeals applied *Mt. Healthy* principles to Indiana law and also concluded that a county welfare department was independent of the state and thus not immune from suit.

> In all respects that the Supreme Court seemed to consider significant in *Mt. Healthy,* the county department here is similiar to the school board in that case. Although both are subject to state supervision and depend heavily on state funds, they perform

70. 475 F. Supp. at 530. The same court used a simliar analysis in an earlier case in which it found the Pennsylvania Board of Probation & Parole to be an arm of the state. Ahmad v. Burke, 436 F. Supp. 1307, 1310-11 (E.D. Pa. 1977).

71. 605 F.2d 638 (2d Cir. 1979), *cert. denied,* 446 U.S. 913 (1980).

72. 605 F.2d at 644.

73. 586 F.2d 1126, 1130-31 (7th Cir. 1978), *cert. denied,* 444 U.S. 882 (1979).

> their duties on a local level. More important, both have the power to raise their own funds by tax levy and by bond issuance. Significantly, Ind. Code Ann. § 12-1-11-13 (Burns) is analogous to Ohio Rev. Code Ann. § 133.27 (Page), providing a manner for payment of judgments without resort to the state treasury.[74]

Similarly, in *Morrison v. Jones*,[75] the Ninth Circuit Court of Appeals rejected the argument by a California county department of social services that it was entitled to absolute immunity from a suit brought under section 1983 by a mother whose child had been declared a dependent of the courts pursuant to the California Welfare and Institutions Code.

B. Criteria for Finding Immunity Under the State Action Doctrine

Since 1975, the United States Supreme Court has addressed itself six times to the issue of state action immunity from the federal antitrust laws.[76] Each one of these six decisions was an attempt by the Court to define more clearly the standard it had set in its 1943 landmark decision in *Parker v. Brown*.[77]

In *Goldfarb v. Virginia State Bar*,[78] the Court invalidated a

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74. 586 F.2d at 1131. *But see* Carey v. Quern, 588 F.2d 230, 233 (7th Cir. 1978), in which the same court concluded that an analysis of Illinois law led to the conclusion that the Cook County Department of Public Aid was entitled to the state's immunity because it was defined by statute as an instrumentality of the State of Illinois and an agency of the Illinois Department of Public Aid. Moreover, the County Department's primary source of revenue was from the state. *Id.* at 233-34.

75. 607 F.2d 1269, 1273 (9th Cir. 1979), *cert. denied*, 445 U.S. 962 (1980).

76. *See* Goldfarb v. Virginia State Bar, 421 U.S. 733 (1975); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Bates v. State Bar, 433 U.S. 350 (1977); City of LaFayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). *See also* 15 U.S.C. §§ 1-31 (1975 & Supp. 1980).

77. 317 U.S. 341 (1943). Although the *Parker* case is grounded on statutory interpretation some commentators have interpreted the case of National League of Cities v. Usery, 426 U.S. 833 (1976), to imply Tenth Amendment protection from federal interference with those types of state action now protected under the *Parker* decision. *See* Davidson & Butters, *Parker and Usery: Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action*, 31 VAND. L. REV. 575 (1978). The Court has decided all of the six cases mentioned above on the basis of statutory interpretation and thus has not had to reach the issue of whether the Eleventh Amendment would require a similar interpretation. Of course, Congress could avoid the Eleventh Amendment by permitting jurisdiction over antitrust cases in the state courts, but it has not chosen to do so. *See also* Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 179 (1977).

78. 421 U.S. 773 (1975).

minimum-fee schedule published by a county bar association and enforced by the Virginia State Bar. Finding that the fee schedule was in effect price fixing, the Court stated that the standard to be applied was not whether the anticompetitive activity was prompted by state action, but rather whether "anticompetitive activities [were] compelled by direction of the State acting as a sovereign."[79] In other words, was the activity mandated by the state? The Court concluded that it was not.

In *Cantor v. Detroit Edison Co.*,[80] the Court again rejected a claim of state action immunity. In this instance the Court found a public utility liable under the antitrust laws for a tariff approved by the Michigan Public Service Commission which permitted the company to conduct a lightbulb exchange program for its customers. The Court reasoned that the private company had exercised its own discretion in initiating such a program, while the state agency had only approved the application in a passive role.[81]

In a 1977 opinion the Court granted state action immunity to an Arizona Supreme Court rule prohibiting the advertising of attorneys' fees on the grounds that the supreme court was "the ultimate body wielding the State's power over the practice of law."[82] The rule, therefore, "reflect[ed] a clear articulation of the State's policy" and was "subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings."[83]

The following year in *City of Lafayette v. Louisiana Power & Light Co.*,[84] the Court rejected the argument of the City of Lafayette that its operation of a city-owned utility was automatically exempt from the Sherman Act because the City was "a subdivision of the state and only exercise[d] power delegated to it by the state."[85] Writing for a plurality of four Justices, Mr. Justice Brennan concluded that *Parker v. Brown* had not "held that all governmental entities, whether state agencies or subdivisions of a State, are, sim-

79. *Id.* at 791.

80. 428 U.S. 579 (1976).

81. *Id.* at 594. The lightbulb program was later described by the Court in Bates v. State Bar, 433 U.S. 350 (1977), as a program "instigated by the utility with only the acquiescence of the state regulatory commission." *Id.* at 362.

82. Bates v. State Bar, 433 U.S. 350, 360 (1977).

83. *Id.* at 362.

84. 435 U.S. 389 (1978).

85. *Id.* at 394.

ply by reason of their status as such, exempt from the antitrust laws."[86] Mr. Justice Brennan noted, however, that

> the fact that municipalities, simply by their status as such, are not within the *Parker* doctrine, does not necessarily mean that all of their anticompetitive activities are subject to antitrust restraints. Since "[m]unicipal corporations are instrumentalities of the State for the convenient administration of government within their limits," *Louisiana ex rel. Folsom v. Mayor of New Orleans,* 109 U.S. 285, 287 (1883), the actions of municipalities may reflect state policy. We therefore conclude that the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service.[87]

Lafayette was soon followed by *New Motor Vehicle Board v. Orrin W. Fox Co.,*[88] in which the Court upheld a California statute requiring automobile manufacturers to obtain the Board's approval before opening a new automobile dealership within the market area of an existing franchise, if that franchisee objected. The purpose of the statute was to protect retail car dealers "from perceived abusive and oppressive acts by the manufacturers."[89] The Court found the regulatory plan to be clearly expressed state policy and "therefore outside the reach of the antitrust laws under the 'state action' exemption."[90]

Finally, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,*[91] the Court summarized two standards its earlier decisions had established for antitrust immunity under *Parker v. Brown*: first, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the state itself.[92]

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86. *Id.* at 408.

87. *Id.* at 413. Chief Justice Burger concurred, but would have used the governmental/proprietary distinction as the basis for municipal antitrust liability, *i.e.,* exempting governmental but not proprietary activities. *Id.* at 418. (Burger, C.J., concurring).

88. 439 U.S. 96 (1978).

89. *Id.* at 101.

90. *Id.* at 109. Some observers have suggested that the Court's finding of state action in this case reflected a conclusion that the state's system "probably results in only minor injury to competitive structure, with little or no impact on consumer welfare." Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage and Retaining the Rule of Reason,* 27 U.C.L.A. L. REV. 265, 303 (1979).

91. 445 U.S. 97 (1980).

92. *Id.* at 105.

In *Midcal* the challenged statute failed to meet the second standard because the state simply authorized price-setting and enforced the prices established by private parties. The state did not set the prices, review their reasonableness, regulate the terms of fair trade contracts, monitor market conditions, or engage in any re-examination of the program.[93]

Since *Midcal,* one reported case has applied its standards for finding immunity from antitrust liability. In *Community Communications Co. v. City of Boulder,*[94] the defendant City adopted an ordinance prohibiting the plaintiff (CCC) from expanding its area of cable television service within the City for ninety days in order to provide other cable companies an opportunity to enter the Boulder market. The purpose of the ordinance was to prevent CCC from becoming a monopoly.

Overruling the district court, the Tenth Circuit Court of Appeals found that the standards of *Midcal* had been met. First, a state policy of fostering competition for cable television franchises was affirmatively expressed through the language of the ordinance, passed pursuant to the City's home rule powers. Second, the policy was actively supervised and enforced by imposition of the ninety-day moratorium and by issuance of civil and criminal citations to cable workers when the moratorium was violated.[95]

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93. *Id.*

94. 630 F.2d 704 (10th Cir. 1980).

95. *Id.* In regard to the first criteria, the court reasoned that because home rule authority in Colorado is derived directly from the state constitution, an ordinance passed pursuant to those powers had the force of state policy. A similar conclusion had been reached in December 1979, by the District Court for the Northern District of Ohio in Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N.D. Ohio 1979). In *Glenwillow,* the court ruled that actions taken by the City of Akron to eliminate competition for solid waste disposal services in the city were immune from antitrust liability because they were taken pursuant to home rule powers granted by the Ohio Constitution.

A contrary result was reached, however, in Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978), in which the court rejected the City of Dallas' argument that its grant of a monopoly taxicab franchise at the Dallas-Fort Worth Airport was immune by virtue of its status as a home rule municipality. *Id.* at 1032.

See also Stauffer v. Town of Grand Lake, No. 80-A-752 (U.S.D.C. Colo. Oct. 9, 1980), in which the court concluded at the motion to dismiss stage that the Colorado zoning enabling statute met the two-pronged *Midcal* test by simply authorizing municipalities to zone and providing for the review of zoning decisions by a local board of adjustment and the district courts of Colorado. The court held, however, that the defendants were not protected by the state action doctrine because plaintiffs had alleged that the defendants had acted to promote their personal property interests. Such conduct was viewed as not within the scope of conduct contemplated by the legislature when granting authority to zone.

C. Comparison of Factors for Finding Delegation of State Immunity

The first conclusion which emerges from our discussion of the section 1983 cases is that the federal courts recognize that the question of the delegation of state immunity can only be answered after a review of applicable state statutes and the powers exercised by the governmental entity in question. Secondly, the courts have tended to consider a number of factors in reaching their conclusions as to whether or not an entity is indeed functioning as an arm of the state:

First, does the state formulate policy which the entity in question is mandated to follow,[96] or does the state merely offer guidance?[97]

Second, does the state retain the power to enforce or administer its policies; does the state have a veto power?[98]

Third, would a judgment for the plaintiff be paid from the state treasury or by the entity in question?[99]

Fourth, does the entity receive operating funds from the state treasury[100] or does it rely on local funding?[101]

Fifth, has the state expressed its intent to confer its immunity on the entity in question[102] or has it expressly withdrawn such

96. *See* Savage v. Pennsylvania, 475 F. Supp. 524 (E.D. Pa. 1979).

97. *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). Some federal courts have used a somewhat similar rationale in deciding whether or not to abstain from deciding land use cases. *See* Note, *Land Use Regulation, The Federal Courts, and the Abstention Doctrine,* 89 YALE L.J. 1134, 1151 n.96 (1980).

98. *Compare* Henry v. Texas Tech Univ., 466 F. Supp. 141 (N.D. Tex. 1979) *with* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Holley v. Lavine, 605 F.2d 638 (2d Cir. 1979), *cert. denied,* 446 U.S. 913 (1980); *and* Goss v. San Jacinto Junior College, 588 F.2d 96 (5th Cir.), *modified on other grounds,* 595 F.2d 1119 (5th Cir. 1979).

99. *Compare* Skehan v. Trustees of Bloomsburg State College, 590 F.2d 470 (3d Cir. 1978), *cert. denied,* 444 U.S. 832 (1979) *and* Henry v. Texas Tech Univ., 466 F. Supp. 141 (N.D. Tex. 1979) *with* Holley v. Lavine, 605 F.2d 638 (2d Cir. 1979), *cert. denied,* 446 U.S. 913 (1980).

100. *See* Bailey v. Ohio State Univ., 487 F. Supp. 601 (S.D. Ohio 1980); Savage v. Pennsylvania, 475 F. Supp. 524 (E.D. Pa. 1979).

101. *See* Goss v. San Jacinto Junior College, 588 F.2d 96 (5th Cir.), *modified on other grounds,* 595 F.2d 1119 (5th Cir. 1979); Hillis v. Stephen F. Austin Univ., 486 F. Supp. 663 (E.D. Tex. 1980).

102. *See* Supreme Court of Va. v. Consumers Union, 446 U.S. 719 (1980); Savage v. Pennsylvania, 475 F. Supp. 524 (E.D. Pa. 1979).

immunity?[103]

In the area of state action immunity, the standards expressed in *Midcal* are controlling: (1) the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; (2) the policy must be actively supervised by the state itself. The similarities to the section 1983 policies are inescapable. The two state action standards are very similar to the first two factors used by the courts for finding a delegation of state immunity, and arguably are the most persuasive criteria for making such a finding. The other three policies used in the section 1983 cases might be equally appropriate in state action cases if an analogous fact situation were found to exist.

With the foregoing in mind, Section IV of this article will review the land use control statutes of California, Nevada and Oregon placing emphasis on the issues of state policy formation and state oversight, while also considering the issues of financing and intent where appropriate.

IV. Extent of Immunity Delegation in Three State Land Use Control Systems

A. California

In order to acquire a full understanding of California's land use control system it is necessary to conduct a two-part analysis. Under the state's Government Code, mandatory planning policies are established for most local jurisdictions, but enforcement powers are not actively executed by any state agency.[104] In the area of the state's coastal zone, however, California has chosen to give a state agency an active role in guiding development.[105]

1. California Planning and Zoning Statutes

California's planning enabling statute seeks to achieve a balance between the state's preference that most land use control decisions be made at the local level and the state's desire to guide such decisions through officially approved statewide goals and poli-

103. *See* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).

104. CAL. GOV'T CODE §§ 65000-65020.10 (West 1966).

105. CAL. PUB. RES. CODE §§ 30000-30900 (West 1977).

cies.[106] All cities and counties within the state are required to adopt a long-term general plan,[107] which must include nine separate subplans, or elements, encompassing land use, traffic circulation, housing, conservation and utilization of natural resources, open space,[108] seismic safety, noise control, scenic highway protection, and safety from fire and geologic hazards.[109] The substantive nature of the policies contained in these elements is exemplified by the land use and housing elements:

> The general plan shall consist of a statement of development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals. The plan shall include the following elements:
>
> (a) A land use element which designates the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space, including agriculture, natural resources, recreation, and enjoyment of scenic beauty, education, public buildings and grounds, solid and liquid waste disposal facilities, and other categories of public and private uses of land. The land use element shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan. The land use element shall also identify areas covered by the plan which are subject to flooding and shall be reviewed annually with respect to such areas.
>
> (b) . . .
>
> (c) A housing element, to be developed pursuant to regulations established under Section . . . 50459 of the Health and Safety Code, consisting of standards and plans for the improvement of housing and for provisions of adequate sites for housing. This element of the plan shall make adequate provisions for the housing needs of all economic segments of the community. Such element shall consider all aspects of current housing technology, to include provisions for not only site-built housing, but also

106. CAL. GOV'T CODE § 65030.1 (West Supp. 1980).

107. *Id.* § 65300. The general plan is to serve "as a pattern and guide for the orderly physical growth and development and the preservation and conservation of open space land of the county or city." *Id.* § 65400. *See* Selby Realty Co. v. City of Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973); O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 782, 42 Cal. Rptr. 283, 288 (1965) ("the plan is, in short, a constitution for all future development within the city").

108. The open space element, or local open space plan, must comply with the detailed provisions of CAL. GOV'T CODE §§ 65560-65564 (West Supp. 1980).

109. *Id.* § 65302.

manufactured housing, including mobilehomes and modular homes.[110]

In addition to the required elements, local governments may expand the scope of their plans to include elements concerning recreational facilities, comprehensive transportation systems, public services and facilities, location of public buildings, elimination of substandard dwellings, redevelopment, community design and historic preservation.[111]

Once a general plan has been adopted, California law mandates that all zoning ordinances be consistent with that plan.[112] Though this requirement has been in effect since 1971, it still remains unclear just what "consistent" means.[113] California courts have, however, considered the issue in a number of decisions. In *Sierra Club v. County of Alameda*,[114] the court held that it was not inconsistent with the county's open space plan to permit a developer to build a 145-acre recreational facility on land designated for open space so long as the developer's remaining 2,555 acres remained open. The court stated that "consistency" meant that regulations must be "closely attuned to the stated policy and goals"[115] of the plan.

In *Youngblood v. Board of Supervisors*,[116] the California Supreme Court ruled that where the County Board of Supervisors had approved a developer's tentative subdivision map and the de-

110. *Id. See also* City of Davis v. Coleman, 521 F.2d 661, 672 (9th Cir. 1975); Agins v. City of Tiburon, 24 Cal.3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 100 S. Ct. 2138 (1980).

111. CAL. GOV'T CODE § 65303 (West Supp. 1980).

112. *Id.* § 65860. Moreover, CAL. GOV'T CODE § 65860(c) (West Supp. 1980) requires that should a zoning ordinance become inconsistent with a general plan due to an amendment to the plan, the ordinance must be amended within a reasonable time. The consistency requirements of § 65860 do not apply, however, to charter cities with populations of less than two million people. Charter cities of more than two million must achieve consistency by July 1, 1982. *Id.* §§ 65803, 65860(d). *See* San Diego Gas & Elec. Co. v. City of San Diego, 146 Cal. Rptr. 103, 111 (1978), *dismissed for lack of jurisdiction*, 49 U.S.L.W. 4317 (1981); Dale v. City of Mountain View, 55 Cal. App. 3d 101, 108 n.5, 127 Cal. Rptr. 520, 524 n.5 (1976); 58 Op. Cal. Att'y Gen. 21 (1975).

113. *See* Hagman & DiMento, *The Consistency Requirement in California*, 30 LAND USE L. & ZONING DIG. No. 6, at 5-8 (1978). For a discussion of the consistency issue in California and other states *see generally* DIMENTO, THE CONSISTENCY DOCTRINE AND THE LIMITS OF PLANNING (1980); DiMento, *Improving Development Control Planning: The Consistency Doctrine and the Limits of Planning*, 5 COLUM. J. ENVT'L L. 1 (1978).

114. 140 Cal. Rptr. 864, *vacated*, 572 P.2d 755, 142 Cal. Rptr. 696 (1977).

115. 140 Cal. Rptr. at 872.

116. 22 Cal. 3d 644, 556 P.2d 586, 150 Cal. Rptr. 242 (1978).

veloper had subsequently complied with the conditions of the approval, the Board was required to approve the developer's final map even though the county general plan had been modified.[117]

In addition to requiring that zoning regulations be consistent with the general plan, subdivision and parcel map approvals in all jurisdictions must also be consistent.[118] Similarly, any actions by cities or counties affecting open space must be consistent with local open space plans.[119]

Although California has adopted strong mandatory planning requirements for local governments, little, if any, enforcement power is given to any state agency. Sections 65035 and 65040 of the Government Code authorize the Office of Planning and Research[120] to develop state land use goals and policies, develop guidelines which will assist local governments in the preparation of the mandatory elements of their general plans, and to assist local governments generally in land use planning. However, the statutes specifically provide that such planning guidelines may be viewed only as advisory[121] and that it is not the legislature's intent to vest in the Office "any direct operating or regulatory powers over land use."[122]

This absence of review authority to determine local government compliance with state-mandated planning policies has left enforcement of these requirements to relatively infrequent Attor-

117. *Id.* at 657, 586 P.2d at 563, 150 Cal. Rptr. at 249. *See also* Ensign Bickford Realty Corp. v. City Council, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977); Mountain Defense League v. Board of Supervisors, 65 Cal. App. 3d 723, 135 Cal. Rptr. 588 (1977); Hawkins v. County of Marin, 54 Cal. App. 3d 586, 126 Cal. Rptr. 754 (1976).

118. CAL. GOV'T CODE §§ 66473.5, 66474 (West Supp. 1980). In a recent decision the court of appeal also implied a requirement that public works projects be consistent with the general plan. Friends of "B" Street v. City of Hayward, 106 Cal. App. 3d 988, 165 Cal. Rptr. 514 (1980). *See also* Save El Toro Ass'n v. Days, 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977); Woodland Hills Residents Assn. v. City of Los Angeles, 44 Cal. App. 3d 825, 118 Cal. Rptr. 856 (1975), *rev'd on other grounds,* 24 Cal. 3d 72, 593 P.2d 200, 154 Cal. Rptr. 503 (1979). Judicial review of the consistency of zoning regulations with the general plan is available under the mandamus provisions of the California Code of Civil Procedure § 1094.5 (West 1980).

119. CAL. GOV'T CODE §§ 65566, 65910 (West Supp. 1980). In Save El Toro Ass'n v. Days, 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977), the court held that failure to adopt an open space plan precluded approval of a subdivision map. *Id.* at 74, 141 Cal. Rptr. at 288.

120. The Office of Planning and Research is part of the Office of the Governor and replaced the Council on Intergovernmental Relations. The Office serves as the comprehensive state planning agency. CAL. GOV'T CODE § 65040 (West Supp. 1980).

121. *Id.* § 65040.2.

122. *Id.* § 65035.

ney General and private citizen suits.[123] Although California courts have increasingly tended to scrutinize the text of the planning statutes to determine whether local governments have complied, it can still be fairly said of the body of California decisions that "they represent a deeply ingrained but not wholly uncritical, deference to municipal autonomy."[124]

2. *California Coastal Act of 1976*

After unsuccessful attempts in the early 1970's to persuade the state legislature to approve a California coastal zone protection program, frustrated environmentalists made a strategic decision in 1972 to bring their proposal to a vote through the state's initiative process. That decision resulted in voter approval of Proposition 20, the California Coastal Zone Conservation Act of 1972.[125]

In 1976, the California legislature reaffirmed the state's commitment to protection of its 1,100-mile coastline[126] through passage of the Coastal Act of 1976.[127] The 1976 Act continues the two major tasks of the Coastal Act of 1972—preparation of comprehensive plans for the state's coastal zone, and regulation of development within that zone.[128] However, as a result of changes in the political climate most authority over plans and permits was returned to local governments,[129] while review authority was retained by the state.

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123. DiMento, *supra* note 113, 5 COLUM. J. ENVT'L L. at 16 n.54. The institution of citizen suits is subject to the requirement that such actions be filed within 90 days of the enactment of any new zoning ordinance or the amendment of an existing ordinance. CAL. GOV'T CODE § 65860(b) (West Supp. 1980).

124. N. WILLIAMS, *supra* note 9, at 116.

125. CAL. PUB. RES. CODE §§ 27000-27650 (West Supp. 1975) (repealed 1977), passed with 55% of the vote. For a discussion of the history of Proposition 20, see Douglas & Petrillo, *California's Coast: The Struggle Today—A Plan for Tomorrow (I)*, 4 FLA. ST. U. L. REV. 179, 184-91 (1976); Finnel, *Coastal Land Management in California*, 4 AM. B. FOUNDATION J. 649, 652-54 (1978).

126. The fifteen counties which include California's 1,110 miles of coastline, contained 63% of the state's population in 1975. Eighty-five percent of the state's population is no more than an hour away from the coast. DeGrove, *supra* note 10, at 120.

127. *See* note 105, *supra*. By its terms, the 1972 Act expired soon after the 1976 legislative session.

128. DeGrove, *supra* note 10, at 122.

129. *Id.* at 128-29. "The key to this shift in attitude lay in the fact that many environmentalists had come to view local governments in a different light over the four year period from 1972 to 1976. Many environmentalists had been elected to local governments in California; and thus, were more comfortable with a larger role for local governments in 1976 than in 1972." *Id.* at 129.

The three-tier system of coastal regulation established under the 1972 Act remains. First, local governments are required to prepare a local coastal program[130] for that portion of the coastal zone lying within their jurisdictions.[131] Coastal programs are then submitted to one of six regional coastal commissions for certification[132] of their conformity with the policies of the Coastal Act.[133] Final certification of the programs[134] and approval of local governments' zoning ordinances, zoning district maps, and other actions taken to implement the plans[135] must be obtained from the state Coastal Commission.[136] Similarly, the Commission must certify all amendments to local programs or local governments' implementing regulations.[137]

All development within the coastal zone is carefully regulated by a permit system begun under the 1972 Act and modified by the legislature in 1976. Under the system, the six regional coastal commissions retain the authority to issue coastal development permits until a local coastal program has been certified.[138] Once the local program is approved, local governments are given jurisdiction over

130. A local coastal program includes a local government's land use plan, zoning ordinances, zoning district maps, and within sensitive coastal resources areas, other implementing actions. CAL. PUB. RES. CODE § 30108.6 (West Supp. 1980).

131. *Id.* § 30500 (West 1977). A local government may request the state commission to prepare its program. *Id.* § 30500(a).

132. *Id.* §§ 30511, 30512.

133. *Id.* §§ 30200-30264. The stated policies of the Act are: (1) development must not interfere with the public's right of access to the sea (§ 30211); (2) coastal areas suited for water-oriented recreational activities shall be protected for such uses (§ 30220); (3) use of the marine environment must be carried out in a manner that will sustain the biological productivity of the coastal waters (§ 30230); (4) land resources, such as environmentally sensitive habitat areas, prime agricultural land and timberlands must be protected (§§ 30240, 30241, 30243); (5) new development must be located in close proximity to existing development (§ 30250); (6) scenic qualities of coastal areas should be protected (§ 30251); and (7) coastal-dependent industrial facilities, such as tanker facilities, oil and gas platforms, refineries, petrochemical facilities, and electric generating plants must be encouraged to locate or expand within existing sites (§§ 30260-30264). These policies also serve as the standards by which coastal development permits are to be measured. (§ 30200).

134. CAL. PUB. RES. CODE § 30512 (West 1977).

135. *Id.* § 30513.

136. The 15 members of the Coastal Commission are: the Secretary of the Resources Agency, the Secretary of the Business and Transportation Agency, the Chairperson of the State Lands Commission, six representatives of the public appointed by the governor and legislative leaders, and six representatives from the regional coastal commissions. *Id.* § 30301.

137. *Id.* § 30514.

138. *Id.* §§ 30600(c), 30601.

the permit program.[139] However, certain types of local decisions approving specific development projects may be appealed to the Coastal Commission to determine whether the projects are consistent with the state's mandated policies.[140]

Unlike the operation of California's planning statutes, the state retains strong and active control over the planning and implementation activities of local governments mandated by the Coastal Act. The state's supervisory role is demonstrated by the statutory powers given to the California Coastal Commission. First, the Commission has the responsibility to determine whether local governments' coastal programs, zoning ordinances, and other implementing regulations are consistent with the Coastal Resources Planning and Management Policies established by the Act.[141] Second, the Commission continues the state's monitoring role through its power to review and approve amendments to certified coastal programs, ordinances and regulations.[142] Third, at least once every five years after certification, the Commission is required to review every certified coastal program to determine whether each program is being implemented in conformity with the policies of the Act;[143] and fourth, the Commission serves as the administrative body to which decisions by local governments and the regional coastal commissions can be appealed.[144] Judicial review of any Commission or regional commission decision is available,[145] as are actions for declaratory and equitable relief to restrain any alleged violation of the Act.[146]

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139. *Id.* §§ 30519, 30600(d). All development for which a permit application is made must be found by the issuing agency to be in conformity with the certified local coastal program. *Id.* §§ 30604(a)-30604(b).

140. *Id.* § 30603. *See also* Finnell, *supra* note 125, at 718.

141. *See* note 133 and accompanying text *supra.*

142. *See* note 137 and accompanying text *supra.*

143. CAL. PUB. RES. CODE § 30519.5 (West 1977).

144. *See generally id.* §§ 30620-30627. *See also id.* § 30512(b) (local government appeal of regional commission disapproval of local land use plan); *id.* § 30513(b) (local government appeal of regional commission rejection of local zoning ordinances, zoning district maps or other implementing actions); *id.* § 30513(c) (appeal by an aggrieved person of regional commission approval or rejection of local zoning ordinances, zoning district maps or other implementing actions); *id.* § 30602(b) (appeal by any person, including the applicant, of any action taken by a regional commission on a coastal development permit application); *id.* § 30603(a)-30603(b) (appeal of a local government action on a coastal permit application for certain types of developments).

145. *Id.* § 30801.

146. *Id.* § 30803.

Finally, it is significant to note that the Coastal Act provides financial assistance to local governments to cover the cost of implementing their local coastal programs.[147] Moreover, litigation costs incurred by a local government in a successful defense of its certified local coastal program may be reimbursed by the state.[148] A recent amendment to the Act authorizes the California Department of Justice to provide legal assistance to local governments upon request so long as the action is not brought by or against the Coastal Commission.[149]

B. Nevada

Nevada has adopted legislation concerning both local zoning and planning and state land use planning. The zoning statutes date from 1923. As is common with early enabling legislation, the statutes permit but do not require the division of a city into districts[150] and the regulation of the location, height and use of buildings within those districts.[151] The statutes authorize creation of a zoning commission,[152] and require that all land use ordinances and regulations be "in accordance with a comprehensive plan incorporating at least the mandatory requirements of a master plan."[153]

Since 1941, the Nevada statutes have required the creation of a planning commission by the governing body of each city and

147. *Id.* §§ 30350-30355. Such costs include expenditures for establishing a regulatory program to implement a certified coastal plan (§ 30353(a)), a fixed payment of ten dollars per permit application (§ 30353(b)), and costs for enforcement of regulatory requirements (§ 30353(d)).

148. *Id.* § 30353(e). Where a local government loses an action brought against its coastal program because it has failed to properly carry out the program, the statute specifically prohibits reimbursement of litigation costs. *Id.*

149. *Id.* § 30806(B) (effective 1979).

150. NEV. REV. STAT. §§ 268.250, 266.376 (1979). *See* Eagle Thrifty Drugs & Mkts., Inc. v. Hunter Lake Parent Teachers Ass'n, 443 P.2d 608, 609 (Nev. 1968), *rev'd*, 451 P.2d 713 (Nev. 1969).

151. NEV. REV. STAT. § 268.240 (1979).

152. *Id.* §§ 268.280, .290.

153. *Id.* § 268.260. Section 268.260 also provides some general guidelines for all zoning regulations. They should be designed to lessen street congestion, secure safety from fire and other dangers, protect property and promote the health, safety and general welfare, provide adequate light and air, prevent overcrowding of land and conserve the value of buildings.

In Forman v. Eagle Thrifty Drugs & Mkts., Inc., 516 P.2d 1234, 1238 (Nev. 1974), the Supreme Court of Nevada affirmed a trial court's conclusion that the rezoning of the respondent's three and one-half acre parcel from residential to neighborhood commercial was not inconsistent with the City of Reno's comprehensive plan because such change would not materially affect the residential character of the surrounding property.

county having a population greater than 15,000 people.[154] The commission is required to prepare and adopt a comprehensive, long-term master plan for the physical development of the city, county or region.[155] The master plan, in turn, must include those elements or sub-plans which are considered relevant (presumably in the opinion of the commission) to a particular city, county or region.[156] The master plan is intended to be a "pattern and guide" for the orderly physical growth and development of the city or county,[157] and all zoning regulations must be adopted in accordance with the master plan's land use element.[158] Furthermore, the planning commission is given the responsibility to advise the governing body on various matters, including the establishment of zoning districts.[159]

In addition to the general zoning and planning enabling provisions of chapters 268 and 278, Nevada has entered, in a limited way, the area of state land use planning.[160] Although the "State Land Use Planning" statute emphasizes a philosophy that the primary responsibility for the land planning process in Nevada should remain with local governments,[161] the state is given a significant

154. NEV. REV. STAT. § 278.030 (1979). The governing bodies of cities and counties of less than 15,000 population are authorized, but not required, to create a planning commission, or may themselves act as the planning commission. *See also* Op. Nev. Att'y Gen. 20 (1971).

155. NEV. REV. STAT. § 278.150 (1979). *See* Forman v. Eagle Thrifty Drugs & Mkts., Inc., 516 P.2d 1234 (Nev. 1974). Sections 278.640-.675 authorize the governor of Nevada to prescribe and administer comprehensive land use plans and zoning regulations for any land lying within any county exceeding 15,000 in population which is not subject to a comprehensive land use plan adopted pursuant to § 278.150. Such power, however, has not been exercised.

156. NEV. REV. STAT. § 278.160 (1979). The plan elements include, but are not limited to community design, a conservation plan, economic plan, land use plan (described as "an inventory and classification of natural land types and of existing land cover and uses, and comprehensive plans for the most desirable utilization of land"), a population plan, public buildings plan, recreation plan, seismic safety plan, solid waste disposal plan, streets and highways plan, transit plan, transportation plan, and consideration of public services and facilities.

157. *Id.* § 278.230. *See* Williams v. Griffin, 542 P.2d 732, 733 (Nev. 1975).

158. NEV. REV. STAT. § 278.250 (1979). Section 278.250 also provides some additional guidelines for all zoning regulations. They should be designed to preserve air and water quality, promote conservation of open space, provide for recreational needs, protect life and property in flood-prone areas, and develop a timely arrangement of public services.

159. *Id.* § 268.240.

160. *See generally id.* §§ 321.604-.770 (1979) (adopted 1973, amended 1977).

161. *Id.* § 321.640. Similarly, § 321.710 provides that the "priority activities" of the state land use planning agency are the provision of technical assistance where such assis-

role in two specific areas: planning for areas of critical environmental concern and the resolution of inconsistencies between local land use plans.

In regard to "areas of critical environmental concern,"[162] the state land use planning agency is required to provide land use planning assistance when either the governor directs the agency to provide such services, or when one or more local governments request assistance.[163] No mechanism exists by which the state agency can initiate such a review.

Once an area has been designated for state assistance, the executive council of the state land use planning advisory council[164] has the authority to review the matter and make recommendations for land use planning policies regarding matters of critical environmental concern, and also has authority to formulate land use regulations to carry out such policies. However, no land use regulation adopted by the executive council may become effective without the approval of the governor.[165]

In 1977, the executive council was given strong authority to resolve inconsistencies between local land use plans when those inconsistencies could not be resolved through negotiations between the affected local governments and the administrator of the state land use planning agency.[166] After study and hearings, the council is empowered to adopt land use plans and regulations to implement its decision. Such plans and regulations supersede inconsis-

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tance is requested, activities relating to federal lands in the state, and the review of proposals for designations of areas of critical environmental concern. Section 321.720, agency "duties respecting local governments," also reflects a policy to provide informational assistance, rather than intervening in local land use decisions.

162. Defined in NEV. REV. STAT. § 321.655 (1979) as "any area in this state where there is or could develop irreversible degradation of more than local significance but does not include an area of depleting water supply which is caused by the beneficial use or storage of water in other areas pursuant to legally owned and fully appropriated water rights."

163. *Id.* § 321.770(1).

164. NEV. REV. STAT. § 321.740 (1979) creates a 17-member state Land Use Planning Advisory Council appointed by the governor. The members must be elected officials or representatives of local political subdivisions, one member from each county. NEV. REV. STAT. § 321.755 (1979) creates the executive council of the Land Use Planning Advisory Council, consisting of four members of the Advisory Council and the administrator of the state land use planning agency.

165. *Id.* § 321.770(5). To date, this section has been used in a limited manner in only one instance.

166. *Id.* § 321.761.

tent plans and regulations of the affected local governments.[167] However, it is the local governments which are responsible for enforcing the executive council's plans and regulations.[168]

C. Oregon

In 1973, the State of Oregon, long considered an innovator in regard to protection of its environment, adopted one of the most comprehensive land use control statutes in the United States. The impetus for this legislation was concern among Oregonians that the pressures of urban sprawl would be too great for local governments to resist absent a forcefully articulated state land use policy.[169] The result was the passage of the Land Conservation and Development Act.[170]

The provisions of the legislation clearly reflect the view of the legislature that the state could achieve coordinated and orderly development of its lands only if all cities, counties and special districts adopted comprehensive plans that implemented mandatory statewide planning goals and were subject to state review.

To accomplish these ambitious objectives, the Act authorized the establishment of a Department of Land Conservation and Development,[171] and a seven-member Land Conservation and Development Commission (LCDC).[172] The LCDC was given broad authority and responsibility to develop statewide planning goals and guidelines,[173] review city and county comprehensive plans for con-

167. *Id.* § 321.763(4).

168. *Id.* §§ 321.736(4)-736(5).

169. Of particular concern was the development pressure on the two million acres of prime agricultural lands located in the state's Willamette Valley. The Valley's 1970 population of 1.5 million people is expected to reach 2.5 million by the year 2000. DeGrove, *supra* note 10, at 123.

170. OR. REV. STAT. § 197.005 (1979). An effort to repeal the Act in 1976 was rejected by Oregon voters. Huffman & Plantico, *Toward a Theory of Land Use Planning: Lessons from Oregon,* 14 LAND AND WATER L. REV. 1 (1979). *See also* Morgan & Shonkwiler, *Statewide Land Use Planning in Oregon with Special Emphasis on Housing Issues,* 11 URB. LAW. 1 (1979).

171. OR. REV. STAT. § 197.075 (1979).

172. *Id.* § 197.030. The members of the commission are appointed by the governor, subject to confirmation by the Senate.

173. *Id.* §§ 197.040(2)(a); -.225, -.230. Between December 1974 and December 1976, the LCDC adopted 19 goals and guidelines. They are: (1) development of a citizen involvement program to ensure public participation in all phases of the planning process; (2) establishment of a land use planning process and policy framework to be used as a basis for all decisions; (3) preservation of agricultural lands; (4) conservation of forest lands for forest

formity with the statewide planning goals,[174] and serve as an appeals board to review alleged violations of the Act's policies.[175]

Under the statute, cities and counties must prepare and adopt comprehensive plans consistent with the statewide planning goals approved by the Commission,[176] and enact zoning, subdivision and other ordinances or regulations to implement their plans.[177] At the

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uses; (5) conservation of open space and preservation of scenic resources; (6) maintenance of the quality of air, water and land resources; (7) protection of life and resources from natural disasters; (8) satisfaction of recreational needs; (9) improvement of the economy of the state; (10) provision for the housing needs of the state's citizens; (11) planning for the orderly development of public facilities; (12) provision of a comprehensive transportation system; (13) conservation of energy; (14) provision for the orderly transition from rural to urban land use; (15) protection of the lands along the Willamette River; (16) recognition of the values of estuaries and wetlands and the preservation of such areas; (17) protection of coastal shorelands; (18) protection of coastal beach and dune areas; and (19) proper management and protection of renewable resources of the continental shelf. OREGON LAND CONSERVATION AND DEVELOPMENT COMMISSION, STATEWIDE PLANNING GOALS AND GUIDELINES (1976).

174. OR. REV. STAT. § 197.040(2)(e) (1979). The review process is known as "acknowledgement review." As of December 5, 1980, only 88 of 241 cities and 5 of 36 counties had received approval of their plans and ordinances by the LCDC. Fifty-one local governments had not as yet even submitted their plans. Telephone conference with LCDC staff (Dec. 29, 1980).

175. OR. REV. STAT. §§ 197.300-.315 (repealed 1979). The LCDC was also authorized to review and recommend to the legislature the designation of areas of critical state concern (§ 197.040(2)(h); prepare land use inventories (§ 197.040(2)(c)); prepare model zoning, subdivision and other ordinances (§ 197.045(5)); and designate, and issue permits for, activities of statewide significance (§§ 197.400, -.045, -.040(2)(b), -.410, -.415). The planning and siting of public transportation facilities, public sewerage systems, water supply systems, solid waste disposal facilities and public schools may be designated by the LCDC as activities of statewide significance. Other activities may be recommended by the Commission to the Joint Legislative Committee on Land Use.

176. OR. REV. STAT. § 197.175(2)(a) (1979). *See* Alexanderson v. Board of Comm'rs, ___ Or. ___, 616 P.2d 459 (1980); 1000 Friends of Or. v. Board of County Comm'rs, 32 Or. App. 413, 422, 575 P.2d 651, 656-57 (1978), *appeal denied*, 284 Or. 41, 584 P.2d 1371 (1978) (holding that "[c]omprehensive plan amendments . . . need not serve the ends of each and every applicable planning goal. . . . Compliance is achieved if local governments can adequately demonstrate that an amendment results in a plan which considers and accommodates as much as possible all applicable planning goals"); Petersen v. Klamath Falls, 279 Or. 249, 566 P.2d 1193 (1977); South of Sunnyside Neighborhood League v. Board of Comm'rs, 27 Or. App. 647, 649, 569 P.2d 1063 (1977), *appeal granted*, 278 Or. 393 (1977). *See also* Commentary, *Comprehensive Plans and the Law: The Oregon Experience*, 32 LAND USE L. & ZONING DIG. No. 9, at 6 (1980).

177. OR. REV. STAT. § 197.175(2)(b) (1979). The Oregon courts have issued a number of opinions interpreting the statutory requirement that zoning be consistent with the local plan. In Fasano v. Board of County Comm'rs, 264 Or. 574, 584, 507 P.2d 23, 28 (1973), the Supreme Court of Oregon established two standards for proving conformity with the comprehensive plan: "(1) there [must be] a public need for a change of the kind in question, and (2) that need will be best served by changing the classification of the particular piece of property in question as compared with other available property." In Baker v. City of Mil-

request of any city or county, the LCDC may review a local comprehensive plan and any implementing ordinances to determine whether the plan or ordinances are in compliance with the statewide planning goals.[178]

To ensure that all local comprehensive plans are in compliance with the statewide goals,[179] each county is required to review all local plans within its jurisdiction and advise the relevant governing body whether or not the plan is in conformity with the statewide planning goals.[180] Should the LCDC determine that a plan is not in conformity with state goals, the Commission has the authority to issue an order requiring a city, county, state agency or special district to take any action necessary to bring its comprehensive plan or related ordinance into conformity.[181]

Legislation passed in 1979[182] shifted a significant amount of the Commission's appellate responsibility to a newly-created Land Use Board of Appeals, whose members are appointed by the governor with the consent of the Senate.[183] The Board now has exclusive jurisdiction over appeals filed by any person[184] for administrative review of land use decisions by cities, counties or special districts.[185] Petitions alleging inconsistency of land use decisions with

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waukie, 271 Or. 500, 533 P.2d 772 (1975), the court held that a comprehensive plan is the controlling land use planning instrument of a city and that a zoning ordinance which permitted a more intensive use than that permitted by the plan was not in conformity with the plan. *See also* Green v. Hayward, 275 Or. 693, 552 P.2d 815 (1976); Greb v. Board of Comm'rs, 32 Or. App. 39, 573 P.2d 733 (1978); Marracci v. City of Scappoose, 26 Or. App. 131, 552 P.2d 552 (1976); Pohrman v. Klamath County Comm'rs, 25 Or. App. 613, 550 P.2d 1236 (1976); Kristensen v. Eugene Planning Comm'n, 24 Or. App. 131, 544 P.2d 591 (1976). In addition, state agencies must carry out their programs which affect land use in a manner consistent with the statewide planning goals. OR. REV. STAT. § 197.180 (1979).

178. *Id.* § 197.251(1).

179. OR. REV. STAT. § 197.250 (1979) requires that all comprehensive plans and any zoning, subdivision and other ordinances and regulations adopted by a city or county to carry out such plans, be in conformity with the statewide planning goals.

180. *Id.* § 197.255.

181. *Id.* § 197.320. *See* Columbia County v. Land Conservation & Dev. Comm'n, 44 Or. App. 749, 606 P.2d 1184 (1980), affirming an LCDC enforcement order requiring a county which had failed to adopt a comprehensive plan to submit an interim procedure by which the county would protect its agricultural lands. *Id.* at 750, 606 P.2d at 1185. *See generally* T. PELHAM, STATE LAND USE PLANNING AND REGULATION 162-64 (1979).

182. 1979 OR. LAWS, ch. 772 (effective November 1, 1979) (repealed §§ 197.300, .305, .310 & .315).

183. *Id.* § 2(1). The Board may consist of no more than five members.

184. Defined as "any individual, partnership, corporation, association, governmental subdivision or agency or public or private organization of any kind." *Id.* § 3(2).

185. "Land use decision" is defined by section 3 of the 1979 Act to mean:

statewide planning goals are first considered by the Land Use Board of Appeals, which submits its recommended final order to the LCDC for review.[186] The Board must adopt the Commission's determination in its final order.[187] Decisions of the Board concerning matters not related to statewide planning goals are not reviewed by the LCDC and are final.[188] However, all final orders of the Board may be appealed to the Oregon Court of Appeals.[189]

The Oregon legislature has given strong support to the Land Conservation and Development Act since its passage. The Act establishes a Land Conservation and Development Account in the state treasury, for which $10 million was appropriated for 1978-1979. Most of these funds are given to local governments to support their planning efforts.[190]

"(1) . . .

"(a) A final decision or determination made by a city, county or special district governing body that concerns the adoption, amendment, or application of:

"(A) The state-wide planning goals;

"(B) A comprehensive plan provision; or

"(C) A zoning, subdivision or other ordinance that implements a comprehensive plan; or

"(b) A final decision or determination of a state agency other than the Land Conservation and Development Commission, with respect to which the agency is required to apply the statewide planning goals."

186. OR. LAWS ch. 772, § 6 (1979) provides detailed procedures for the Commission's review of the Board's recommendation. Each party to the proceeding is given the opportunity to comment in writing on the Board's recommendation and the Commission may permit oral argument if it wishes.

187. *Id.* § 5(3).

188. *Id.*

189. *Id.* § 5(5) (a similar right to judicial review had been provided in § 197.310(5)). A court may reverse or remand an order only if it finds the order to be unlawful in substance or procedure, unconstitutional, or not supported by substantial evidence in the record. *Id.* § 6a(8). *See, e.g.*, State Housing Council v. City of Lake Oswego, ___ Or. App. ___, 617 P.2d 655 (1980) (appeal of an order by the LCDC upholding a "development charge" ordinance as consistent with statewide planning goals). Though affirming, the court held that the LCDC did not have jurisdiction to review the adoption and administration of local taxation and budget policy that might have an impact on land use. *See also* Haviland v. Land Conservation & Dev. Comm'n, 45 Or. App. 761, 609 P.2d 423 (1980) (appeal of an order of the LCDC determining that a city and county did not violate statewide planning goals by excluding the landowner's property from the city's urban growth boundaries); Willamette Univ. v. Land Conservation & Dev. Comm'n, 45 Or. App. 355, 608 P.2d 1178 (1980); Fish & Wildlife Dep't v. Land Conservation & Dev. Comm'n, 37 Or. App. 607, 588 P.2d 80 (1978), *aff'd*, 288 Or. 203, 603 P.2d 1371 (1979) (appeal of two orders by the LCDC dismissing the Department's petition for review of a county commission's approval of six subdivision plats); Schmidt v. Land Conservation & Dev. Comm'n, 29 Or. App. 665, 564 P.2d 1090 (1977).

190. DeGrove, *supra* note 10, at 131.

Finally, as in California's Coastal Act,[191] chapter 197 provides some financial assistance to local governments for litigation costs. The LCDC will pay the reasonable attorney fees and court costs incurred by a city or county in its defense against any action challenging any comprehensive plan, zoning, subdivision or other ordinance which was adopted for the primary purpose of complying with the LCDC statewide planning goals and which does in fact comply with such goals. From this language, it appears that in limited circumstances—when the city or county prevails—the state will bear the costs.[192]

V. Conclusion

As discussed in Part III of this article, the courts have focused on several factors to determine whether a state has delegated its immunity for purposes of the Eleventh Amendment and have developed criteria to determine whether a governmental activity can claim state action immunity from the federal antitrust laws.

In both of these areas, the courts have placed emphasis on two factors: (1) a clearly articulated state policy, and (2) retention by the state of the power to administer and enforce that policy. Of additional, but probably secondary, importance is the question of whether financial liability is assumed by the state.

The California planning and zoning statutes probably satisfy the first test insofar as they reflect a clear state policy. However, in regard to the second test, the state does not retain the requisite supervisory power. No effective mechanism exists whereby the state may force municipalities' general plans and zoning regulations to embody state policy.

The California coastal zone program, however, appears to meet both standards. Because the Coastal Commission exercises direct supervision over both the adoption of state policies and their implementation by local governments,[193] the actions of local governments pursuant to the Coastal Act would seem entitled to claim a share of immunity under both antitrust and civil rights laws.[194]

191. *See* note 148 and accompanying text *supra.*

192. OR. REV. STAT. § 197.265 (1979).

193. *See* notes 133-137, 143-144 and accompanying text *supra.*

194. To the extent that the appealability of local decisions to the Coastal Commission provides an administrative remedy, the exhaustion doctrine may provide another defense in

In contrast, the very general policies established in the Nevada planning statutes, the optional nature of the elements to be included in a city or county master plan,[195] and the lack of meaningful state supervision would appear to put the land use decisions of Nevada local governments beyond the reach of any state immunity. The degree of local government independence is generally far too great, except perhaps in those instances in which the governor exercises his authority to prescribe and administer comprehensive land use plans and zoning regulations for land lying within a county or city which has failed to adopt a comprehensive plan as required by law.[196] In these instances, a local government could well argue that the degree of state involvement should entitle it to share in the state's immunity.

Additionally, the state may assume an influential role in the planning of Nevada's areas of critical environmental concern and in the resolution of inconsistencies between local land use plans. In areas of critical environmental concern, the executive council of the state land use planning advisory council (a body appointed by the governor) has the authority to make recommendations and adopt land use planning policies and regulations subject to the approval of the governor. Similarly, the executive council is empowered to adopt and implement land use plans and regulations which supersede inconsistent local plans. However, it is the local governments which enforce the regulations. Should these two statutory provisions be found to satisfy the test for immunity, they may also provide a local government with the means to avoid liability for the administration of state-imposed land use policies and regulations.[197]

The Oregon program of land use control seems to satisfy all criteria articulated by the courts as prerequisite to finding delegation of state immunity. The state-adopted planning goals and poli-

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regard to those decisions subject to appeal, but the applicability of the exhaustion defense to § 1983 actions is not clearly established. *See* Oakes, note 25 *supra*, at 943 n.207.

195. *See* notes 155-159 and accompanying text *supra*.

196. *See* note 155 *supra*.

197. Although to date neither § 321.761 nor § 321.770 have been used in response to a local government request, these provisions could provide a local government faced with a difficult political issue the opportunity to ask the state land use planning agency to resolve the matter by imposing land use policies and regulations. The local government might thus be able to claim the state's immunity, even if administration of the regulations was left to local government.

cies are meaningful, supported by detailed regulations,[198] and must be complied with by all local governments. The LCDC provides state supervision so strict that it has been the source of persistent criticism by local officials.[199] In addition, the state bears a substantial percentage of the costs incurred by local governments in implementing the program[200] and at least part of the cost in defending it.[201]

Though all the implications of the Supreme Court's decisions in *Monell v. Department of Social Services* and *City of Lafayette v. Louisiana Power & Light Co.* have yet to be explored, and though the issues discussed in this article are far from resolution, anyone designing a land use control program or making decisions under such a program should be aware of the potential for local government immunity in structuring their decisionmaking process. The rewards of such foresight may be significant in the years to come.

198. *See* notes 171-175 and accompanying text *supra.*

199. *See* Commentary, note 176 *supra,* at 8-9. One planner was quoted as having chosen to leave the state because "planning wasn't fun anymore." *Id.*

200. *See* note 190 and accompanying text *supra.*

201. *See* note 192 and accompanying text *supra.*