The Legislative-Adjudicative Distinction in California Land Use Regulation: A Suggested Response to Arnel Development Co. v. City of Costa Mesa

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Comments

The Legislative-Adjudicative Distinction in California Land Use Regulation: A Suggested Response to *Arnel Development Co. v. City of Costa Mesa*

Over fifty years have passed since the United States Supreme Court ruled that land use regulation is a constitutional exercise of the police power1 and accorded zoning legislation a presumption of validity.2 The Court, however, has never defined the term “legislation” in the land use regulatory context.3 Therefore, the states have been left to formulate their own rules to delineate the scope of regulatory actions that are “legislative,” as opposed to those that are “adjudicative,”4 in nature. The determination that an action is legislative not only attaches to the act a presumption of validity5 but also insulates it from the constitutional due process requirements of notice and hearing to affected parties6 and allows a direct vote by the electorate on the issue.7

1. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Land use ordinances are not unconstitutional unless they are “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” *Id.* at 395. The California Supreme Court reached the same conclusion a year earlier. *See* Miller v. Board of Pub. Works, 195 Cal. 477, 234 P. 381 (1925).

2. “If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.” *Euclid*, 272 U.S. at 388. The California Supreme Court also accorded a strong presumption of validity to zoning measures, stating that “[e]very intendment is to be indulged by the courts in favor of the validity of [the police power’s] exercise . . . .” *Miller*, 195 Cal. at 490, 234 P. at 385. This standard of review is discussed *infra* in notes 143-50 & accompanying text.

3. The Court has decided few zoning cases since its broad pronouncement in *Euclid* on the validity of zoning. *See* 1 R. Anderson, *American Law of Zoning* § 3.10 (2d ed. 1976). Although the Court’s decision in City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976), has been interpreted by the California Supreme Court to sanction the use of the technical label of a regulatory modification to determine whether an action is “legislative,” “administrative” or “judicial,” *see* Arnel Dev. Co. v. City of Costa Mesa, 28 Cal. 3d 511, 519-21, 620 P.2d 565, 570-71, 169 Cal. Rptr. 904, 909-10 (1980), the *Eastlake* decision did not address this issue. *See infra* notes 179-82 & accompanying text.

4. For definitions of “legislative” and “adjudicative,” *see infra* notes 72-81 & accompanying text. Although governmental actions may be characterized by various other terms, such as “administrative” or “quasi-judicial,” the single distinction made in this Comment is between legislative and nonlegislative actions. The latter category includes “adjudicative,” “administrative,” and “quasi-judicial,” and these terms will be used interchangeably.

5. *See supra* note 2 & accompanying text.

6. Bi-Métallique Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); San Diego
Most states rely upon an action's label or upon the character of the governmental body that is acting to determine whether the action is legislative or adjudicative. However, some states have abandoned strict reliance on labels in favor of definitional approaches that allow greater judicial scrutiny of local "legislative" decisions or that prevent land use decisions from being made by the electorate directly. California appeared to be following this trend. Then, in *Arnel Development Co. v. City of Costa Mesa*, the California Supreme Court ruled that the label of a land use regulatory change determines whether it is legislative in character.

This Comment examines the effect of the *Arnel* decision on land use regulation in California and suggests modifying the regulatory system to alleviate problems perpetuated by the decision. The first section describes California's statutory framework of land use regulation and explains the relationship between zoning legislation and zoning administration within that system. The second section surveys California case law prior to *Arnel* to determine the impact of constitutional law on the zoning system. Then the *Arnel* decision is examined in order to complete the broad picture of land use regulatory procedures in California today. The final section proposes statutory modifications to the...
regulatory system that would alleviate the consequences of California's reliance on labels.

Statutory Framework

The California Constitution confers broad police powers on all cities and counties to regulate the uses of land within their jurisdictions. In addition, the state legislature has imposed a duty on local governments to engage in planning and has restricted the manner in which the duty can be met. However, the legislature has declared that, in general, its guidelines for zoning regulations should "provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning."18

Land Use Legislation

The California Government Code mandates that the legislative
body of each county and city adopt a comprehensive, long-term gen-
eral plan for the jurisdiction's physical development. The legislative
body must also establish a planning agency to develop and maintain
the general plan. There are nine particular topics, or "mandatory ele-
ments," that must be discussed in the plan, and numerous other ele-
ments that may be included.

The comprehensive plan determines, in a general sense, the sub-
stance of the jurisdiction's zoning ordinances, because such ordi-
nances must be consistent with the plan. Except for this consistency

19. Id. § 65300. The scope of the plan must also include "any land outside [the juris-
diction's] boundaries which in the planning agency's judgment bears relation to [the jurisdi-
cction's] planning." Id. The Government Code also provides that the plan is to include a
statement of development policies along with diagrams setting forth objectives, principles,
standards, and plan proposals. Id. § 65302. The general plan has been described as "a con-
stitution for all future developments within the city." O'Loane v. O'Rourke, 231 Cal.
App. 2d 774, 782, 42 Cal. Rptr. 283, 288 (1965). Unlike a constitution, however, it is "tentative
and subject to change." Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110,
17, § 1.20.

20. This agency can be the local legislative body itself. Cal. Gov't Code § 65100
(West Supp. 1982).

21. Id. § 65101 (West 1966).

22. The nine elements are (1) land use, which designates the proposed general distribu-
tion and location and extent of land for housing, business, industry, open space, etc.; (2) cir-
culation, which consists of the general location and extent of existing and planned major
transportation thoroughfares, terminals, and other public utilities and facilities; (3) housing,
which is aimed at analyzing and providing for housing needs; (4) conservation, which con-
cerns the conservation, development and utilization of natural resources; (5) open space,
which is aimed at preserving open, unimproved lands; (6) seismic safety, to deal with effects
of seismically induced waves such as tsunamis and seiches; (7) noise, for the purpose of noise
ordinance development and enforcement; (8) scenic highways, to develop, establish, and
protect scenic highways; (9) safety, for protection from fires and geologic hazards. Id. § 65302 (West Supp. 1981). See generally J. Longtin, supra note 17, § 1.22.

ments, including recreation, traffic, transportation, transit, public services and facilities, pub-
lic buildings, community design, substandard housing, redevelopment, and historical
preservation. See generally J. Longtin, supra note 17, § 1.23.

24. Zoning ordinances are local laws that actually describe and limit the activities and
tablish the procedures and criteria for obtaining administrative permits. See Cal. Gov't
Code § 65901 (West Supp. 1981). For a general discussion of the distinction between plan-
ning and zoning, see O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 780, 42 Cal. Rptr. 283, 286
(1965).

25. Cal. Gov't Code § 65860 (West Supp. 1981). This statute provides that an ordi-
nance is consistent with the general plan only if "[t]he various land uses authorized by the
ordinance are compatible with the objectives, policies, general land uses, and programs speci-
fied in such a plan." Id. § 65860(a)(ii). Few courts have considered whether an ordinance
is consistent with a general plan, and no clear analysis or approach to the issue has been
developed. See D. Hagman, J. Larson, & C. Martin, California Zoning Practice
§ 2.29 (Supp. 1982). It is clear, however, that if no plan has been adopted, or if the existing
requirement, local governments are fairly free to control the substance of their land use regulations.  

Furthermore, if a zoning amendment is inconsistent with the general plan, the plan can be amended concurrently to remove the inconsistency.  

Although the substance of general plans and ordinances is determined almost exclusively by local governments, the procedures for adopting or modifying plans and ordinances are established to a large degree by the state legislature. Before action to adopt or modify a general plan or ordinance can be taken, the local legislative body must hold at least one public hearing, notice of which is published no fewer than ten days before the hearing. If the jurisdiction has a planning commission in addition to its legislative body, then that commission must similarly give notice and hold a public hearing before making its recommendations to the legislators. If the legislators disagree with the commission's recommendations, any proposed changes not already considered by the commission must be referred back to the commission plan is inadequate, then the consistency requirement cannot be met. Camp v. Mendocino County Bd. of Supervisors, 123 Cal. App. 3d 334, 176 Cal. Rptr. 620 (1981). In the absence of a valid plan, the local government "may not lawfully approve any subdivision or parcel map or enact any zoning ordinance or issue any certificates of compliance or certificates of approval." Id. at 352 & n.10, 176 Cal. Rptr. at 632 & n.10 (quoting with approval the trial court's statement of the law); see also Save El Toro Ass'n v. Days, 74 Cal. App. 3d 64, 141 Cal. Rptr. 282 (1977) (absence of required open space plan precluded any action by city to acquire, regulate or restrict open space land or approve subdivision map).

26. See supra notes 15-18 & accompanying text. Scattered throughout the California Government Code are various restrictions on permitted zoning purposes and methods for their achievement. See, e.g., § 65852 (West 1966) (requires regulations to be uniform within any given zone), § 65852.3 (West Supp. 1981) (restricts prohibition of mobile homes).

27. See CAL. GOV'T CODE § 65862 (West Supp. 1981). The local legislative body may amend a general plan when it deems such change to be in the public interest, id. § 65356.1, but none of the nine mandatory elements of a plan may be amended more than three times a year. Id. § 65361. See infra notes 29-32 & accompanying text for a discussion of the procedures for adopting and amending general plans.

28. See supra notes 15, 18, 22-27 & accompanying text.

29. The procedures described in this section do not apply to a charter city unless adopted in the charter or as an ordinance. See San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3d 205, 210 n.2, 529 P.2d 570, 572 n.2, 118 Cal. Rptr. 146, 148 n.2 (1974); CAL. GOV'T CODE § 65803 (West 1966). See also supra note 17. The state legislature has mandated some "minimum procedural standards for the conduct of city and county zoning hearings" which are applicable to charter cities. CAL. GOV'T CODE § 65804 (West Supp. 1981). However, the guidelines it has established in § 65804 to apply to both charter and general law cities are far less detailed than those that apply just to general law cities. See infra notes 30-35 & accompanying text.

30. CAL. GOV'T CODE §§ 65355, 65358, 65856, 65861 (West 1966). Notice must be published in a newspaper of general circulation in the city or county or, if there is no such newspaper, notice must be posted in at least three public places in the city or county. Id. §§ 65351, 65355, 65854.

31. Id. §§ 65351, 65854.
for report and recommendation.\textsuperscript{32}

Further procedural prerequisites to actions on ordinances exist that do not apply to actions on a general plan. In addition to notice by publication, whenever an ordinance proposal or change is contemplated, notice must be mailed to all owners of property lying within three hundred feet of the affected area.\textsuperscript{33} If the action is contested, a record must be made of any hearing on the issue if anyone so requests prior to the hearing.\textsuperscript{34} However, both plans and ordinances can be adopted or amended without any findings being made to support the decision.\textsuperscript{35}

Any actions on plans or ordinances are considered legislative,\textsuperscript{36} so they do not trigger the constitutional due process requirements of notice and hearing.\textsuperscript{37} Because the procedures described above are mandated by statute, the notice and hearing that are provided pursuant to that mandate need not meet constitutional standards;\textsuperscript{38} they need only

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  \item \textsuperscript{32} Id. §§ 65356, 65857 (West Supp. 1981).
  \item \textsuperscript{33} Id. § 65854.5. However, “[f]ailure to receive the notice required by [§ 65854.5] shall not invalidate the ordinance or amendment.” \textit{Id}.
  \item \textsuperscript{34} Id. § 65804(b). Although the duty to make such a record is placed on the local planning agency by subsection (b), the hearings that the agency must record appear to be all zoning hearings, because subsection (b) is set out in the statute as one of the “procedures [that] shall govern city and county zoning hearings.” \textit{Id}. The California Supreme Court has stated in dicta, however, that § 65804 applies only to those zoning hearings before local planning agencies, not to all zoning hearings. \textit{San Diego Bldg. Contractors Ass'n}, 13 Cal. 3d at 210 n.2, 529 P.2d at 572 n.2, 118 Cal. Rptr. at 148 n.2.
  \item \textsuperscript{35} There is no requirement in the planning or zoning laws that findings be made. Furthermore, because action on both plans and ordinances is “legislative” in character, its presumption of validity can be rebutted only if there is no rational basis that the legislators may have had in mind when they passed it. Miller v. Board of Pub. Works, 195 Cal. 477, 490, 234 P. 381, 386 (1925). \textit{See supra} notes 1-4 & accompanying text. Legislative action is reviewable only by traditional mandamus pursuant to California Code of Civil Procedure § 1085, and findings are not required under that section. Ensign Bickford Realty Co. v. City Council, 68 Cal. App. 3d 467, 473, 137 Cal. Rptr. 304, 307 (1977). Administrative actions, on the other hand, must be supported by findings. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974) (interpreting the administrative mandamus provision, \textit{CAL. CIV. PROC. CODE} § 1094.5 (West 1980)). For a discussion of the two forms of mandamus, see \textit{infra} notes 130-50 & accompanying text.
  \item \textsuperscript{37} Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (“Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. . . . [The rights of affected parties] are protected the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”).
  \item \textsuperscript{38} “[A] hearing allowed by legislative grace is not circumscribed by the restrictions applicable to judicial or quasi-judicial adversary proceedings.” Franchise Tax Bd. v. Superior Court, 36 Cal. 2d 538, 549, 225 P.2d 905, 911 (1950). The doctrines surrounding the
comply with the statute.

In California, the electorate has a constitutional right to adopt and veto legislation. This right cannot be impeded by statutorily imposed zoning procedures. Therefore, whenever plans or ordinances are adopted or amended by the electorate by means of initiative or referendum, the procedural requirements described above do not apply. Affected parties have no right to notice or hearing. The planning commission, which is required to hold hearings and make recommendations to the legislative body on proposed changes, and which pre-

phrase “notice and hearing” in its constitutional sense—the right to notice reasonably calculated to apprise one of the pendency of the action, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 33 (1950); the right to be represented by counsel, Borror v. Department of Inv., 15 Cal. App. 3d 531, 540, 92 Cal. Rptr. 525, 530 (1971); the right to present evidence and rebut opposing evidence, Morgan v. United States, 304 U.S. 1 (1938)—do not apply to legislative hearings. “Generally speaking, a hearing on a legislative matter is held for the purpose of informing the law makers regarding relevant facts and policy considerations; it is not held for the protection of individual rights, property or otherwise.” Bayless v. Limber, 26 Cal. App. 3d 463, 470, 102 Cal. Rptr. 647, 650 (1972).

39. The California Constitution provides that “[i]nitiate and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide.” CAL. CONST. art. II, § 11. Although this section explicitly leaves charter cities unaffected, a city may provide such powers in its charter. CAL CONST. art XI, § 5; see San Diego Bldg. Contractors Ass'n, 13 Cal. 3d at 208, 529 P.2d at 571, 118 Cal. Rptr. at 147.

The initiative process allows the electorate directly to enact legislation. A local initiative is a proposed ordinance that is submitted to the local legislative body after a petition in its support has been signed by at least 15% (the required number is different in smaller cities) of the jurisdiction’s registered voters. The legislative body may then adopt the ordinance, or order a special election at which the proposed ordinance is submitted to a general vote. A smaller number of petition signatures is required if the proponents seek only to have the ordinance submitted to the voters at the next regular election. See CAL. ELEC. CODE § 4000-4021 (West 1977 & Supp. 1982).

The local referendum process may be used to veto ordinances passed by the local legislative body. If a petition protesting the adoption of an ordinance is signed by 10% of the jurisdiction’s registered voters (the percent is greater in smaller cities) and submitted to the clerk of the legislative body within 30 days of the adoption of the ordinance, the effective date of the ordinance is suspended, and the legislative body must reconsider the ordinance. If the legislative body does not entirely repeal the ordinance, it must submit it to the voters at a regular or special election. If a majority of the voters does not approve it, the ordinance does not become effective, and it cannot be enacted by the legislative body for the period of a year. See id. §§ 4050-4061.


41. See Associated Home Builders, 18 Cal. 3d at 590-96, 557 P.2d at 476-81, 135 Cal. Rptr. at 44-49.

42. See id. at 596, 557 P.2d at 481, 135 Cal. Rptr. at 49.


44. Id. §§ 65351-65352, 65354, 65854-65855 (West 1966 & Supp. 1981). If the legislative body wants to modify the action that the planning commission recommended, it must refer the proposed modification back to the commission for a report on the proposal. Id.
sumably has expertise in the area of local land use regulation and planning, is bypassed when the electorate exercises its power to legislate.

Although the statutory procedural requirements are inapplicable to initiatives and referenda, the statutory substantive requirements relating to plans and ordinances must be met even when the electorate legislates directly. The general plan must meet the requirements established by the legislature, and the zoning ordinances must be consistent with the general plan. The people cannot adopt by initiative an ordinance that the legislative body would not have the power to enact.

Land Use Administration

The state zoning laws provide for a system by which administrative relief from the strict application of the zoning ordinances can be granted. First, the statutes provide that the local legislative body may create separate bodies to hear and decide administrative zoning matters, or it may leave these functions to the planning commission and the local legislative body itself. Because the establishment of both the administrative bodies and the planning commission is optional, the local legislative body may handle all of the administrative responsibilities as well as the legislative tasks. Second, the statutes prescribe vari-

§§ 65356, 65857. See generally J. Longtin, supra note 17, § 1.13. See supra notes 31-32 & accompanying text.

45. Arnel, 28 Cal. 3d at 524, 620 P.2d at 573, 169 Cal. Rptr. at 912. The requirements are discussed supra at notes 22-27 & accompanying text.


49. See id. §§ 65900-65909.5. These provisions do not apply to charter cities. See supra note 17.

50. Cal. Gov't Code §§ 65900-65901 (West 1966 & Supp. 1981). Section 65900 refers to these separate administrative bodies as a "board of zoning adjustment," an "office of zoning administrator," and a "board of appeals." The first two bodies hear and decide applications for conditional use and other permits, as well as variances. Id. § 65901 (West Supp. 1981). See infra notes 53-55 & accompanying text. The function of the board of appeals is to hear and determine appeals from the first two bodies. Id. § 65903 (West 1966).

51. If neither a board of adjustment nor an office of zoning administrator has been created, the planning commission is to exercise the functions of these bodies. Id. § 65902 (West Supp. 1981). If a board of appeals has not been created, the local legislative body is to exercise its functions and duties. Id. § 65904 (West 1966). See supra note 50.

52. See supra notes 43 & 51.
ous prerequisites to the granting of variances and conditional use permits, the two major forms of administrative relief from zoning ordinances.

While the California Government Code restricts the conditions under which a variance may be granted, it leaves it to the local legislative body to establish by ordinance the criteria for granting conditional use permits. These criteria may be as vague as a "general welfare" standard. Neither variances nor conditional use permits are

53. A variance is an exception from the strict application of the zoning ordinance and is granted when, because of the special circumstances of a piece of property, such application would deprive the property of privileges enjoyed by other property within the same zone. CAL. GOV'T CODE § 65906 (West Supp. 1981). In Zakessian v. City of Sausalito, 28 Cal. App. 3d 794, 105 Cal. Rptr. 105 (1972), for example, where most of a lot was submerged in salt marsh and tidelands, the owner was entitled to a variance from the strict application of a citywide requirement that offstreet parking be provided. The owner had a lease on a nearby parking lot, but the lease was not permanent, so it did not satisfy the requirement. Had the variance not been granted, the owner would have had to fill in part of the bay for parking before he could have used his building, which rested on pilings in the water, as a restaurant.

A variance serves to place the property on an equal basis with neighboring properties but may not be used to grant special privileges inconsistent with the limitations on other properties in the vicinity or to allow a use not otherwise allowed in the zone. CAL. GOV'T CODE § 65906 (West Supp. 1981). See infra notes 61-62 & accompanying text. See generally D. HAGMAN, J. LARSON & C. MARTIN, supra note 25, §§ 7.21-51 (1969 & Supp. 1982).

54. A conditional use permit is an exception to the zoning ordinance for a use that is not generally allowed in the zone but that will promote the general welfare without impairing the character of the district. See Upton v. Gray, 269 Cal. App. 2d 352, 357, 74 Cal. Rptr. 783, 786 (1969). See generally CAL. GOV'T CODE § 65901 (West Supp. 1981); J. LONGTIN, supra note 17, § 2.112; 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 484 (8th ed. 1974).


55. These prerequisites also apply to other administrative permits, such as building and grading permits. The statutory procedures discussed with regard to conditional use permits and variances are generally applicable to these other permits. See, e.g., CAL. GOV'T CODE § 65905 (West 1966). The criteria for determining the availability of permits is left to the local legislative body to establish by ordinance. Id. § 65901 (West Supp. 1981).


58. See supra note 54.
explicitly required to be consistent with the general plan.\textsuperscript{59} At least one court has stated that there is no implicit requirement that conditional use permits be consistent with the general plan.\textsuperscript{60} Although a variance cannot authorize a use not expressly permitted by the applicable zoning ordinance,\textsuperscript{61} it can allow structures to be built that do not conform to the general plan.\textsuperscript{62}

A variance application may be ruled on without a hearing,\textsuperscript{63} but all other permit applications require a public hearing after notice is given by mail or by publication and posting on the property.\textsuperscript{64} Regardless of whether the local variance ordinance requires a hearing, notice of proposed variances must be mailed or delivered to all owners of property within three hundred feet of the subject property.\textsuperscript{65}

Because actions on permit applications are administrative,\textsuperscript{66} they cannot be decided or vetoed by initiative or referendum.\textsuperscript{67} Therefore, the notice and hearing procedures are never bypassed, unlike the procedures accompanying legislative decisions, which are bypassed when the electorate makes the legislative decision.\textsuperscript{68}

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  \item[59.] Government Code § 65860 requires only that zoning ordinances be consistent with general plans. See supra note 25. It makes no mention of variances or permits. CAL. GOV'T CODE § 65860 (West Supp. 1981).
  \item[60.] Hawkins v. County of Marin, 54 Cal. App. 3d 586, 594, 126 Cal. Rptr. 754, 760 (1976) (alternative holding). In Hawkins, the conditional use permit allowed the construction of 102 units of housing, including a 26-unit building, in an area zoned for single-family dwellings.
  \item[61.] CAL. GOV'T CODE § 65906 (West Supp. 1981). Uses authorized by ordinances must be consistent with the general plan. See supra note 25 & accompanying text. Uses authorized by a variance must also be consistent with the general plan, since a variance cannot allow a use not otherwise allowed in the zone. See supra note 53.
  \item[62.] The California Government Code does not require variances to be consistent with the general plan. See CAL. GOV'T CODE § 65906 (West Supp. 1981). See supra note 59. However, many cities and counties require that variances be in harmony with the general plan. J. LONGTIN, supra note 17, § 2.111[7].
  \item[63.] CAL. GOV'T CODE § 65901 (West Supp. 1981). The ordinance that provides for variance decisions to be made without a public hearing must "specify the kinds of variances which may be granted by the zoning administrator, and the extent of variation which the zoning administrator may allow." Id. If a variance may affect a significant property interest, however, notice and hearing will be constitutionally required. See infra notes 123-29 & accompanying text.
  \item[64.] CAL. GOV'T CODE § 65905 (West 1966). Notice and hearing requirements may be more stringent when a permit affects a significant property interest. See infra notes 123-29 & accompanying text.
  \item[65.] CAL. GOV'T CODE § 65901 (West Supp. 1981). It has been suggested that the purpose of this notice requirement, when no hearing is required, is to allow property owners in the area to appeal the administrator's decision. Review of Selected 1979 California Legislation, 11 PAC. L.J. 259, 620 (1979).
  \item[66.] See Arnel, 28 Cal. 3d at 518 n.8, 620 P.2d at 569 n.8, 169 Cal. Rptr. at 908 n.8.
  \item[68.] See supra notes 39-41 & accompanying text.
\end{itemize}
Comparison of Legislative and Administrative Systems

The legislative and administrative regulatory systems are not merely alternative or redundant means to control the use of land. The legislative system operates to establish rules that apply equally to all land within a given zone. By virtue of their broad application, these rules reflect and implement general policy. Conversely, the administrative system is the means by which the government responds to particular situations. Permits are issued only in response to an application for relief by some particular party; there is no provision for the \textit{sua sponte} issuance of administrative relief.

The California Supreme Court has recognized this basic difference in the character and the purposes of the two regulatory systems. The court addressed the distinguishing characteristics of the two systems in \textit{San Diego Building Contractors Association v. City Council}, in which it characterized the zoning ordinance in question as "legislation of the classic mold, establishing a broad, generally applicable rule of conduct on the basis of a general public policy." The court distinguished the enactment of an ordinance from adjudicative decisionmaking, "in which the government's action . . . was determined by facts peculiar to the individual case." In the "adjudicative" category, the court placed "'administrative' zoning decisions, such as the grant of a variance or

69. "All [zoning] regulations shall be uniform for each class or kind of building or use of land throughout each zone . . .." \textsc{Cal. Gov't Code} § 65852 (West 1966). Although exceptions to the uniform application of zoning ordinances are granted, such exceptions are uniformly available to all. That is, the ordinances which provide for the granting of administrative relief must themselves be uniform. \textit{See id.} § 65901 (West Supp. 1981) (permits are available only "when the zoning ordinance provides therefor and establishes criteria for determining such matters . . .").

The statutes do not limit how small the zones can be, \textit{see id.} § 65851 (West 1966) ("the legislative body may divide [its jurisdiction] . . . into zones of the number, shape and area it deems best suited to carry out the purpose of this chapter"), so it might be argued that the uniformity requirement could be defeated by simply creating a new zone whenever different treatment within a given zone was desired. However, this potential practice is curtailed by the requirements that zoning ordinances not be arbitrary and have a substantial relation to the public welfare. \textit{See supra} note 1. In addition, if the new zone is quite small, the rezoning may be attacked as not only arbitrary, but also discriminatory. "The principle limiting judicial inquiry into the legislative body's police power objectives does not bar scrutiny of a quite different issue, that of discrimination against a particular parcel of property." \textsc{G & D Holland Constr. Co. v. City of Marysville}, 12 Cal. App. 3d 989, 994, 91 Cal. Rptr. 227, 230 (1970).

70. The requirement that zoning ordinances be consistent with the general plan acts to ensure that they reflect general policy. \textit{See supra} note 25 & accompanying text.


73. \textit{Id.} at 213, 529 P.2d at 574, 118 Cal. Rptr. at 150. The ordinance imposed a 30-foot height limit on all buildings within San Diego's coastal zone, from the northern limit of the city to the Mexican border. \textit{Id.} at 208 n.1, 529 P.2d at 571 n.1, 118 Cal. Rptr. at 147 n.1.

74. \textit{Id.} at 212, 529 P.2d at 574, 118 Cal. Rptr. at 150.
the award of a conditional use permit . . . .”75

The court also recognized the different purposes of the two systems in Topanga Association for a Scenic Community v. County of Los Angeles.76 The court noted that variances permit flexibility when a comprehensive zoning plan affects owners of some parcels unfairly.77 After invalidating a variance on procedural grounds,78 the court remarked in dictum that by granting variances involving large79 tracts of land, “a variance board begins radically to alter the nature of the entire zone. Such change is a proper subject for legislation, not piecemeal administrative adjudication.”80

Although the legislative creation of land use policy and the administrative application of that policy can be readily distinguished both statutorily and conceptually,81 they cannot so easily be distinguished in practice. Many substantive changes in land use restrictions can be effected through either system. For example, a landowner who wants to develop his or her land for a use not allowed by the applicable zoning ordinance can apply for a variance if the parcel can be somehow distinguished from the surrounding property in the zone as suffering a unique hardship.82 A conditional use permit may be available if the owner shows that the proposed use would promote the general welfare of the area.83 Finally, the zoning ordinance can be amended to allow

75. Id.
76. 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).
77. Id. at 511, 522 P.2d at 14, 113 Cal. Rptr. at 838.
78. The court found that the administrative mandamus provision, CAL. CIV. PROC. CODE § 1094.5 (West 1980), implicitly requires that findings be made to support administrative decisions. 11 Cal. 3d at 514-15, 522 P.2d at 17, 113 Cal. Rptr. at 841. Topanga and the administrative mandamus provision are discussed infra at notes 130-42 & accompanying text.
79. The variance applied to 28 acres. 11 Cal. 3d at 522, 522 P.2d at 22, 113 Cal. Rptr. at 846.
80. Id.
81. Many courts and commentators have addressed the conceptual distinction between legislative and adjudicative acts. In addition to the differences noted by the California Supreme Court, see supra notes 72-80 & accompanying text, it has been suggested that “legislative action is that which defines or alters private rights. . . . Judicial action is that which relates to the adjudication of rights. By adjudication is meant the determination of the extent of pre-existing legislatively recognized rights.” Huffman & Plantico, Toward a Theory of Land Use Planning: Lessons from Oregon, 14 LAND & WATER L. REV. 1, 59-60 (1979). See generally Developments in the Law—Zoning, 91 HARV. L. REV. 1427, 1508-13 (1978); Comment, Zoning Amendments—The Product of Judicial or Quasi-Judicial Action, 33 OHIO ST. L.J. 130, 134-36 (1972).
82. See supra note 53 & accompanying text. In Topanga, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974), the court held that a mere showing that a particular parcel was unsuitable for its zoned use would not support the granting of a variance. Id. at 521, 522 P.2d at 21, 113 Cal. Rptr. at 845.
the proposed use.\textsuperscript{84}

The electorate can legislatively block virtually all of these changes.\textsuperscript{85} First, it can enact by initiative an ordinance that effectively precludes variances\textsuperscript{86} or conditional use permits\textsuperscript{87} for the use contemplated by the owner. Second, it can veto the owner’s zoning amendment through the referendum process\textsuperscript{88} or amend the zoning ordinance a second time to disallow his or her proposed use.\textsuperscript{89}

Thus, the regulations that apply to a particular piece of property can be changed through either system. When the change is made by the local legislative body and its agencies, the procedures may differ little between the two systems.\textsuperscript{90} The primary impact of the label upon the mechanical process of regulatory change is that the electorate can veto a modification that is cast in a legislative form and can bypass the statutory procedures to enact changes that are similarly cast.\textsuperscript{91}

The ramifications of the legislative-administrative distinction are much greater when the focus is expanded to include the impact of con-

\textsuperscript{84} The landowner who brought suit in Arnel Dev. Co. v. City of Costa Mesa, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980), had obtained a rezoning of his property to allow his planned development. \textit{See infra} note 159 & accompanying text.

\textsuperscript{85} However, such actions by the electorate are subject to invalidation if found to be arbitrary or discriminatory. \textit{See} Arnel Dev. Co. v. City of Costa Mesa, 126 Cal. App. 3d 330, 178 Cal. Rptr. 723 (1981) (on remand).

\textsuperscript{86} The statutory criteria for granting a variance “may be supplemented by harmonious local legislation.” \textit{Topanga}, 11 Cal. 3d at 511, 522 P.2d at 15, 113 Cal. Rptr. at 839 (footnote omitted). Restrictive zoning may render a particular piece of property useless and may thus constitute an unconstitutional taking. \textit{See infra} notes 188-89 & accompanying text.

The court noted in \textit{Topanga} that variances may insulate zoning schemes from constitutional attack by introducing flexibility into the system. “The primary constitutional concern is that as applied to a particular land parcel, a zoning regulation may constitute a compensable ‘taking’ of property.” 11 Cal. 3d at 511 & n.4, 522 P.2d at 14 & n.4, 113 Cal. Rptr. at 838 & n.4. Therefore, there may be a constitutional limitation against the preclusion of variances.

\textsuperscript{87} \textit{E.g.}, Bayless v. Limber, 26 Cal. App. 3d 463, 102 Cal. Rptr. 647 (1972) (initiative petition to ban oil well drilling from all areas of city zoned residential after city had granted a permit to drill an oil well in a residential area).

\textsuperscript{88} \textit{E.g.}, Dwyer v. City Council, 200 Cal. 505, 253 P. 932 (1927) (referendum petition to veto reclassification of property from residential to business and public use).

\textsuperscript{89} \textit{E.g.}, \textit{Arnel}, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal Rptr. 904. After the supreme court upheld the use of the initiative to rezone a particular parcel, however, the court of appeal reviewed the substance of the initiative and found it to be arbitrary and discriminatory. \textit{Arnel}, 126 Cal. App. 3d 330, 178 Cal. Rptr. 723 (1981) (on remand). \textit{See infra} notes 210 & 221.

\textsuperscript{90} This would be particularly true if the jurisdiction had no planning commission or other administrative body. Then the local legislative body alone would consider and decide all proposed changes. \textit{See supra} notes 50-52 & accompanying text. Regardless of the form of relief, the local government would publish notice, mail notice to neighboring landowners, and hold public hearings. \textit{See supra} notes 30-34, 63-65 & accompanying text. Furthermore, the local body presumably would consider the general public welfare to the same degree regardless of how the change was labeled.

\textsuperscript{91} \textit{See supra} notes 39-44 & accompanying text.
stitutional law. Considerations of procedural due process apply to ad-
ministrative changes, but not to legislative changes. The gulf that has
developed between the procedures of the two systems as a result of this
constitutional distinction is explained in the next section, as the case
law leading up to Arnel Development Co. v. City of Costa Mesa is
surveyed.

**California Case Law Before Arnel**

California has always treated the amendment of a zoning ordi-
nance as a legislative act, regardless of the size of the parcel involved or
the number of persons directly affected. Beginning with Dwyer v. City
Council, California courts have viewed rezoning as a matter of gen-
eral public concern, because any rezoning alters an integral component
of an entire system of zoning ordinances. In Dwyer, the Berkeley
City Council rezoned a small area from residential use to a business
and public use district to permit the University of California to operate
an experimental poultry farm. The city rejected a referendum petition
submitted by opponents on the ground that the rezoning was local in
nature and not a proper subject for a referendum. The court held
that all rezonings are legislative and therefore may be subject to
referenda.

Another argument raised in Dwyer was that the referendum pro-
cess was incompatible with the notice and hearing procedures pre-

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92. See infra notes 112-13 & accompanying text.
93. Arnel, 28 Cal. 3d at 517, 620 P.2d at 568, 169 Cal. Rptr. at 907. Although the
California Supreme Court has not always strictly relied upon the label of the change to
determine its character, it has concluded in every case in which it has reviewed a zoning
amendment that the amendment was legislative. See infra notes 166-77 & accompanying
text. Rezonings cited by the Arnel majority as examples of legislative acts with narrow ap-
plication include Dwyer v. City Council, 200 Cal. 505, 253 P. 932 (1927) (parcel constituted
1/550 of the city of Berkeley); Toso v. City of Santa Barbara, 101 Cal. App. 3d 934, 162 Cal.
Rptr. 210 (single lot), cert. denied, 449 U.S. 901 (1980); Ensign Bickford Realty v. City
Council, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977) (single lot); Hilton v. Board of
516-17, 620 P.2d at 568, 169 Cal. Rptr. at 907.
94. 200 Cal. 505, 253 P. 932 (1927).
95. "The restrictions relating to any portion of the city are an integral part of an entire
scheme, and should be the expression of a definite policy . . . . [A] piecemeal rezoning of
small areas may result in a plan differing in vital particulars from that originally com-
templated." Id. at 514-15, 253 P. at 936. See Arnel, 28 Cal. 3d at 517, 620 P.2d at 568-69, 169
Cal. Rptr. at 907-08; cf. Johnston v. City of Claremont, 49 Cal. 2d 826, 838, 323 P.2d 71, 78
(1958) ("where the wording of ordinances must be changed in order to accomplish the de-
sired revision, the act is legislative and not administrative").
96. The area rezoned was about 1/550 of the area of the city. 200 Cal. at 508, 253 P. at
933.
97. Id. at 508-09, 253 P. at 933.
98. Id. at 513-15, 253 P. at 935-36.
scribed by the zoning law. Berkeley argued that the referendum deprived the affected property owners of their right to have the rezoning decided in accordance with these statutorily prescribed procedures. The court responded that the procedures had been followed in the adoption of the ordinance and that they did not apply when the ordinance was tested by the referendum process.

This issue of incompatibility of zoning by popular vote with the statutory notice and hearing procedures was raised again in Hurst v. City of Burlingame, after the electorate of Burlingame amended a zoning ordinance by initiative. Hurst's property was rezoned to residential use, thereby precluding him from continuing to operate his lumber yard. He argued that the amended ordinance was invalid because the city authorities failed to comply with the mandatory procedures of the state zoning act. The California Supreme Court agreed, holding that the initiative process could not be used to adopt zoning ordinances.

The holding of Hurst was based on the inconsistency of two statutes, the zoning law and the initiative law. The court concluded that the zoning law "is a special statute dealing with a particular subject and must be deemed to be controlling over the initiative which is general in scope." However, the court also suggested in dictum that when notice and hearing requirements are imposed by statute, such notice and hearing become requirements of due process as well.

99. Id. at 515, 253 P. at 936. These procedures were promulgated as part of Berkeley's city charter and were similar to the statutory zoning procedures prescribed by the Government Code. See supra notes 30-35 & accompanying text.

100. 200 Cal. at 516, 253 P. at 936. The court also pointed out that the ordinary democratic procedures of an election afforded some procedural protections, such as the opportunity to make public arguments. Id.


102. 207 Cal. at 136-37, 277 P. at 309-10.

103. Id. at 137, 277 P. at 310. The state zoning act was an early version of present Government Code §§ 65800-65912 (West 1966 & Supp. 1981), described supra in notes 24-35 & accompanying text.

104. 207 Cal. at 142, 277 P. at 312. Dwyer was distinguished because it involved a referendum rather than an initiative. Therefore, the statutory procedures had already been followed. See supra notes 99-100 & accompanying text. Hurst did not affect the electorate's power to veto zoning amendments by referenda. 207 Cal. at 142, 277 P. at 312.

105. 207 Cal. at 141, 277 P. at 311. The state zoning laws as well as the right to exercise local initiative and referendum powers apply to general law cities only. See supra notes 17 & 39. Therefore, Hurst applied only to general law cities. An analogous incompatibility problem could arise in a charter city if its charter prescribed zoning procedures and initiative powers that were inconsistent. For example, in Dwyer, the alleged conflict was between Berkeley's charter provisions dealing with zoning and the power of the electorate to legislate. See supra notes 99-100 & accompanying text.

106. "When the statute requires notice and hearing as to the possible effect of a zoning
Hurst long remained the law, and its due process dictum was often repeated to support the view that constitutional due process demanded notice and hearing before a rezoning. Its dictum was not disapproved until 1974, and its holding that a general law city cannot use the initiative process to zone property was valid until 1976. Thus, from 1919 until the mid-1970's, the notice and hearing requirements of the zoning law injected concepts of constitutional due process into zoning proceedings. The direct role of the electorate in zoning was restricted during this period to the power to veto rezoning that had been approved by the local legislators; the electorate could do no more than preserve the status quo.

The Hurst dictum was disapproved in San Diego Building Contractors Association v. City Council. The electorate of San Diego had enacted by initiative an ordinance that limited to thirty feet the height of buildings to be constructed in the city's coastal zone. The plaintiffs asserted that because the ordinance significantly affected their property rights they had a constitutional right to notice and a hearing before the ordinance was enacted. The court responded that statutes of general application may be enacted without notice or hearing to affected parties, because the broad application of legislation makes it impracticable to allow individual participation in its enactment. Instead, the people must protect their rights through their power to elect legislators.

Hurst finally was overruled in Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore. Livermore is a general law city, so it is governed by the state zoning law. Despite this fact,
the electorate enacted an initiative that put a moratorium on the issuance of building permits until such time as the city's educational, sewage disposal, and water supply facilities met certain standards. A group of people interested in residential construction sued to invalidate the ordinance on the ground that it was enacted without complying with the notice and hearing requirements of the state zoning law.\[116\] The supreme court held that the procedural requirements were not intended by the legislature to apply to initiatives.\[117\] Furthermore, the court stated that because the right of initiative is guaranteed in the state constitution, any statute that barred the use of the initiative "would be of doubtful constitutionality."\[118\]

While the supreme court was opening zoning to direct legislation, thereby allowing the electorate to bypass the statutory notice and hearing requirements, it was imposing more stringent procedural requirements on the administrative side of land use regulation. First, the court recognized that administrative decisions involve procedural due process considerations that are not necessarily satisfied by the statutory procedures imposed upon administrative agencies. In *Scott v. City of Indian Wells*,\[119\] a landowner whose property was beyond the city limits was found to have a constitutional right to notice and hearing when the city was considering a land development that would have a significant impact on his property.\[120\] "[I]t is clear that the individual's interest in his property is often affected by local land use controls, and the 'root requirement' of the due process clause is 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest . . . .'\[121\]

The *Indian Wells* opinion was followed by *Horn v. County of Ven-

\[116\] 18 Cal. 3d at 588, 557 P.2d at 475, 135 Cal. Rptr. at 43. The plaintiffs also asserted that the ordinance was unconstitutionally vague, and that it unconstitutionally attempted to bar immigration to Livermore. *Id.* at 588-89, 557 P.2d at 475, 135 Cal. Rptr. at 43.

\[117\] *Id.* at 594, 557 P.2d at 479, 135 Cal. Rptr. at 47.

\[118\] *Id.* at 595, 557 P.2d at 480, 135 Cal. Rptr. at 48. The court explained that *Hurst* erroneously treated the state zoning law and the initiative law as statutes of equal status. Rather, the initiative law merely establishes procedures for exercising the right of initiative. The constitutional right of initiative itself is superior to the zoning law. *Id.* at 594-95, 557 P.2d at 479-80, 135 Cal. Rptr. at 47-48. *See supra* text accompanying note 105.


\[120\] *Indian Wells* was considering issuing a conditional use permit to allow a large development of golf courses, tennis courts and numerous condominium units near the border of the city. The taller buildings and commercial shops were to be situated behind a hill to minimize their visual impact on Indian Wells. However, the buildings would have blocked the view of plaintiff Scott and his neighbors who lived beyond the city's limits. The city sent no notice to nonresidents, and refused to consider their objections to the development. *Id.* at 544-45, 492 P.2d at 1138-39, 99 Cal. Rptr. at 746-47.

\[121\] *Id.* at 549, 492 P.2d at 1141, 99 Cal. Rptr. at 749 (emphasis in original). The court concluded that "Indian Wells owes adjoining landowners who are not city residents a duty of notice to the extent given similarly situated city residents, a duty to hear their views, and a
in which the court determined that the approval of a subdivision was "adjudicatory." Therefore, it must be preceded by constitutionally sufficient notice and hearing to parties whose property rights may be substantially affected by the subdivision. Ventura County had approved a subdivision of property without sending notice to any of the adjoining landowners. Horn alleged that the subdivision would interfere with access to his parcel and would increase traffic congestion and air pollution. The court found that these allegations "adequately described a deprivation sufficiently 'substantial' to require procedural due process protection."

Ventura County argued that the notice and hearing procedures imposed by the California Environmental Quality Act (CEQA), and followed in the county's environmental review of the proposal, satisfied due process requirements. The court found that neither the notice nor the hearing was constitutionally sufficient. The CEQA procedures placed the burden of obtaining notice on the interested parties themselves and were "intended only to evoke and record a public response limited to the general environmental aspects of a proposed project. . . . [T]he CEQA process does not guarantee an affected landowner a 'meaningful' predeprivation hearing . . . at which his specific objections to the threatened interference with his property interests may be raised."

The second development that enhanced procedural safeguards involved judicial review of administrative decisions. The administrative
duty to consider the proposed development with respect to its effect on all neighboring property owners." Id., 492 P.2d at 1142, 99 Cal. Rptr. at 750.
122. 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979).
123. Id. at 614-15, 596 P.2d at 1138, 156 Cal. Rptr. at 722. See infra notes 174-75 & accompanying text.
124. 24 Cal. 3d at 622-25, 596 P.2d at 1137-40, 156 Cal. Rptr. at 721-24.
125. Because the proposed subdivision involved only four parcels, it was not subject to the Subdivision Map Act, CAL. GOV'T CODE §§ 66410-66499.37 (West Supp. 1981), which requires notice and hearings. See 24 Cal. 3d at 610, 596 P.2d at 1136, 156 Cal. Rptr. at 720.
126. 24 Cal. 3d at 615, 596 P.2d at 1139, 156 Cal. Rptr. at 723.
127. Id. at 616, 596 P.2d at 1140, 156 Cal. Rptr. at 724.
128. Id. at 617-18, 596 P.2d at 1141, 156 Cal. Rptr. at 725. The county's CEQA procedures required that all CEQA documents be placed in three different county offices, and that notice of all environmental matters pending before county agencies be mailed to people who requested such notice. Id. at 616-17, 596 P.2d at 1140, 156 Cal. Rptr. at 724.
129. Id. at 619, 596 P.2d at 1141, 156 Cal. Rptr. at 726 (emphasis in original) (citations omitted). The constitutional right to a hearing includes a right to present evidence and to rebut opposing evidence. Morgan v. United States, 304 U.S. 1, 18-20 (1938). Furthermore, "a party . . . is entitled to be represented by counsel retained by him where . . . the party's interest might be prejudiced if he is denied the right to be represented by an attorney." Borror v. Department of Inv., 15 Cal. App. 3d 531, 540, 92 Cal. Rptr. 525, 530 (1971). However, due process does not require that the hearing be a formal judicial proceeding. Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246-47 (1944).
mandamus provision of the California Code of Civil Procedure provides the structure for reviewing adjudicatory decisions of administrative agencies, including administrative land use decisions. The supreme court examined this mandamus provision in Topanga Association for a Scenic Community v. County of Los Angeles and concluded that "[s]ection 1094.5 clearly contemplates that at minimum, the reviewing court must determine both whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision." The court further concluded that "implicit in section 1094.5 is a requirement that the agency . . . must set forth findings to bridge the analytic gap between the raw evidence and the ultimate decision or order."

Because California relies upon the label of a land use decision to decide whether the action is administrative, all actions cast in the

130. CAL. CIV. PROC. CODE § 1094.5 (West 1980).
131. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 514, 522 P.2d 12, 17, 113 Cal. Rptr. 836, 840 (1974). The administrative mandamus provision applies to writs "issued for the purpose of inquiring into the validity of any final administrative order or decision made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer . . . ." CAL. CIV. PROC. CODE § 1094.5 (West 1980).
133. 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).
134. Id. at 514-15, 522 P.2d at 17, 113 Cal. Rptr. at 841 (emphasis added). The court's conclusion was based on an analysis of subsections (b) and (c) of § 1094.5:

"(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings or the findings are not supported by the evidence.

"(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." CAL. CIV. PROC. CODE § 1094.5(b)-(c) (West 1980) (emphasis added).
135. 11 Cal. 3d at 515, 522 P.2d at 17, 113 Cal. Rptr. at 841 (emphasis added).
form of a discretionary permit, variance, or other approval are reviewed under section 1094.5. Therefore, after Topanga, all agency decisions must be supported by findings, supported in turn by substantial evidence.

Another consequence of review under section 1094.5 is that the administrative proceeding must be "fair." The meaning of "fair" within the context of section 1094.5 is unclear. But, because administrative decisionmaking must meet the constitutional requirements of notice and predeprivation hearing, these proceedings must meet constitutional standards of fairness.

In contrast to review of administrative agency decisions, legislative decisions are reviewed by "ordinary, or so-called traditional, manda-

137. See supra note 132.
138. "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Section 1094.5(c) requires that the evidence be viewed "in the light of the whole record," so a court cannot look only for supporting evidence. Bixby v. Pierno, 4 Cal. 3d 130, 149 n.22, 481 P.2d 242, 255 n.22, 93 Cal. Rptr. 234, 247 n.22 (1971). The United States Supreme Court interpreted similar language ("substantial evidence on the record considered as a whole") to mean that "[t]he substantiality must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 485, 488 (1951). The Court in Universal Camera also noted that the application of the substantial evidence standard requires some degree of judicial discretion. Id. at 489.

It has been suggested that the substantial evidence standard is flexible, and that "[t]he critical determinant of the intensity of review . . . is the court's confidence in the agency as a decisionmaker. This in turn depends on a range of factors in addition to the importance of the right involved: the technical or specialized nature of the issues, the amount of procedural protections afforded at the agency level, the harshness of the penalty imposed, the gravity of the alleged error, and the political pressures and bias at the agency level." Note, Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Board: Administrative Adjudications and the Substantial Evidence Standard of Judicial Review, 68 CALIF. L. REV. 618, 636 (1980) (footnote omitted).

139. "The inquiry in such a case shall extend to the questions . . . whether there was a fair trial . . . ." CAL. CIV. PROC. CODE § 1094.5(b) (West 1980).
140. Two land use regulation cases have involved challenges under the § 1094.5 fair hearing requirement, based on allegations that the administrative body was not impartial, but both challenges were unsuccessful. Woodland Hills Residents Ass'n v. City Council, 26 Cal. 3d 938, 609 P.2d 1029, 164 Cal. Rptr. 255 (1980) (receipt by city council members of campaign contributions from parties who have a financial interest in an administrative proceeding does not prevent a fair hearing before those members); City of Fairfield v. Superior Court, 14 Cal. 3d 768, 537 P.2d 375, 122 Cal. Rptr. 543 (1975) (campaign statements expressing opposition to a proposal will not disqualify an elected official from voting on the proposal).
141. See supra notes 122-29 & accompanying text.
142. "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950); see Withrow v. Larkin, 421 U.S. 35 (1975) (due process requirement of a fair tribunal applies to administrative agencies that adjudicate as well as to courts).
The purpose of the traditional writ of mandate is to compel the performance of a legal duty. The duty of legislators in enacting zoning legislation is to promote the public health, safety, morals or general welfare, and their decisions are presumed to be valid. Therefore, when a court reviews zoning legislation, its role is limited to deciding whether there is a "real or substantial relation" between the legislation and the public welfare. A reviewing court does not concern itself with the legislators' motives. Rather, it will uphold the legislative decision if there is any rational basis which the legislators "may have had in mind." Consequently, legislative decisions need not be accompanied by findings. Furthermore, the legislators need not be impartial and the proceedings need not be "fair."

During the 1970's, land use regulation procedures changed dramatically. On the legislative side, zoning was freed of any procedural due process constraints and was opened to direct enactment by the electorate. On the administrative side, the statutory procedures were supplemented by the requirements of constitutionally sufficient notice and hearing to all parties whose property interests may be significantly affected. Furthermore, administrators were required to support their

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145. See supra note 1.

146. See supra note 2 & accompanying text.

147. Miller v. Board of Pub. Works, 195 Cal. 477, 490, 234 P. 381, 385 (1925). Of course, legislators also have a duty not to violate the state or federal constitutions or other laws in the course of exercising their police powers to regulate land, and this duty may be enforced by a traditional writ of mandate. For example, zoning ordinances cannot unfairly discriminate against a particular parcel of land. Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 338, 175 P.2d 542, 547 (1946). Zoning administration is subject to these same restrictions. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886) (use permits cannot be issued in a discriminatory manner). Therefore, in the course of comparing the standards of review of legislative and administrative land use decisions, these secondary bases for invalidating land use regulation will be disregarded.


149. See Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935) (validity of a regulation made by an administrative body under a state statute is not dependent on the making of special findings of fact when not required by the statute).

150. The traditional mandamus provision does not authorize the court to inquire into the fairness of the proceedings. See supra note 144. Because there is no constitutional requirement that legislation be preceded by notice or hearing to affected parties, see supra notes 37, 113 & accompanying text, the reviewing court does not look to see whether the hearing, if one was held, was fair. The constitutional requirement that administrators be impartial stems from the requirement that a hearing be provided. See supra note 142.

151. See supra notes 110-18 & accompanying text.
decisions with appropriate findings. These divergent developments aggravated the consequences of the legislative-adjudicative distinction.

As an example of the procedural ramifications of the legislative-adjudicative distinction, consider the situation of the property owner in Horn v. County of Ventura. Before the county can approve the division of neighboring property into four parcels, an administrative decision, Horn has a right to notice reasonably calculated to apprise him of the subdivision application. Then he has a right to have a hearing during which his specific concerns will be considered by impartial decisionmakers and at which he can be represented by counsel, present his evidence, and rebut other evidence. The administrators' decision must be supported by findings supported by substantial evidence. Horn can have the decision reviewed to determine whether the hearing was fair, the proceedings were in accordance with the law, and the decision was supported by substantial evidence. Of course, the owner of the lot proposed for subdivision has the same rights as Horn.

If, instead, a legislative rezoning of the neighboring land is proposed to allow multifamily dwellings, neighbor Horn will be in a much weaker position to protect his property interest. A rezoning by the local legislative body will be preceded by the statutorily required notice and public hearings, but these hearings may be structured more for the expression of general public opinion than for the consideration of any particular party's objections. The legislators may be partial, and their decision is presumed valid and need not be accompanied by findings.

The impact upon Horn's land will probably be similar in the two cases—potential interference with access to his parcel, increased traffic and air pollution—yet in the latter case, Horn is accorded no due process rights to protect his property interests. The rationale for the absence of due process protection in connection with legislation is based upon the theoretically broad impact of legislation. The large number of persons affected makes it impracticable to afford them all a hearing. The broad impact also means that objections can be voiced politically.

In the case of a small-scale rezoning, however, the impact on the owner and immediate neighbors of the subject property is often far greater than the impact on the general population. The small number of significantly affected parties indicates that the political response on
their behalf to the legislation will be weak. The small number also means that providing them with notice and hearing would not be as great a burden as it would be in the case of more general legislation. The rationale for denying notice and hearing becomes weaker as the impact of the legislation becomes narrower.

The disparity between the procedures afforded in adjudicative and legislative actions becomes even more stark, and the rationale for that disparity even weaker, when the electorate rezones small parcels by initiative. No hearing is provided to affected parties, except for whatever "hearing" they can accomplish by appealing directly to the voters in the course of the campaign. The electorate can be as interested or disinterested as it chooses. Many voters will not even vote on the initiative. Unlike elected legislators, the individual votes of the electorate are never scrutinized or publicized. Because the electorate effects the change, it will be difficult for the landowners involved to find adequate recourse through the political system.

The use of the initiative power to rezone the land of only a few people, then, is the situation in which the legislative-adjudicative distinction based on labels has the most irrational impact on the due pro-

155. Although this discussion implicitly portrays the conflict as being between the landowners in the area of the rezoning and the rest of the electorate in the jurisdiction, the conflict may more commonly be between a particular landowner who wants to develop his or her land and adjoining landowners. "Most zoning amendment controversies are . . . three-sided, involving the directly affected landowner or developer, the city council, and the indirectly affected neighbors." Glenn, *State Law Limitations on the Use of Initiatives and Referenda in Connection with Zoning Amendments*, 51 S. Cal. L. Rev. 265, 271 (1978).

156. For example, the initiative at issue in *Arnel* was voted on by only 23% of Costa Mesa's registered voters. See Note, supra note 12, at 1108 n.10. The initiative to put a moratorium on all building permits in Livermore was voted on by only 36% of the registered voters of that city. Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 615 n.4, 557 P.2d 473, 492 n.4, 135 Cal. Rptr. 41, 60 n.4 (1976) (Clark, J., dissenting).

157. To be successful, the landowners would have to convince popularly elected officials to overturn the electorate's decision, or they would have to put the issue to another vote, a costly and time-consuming proposition.

Although the adoption of an adjudicative process would necessarily deprive the electorate of its power to legislate directly, it would not deprive it of ultimate power over land use regulation. The electorate has the power to protect its interests through the political process that a handful of landowners does not have. Furthermore, if the conflict is between a landowner and his or her neighbors, see supra note 155, the use of direct legislation is particularly inappropriate, as it would be tantamount to delegating control over the zoning of a particular parcel to the neighbors. That is, direct legislation allows neighbors, whose votes can comprise the majority of the typically small turnout in rezoning elections, see supra note 156, to control the election results. The delegation of zoning control to neighbors has been disapproved by the United States Supreme Court. See Washington *ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Eubank v. City of Richmond*, 226 U.S. 137 (1912); see also Glenn, supra note 155, at 271 n.27 ("In these cases, it is generally the neighbors who will avail themselves of the direct legislation devices.").
cess rights of landowners. This was the situation presented to the California Supreme Court in *Arnel Development Co. v. City of Costa Mesa*.

*Arnel Development Co. v. City of Costa Mesa*

The Arnel Development Company sought to build a residential development on fifty acres of land in Costa Mesa. In 1976, the city approved Arnel's development plan and rezoned the property to allow the planned development. After final approval was given by the city in 1977, a Costa Mesa homeowners' association submitted an initiative petition to rezone the Arnel property to allow only single-family residential development. In early 1978, the initiative was adopted by the voters, and the city thereafter refused to take any more steps to approve Arnel's project.

Arnel sued for mandate, injunctive relief, and declaratory relief. The trial court upheld the validity of the initiative, but the court of appeal reversed and held that the rezoning of specific, relatively small parcels is adjudicatory and, therefore, not a proper subject for an initiative. The state supreme court, on its own motion, transferred the case for review, and reversed the court of appeal, stating that "California precedent has settled the principle that zoning ordinances, whatever the size of parcel affected, are legislative acts."

Justice Tobriner began the majority opinion by listing numerous cases which have held that zoning is a legislative act, and concluded from them that "whatever the legal controversy and whatever the size of ownership of the land involved, every California decision on

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159. In its final form, the plan contemplated 127 single-family residences on 23 acres and 539 apartment units on a comparable area, primarily for moderate income housing. The zoning was changed from low- and medium-density residential, to low- and medium-density planned residential development. *Id.* at 515, 620 P.2d at 567, 169 Cal. Rptr. at 906.
160. The initiative also proposed to rezone 17.6 acres of adjacent land that belonged to two other parties. One of these owners also filed suit, and the two actions were consolidated for trial. *Id.* at 514-15, 620 P.2d at 567, 169 Cal. Rptr. at 906.
161. *Id.* at 515, 620 P.2d at 567, 169 Cal. Rptr. at 906. The initiative was supported by 12% and opposed by 11% of Costa Mesa's registered voters. Seventy-seven percent did not vote on the initiative. See Note, *supra* note 12, at 1108 n.10.
162. 28 Cal. 3d at 515-16, 620 P.2d at 567-68, 169 Cal. Rptr. at 906-07.
163. *Id.* at 514, 620 P.2d at 566, 169 Cal. Rptr. at 905. The city attorney of Costa Mesa did not defend the initiative. Therefore, he did not petition the supreme court for review after the court of appeal held the initiative invalid. The supreme court transferred it "to secure uniformity of decision and settle an important question of law . . . ." *Id.* at 514 n.3, 620 P.2d at 566 n.3, 169 Cal. Rptr. at 905 n.3.
164. *Id.* at 514, 620 P.2d at 566-67, 169 Cal. Rptr. at 906.
165. Justices Bird, Mosk, and Manuel concurred in the opinion, and Justice Newman concurred in the result. Justice Richardson wrote the dissent, in which Justice Clark concurred.
point... has held that the enactment or amendment of a zoning ordinance is a legislative act." 166 The court found the rationale for this rule in *Dwyer v. City Council*: 167 "A zoning ordinance as amended becomes in effect a different ordinance... [and] a piecemeal rezoning of small areas may result in a plan differing in vital particulars from that originally contemplated...." 168 Because the electorate has an interest in the whole zoning system, it has an interest in all of its parts. 169

Justice Tobriner then addressed the language and reasoning of two supreme court opinions that, the dissent argued, had adopted a new approach to determining whether an act was legislative. In *San Diego Building Contractors Association v. City Council*, 170 the court had distinguished between adjudication and legislation by stating that the former was an action "determined by facts peculiar to the individual case," whereas the latter action involved the establishment of "a broad, generally applicable rule of conduct on the basis of a general public policy." 171 In *Horn v. County of Ventura*, 172 the court stated, "We expressly cautioned in *San Diego* that land use planning decisions less than general rezoning could not be insulated from notice and hearing requirements by application of the 'legislative act' doctrine." 173 The *Horn* court repeated the basis of the legislative-adjudicative distinction described in *San Diego*, 174 then characterized subdivision approvals as actions that "involve the application of general standards to particular parcels of real estate," and concluded that such conduct was adjudica-

166. 28 Cal. 3d at 516-17, 620 P.2d at 568, 169 Cal. Rptr. at 907. The court also reviewed in a footnote various cases involving administrative land use decisions, and came to a similar conclusion: "[T]he courts have not resolved the legislative or adjudicative character of administrative land use decisions on a case by case basis, but instead have established a generic rule that variances, use permits, subdivision maps, and similar proceedings are necessarily adjudicative." *Id.* at 519 n.8, 620 P.2d at 569 n.8, 169 Cal. Rptr. at 908 n.8.

167. 200 Cal. 505, 253 P. 932 (1927).


169. *See supra* notes 94-98 & accompanying text.


171. 13 Cal. 3d at 212-13, 529 P.2d at 574, 118 Cal. Rptr. at 150. In *San Diego*, the court concluded that the ordinance before it, which limited the height of all buildings in the city's coastal zone, was "unquestionably a general legislative act. . . . Notice and hearing have never been constitutional prerequisites for the adoption of such a legislative enactment." *Id.*

172. 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979). *See supra* notes 122-29 & accompanying text.

173. *Horn*, 24 Cal. 3d at 613, 596 P.2d at 1138, 156 Cal. Rptr. at 722.

174. "[In holding in *San Diego* that the enactment of a general zoning ordinance was legislative], we distinguished 'adjudicatory' matters in which 'the government's action affecting an individual [is] determined by facts peculiar to the individual case' from 'legislative' decisions which involve the adoption of a 'broad, generally applicable rule of conduct on the basis of general public policy.'" *Id.*
Justice Tobriner explained that the language of *San Diego* and *Horn* was used only to distinguish between the two general categories, not as a basis for analyzing the particular government action before the court. Neither the outcome of *San Diego* nor that of *Horn* varied from the rule that rezoning is legislative and that various other acts, including subdivision approvals, are adjudicative. The plaintiff argued that the rule that rezoning is a legislative act operated to deprive it of due process of law. The court rejected this contention, relying primarily upon the United States Supreme Court's opinion in *City of Eastlake v. Forest City Enterprises, Inc.* In *Eastlake*, the Supreme Court accepted a state court's characterization of a proposed zoning amendment as "legislative" and held that the

175. *Id.* at 614, 596 P.2d at 1138, 156 Cal. Rptr. at 722.

176. "Although our opinion [in *San Diego*] described the initiative as a 'general' legislative act . . ., we did so to distinguish the great number of more limited "administrative" zoning decisions, such as the grant of a variance or the award of a conditional use permit, which are adjudicatory in nature." *28* Cal. 3d at 518, 620 P.2d at 569, 169 Cal. Rptr. at 908 (citations omitted). In *Horn*, "[w]e did not . . . conclude that the particular subdivision approval at issue was adjudicatory in character by examining the size of the subdivision or the number of persons affected. Instead we stated a generic rule . . .." *Id.* at 518-19, 620 P.2d at 569-70, 169 Cal. Rptr. at 908-09.

177. For a discussion of the "characterization analysis" typified by *San Diego* and *Horn* and rejected in *Arnel*, see Note, *supra* note 12, at 1115-21.

178. *28* Cal. 3d at 519, 620 P.2d at 570, 169 Cal. Rptr. at 909.

179. 426 U.S. 668 (1976). The Supreme Court reviewed a city charter provision that required all zoning ordinance changes to be approved by 55% of the electorate by referendum. *Id.* at 670. A developer challenged the ordinance after its proposed zoning change failed to receive the requisite approval.

The Ohio Supreme Court had ruled that the proposed zoning was "legislative" and therefore could be subject to the referendum power. However, the charter provision that delegated the zoning power to the electorate lacked standards to guide the decision of the voters. The Ohio court held that without such standards, the delegation could result in the arbitrary and capricious exercise of the police power. Therefore, the provision violated landowners' due process rights. 41 Ohio St. 2d 187, 195-96, 324 N.E.2d 740, 746-47 (1975). "The Supreme Court of Ohio rested its decision solely on the due process clause of the Fourteenth Amendment. . . . The only questions presented to this Court in the petition for certiorari concern the validity of that due process holding. . . . Accordingly, we confine ourselves to considering whether due process is denied by the challenged charter [provision]." 426 U.S. at 677 n.11 (citation omitted).

180. "To be subject to Ohio's referendum procedure, the question must be one within the scope of legislative power. The Ohio Supreme Court expressly found that the City Council's action in rezoning respondent's eight acres from light industrial to high-density residential use was legislative in nature." 426 U.S. at 673. In a footnote, the Court went on to justify this characterization, stating, "The land use change requested by respondent would likely entail the provision of additional city services, such as schools and police and fire protection. *Cf.* *James v. Valtierra*, 402 U.S. 137, 143 n.4 (1971). The change would also diminish the land area available for industrial purposes, thereby affecting Eastlake's potential economic development." 426 U.S. at 673 n.7. *James v. Valtierra*, which the Court cited as analogous support for the legislative characterization of the rezoning of eight acres, was a challenge to California's requirement that low-rent housing projects be approved by referen-
exercise of legislative power by the people through the referendum process does not violate due process. However, the Eastlake Court did not address the question whether a label may determine whether a given specific zoning change is "legislative" for purposes of constitutional due process. Therefore, the Arnel court's reliance on Eastlake is misplaced.

The state due process claim was rejected without analysis of the adjudicative nature of small-scale rezonings. Instead, the court simply repeated that California has always treated amendments of zoning ordinances as legislative acts. Therefore, constitutional due process considerations do not apply to rezoning.

After it disposed of the due process issue, the court discussed the virtue of California's reliance on labels to classify land use decisions as legislative or adjudicative. Ease of application is the essential attraction of this classification method. This simplifies the land use regulatory process because proponents and opponents of a proposed measure can readily determine whether the measure is subject to a popular vote, whether review should be under the ordinary or the administrative mandamus provisions, and whether the decision must have only a rational basis or must be supported by substantial evidence. In the absence of this clear test for distinguishing legislative from adjudicative action, local governments would be unsure of how to proceed on a proposed measure, and resources would be wasted litigating the character of an action.

dum. The referendum requirement was upheld, as such projects "may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues." 402 U.S. at 143 (footnote omitted). Footnote 4 of James, which was cited in particular by the Eastlake Court, is a further explication of the citywide fiscal impact of low-rent housing projects. Id. at 143 n.4.


182. See Glenn, supra note 155, at 299 n.159; cf. Developments in the Law—Zoning, supra note 81, at 1536; Note, supra note 12, at 1126-28.

183. 28 Cal. 3d at 521, 620 P.2d at 571, 169 Cal. Rptr. at 910.

184. Id. at 522, 620 P.2d at 572, 169 Cal. Rptr. at 911. "This method of classifying land-use decisions enjoys the obvious advantage of economy; the municipality, the proponents of a proposed measure, and the opponents of the measure can readily determine if notice, hearings, and findings are required, what form of judicial review is appropriate, and whether the measure can be enacted by initiative or overturned by referendum." Id. at 523, 620 P.2d at 572, 169 Cal. Rptr. at 911.

185. Id. at 523, 620 P.2d at 572, 169 Cal. Rptr. at 911. The court stated in a footnote that "[a] holding that rezoning of relatively small parcels is an adjudicative act would necessarily imply that decisions presently considered adjudicative, such as the grant of a use permit or the approval of a subdivision map, would henceforth be classified as legislative acts if they affected a relatively large parcel of property." Id. at 522 n.11, 620 P.2d at 572 n.11, 169 Cal. Rptr. at 911 n.11. However, the fact that administrative relief will have a broad impact need not put it in the "legislative" category. Permits and approvals are always issued in response to individual applications, and are decided on the basis of criteria set out in the ordinance,
The counterargument to this efficiency rationale is that due process rights are not dependent upon their efficient accommodation within the system. The *Arnel* court, however, asserted that landowners' property interests are adequately protected without due process rights of notice and hearing. For example, the landowner retains his or her constitutional protection against zoning which is arbitrary or unreasonable. This right can be vindicated, however, only through an attack on a final legislative decision that is presumed to be valid; the landowner must show a court that there is no rational basis which the legislators may have had in mind. The landowner can also invalidate a zoning ordinance that precludes substantially all use of his or her land. Again, an attack on a presumptively valid legislative decision is required. Furthermore, even if the ordinance is found to deprive the owner of substantially all use of the land, the particular ordinance will simply be invalidated; the owner cannot collect damages for the period during which the regulation effected a taking.

The *Arnel* court also noted that landowners' interests are protected by their statutory right to notice and hearing when the government rezones, as well as their opportunity to present their case to the electorate which are applied to the facts of the particular application. See *supra* notes 71-81 & accompanying text. It would be reasonable to maintain the "adjudicative" label for all forms of administrative relief, and expand the "adjudicative" category to include small-scale rezonings. "The heart of the problem [of procedural unfairness in local zoning practices] is the underinclusiveness of the adjudicatory category . . . ." Wolfstone, *supra* note 181, at 82.

186. 28 Cal. 3d at 524, 620 P.2d at 573, 169 Cal. Rptr. at 912.

187. *See supra* notes 143-50 & accompanying text. If an ordinance is found to be arbitrary or unreasonable, it is invalidated, but the government did not commit a tort in passing the ordinance and need not compensate the landowner for any loss incurred during the period the ordinance was in effect. HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), cert. denied, 425 U.S. 904 (1976); *see* Gilliland v. County of Los Angeles, 126 Cal. App. 3d 610, 615-17, 179 Cal. Rptr. 73, 76-78 (1981).

188. 28 Cal. 3d at 524, 620 P.2d at 573, 169 Cal. Rptr. at 912.


190. Compensation is not an available remedy because such a remedy would have a chilling effect on the exercise of the police powers by local governments. *Agins*, 24 Cal. 3d at 273-76, 598 P.2d at 28-31, 157 Cal. Rptr. at 375-78. It appears, however, that the United States Supreme Court may disagree with California's bar on recovery for regulatory takings. The Court recently considered San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981), which involved the *Agins* rule. Although the appeal was dismissed for absence of a final judgment, Justices Brennan, Stewart, Marshall, and Powell stated in their dissent that they would have reversed the California Supreme Court on the question of compensation for a regulatory taking. *Id.* at 639-40. Justice Rehnquist stated in his concurrence that he would have generally agreed with the dissenters if he thought the appeal was from a final judgment. *Id.* at 633-34. *See* Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981) (following the reasoning of the dissenters in *San Diego Gas & Electric*).
when the people rezone.\textsuperscript{191} Of course, the hearing preceding a rezoning will vary among jurisdictions and among particular proposals, but such a hearing will not necessarily address the specific concerns of the landowner and is not required to be fair.\textsuperscript{192}

Finally, the court perceived little risk that landowners’ interests would be abused by the legislators. “[A]s a practical matter the initiative is unlikely to be employed in matters which could fairly be characterized as adjudicative in character.”\textsuperscript{193} Furthermore, the substance of zoning changes would be restricted by the statutory mandate that ordinances be consistent with the general plan\textsuperscript{194} and by the further requirement that zoning changes be reasonably related to the regional welfare.\textsuperscript{195} The court concluded that “[t]he spectre of a few voters imposing their selfish interests upon an objecting city and region has no basis in reality.”\textsuperscript{196}

In summary, the \textit{Arnel} court interpreted California precedent as having established a generic rule that all rezoning is legislative. The court perceived no issue of a potential deprivation of constitutional due process in the application of this rule to small-scale rezonings, and be-

\textsuperscript{191} 28 Cal. 3d at 524, 620 P.2d at 573, 169 Cal. Rptr. at 912.
\textsuperscript{192} See \textit{supra} notes 38, 129 \& accompanying text. “The right to a hearing, however, would be a hollow one absent additional procedural requirements that ensure the integrity and responsibility of the decisionmaking process. A landowner’s opportunity to argue his case in a hearing whose outcome is preordained or whose decisionmaker harbors illegitimate biases against him protects none of the interests underlying due process.” \textit{Developments in the Law—Zoning,} \textit{supra} note 81, at 1525 (footnote omitted).
\textsuperscript{193} 28 Cal. 3d at 524, 620 P.2d at 573, 169 Cal. Rptr. at 912. The court theorized that the burden of collecting signatures of 10\% of the registered voters for an initiative petition and then convincing a majority of the voters to support the initiative would practically restrict the use of the initiative to broad, general policy questions. \textit{Id.} The initiative that rezoned Arnels’s land was supported by only 12\% of Costa Mesa’s registered voters. See \textit{supra} notes 155-56, 161 \& accompanying text.
\textsuperscript{194} 28 Cal. 3d at 524, 620 P.2d at 573, 169 Cal. Rptr. at 912. However, the plan can be amended concurrently. See \textit{supra} note 27 \& accompanying text.
\textsuperscript{196} 28 Cal. 3d at 524, 620 P.2d at 573, 169 Cal. Rptr. at 912. On remand, the court of appeal reviewed some of the findings of the trial court, including the trial court’s conclusion that “the primary objective of the proponents of the initiative was to stop the development of apartments in the Arnel project notwithstanding the acute shortage of moderate income housing in the city . . . .” 126 Cal. App. 3d at 335, 178 Cal. Rptr. at 726. In this case, a small group of voters was defeated in its attempt to impose its will, but this defeat came about only because the developer was willing to litigate the issue for over four years. The rezoning of this small parcel did not generate objections from the city or the region, even though it might cause harm to the region. The interests of a landowner that are affected by the rezoning must be worth a relatively large sum for the landowner to pursue the potential remedies.
lied that departure from the rule would create confusion and spawn litigation without enhancing the property owner's protections to any substantial degree.

It is unlikely that California will abandon its reliance on labels in the near future. By reasserting the reasoning of Dwyer—that every rezoning is a matter of general public concern because piecemeal rezoning may radically alter the whole system—the court in Arnel left no room for finding rezoning too inconsequential to be a proper subject of "legislation." California precedent certainly supports the Arnel court in its result, if not totally in its reasoning. That is, although courts have always found rezoning to be legislative, they have sometimes done so without relying strictly on labels. Furthermore, the California Supreme Court has always shown great deference to legislative judgment in the exercise of its police power to regulate land use. Finally, the right of the electorate to exercise the powers of initiative and referendum is often touted by the California Supreme Court, so it is unlikely that the court will remove rezoning from the reach of direct action by the electorate.

It is also unlikely that the United States Supreme Court will rule on the due process issue involved in California's reliance on labels. The Court declined to address the issue in Eastlake and has long exhibited a preference for leaving resolution of zoning matters to local agencies.

In the absence of judicial intervention to ensure that due process concerns are addressed, the legislature should increase statutory safeguards to encourage reasonable and fair land use regulation. The next section suggests statutory modifications that will help to mitigate the procedural consequences of California's reliance on labels.

197. See supra notes 167-69 & accompanying text.
198. See supra notes 170-75 & accompanying text.
199. See, e.g., Agins v. City of Tiburon, 24 Cal. 3d 266, 276, 598 P.2d 25, 30, 157 Cal. Rptr. 372, 377 (1979) (allowing damages in suit to invalidate zoning ordinance "would have a chilling effect upon the exercise of police regulatory powers at the local level . . . ."); Associated Home Builders of the Greater东湾, Inc. v. City of Livermore, 18 Cal. 3d 582, 609, 557 P.2d 473, 489, 135 Cal. Rptr. 41, 57 (1976) (although courts can defer to the local legislative body on the question whether an ordinance reasonably relates to the regional welfare, "it cannot be assumed that a land use ordinance can never be invalidated as an enactment in excess of the police power"); Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38 (1949).
200. See, e.g., Associated Home Builders, 18 Cal. 3d at 591, 557 P.2d at 477, 135 Cal. Rptr. at 45 ("Declaring it 'the duty of the courts to jealously guard this right of the people' . . . the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process.'") (citations omitted).
201. See supra notes 178-82 & accompanying text.
Proposals for Further Statutory Safeguards

The major procedural consequences of attaching a "legislative" label to an action are that (1) the electorate can decide the issue by popular vote; (2) the decision need not be supported by findings; (3) the decision is presumed valid, so it need not be supported by substantial evidence; and (4) parties affected by the action have no constitutional right to notice or hearing. Furthermore, because no hearing is constitutionally required, there is no right to present or rebut evidence, or to have impartial decisionmakers.

The most obvious way to avoid these consequences is to avoid attaching a legislative label to a regulatory modification. There is a broad overlap between the administrative and legislative regulatory systems, and within this broad area, local agencies should be required to effect changes through administrative means before resorting to rezoning. Parties who apply for zoning changes should be required first to apply for administrative relief. Then the people who would be significantly affected by the proposed change will have a right to constitutionally sufficient notice and a hearing at which their specific concerns must be addressed. Evidence will be accepted and the decision will be made by impartial officials. The administrative decision must be evidenced by findings that are supported by substantial evidence.

This requirement of "exhaustion of administrative remedies" will act primarily to protect neighbors of the subject property. The owner of the subject property always has the option of applying for administrative relief, having a hearing, and appealing the decision under the substantial evidence standard. However, the applicant can also apply for a rezoning and thereby waive not only his or her own due process rights but also the due process rights of neighbors. An applicant who believes the local agency will be supportive of his or her plans may prefer to apply for legislative relief, thereby avoiding the demands of a few neighbors that they be given a constitutionally sufficient hearing and achieving a decision which has a strong presumption of validity.

When opposition to the change does not extend beyond the immediate
neighbors, it is unlikely that there will be a political response to a rezoning to protect the interests of these neighbors.

Of course, a local body could go through the required procedures as a formality, deny the administrative relief, and then proceed to effect the change legislatively. This approach would insulate a controversial change from effective judicial review. The immediate neighbors may not have the political support to overturn the decision. However, the initial administrative proceedings will have created a record of evidence which may be valuable in attacking the rezoning.

Although a court will not examine the motives of legislators when it is deciding whether a rezoning is arbitrary, it will look into motive and purpose when determining whether a zoning ordinance is discriminatory. The neighbors will be able to present their evidence to the legislators during the administrative proceeding. This record will reveal the information and arguments before the legislators, and can be used to demonstrate discriminatory purpose.

The statutory system should also be modified to require that legislative land use decisions be supported by findings. A findings requirement should have the same beneficial effect in the legislative setting as it has in the administrative setting: "to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions." A findings requirement would also promote the due process concerns that the proceeding seem fair and reasonable and that the individual be left with an understanding of what has happened and why.

imprudence of allowing the change at all) of making findings to support the decision. Also, an interested official can vote on a legislative decision but not an administrative decision.

207. See REAL PROP. L. REP. (CEB) 27 (March 1981) ("Local governments can continue to operate in fairly free disregard of judicial supervision as long as they learn to cast their actions in a legislative rather than an adjudicatory form.").

208. Legislative hearings also create a record, but the hearings may not involve the consideration of as much evidence and argument as constitutionally mandated hearings of administrative proceedings. See supra notes 38, 126 & accompanying text.


210. For example, in Arnel, the court of appeal, on remand, examined the voter pamphlet arguments in favor of the initiative ordinance as well as other circumstances of the rezoning, and found a discriminatory purpose behind the rezoning. Id. at 335-37, 178 Cal. Rptr. at 725-27.

211. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 516, 522 P.2d 12, 18, 113 Cal. Rptr. 836, 842 (1974). "The indictment of zoning to which all critics subscribe is that its administration is arbitrary and capricious. Procedural due process is continually flaunted in our medieval hearings, our casual record keeping and our occult decision-making." R. BABCOCK, THE ZONING GAME 135 (1966).

212. See Kahn, supra note 9, at 1024, 1026-27.
In the context of direct legislation by the electorate, there are few procedural safeguards because the procedural requirements of the state zoning law do not apply to direct legislation. Furthermore, there is little potential for procedural restrictions because statutory procedural requirements may not impede the electorate’s state constitutional right to exercise legislative power. However, the environment in which the electorate reaches its decision can only be enhanced by greater and more reliable information. The California Election Code provides that an initiative may be supported and opposed by the proponents and the local legislative body, respectively, each with a written argument not to exceed three hundred words. This limit on information is unreasonable when compared to the information that would be generated if the proposal were before the local legislative body. The local planning commission and legislative body should be required to give notice and hold hearings, and to make the same reports and recommendations as they would be required to make if the proposal were before them. This process would not only make information available to the public but would also provide a forum for discussion of the issues. Probably only those most interested would attend. But, because the interested segment of the electorate may often control the election outcome, the impact would be greater than the level of attendance would indicate. Also, a summary of the information produced and arguments raised in these hearings and reports should be included in a published argument or recommendation of the legislative body.

A final recommendation is that landowners whose land is zoned in

213. Associated Home Builders, 18 Cal. 3d at 594, 557 P.2d at 479, 135 Cal. Rptr. at 47. See supra notes 114-18 & accompanying text.

214. See 18 Cal. 3d at 595, 557 P.2d at 480, 135 Cal. Rptr. at 48 (“The notice and hearing provisions of the state zoning law, if interpreted to bar initiative land use ordinances, would be of doubtful constitutionality.”).


216. Public hearings would be held by both the planning commission and the local legislative body. Furthermore, the planning commission would make written recommendations on the proposal. See supra notes 30-34 & accompanying text. If the proposal would have a significant impact on the environment, the local agency would have to prepare an environmental impact report. See CAL. PUB. RES. CODE § 21080 (West Supp. 1982).

217. The initiative that rezoned Arnell’s land passed with the support of only 12% of Costa Mesa’s registered voters. See supra notes 155-56 & 161. In an election on a proposed ordinance that would have much broader impact—the moratorium on building permits in Livermore—only 36% of the registered voters voted, and the initiative was approved by 55% of those voters. Associated Home Builders, 18 Cal. 3d at 615 n.4, 557 P.2d at 492 n.4, 135 Cal. Rptr. at 60 n.4 (Clark, J., dissenting).

218. It is not entirely unrealistic to suggest that the interested persons on either side of the controversy might be persuaded to the other side. Apparently, the original proponents of the initiative that rezoned Arnell’s land were in agreement with the developer before the election but were unable to remove the measure from the ballot. See Note, supra note 12, at 1108 n.9.

219. In addition to being informative, the hearings and reports will give a reviewing
an arbitrary or discriminatory manner should not have to bear the entire burden of challenging the ordinance. There should be a provision for awarding attorney's fees when a landowner prevails in a suit challenging a zoning ordinance. Because there is a strong presumption in favor of the validity of legislation, a landowner will prevail only in cases of outrageous zoning. A provision awarding attorney's fees would not only protect private property interests from arbitrary zoning; it would also promote both the integrity of land use regulation and the general welfare by encouraging private parties to challenge zoning which has no reasonable relation to the general welfare.

Conclusion

California's land use regulatory system is structured to implement general rules and policies to govern land use while allowing reasonable exceptions in cases of unique hardship and accommodating individual requests where doing so would promote the general welfare. The general rules are promulgated through the enactment and amendment of zoning ordinances, primarily with reference to the comprehensive plan. Specific exceptions and permits are dispensed through administrative proceedings, primarily with reference to the facts of the individual situation.

The California Supreme Court has recognized that when the government addresses itself administratively to an individual situation and decides which property rights are attached to a particular parcel of land, it must satisfy the due process rights of all persons whose property interests may be substantially affected by the decision. Therefore, when the government considers an application for a variance or other permit, it must give constitutionally sufficient notice and hearing to affected parties, and it must support its decision with findings supported by substantial evidence. On the other hand, when the government leg-

220. In those cases in which an ordinance is struck because it is not in the regional welfare, the landowner will have bestowed a benefit on the general public, so the award of attorney's fees may be appropriate under California's statutory provision for the award of attorney's fees to "private attorneys general." See Cal. Civ. Proc. Code § 1021.5 (West 1980); see also Horn v. County of Ventura, 24 Cal. 3d 605, 620, 596 P.2d 1134, 1142, 156 Cal. Rptr. 718, 726 (1979).

221. For example, the Arnel suit eventually succeeded in invalidating an ordinance that was intended "to stop the development of apartments in the Arnel project notwithstanding the acute shortage of moderate income housing in the city." Arnel, 126 Cal. App. 3d at 335, 178 Cal. Rptr. at 726 (on remand). The proponents of that initiative stated in their ballot argument that "[s]ingle family homes would have a greater positive effect upon the fair market value of homes in the immediate area." Id. at 336 n.5, 178 Cal. Rptr. at 726 n.5. See supra note 196.
islates, it is free of due process constraints, and its decisions are presumed to be valid.

Sometimes the legislative machinery of land use regulation is used to determine the rights of a particular landowner or as to a particular parcel of land. The impact of this legislative decision on the landowner and neighbors may be the same as if the determination had been made through administrative proceedings. Because the determination is effected through a zoning ordinance amendment, however, it is technically a legislative decision.

In *Arnel Development Co. v. City of Costa Mesa*, the California Supreme Court refused to look past the means of governmental actions to consider the object of those actions. Therefore, governmental actions that are cast in a legislative form are deemed to be legislative decisions, even if their object and effect is to determine the property rights of a small group of politically weak people. Parties whose property interests are substantially affected by small-scale rezonings are left with no constitutional right to notice or a hearing before the decision is made, and are faced with a strong presumption of validity of the rezoning if they challenge the decision in court.

The state legislature should provide statutory protection to these landowners. First, there should be a requirement that regulatory modifications be effected through administrative means whenever possible. Second, when a local legislature does make a decision through legislative means, it should be required to support that decision with findings. Third, when the electorate legislates directly, the local legislative body should not passively await the decision. The local legislators should hold hearings and disseminate information in order to encourage informed decisionmaking by the electorate. Finally, a landowner or neighbors who are victims of arbitrary or discriminatory land use legislation should have a right to attorney’s fees when they successfully challenge the legislation.

Although the concept of democratic control of the use of land is attractive, this power can be used to deprive a small minority of their property interests without due process of law. In the absence of a judicial willingness to address the problem of small-scale rezoning, a legislative response is in order.

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