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EXCLUSIONARY ZONING: A PROJECT FOR THE CALIFORNIA ENVIRONMENTAL QUALITY ACT?

INTRODUCTION

The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people.¹

The traditional concept of zoning involves the valid exercise of the police power to promote the general welfare of a municipality.² Popularized in the 1920’s, it became a valuable tool to protect suburban communities from impending urbanization.³ Municipalities continue to exercise their zoning power to preserve rural settings⁴ or to maintain the social homogeneity of a neighborhood.⁵ This exercise remains largely a municipal function.

California, however, has enacted a statutory scheme that requires that every city adopt a general plan⁶ with which zoning decisions must conform.⁷ The state law establishes mandatory elements of these general plans.⁸ One such required element is a housing element which “make[s] adequate provision for the

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4. See, e.g., Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974).
7. “County or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974.” Cal. Gov’t Code § 65860(a) (West Supp. 1978).
8. These requirements include a land-use element, an open-space element, a noise element, and a safety element for protection from fires and geologic hazards. See Cal. Gov’t Code § 65302 (West Supp. 1978).
housing needs of all economic segments of the community."

It is clear that zoning that has the effect of excluding low-
moderate cost housing from a community is not within the
intent of the state planning and zoning requirements. Never-
theless, municipalities engage in exclusionary zoning and
view it as a matter of municipal rather than state concern. The
traditional view that zoning is a municipal affair, not subject
to the general laws of the state, remains firmly embedded
in the political philosophies of charter cities. The munici-
ality continues to be "the repository of the general welfare," and
exclusionary zoning which tends to exclude low-moderate cost
housing remains a viable alternative to California cities.

The California Environmental Quality Act (CEQA) also
includes zoning and planning within its scope. In the context
of environmental quality, an exclusionary zoning ordinance
takes on added controversy. Such an ordinance has often been
designed to protect the environment, and yet it may have
impact on population density outside an enacting city or a
significant effect on resource allocation in the regional area.

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10. The term "exclusionary zoning" as used in this comment refers to land-use
controls imposed through ordinances that directly or indirectly bar low-moderate cost
housing in a community. Such exclusion occurs, for example, through minimum floor
space requirements for residences, restrictions on the number of bedrooms per resi-
dence, or an outright ban on multiple dwellings. See Williams & Norman,
Exclusionary Land Use Controls: The Case of North-Eastern New Jersey, 22 SYRACUSE
11. See generally Susanna, Remedying Exclusionary Zoning Practices in
12. Charter cities in California are incorporated under art. XI, § 3 of the
California Constitution. They are fairly autonomous with respect to municipal affairs.
General law cities, in contrast, are incorporated under the general laws adopted by the
legislature. For a description of the municipal affairs doctrine, see text accompanying
notes 43-48 infra.
13. Comment, So You Want to Move to the Suburbs: Policy Formulation and
the Constitutionality of Municipal Growth-Restricting Plans, 3 HASTINGS CONST. L.Q.
14. See, e.g., Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974);
Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291
(9th Cir. 1970); Confederacion de la Raza Unida v. City of Morgan Hill, 324 F. Supp.
885 (N.D. Cal. 1971).
as a comprehensive planning tool, see Comment, Aftermath. Friends of Mammoth and
the Amended California Environmental Quality Act, 3 ECOLOGY L.Q. 349, 381-89
(1973).
17. See 1 A. RATHKOFF, supra note 2, §§ 7.01-.02, for discussion of wetlands
zoning and flood plains zoning.
597 (1965).
CEQA requires that an Environmental Impact Report (EIR) be filed if a project has the potential to cause a significant effect on the environment.20 Included within CEQA's meaning of "project" is the "enactment and amendment of zoning ordinances . . . ."21

This comment will examine whether the enforcement of exclusionary zoning ordinances constitutes a "project" subject to the EIR requirements of CEQA. Before concluding that an exclusionary zoning ordinance is such a project, the comment will first briefly discuss the general background of the zoning power, highlighting the derivation of it and the general welfare concept which serves to legitimize it. Secondly, a discussion of the municipal affairs doctrine will show why exclusionary zoning should not be considered strictly a municipal affair. Finally, the comment will explain why exclusionary zoning is a project that should require an EIR and what the legal significance of this requirement would be. The discussion will draw on California case law to interpret CEQA requirements as well as to show the state's general judicial disposition toward exclusionary zoning.

ZONING FOR THE GENERAL WELFARE

The municipal zoning power is considered a valid exercise of the police power.21 The power to zone is delegated to cities through the state's enabling legislation.22 The city, in exercis-
ing its power through its local zoning authority, acts as a dele-
gate of the state’s power. In that position, it is required to zone for the general welfare and to assure equal protection of the laws.23

Initially, municipal zoning was associated with the prohibi-
tion of nuisances and hazardous activity.24 In the landmark case of Village of Euclid v. Ambler Realty Company,25 the United States Supreme Court for the first time reviewed the validity of zoning pursuant to a comprehensive plan. The Court upheld the right of a city to enact such a plan by restricting uses in designated districts.26 In addition, the Court held that it was a valid exercise of the police power to exclude uses even though they were not nuisances or hazardous activity.27 The Court declared that before a zoning ordinance can be invalida-
ted, “it must be said . . . that [its] provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”28

California cases have confirmed the validity of zoning as an exercise of the police power if it bears a “reasonable relation to the public welfare.”29 Moreover, state courts have consistently held that a zoning ordinance carries the presumption of validity,30 explaining the theory in the following manner:

The courts may differ with the zoning authorities as to the “necessity or propriety of an enactment,” but so long as it remains a “question upon which reasonable minds might

23. See generally 1 A. RATHKOFF, supra note 2, § 4.02.
24. Thus, the choking off of light and air, the danger of fire, to-
gether with congestion, noise, traffic, dust, fumes, smoke, soot, the spread of contagious disease, and the attraction of rodents and insects are well-recognized evils which the cases on bulk and residential use zoning set forth as proper considerations in zoning control.
26. Id. at 388.
27. Id.
28. Id. at 395.
differ," there will be no judicial interference with the municipality's determination of policy.\textsuperscript{31}

Thus, as the Supreme Court concluded in \textit{Euclid} and again in \textit{Zahn v. Board of Public Works},\textsuperscript{32} "[i]f the validity . . . be fairly debatable, the legislative judgment must be allowed to control."\textsuperscript{33}

In a few states, this deference to legislative judgment has been replaced by a more exacting review when an exclusionary zoning ordinance is challenged.\textsuperscript{34} California courts, however, generally uphold an exclusionary ordinance shown to have a reasonable relation to the public welfare.\textsuperscript{35}

Nevertheless, in a recent case, \textit{Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore},\textsuperscript{36} the California Supreme Court asked, "Whose welfare?" and concluded that an ordinance must relate to the welfare of those whom it significantly affects.\textsuperscript{37} This view potentially expands the concept of general welfare beyond the traditional limits of a municipality's borders. In addition, there is significant dicta in judicial decisions indicating an awareness of the effect that an exclusionary ordinance can have on the critical housing situation and on environmental objectives in general.\textsuperscript{38} A federal

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\textsuperscript{31} Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 605, 557 P.2d 473, 486, 135 Cal. Rptr. 41, 54 (1976), citing Clemons v. City of Los Angeles, 36 Cal. 2d 95, 98, 222 P.2d 439, 441 (1950).
\textsuperscript{32} 274 U.S. 325 (1927).
\textsuperscript{33} Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).
\textsuperscript{34} See, e.g., Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (1971) (housing needs encompassed within general welfare; general welfare does not stop at municipal border); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970) (exclusive zoning regulation invalid to unnaturally limit population growth).
\textsuperscript{35} E.g., Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974).
\textsuperscript{36} 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).
\textsuperscript{37} Id. at 608, 557 P.2d at 488, 135 Cal. Rptr. at 56.
\textsuperscript{38} While we recognize the ominous possibility that the contributions required by a city can be deliberately set unreasonably high in order to prevent the influx of economically depressed persons into the community, a circumstance which would present serious social and legal problems, there is nothing to indicate that the enactments of Walnut Creek in the present case raise such a spectre.
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\textit{Associated Home Builders of Greater Eastbay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 648, 484 P.2d 606, 618, 94 Cal. Rptr. 630, 642 (1971).}

\[T]\e plan may frustrate some legitimate regional housing needs . . . .

We agree with appellees that unlike the situation in the past most municipalities today are neither isolated nor wholly independent from neighboring municipalities and that, consequently, unilateral land use decisions by one local entity affect the needs and resources of an entire region.
court in *Southern Alameda Spanish Speaking Organization v. Union City*\(^\text{38}\) aptly stated:

>Surely, if the environmental benefits of land use planning are to be enjoyed by a city and the quality of life of its residents is accordingly to be improved, the poor cannot be excluded from enjoyment of the benefits. Given the recognized importance of equal opportunities in housing, it may well be, as matter of law, that it is the responsibility of a city and its planning officials to see that the city’s plan as initiated or as it develops accommodates the needs of its low-income families. . . .\(^\text{40}\)

Such language reflects the courts’ concern for accommodating social needs while pursuing environmental objectives. A basic underlying question is whether zoning may continue to be used “to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring.”\(^\text{41}\) It is helpful to refer back to the *Euclid* decision. Although it validated zoning as a proper municipal use of the police power, it also contained a strong caveat: “[There is] the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.”\(^\text{42}\)

In the context of this “possibility,” it may be necessary for municipalities to balance development and preservation interests to promote the general welfare. In analyzing whether an exclusionary zoning ordinance is a CEQA “project,” a threshold issue is whether municipalities owe responsibilities to those outside their borders.\(^\text{43}\)

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\(^{38}\) Id. at 283.

\(^{39}\) Construction Indus. Ass’n, Sonoma City v. City of Petaluma, 522 F.2d 897, 908 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976).

\(^{40}\) Id. at 295-96.


\(^{42}\) 272 U.S. at 390.

EXCLUSIONARY ZONING

THE MUNICIPAL AFFAIRS DOCTRINE—RECOGNITION OF EXTERNAL EFFECTS

The doctrine of municipal affairs stems from constitutional provisions\(^{44}\) that enable charter cities to "control their own affairs to the fullest possible extent. . . ."\(^{45}\) The primary purpose of the doctrine is to prevent state legislative interference with matters that are considered to be strictly the municipal affairs of charter cities.\(^{46}\) If a state legislates on a matter determined to be a municipal affair, local law will control.\(^{47}\) On the other hand, a state regulation on a matter determined to be of statewide concern will prevail over local regulation in the event of a conflict.\(^{48}\)

There are judicially developed factors that determine whether a matter is a municipal affair or one that is of statewide concern. These factors are important to show why exclusionary zoning should be considered a "project" subject to CEQA requirements. The issue of whether exclusionary zoning is a matter of statewide concern is not determinative of its qualification as a "project" under CEQA. However, the factors that support its treatment as such suggest that it is more than purely a municipal affair.

Local Projects with External Effect—Not a Municipal Affair

Courts have generally considered the adoption of a zoning ordinance or a general plan to be a municipal affair.\(^{49}\) However, they have not yet decided whether a zoning ordinance which has an external effect outside an acting municipality’s borders should remain a municipal affair. Cases that held that a municipal project extending beyond a city’s borders is not a municipal affair lend support to the proposition that a zoning

\(^{44}\) The derivation of the doctrine is from Cal. Const. art. XI, which provides:
It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.

\(^{45}\) Fragley v. Phelan, 126 Cal. 383, 387, 58 P. 923, 925 (1899).

\(^{46}\) See The Municipal Affairs Doctrine, supra note 22, at 434-36.

\(^{47}\) Bishop v. City of San Jose, 1 Cal. 3d 56, 61, 460 P.2d 137, 140, 81 Cal. Rptr. 465, 468 (1969).

\(^{48}\) Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 292 n.11, 384 P.2d 158, 168 n.11, 32 Cal. Rptr. 830, 840 n.11 (1963).

\(^{49}\) E.g., Brougher v. Board of Public Works, 205 Cal. 426, 271 P. 487 (1928).
ordinance shown to have an external effect should similarly be considered.

Two early California cases dealing with municipal projects reflect the acceptance by courts of the contention that local activities which affect inhabitants outside an acting city's borders are not municipal affairs over which a municipality may exercise exclusive control.

In *Gadd v. McGuire*, the court upheld the constitutionality of the City Boundary Line Act, which authorized the construction of sewers and drainage systems along streets that form or intersect municipal boundaries. Concluding that the ordinance did not deal with a municipal affair, the court explained that municipal improvements may "become affairs of a broader scope which cannot be handled adequately by the municipal authorities of a single city or town for the reason that they . . . affect the inhabitants . . . of two or more cities . . ." 

The court restricted municipal affairs to projects that are contained exclusively within a city's borders and which do not affect outside residents. It implied that local regulations are too narrow in scope to deal adequately with a matter that is of concern to two or more cities and that enforcement of a local ordinance in such a situation would interfere with the interests of a neighboring city. What would ordinarily be a municipal affair became a matter of broader concern by virtue of its external impact. Consequently, the court held that it was not a matter for exclusive municipal control.

A similar conclusion was reached in *City of Pasadena v. Chamberlain*, in which the court upheld the constitutionality of the Metropolitan Water District Act. The court held that because the subject matter of the Act transcended municipal borders, it was not a municipal affair. The court pointed out that the proper allocation of water required cities to act collectively. The implication was that cities would be ineffective acting alone.

51. Id. at 351, 231 P. at 756.
52. Id. at 357, 231 P. at 759.
53. Id. at 355, 231 P. at 757.
54. 204 Cal. 653, 269 P. 630 (1928).
55. Id. at 660, 269 P. at 633.
56. Id.
57. Id.
Both Gadd and Chamberlain illustrate that a court will determine what constitutes a municipal affair based on the scope of a matter, its effect on outside interests, and whether it can be handled effectively on a local level. Though both cases differ factually from a situation involving a zoning ordinance, they support the idea that the same considerations of scope, effect, and local resolution would be appropriate in determining whether the subject of a zoning ordinance is one for exclusive local control.

In a more recent case, the court relied heavily on the general public interest in a utility in determining that it was not a municipal affair. The court in Pacific Telephone and Telegraph Company v. City and County of San Francisco rejected a city’s contention that it had exclusive control over the construction and maintenance of telephone lines within the city. The court held that the matter was one of statewide concern due, in part, to the scope of the matter (the state’s telephone communication system) and the possible effect of the city’s action outside its borders. In contrast with Gadd and Chamberlain, there was no evidence of foreseeable effect, merely the possibility that exclusive control by the city would interfere with the state’s telephone network. Nevertheless, the court was persuaded to rule against the city because of “the interest of the people throughout the state in the existence of telephone lines in the streets in the city...”

Apparently, statewide public interest in the integrity of a statewide communication system outweighed any municipal interest in exclusive control over telephone construction within city limits. The implication with respect to exclusionary zoning is that statewide concern in providing low-moderate cost housing may outweigh a municipal interest in exercising exclusive control over all land-use decisions within its borders. If the external effect of exclusionary zoning were substantiated by evidence, then it should weigh at least as heavily as did the speculative effect of exclusive municipal control in Pacific Telephone.

59. Id. at 773, 336 P.2d at 518.
60. If the telephone lines were removed from the streets in the city, the people throughout the state, the United States, and most parts of the world who can now communicate directly by telephone with residents in the city could no longer do so.
61. Id. at 774, 336 P.2d at 519.
External Effect—New Significance in an Environmental Context

It follows from Gadd, Chamberlain, and Pacific Telephone that the recognition of general interest beyond a municipality’s borders may be determinative of whether a matter is of statewide concern. Courts have shown that where there is a recognized general interest in land-use decisions that affect an entire region, the powers of planning and zoning likewise cease to be purely local in nature or in purpose.

This point was illustrated in Younger v. El Dorado County. In that case, certain counties refused to contribute their share of funds to the Tahoe Regional Planning Agency, contending that the Agency’s powers to formulate and enforce a regional plan violated their constitutional grant of power over local affairs. The court upheld the constitutionality of the Agency’s powers based on the conclusion that the subject matter was of regional, rather than local, concern. The court emphasized that “[t]he unique scenic attributes which the Agency must preserve are enjoyed not only by the residents of the region but also by large numbers of the state’s general citizenry.” The Agency’s role was even recognized as a matter of concern not only to California, but also “to its neighbors and, indeed, to the entire country.”

In Younger, the broad interest in a particular scenic region of the state transformed a traditionally municipal affair (planning and zoning) into a matter of statewide concern. The transformation required a broad perspective. In particular, the court emphasized the need to respond to changing conditions and to adjust methods and concepts accordingly:


62. 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971).
63. The Planning Agency was organized pursuant to the Tahoe Regional Compact. The Compact was formed between California and Nevada. It gives the Planning Agency jurisdiction over the Tahoe region to formulate and enforce a regional plan. See Cal. Gov’t Code § 66801 (West Supp. 1978).
64. Id. at 492, 487 P.2d at 1199-1200, 96 Cal. Rptr. at 559-60.
65. Id. at 494, 487 P.2d at 1201, 96 Cal. Rptr. at 561.
66. Id. at 491-92, 487 P.2d at 1199, 96 Cal. Rptr. at 559.
67. Id. at 485, 487 P.2d at 1194, 96 Cal. Rptr. at 554.
changing conditions upon which it is to operate.'" [Citations omitted]. When the effects of change are felt beyond the point of its immediate impact, it is fatuous to expect that controlling such change remains a local problem to be solved by local methods. Old attitudes confer no irrevocable license to continue looking with unseeing eyes. 18

In Younger, "to continue looking with unseeing eyes" was to ignore the larger dimensions of land-use decisions in the Tahoe region and to avoid control of the effects of local action on the area's environment.

The effects of local activity took on even broader dimensions in CEEED v. California Coastal Zone Conservation Commission. 69 There, the court held that the Coastal Conservation Act of 1972 did not constitute an invalid intrusion into the municipal affairs of charter cities. 70 It placed the matter of local activity in the broad context of environmental protection by stating:

Although planning and zoning in the conventional sense have traditionally been deemed municipal affairs, where the ecological and environmental impact of land use affect the people of the entire state, they can no longer remain matters of purely local concern. 71

The courts in Younger and CEEED discussed the municipal affairs doctrine with respect to the constitutionality of powers granted to a regional agency. In both cases, the issue of municipal affairs became collateral to the broader question of resource allocation or how best "to control land use which threatens harm to the state's resources..." 72

While the doctrine of municipal affairs remains a valid concept, the factors which are determinative in a conflict between state and local control are also significant in the context of environmental issues. Given the judicial recognition of the external effect that a local activity may have, there is a need to examine the effects of exclusionary zoning in the broader context of resource allocation. There is a similar need to balance municipal interests with broader concerns in the housing

68. Id. at 497-98, 487 P.2d at 1204, 96 Cal. Rptr. at 564.
70. Id. at 324, 118 Cal. Rptr. at 328.
71. Id. at 323, 118 Cal. Rptr. at 327.
72. Id. at 319, 118 Cal. Rptr. at 325.
situation, and to evaluate the impact of exclusionary practices by one municipality on the region as a whole. An approach that provides a means of achieving this examination is to consider an exclusionary zoning ordinance a "project" under the California Environmental Quality Act.

Is Exclusionary Zoning a "Project" Subject to CEQA Requirements?

CEQA—An Introduction

The California Environmental Quality Act (CEQA)\textsuperscript{73} contains a broad expression of legislative policy which places priority on the "maintenance of a quality environment"\textsuperscript{74} in conjunction with "the general welfare of the people of the state, including their enjoyment of the [state's] natural resources . . . ."\textsuperscript{75} These priorities are emphasized in one of the stated purposes of the Act: "[To c]reate and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations."\textsuperscript{76} It is clear from this general purpose that environmental protection is not an exclusive goal of the Act. Rather, the intent is to promote "a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations."\textsuperscript{77}

The key procedural tool with which the Act's policies are implemented is the Environmental Impact Report (EIR).\textsuperscript{78} The

\begin{footnotes}
\footnote{74. CAL. PUB. RES. CODE § 21000(a) (West 1977).}
\footnote{75. Id. § 21000(e).}
\footnote{76. Id. § 21000(e).}
\footnote{78. CAL. PUB. RES. CODE § 21061 (West 1977). "In many respects the EIR is the heart of CEQA. The report . . . may be viewed as an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environments changes before they have reached ecological points of no return." County of Inyo v. Yorty, 32 Cal. App. 3d 795, 810, 108 Cal. Rptr. 377, 388 (1973). For a thorough treatment on information that should be included in an EIR, see Hildreth, Environmental Impact Reports under the California Environmental Quality Act: The New Legal Framework, 17 SANTA CLARA L. REV. 805 (1977) [hereinafter cited as Hildreth].}
EXCLUSIONARY ZONING

function of the EIR is to serve as an informational document. It is "prepared using a systematic, interdisciplinary approach." Its purposes are: "[T]o identify the significant effects of a project on the environment, to identify alternatives to the project, and to indicate the manner in which such significant effects can be mitigated or avoided." The emphasis of the preparation of the EIR should be on mitigation measures and project alternatives, including the alternative of no project at all.

Exclusionary Zoning as a "Project" under CEQA and the Guidelines

CEQA requires that public agencies "shall prepare, or cause to be prepared . . . an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment." The question arises whether exclusionary zoning constitutes a "project" under both CEQA and the guidelines issued in 1973 by the Secretary of the Resources Agency.

Section 21065 of CEQA defines "project" in terms so broad as to include even activities that have no effect on the environment. Relevant parts provide that "project" means:

(a) Activities directly undertaken by any public agency . . . .
(b) Activities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

Under these broad terms, exclusionary zoning qualifies as a "project." It is clearly an activity undertaken by a public

81. CAL. PUB. RES. CODE § 21002.1(a) (West 1978).
82. See CAL. PUB. RES. CODE § 21003(c) (West 1977); CAL. ADMIN. CODE tit. 14, § 15143(d) (1977).
83. CAL. PUB. RES. CODE § 21151 (West 1977).
84. CAL. ADMIN. CODE tit. 14, §§ 15000-15192 (1977) (issued pursuant to CAL. PUB. RES. CODE § 21063. It has been suggested that California has a three-tier system—the Act, the guidelines, and local regulations that must conform to the first two. See Seneker, The Legislative Response to Friends of Mammoth: Developers Chase the Will-o-the-Wisp, 48 CAL. ST. B.J. 127 (1973).
85. CAL. PUB. RES. CODE § 21065 (West 1977).
86. Id. § 21065(a), (c).
agency, and it involves the issuance of "entitlement for use" each time a permit is granted in accordance with the terms of a zoning ordinance.

Although "project" is defined broadly, CEQA narrows the range of projects to which the Act applies. Nevertheless, "discretionary projects," such as the enactment or amendment of zoning ordinances, are included in the scope of application.\footnote{87} The definition of "project" in the guidelines is also sufficiently broad to include exclusionary zoning ordinances. According to the guidelines, "project" refers to:

[T]he whole of an action, which has a potential for resulting in a physical change in the environment directly or ultimately, that is any of the following: . . . enactment and amendment of zoning ordinances and the adoption and amendment of local General Plans or elements thereof. . . .\footnote{88}

Subdivision (c) of that provision serves to emphasize "the whole of an action" by stating that "project" refers to the underlying activity.\footnote{89} This is an important consideration in determining the applicability of CEQA to procedural processes such as the enactment or amendment of a zoning ordinance.

It may be argued that the continued enforcement of a zoning ordinance is not an activity, but merely the continuation of a prior decision—a nonactivity, in a sense. However, the fact that the enactment of an ordinance constitutes a "project" under CEQA supports the idea that enforcement or repeated approval of the ordinance does also.

The issue is partially covered in section 15070 of the guidelines, which discusses "ongoing projects."\footnote{90} The relevant section provides as follows:

(a) A project covered by Section 15037(a)(1) definition of project specified by these Guidelines, approved prior to November 23, 1970, shall not require an Environmental Impact Report . . . unless it is a project which may have a significant effect on the environment . . . .\footnote{91}

\footnote{87. Id. § 21080 (West Supp. 1978).} \footnote{88. CAL. ADMIN. CODE tit. 14, § 15037(a)(1) (1977).} \footnote{89. Id. § 15037(c). "The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies." Id.} \footnote{90. Id. § 15070.} \footnote{91. Id. (emphasis added).}
EXCLUSIONARY ZONING

It appears safe to conclude from this section that the technical nature of an activity—whether it is the enactment of a zoning ordinance as opposed to its continued enforcement—is not the critical issue in determining whether there must be CEQA compliance. Rather, the issue is whether an activity "may have a significant effect on the environment."92

The continued enforcement of exclusionary zoning qualifies as an ongoing project having a significant environmental effect. Since exclusionary zoning may have an impact on neighboring communities93 contending with a serious housing shortage, it is reasonable to expect the continued enforcement of an exclusionary ordinance to have a significant regional impact on land use, and thus, on the environment.94 Recent case law lends judicial support to this statutory analysis.

Judicial Interpretation

Judicial decisions are important sources of information in interpreting CEQA requirements.95 They are a vital supplement to the language of the guidelines. The court in County of Inyo v. Yorty,96 for example, clarifies the factors determinative of whether an ongoing project must comply with CEQA. The court was faced with the specific issue of whether an "ongoing project," the structural part of which had been completed prior to the enactment of CEQA, was nevertheless subject to CEQA requirements.97

Yorty involved the City of Los Angeles and its controversial water project in the Owens Valley. Inyo County, where the valley is located, sought injunctive restraints on the extraction

93. "The Legislature finds and declares that... there exists within the urban and rural areas of the state a serious shortage of decent, safe, and sanitary housing which persons and families of low or moderate income, including the elderly and handicapped, can afford." CAL. HEALTH & SAFETY CODE § 50003 (West Supp. 1978).
94. See A. Jokela, SELF REGULATION OF ENVIRONMENTAL QUALITY (1975). But cf. Aloi, Recent Developments in Exclusionary Zoning: The Second Generation Cases and the Environment, 6 Sw. U. L. Rev. 88 (1974) (preservation of environmental values may result in exclusion of certain income and racial groups from acting communities); Ackerman, Impact Statements and Low Cost Housing, 46 S. CAL. L. Rev. 754 (1973) (impact statements could lead to ad hoc planning, exclusion of low-cost housing, increased costs).
95. See Hildreth, supra note 78, at 806.
97. Id. at 802, 108 Cal. Rptr. at 382.
of groundwater for export from the valley. It also sought a mandatory injunction requiring the City of Los Angeles to file one or more environmental impact reports.

The city contended that the extraction and exportation of groundwater was an inherent part of its second aqueduct, a project that had been completed prior to the enactment of CEQA. The city argued that, as such, its groundwater extraction program was not subject to CEQA requirements.

The court rejected the city's argument. It noted that the ecological impact on the second aqueduct, in terms of the continued increase in amount of groundwater extraction, was of such mounting severity as to fall within the policy concerns of CEQA. The court concluded that the extraction of groundwater for exportation through the aqueduct constituted a second project within the scope of the Act. It issued a writ of mandate directing Los Angeles and its Department of Water and Power to file an environmental impact report on the extraction of groundwater from the valley despite the inception of the project before the enactment of CEQA.

The court's broad interpretation of the term "project" is significant in its focus on the environmental impact of an activity rather than on a functional definition. Under this interpretation, a "project" may be that part of an original activity that continues to have an impact on the environment. This is an important distinction in the case of exclusionary zoning ordinances that have increasing impact in view of rapid population growth and a critical housing shortage.

The court determined that the ongoing project required an EIR based on "substantial evidence" that continuance of the subsurface extraction might have a significant effect on the environment. This use of evidence illustrates the lack of a standard to determine when an ongoing project requires an EIR. The decision was based on the particular facts of the case. Nevertheless, the court in Inyo emphasized in its ad hoc

98. Id. at 798, 108 Cal. Rptr. at 379.
99. Id.
100. Id.
101. Id.
102. Id. at 806, 108 Cal. Rptr. at 385.
103. Id.
104. Id. at 815-16, 108 Cal. Rptr. at 391.
105. Id. at 809, 108 Cal. Rptr. at 387.
106. This is similar to the ad hoc determination of whether a matter has such
decision that "the highest priority shall be given to environ-
mental considerations."107

Major judicial decisions consistently reinforce this prior-
ity. As a result, courts require minimal evidence to establish
that a project may have a significant environmental effect. For
example, the Ninth Circuit Court of Appeals in City of Davis
v. Coleman108 explained that the "significant effect" test is met
when a plaintiff "allege[s] facts which, if true, show that the
proposed project would materially degrade any aspect of envi-
ronmental quality."109

Placing the same priority on environmental considera-
tions, the California Supreme Court in No Oil, Inc. v. City of
Los Angeles110 significantly expanded the applicability of
CEQA by adding that "the existence of serious public contro-
versy concerning the environmental effect of a project in itself
indicates that preparation of an EIR is desirable."111

The requirement of an EIR in situations of controversy is
also covered in the guidelines. Section 15081 provides:

[W]here there is, or anticipated to be, a substantial body
of opinion that considers or will consider the effect [of the
project] to be adverse, the lead agency should prepare an
EIR to explore the environmental effects involved.112

The No Oil decision and the guidelines strongly indicate
that the mere anticipation of debate over whether a project
may have a significant effect is sufficient grounds to require an
EIR. The requirement is reasonable in light of the fact that the
EIR is to serve as "an informational document." If the top
priority is to "afford the fullest possible protection to the envi-
ronment," then the requirement of an EIR to provide factual
certainty in a debatable issue is a necessary safeguard.113

Based on judicial interpretation of CEQA requirements
and on the guidelines, it is reasonable to treat exclusionary

107. 32 Cal. App. 3d at 804, 98 Cal. Rptr. 384.
108. 521 F.2d 661 (9th Cir. 1975).
109. Id. at 673.
111. Id. at 85-86, 529 P.2d at 78, 118 Cal. Rptr. at 46.
113. Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d at 259, 502 P.2d at
1056, 104 Cal. Rptr. at 768.
zoning as an ongoing project which may have a significant effect on the environment. The attendant controversy over the effect of land-use decisions on surrounding cities, on population density, or on the housing market is adequate reason to require that continued enforcement of exclusionary zoning ordinances be the subject of an EIR.

The Significance of Applying CEQA to Exclusionary Zoning

One of the results of applying the EIR requirement to exclusionary zoning would be the inclusion of a regional perspective in a municipality's decision. Section 15142 of the guidelines stresses that an EIR describe the environment around the project "from both a local and regional perspective." An important part of this description must include "related projects" in the region "for purposes of examining the possible cumulative impact of such projects." In the context of exclusionary zoning, this might entail the description of municipal ordinances throughout the region and the cumulative impact of them on the allocation of regional resources.

The importance of a regional perspective was alluded to by the court in *Environmental Defense Fund v. Coastside County Water District.* The case was the first to decide that the courts may review the sufficiency of an EIR. In reaching its decision, the court pointed out that "[t]hose who prepare the EIR may not limit their vision by the boundaries of the district, nor by purely physical auxiliaries or obstacles to a project's success which may be found beyond the borders."

The court also strongly implied that social as well as purely environmental ramifications be discussed in the EIR stating that: "[T]he preparation of the EIR demands thoughtful consideration of public interests transcending such neces-

117. Id. at 704, 104 Cal. Rptr. at 202.
EXCLUSIONARY ZONING

sary elements as always have been present, e.g., engineering and economic feasibility.” It is unclear to what extent social information should be included in an EIR. CEQA and the guidelines both support the inclusion of such information. Both recognize any “adverse effects on human beings” as one of the criteria by which to determine whether a project may have a significant environmental effect.

Where an exclusionary zoning ordinance is the subject of a report, it would be helpful to neighboring cities to include information on social effects. This information would help them determine the exclusionary project’s impact on the area’s quality of life, probably one of their major concerns.

CEQA would provide a conceptual, as well as legal framework in which to consider the environmental effects of an exclusionary ordinance. Although the Act defines “environment” in terms of physical conditions, the concept quickly assumes much broader social ramifications when the criteria for “significant effect” are considered.

An EIR on exclusionary zoning, prepared according to the above directives, would be not only an “informational document,” but also a strong commentary on the validity of an exclusionary ordinance. This follows from the statement in Livermore that an ordinance, to be valid, must “reasonably relate to the welfare of those whom it significantly affects.”

A properly prepared EIR would attest to the reasonableness of an ordinance in light of its external impact.

In short, subjecting exclusionary zoning to CEQA requirements would not only force a city to consider environmental effects within its own borders, but would also compel it to make decisions with regional environmental consequences in mind. This function of an EIR would compliment the judicial decision in Scott v. City of Indian Wells and also de-emphasize the traditional concept of zoning as a purely municipal affair.

In Scott, the controversy stemmed from the issuance of a conditional use permit by a city to allow major development on land just within its borders. Property owners on the other side

118. Id.
119. CAL. PUB. RES. CODE § 21083(c) (West 1977) (repeated in CAL. ADMIN. CODE tit. 14, § 15082(d) (1977)).
120. See CAL. PUB. RES. CODE § 21060.5 (West 1977).
121. 18 Cal. 3d 582, 607, 557 P.2d 473, 487, 135 Cal. Rptr. 41, 55 (1976).
122. 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972).
of the border brought an action to void the city's grant of permit, claiming that the planned development would destroy their view. The court rejected the city's claim that its ordinances applied only to areas within its borders. The court held that nonresident adjacent property owners have standing to challenge zoning decisions adverse to their property interests. The court also concluded that the city had a duty to give notice to all affected landowners and to consider their views and the effect of the proposed zoning ordinance on their property.

Although the court's decision applied specifically to adjacent nonresident landowners, the court recognized in dictum that "local zoning may have even a regional impact." Thus, there was an implication that an acting municipality may have a duty to consider the effects of a land-use decision on an entire region.

One of the major functions of the EIR is to inform governmental agencies and the public in general about a project's environmental impact. Part of the procedure in filing a report is to invite public participation in the decision-making process.

Preparation of an EIR by an acting municipality would not only alert neighboring cities to the potential external effects of a particular land-use decision; it might also serve to substantiate their claims that a city was acting adversely to their interests. Thus, other municipalities in the same region would be entitled to comment on a municipality's EIR with respect to an exclusionary zoning ordinance and to have their comments considered during the review process.

Application of CEQA to exclusionary zoning would legalize the decision-making process. The court in County of Inyo v. City of Los Angeles alluded to this aspect when it reviewed the city's EIR, filed pursuant to a 1973 writ of mandate. Inyo County objected to the report's sufficiency and the court sus-

123. Id. at 545, 492 P.2d at 1139, 99 Cal. Rptr. at 747.
124. Id. at 548, 492 P.2d at 1141, 99 Cal. Rptr. at 749.
125. Id. at 549, 492 P.2d at 1142, 99 Cal. Rptr. at 750.
126. Id.
127. Id. at 548, 492 P.2d at 1141, 99 Cal. Rptr. at 749.
129. See City of Davis v. Coleman, 521 F.2d 661, 672 (9th Cir. 1975).
EXCLUSIONARY ZONING

The court noted that the EIR recommended proposals for large-scale projects for the entire aqueduct program. These proposals, adopted in a resolution by the Los Angeles Board of Water and Power Commissioners, went far beyond the project description in the EIR. The court concluded that the modest EIR description in the initial project provided a questionable basis for the broad proposals. As a result, the report was held to be legally insufficient.

Although the court confined its decision to whether or not the EIR complied with CEQA, it cast doubt on the legality of the Board's approval of the large proposals. The court stated in dicta that "a legally sufficient EIR is a precondition to legality of the public agency's approval resolution. . . ." By strong implication, the court interpreted the EIR requirement to be a necessary step in an agency's decision-making process.

The significance of this interpretation, especially with respect to land-use planning, is in the establishment of procedures that require full disclosure of the factors that shape an agency's final decision. The enforcement of such a system through active judicial review of the sufficiency of the EIR (as in the Inyo case) would limit parochial decision-making. In addition, the decision itself, to be a valid exercise of power and thus, to be legally binding, would be conditioned upon sufficient compliance with CEQA.

CONCLUSION

Rapid population growth and a critical housing situation create demands on natural resources. The challenge facing many municipalities today is how best to accommodate social and economic demands while pursuing environmental goals. The answer does not lie in exclusionary zoning, for the environmental benefits it may bring to one community translate into increased population density and attendant problems for others.

Since cities form an interdependent regional complex, it is reasonable that they infuse a regional perspective into their land-use policies. One of the ways to achieve this is to subject

133. Id. at 200, 139 Cal. Rptr. at 406. The court also held that the EIR failed to describe all reasonable alternatives to the project. Id. at 203, 139 Cal. Rptr. at 408.
134. 71 Cal. App. 3d at 204, 139 Cal. Rptr. at 408.
their land-use decisions to the requirements of CEQA, especially where the policies of one community have an impact on another. It is hoped that the result would be to replace unilateral exclusion with regional harmony.

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