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"Zoning Shall Be Consistent with the General Plan"-A Help or a Hindrance to Planning?

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"ZONING SHALL BE CONSISTENT WITH THE GENERAL PLAN"—A HELP OR A HINDRANCE TO PLANNING?

The past few years have produced a growing public interest in ecology and the environment and increasing citizen concern about land use and planning. This was recently evidenced in California with the passage, by 55% of the voting electorate,[1] of Proposition 20, which established regional coastline regulatory commissions. The California Legislature, reflecting the presumed concerns of its constituents, in 1971 passed Assembly Bill 1301[2] adding to and amending the present procedures for land use planning in California. This paper deals only with § 12[3] of the Bill which reads:

> County or city zoning ordinances shall be consistent[4] with the general plan of the county or city by January 1, 1973.[5] Any resident or property owner within a city or county . . . may bring an action in the superior court to enforce compliance . . . .

This new law has generated confusion and consternation among government officials, planners, and land owners in at least two major areas. First, what does "consistent with the general plan" mean? Does the general plan in effect attain the status of a zoning ordinance? Or, is there some leeway for discrepancy between the plan and zoning and, if so, how much? Secondly, will cities and counties be subject to inverse condemnation suits for private lands which are planned (and now "consistently zoned") for public use (e.g. park sites, school sites, etc.) or for land which has substantially decreased in value?

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1. The San Diego Union, November 10, 1972, at A-7.
2. A.B. 1301, Stats. 1971, ch. 1446, amends §§ 11510, 11511, 11526, 11535, and 11540.1 of, and adds §§ 11526.1, 11549.5, and 11549.6 to, the CAL. BUS. & PROF. CODE (West Supp. 1973) and amends § 65850 of, adds §§ 65450.1, 65451 and 65452 to, and repeals § 65461 of the CAL. GOV. CODE (West Supp. 1973).
3. CAL. GOV. CODE § 65860 (West Supp. 1973).
4. Amended in 1972 by A.B. 1725 to define "consistent". CAL. GOV. CODE § 65860 (West Supp. 1973).
5. Amended in 1972 by S.B. 1239 to extend this date to July 1, 1973. CAL. GOV. CODE § 65860 (West Supp. 1973).

"CONSISTENT WITH THE GENERAL PLAN"

Zoning and the general plan are very interrelated in that they both deal with land use. However, there are certain inherent difficulties in reconciling the two if zoning has not been enacted with the general plan in mind, because each performs an essentially different function.

The General Plan. The general plan is a "long-term general outline of projected development,"[6] a planning document which is developed administratively and approved legislatively[7] to serve as a guide to specific decisions concerning future land use. As a guide, of course, it need not be adhered to strictly. The value of a general plan quite obviously depends on the competence of the persons preparing it, the validity of the data utilized, the reasonableness of the projections drawn therefrom, the age of the document, and the extent of review it has had. But, more importantly, if a well drawn general plan is to have any real meaning, there must be a commitment by the decision makers to keep their land use decisions within the spirit of the plan.

In California, general plans are mandatory[8] but there is no deadline for their completion. The required standard elements to be included are: land use, circulation, housing, conservation, open space, seismic safety, noise, and scenic highways.[9] In 1971 at least four cities were still in the process of developing their general plans.[10] At the same time, numerous cities and counties reported that standard elements in their general plans had not been adequately covered.[11] This clearly indicates that for some local governments the general plan is not a final document—neither completed nor inflexible. It also highlights the need for continuing review and amendment of the plan, where needed, on a periodic basis. Indeed, difficult decisions of land use planning may well have been postponed because the general plan was considered to be only a vague and general guide.

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6. Haar, *In Accordance with a Comprehensive Plan,* 68 HARV. L. REV. 1154, 1156 (1955).

7. Notice must be given and at least one public hearing held before the plan can be approved or amended by the planning commission. After this approval, the plan is transmitted to the city or county legislative body and another public hearing held. Adoption of the general plan is by resolution of the legislative body. CAL. GOV. CODE §§ 65350-65360 (West 1966).

8. CAL. GOV. CODE § 65300 (West 1966).

9. CAL. GOV. CODE § 65302 (West Supp. 1973).

10. Perry, *The Local 'General Plan' in California,* 9 SAN DIEGO L. REV. 1, 4 (1971).

11. *Id.* at 8.

The Specific Plan. Specific plans for particular areas may be drawn up to reflect proposed future development or redevelopment of a circumscribed neighborhood.[12] These plans may be incorporated into the general plan and as such become an integral part of it.[13] Thus, although most of the general plan will be extremely vague as outlined above, certain parts of it will pinpoint particular future land uses.

Zoning and the Comprehensive Plan. In contrast to the vast majority of the general plans, zoning is precise and legally restricts land use. Zoning is by ordinance and is binding unless legislatively changed. In developed areas it can be characterized as static in that it reflects only the current state of affairs. As to undeveloped areas, it either reflects a prediction as to what should and could happen, or it is a low density zone allowing for rezoning if a change in usage is deemed desirable. Although variances and rezoning are permitted, zoning is legally oriented to the here and now, whereas the general plan was oriented to what is to come.

The term "comprehensive (zoning) plan" has not been clearly defined by the courts. It is not specifically a separate act or document but rather an operational concept. Essentially, the comprehensive plan is the rationale which causes the zoning to take the form it does. Such a plan must cover the entire area in question, be internally consistent, and serve the interests of the whole community rather than some special interest group. If the scheme of separating uses, through the adoption of the zoning ordinances, reflects the comprehensive planning idea and is otherwise reasonably related to the police power and applied impartially, then zoning ordinances which conform to the comprehensive plan are valid.

The Interrelationship between Planning and Zoning. Theoretically, of course, planning should precede zoning since, although "(z)oning is not devoid of planning . . . it does not include the whole of planning."[14] However, until now, in California the prep-

12. CAL. GOV. CODE §§ 65450, 65451 (West 1966 *as revised in* West Supp. 1973).

13. At least two noticed public hearings, one before the planning commission and one before the legislative body, must be held before it is adopted by resolution or ordinance. CAL. GOV. CODE §§ 65500-65507 (West 1966 *as revised in* West Supp. 1973).

14. O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 780, 42 Cal. Rptr. 283,

aration of a general plan was not a necessary precondition for adopting or enforcing a zoning ordinance.[15] On the other hand, this did not mean that zoning could be unplanned or haphazard. By 1925, the California courts were considering the validity of a particular zoning ordinance by referencing it to the comprehensive zoning plan.[16] However, in more recent cases, some California courts have indicated that the validity of a zoning ordinance was (or should be) evaluated in terms of a general or master plan of development other than the comprehensive zoning plan. For example, in *Clemons v. City of Los Angeles*,[17] the court referred to a master plan of which zoning was a part, and affirmed the trial court's judgment upholding the ordinance in part because it ". . . constitutes an essential part of the master plan for the (c)ity. . . ."[18] Likewise in *O'Loane v. O'Rourke*,[19] albeit in dictum, the court felt that future zoning would be judged at least partly by its "fidelity to the general plan"[20] which was then under consideration. In short, the courts have already shown a tendency to evaluate zoning ordinances in terms of the general plan as actually adopted.

In addition to the trend reflected in these decisions, the Legislature, prior to the enactment of A.B. 1301, had enunciated its policy that "future growth of the state should be guided by an effective planning process."[21] But, although planning was mandated on a statewide basis, implementation was to be effected at the local level[22] and consequently could "frequently (be) motivated by political considerations."[23] On its face, Assembly Bill 1301 remedies this drawback by legislating on a statewide basis that the general plan shall be implemented and that it shall be implemented through zoning. In addition, those areas which had not adopted a general plan are indirectly required to do so by July 1, 1973.[24] In these instances, zoning and development may have been occurring with no general planning. Thus, A.B. 1301 places a limit on the

286 (1965) quoting from Angermeier v. Bourough of Sea Girt, 27 N.J. 298, 142 A.2d 624, 628 (1958).

15. Stats. 1965, c. 1880, p.4349 § 6; Ayers v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949).

16. Miller v. Board of Public Works, 195 Cal. 477 (1925).

17. 36 Cal. 2d 95, 222 P.2d 439 (1950).

18. *Id.* at 99, 222 P.2d at 442.

19. 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (1965).

20. *Id.* at 783, 42 Cal. Rptr. at 288.

21. CAL. GOV. CODE § 65030 (West Supp. 1973).

22. CAL. GOV. CODE § 65800 (West Supp. 1973).

23. Perry, *The Local 'General Plan' in California*, 9 SAN DIEGO L. REV. 1, 23 (1971).

24. CAL. GOV. CODE § 65860 (West Supp. 1973).

time by which a plan must be adopted.

However, as noted above, planning, unless it has been done with foreknowledge that zoning is to follow, may have avoided difficult land use decisions and/or been deliberately vague because it was designed only as a guideline. Or plans may have been abstractly designed so that decision makers would have wide discretion in adopting ad hoc decisions without censure. Whatever the reason for the generality of the plan, it may be entirely inappropriate to impose zoning on it. If zoning must reflect ultimate land use in undeveloped areas, specific land use decisions may be forced now, which could better be made in ten or fifteen years when actual development of the area occurs. Thus, the meaning of "consistency" between zoning and the general plan assumes great importance.

The Legislature, in 1972, enacted A.B. 1725 amending A.B. 1301 to define "consistent" as:

> . . . the various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses and programs specified in such a plan.[25]

But, this does not end the debate and speculation as to the meaning of consistency. It does seem clear, however, that there does not need to be an absolute 1:1 correspondence between the general plan and zoning.

What then are the practical implications of implementing the general plan? Where specific plans have been incorporated into the general plan, developed property may no longer be zoned appropriately. For example, the lot on which a commercial establishment is now situated may be planned (and "consistently zoned") as residential. In this instance, presumably the traditional remedy of nonconforming use would be applicable. Or, a house may now be located in an area which in the future is to become a park. This raises the possibility of an action in inverse condemnation, a topic explored more fully later in this article.

Where there is no specific plan, there need not be a 1:1 correspondence between zoning and planning. Thus, for undeveloped areas, low density zoning would appear to be "consistent," and thus, appropriate. In the past, when the time for development ar-

25. *Id.*

rived and desired zoning was contrary to the general plan, the landowner sought rezoning. Now, one of two possible alternative procedures may develop. The landowner may have to seek an amendment to the general plan and subsequently request a change of zoning to conform to the changed plan. Or the procedure for amending the general plan could merely become an alternative to zoning thus substituting one bureaucratic device for another. In either case, it appears that the critical citizen input and decision making point has changed from zoning to the general plan. Thus, A.B. 1301 seems only to change the procedure and not the substance of land use control in California.

If amending the general plan merely substitutes for rezoning, the procedural change allows the same amount of citizen participation in the decision making process. Two public, noticed hearings are required to change the general plan[26] (unless initiated by the legislative body in the public interest, in which case only one public hearing is necessary),[27] while two are also mandated for a rezoning.[28] However, assuming that the concept of long range land use planning is a valid and valuable one, vigilance must be exercised by planners and decision makers alike so that amendment to the general plan does not become a substantive substitute for rezoning. If the plan is to be responsible to the larger community and to assure a well integrated, harmonious scheme of land use, then its amendment must be viewed in the context of the plan as a whole. To allow these amendments to be responsive to a small coterie of neighboring landowners, similar to a hearing for rezoning, may in many instances, dictate less suitable uses for future development of other lands and/or produce a patchwork quilt of land use without a design.

Arguably the possibility of citizen suits to enforce compliance to this new legislation gives added muscle to the new procedures. However, this obtains only if A.B. 1301 precludes amendment of the general plan. As long as the general plan can be amended to provide the basis for desired zoning, citizen suits are futile. Can the general plan still be amended? There is no doubt that continuing review of the general plan is desirable.[29] Different general plans are developed for differing periods of time[30] and the tech-

26. *See* note 7, *supra.*
27. CAL. GOV. CODE § 65356.1 (West Supp. 1973).
28. CAL. GOV. CODE §§ 65854-65857 (West 1966).
29. *See generally,* Perry, *The Local 'General Plan' in California,* 9 SAN DIEGO L. REV. 1 (1971).
30. For example, the General Plan for the City of San Diego goes until 1985 while the County Plan goes to 1990.

nological advances which make for our rapidly changing society also create a situation where it is increasingly difficult and tenuous to plan very far ahead. Finally, there is no reason why the Legislature would retain the procedure for amending the general plan[31] if there is to be no amendment. Thus, the threat of citizen suits appears slight except as a trigger to inverse condemnation suits and the public hearings surrounding general plan amendments assume far reaching importance to the citizenry.

As long as the general plan can be amended, higher density and use of land can be obtained,[32] provided the change falls within general land uses and programs.[33] Those instrumentalities with the vaguest general plans will have the greatest latitude in future land use decisions and the least possibility of inverse condemnation suits, a potential problem discussed later in this article. The implications for long range planning, as will be detailed later, are clear.

Because zoning must be consistent with and follow planning, arguably the latter becomes tantamount to the former. But it seems clear that this is not the case if only "consistency" and not absolute conformity is required. In addition, the enactment of A.B. 1301 did not change the procedures for adoption of the general plan which presumably the Legislature would have done had it been necessary. Thus, although A.B. 1301 forces planning and zoning to be more closely intertwined it does not make them synonymous.

31. CAL. GOV. CODE § 65356.1 (West Supp. 1973).

32. In the past, planning generally assumed that there would be growth and one purpose of planning was to accommodate that growth. Now the tide has turned and many communities seek to limit growth or to stop it altogether. However, to date, direct controls on growth per se have not been sustained in the courts. Indirect controls such as large lot zoning, temporary moratoria, agricultural zones, etc. have been approved when their purpose has been other than delaying growth.

33. Amendments to the general plan (as well as rezonings) are subject to the California Environmental Quality Act (CEQA), CAL. PUB. RES. CODE § 21000-21174 (West Supp. 1973), which requires that an environmental impact statement be prepared if there is a likelihood that such a change will cause an adverse environmental impact. This report must then be considered by the decision maker before an amendment to the plan can be approved or disapproved. The courts can review the procedural aspects of the report but may not question the wisdom of the decision unless it is capricious or arbitrary. This added step will help assure that environmental factors are taken into account as amendments to the general plan are requested. But it will also increase the costs to the landowner seeking the change, and these costs will, of course, be passed on to the ultimate consumer.

It thus appears that A.B. 1301 remedies three problem areas. For those cities and counties which had not yet complied with the law to develop a general plan, a time limit for adoption has been set.[34] In contrast to previous legislation, the general plan becomes a prerequisite for adopting and for judging the validity of zoning ordinances. Both results further assure that planning will precede zoning and development. In those cities and counties which had previously adopted a general plan, A.B. 1301 mandates that it shall be implemented through zoning. The major effect, however, appears to be a procedural one. It is questionable whether the change will do anything more than transfer ad hoc zoning to ad hoc amendments to the general plan.[35] But, even if we assume to the contrary that A.B. 1301 will eliminate the ad hoc nature of zoning, imposing zoning on the general plan raises the threat of inverse condemnation.

The Threat of Inverse Condemnation

When the government initiates an action to acquire private land for public use or benefit, the land is condemned in an eminent domain proceeding and the owner is compensated for the taking or damage to his property.[36] Inverse condemnation occurs when a landowner believes that his land has in fact been taken or that he has suffered damage from a public improvement although his property has not been formally appropriated nor has he been compensated by a governmental agency. This taking, whether formal or informal, "includes a permanent or temporary deprivation of the owner of its (the property's) use"[37] for the use or benefit of the public.

34. Although a time limit has been set, there is no penalty for failing to adhere to it.

35. Some of the problems pointed out in this article have subsequently been recognized by members of the Legislature. Assembly Bill 1864 has been introduced by Assemblyman Kapiloff but it had not been voted on at the time this article was sent to the printers. The announced intent of this Bill is to "establish a clear separation between the general planning and zoning processes . . . (by) prohibit(ing) concurrent actions and decisions on general planning and zoning matters." In order to accomplish this, only two amendments to the general plan would be permitted each year with a minimum of 180 days separating subsequent amendments. If zoning should become inconsistent with the general plan due to its revision, the zoning would be changed within 90 days. A.B. 1864 does make changes in permitted land uses more time consuming. But, it does not appear that this Bill would materially separate the zoning and planning processes. If all of the proposed amendments to the general plan were to be accumulated and acted upon simultaneously twice a year, ad hoc changes could still be permitted. However, instead of occurring as needed, changes would be in the form of semiannual amendments to the general plan.

36. Cal. Const. art. 1, § 14.

37. Pacific Telephone and Telegraph v. Eshleman, 166 Cal. 640, 664,

In contrast, the power to regulate land use through zoning is derived through the state's police power and to be legitimate must be justified in terms of the public health, safety, or general welfare. The distinction between a taking, which is compensable, and a police power regulation, which is not, has been the center of much litigation and much scholarly discussion. To discuss the distinction at length is beyond the scope of this paper. However, the distinction is crucial since the possibility of inverse condemnation suits arising from the implementation of A.B. 1301 hinge on whether or not there has been a taking.

With the implementation of A.B. 1301, zoning must be consistent with the general plan. Can those persons whose property is thereby rezoned to an economically less valuable use claim inverse condemnation? Not necessarily, since zoning is a function of the police power and as long as the zoning is reasonable (i.e. not arbitrary nor discriminatory) any resulting decrease in land values is not compensable.[38] In fact, unlike some states, no California cases were found in which a claim of inverse condemnation was sustained where there was merely economic harm resulting from regulation. Only if the regulation is unreasonable does the taking occur.

In *Consolidated Rock Products Co. v. City of Los Angeles*,[39] the plaintiff argued that the rezoning of his land to preclude gravel excavation was a taking because this was the only possible economic and fully beneficial use of the land. However, the gravel excavation was a non-conforming use which had been abandoned some twenty years prior. And the court found that there was no taking although the economic value of the land had

137 P. 1119, 1127 (1913).

38. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

39. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962). In a recent case of interest, Selby Realty Co. v. City of San Buenaventura, — Cal. App. 2d —, 104 Cal. Rptr. 866 (1972), the opinion has been vacated pending a hearing by the California Supreme Court. Here a developer was denied a building permit for an apartment house because the general plan dictated a street. The two uses were mutually incompatible (the lot was such that if the street were built the proposed building could not be) and the owner argued that he had lost all value. The Court of Appeal held that the builder had an action in inverse condemnation in part because the proposed city street appeared to benefit the entire public. This opinion, which may be modified or overruled, indicates that only where new zoning effectively destroys the land's value and is used to provide an affirmative improvement to benefit the entire community will there be an action in inverse condemnation.

been virtually destroyed and the agriculture/residential zone did not permit any use in fact.

Will the zoning prescribed by A.B. 1301 result in legitimate claims of inverse condemnation? In those areas of the general plan which are vague blobs of color, it is impossible for the landowner to trace the boundaries of his parcel and thus know what the actual zoning will be. Until a particular lot is planned and thus zoned for a public facility and as such can be pointed out, there can be no possibility of inverse condemnation. However, where specific plans have been incorporated into the general plan and particular sites have been designated for public improvements, the possibility of suits in inverse condemnation is real. In these instances, presumably the zoning has now changed to be consistent with the general plan, and actual or potential commercial and residential properties are now designated as parks, schools, etc. Alternatively a caveat may have been inserted into the plan to the effect that the designated site might, among others, be appropriate for a public facility. It should be noted that the mere possibility that land will be publicly acquired is not a basis for suit.[40] In addition, the mere planning in advance of a public improvement is not compensable unless the governmental body does some unequivocal act. In *Hilltop Properties v. State*,[41] the state had discussed its intentions with the developer who subsequently withheld the necessary land from development for a highway. The court held that, even so, there was no unequivocal act, and consequently there was no compensation. Thus, because an abstract threat of condemnation from the general or specific plan is not a taking, prior to A.B. 1301, this problem did not arise.

However, where by ordinance (i.e. zoning) it is established that certain properties are to be taken under eminent domain, action must be begun within six months or the owner may bring suit in inverse condemnation.[42] In addition, where just an official announcement is made of future condemnation, followed by unreasonable delay in carrying out eminent domain proceedings, the owner may recover for any decline in the value of his property. In *Klopping v. City of Whittier*[43] the city had adopted a resolution to take plaintiff's land, among others, for a parking facility. The city delayed in bringing the suit and the plaintiff was able to re-

40. Heimann v. City of Los Angeles, 30 Cal. 2d 746, 185 P.2d 597 (1947) *disapproved on other grounds* in County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680 (1957).

41. 43 Cal. Rptr. 605, 233 Cal. App. 2d 349 (1965).

42. CAL. CIV. PRO. CODE § 1243.1 (West Supp. 1973).

43. 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

cover lost rentals resulting from the precondemnation announcement as well as the condemnation award. The general plan is also adopted by resolution and thus is simliar to the official action taken in *Klopping*. As such, the governmental body must bring condemnation suits to take all those lands specifically designated within the plan for public facilities immediately after adopting the plan. Otherwise it will be subject to inverse condemnation and, in addition, may be liable for lost value caused by the announcement.

One can get around this problem by adding a caveat to the general plan that the designated site is only one of several possible sites. However, a landowner who suspects that his land may be chosen for public facilities, or whose land is designated as one of the sites, can force the issue by attempting to develop or rezone his property. The governmental body will at that point in time be faced with the decision of whether the land is to be taken for public use or not. If the landowner's application is denied because of the general plan, condemnation will have to begin promptly even though actual public use may be some years in the future. On the other hand, if the applicant is allowed to proceed, the governmental body can acquire the land at a later date but it will have to pay for the improvements thereon as well. This illustrates one of the benefits of advance land acquisition,[44] but it also assumes that money from the public purse will be available to make the purchase. The single impact that money has on the decision to take now or later cannot be overlooked and may well be controlling.

Another possibility for governmental agencies when a landowner seeks inverse condemnation is to amend the general plan, thereby eliminating the public use. If there are a number of equally attractive sites, this might present no problems except for those mentioned previously which are associated with ad hoc amendment of

44. Advance land acquisition prevents costly improvements on needed land, thereby decreasing acquisition costs, allows for better planning and more orderly development, and enables private property owners to undertake development in a manner consistent with already designated public uses. The obvious drawback is money, both for the initial purchases and from the loss from the tax rolls. In addition, the government may well become a large landowner and landlord with attendant administrative problems. *See generally,* Note, 52 MINN. L. REV. 1175 (1968). And what happens if the plan for the proposed site should change and the government ends up holding lands acquired under eminent domain and now available for private use?

the plan. However, the owners of these lands, if they recognize that governmental finances preclude immediate condemnation, may rush to develop their land if it has any higher use. The person who holds his land the longest will have it condemned. If it is not condemned, either the public facility will be eliminated or it will eventually be built on a less suitable site or one of the original group of properties (presumably improved in the interim) will be taken at a greater cost.

In order to avoid the possibility of inverse condemnation suits, specific plans will not be developed and designation of specific public facilities will not be announced until pressures are great or money is available. Alternatively actual decisions will be delayed until a landowner initiates "planning" by bringing suit and decisions will be dictated by the treasury or follow a policy of last resort. In either of these cases, the whole object of planning is defeated and long range planning is undermined.

It is, of course, possible that those parts of specific plans which are subject to possible inverse condemnation suits could be done on an informal basis and not be incorporated into the general plan. This information would then be available when land owners presented specific development plans for the property. But this may not remedy the problem. If the proposed use were denied because of the "informal" data, there would still be the problem of inverse condemnation.

Conclusion

A.B. 1301 was an attempt by the Legislature to insure that all cities and counties would adopt a formal plan of future development and that this plan would then be implemented in a rational way. By placing a time limit on its adoption, all governmental bodies will be forced to comply with the mandate of a general plan. For those instrumentalities that already had a general plan, however, the change may be merely procedural rather than substantive. And, unless there can be a reconciliation between the zoning required by A.B. 1301 and the threat of inverse condemnation or some adequate method of financing acquisition is devised, planning will become more vague as far as public facilities are concerned. Because of the increasing amount of land being used by governmental agencies, this non-planning is not insignificant. It, in turn, will affect the rest of the planning process since the designation of public lands will be unknown or tentative. Thus, instead of implementing the general plan, it may well be that the Legislature has undermined its purpose and function.

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