

California Land Use & Planning Law

PUBLISHER'S NOTE

Before you rely on the information in this book, be sure you are aware that some changes in the statutes or case law may have gone into effect since the date of publication. The book, moreover, provides general information about the law. Readers should consult their own attorneys before relying on the representations found herein.

35th EDITION

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MATTHEW S. GRAY

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Notice

This book is designed to assist you in understanding land use and planning law. It is necessarily general in nature and does not discuss all exceptions and variations to general rules. Also, it may not reflect the latest changes in the law. It is not intended as legal advice and should not be relied on to address legal problems. You should always consult an attorney for advice regarding your specific factual situation.



IN MEMORIAM
Daniel J. Curtin, Jr.
(1933–2006)

In the fall of 2006, Daniel J. Curtin, Jr., passed away unexpectedly from natural causes after seventy-three years of living a wonderful life, full of family and friends. Dan's professional life can be described as a never-ending passion to improve our understanding of the land use laws and regulations which govern our lives.

This year's edition is again dedicated to Dan's memory and spirit. Widely regarded as the "Dean" of land use and local government law, Dan received countless honors and awards for his leadership and service, including the Jefferson Fordham Lifetime Achievement Award from the State and Local Government Law Section of the American Bar Association; the International Municipal Lawyers Association Charles S. Rhyne Award for Lifetime Achievement in Municipal Law; the American Planning Association's Distinguished Leadership Award, recognizing more than two decades of writing and teaching and his support for planning ideas and education; and was named Honorary Life Member of the California Park and Recreation Society for his contributions to parklands.

He served as Chair of the State and Local Government Law Section of the American Bar Association in 2001–2002, and was past Chair of the Land Development, Planning and Zoning Section of the International Municipal Lawyers Association. Also, he was past Vice-Chair of the Executive Committee of the Real Property Law Section of the State Bar of California. He served as President of the City Attorneys' Department of the League of California Cities, as a member of the Board of Directors of the League, and as Regional Vice President of the International Municipal Lawyers Association. He was recognized on numerous "Best Lawyers" lists for the state and nation.

During his legal career, Dan shaped the general plan as the center point for land use decisionmaking. In *Leshar Communications v. City of Walnut Creek*, 52 Cal. 3d 551 (1990), the California Supreme Court adopted Dan's description of the general plan as the "constitution for all future development." Later, in *DeVita v. County of Napa*, 9 Cal. 5th 763 (1995), the court accepted the notion of "vertical consistency" that Dan had been teaching for years: that all key development decisions must be consistent with the general plan. Other notable decisions involving Dan include *Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633 (1971), wherein the court upheld a city's police power to require developers to dedicate land or pay fees for park and recreation purposes.

Along with this text, Dan authored the *Subdivision Map Act Manual*, published by Solano Press, the *Subdivision Map Act and the Development Process*, published by California Continuing Education of the Bar, as well as hundreds of articles. He was a frequent lecturer for University of California Extension and Continuing Education of

the Bar (CEB) and was an adjunct professor for the University of San Francisco Law School teaching Land Use Law. He also traveled extensively to provide land use expertise to the international community and to several developing nations.

A native San Franciscan, Dan was raised by Irish-immigrant parents. He earned his A.B. and J.D. from the University of San Francisco. After serving as an officer in the U.S. Army for eight years, Dan worked as Assistant Secretary for the California State Senate, as Counsel to the Assembly Committee on Local Government, and Deputy City Attorney for Richmond. From 1965 to 1982, Dan served as City Attorney of Walnut Creek. Dan then entered private practice and, in 1984, joined Van Voorhis & Skaggs, which later became part of Bingham McCutchen, LLP, where he continued to practice until his death. Dan visited over sixty-five countries, including several trips to his beloved Ireland, and voyaged on thirty-nine cruises, typically with many family members in tow.

While Dan's accolades and accomplishments are long, the list of planners and land use practitioners he guided and befriended is even longer. His skills as a mentor were legendary and Dan counted as friends virtually every planning director and city attorney in the state, as well as planning experts around the country and the world. He had an exceptional memory, often surprising people who had not seen him for many years by asking about their close relatives or children by name. Anyone involved in local government or land use in California knew of Dan or had been influenced by his work and teachings.

In a fitting tribute, the California League of Cities described Dan's most important contribution to the land use field:

Dan's lasting professional legacy truly rests with his peers who loved and respected him. Dan was a mentor and a friend to two generations of land use professionals. He reveled in mentoring young attorneys and planners and making them feel part of his circle. He would take an interest in their careers and go out of his way to cite their work. Dan made his numerous friends feel like they were the most important person in his life. He loved hosting dinners at conferences and hearing about everyone's practices and his invitees relished the heady conversations and the wisdom he could share. His gracious, old-school style of lawyering and living—always courteous, respectful, and inquiring about family—will be enormously missed.

The state of California is fortunate that Dan Curtin was so generous with his talent and shared his knowledge so freely. He trained countless lawyers, planners, commissioners, and elected officials. Many have asked, "who will replace him?" The answer is that this responsibility falls upon us all. He was a moral compass for the legal and planning profession. And now we must make our way without him.

Chapters at a Glance

1	Local Land Use Authority	1
2	General Plan	9
3	Specific Plan	37
4	Zoning	41
5	Subdivisions	73
6	California Environmental Quality Act (CEQA)	141
7	Federal and State Wetland Regulation	185
8	Endangered Species Protections	223
9	Design Review, Historic Preservation, Williamson Act, Coastal Development, Stormwater, Prevailing Wage and Public Bidding	259
10	Vested Rights and Ability to Bind City by Contract	285
11	Regulatory Takings	299
12	Exactions: Dedications and Development Fees	331
13	Initiative and Referendum	371
14	Local Agency Formation Commissions (LAFCOs): Local Agency Boundary Changes	399
15	Affordable Housing	423
16	Sustainable Development	457
17	Rights of the Regulated	487
18	Enforcement of Land Use Laws	503
19	Land Use Litigation	511

Contents

Preface	xvii	
Conventions in This Book	xx	
CHAPTER 1		
Local Land Use Authority	1	
Police Power	1	
Legislative Preemption	4	
State Statutory Framework for Land Use Decisions	5	
City Council	6	
Planning Commission	6	
Planning Staff	7	
Public Meetings	7	
CHAPTER 2		
General Plan	9	
From Advisory Status to Constitution for Development	9	
Contents	11	
Organization	12	
Mandatory Elements	13	
Land Use		
Circulation		
Housing		
Conservation		
Open Space		
Noise		
Safety		
Legal Adequacy of the General Plan	19	
Legal Implications of a Legally Inadequate General Plan	20	
Internal (Horizontal) Consistency	22	
Consistency Among General Plan and Other Land Use and Development Actions (Vertical Consistency)	23	
Consistency with Airport Land Use Plan	26	
Procedure for Adoption and Amendment	27	
Implementation and Annual Report	29	
Checklist for General Plan Adequacy	29	
Is it complete? • Is it informational, readable, and available to the public? • Is it internally consistent? • Is it consistent with state policy? • Does it cover all territory within its boundaries and outside its boundaries that relate to its planning? • Is it long-term in perspective? • Does it address		all locally relevant issues? • Is it current? • Does it contain the statutory criteria required by state law as interpreted by the courts? • Are the diagrams or maps adequate? • Does it serve as a yardstick? • Does it contain an action plan or implementation plan? • Is it horizontally consistent? • Was it adopted correctly?
		Adoption of General Plans by New Cities, Revisions of Existing General Plans, and Related Approvals
		The General Plan as a Source of Dedications and Development Fees
		The General Plan as a Tool in Growth Management and Other Innovative Land Use Controls
		Judicial Review of the Adequacy of the General Plan
		CHAPTER 3
		Specific Plan
		Introduction
		Contents of a Specific Plan
		Adoption
		Interplay with CEQA
		Judicial Review
		CHAPTER 4
		Zoning
		Zoning Defined
		Application to Charter Cities
		Judicial Review
		Presumption of Validity
		Limited Role of Court Review—Policy Issue
		Enactment of Zoning Regulations
		In General
		The Ordinance Must Be Reasonably Related to the Public Welfare
		Zoning Must Be Consistent with the General Plan
		Zoning Must Be Consistent with Airport Land Use Plan
		Due Process Requirements
		Sufficiency of Standards—Vagueness and Uncertainty
		Adoption of a Zoning Ordinance
		Motives
		Zoning by Initiative and/or Referendum
		No Formal Rules of Evidence; Effect of Procedural Errors

Zoning and the First Amendment	51	Other Exemptions	
Regulation of Adult Businesses		Map Waivers	
Protection of Religious Exercise		Condominium projects • Mobile home park/floating home marina conversions • Other parcel map waivers	
Administrative Zoning Relief—Variances—Conditional Use Permits	56	Tentative Map Processing	86
In General		Tentative Maps	
Variances		Necessity for tentative maps • Local ordinances • Other regulations • Applicable time periods to act upon the tentative map	
Conditional Use Permit		Time Limits Imposed by the Permit Streamlining Act	
Nonconforming Uses	60	Notice and hearing; processing	
Voluntary and Required Repairs of Nonconforming Uses		Life of tentative maps	
Structural Alterations of Nonconforming Uses		Initial life • Multiple final maps • Development agreements	
Destruction of a Nonconforming Use by Fire or Other Catastrophic Events		• Discretionary extensions • Statutory extensions • Moratoria • Litigation stays • Summary • Conditions imposed on extensions • Expiration of other permits issued in conjunction with a tentative map	
Amortization		Effect of Approval of Map on the Right to Develop—Vested Rights	
Other Types of Zoning	63	Vesting Tentative Map	
Form-Based Zoning		Background • Procedures	
Prezoning		Effect of Annexation to City Upon Maps	
Interim Ordinance		Effect of Incorporation into a Newly Incorporated City	
Conditional Zoning		Conditions to Map Approval	103
Specific Plan as Zoning		In General	
Planned-Unit Development		Conditions Imposed through the Subdivision Process	
Inclusionary Zoning/Housing Programs	67	Specific Conditions Allowed by the Map Act and Local Ordinance	
Applicability of Zoning to the Federal and State Governments	67	Parkland dedication • Adequate water supply • School site dedication • Reservations • Street and bicycle path dedications • Dedication for local transit facilities • Fees for drainage and sewer facilities • Fees for bridges and major thoroughfares • Groundwater recharge • Fees for transportation facilities • Supplemental improvements—reimbursement agreements • Soils investigations and reports • Setting of monuments • Grading and erosion control requirements • Public access to public resources and dedication of public easements along banks of rivers and streams • Energy conservation • Dedication for solar access easements • Indemnification • Off-site improvements • Standards and criteria for public improvements: residential subdivisions	
Federal Government		Conditions Imposed under City's Authority to Regulate "Design" and "Improvement" and Ensure General and Specific Plan Consistency	
State Government		Map Act Requirements vs. General Plan Standards	
Applicability of Zoning to Joint Powers Agencies, School Districts, and County and Other Local Districts	69	Conditions That May Be Imposed Through the CEQA Process	
Applicability of Zoning to Indian Lands	70	Condominium, Stock Cooperative, and Community Apartment Project Conversions	
CHAPTER 5		Timing of Conditions and Subsequent Conditions	
Subdivisions	73	Refunds	
Introduction	73	Reconveyances	
Subdivision Map Act		Grounds for Map Approval or Denial	115
Need for a local ordinance; applicable to charter cities • Preemption		Grounds for Approval	
Subdivisions Covered by the Map Act	75	Grounds for Denial	
What Is a Subdivision?		Findings for Approval or Denial	
What Type of Map Is Required?	79	Appeals and Judicial Review	118
General Rule: Tentative and Final Map or Parcel Map?		Appeals	
Counting Parcels			
Successive subdivisions • Remainder parcels • Conveyances to or from public entities and public utilities			
Important Exemptions to Mapping Requirements	81		
Lot Line Adjustments			
"Second" Units			
Conveyances to or from Public Entities and Public Utilities			
Financing and Leasing of Certain Units			
Condominium, Stock Cooperatives, and Community Apartment Projects			
Conversions • Three-dimensional divisions			
Agricultural Leases and Agricultural Labor Housing			

Judicial Review		Contents of an Environmental Impact Report	
Exhaustion of administrative remedies • Statute of limitations		Project description • Environmental setting/baseline • Evaluation of environmental impacts • Thresholds of significance • Historic and cultural resources • Water supply • Climate change • Energy • Cumulative impacts • Mitigation • Project alternatives • Range of alternatives • Extent of discussion • Growth inducement	
Final Maps and Parcel Maps	121	Responses to Comments	
Final Maps		Recirculation of an EIR	
Form and filing of final maps • Procedures for approval		Project Approval and Findings	
Final Map Is Deemed Valid When Recorded		Mitigation Monitoring and Reporting Programs	
Filing of certificates and security for tax liens • Subdivider to provide evidence of consent of record title holders • Recorder has 10 days to accept or reject map for filing • Condominium, stock cooperatives, and community apartment project conversions • Dedications of streets, utilities, and other property • Improvement agreements		Supplemental and Subsequent EIRs and Negative Declarations	
Improvement Security		Use of an Addendum	
Types of security • How much security is required? • Rights and requirements • Releasing security • Remedies		EIR Deadlines and Required Notices	
Parcel Maps		Judicial Challenges to Agency Action	182
Local ordinance requirements • Parcel map requirements • Special case: four or fewer parcels and no dedications or improvements		Time Limits for Judicial Challenges	
Correction and Amendment of Maps	130	Judicial Review	
Grounds		CHAPTER 7	
Errors and omissions • Changed circumstances		Federal and State Wetland Regulation	185
Amendment Procedure		Introduction	185
Changes Affecting Property Rights		A Brief History of the Federal Program	187
Enforcement	132	Legal Definitions of Wetlands and Other "Waters of the United States"	187
Prohibition		The Narrowing of Federal Jurisdiction	188
Remedies of Private Persons		New Regulations and Continued Uncertainty Over the Boundaries of Federal Jurisdiction	191
Remedies of a City		California Jurisdiction over "Waters of the State"	193
Certificates of Compliance		The Scientific/Technical Definition of Wetlands	194
Exclusions and Reversions	135	Wetland Hydrology	195
Antiquated Subdivisions	136	Hydric Soils	195
Antiquated Subdivisions—Legally Created Parcels?		Wetland Vegetation	195
Maps Before 1929		California's State Law Definition of Wetlands	196
Maps After 1893 Generally		Procedural Issues in Delineating Wetlands	196
U.S. Survey Maps and Federal Patents		Activities Regulated by the Corps	197
Merger and Unmerger		Statutory Exemptions	198
Merging parcels under one ownership • Unmerger or deemed not to have merged		The Corps' Permitting Process	199
Presumption of Legal Parcels		Nationwide Permits	200
CHAPTER 6		The Corps' Individual Permitting Process	202
California Environmental Quality Act (CEQA)	141	Regulatory Guidance Letters	204
Introduction	141	Scope of Environmental Analysis under NEPA	204
Definition of a Project under CEQA	142	Alternatives Analysis under EPA's 404(b)(1) Guidelines	206
Approval		Project Purpose and Wetlands Avoidance (Sequencing)	207
Environmental Change		Practicability	208
Process	146	Availability	210
Determining if the Activity Is Exempt from CEQA		Mitigation	211
Preparation of an Initial Study		The EPA's Role in the Permit Process	212
Adoption of a Negative Declaration		Other Federal Statutes	213
Preparation of an Environmental Impact Report		Section 401 of the Clean Water Act • National Environmental Policy Act • Endangered Species Act • Fish and Wildlife Coordination Act • Section 302 of the	
EIR Procedure			
Scoping • Draft EIR • Final EIR			

Marine Protection, Research and Sanctuaries Act of 1972 • National Historic Preservation Act of 1966 • Land Sales Full Disclosure Act • Coastal Zone Management Act of 1972 • Food Security Act of 1985			
State Statutory Authority	215		
Porter-Cologne Water Quality Control Act • Streambed Alteration Agreement • Navigation Dredging Permit • Coastal Zone Management			
Enforcement	218		
Citizen Suits			
Standing to Sue	219		
Investigations and Compliance Orders	219		
Criminal, Civil, and Administrative Penalties	220		
Practical Considerations	221		
CHAPTER 8			
Endangered Species Protections	223		
Introduction	223		
Listing Process	224		
Listing of a Species as Threatened or Endangered			
Listing of a "Distinct Population Segment"			
"Significant Portion of Its Range"			
Listing Procedures and Requirements			
Five-Year Review and Delisting			
Emergency Listings			
Designation of "Critical Habitat"			
Consultation Process	234		
Components of the Consultation Process			
Agency action • The "Action Agency," "Action Area," and "Effects of the Action" • "Informal" vs. "formal" consultation • Duty to use best available science • Climate change impacts • Biological opinion • Incidental take statement • Reinitiation of consultation			
Exemptions from the Endangered Species Act Requirements	244		
Prohibitions Against Takings	245		
Fish and Wildlife			
Plants			
Definition of Take			
No Exceptions for Religious Practices or the Protection of Private Property			
Habitat Conservation Plans and Incidental Take Permits	248		
Safe Harbor and Candidate Conservation Agreements	250		
Judicial Review and Enforcement	250		
Citizen Suits			
Suits under the Administrative Procedure Act			
Judicial Remedies and Penalties			
California Endangered Species Act	252		
The CESA Listing Process			
"Take" under the CESA			
Incidental Take Permits under the CESA			
Other Species Protections under California Law	256		
CHAPTER 9			
Design Review, Historic Preservation, Williamson Act, Coastal Development, Stormwater, Prevailing Wage and Public Bidding	259		
Introduction	259		
Design Review	259		
Historic Preservation	262		
Federal Level			
State Level			
Local Level			
Preservation of Agricultural Lands by Williamson Act Contract	265		
Notice of Non-Renewal • Cancellation of Contract • Substitution of New Williamson Act Contract • Lot Line Adjustment • Replace Williamson Act Contract with Open Space Easement • Replace Williamson Act Contract with Solar Easement • Reduction of Contract Term and Tax Benefits as Result of Loss of Subventions			
California Coastal Commission			
Composition • Constitutionality			
California Coastal Act of 1976			
Coastal Zone			
Development and Permitting			
Local Coastal Programs			
Appeals			
Judicial Review of Commission Decisions			
Other Coastal Commission Responsibilities			
San Francisco Bay Conservation and Development Commission			
Composition • Jurisdiction • Permitting Authority			
Storm Water Quality Requirements	276		
Regulatory Background			
The Statewide Construction General Permit			
The Statewide Industrial General Permit			
Municipal Separate Storm Sewer System (MS4) Permits			
Prevailing Wage Concerns on Private Development Projects	280		
Public Bidding Concerns on Private Development Projects	282		
CHAPTER 10			
Vested Rights and Ability to Bind City by Contract	285		
Vested Rights	285		
The <i>Avco</i> Rule			
Refinements of the <i>Avco</i> Rule			
Development Agreements	289		
Vesting Tentative Maps	295		
Vesting Tentative Maps vs. Development Agreements	295		
CHAPTER 11			
Regulatory Takings	299		
Introduction	299		

The Four Types of Regulatory Takings		Habitat Conservation Plans and Natural Communities Conservation Plans	
Regulation that effects a physical taking (<i>Loretto</i>) •		CEQA	
Regulation that denies all economic use (<i>Lucas</i>) • Regulation that goes too far (<i>Penn Central</i>) • Exactions (<i>Nollan/Dolan</i>)		Special Requirements Relating to Imposition of Fees	356
Temporary Takings		Waiting Period Before Fees Become Effective; Public Hearing Required	
Federal decisions • California decisions • Measure of compensation for a temporary taking		When Fees Are Required to Be Paid	
Segmentation—the Relevant Parcel Issue		Reasonableness of Development Fee Amount	
Grounds for Denial of a Takings Claim		Fees Cannot Be Levied for Maintenance and Operation	
The ripeness requirement • Ripeness and the requirement for a final determination of the agency • Ripeness and the requirement to seek compensation through state procedures • The requirement to challenge an unconstitutional condition in court before seeking compensation • The requirement of a unique injury • The role of California constitutional expenditure limitations • Nuisance defense		Dedication of Land—Reconveyance to Subdivider	358
Takings in the Flood Control Context	323	Judicial Review	359
Civil Rights Action under Section 1983	323	Development Fee or a Tax?	359
Procedural issues arising in Section 1983 Cases • Substantive claims under Section 1983—equal protection and due process		Historical Background	
Substantive Due Process and Rent Control	326	Effect of Jarvis Initiatives—Prop. 13 (1978), Prop. 62 (1986), and Prop. 218 (1996)	
Interplay Between Takings Claims and Substantive Due Process Claims	327	Proposition 218 • Impacts on local general taxes • Impacts on local special taxes • Impacts on special assessments • Impacts on fees and charges • Possible impacts on new development fees • Impacts on standby charges • Use of initiatives	
Legislative Acts Given More Deference Than Adjudicatory Acts	328	Conditions Attached to Land Use Approvals for Financing and Maintaining Public Facilities	
		• GHADs in particular	
CHAPTER 12		CHAPTER 13	
Exactions: Dedications and Development Fees	331	Initiative and Referendum	371
Introduction	331	Introduction	371
Proper Exercise of Police Power	332	The Initiative	372
Development: Privilege or Right?	332	The Referendum	372
Test of Reasonableness/Nexus Requirement	334	Procedural Requirements for Placing an Initiative or Referendum Measure on the Ballot	
In General		Initiatives proposed by council or board • Initiatives proposed by voters, and voter referenda of council- or board-adopted measure	
The <i>Nollan</i> and <i>Dolan</i> Decisions		Form of Petition	
<i>Nollan v. California Coastal Commission</i> • <i>Dolan v. City of Tigard</i> • What does <i>Dolan</i> mean in California?		Notice of Intention to Circulate; Ballot Title and Summary	
Applicability of the <i>Nollan/Dolan</i> Test to Impact Fees and Exactions: <i>Koontz v. St. Johns River Water Management District</i> and <i>Ehrlich v. Culver City</i>		Publication and Posting	
<i>Koontz v. St. Johns River Water Management District</i> : expansion of <i>Nollan</i> and <i>Dolan</i> • <i>Ehrlich v. City of Culver City</i> : legislatively formulated vs. ad hoc development fees		Circulation; Signature	
California's "Nexus Legislation"—The Mitigation Fee Act	346	Filing; Examination of Signatures	
Documenting the Nexus		Actions by Councils and Boards on Voter-Sponsored Initiative and Referenda Petitions	379
Double Taxation	349	Voter-Sponsored Initiatives	
Equal Protection	349	Referenda	
Opportunities for Dedications or Fees	350	Limitations on the Use of Initiative and Referendum	382
In General		Cannot be unconstitutional • Cannot conflict with state law • Vertical consistency • Horizontal or internal consistency • Cannot invade a duty delegated exclusively to the council or board or imposed on an agent of the state • Cannot adopt non-legislative measures • Cannot impair an essential governmental function • Must address a single subject • Cannot be used to reject urgency measures	
The General Plan		Initiatives and Referenda Are Not Subject to the Same Procedural Requirements as City Council Measures	388
Subdivision Process		Pre-Election Challenges to Initiatives and Referenda	390
Building Permits		Initiatives Limiting Housing: Burden of Proof	393
Processing Fees—Land Use and Building Permit Fees		Conflicting Initiatives on the Same Ballot	393
School District Facilities Fee			
Nonprofit private university is not exempt from school fees • Redevelopment construction is not exempt from school fees			

Restrictions on a City's Role in Campaigns	395	Disapproval of Housing Development Projects Generally	
Conclusion	397	Prioritization of Services to Certain Affordable Housing Projects	
		Certain Multifamily Housing Projects May Be a Permitted Use	
CHAPTER 14		Other State Laws Designed to Facilitate	437
Local Agency Formation Commissions (LAFCOs):	399	Housing Production	
Local Agency Boundary Changes		Least Cost Zoning Law	
Introduction	399	Density Bonuses	
History of LAFCO Law	399	Second Units	
Composition and Function of LAFCOs	401	Growth Management and Affordable Housing	442
Spheres of Influence	402	Inclusionary Housing	443
Municipal Service Review Requirement		Introduction	
LAFCOs' Jurisdiction Over Changes of Organization and Reorganizations	404	Judicial Treatment of Inclusionary Housing	
Authority to Make Determinations Regarding Changes of Organization or Reorganizations		Relationship to the Costa-Hawkins (Anti-Rent Control) Act	
Agencies Over Which LAFCOs Have Jurisdiction		History of Inclusionary Housing—The Pre- <i>Nollan</i> and <i>Dolan</i> Era	
Procedures for Changes of Organization or Reorganizations		Inclusionary Housing in California in the Post- <i>Nollan</i> and <i>Dolan</i> Era	
Factors LAFCOs Must Consider When Reviewing a Boundary Change Proposal	412	Legal Issues to Consider When Adopting and Implementing an Inclusionary Housing Program	
General Factors		Method of Enactment	
Additional Factors That LAFCO Must Consider in Certain Proceedings		Factual Record to Support Enactment and Application	
Additional Factors That LAFCO May Consider		Inclusion of "Safety Valve" Provisions	
LAFCOs' Determination on Boundary Change Proposals		Provision of Incentives and Concessions to Developers	
Reconsideration Hearing		Policy Issues to Consider When Crafting an Inclusionary Housing Program	
Protest Proceedings		Nature of the Program—Mandatory or Voluntary?	
Final Actions, Filings, and Notifications		Determining the Classes and Size of Development That Will Be Subject to the Inclusionary Housing Program	
Processing Multi-County Changes of Organization or Reorganization		Required Amount and Affordability Levels of Inclusionary Units	
Environmental Review		Timing Issues and Design Standards for Inclusionary Units	
Challenging LAFCO Decisions in Court	420	Preserving Affordability of Inclusionary Units	
		Sales Price Limitations	
CHAPTER 15		Qualification of Applicants	
Affordable Housing	423	Length of Time That Inclusionary Units Must Remain Affordable	
Introduction: The Affordable Housing Crisis in California	423	Enforcement and Monitoring Mechanisms	
State Housing Element Law	424		
Purpose of the Mandated Housing Element		CHAPTER 16	
Required Contents of the Housing Element		Sustainable Development	457
Regional Housing Needs Allocation Process		Introduction	457
Preparing the Land Inventory and Identifying Adequate Sites		Growth Management Measures	458
Analysis of Governmental and Non-Governmental Constraints		"Smart Growth"	459
Consistency with General Plan, Preparation of Annual Report, and Notification Requirements		Sustainable Development and Transportation Policy	461
Special Provisions Regarding Housing Needs within the Coastal Zone		Congestion Management Planning	
Review, Certification, and Legal Adequacy of Housing Elements		Relationship Between CMPs and Regional Transportation Plans	
Restrictions on the Disapproval of Certain Housing Projects	432	"Complete Streets"	
Disapproval Restrictions on Affordable Housing Projects		Water Supply Planning and Conservation	463
		Senate Bills 610 and 221	
		Senate Bill X7-7	
		Graywater Systems	

Assembly Bill 32: The California Global Warming Solutions Act of 2006	469	CHAPTER 18	
Senate Bill 375: The Sustainable Communities and Climate Protection Act of 2008	469	Enforcement of Land Use Laws	503
Sustainable Communities Strategies		Introduction	503
Traffic Model Guidance		Administrative and Criminal Sanctions	503
Affordable Housing		Misdemeanor	
Accounting for Climate Change Impacts in CEQA Documents: Guidance from CEQA Guidelines, Regional Air Quality Management Districts, and the Courts	472	Infraction	
2010 CEQA Guidelines Changes		Administrative Penalties	
CEQA Streamlining for Sustainable Development		Warrant	
Green Building	475	Enforcement under the Revenue and Taxation Code	
State Green Building Standards		Enforcement under the Subdivision Map Act	
Energy Code, Title 24, Part 6 • Green Building Code, Title 24, Part 11		Enforcement under CEQA	
Local Green Building Standards		Enforcement under the Business and Professions Code	
Potential Issues Arising from a City's Use of Rating Systems		Possible Defenses to a City's Enforcement Action	506
State Preemption and Required Findings		Denial of Due Process or Equal Protection	
Federal Preemption of State and Local Green Building Codes		Estoppel	
Development of Renewable Energy	482	CHAPTER 19	
Required Renewable Procurement		Land Use Litigation	511
Lowering Barriers to Development and Permitting of Renewable Energy		Introduction	511
Subdivision Map Act exemptions for solar projects • Permitting process for wind systems outside urbanized areas • Williamson Act express inclusion of biofuels and probable inclusion of wind • Public interest cancellation of Williamson Act contract to allow solar facility • Minimizing private entity restrictions on solar energy systems • Minimizing public entity restrictions on solar energy systems • Minimizing public entity restrictions on solar energy systems • Solar panels as a standard option on new homes • Geothermal heat pump and geothermal ground loop technologies		Overview and Terminology	511
Adaptation to Effects of Climate Change	485	Types of Mandate Proceedings	512
CHAPTER 17		Traditional Mandate Proceedings under Section 1085	
Rights of the Regulated	487	Challenge Legislative and Ministerial Acts	
In General	487	Legislative acts • Ministerial acts	
Notice and Hearing	487	Administrative Mandate Proceedings under Section 1094.5	
The One Who Decides Must Review Evidence	489	Challenge Administrative and Quasi-Judicial Decisions	
Findings	491	Administrative Mandate Is the Exclusive Procedure for Challenging Administrative Decisions	
When Are Findings Required?		Standards Courts Apply in Reviewing and Use Decisions	517
Legislative Acts		Standard of Judicial Review of Legislative Decisions	
Adjudicative Acts under 1094.5		The "arbitrary-and-capricious" standard of review • Individual legislator's motives are irrelevant • The intent and purpose of the legislative body is relevant • Due process and fair hearing requirements	
Findings can take many forms • The record must contain evidence supporting the findings		Standard of Judicial Review of Administrative Decisions	
Maintaining Separation Between Prosecutorial and Adjudicatory Function	493	"Excess of jurisdiction" • "Fair hearing" • "Proceeding in the manner required by law" • "Supported by the findings and evidence"	
Ralph M. Brown Act	494	Standard of Judicial Review of Agency Decisions with Both Legislative and Administrative Aspects	
Ex Parte Contacts	497	Standard of Judicial Review of an Aspect of an Agency Decision That Interprets or Applies Law	
Permit Streamlining Act	498	Deadlines for Bringing Actions	524
Other Procedural Requirements	502	Actions Subject to More Than One Statute	
Developer Misrepresentations	502	How to Find the Applicable Statute of Limitations	
		Process of a Mandate Proceeding	533
		Prerequisite to Litigation: Exhaustion of Administrative Remedies	
		The common law exhaustion doctrine • The exhaustion requirement has two components • Issue exhaustion • Appeal exhaustion • Rehearing/reconsideration • Exceptions to the exhaustion requirement • Codification of the exhaustion requirement	

Ripeness and Finality		
Identifying the Proper Parties		
Petitioner standing • Beneficial interest • Associational standing • Public interest standing • Taxpayer suits • Respondent • Real party in interest		
Joining Other Causes of Action with a Writ Claim		
Early Mediation		
Preparation of the Record		
Discovery and Evidence Outside the Record		
Evidence outside the record generally is inadmissible and undiscoverable to determine whether a local agency's decision is valid • Evidence outside the record regarding issues other than the validity of a local agency's decision generally is admissible and discoverable • Evidence outside the record may be admissible in traditional mandate proceedings that challenge ministerial acts • Decisionmakers' thought processes • Attorney-client privilege and work product doctrine • Judicial notice		
Setting a Briefing and Hearing Schedule		
Alternative writ • Noticed motion • Informal means of obtaining hearing date		
Summary Judgment		
Preparing the Briefs		
A Stay or Preliminary Injunction May Issue Pending a Final Decision on the Writ Petition		
Stays • TROs and preliminary injunctions		
Issuance of the Writ		
Appeal in a Writ of Mandate Case		
Time to appeal • Effect of appeal on judgment • Administrative mandate • Traditional mandate • Injunction		
Litigation under CEQA	557	
Special Procedures for CEQA Actions		
Contents of a CEQA Record		
Web-based materials • Documents for which a general website address is provided • Documents for which a specific web address is provided • Documents for which no website address is provided • Documents in consultant and subconsultant files • Responsibility of preparation of the record and recovery of costs		
CEQA Exhaustion and Standing Rules		
Standard of Judicial Review of CEQA Decisions		
Remedies in a CEQA Case		
Litigation under the Mitigation Fee Act	563	
As Applied Challenges to Development Fees • Facial Challenges To Sewer and Water Fees, Capacity Charges and Processing Fees		
Challenges by Permit-Holders to Permit Conditions	565	
Challenge to Imposition of Fees on a Development Project (Gov't Code § 66020)		
Challenge to Enactment or Increase of Water, Sewer, Capacity or Processing Fees (Gov't Code § 66022)		
Remedy		
Validation Actions		
Anti-SLAPP Statute	571	
Application of the Anti-SLAPP Statute to the Land Use Context		
Attorneys' Fees in Land Use Cases	573	
Legal Liability of Local Agencies and Personnel	576	
California Tort Claims Act		
Liability of Public Employees and Entities		
Employees • Entities		
Immunity of Public Employees and Entities		
Federal Civil Rights Act		
Color of Law		
Treatment of Persons and Public Entities under Section 1983: Municipal Liability and Legislative Immunity		
Short Articles		
Calculating the Life of a Tentative Map		95
Map Act Definitions of "Design and Improvement"		110
Nationwide Permits		201
List of Figures		
Figure A: Certificate of Compliance Flow Chart		134
Figure B: CEQA Flow Chart for Local Agencies		152
Figure C: Lead Agency Decision to Prepare an EIR		153
Figure D: Time Periods for Review of Environmental Documents		184
Figure E: U.S. Army Corps of Engineers Permitting Process		203
Figure F: LAFCO Proceedings		410
List of Tables		
Table 1: A Comparison of California's Vested Rights Statutes		296
Table 2: LAFCO Protest Proceedings—Effect of Protests		416
Table 3: Comparison of SB 610 and SB 221		454
Table 4: Summary of CEQA Streamlining Provisions for Sustainable Development		476
Table 5: Statutes Applicable to Common Land Use Decisions		530
Table 6: Summary of Government Code 66022 and Related Provisions		570
Glossary		581
Acronyms		590
Suggested Reading		591
Table of Authorities		595
Index		621

For 27 years, Dan Curtin authored this book as a desk reference for those interested in California land use and planning law. Cecily joined Dan as a co-author in 2000 and worked with him to continually update the book based on their own and their partners' decades of experience representing both public agencies and private developers. Following Dan's passing in November 2006, Matt joined Cecily—first as Managing Editor and later as co-author—in preserving and expanding upon the legacy Dan started with this book. Like all editions published since his passing, this book is again dedicated to Dan.

This 35th edition represents a departure from prior editions in that we have elected to update the book every other year. We concluded this would provide more value to the regular purchasers of each edition. In the interim year, 2015, we published a “2015 Supplement” that included a comprehensive summary of published judicial decisions concerning land use and planning in California. This supplement was provided to all known purchasers of the 2014 edition, and was made available online through Solano Press and our law firm's law report at www.californialanduseanddevelopmentlaw.com. We have concluded this bi-annual publication approach has been a success. We will be providing a similar judicial decision supplement in 2017, and publishing our 36th edition in 2018.

This 35th edition summarizes two years of published decisions, statutory revisions and other agency policies and guidance, including:

- Discussion of the California Supreme Court's decision in *California Building Industry Association v. City of San Jose* holding that inclusionary housing programs are to be evaluated like zoning and other land use measures that restrict use, rather than as exactions (chapters 4, 15)
- Discussion of several cases addressing the degree of deference owed to various local agency approvals or denials of applications for land use permits (chapter 4)
- Description of the Legislature's further statutory extension in 2015 of tentative subdivision maps in some, but not all, California counties (chapter 5)
- Discussion of the California Supreme Court's decision in *Tuolumne Jobs & Small Business Alliance v. Superior Court* holding that an agency's decision to adopt a voter-sponsored initiative rather than place it on the ballot is exempt from CEQA (chapters 6, 13)
- Discussion of numerous cases decided under CEQA addressing when a project is exempt from CEQA, the permissible baseline for project review, when tiering is appropriate, when a supplemental or subsequent EIR is required, and the scope of alternatives that must be considered (chapter 6)
- Discussion of the California Supreme Court's decision in *California Building Industry Association v. Bay Area Air Quality Management District* affirming that CEQA generally does not require an analysis of the impacts of the surrounding environment on the project (chapter 6)

- Discussion of the California Supreme Court’s decision in *Center for Biological Diversity v. California Department of Fish & Wildlife* (the “Newhall” decision) in which the Court upheld use of CARB’s goal of 29 percent reduction from “business as usual” as a significance threshold, but held that an individual project’s 29 percent reduction in greenhouse gas emissions did not necessarily establish consistency with CARB’s *statewide* goal (chapter 6)
- Discussion of amendments to the Density Bonus Law prohibiting density bonuses for redevelopment projects on sites where affordable units exist, or have been vacated or demolished in the previous five years, unless those affordable units are first replaced (chapter 15)
- Analysis of new regulations defining “waters of the United States” and identifying categories of waters that are exempt from federal jurisdiction (chapter 7)
- Analysis of new case law and regulatory guidance on the scope of critical habitat designations and standards for excluding areas from such designations (chapter 8)
- Discussion of how the United States Supreme Court’s recent takings guidance in *Koontz* has been applied to local agency regulations (chapter 12)
- Discussion of the more rigorous quantitative approach to industrial stormwater regulation adopted by the State Water Resources Control board in its 2014 Industrial General Permit (chapter 9)
- Discussion of cases excepting certain public interest lawsuits from anti-SLAPP protections (chapter 19)
- Discussion of recent decisions adjusting or denying attorney’s fees sought by petitioners under the private attorney general statute (chapter 19)

This 2016 edition has benefited from the contributions made by attorneys in Perkins Coie’s California Land Use and Development Practice.

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Geoff has been an active participant in pro bono efforts, representing individuals, nonprofits and public agencies before state and federal courts, including several matters in the California Supreme Court. He is the recipient of the California State Bar President's Pro Bono Award. Geoff served as law clerk to the Honorable Thomas J. MacBride of the United States District Court for the Eastern District of California and as extern to the Honorable Joseph T. Sneed of the United States Court of Appeals for the Ninth Circuit. Geoff attended law school at the University of Virginia and Hastings College of the Law, from which he received his law degree with honors. He graduated with distinction from the University of California, Berkeley.

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through the Department of Conservation. Marie has substantial litigation experience in challenging and defending land use entitlements, general planning and zoning enactments, development fees and dedications, annexation proceedings, and initiatives and referenda. Her land use litigation practice focuses on writ of mandate proceedings, validation actions, and inverse condemnation. She is adept at navigating the peculiar procedures applicable to land use cases and focusing on rational solutions that fit the client's particular circumstances. Marie served as an extern to the Honorable Otto Kaus of the California Supreme Court. She graduated from the University of California, Berkeley School of Law (Boalt Hall), where she was elected to the Order of the Coif. Marie graduated with high honors from the University of California, Santa Barbara.

We also wish to thank the following individuals in the San Francisco office of Perkins Coie for their contributions to this 2016 edition: Alan Murphy, counsel, and Christopher Tom and Christopher Chou, associate attorneys, for their review, writing, and editing of portions of this edition; and Shari Harewood and Michelle Rodriguez, administrative assistants, for reviewing and preparing numerous draft revisions of each chapter.

This book is not a substitute for the guidance and advice of an attorney, especially in complex matters in which refinements and interpretations of the law are essential before final conclusions are drawn about planning and development processes, property rights, due process, and procedural matters.

In addition, although legal reference points are essential, in matters pertaining to local public planning and the development process, there is no substitute for an understanding of how the planning process works at the city and county levels. Much of the process is delineated by California law and indeed most of the process is mandated. The law does not say a great deal, however, about what local planning policies should be or how a city or county should organize its land uses. That is a local task. But the law does require cities and counties to prepare, adopt, and update general plans before making land use and land use-related decisions, and it requires that certain procedures be followed to carry out public policies, protect private rights, and ensure due process prior to making decisions. We hope you find this book a helpful guide to better understanding how those mandates and procedures may be applied at the local level. For regular insights into legal issues relating to development and use of land and federal, state, and local permitting and approval processes, subscribe to Perkins Coie's California Land Use and Development Law Report at www.californialandusedevelopmentlaw.com.

Cecily Talbert Barclay
Matthew S. Gray
January 2016

CONVENTIONS IN THIS BOOK

For brevity and readability, this text uses the following conventions:

- When the word “city” is used, it also means “county”; “city council” also means “county board of supervisors.” The text will note instances where there is a substantive distinction between how land use and planning law affects cities and counties.
- All references to the Legislature are to the California State Legislature, unless otherwise indicated.

Code references are to the California Code, unless otherwise indicated.