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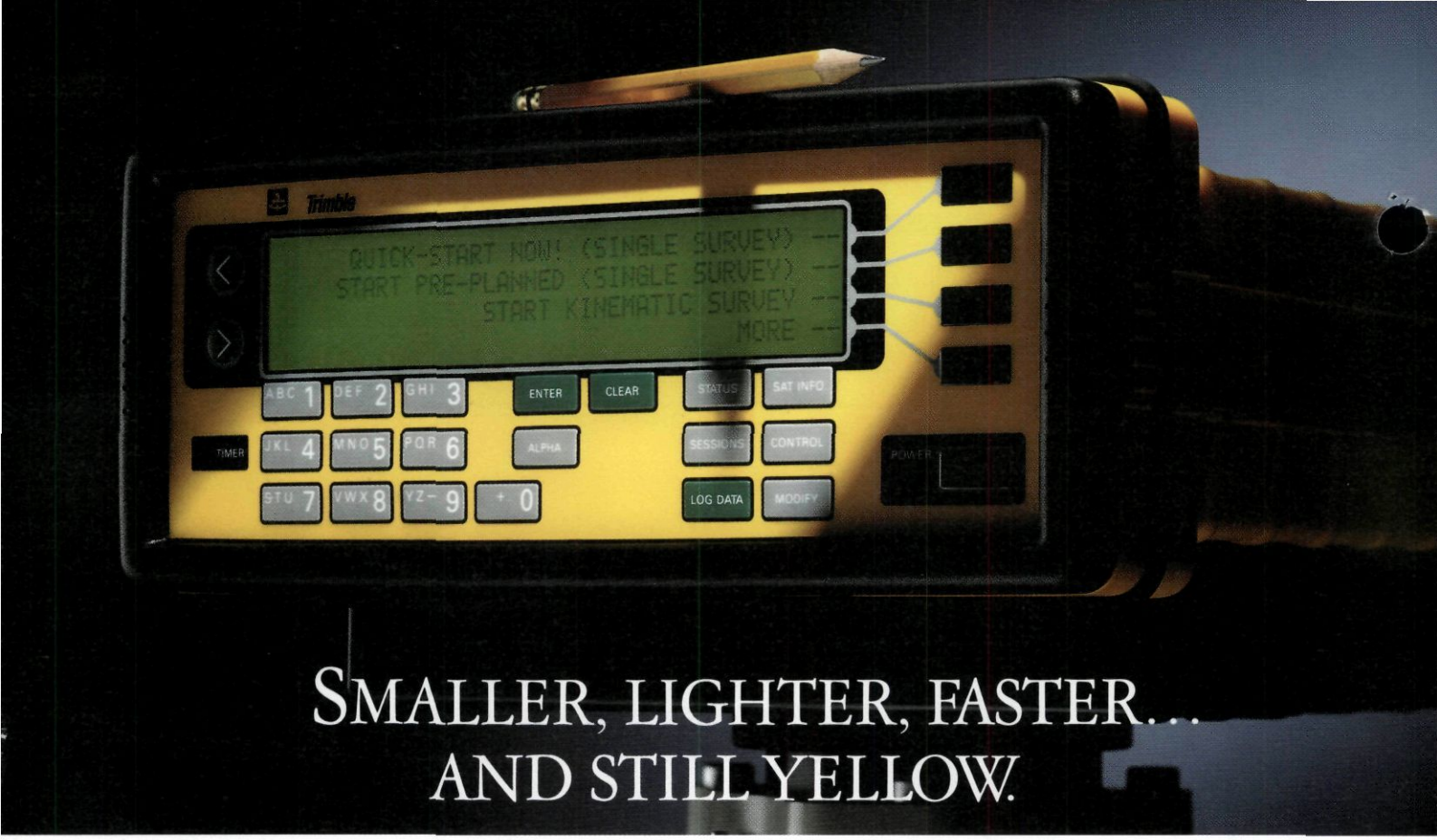
The California Surveyor

No. 96 The Voice of the Land Surveyors of California Winter/Spring 1992

Theodore Reichert

State Surveyor General from January 3, 1887 to January 7, 1895



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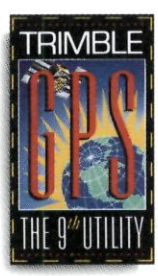

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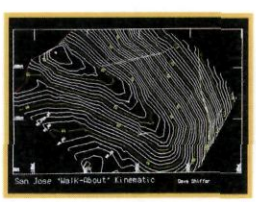

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The California Surveyor

is the quarterly publication of the California Land Surveyors Association, Inc. and is published as a service to the land surveying profession of California. It is mailed to all Licensed Land Surveyors in the state of California as well as to all members of California Land Surveyors Association, Inc. *The California Surveyor* is an open forum for all surveyors, with an editorial policy predicated on the preamble to the articles of Incorporation of the California Land Surveyors Association, Inc. and its stated aims and objectives, which read:

"Recognizing that the true merit of a profession is determined by the value of its services to society, the 'California Land Surveyors Association' does hereby dedicate itself to the promotion and protection of the profession of land surveying as a social and economic influence vital to the welfare of society, community and state."

"The purpose of this organization is to promote the common good and welfare of its members in their activities in the profession of land surveying, to promote and maintain the highest possible standards of professional ethics and practices, to promote professional uniformity, to promote public faith and dependence in the Land Surveyors and their work."

PERSONNEL

OWNER
California Land Surveyors Association, Inc.

CENTRAL OFFICE
P.O. Box 9098, Santa Rosa, CA 95405-9990

EDITOR
Brett K. Jefferson, P.L.S.

ASSISTANT EDITORS
Christopher L. White, P.L.S. – Tom Mastin, P.L.S.
Jeremy L. Evans, P.L.S.

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SUSTAINING MEMBERSHIP

Membership in the California Land Surveyors Association, Inc. as a sustaining member is open to any individual, company, or corporation who, by their interest in the land surveying profession, is desirous of supporting the purposes and objectives of this association. For information regarding sustaining membership, contact CLSA Central Office, P.O. Box 9098, Santa Rosa, CA 95405, (707) 578-6016, Fax (707) 578-4406.

EDITORIAL MATERIAL

All articles, reports, letters, and contributions are accepted and will be considered for publication regardless of the author's affiliation with the California Land Surveyors Association, Inc. Contributions submitted on floppy diskette medium is encouraged. For compatibility, disks should be 5.25 or 3.5 inch, MSDOS (IBM compatible) format. We can accept ASCII text files or word processor files from the following programs: WordPerfect, Microsoft Word, Windows Write, Multimate, DCA (Displaywrite III and IV), Wordstar, Xerox Writer, and Xywrite.

EDITOR'S ADDRESS

Brett K. Jefferson, P.L.S.
The California Surveyor
P.O. Box 9098, Santa Rosa, CA 95405-9990

DEADLINE DATES

Summer	April 10, 1992	Winter	October 10, 1992
Fall	July 10, 1992	Spring	January 10, 1993

Articles, reports, letters, etc., received after the above mentioned date will be considered for the next edition.

Cover Photo: Theodore Reichert, State Survey General from January 3, 1887, to January 7, 1895 (see article on page 14). Photo submitted by Herbert A. Maricle, Land Agent with the State Lands Commission.

Opinions or assertions expressed in articles in this publication do not necessarily represent the official views of the Association.

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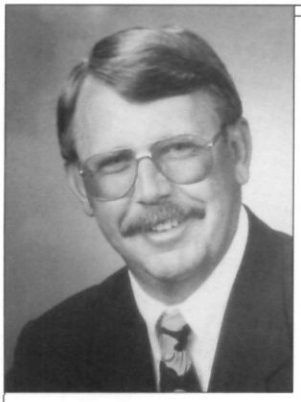

President's Message

By Kenny L. Fargen, P.L.S.

EDUCATION HAS been a very popular topic for the past couple of years on national, state and, local levels. Why should CLSA be any different?

Continuing education for CLSA has been a long-term goal of our association and — I personally think — should continue to be one. Representatives of all chapters sit on the board and, for at least the last eight years, have endorsed the concept of continuing education. This tells me that the majority of our members see the need for continuing education as a part of what will make a professional land surveyor. What shape continuing education or professional development units takes will be discussed for endless hours, and I'm sure will take a much diluted form.

One thing I know is that getting your license doesn't mean the end of the process. This is the point in your life when you start to become a professional. Being ignorant of legislation, the ever-changing technologies, and even local ordinance changes can only cost the public time and money. A land surveyor's responsibilities as a professional is to stay educated on our ever-changing profession. Thinking that being retired or too busy excuses an individual from their professional responsibility only hurts two groups: the public and your fellow surveyors.

The majority of people I have come in contact with are in favor of professional development in some form. Most also have some trepidations as to its forms. This is understandable, as change and the unknown always frighten those who are unprepared.

Now that the pros and cons of this issue have been written about, please let your representatives at CLSA know if you still feel continuing education is a viable goal of the association, or if you feel it's an issue that should be dropped.

I know the democratic process works within the association, but in most cases the majority stands silent on this issue. Let your CLSA representatives know with a note or call, but lets stop giving lip service to continuing education as a goal if it is not embraced by a majority of our members.

Change and the unknown always frighten those who are unprepared.

Membership in CLSA has given me two very important member's benefits: the exchange of information between professionals and my increased understanding of the legislative process. Both of these very important benefits are available to anyone who willingly takes advantage of their membership in CLSA. The key factor here is that you get involved. Just showing up for the chapter meetings will only get you so much. What you get out is directly related to how much you put into the chapter or association. Every committee involvement will benefit you in the future. This often sounds very trite, but from my personal experience I would encourage everyone to expand their knowledge by getting involved. Standing on the side looking in will only let you see what is on the edges. ⊕

Here's Some Important Information About CLSA

The goal of the California Land Surveyors Association is to promote and enhance the profession of surveying, to promote the common good and welfare of its members, to promote and maintain the highest possible standards of professional ethics and practice, and to elevate the public's understanding of our profession. CLSA represents all land surveyors, whether they are employees or proprietors, whether in the public or the private sector.

Representation

LOCAL: Your local chapter represents you in local issues. Through your chapter representative to the State Board of Directors, the individual member can direct the course CLSA will take. STATE: The surveyor is represented at the state level through an active legislative program, legislative advocate, and liaison with the State Board of Registration. REGIONAL: CLSA is an active member of the Western Federation of Professional Land Surveyors. This federation is composed of associations throughout the western United States and addresses regional issues. NATIONAL: Through institutional affiliation with the National Society of Professional Surveyors and the American Congress on Surveying and Mapping, CLSA is represented at the national level.

Education Opportunities

CLSA presents annual conferences which provide technical and business programs, as well as exhibits of the latest in surveying and computing technology. Seminars and workshops are presented to assist in continuing education. CLSA publishes the *California Surveyor* magazine and the *CLSA News* to keep the membership abreast of changing legislation, legal opinions, and other items which affect our profession.

Business and Professional Services

CLSA provides a fully staffed central office which is available to answer questions or to provide up-to-date referrals concerning legislation, educational opportunities, job opportunities, or other issues concerning our membership. Health and professional liability insurance programs are available to members.

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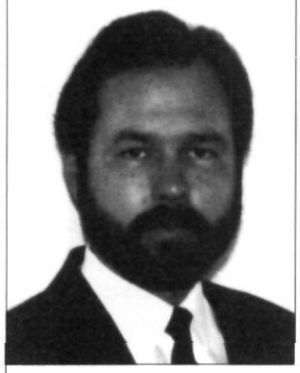

FROM THE EDITOR

Managing Toward The Future

By Brett K. Jefferson, P.L.S.

THESE ARE difficult economic times for land surveyors. Our country is in the midst of a recession that has finally caught up with the southwestern United States in full force. Cities known for rapid growth are now stifled. Cities like Los Angeles, Las Vegas, San Diego, and Phoenix. Harsh economic times such as these really test the mettle of the individuals managing our firms. The typical problems facing managers of how to get projects, complete them on schedule, stay under budget, and collect fees now become compounded by issues critical to the overall survival of the firm: Can we maintain a positive cash flow? How long will our current backlog support the technical staff we employ? Do we cut salaries or benefits? Do we reduce the length of our work week? Should we cut our rates in order to stay competitive in the current market? How can we maintain the confidence of our staff to eliminate unnecessary insecurity leading to turnover? How do we maintain positive staff motivation so that the projects we do have will be completed within required time frames and not "stretch-out" due to reduced work loads?

These are tough decisions. In the following, I would like to turn our attention away from the daily technical project decisions we are faced with and look at the personal qualities of the individual managers that must make these types of decisions — decisions requiring leadership, true leadership. These are not decisions unique to the surveying profession, but are decisions that face many managers in business during such times.

The qualities of an exceptional land surveyor are not necessarily in common with those of an exceptional manager. We all are familiar with the qualities of an exceptional land surveyor but may not be so familiar with the qualities of a successful manager. So, what are these qualities? The answer can be summed up in one sentence: An effective manager is willing to make the sacrifices, make the decisions, and execute the tasks that an ineffective manager is not willing to do. This statement is indeed an over-simplification of a complex topic that we will discuss in more detail, but affords us a starting point to discuss the personal qualities of a successful manager at the most basic level.

The first and foremost quality a manager must have is the desire to be a manager. Seniority or promotion alone is not enough to ensure the personal commitment necessary to be a good manager. Technical expertise, although desirable, is not a sole requirement either. Often times managers find themselves departing more and more from the technical aspects of their projects and focusing on administrative issues, staff and resource coordination, critical thinking (and the associated headaches), problem solving, and client negotiations. A manager must also have the motivation to be successful as a manager, overcoming all obstacles impeding the completion of their projects.

A manager should have foresight — being able to anticipate possible events based on his or her past experience, and develop a pro-active posture to avoid potential disasters. This can best be described as an uncanny sense of the results of their decisions and actions, and those of their staff. Reactive management styles are common and result in a project managing the manager — not vice-versa. Many managers tend to forge relentlessly ahead with abandon hoping that the means will serve the end and often find themselves reacting to event after event, victims of their own management techniques.

A manager must have qualifying experience directly related to the discipline application he or she oversees. This strong background will lead to the self-confidence necessary to make quick, sound decisions, minimizing the associated risks and leading to a high percentage of positive results.

We have all heard of the stress associated with managing. Ask any manager and they will tell you that they are frequent victims of stress. The fact is that stress is an inherent part of managing. It is one of the prices that must be paid by managers to manage. However, stress is not necessarily an adverse condition; it is the behavior resulting from stress that is dangerous. Releasing stress in some form or another is essential for the survival of a manager and the avoidance of "job burnout." In order for managers to handle stress they must possess — and continually develop — their mental and physical endurance. Exercise in both of these areas away from work will increase the ability of the manager to deal with stress. Being physically and mentally "in shape" also provides the manager with the fervor and tenacity to attack their goals and objectives with vigor.

Managers must also accept the responsibility for projects under their supervision and be accountable for their actions and decisions as well as those of their staff. A manager is expected to perform his assignments with minimal supervision and in most cases without the instant gratification of recognition. Managers must display consistent responsible behavior and see that their directions are followed through, resulting in the successful completion of the goal or objective. The nature of our profession requires a constant balancing act between business ethics and professional ethics. Exceptional managers are able to effectively balance these two concepts. All decisions do not come down to the dollars and cents of the issue at hand: professional standards of practice must also play a role.

A manager must be honest and dependable, both with respect to their superiors and their subordinates. It is important that a manager be cognizant of his or her reputation and stalwart on presenting themselves with the utmost integrity. They must be able to use their reputation to their advantage in a variety of situations. In the case of superiors, a manager must provide accurate and reliable information, objectively

assessing the circumstances and presenting a logical course of action. In the case of subordinates, a manager is faced with a set of more complex issues. Subordinate trust is essential in order to maximize the level of effort and commitment necessary to achieve the desired result. A manager must be tactful and charismatic in order to positively deal with the dynamic personalities of the individuals under their supervision. A manager's behavior must be consistent — and I stress the importance of consistency. Managing people is not unlike being a parent. We have all heard the adage of "one ah-#### wipes out one-thousand atta-boys." This applies not only with superiors, but with subordinates as well. Staff must know that the manager is on their side and will go to bat for them; that he or she will do their best to champion their cause. A manager able to make this kind of commitment to his staff will gain their trust and reap the rewards of efficient performance. If a manager loses the respect and confidence of his subordinates through inconsistent or petty behavior the result will be a rift in the organization, fostering a "we-they" attitude that may never mend.

Managers must dedicate themselves to unselfishly train and develop the people under their supervision. This requires a manager to take a personal interest in selecting and preparing individuals to advance within the organization. This type of an approach creates greater personal growth in subordinates leading to greater potential for the organization. A manager must recognize, appreciate, and acknowledge the efforts of their subordinates; "quick to praise — slow to criticize" the saying goes. Far too often managers point out the things that subordinates do incorrectly, forgetting to complement on the things that were done correctly. Focusing on positive examples demonstrates correct behavior to the other members of the organization resulting in self-motivation/discipline and an overall increase in employee morale.

One rewarding aspect of management is that the manager has the ability, through their power, to create and influence the environment in which the work product is prepared. The manager can be autocratic or democratic, with the best results coming from a combination of both. Promoting a team ideology with common goals and obstacles will generally bring diverse individuals together resulting in higher achievement. If managers can create an organization they can be absent from — not adversely affecting production — then they have been successful in their efforts. Such a manager is the one poised to move ahead in the organization. There is nothing more satisfying for a manager than being able to leave their organization in the hands of the individuals he or she has personally developed.

A successful manager must be able to get along with individuals inside their organization, as well as those outside, in a diplomatic fashion. Most conflicts facing a manager will be within their own organization. The need for state of the art equipment to complete the project or the need for more staff to finish on time are a few examples. Managers must be able to efficiently plan and learn to utilize resources to maximize productivity while minimizing the required effort. This requires creativity and a willingness to take risks. It also requires salesmanship; being able to persuade others to agree with you and your approach.

One of the most difficult tasks facing managers in our profession is the ability to delegate. Technical people just do not delegate tasks well. A manager should never delegate a task to a subordinate and then attempt to execute the same task. The resulting message to the subordinate is that there is a lack of confidence in his ability to perform the task. The long-term affect will be an unwillingness on the part of the subordinate to further expand his potential. Technical managers should not underestimate the abilities of their staff and be willing to accept solutions to problems at hand other than their own. On the other hand, a manager should never delegate a task that will require his or her direct involvement to complete. Assignments that do not require the direct attention of the manager should be delegated to the individual best suited to complete the task most effectively.

When delegating, a manager must learn to delegate both the authority to make decisions and the responsibility for the results. Subordinates will never develop unless they are given this type of opportunity to learn. Managers must learn to trust subordinates to make decisions on tasks delegated to them. A manager cannot be intimately involved in every aspect of every project; learning to effectively delegate will afford the manager the opportunity to grow within the organization. Managers must select the most capable staff member when delegating assignments, audit the progress of the assignment, and hold the individual accountable for the results.

In order for a manager to be able to effectively delegate, he or she must be able to effectively communicate what is expected of the subordinate. Problems will inevitably arise, and the manager should deal with problems directly with the individual involved. People do not like third-party or indirect types of communication; it tends to create doubt and question in the mind of the subordinate. Dealing with problems in an up-front manner at the time they occur clearly communicates any dissatisfaction and promotes individual responsibility for behavior.

Far too often managers point out the things that subordinates do incorrectly, forgetting to complement on the things that were done correctly.

In addition to effective communication, a manager must also learn the other half of communication, listening. My experience has brought me to the conclusion that not only are most managers not good listeners, but that most people are not good listeners as well. Listening takes time, we generally don't like to take the time necessary to truly listen. As we listen, we have a tendency sort information into two files, one file representing information that we agree with, the other file what we disagree with. Effective listening requires that we close these two files, tune in to the speaker, and open a third file — the file for his or her opinion. The quality just described is empathy; managers must have empathy to be able to listen and react to information presented to them, both by subordinates and by superiors.

This brings us to what might be the most important quality a manager must posses. That quality is courage. Successful managers must have the courage to make decisions. Managers

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From The Editor . . . .

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must make responsible decisions based on doing what is right. The logical alternative is generally the prudent one. Decisions should be made on the facts of the matter and driven by the project, economics, people, and resources involved. Managers must take the risk of implementing their creativity. Unfortunately, as with any risk, failure is a possible result. Learning to overcome failure and turn a negative situation into a positive one is the true test of a manager. In our business, projects often times don't go the way they are planned; a manager must be open to accept personal failure or the failure of their subordinates and be able to overcome these failures in stride. Managers must learn to overcome setbacks and encourage their staff even when things go wrong. Expect plans to change, and be prepared to change direction or approach. Staying on a course destined to fail is ridiculous. Recognizing that plans must be modified and having the courage to critically assess an ongoing project work plan is an essential aspect of successful management.

The need for successful managers in our surveying practices is essential and should be cultivated over time at all levels in order for the organization to grow and prosper. Furthermore, I believe that management qualities can be developed in those individuals who do not currently possess them; otherwise, quite frankly, this editorial serves no purpose. The challenge is for us to reflect upon ourselves, recognize the need for change, and focus our energy to accomplish that change. In order for us to do this, we must become students of ourselves, open to learning new ideas and willing to make the personal sacrifices necessary to achieve the desired results. A manager must be devoted to himself or herself, to their superiors, and most importantly to their staff. When a manager stops being devoted to his staff he will surely loose the devotion of that staff. A good manager recognizes that he or she is not perfect and strives everyday to be a better manager than the day before.

For further reading into management, management techniques, and the psychology of management, I recommend the following reading from my library: 1) *The One Minute Manager,* Kenneth Blanchard and Spencer Johnson, Berkley Publishing Corporation, 1983; 2) *The 7 Habits of Highly Effective People,* Steven R. Covey, Simon & Schuster, Inc., 1989; 3) *How to Run a Successful Meeting in 1/2 the Time,* Milo O. Frank, Simon & Schuster, Inc., 1989; 4) *A Passion for Excellence — The Leadership Difference,* Tom Peters and Nancy Austin, Random House, 1986; 5) *Let's Talk Quality,* Philip B. Crosby, McGraw-Hill, 1989; 6) *Influence — Science and Practice,* Robert B. Cialdini, Scott, Foresman and Company, 1988; 7) *The Different Drum,* M. Scott Peck, Simon & Schuster, Inc., 1987; 8) *Ethics in Human Communication,* Richard L. Johannesen, Waveland Press, Inc., 1990; *9) The Elements of Logic,* Stephen F. Barker, McGraw-Hill Book Company, 1980. ⊕

Letters To The Editor

■ GET CLEAR ON INTENT

I was happy to see so many relevant articles in issue No. 94 of the *California Surveyor.* One article especially caught my interest. It was Michael Mcgee's "The Role of the Boundary Surveyor in the Legal Aspects of Possession, Title, and Ownerships." I don't know if it was the content of the article that interested me, or the fact that it sets the record for the longest title ever in a *California Surveyor.*

I am sure my interest was piqued because it was an article on boundary interpretation by a practicing surveyor. An article such as Michael's is rare to come across in California. I know of many surveyors who think of boundary surveying as a static science when it is truly a fluid art. The article was very thorough in its presentation and should be read by all surveyors; especially the section on Surveyor's Responsibilities.

It is important to support anyone willing to put themselves out on that professional limb by stating an opinion on surveying and surveyors. However, I have not come here to praise Caesar but to bury him. As thoroughly and thoughtfully presented his article is, I still see the possible misinterpretation by many new land surveyors. (In this article "surveyors" means people legally allowed to retrace boundaries; whereas, in "real life" when I call someone a surveyor, I mean a person competent and capable to perform the surveying required.)

My main concern is with that old "Quasi-Judicial" robe surveyors like to throw on when interpreting deeds. The article does go into depth about how to establish "intent," yet many people retracing boundaries are quick to guess the intent. Often this intent is based on one of two theories. The first theory is to make everything straight, perpendicular, and parallel (which I call "computer generated" intent). The other theory is to go from fence to fence to fence (which I call the "easy way out" intent). Often these types of theories are known as "gut felling."

When talking about intent, it is meant the actual intent of the parties involved. If both those parties cannot agree to the intent, the written word is used to determine the intent of the parties. Poorly written descriptions do not void the description nor does it allow the surveyor to establish intent. As Michael's article points out, to resolve ambiguities, extrinsic evidence is used — not a surveyors "gut feeling."

There are two points I would like to make with this letter. First, just because a deed does not mathematically close, does not mean it has ambiguities and, second, intent is not an assumption.

Truly I am not in disagreement with Michael McGee's article and strongly support most of statements made in the article. I am sure that if Michael and I surveyed that 100-foot lot, we would both show the same information on our maps and our monuments would be within half a foot.

Tom Mastin, P.L.S.
Mastin Land Surveys

■ WELL DONE!

I just finished reading the *California Surveyor,* issue No. 94, Spring 1991. The article by Mr. Michael R. McGee, P.L.S., was outstanding. I am registered in four states and the article address items that apply in all four states.

I appreciate your publishing it and wish to compliment Mr. McGee on his research and compilation of the material in a well-written article.

James E. Ellett, R.P.L.S.
Survcon, Inc.

Editor's Comment: On behalf of Michael McGee we at the California Surveyor *would like to thank you for the compliments. Michael has presented this paper several times around the state of California and it is always received with equal enthusiasm. We all look forward to Michael's next contribution to the profession.*

■ 1991 PROJECT OF THE YEAR AWARD

Hunsaker & Associates Riverside/San Bernardino, Inc. was recently presented a Project of the Year Award for the firm's Sleepy Hollow Record of Survey Project. The California Council of Civil Engineers & Land Surveyors held their annual convention in the Lake Tahoe area in March, where Bruce Hunsaker, Vice President and author of the Sleepy Hollow Record of Survey Narrative, was presented with a 1991 Project of the Year Award in the Land Surveying Category.

The Sleepy Hollow Record of Survey sits along Highway 142 as it winds through Carbon Canyon in the Chino Hills area of San Bernardino and affects four townships within Los Angeles, San Bernardino, and Orange Counties. The project consisted of seven contiguous parcels comprising 546 acres of some of the roughest topography in the state. Notes, dating back to the 1850s, and dense vegetation, allowed for a most challenging experience.

Pam Quenzler, P.L.S.
Hunsaker & Assoc.

Editor's Comment: Congratulations to Hunsaker and Associates from all of us at the California Surveyor.

■ NEW SURVEY CONTROL MAPS NOW AVAILABLE

The State of California, State Land Commission announces two sets of Survey Control Maps, now available: one around the shore of Lake Tahoe, and one along the San Joaquin River.

Copies of these may be obtained, as long as the supply lasts, by contacting the Map and Document Center in the Land Location and Boundary Section in the State Land Commission at (916) 322-3317.

Both of these sets have been sent to registered surveyors practicing in the respective area. However, our list may be incomplete so we would like to make this announcement.

Roy Minnick, Supervisor
Land Location and Boundary Section
California State Lands Commission

■ PREFERS CHAINS AND LINKS OVER METRIC

In regards to Mr. Tom Alciere's letter in the Fall issue of the *California Surveyor:* If Mr. Alciere is a licensed land surveyor (which I hope he is not), he should, nevertheless, have someone in responsible charge count his marbles. If he wants to go metric, he should major in organic chemistry and be happy as a clam. When I took Chemical Engineering at Oregon State, we were well taught on conversion factors: Centigrade, Fahrenheit, centimeters, inches, pounds, kilograms, BTUs, and on and on. No surveyor I know deals in 5 feet 7 9/16 inches. If that's a problem, you

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Letters . . . .

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buy a Lufkin folding rule which has feet and inches on one side and feet and hundredths of foot on the opposite. Actually, I would prefer to go back to chains and links. Eighty chains to the mile, one hundred links to the chain. Pretty simple. That way, when I buy forty acres by government survey, I know what it is. Not 402.316 meters by 402.316 meters, more or less.

H.J. Newhouse

■ MORE ON METRIC

Upon receiving the Fall edition of the *California Surveyor*, and immediately after reading the president's message (but prior to reading "From the Editor"), I read the "Letters to the Editor." Obviously, I must feel our opinions are more worthwhile than his!!

I have revised my thinking, in that respect, after reading the letter from such an obvious intellectual as Mr. Alciere. I immediately rushed to my roster with bated breath to see if Mr. Alciere was one of "ours." To my dismay and consternation, I couldn't find this paragon of intellectual superiority anywhere. Can you imagine my dismay?

Upon reflection I realized this "pro-metric, intelligent person" (his words, not mine) was lumping **me** — who is still lamenting the change from chains to feet — in with those "useless idiots" who write letters expressing their views without calling anyone who disagrees with them either clods or idiots.

I have no quarrel with the change-over from feet and decimals thereof to the metric system. As an example of futility (and just to keep the title companies on their toes), I have, in fact, filed the first map in either the City or County of Santa Cruz showing metric dimensions thereon. I must confess to being "chicken," however. I also showed the dimensions in feet and decimals. It took a great land surveyor (Stanley R. Smith, LS 2265) to file the first map in the county (the Aptos Post Office) employing only metric dimensions. Stanley will always be remembered (less than fondly, I'm afraid) by the title companies who must cope with his map — which was drawn employing a metric scale, by the way.

It is interesting to note that an intellectual of Mr. Alciere's caliber doesn't even realize that we surveyors do not work (normally) in feet and inches.

At any rate, I wish Mr. Alciere and all other "pro-metric, intelligent persons" my very best, and hope all their problems can be measured in millimeters.

George R. Dunbar

■ CONTINUING EDUCATION: WERE ALL IN THIS TOGETHER

About a year ago my views on continuing education were in "Letters to the Editor." I am happy to see the education question is (at long last) being addressed via open forum as presented in the Fall issue of *California Surveyor.*

In the future, we will see many more elegant letters and opinions — for and against continuing education — like those from Gerald Oldenburg and Robert Hennon appearing in the Fall issue. My opinion of a year ago has not changed, and that was simply that all CLSA members should have a say in whether or not CLSA should pursue and support legislation for continuing education. This issue is too important for just the Board of Directors of CLSA to decide.

Progress is on the way; at least the question is finally being debated. What still galls me, however, is the attitude of the *California Surveyor,* ie; staff, for their disclaimer prior to Mr. Oldenburg's letter. That disclaimer basically said Mr. Oldenburg's "anti" continuing education opinions did not necessarily represent those of the *California Surveyor* or its staff. There was no such disclaimer prior to Mr. Hennon's article, so are we to assume his "pro" continuing education opinions do represent those of the *California Surveyor* and staff? Or the Board of Directors? They do not represent mine! I personally agree with Mr. Oldenburg and think a majority of CLSA members do, or will, feel the same way. CLSA is, and will be, only as strong as its membership allows. With this continuing education issue, it is time for the *California Surveyor* and staff to lend an impartial ear to **all** members and omit the tilting of media coverage with embarrassing and unnecessary disclaimers that portray a biased attitude. We are all in this thing together, so let us all be heard and treated equally. Thank you Mr. Oldenburg and Mr. Hennon for your interesting views.

Andrew E. Johnston, P.L.S.

■ ANYONE CAN BECOME A SURVEYOR

How would you feel if I told you anyone can become a surveyor? Becoming a surveyor took me six years of experience, attendance at classes and seminars, a year or more of study and an eight-hour exam. But I recently discovered that none of this was necessary to own a surveying company.

The Land Surveyor's Act governs the procedures to apply for and obtain a license to survey, yet the rules are so loosely written that anyone, licensed or not, can open a land surveying company.

For example: some individuals are interpreting the Land Surveyors Act, Chapter 15, Article 3, Section 8729, to mean that anyone can open a survey business by merely hiring a licensed individual as the "partner, member, or directing officer in charge . . . and if all surveying work and documents are done by or under the direct supervision of such land surveyor."

At different government levels, laws have been passed to encourage participation by minorities and women. These laws are not requirements, they are merely goals. However, there are some people who twist the spirit of these laws in an effort to edge out their competition. White, male, licensed land surveyors are handing over the business control to their wives in the most obvious efforts.

And, as a profession, are we ready for the free trade agreements with Mexico and Canada? Will this allow companies to bid for jobs in the U.S. merely by appointing one token California Land Surveyor to their Board of Directors?

There are some people who twist the spirit of these laws in an effort to edge out their competition.

Was this the intent of the Land Surveyors Act? Chapter 15, Article 3, is vague in this area and seems to contradict itself in different sections of the article as follows:

Section 8725: "**any** person . . . offering to practice land surveying in this

State . . . shall be licensed" and "it is unlawful for **any** person to practice, **offer to practice** or represent himself as a land surveyor."

This section addresses "persons"; does this exempt companies or corporations from compliance?

Section 8726: This section defines instances when "a person" is practicing land surveying and therefore must be licensed per Section 8725. Companies or corporations are not mentioned.

Item (h) of Section 8726: "Indicates, in **any** capacity or in **any** manner, but the use of the title 'land surveyor' or by any other title or by any other representation that he practices or offers to practice land surveying in any of its branches."

Can this be interpreted to mean that a company, because it is not a person, does not need a license to represent itself to offer land surveying services?

Item (i) of Section 8726: "Procures or offers to procure land surveying work for himself or others." This seems very clear that the law says to just obtain the work, a "person" must hold a license. But what is the responsibility of a company or a corporation who procures the work?

Item (j) of Section 8726: "Manages, or conducts as manager, proprietor, or agent, **any** place of business from which land surveying work is solicited, performed or practiced." It seems that the purpose of this item is to keep any person from finding a loophole to allow them to practice land surveying without a license. Are companies and corporations excluded from this requirement?

This section is followed by a section that answers my questions about companies and in a few sentences totally negates the power of Section 8726.

Section 8729: "This chapter prohibits the practice of land surveying by **any** partnership, firm, company, association or corporation." "**However;** nothing contained in this chapter shall prohibit one or more licensed land surveyors from practicing or offering to practice their profession through the medium of a partnership . . . or corporation if a land surveyor licensed pursuant to the provisions of this chapter . . . is the partner, member, or directing officer in charge of the land surveying practice of the partnership . . . and if all land surveying work and documents are done by or under the direct supervision of such land surveyor."

If you are a "person" who's taken the LS exam seven times and still can't pass, or you want a career that doesn't require training or education, just start a land surveying business. Form a corporation with a fictitious name, hire any licensed "person" as partner, member, or directing officer just by filling out the blanks on the incorporation papers. There is no minimum ownership that this person has to hold, is .0001% too much? If that "person" loses his license just hire another "person." At worst, get a new fictitious name.

There will always be loopholes but should we make it so easy?

Aleksi Rapkin, P.L.S.

Editor's Comment: Your letter is one that will surely prompt a response from other land surveying professionals. The questions may be related more to a conflict of ethics as opposed to legal issues. In particular, business ethics versus professional ethics. However, it should be noted that the intent of the Land Surveyors Act is to provide legislation to protect the public and regulate those ***individuals*** *licensed to practice surveying; and it is those individuals who are ultimately responsible for the direction and supervision of land surveying as it is defined within the act.*

■ FEES ON THE RISE

The economic slowdown has hit Riverside County with a fury greater than the 1981–82 recession. Many of our private sector colleagues have taken strong measures to survive. Some have been forced to lay off all their employees, with key people on call as jobs are obtained. The firm principals are taking to the field, computer, and drafting table.

What is county government doing to survive? The only thing short-sightedness allows: increase taxes.

The Riverside County Surveyor's Office raised the Record of Survey map checking fee from $600 to $1500 plus, effective July 27, 1991. The guise used to justify the increase to the Board of Supervisors was to point out that major businesses with multiple map sheets do not pay more than the mom and pop survey. If all our clientele were major businesses, you would not be reading this article. On the contrary, a majority of my clientele can barely afford my services. They just do not have an additional $1500, plus, to pay government.

An automobile dealer was complaining to me recently that on every new car sold, twelve percent of the sales price is extracted by government. He does not believe government is earning the twelve percent but feels powerless to do anything. Some of my colleagues have told me the map checking fee has been greater than the actual survey cost. My records show the fees to be thirty percent of the money the Client pays us. The key question that we must ask ourselves is, "Should we allow government to charge a 30% business tax on every Record of Survey map filed?"

Should we allow government to charge a 30% business tax on every Record of Survey map filed?

Both professional organizations in Riverside/San Bernardino Counties sent letters to the Board of Supervisors in 1988 in opposition to the then-proposed fee increase, from $160 to $600. If we do nothing regarding this last fee increase, government will — by projecting the past — increase the fee to $4000 by 1993.

Ordinance No. 671.6 is written as follows:

1. Filing a Record of Survey
   a. General Fund
   i) Survey-plus recording fee (Initial Deposit), $600, $1500, 150%. An initial deposit of $1500 will be placed in a trust fund. Upon depletion of this fund to $200 an additional $1500 deposit will be required until recordation of the map. After recordation any balance will be refunded unless the balance is less than $50.

My proposal is to seek a repeal of the $1500 fee. Change the fee structure to permit only the state fee of $100.

CLSA Resolution 86–10, approved July 26, 1986, in the last paragraph states:

> *"Resolved; that as Records of Survey maps are beneficial to the general public, now therefore, it is appropriate that the Counties should absorb the cost of checking said maps from their general fund."*

Both the Riverside/San Bernardino Chapters of the California Land

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*Surveyors Association and Civil Engi*neers and Land Surveyors Association of Riverside and San Bernardino Counties, in 1988, went on record publicly against the proposed fees increase.

If we are to grow in professional stature a coalition must be formed to repeal the county fee. The coalition could:

1. Start dialogue with our State Legislature.
2. Meet with the County Surveyor and Department Head.
3. Meet with individual members informally and make a public presentation to the Board of Supervisors.
4. Make a formal presentation to the local and state CLSA Board of Directors.
5. Make a formal presentation to the local and state CCCE & LS Board of Directors.
6. Make a formal presentation to the area and state Consulting Engineers Association of California Board of Directors.
7. Legal Action, if supported by 4,5, and 6 above.

If you want to participate in this endeavor, or receive furthur information, please contact: Ernest Pintor, Land Surveyor, P.O. Box 1565, Riverside, CA 92502. Phone (714) 683-4292.

Ernest Pintor, P.L.S.

Editor's Comment: One cannot help but wonder what the impact of such high fees will be, with map checking fees likely to exceed the fees of performing the survey. Could we digress back to the era of unrecorded surveys? Furthermore, who is responsible for the integrity of the map, the licensed professional land surveyor performing the survey, or the jurisdiction recording the survey?

■ PSOMAS AND ASSOCIATES VICE PRESIDENT RELOCATES

Paul Enneking, Vice President and Principal of Psomas and Associates' Santa Monica Office, has relocated to the company's Sacramento office, announced president Timothy Psomas.

As Regional Director of Surveying for the Sacramento office and as Corporate Director of Design and ALTA Surveys, Enneking supervises all surveying operations in Sacramento and oversees the business development activities in the Sacramento, Santa Monica, Costa Mesa, and Riverside offices.

Enneking has been with Psomas for fifteen years and specializes in land surveying and mapping, boundary analysis, construction surveys, and project management. He has been instrumental in such Los Angeles projects as the California Plaza at Bunker Hill, the Walt Disney Concert Hall, and the Los Angeles Corporate Center Business Park in Monterey Park.

Psomas and Associates specializes in land planning, civil engineering, land surveying, GPS, water and wastewater management, and governmental relations, from project definition through completion of construction.

Barbara Harris
Carl Terzian Associates ⊕

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CELEBRATING 100 YEARS

Standing On The Shoulders Of Giants

by Donald E. Bender, Student of Economic History

CALIFORNIA has the honor of being the first state in 1891 to license land surveyors for the protection of the public. The Office of County Surveyor has existed in California since 1850, the early 1600s in North America, and much earlier in England. The licensing of both private and public land surveyors in the United States, however, appears to begin in California in the fall of 1890. The idea of licensing land surveyors follows a pattern developed by European surveyors much earlier.

In his 1977 publication, *Chaining the Land*, Mr. Francois D. "Bud" Uzes, Land Surveyor 3175, provides a glimpse of the effort initiated by California land surveyors in 1890 to become regulated. Mr. Adolph Theodore Herrmann of San Jose is given the title by Bud Uzes of "father of the act to license and define the duties of land surveyors, and to provide for a proper record of surveys." Mr. Adolph Theodore Herrmann apparently proposed regulation on December 5, 1890. He was subsequently awarded land surveyor license twelve on July 22, 1891.

Was Mr. Herrmann the "father" of land surveyor licensing? Should the committee members of the Technical Society of the Pacific Coast be given top honors? Should the members of the first Board of Examining Surveyors be given top honors? Should the land surveyors honored with the first licenses be given consideration for top honor? Should individuals never licensed as land surveyors be considered for the top honor?

LAND SURVEYOR GIANTS

The biennial report of Surveyor General Theodore Reichert to "his Excellency H. H. Markham, Governor of California" on August 1, 1892, *[see page 22. — Ed.]* provides answers to a few of these questions. At page ten of his report, Surveyor General Reichert provided a copy of the 1891 act that licensed land surveyors.

At page thirteen Surveyor General Reichert reported "Under the above-quoted act, licenses have been issued to the following persons":

1. Charles Terraine Heal[e]y
   Los Angeles, July 20, 1891
2. James Malcolm Gleaves
   Redding, July 20, 1891
3. Hubert Vischer
   San Francisco, July 20, 1891
4. Otto Von Geldern
   San Francisco, July 20, 1891
5. Charles Henry Holcomb
   San Francisco, July 20, 1891
6. Thomas Lennington Knox
   Orland, July 20, 1891
7. Benjamin L. McCay
   Oroville, July 20, 1891
8. William F. Peck
   Yuba City, July 20, 1891
9. Pallas N. Ashley
   Woodland, July 20, 1891
10. Ernest McCullough,
    San Francisco, July 20, 1891
11. S. Harrison Smith
    San Francisco, July 20, 1891

Eleven land surveyors were licensed on July 20, 1891. The Report continues to identify a total of one hundred and nine individuals who were issued licenses through July 13, 1892.

Several observations come to mind when I read and reread that August 1, 1892, report from Surveyor General Reichert to Governor Markham.

First, San Francisco land surveyors appear to have done very well in the first round of licensing. One possible reason: Surveyor General Reichert was a long term resident of San Francisco. Another possibility: the Technical Society of the Pacific Coast was in San Francisco. The three Technical Society members appointed to the first Board of Examining Surveyors lived north of the thirty-seventh parallel of latitude.

Second, land surveyors north of the thirty-seventh parallel of latitude did extremely well in the first round of licensing. This might again be the result of the geographic reality that the Technical Society was in San Francisco. Participation by land surveyors in Technical Society meetings in San Francisco in 1891 was no easy task.

Third, the Technical Society Committee members who drafted the original licensing proposal in December of 1890 and January of 1891 could have been considered very deserving of the early license numbers. But, the early licenses were not awarded to former committee members. The Technical Society Committee members were licensed as follows: Otto Von Geldern of San Francisco (4), Adolph Theodore Herrmann of San Francisco (12), C.E. Grunsky of San Francisco (17), and Luther Wagoner of Sacramento (216).

Fourth, the first members of the Board of Examining Surveyors could have awarded themselves the early licenses. But, contrary to the practice in the other states that followed California in the licensing of land surveyors and engineers, the first surveyor board members did not receive the early licenses. The licensing of board members will be considered later.

Fifth, who was Mr. Charles Terraine Heal[e]y of Los Angeles? As land surveyor one, he appears to stands out from the others. The next license awarded to a land surveyor south of the thirty-seventh parallel is Mr. Burr Bassell of San Bernardino. Mr. Bassell was awarded license fifteen on August 10, 1891. Why did Mr. Healey receive the honor of land surveyor license one when eleven licenses were issued on July 20, 1891? Should he receive the top honor? We will later return to the consideration of Captain Healey.

Sixth, who was Surveyor General Theodore Reichert? He became

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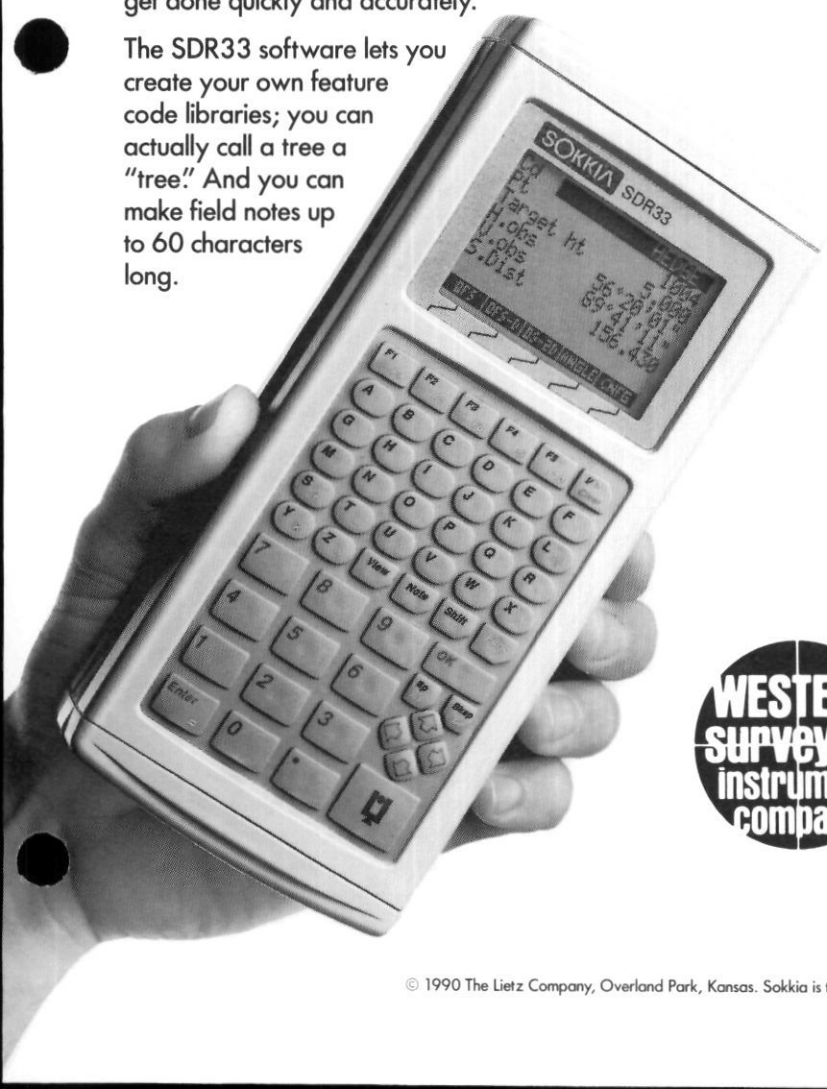

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Standing . . . .

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Surveyor General at the approximate age of forty-seven and left office on January 7, 1895, at the approximate age of fifty-five. He died fifteen years later in San Francisco and is interned in Sacramento. His name does not appear in the annals of California land surveyors.

The results of my research will be presented in due course. I must, however, disagree at this point with my learned, highly-respected surveying colleague, and friend, Bud Uzes. The licensing of land surveyors in California is not the result of a single father, but the result of the efforts and sacrifices of many highly-qualified and dedicated surveyors, and possibly, at least one non-surveyor.

Some politics and luck also played a significant role in the licensing of land surveyors. Rather than one father, I believe California surveyors should recognize several giants in the land surveying profession. A profession that is increasingly recognized worldwide for its historic service to ancient and modern civilizations.

If land surveyors could only raise the level of their eyes to the horizon seen by those giants in 1891. We must again accept the reality that the licensing of land surveyors is for one reason only, the protection of the public. With that reality, we need only lift ourselves to the height of the shoulders of those land surveying giants to see a new, more distant, and promising horizon for the land surveying profession in California.

But first, we should know more about these giants and give them the recognition they deserve. We should not lose sight of their efforts and sacrifices in this **Centennial of the Licensing of Land Surveyors.**

LAND SURVEYORS AND THE POLITICAL PROCESS

Statewide elections were held in the fall of 1890. Of interest to land surveyors, Theodore Reichert was reelected to the Constitutional Office of Surveyor General. Before his first election as the twelfth Surveyor General of California in 1886, Theodore Reichert had worked seventeen years in the United States Surveyor General's office in San Francisco. He was Chief Clerk when he was elected Surveyor General. During his first term he had learned the ways of Sacramento politics. His knowledge of government would be of significant benefit to the land surveying profession in 1891.

The following quotes from biographical notes by Mr. Herb Maricle in the *California Landword* give us a glimpse of Theodore Reichert. "Concurrent with his Federal position, Reichert was active in San Francisco politics. He remained so beyond 1890. The *Sacramento Union* (1891) rendered a glowing account of Reichert as a skilled organizer and tireless worker in Republican circles. It also described him as an able, efficient administrator and all-round qualified manager."

If land surveyors could only raise the level of their eyes to the horizon seen by those giants in 1891.

Also, "the *San Francisco Call* edition of December 25, 1890, describes Reichert as the man who put a stop to the schemes of land-grabbers."

A second significant event occurred in the fall of 1890. Attorney Henry Harrison Markham, Republican, was elected Governor. As a former United States Congressman from Pasadena, he had distinguished himself as an effective legislator in Washington, D.C., and enjoyed public support from prominent Democrats. He was also noted for his wealth that resulted from his investments in California real estate. He very probably had contact with land surveyors in the Los Angeles area.

I am quite certain that Surveyor General Reichert and Governor Markham had early discussions of the urgency for the licensing of land surveyors. The speed with which the idea for the licensing of land surveyors progressed, suggests their combined influence may have played a very significant role in the enactment of the 1891 act to license land surveyors. They have not been properly recognized for their contribution to the land surveying profession.

With this political environment in place, it was an appropriate time to consider regulation of land surveyors for the protection of the public. California had regulated teachers in 1851. The regulation of attorneys followed in 1872, the physicians in 1876, and the dentists in 1885. Other professional occupations would not be regulated until years later. For example, veterinarians were regulated in 1893. Architects and accountants were regulated in 1901. Real estate brokers were regulated in 1917. And, civil engineers were regulated in 1929.

Absent a statewide society for land surveyors in 1890, the preliminary discussions concerning the regulation of land surveying very probably took place in the Technical Society located in San Francisco. *Chaining the Land* provides an account of one meeting on December 5, 1890, and a series of meetings beginning January 9, 1891.

It is obvious from the material published by Bud Uzes, that the land surveyors and engineers were having a very difficult time in agreeing on proposed legislation. New laws, however, are generally not the result of self-interested individuals and competing special interest groups. The California Legislature and the Governor, in 1891, had a great deal to say about any proposal for new laws that would license land surveyors. Additionally, the Surveyor General undoubtedly carried significant influence while new laws were enacted that he would be required to implement.

LAND SURVEYORS BECOME A LEGISLATIVE URGENCY

The following sequence of events should be considered by all land surveyors who are interested in the legislative process.

January 14, 1891: Assemblyman Clark of Yolo introduced a bill titled "An Act to License and Define the Duties of Land Surveyors, and to Provide for a Proper Record of Surveys." The bill was designated AB 238 and assigned to the Judiciary Committee.

January 26, 1891: Assemblyman Dow of Santa Clara introduced a bill with the same title as AB 238. This bill was designated AB 510 and assigned to the Judiciary Committee.

February 3, 1891: Senator Crandall of Santa Clara introduced a bill titled "An Act to Define the Duties of, and to License Land Surveyors." The bill was designated SB 545 and assigned to the Committee on Roads and Highways.

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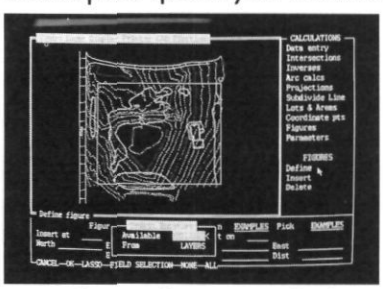

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Standing . . . .

CONTINUED FROM PAGE 16

February 26, 1891: The California Senate approved SB 545 as a "Case of Urgency" by a vote of thirty to zero.

March 24, 1891: Assemblyman Dow, the author of AB 510, moved for a substitute to Assemblyman Clark's AB 238. The Assembly approved the substitute AB 238 by a vote of forty-one to twenty-one.

March 24, 1891: **The same day,** the California Senate approved the substitute AB 238 on a "Special Urgency Case." The vote was twenty-one to eleven.

March 31, 1891: "An Act to Define the Duties of and to License Land Surveyors" was approved as Chapter CCLV. The act required that it take effect on July 1, 1891.

Seventy-six days to enact legislation to license land surveyors. This must be a record for any legislative proposal of interest to land surveyors.

LAND SURVEYOR LICENSING HIGHLIGHTS

The study of the legislative compromises and the reasons — some fact and some guesswork — for this record-setting legislation provides a fascinating story that every land surveyor should understand. Again, *Chaining the Land* provides just a glimpse of the 1891 legislative compromises that were made in adopting the act to license land surveyors.

For example, the Legislature required the "Deletion of the 'free ride' for graduates of the College of Engineers from the State University at Berkeley."

Also, the Legislature expanded the Board of Examining Surveyors by requiring two additional surveyor members who were not members of the Technical Society. This legislative compromise diluted, but did not eliminate, one of the original proposals of the Technical Society. The original legislation required the Governor to appoint the three members of the Board of Examining Surveyors from the Society's membership.

Additionally, the title for the act proposed by Senator Crandall was adopted. This change removed the reference to records of survey from the title of the act. The act did, however, require every "licensed surveyor" to "set monuments permanently marked with his initials," and to file with the Recorder a "record of survey" within sixty days.

The act uses the terms surveyor, licensed surveyor, licensed as a land surveyor, land surveyor, and licensed land surveyor interchangeably. For example, every licensed surveyor was required to have a "seal of office" that contained the words "licensed surveyor." The Surveyor General, on the other hand, was required to maintain a list of all "licensed land surveyors."

THE BOARD OF EXAMINING SURVEYORS

Section Five of the act mandated the following: "Within twenty days after the passage of this act, the Governor shall appoint three surveyors in good standing, members of the Technical Society of the Pacific Coast, and two other surveyors in good standing, not members of such society, as a Board of Examining Surveyors, who shall conduct such examinations and make such inquiries as to them may seem necessary to ascertain the qualifications of applicants for surveyors' licenses."

The act . . . require[d] every "licensed surveyor" to "set monuments permanently marked with his initials," and to file with the Recorder a "record of survey" within sixty days.

The April 20, 1891, deadline for the appointment of five surveyors to serve on the first board was not a problem for Governor Markham. He moved promptly and appointed the following surveyors to the first Board of Examining Surveyors.

Mr. Lemuel Franklin Bassett of Redding. Mr. Bassett was a member of the Technical Society and was subsequently awarded license forty on September 18, 1891.

Mr. H. Dittrich of San Jose. Mr. Dittrich was not a member of the Technical Society and was subsequently awarded license twenty-one on August 18, 1891. In examining his own qualifications to practice land surveying, Mr. Dittrich attested to his own competence.

Mr. Fredrick Eaton of Los Angeles. Mr. Eaton was not a member of the Technical Society and was never awarded a land surveyors license. Mr. Eaton was Chief Engineer of the Los Angeles Consolidated Electric Co. and may have lacked the appropriate qualifications to be licensed.

Mr. S. Harrison Smith of San Francisco. Mr. Smith was a member of the Technical Society and was awarded license eleven on July 20, 1891, the first day of licensing.

Mr. Luther Wagoner of Sacramento. Mr. Wagoner was a member of the Technical Society and was also a member of the Technical Society committee that developed the first licensing proposal. The reason for the delay of his license for several years, and his high license number of two hundred sixteen remains a mystery.

APPLICATION FOR LICENSE OF LAND SURVEYOR

Section One of the act required that "Every person desiring to become a licensed land surveyor in this State must present to the State Surveyor-General of this State a certificate that he is a person of good moral character." A certificate was also required that "set forth that the person named therein is, in the opinion of the person signing the same, a fit and competent person to receive a license as a land surveyor." Also, the license applicant was required take an "oath that he will support the Constitution of this State and of the United States, and that he will faithfully discharge the duties of a licensed land surveyor, as defined in this act."

Surveyor General Reichert did not delay in the administration of this new statutory duty. In addition to the regular statutory duties of the Office of Surveyor General since 1850, he set in motion what was needed to license land surveyors. His ability as a "skilled organizer" and as "an able, efficient administrator and all-round qualified manager" can be clearly seen in the form developed for the "Application for License of Land Surveyor." The three-page application form provided space for the applicants to document their qualifications and for the certificates required by the act.

On February 22, 1991, I was able to hold in my hands the original handwritten applications for License of Land Surveyor. Written nearly one hundred years ago, the original

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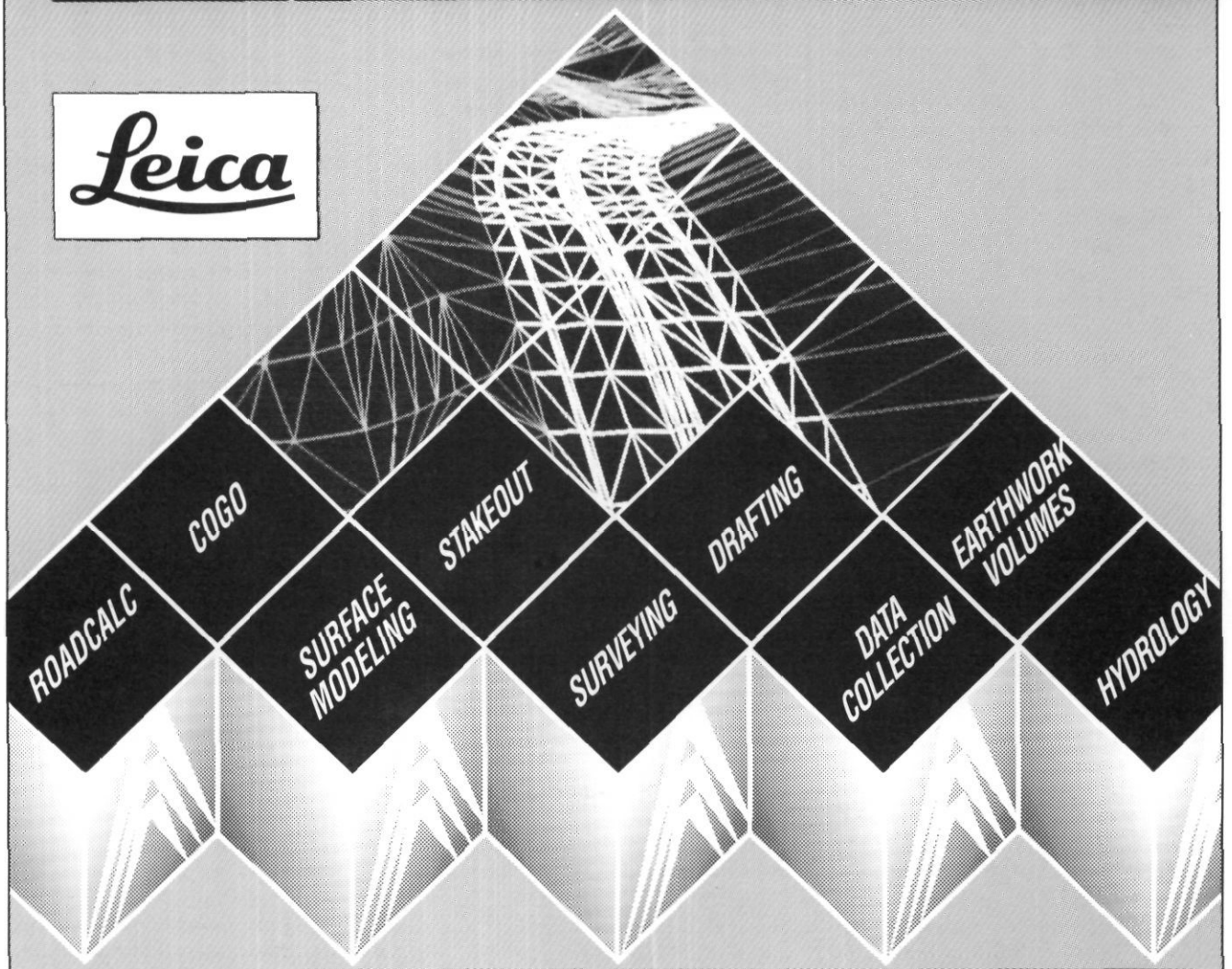

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handwritten applications provide a treasure-trove of information on the giants of the land surveying profession. The character of these giants comes into clear focus when you read their hand written applications.

The California State Archives in Sacramento, California, has preserved most of the original applications. The originals are available for public inspection and copying.

The original application form had the following significant items. Twelve lines were provided under the heading, "If not a graduate, state when and how you acquired a practical knowledge of land surveying." By writing in the margins, several of the early applicants increased their response beyond the twelve line limitation.

Twenty-one lines were provided under the heading, "Give a succinct statement of the principal work done by you as a land surveyor, and make as full a statement as possible in the following space." Again, applicants eager to document their experience went beyond the admonition to "make as full a statement as possible in the following space."

The applicants signed an oath concerning the truth of the information provided and additional oaths that were required by the act. The signature of the applicant was required to be notarized. The application was apparently available in June, since the application for license number two was notarized on June 27, 1891.

The application also provided space for five individuals to sign a Certificate of Good Moral Character. Each person was required to certify that they were "well acquainted with the applicant, and that he is a person of good moral character, and, in our opinion, a fit person to have and hold the office of Licensed Land Surveyor."

The references provide some of the most interesting reading. The occupation of each reference was required on the form. After reading a few applications it become apparent that the applicants were socially prominent in their communities. For example, land surveyor two, James Malcolm Gleaves, of Redding, has references from a banker, district attorney, attorney at law, superior judge, and Register U.S. Land Office.

The application also provides space for the required Certificate of Competency. Each application was signed by at least three of the five members of the Board of Examining Surveyors. The board members were required to "certify that we have made the inquiries and examinations prescribed by law, and declare it our opinion that the said applicant, is competent to perform the duties of the office of Licensed Land Surveyor in California."

The final step in the process required the Surveyor General to sign and indicate the date that the applicant was approved for a "License of Licensed Land Surveyor."

From an administrative perspective, the application was extremely efficient. Considering the size of the state and the difficulty of obtaining the required signatures, it was a major accomplishment to license the first eleven land surveyors on July 20, 1891. Just one hundred and eleven days after the act was approved, California had the first land surveyors licensed for the protection of the public.

The administration of the licensing of land surveyors in California continued under several Surveyors General. Surveyor General Reichert administered the statutory duty until January 7, 1895. Surveyor General Martin J. Wright until January 5, 1903, and Surveyor General Victor H. Woods until January 7, 1907.

Surveyor General William S. Kingsbury established the record for administering the responsibility. Surveyor General Kingsbury administered the licensing of land surveyors from January 7, 1907, until August 14, 1929, when the Office of Surveyor General was abolished. In 1933, major changes to the licensing of land surveyors were enacted by the Legislature. That story, however, must remain for the future.

LAND SURVEYOR ONE

On first glance at the application of land surveyor number one you observe his penmanship. It appears to be the writing of a determined man in a hurry. And yet, he reports his age as 57.

The second thing that struck me about his application is the references to his good moral character. Their occupations include a U.S. Judge, a U.S. Marshall, two "ex Mayor of Los Angeles," and the Mayor of Los Angeles. One "ex Mayor of Los Angeles" identified his occupation as, "Capitalist."

The third thing that struck me about the application is the board members who certify to his competence. Luther Wagoner of Sacramento is the first to sign, and then S. Harrison Smith of San Francisco. Both are members of the Technical Society. And finally, Fred Eaton of Los Angeles, a non-society member, signs at the bottom of the page.

The account of his education requires thirteen lines, one more than the application provides. His "succinct statement" of his experience remains within the margins and the twenty-one line limitation. He concludes his "succinct statement" with the following: "and many others, and surveyed townsites to enumerate which the space allowed is wholly inadequate."

Now, land surveyor number one has really caught my attention. With too much experience to document in the twenty-one lines that are provided, and three mayors of Los Angeles as references, I have to know more about Land Surveyor One.

CHARLES TERRAINE HEALEY

With very little effort, one is able to learn a great deal about Charles Healey. Captain Charles Healey, as he is known to the biographers, is widely recognized for his accomplishments as a land surveyor. Based on his application and several biographies, it is easy to rank him among the giants of the land surveying profession. The following highlights of his career appear to be correct.

He was born on July 31, 1833, in North Hartland, Vermont. Educated at the Perkinsville Academy, his studies included surveying. He worked in surveying and as an instrument maker before leaving for California. At age twenty-one, Mr. Healey arrived in San Jose, California, in 1854 after making the voyage around Cape Horn to San Francisco.

He immediately went to work in surveying, and married Annie Morgan on October 23, 1855. From this marriage he fathered daughter Eva L., and two sons, Eugene T. and Lucien T. He established himself as a surveyor and performed numerous surveys throughout California.

At the outbreak of the Civil War he organized, and was made Captain of, the home guard in San Jose. Apparently this is how he became known as Captain Charles Healey. He served as City Surveyor and County Surveyor. He became actively involved in surveying official partitions and subdivisions of numerous ranchos. Several

biographers report "every Spanish grant of land south of San Jose, Cal., was surveyed by him." He also performed mine surveying in Santa Clara County.

On November 17, 1869, he married Orlena Medora Swett of San Francisco. She was the daughter of Captain Frederick Parker Swett, who built the first, "Meigg's wharf" in San Francisco. From this marriage he fathered two daughters, Blanche Medora and Maud Alma.

LAND SURVEYOR ONE BECOMES A LAND DEVELOPER

On April 25, 1882, Captain Healey, with a party of eleven persons, departed San Francisco for Southern California. He had been invited by Mr. Jotham Bixby to come to the Los Cerritos Rancho for the purpose of laying out a townsite. Captain Healey had previously surveyed the rancho in the 1870s. Included in his party was Mr. William F. Sweeney, a surveying assistant and future partner.

The rancho, consisting of five leagues in size, had originally been granted to a Manuela Neito in 1834. It was patented to Mr. John Temple on December 7, 1867, and contained 27,054.36 acre. The Flint-Bixby Co. purchased the rancho from John Temple who was reported to have been a "well-known trader and land holder." It is reported that the Flint-Bixby Company purchased the property "for what it cost John Temple to build the ranch house." It is also reported that John Temple "died in San Francisco soon after making this sale."

A major land development was beginning. Mr. W. E. Willmore had leased 5,300 acres of the Los Cerritos Rancho from J. Bixby & Co. in 1881. The townsite of Willmore City was being organized by Mr. Willmore through the American Colony Land Company. The land company was located at 38-40 Spring Street in Los Angeles. The officers of the American Colony Land Company included Charles T. Healey, "surveyor and engineer."

The townsite of Willmore City was comprised of one hundred and twenty-two blocks. Each block measured three hundred and ten feet by three hundred and sixty feet. The blocks were divided into lots twenty-five feet wide by a minimum of one hundred and fifty feet deep. Streets ranged in width from eighty feet to one hundred and twenty-four feet. The main street, Ocean Park Avenue, was one hundred and seventy-five feet wide. Restrictive covenants were imposed on most of the lots with some requiring a one hundred foot building setback.

On August 29, 1882, members of Captain Healey's family and assistants moved to what was then called "Los Cerritos Beach to commence work in the making of a town." "The Captain and his assistants went to Los Angeles the first day, for field notes to be used in the survey and which were urgently needed, it seemed, for use on the morrow."

A "tent-house was established at what is now the northwest corner of Ocean and Pine." Mrs. Healey and daughter Maud spent the first night alone in their tent and "terribly lonesome." "Our food and clothing had to be watched very carefully during our camping life there, for the scorpions were numerous." "All drinking water had to be carried from Los Cerritos ranch house, five miles away."

"There were bad sand storms at that time, making life almost unbearable, and on many occasions it was with difficulty that we could eat and sleep." On October 3, 1882, Captain Healey was forced "to move out to the Los Cerritos ranch house, for the surveyors could not do any work on account of the wind."

Excursion trains were scheduled from Chicago on October 17, Boston on October 18, and Kansas City on November 21, 1882. The reduced one-way fare from Kansas City was $52.50.

By 1884, Mr. Willmore and the American Colony Land company were unable to make the payments on the contract. "Willmore City" was in financial trouble. "Pomeroy & Mills of Los Angeles took over from the Bixby Company four thousand acres, including Willmore City, at sixty dollars per acre. The town was renamed Long Beach." The survey of lots was extended with "Captain Healey having charge of the work."

Captain Healey and his wife established the first home in Long Beach in 1884. "They set out across the front of the yard, three palm trees." With the initial development of Long Beach completed, Captain Healey took his surveying practice to Los Angeles, and "continued the practice of his profession at an office in that city for some time." Many surveys in Los Angeles were performed under the name of Healey and Sweeney.

Captain Healey reported on his Application in 1891 that his business address was 101 S. Broadway in Los Angeles. His Application was notarized on July 6, 1891, by George Pomeroy.

A TRIBUTE TO LAND SURVEYOR ONE

The death of Captain Healey on August 3, 1914, brings to an end the life of one of California's land surveying giants. Captain Healey, Land Surveyor One, is remembered by the biographers of California's pioneers.

A History of California, published in 1915, begins its report on Charles Terraine Healey with this tribute. "Among the early settlers of Southern California, who have been active in the apportioning of the old estates formerly owned by the Spaniards, and in establishing cities where formerly only sheep and cattle ranches were to be seen, should be mentioned Charles T. Healey, whose death, August 3, 1914, removed from the town of Long Beach its pioneer resident, through whose endeavors the town was laid out, and whose interests have been wrapped up with those of the town since 1882."

Mr. Walter Case, in the *History of Long Beach and Vicinity*, begins his 1927 ten-page report on Charles Terraine Healey with these words. "Charles Terraine Healey, who made the original survey of Willmore City, now Long Beach, in 1882, was a distinguished pioneer who had been a resident of the municipality for nearly a third of a century when he departed this life in 1914, at the venerable age of eighty-one years. He lived in the first house built here and was closely identified with the early growth and development of the community."

Mr. Case continues by reporting that the trees, planted by Captain Healey, will "never be cut down or removed if Mrs. Healey's wishes are obeyed. She has refused to sell the property save under the condition that the trees would not be disturbed, and she has determined to provide in her will that her heirs shall always give the old palm trees, the same consideration."

" 'These palms are very precious to me,' she said the other day. 'They are to me a sort of monument to my husband's memory, and as I have watched them grow, through these forty years, I have come to regard them as a heritage to the city of Long Beach from the pioneer who surveyed the original townsite — a heritage deserving of preservation.' " ⊕

REPORT

STATE OF CALIFORNIA, OFFICE OF SURVEYOR GENERAL
SACRAMENTO, AUGUST 1, 1892

To his Excellency H.H: Markham, *Governor of California:*

DEAR SIR: In accordance with the requirements of the law relating to the duties of the Surveyor-General, I have the honor to submit the following report of the transactions of this office from August 1, 1890, to August 1, 1892.

THEO. REICHERT,
Surveyor-general, and ex officio Register of State Land Office.

AN ACT TO DEFINE THE DUTIES OF AND TO LICENSE LAND SURVEYORS.

[Approved March 31, 1891.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Every person desiring to become a licensed land surveyor in this State must present to the State Surveyor-General of this State a certificate that he is a person of good moral character; also, a certificate signed by three licensed surveyors, or a certificate signed by the Board of Examining Surveyors (provided for in section five of this Act), which certificate shall set forth that the person named therein is, in the opinion of the person signing the same, a fit and competent person to receive a license as a land surveyor, together with his oath that he will support the Constitution of this State and of the United States, and that he will faithfully discharge the duties of a licensed land surveyor as defined in this Act.

SEC. 2. Upon receipt of such certificate and oath by the State Surveyor-General, it shall be his duty to forthwith to issue to such applicant a license, without charge, which license shall set forth the fact that the applicant is a competent surveyor, or that he has had at least two years' experience in the field as a surveyor or assistant surveyor.

SEC. 3. Such licenses shall contain the full name of the applicant; the technical institution from which he is a graduate (if he be a graduate), or if he be not a graduate, the fact must be stated in the license; his birthplace, age, and to whom issued the name of the person upon whose certificate the licenses is issued, and the date of its issuance.

SEC. 4. All papers received by the state Surveyor-General on application for licenses shall be kept on file in his office, and a proper index and record thereof shall be kept by him, and a list of all licensed land surveyors shall be kept by him, and he shall monthly transmit to the County Recorder of each county in this State a full an correct list of all persons so licensed; and it is hereby made the duty of such Recorders to keep such lists in their offices in such a way as they may be easily accessible to all persons.

SEC. 5. Within twenty days after the passage of this Act, the Governor shall appoint three surveyors in good standing, members of the Technical Society of the Pacific Coast, and two other surveyors in good standing, not members of such society, as a Board of Examining Surveyors, who shall conduct such examination and make such inquiries as to them may seem necessary to ascertain the qualifications of applicants for surveyors' licenses.

SEC. 6. A majority of the Board of Examining Surveyors shall meet on the first Friday of each month during their term of office, in the rooms of the Technical Society of the Pacific Coast, in San Francisco, and at such other times and places as they may select. The members of the Board shall hold office for the term of one year from the date of appointment, and shall serve without compensations.

SEC. 7. Every licensed surveyor shall have a seal of office, the impression of which must contain the name of the surveyor, his principal place of business, and the words "Licensed Surveyor;" and all maps and papers signed by him, and to which said seal has been attached, shall be prima facie evidence in all the Courts of this State.

SEC. 8. Surveyors' licenses, issued in accordance with this Act, shall remain in force until revoked for cause, as hereinafter provided.

SEC. 9. Every licensed surveyor is authorized to administer and certify oaths, when it becomes necessary to take testimony to identify or establish old or lost corners; or, if a corner or monument be found in a perishable condition, and it appears desirable that evidence concerning such corner or monument be perpetuated; or whenever the importance of the survey makes it desirable, to administer an oath for the faithful performance of duty to his assistants. A record of such oath shall be preserved as a part of the field notes of the survey.

SEC. 10. Every licensed surveyor is hereby authorized to make surveys relating to the sale or subdivision of lands, the retracing or establishing of property or boundary lines, public roads, streets, alleys, or trails; and it shall be the duty of each surveyor, whenever making any such surveys, except those relating to the retracing or subdivision of cemetery or town lots, whether the survey be made for private persons, corporations, cities, or counties, to set permanent and reliable monuments, and such monuments must be permanently marked with the initials of the surveyor setting them.

SEC. 11. Within sixty days after a survey relating to the sale or subdivision of lands, the retracing or establishing of property and boundary lines, public roads or trails, original cemetery or town sites, and their subdivisions has been made by a licensed surveyor, he shall file with the Recorder of the county in which such survey or any portion thereof lies, a record of survey. Such record shall be made in a good draughtsmanlike manner, on one or more sheets of firm paper of the uniform size of twenty-one by thirty inches. This record of survey shall be either an original plat or a copy thereof, and must contain all the data necessary to enable any competent practical surveyor to retrace the survey. The record survey must show: All permanent monuments set describing their size, kind, and locations, with reference to the corners marked in the field; complete outlines of the several tracts or parcels of land surveys, within courses and lengths of boundary lines; the angles as measured by Vernier readings, which the lines of blocks or lots, if the record relate to an original town-site survey, make with each other and with the center lines of adjacent streets, alleys, roads, or lanes; the variations of the magnetic needle with which old lines have been retraced; the scales of the map; the date of survey; a proper connection with one or more points of an original or larger tract of land, and the name of the same; the name of the grant or grants, or of the townships and ranges within which the survey is located; the signature and seal of the surveyor; *provided*, that nothing is this section shall require record to be made of surveys of a preliminary nature, where no monuments or corners are established.

SEC. 12. The record of surveys thus filed with the County Recorder of any county must be by him pasted into a stub book, provided for that purpose, and he must keep a proper

index of such records, by name of owner, by name of surveyor, by name of grant, city, or town, and by United States subdivisions; and he shall make no charge of filing and indexing such records of surveys.

Sec. 13. Upon the failure of any licensed surveyor to comply with the requirements of this Act, and the furnishing of satisfactory proofs of such fact, the State Surveyor-General must revoke his license, and no other license shall be issued to him within one year from such revocations. A violation of section eleven of this Act shall be a misdemeanor, and any person convicted of such violation shall be punished by a fine not to exceed more than one hundred dollars, or imprisonment in the county jail not exceeding thirty days.

Sec. 14. In case said Board shall refuse to meet and examine the applicants for licenses as in this Act provided, and issued to such applicants the certificate or certificates mentioned in this Act, if such person be a fit and competent person to receive the same, they may be compelled to do so by mandamus; and if upon the hearing of such mandamus it appears that they have willfully and wrongfully refused to examine any applicants, or to issue him a certificate when he is entitled to the same, such Board so refusing or failing shall be, jointly and severally, liable for all cost of said mandamus proceeding, including attorney's fee of five hundred dollars, and shall be so jointly and severally liable to any person aggrieved by such refusal, in the sum of five hundred dollars, as fixed, settled, and liquidated damages, which may be recovered in any Court in this State, and the judgment (if it be for plaintiff) in mandamus under this Act shall be in accordance therewith.

Sec. 15. All that part of the Code of Civil Procedure of this State relating to mandamus is hereby made applicable to the provisions of this Act; and all proceedings in mandamus under this Act shall be in accordance therewith.

Sec. 16. This Act shall take effect on the first day of July, eighteen hundred and ninety-one.

Under the above-quoted Act, licenses have been issued to the following persons:

NO.	NAME	ADDRESS	DATE OF LICENSE
1	Charles Terraine Healey	Los Angeles, Los Angeles Co.	July 20, 1891
2	James Malcolm Gleaves	Redding, Shasta Co.	July 20, 1891
3	Hubert Vischer	San Francisco, San Francisco Co.	July 20, 1891
4	Otto Von Geldern	San Francisco, San Francisco Co.	July 20, 1891
5	Charles Henry Holcomb	San Francisco, San Francisco Co.	July 20, 1891
6	Thomas Lennington Knox	Orland, Glenn Co.	July 20, 1891
7	Benjamin L. McCay	Oroville, Butte Co.	July 20, 1891
8	William F. Peck	Yuba City, Sutter Co.	July 20, 1891
9	Pallas N. Ashley	Woodland, Yolo Co.	July 20, 1891
10	Ernest McCullough	San Francisco, San Francisco Co.	July 20, 1891
11	S. Harrison Smith	San Francisco, San Francisco Co.	July 20, 1891
12	Adolph Theodore Herrmann	San Jose, Santa Clara Co.	July 22, 1891
13	Edmond L. Vander Vaillen	San Francisco, San Francisco Co.	July 27, 1891
14	Arthur Walter Keddie	Quincy, Plumas Co.	Aug. 10, 1891
15	Burr Bassell	San Bernardino, San Bernardino Co.	Aug. 10, 1891
16	Edward T. Wright	Los Angeles, Los Angeles Co.	Aug. 10, 1891
17	C.E. Grunsky	San Francisco, San Francisco Co.	Aug. 10, 1891
18	George Hansen	Los Angeles, Los Angeles Co.	Aug. 10, 1891
19	Alfred Solano	Los Angeles, Los Angeles Co.	Aug. 10, 1891
20	Jason Russell Meek	Marysville	Aug. 10, 1891
21	H. Dittrich	San Jose, Santa Clara Co.	Aug. 18, 1891
22	Samuel Houston Rice	Ukiah, Mendocino Co.	Aug. 12, 1891
23	David Edward Hughes	Irvington, Alameda Co.	Aug. 13, 1891
24	Albert Halen	San Jose, Santa Clara Co.	Aug. 13, 1891
25	Charles Henry Congdon	Tulare, Tulare Co.	Aug. 13, 1891
26	Joseph Armitage Shaw	Ferndale, Humboldt Co.	Aug. 13, 1891
27	Walter James	Bakersfield, Kern Co.	Aug. 15, 1891
28	Arthur D. Gassaway	Forrest City, Sierra Co.	Aug. 18, 1891
29	Allen Crosby Hardison	Santa Paula, Ventura, Co.	Aug. 18, 1891
30	Albert J. Butler	Maxwell, Colusa Co.	Aug. 18, 1891
31	Frederick William Skinner	Los Angeles, Los Angeles Co.	Aug. 18, 1891
32	Russell Lambert Dunn	Auburn, Placer Co.	Aug. 24, 1891
33	Hiram Clay Kellogg	Anaheim, Orange Co.	Sept. 7, 1891
34	Paul M. Norboe	Visalia, Tulare Co.	Sept. 7, 1891
35	Joseph Russell Mauran	San Francisco, San Francisco Co.	Sept. 10, 1891
36	William Schuld	Laporte, Plumas	Sept. 10, 1891
37	John Frederick Herman Stahle	San Francisco, San Francisco Co.	Sept. 10, 1891
38	Jonathan C. Shephard	Fresno, Fresno Co.	Sept. 10, 1891
39	Geo. Henry Mitchell	Callahans, Siskiyou Co.	Sept. 10, 1891
40	Lemuel Franklin Bassett	Redding, Shasta Co.	Sept. 18, 1891
41	Valentine James Rowan	Los Angeles, Los Angeles Co.	Oct. 16, 1891
42	Alfred R. Street	Los Angeles, Los Angeles Co.	Oct. 16, 1891
43	James William Johnson	Riverside, San Bernardino Co.	Oct. 16, 1891
44	Samuel R. Langworthy	Riverside, San Bernardino Co.	Oct. 16, 1891
45	Samuel O. Wood	Los Angeles, Los Angeles Co.	Oct. 16, 1891
46	Frank H. Olmsted	Riverside, San Bernardino Co.	Oct. 16, 1891
47	Franklin P. McCray	Oceanside, San Diego Co.	Oct. 27, 1891
48	David Floyd McIntire	Lakeport, Lake Co.	Nov. 10, 1891
49	Gustavus Olivio Newman	Riverside, San Bernardino Co.	Nov. 10, 1891
50	Thomas Martin Topp	Colton, San Bernardino Co.	Nov. 10, 1891
51	William W. Allen	San Diego, San Diego Co.	Nov. 10, 1891
52	Charles John Lathrop	College City, Colusa Co.	Nov. 10, 1891
53	Ernest August Zoellin	Redding, Shasta Co.	Nov. 10, 1891
54	Calet A. Ensign	Los Angeles, Los Angeles Co.	Nov. 10, 1891
55	William H. Tinker	Coronado, San Diego Co.	Nov. 16, 1891
56	William Anthony Burr	Los Angeles, Los Angeles Co.	Nov. 16, 1891
57	John Allibone Morton	Los Angeles, Los Angeles Co.	Nov. 17, 1891
58	Charles Dewey Martin	Merced, Merced Co.	Nov. 24, 1891
59	Ingoart Teilman	Fresno, Fresno Co.	Nov. 24, 1891
60	Curtis Mason Barker	Mayfield, Santa Clara Co.	Nov. 24, 1891
61	Davenport Bromfield	Redwood City, San Mateo Co.	Nov. 24, 1891
62	J. Clark Stanton	Rio Vista, Solano Co.	Nov. 24, 1891
63	Stonewall Jackson Harris	Jerseydale, Mariposa Co.	Nov. 24, 1891
64	Henry Larkin Lowden	Weaverville, Trinity Co.	Nov. 23, 1891
65	Edwin P. Irwin	Hanford, Tulare Co.	Nov. 23, 1891
66	Adolphus Henry Coulter	San Andreas, Calaveras Co.	Nov. 23, 1891
67	Wiley Edwards Brasfield	College City, Colusa Co.	Nov. 23, 1891
68	Charles Edwin Uren	Grass Valley, Nevada Co.	Nov. 23, 1891
69	Smith P. McKnight	Bishop, Inyo Co.	Nov. 23, 1891
70	Wirk Robinson Macmurdo	Bakersfield, Kern Co.	Nov. 23, 1891
71	Frederick Thomas Newberg	San Francisco, San Francisco Co.	Nov. 23, 1891
72	Edward Clement Uren	Auburn, Placer Co.	Nov. 23, 1891
73	Lucien Bonaparte Healy,	Red Bluff, Tehama Co.	Nov. 23, 1891
74	Carroll McFarnahan	Sonora, Tuolumne Co.	Nov. 21, 1891
75	Robert Allen Brown	Porterville, Tulare Co.	Nov. 24, 1891
76	William Penn Stoneroad	Merced, Merced Co.	Nov. 24, 1891
77	Zebulon Brownlow Stuart	San Bernardino, San Bernardino Co.	Nov. 24, 1891
78	Randolph M. Vail	San Jacinto, San Diego Co.	Nov. 24, 1891
79	Jacob William Kaerth	Maxwell, Colusa Co.	Nov. 24, 1891
80	Edward Dexter	San Diego, San Diego Co.	Dec. 8, 1891
81	Samuel Elbert Brackins	Redding, Shasta Co.	Dec. 29, 1891
82	Edward Lownes	Los Angeles, Los Angeles Co.	Dec. 29, 1891
83	Charles W. Hendel	Laporte, Plumas Co.	Jan. 4, 1892
84	James H. Finley	Selma, Fresno Co.	Jan. 4, 1892
85	Charles Carroll Taylor	Garberville, Humboldt Co.	Jan. 4, 1892
86	Homer Hamlin	San Diego, San Diego Co.	Jan. 4, 1892
87	Ernst Nicholas Willberg	San Francisco, San Francisco Co.	Jan. 4, 1892
88	Frank Ephraim Herrick	Eureka, Humboldt Co.	Jan. 4, 1892
89	Jesse T. Meddock	Comptche, Mendocino Co.	Jan. 4, 1892
90	Thomas Montague Shaw	San Diego, San Diego Co.	Jan. 4, 1892
91	Sampson L. Ward	Nuevo, San Diego, CA	Jan. 5, 1892
92	Everett G. Jones	Los Angeles, Los Angeles Co.	Jan. 5, 1892
93	John Simpson McNeish	Bakersfield, Kern Co.	Jan. 5, 1892
94	George Ellis Washburn	San Francisco, San Francisco Co.	Jan. 13, 1892
95	George Frederick Allardt	San Francisco, San Francisco Co.	Feb. 15, 1892
96	Newton Van Vliet Smyth	Santa Rosa	Feb. 27, 1892
97	Frank Enos Smith	Madera, Fresno Co.	Feb. 27, 1892
98	Thomas White Reece	Oroville, Butte Co.	Mar. 5, 1892
99	Thomas Jefferson Montgomery	Ukiah, Mendocino Co.	Mar. 12, 1892
100	Alfred Baltzell	Ukiah, Mendocino Co.	Mar. 12, 1892
101	Thomas Henry James	Los Angeles, Los Angeles Co.	Mar. 17, 1892
102	Charles Z. Soule	San Francisco, San Francisco Co.	Mar. 29, 1892
103	Jesse Newton Lentell	Eureka, Humboldt Co.	Mar. 29, 1892
104	William F.H. Mueser	San Bernardino, San Bernardino Co.	Apr. 21, 1892
105	Jefferson Davis Etter	Fresno, Fresno Co.	May 11, 1892
106	Cassius Morton Phinney	Sacramento, Sacramento Co.	May 14, 1892
107	Waldo Wade Waggoner	Nevada City, Nevada Co.	June 20, 1892
108	Alonzo Tulley Fowler	Visalia, Tulare Co.	July 6, 1892
109	Harvey Hewitt	Redlands, San Bernardino Co.	July 13, 1892

Respectfully submitted.

THEO. REICHERT,
Surveyor-general, and ex officio Register of State Land Office.

GENERAL PLANS: Coming of Age in California

by Thomas R. Curry, Robert E. Merritt, and Maria P. Rivera

THE GENERAL plan in California is atop the hierarchy of local government law regulating land use. *Neighborhood Action Group v. County of Calaveras* (1984) 156 CA2d 1176, 203 CR 401, reported at 7 CEB RPLR 154 (Oct. 1984). It has been called a "charter for future development" within a community. *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 C3d 531, 277 CR 1, reported at 14 CEB RPLR 78 (Feb. 1991). Even though accorded such prominence by the courts, most cities and counties have been quite lax in adopting and updating their general plans. Recent statistics of the California Department of Housing and Community Development (HCD) suggest that perhaps only twenty-seven percent of the general plans in California are in compliance with the law, measured solely on the basis of adequacy of the housing and Community Development (Feb. 1991). If adequacy of other elements was also taken into account, the level of compliance would be even worse.

This alarming statistic should be cause for concern to real property attorneys and their clients alike. An inadequate general plan is the Achilles' heel in the land development process. It places the private sector at risk for millions of dollars in lost time and money because a successful challenge to a general plan can bring all development in a community to a halt. The reason is that not fewer than twenty different types of land use actions or approvals must be consistent with the general plan — notably, approval of zoning enactments, subdivisions maps, use permits, specific plans, redevelopment plans, and development agreements. (For a list of other actions that require consistency, see Appendix, "Consistency Provisions In State Law And Legal Precedents," at p. 155.) If the general plan is inadequate, then the courts have held that consistency does not exist. Due to the severe consequences that can result from general plan inadequacy, attorneys assisting clients with land acquisition and real property development must pay special attention to the general plan in conducting "due diligence."

This article will review the general plan requirement in California and look at indicators of changing judicial and legislative attitudes toward the general plan. It will look at the legal consequences of noncompliance, including recent litigation challenging general plans and ways to defend such challenges. In addition, the article will discuss methods available for bringing plans into compliance. Finally, we will recommend to the practitioner steps to follow in conducting "due diligence" with respect to general plans. Throughout the article, we will use the housing element to illustrate various points, because that element so often is out of compliance.

BACKGROUND

The idea of using a plan as a blueprint for community development got its start in colonial times and was patterned after European experience. Many cities — including Williamsburg, Philadelphia, Detroit, and Savannah — were laid out in geometric or simple grid-like patterns to achieve orderly development. A more elaborate enterprise was undertaken by Pierre Charles L'Enfant in designing the nation's capital at Washington, D.C., following the American Revolution. His plan, which was never completely realized, featured large boulevards, classic-style building, plazas, and malls. Most American cities did not fare so well. As America grew and became more industrialized, planning succumbed to expediency due to minimal public expenditures and land speculation.

One notable example of master planning occurred as part of the World's Columbian Exposition held in Chicago in 1893. A team composed primarily of architects designed and produced the first example in the United States integrating a large group of public buildings and open spaces with an unified design. This enterprise, known as the "White City," made a profound impression on America and gave new meaning to city planning.

The first comprehensive city plan of the modern era was pioneered in Cincinnati in 1925 by Alfred Bettman, a Cincinnati attorney. The plan examined existing conditions and evaluated future community needs. It identified long-term goals and policies of the city encompassing both public and private development. These policies were followed by enactment of control devices such as zoning and subdivision ordinances as well as provision for public expenditures.

An inadequate general plan is the Achilles' heel in the land development process.

Bettman's amicus curiae brief is reportedly what persuaded the U.S. Supreme Court to uphold comprehensive zoning in the landmark case of *Village of Euclid v. Ambler Realty Co.* (1926) 272 US 365. However, the focus on *Euclid* has been on its legal justification for zoning, without appreciating the importance of long-range plans. It was not until the postwar era of the 1940s

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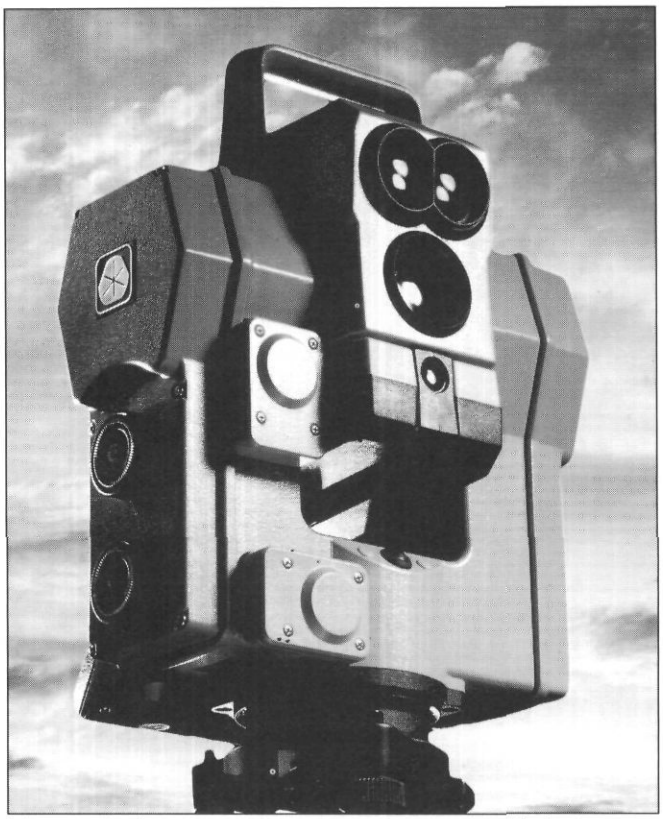

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and 1950s that comprehensive long-term planning as envisioned by Bettman gained acceptance. Factors such as the increased involvement of government in the redevelopment of urban centers, significant growth of suburban areas, and demand for housing have contributed to this trend.

California has adopted the concept of comprehensive statewide planning, at least in principle. The Office of Planning and Research (OPR), operating out of the Governor's office, is designated as the comprehensive state planning agency. Govt C §65040. It is responsible for developing state land use policies, coordinating planning of all state agencies, and assisting and monitoring local and regional planning activities. Govt C §65035. In an effort to link statewide policies to actual planning activities performed by local government, the legislature instructed OPR to develop and adopt guidelines for the preparation and content of general plans. Govt C §65040.2. Each city and county must report annually to OPR on the degree to which its general plan complies with these guidelines. Govt C §65040.5. (The guidelines are contained in an OPR publication, updated regularly, entitled General Plan Guidelines. A copy can be obtained for $16 prepaid from General Services, Publications Section, P.O. Box 1015, North Highland, CA 95660 or call (916) 973-3700. Ask for Stock Number 7540-931-1030-0.)

Confusion in terminology commonly occurs when lawyers, planners, and engineers gather to discuss the planning process.

Although all of this may sound impressive, the problem is that the OPR's guidelines are wholly advisory and in fact the law expressly provides that, in creating OPR, the legislature did not intend to vest in the Office any direct operating or regulatory powers over land use, public works, or other state, regional, or local projects or programs. Govt C §65035. The annual reporting by cities and counties also leaves something to be desired. Most simply report the year in which each mandated element was adopted, which does not provide enough information to determine the level of compliance. Nevertheless, over the years OPR has provided a valuable service in coordinating the land use planning activities of local government and providing technical assistance to cities and counties in developing their general and specific plans. The OPR staff can draw from an informational database that many local agencies will find very helpful in drafting and revising various plan elements.

In at least one area, OPR has been given some authority. It can grant extensions to cities and counties to bring their general plans into compliance with the law, thus allowing for project approvals during this interim period. This authority, and some limitations on it, are discussed later in this article.

The statutory requirements for general and specific plans are found in the Planning and Zoning law (Govt C §§65000–66403). The law affects both cities and counties; for convenience, however, we will speak of cities with the understanding that the same rules apply to counties unless otherwise noted.

As with general law cities, charter cities must adopt general plans with all mandatory elements. Govt C §65300. Yet, rather peculiarly, the requirement that zoning be consistent with the general plan (Govt C §65860) does not apply to charter cities (with the exception of the city of Los Angeles), although many city charters require this consistency. Govt C §65803. This exemption is based on the high degree of autonomy traditionally afforded to charter cities in the land use arena, but it seems illogical today given the increasing emphasis at the legislative and judicial levels on comprehensive planning. In fact, several courts have hinted that zoning inconsistent with the general plan may be an abuse of the police power — a concept that would apply to charter as well as general law cities. See *Mira Dev. Corp. v. City of San Diego* (1988) 205 CA3d 1201, 1214, 252, CR 825, 832; *City of Del Mar v. City of San Diego* (1982) 133 CA3d 401, 414, 183 CR 898, 907, reported at 5 CEB RPLR 131 (Oct. 1982).

Confusion in terminology commonly occurs when lawyers, planners, and engineers gather to discuss the planning process. General plans and specific plans have precise meanings under the law (Govt C §§65302, 65451), but they are frequently confused with such things as master plans, site specific plans, development plans, and the like. These latter terms may refer to a type of plan processed under a city's zoning ordinance, although more often they are simply part of the planner's jargon for a plan describing the proposed development. Also, many cities utilize community plans or area plans which they call specific plans, but are not specific plans under Govt C §65451. Therefore, in discussing general and specific plans, attorneys must be aware of the technical meaning of these terms and be sure that their clients and consultants are communicating on the same level.

THE GENERAL PLAN MANDATE

The concept of a "master" or general plan was introduced in California law as early as 1927, when cities and counties were authorized to prepare "master plans" showing streets, plazas, open spaces, public easements, parks, playgrounds and public rights in lands. Stats 1927, ch 874. In fact, as early as 1929, adoption of "master plans" (changes to "general plans" in 1965) was made mandatory for those cities and counties establishing planning commissions. Stats 1929, ch 838. This statute was based largely on U.S. Department of Commerce, Advisory Committee on City Planning and Zoning, *A Standard City Planning Enabling Act* (Washington, D.C.: Government Printing Office, 1928). But it was a far cry from comprehensive land use planning as we think of it today. The general plan and zoning were not viewed as being integrally related. Zoning was the separation of the municipality into districts and the regulation of uses within those districts. Planning was characterized as policy which served as a guide for land use decisions but was not binding on a city. In fact, the law provided that no city could be required to adopt a general plan before adopting a zoning ordinance. Stats 1965, ch 1880, §6. This situation did not change until 1971 when the legislature, under the authorship of Assemblyman McCarthy, enacted profound changes in the Planning and Zoning Law requiring that subdivision

approvals and zoning be consistent with a city's general plan. Stats 1971, ch 1446, §12; see also 58 Ops Cal Atty Gen 21 (1975).

The present version of the Planning and Zoning Law required cities to adopt a general plan consisting of a statement of development policies including diagrams and text addressing objectives, principles, standards, and plan proposals. The plan must contain seven mandatory elements: land use, circulation, housing, conservation, open space, noise, and safety. Govt C §65302. (At one time the law prescribed two other mandatory elements, seismic safety and scenic highways. They were dropped in 1984 because they duplicated other elements.) In addition to the mandatory elements, cities may adopt any number of permissive elements. Govt C §65303. In fact, many cities have extensive permissive elements which include such diverse subjects as agriculture (Merced County), archaeology (Scotts Valley), citizen participation (Berkeley), geothermal energy (Mono County), child care (Contra Costa County), military reservation (Oceanside), schools (Roseville), trails (Vista), mobilehomes (Del Norte County), urban forests (Coalinga), and quality of life (Davis), The California Planner's 1991 Book of Lists, Office of Planning and Research, State of California (Jan. 1991).

The content of the mandatory elements is spelled out in the Planning and Zoning Law. All of the elements, except open space and housing , are addressed in Govt. C §65302. Entire articles of the Government Code are devoted to the open space element (Govt C §§65560–65570) and housing element (Govt C §§65580–65589.8). Because many of the problems existing with general plans today involve inadequacy of the housing element, it is instructive for us to look at this element in some detail with special regard for how the legislature is attempting to strengthen the mandate of providing housing for all economic segments of the community — notably low income families.

The requirements for the housing element emphasize three major objectives (Govt C §65583):

1. Assessment of housing needs and preparation of an inventory of resources and constraints relevant to meeting these needs.

2. A statement of the community's goals, quantified objectives, and policies relative to the maintenance, preservations, improvement, and development of housing; and

3. A program which set forth a five-year schedule of actions to implement the policies and achieve the goals and objectives of the housing element.

Detailed requirements for meeting each of these objectives in drafting and adopting the housing element are spelled out in Govt C §65583. Special emphasis is placed on the preservation of low-income housing by requiring identification and analysis of existing assisted housing developments that may be eliminated in the next ten years, a cost analysis for replacement housing, and identification of governmental financing and subsidy programs which can be used to preserve assisted housing. Govt C §65583 (a)(8). Assisted housing refers to multifamily rental housing receiving governmental assistance, developed under a local inclusionary housing program or used to qualify for a density bonus under Govt C §65916.

The key to utilizing the general plan as a means for providing housing opportunities for low-income persons lies in the allocation of regional housing needs among cities and counties. Government Code §65584 sets up a hierarchical structure for determining housing needs for all income levels, involving HCD and the various regional councils of governments (known as COGs), of which there are twenty-five. (For example, the COG for the San Francisco Bay Area is the Association of Bay Area Governments (ABAG); in Los Angeles, the Southern California Association of Governments (SCAG); in San Diego the San Diego Association of Governments (SANDAG). For a listing of all COGs, see The California Planner's 1991 Book of Lists, Office of Planning and Research, State of California (Jan. 1991). In consultation with the Department of Finance and each COG, HCD first determines the regional shares of the statewide housing need. Based on these data, each COG determines existing and projected housing need for its region. Once this determination is revived and approved by HCD as being consistent with the statewide housing need, each COG determines the share for each city (commonly referred to as the city's "fair share"). If a city is dissatisfied with its fair share allocation, it may propose a revision. The COG must then respond by accepting the proposed revision, modifying its original determination, or refusing to accept the proposed revision.

Before 1991, a COG's failure to accept the city's revision of its fair share allocation did not in itself necessitate further action. It could result in HCD finding that the housing element was out of compliance with the law, but the finding was advisory only. Stats 1984, ch 1009, §20.5. However, recent amendments to Govt C §65584, effective January 1, 1991, have put some teeth into the fair share allocation mechanism by requiring a city to accept a share which is approved by the COG. Under the new law, if the COG refused to accept the city's proposed revision of its fair share, the city has the right to a public hearing, following which the COG makes a final determination of the city's fair share. The decision of the COG is subject to judicial review under administrative mandamus (CCP §1094.5). Presumably, if the city does not request a hearing, the COG's allocated fair share for the city becomes final. This procedure for determining fair share is expressly made exempt from requirement of the California Environmental Quality Act (CEQA) Pub Res C §§21000–21177). Govt C §65584(g).

In the ideal world, once the city's fair share allocation of housing is determined, the general plan housing objective would be to meet that need. But the law does not require that a city's housing objective be identical to its fair share allocation. It recognized that a gap may exist when housing needs exceeds available resources and the community's ability to satisfy this need within the content of the general plan requirements of state law. Govt C §65583(b). However, with the respect to affordable housing, recent legislation placed the burden on cities to justify disapproval of low- and moderate-income housing when it would help fill this gap. Stats 1991, ch 1439, §1. Known as the "anti-NIMBY" ("not in my backyard") bill, this law prohibits a city from disapproving a housing development project affordable to low- and moderate-income households or conditioning approval in a manner which renders the project infeasible, unless the city makes finding supported by substantial evidence on at least one of six grounds. These grounds consider such things as whether the housing is needed to meet the city's "fair share" allocation of low-income housing, impact on public health and safety, whether denial or

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conditioning is required to comply with state or federal law, preservation of lands zoned for agriculture or resource protection, whether the project would result in undue concentration of lower-income household within a neighborhood, and inconsistency with land use designation in other elements of the general plan. Govt C §65589.5(d).

Finally, the housing element must provide for implementation of housing objectives through a five-year schedule of actions. Govt C §65583(c). This can be done by identifying adequate sites for development of a variety of types of housing for all income levels, removing governmental constraints to development of housing, conserving affordable housing stock, and similar measures. See Govt C §65583(c). Failure to provide adequate means to meet housing objective would presumably result in the housing element being inadequate and internally inconsistent. See *Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 CA3d 90, 212 CR 273, reported at 8 CEB RPLR 108 (July 1985). The consequences of this inadequacy are explored below.

SPECIFIC PLANS

The Planning and Zoning Law permits cities to adopt specific plans, which allow a city to precisely plan an area shown on the general plan — often areas in the path of development. Although specific plans are optional, their use appears to be on the rise. Cities favor them because they allow the city to play a pro-active role in addressing the development area.

A specific plan is the city's plan, not the developer's, although the developer will often have significant input on it and may end up paying for it if the plan is prepared at the developer's request. Govt C §65456(b). Also, the city can impose a fee to recover the cost of preparation, adoption, and administration of the specific plan on persons later seeking approvals which must be consistent with the specific plan. Govt C §65456(a). Customarily it sets forth a detailed development plan including site specific densities, required improvements, and structural design criteria. This can be helpful to a developer interested in acquiring land as it gives fair warning of what the city expects. Adoption or amendment of a specific plan requires consistency with the city's general plan. Govt C §65454. This means that a general plan amendment must be processed along with a specific plan if the adoption of the specific plan would result in inconsistency. Likewise, if a general plan amendment results in an existing specific plan being inconsistent with the general plan (even though consistent at the time the specific plan was adopted), the specific plan must be reviewed and amended so as to make it consistent. Govt C §65359. This is also required because some land use approvals require consistency with both plans. (See, for example, Govt C §66474(a) requiring denial of a subdivision map if findings of consistency cannot be made.)

Developers should understand that the enactment of a specific plan by a city does not give a vested right to develop as envisioned in the specific plan; the city can change the specific plan after the developer acquired the property. Unlike the statutory limitation on the number of general plan amendments that can be adopted in one year (Govt C §65361), a city can amend a specific plan through a development agreement or vesting tentative map. These topics are discussed in detail in Merritt, *Vesting Tentative Maps: Latest Development in the Vested Rights Tug-of-War*, 8 CEB RPLR 165 (Nov. 1985) and 9 CEB RPLR 33 (Mar. 1986). A good discussion of the pros and cons of specific plans, together with guidelines for preparation and implementation, can be found in an OPR publication entitled *Specific Plans in the Golden State* (Aug. 1988, rev Mar. 1989).

FOUR KEY CASES

Although the Planning and Zoning Law spells out requirements for each element of the general plan, the courts have been active in amplifying these requirements, particularly for the land use, noise, housing, and circulation elements. Four cases are particularly prominent in the evolution of the law in this area.

Camp v. Board of Supervisors

The first case to directly tie issuance of land use entitlement to the validity of a general plan is *Camp v. Board of Supervisors* (1981) 123 CA3d 334, 176 CR 620, reported at 4 CEB RPLR 145 (Nov. 1981). *Camp* was a consolidation of three cases involving appeals of subdivision approvals. In *Camp*, taxpayers and the Attorney General argued that the findings of consistency required by Govt C §66473.5 for approval of a tentative map could not be made because the county's general plan was deficient — specifically, the land use, housing, noise, and circulation elements. The county got off on the wrong foot from the beginning. The court noted that the "plan" presented to the trial court as the Mendocino County General Plan was "a somewhat crumpled grey cardboard box . . . containing an unassembled assortment of papers and pamphlets variously identified [by titles or descriptions]." 123 CA 3d at 349 n8, 176 CR at 630 n8.

The key to utilizing the general plan as a means for providing housing opportunities for low-income persons lies in the allocation of regional housing needs among cities and counties.

Moving to specifics, the court first turned its attention to the land use element. It noted that when the subdivisions were approved, the law required the land use element to include a statement of standards of population density and building intensity for the various districts and territory covered by the plan. The county's plan classified the county into twelve different types of areas but failed to state population density for more than two of them and did not relate density standards to the classified types of areas. Thus it was impossible to relate tabulated density standards to any location in the county. Also, this portion of the general plan failed to state building intensity standards.

The court next looked at the housing element and found that it, too, fell short of the mark. The text of the housing element was preliminary, as it anticipated preparation of a more comprehensive element, and it relied on stale data (even though more recent data were available). Also, the element did not comply with advisory guidelines established in HCD

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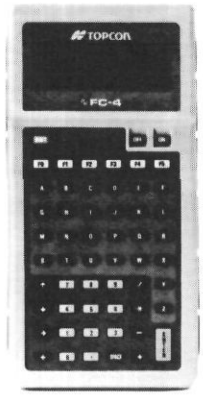

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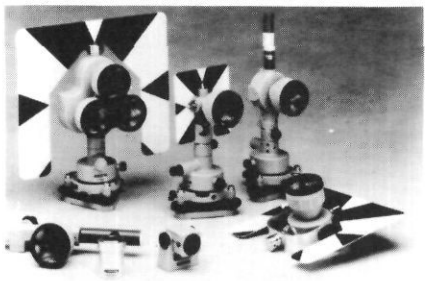

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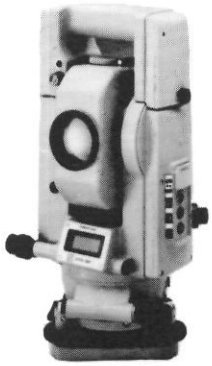

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regulations. (These regulations have since been repealed.) It bore no resemblance to a comprehensive, problem-solving strategy for housing nor did it contain a long-term projection of prospective needs for market-rate housing. Thus, it did not meet the statutory requirement of making adequate provision of the housing needs of all economic segments of the community. The court observed that, even though the housing element regulations adopted by HCD were only advisory, it was proper to resort to them in determining the adequacy of the housing element.

The court also held that the noise element failed to meet statutory requirements. In particular, it included no noise exposure information, indicated no monitoring in areas deemed noise sensitive, and failed to include a community noise exposures inventory. The circulation element was inadequate as well because it failed to show any correlation between the road and transportation facilities mentioned and the land use element.

Aside from pointing out inadequacies of the plan at issue, *Camp* disposed of a number of jurisdictional and procedural objections raised by the county in an effort to blunt the attack on the general plan. Most important, the court rejected the argument that inquiring into the adequacy of the plan is precluded by the separation of powers doctrine. The court denied that it was imposing its wisdom on the county by reviewing the merits of the plan; rather, its inquiry is limited to whether the county has performed its mandatory duty in adopting the plan as the law requires.

The court upheld the severe remedy imposed by the trial court — enjoining the county from conducting any subdivision and "related proceedings" until it adopted a valid general plan. However, the court also held that the injunctions would not affect final maps found to be in substantial compliance with tentative maps which had been approved before the preliminary injunctions were issued and which had not been challenged within the statutory time limits.

Twain Harte Homeowners Ass'n v. County of Tuolumne

Camp provided the foundation for general plan court challenges which followed. In *Twain Harte Homeowners Ass'n v. County of Tuolumne* (1982) 138 CA3d 664, 188 CR 233, reported at 6 CEB RPLR 68 (Apr. 1983), the land use and circulation elements of the county general plan were found inadequate. Unlike *Camp*, the land use element contained standards of population density and building intensity. The question was whether the plan meaningfully addressed these standards. The court found that population density refers to the number of people in a given area and not to dwelling units per acres unless some basis for correlation between the two are set forth in the plan. Because the land use element made reference only to maximum dwelling units per acre and minimum lot size, it failed to contain any appropriate statement of standards for population density based on number of people. Likewise the information contained in the plan failed to address adequately building intensity. Also, the court found the circulation element inadequate because it did not discuss changes in demand on various roadways and transportation systems resulting from changes in use of land. In the ruling, the court took notice of the guidelines issued by OPR for general plan preparations.

Petitioners in *Twain Harte* challenged the housing element as well. On this issue, the court found that the county had adequately prepared both an inventory of existing housing and a needs assessment. The fact that the figures used did not reflect the latest census data was not significant because the data were not available when the plan was prepared. The court was more concerned about the lack of any action program for providing for the housing needs of all economic segments of the community, as required by the HCD guidelines. The court determined that the lack of an action program, where the element was otherwise adequate, was not fatal. Moreover, the impact of this deficiency was diminished because the plan did contain several policies and implementation measures designed to increase the supply of housing.

Neighborhood Action Group v. County of Calaveras

The requirement that a general plan deficiency be relevant to the permit being sought was stressed in *Neighborhood Action Group v. County of Calaveras* (1984) 156 CA3d 1176, 203 CR 401. Plaintiffs sued to invalidate a conditional use permit on the ground that the noise, safety, and seismic safety elements of the county general plan were inadequate. The use permit allowed the processing of hydraulic mine tailings for production of sand and gravel. This process involved forty to sixty vehicle trips per day at peak production by large tractor trailers hauling sand and gravel over roads near plaintiff's property. A rock crushing plant was also to be constructed at the site.

The court first discussed where issuance of a conditional use permit depends on a legally adequate general plan and held that it does. The court reasoned that a use permit is "struck from the mold" of the zoning laws and the zoning laws must comply with the general plan. Of greater significance, the court observed that a general plan challenge can succeed only if the complaint alleges facts showing that "the permitted use implicates a defective policy or standard in the general plan." 156 CA3d at 1188, 203 CR at 409. The court cited no authority for this proposition. Applying this test, the court found that, although the safety and seismic safety elements of the general plan may have been inadequate, the complaint failed to show the relevance of this inadequacy to the use permit.

Looking at the noise element, the court found that the element was deficient because it failed to contain a quantitative inventory of noise levels associated with transportation facilities and a statement of land use policies for avoidance of excessive noise. Here the necessary relevance was present because only through such inventory can noise impacts of a particular project be measured against standards contained in the general plan.

Another interesting aspect of this opinion deserves mention. The county had obtained an extension from OPR to prepare and adopt the relevant elements of the general plan. (These extensions are discussed below.) The county claimed that the extension rendered moot the claims of general plan inadequacy. The court found that the extension did not justify sustaining a demurrer because triable issues of fact existed as to whether conditions allowing for the extension had been satisfied and whether the extension was broad enough to cover the antecedent deficiency.

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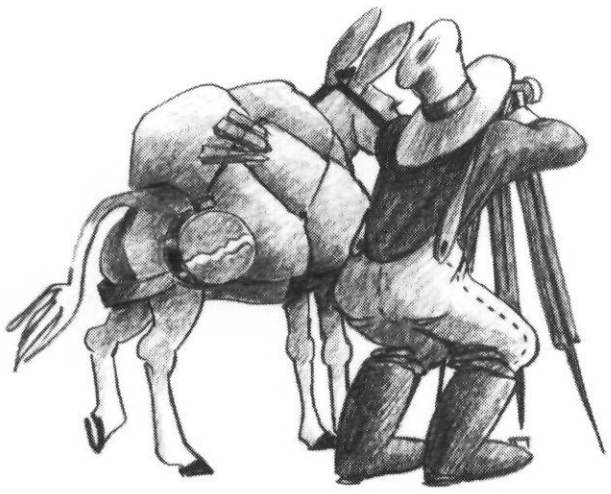

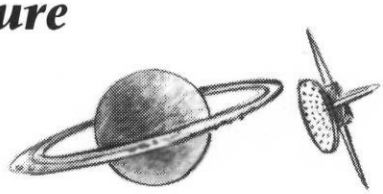

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  David Paul Johnson, PLS
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Friday March 13, 1992

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- California Legislative Process
  Ralph Simoni, CLSA Lobbyist
- Land Cases
  William Owen, Attorney at Law
- Fremont in Nevada, 1843-44
  Francis Landrum, PE, LS
- Friday's Luncheon
  Russian Minister of Land Management
  Dr. Alexei Alexandrov, USSR
- A Code for Title Insurers
  Mitchell Williams, Attorney at Law
- Fee Title v. Easement Rights
  Jerry R. Broadus
- Exhibits Close
- Celebrity Show and Dinner
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Concerned Citizens of Calaveras County v. Board of Supervisors

The cases discussed above focused on the adequacy of general plan elements when measured against the statutory mandate. In *Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 CA3d 90, 212 CR 273, the court emphasized another requirement — the need for the elements of the general plan to comprise an "integrated, internally consistent and compatible statement of policies." Govt C §65300.5; *Sierra Club v. Board of Supervisors* (1981) 126 CA3d 698, 179 CR 261, reported at 5 CEB RPLR 42 (Mar. 1982).

In *Concerned Citizens*, the court reviewed the land use and circulation elements of the county general plan. It found that the circulation element was internally contradictory. In one place it indicated that current county roads would be able to accommodate projected traffic until the year 2000 without significant problems. In other places it commented on the inadequacy of the roads to meet future needs of the county.

Another problem with the circulation element was the lack of correlation between it and the land use element (a problem also present in *Camp and Twain Harte*). The court noted that the land use element called for substantial growth while the circulation element set forth problems associated with projected traffic. The court suggested that, to be valid, the general plan must provide a means by which transportation needs for this increased population would be met; simply proposing that the county should "ask various higher levels of government for money for state highways" is not enough. 166 CA3d at 102, 212 CR at 281. This is a significant statement. It implies that, not only must the general plan describe growth problems faced by the community, it also must come up with meaningful solutions or adjust the land use plan accordingly.

CHALLENGING A GENERAL PLAN

State law specifically provides for court challenges to the legal adequacy of a general plan or one of its mandatory elements. Govt C §§65750–65763. The action must be brought in traditional mandamus (Govt C §65751) because the adoption of the general plan is a legislative act (Govt C §65301.5). If the general plan or element is adjudged legally deficient, the city must bring it into compliance within 120 days. Govt C §65754(a). The court may grant two extensions of time, not to exceed a total of 240 days, for the city to comply. Govt C §65759(2). Of course, the city must thereafter bring its zoning ordinance into compliance with the amended general plan within a further 120 days. Govt C §65754(b). (Note that a zoning ordinance may not be adopted in the absence of an adequate general plan. See, *e.g., Resource Defense Fund v. County of Santa Cruz* (1982) 133 CA3d 800, 806, 184 CR 371, 374, reported at 5 CEB RPLR 134 (Oct. 1982).

Permissive elements generally address either secondary or narrow subjects and do tend not to generate controversy. However, the requirement of internal consistency among general plan elements could provide the basis for a challenge to permissive elements of a general plan, or to the general plan in its entirety, if one or more permissive elements are inconsistent with provisions of the mandatory elements. Such challenges are real, and would be most likely to occur in conjunction with attempts to annul a growth control ordinance or development approval.

The law requires that an action challenging a general plan or amendment must be brought within 120 days of its adoption. Govt C §65009(c). But this does not mean that, once adopted, the plan will be invulnerable until the next amendment. As one can glean from the cases discussed above, any action taken by a local agency which "implicates" the general plan renders the general plan, as well as the approval, subject to attack. So, for example, in *Camp v. Board of Supervisors* (1981) 123 CA3d 334, 176 CR 620, the approval of a tentative subdivision map resulted in adjudication of general plan deficiencies. The court of appeal recently reaffirmed this rule in a case where the inadequacies had existed for years. See *Kings County Farm Bureau v. City of Hanford* (1990) 221 CA3d 692, 741, 270 CR 650, 675, reported at 13 CEB RPLR 203 (Oct. 1990). It is an open question whether an amendment to the general plan could trigger an attack on general plan inadequacies that are wholly unrelated to the amendment.

For a list of action that could implicate general plan deficiencies because they must be consistent with the general plan, see Appendix, "Consistency Provisions In State Law And Legal Precedents" at p. 155.

If the general plan is amended while litigation is pending, the adequacy challenge can become moot, but the permit might still be vulnerable. See *Neighborhood Action Group v. County of Calaveras* (1984) 156 CA3d 1176, 1182 n4, 203 CR 401, 405 n4. For example, when a housing element lacks an up-to-date assessment and inventory of moderate- and low-income housing, a housing advocacy group might sue to invalidate the approval of a condominium conversion. Amendment of the housing element while the litigation is pending, to cure the defect, may render moot plaintiff's general plan challenge, but does not necessarily resolve the question of whether the conversion approval was legally granted. Because the conversion of an apartment building to condominiums must be consistent with a city's housing policies, as embodied in the housing element, a permit issued when the housing policies were inadequate might be declared void from its inception. Cf. *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 C3d 531, 277 CR 1. Or it might be tested for validity under the amended plan. See *Sierra Club v. Board of Supervisors* (1981) 126 CA3d 698, 179 CR 261, reported at 5 CEB RPLR 42 (Mar. 1982). In either event, most lawsuits survive the adoption of general plan amendments. Therefore, the permit holder should consider the alternative of reprocessing the permit under the amended plan.

Effect of OPR Extensions

An OPR extension immunized a local agency from lawsuits challenging general plan adequacy. However, if suit is filed before the extension has been secured, any approvals under attack in the lawsuit can remain vulnerable. See *Neighborhood Action Group v. County of Calaveras* (1984) 156 CA3d 1176, 1190, 203 CR 401, 411; *Resource Defense Fund v. County of Santa Cruz (1982) 133 CA3d 800, 810, 184 CR 371, 376, reported at 5 CEB RPLR 134 (Oct. 1982).*

For example, a lawsuit challenging a subdivision map approval may still go forward even if the general plan challenge on which it is based is preempted by an OPR extension. Assuming the terms of the extension allow the processing of applications pending the extension period, the developer involved in that lawsuit is then presented with the choice of reprocessing the

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Sample OPR Extension

Note: The following extension was issued to the City of Poway and is offered as an example only. It was provided courtesy of the Office of Planning and Research. (The current Director of OPR is Richard P. Sybert.)

October 23, 1990

[name]
City Manager
City of Poway
Re: City of Poway General Plan Extension

Dear [name]:

This is to inform you that I have approved the City of Poway's request for an extension of time for the revision of its general plan. This extension of time does not apply to the housing element because of statutory constraints. The extension is granted for a one-year period beginning on October 23, 1990, and ending on October 22, 1991, or upon the adoption of the revised general plan, whichever is earlier. The extension, as provided in Government Code section 65361, releases the city from the requirement that it maintain a complete and adequate general plan.

As the basis for granting this extension, I reference the finding made by the Poway City Council in Resolution No. 90–199. I have determined that the resolution and the additional explanatory and supporting data submitted with the application satisfy the requirements of Government Code section 65361 and its relevant subsections.

In accordance with the powers granted me by Government Code section 65361, I have determined that the following conditions are necessary in order to ensure full compliance with the Planning and Zoning Law during the term of the extension.

1. Discretionary land use projects shall be approved by the city only when the city makes written finding, based upon substantial evidence in the record, that: (1) the proposed project will be consistent with the existing general plan and (2) there is a reasonable probability that the project will be consistent with the proposed general plan.

2. The city shall neither initiate, accept, process, nor act on any proposals for general plan amendments during the term of this extension.

3. The city shall not enter into any development agreement or other such agreement or document (such as a vesting tentative map) which vests and legally precludes unilateral changes in land use by the city, with the following exceptions:

a. a development agreement for the previously approved "Old Coach Golf Estates" project.

b. disposition and development agreements or similar agreements entered into by the city redevelopment agency for the purposes of redevelopment.

4. For the purposes of this extension —

"Discretionary land use project" is defined to include: a specific plan, a city-initiated annexation request, a tentative map (including parcel map), a zoning ordinance amendment (including rezoning), a planned community development plan, a conditional use permit, a variance, a development review, or a public works/capital improvement project (except as necessary to maintain existing facilities or protect the public health and safety).

"City" is defined to include the city council as well as any city official, committee, or board-delegated administrative responsibilities under city ordinances and policies.

If you have any questions regarding this extension, please contact [name] at [telephone].

Sincerely,

John McCarthy
Director

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subdivision application under the terms of the OPR extension, or defending the "old" general plan in the lawsuit. Because a request for an OPR extension is tacitly premised on the inadequacy of the general plan, reprocessing the application may well be preferable. On the other hand, the developer is then subjected twice to the vagaries of the political process. In short, neither option is particularly appealing. This dilemma underscores the importance of ensuring general plan adequacy before the application is approved.

Given the potential impact of an OPR extension on ongoing development and pending litigation, the application can become the focus of intense lobbying. Informed parties, generally including landowners and environmental activists, will seek to influence the process both before the city council, when the city formally decides to apply for the extension, and before OPR, as the application is studied and the OPR response is prepared.

Because the state must grant virtually all requests for extensions, the conditions imposed on the extension are at the heart of the process. OPR conditions can be quite liberal or quite stringent depending on the circumstances and the nature of the request. For example, OPR rarely permits annexations, vesting tentative maps, or general plan amendments to occur during the extension period, but commonly allows tentative maps, or general plan amendments to occur during the extension period, but commonly allows tentative maps, use permits, and other discretionary approvals to go forward.

Theoretically, the conditions could be subject to judicial review. However, because OPR is vested with broad discretion, and because the extension itself is transitory and short lived (at least, compared to the average life expectancy of a lawsuit), the extensions are rarely, if ever, challenged in court.

OPR extensions are discussed further in *Bringing the General Plan Into Compliance* at page 151. *[For a sample OPR extension see page 33. — Ed.]*

When Can Development Proceed Despite an Inadequate General Plan?

Faced with the sometimes competing considerations of (1) a critical housing shortage, and (2) enforcement of planning laws to require adequate, up-to-date general plans, the legislature enacted provisions that permit ongoing development during a general plan revision. See Govt C §§65754.5–65760. These provisions allow the courts to order a city to correct its deficient general plan without bringing development to a screeching halt. The overriding concern is encouraging residential development (Stats 1983, ch 911, §1 (uncodified)):

> The Legislature recognizes that a judicial decision, holding that the general plan of a city . . . is inadequate, can prevent the approval and development of housing projects even though the projects are not directly affected by the portions of the general plan found to be inadequate. . . . The Legislature finds that additional methods are needed . . . to ensure that court actions challenging the adequacy of a general plan do not unnecessarily inhibit the provision of affordable housing.

Thus, a court may not enjoin residential development pending a general plan challenge, nor during the post order revision period, as long as: (1) the project has been approved; (2) and EIR has been certified (or negative declaration adopted) and the statute of limitations for challenging the action has run; (3) the landowner has irrevocably committed at least one million dollars for public infrastructure; and (4) the proposed project may be developed without having an impact on the city's ability to implement an adequate housing element. Govt C §65754.5. Going further still, §65760 creates a conclusive presumption that any housing development with twenty-five percent affordable units can be developed without having an impact on the city's ability to implement an adequate housing element. The sole exception to this presumption is when approval of the development prevents the city from complying with the court's judgement.

In issuing its order concerning general plan adequacy, the court must address the question of ongoing development activity, and must include one or more of several options. The court may suspend the city's authority to issue building permits, to grant rezoning or variances, or to grand subdivision map approvals. Govt C §65755(a)(1), (2), (3). (There is a special procedure by which a party — an intervener, perhaps — may ask the court to exclude from its "suspension" order a particular program or project if it can be shown that the project would not impair or impede the adoption of a valid general plan and is consistent with that portion of the plan adjudged to be valid. Govt C §65755(b).) At the same time, the court may mandate approval of building permits or subdivision maps for residential projects under certain conditions, the primary one being that the approval may not be granted if it would "significantly impair" the ability of the city to adopt and implement an adequate general plan. Govt C §65755 (a)(4), (5), (6).

This latter standard is not applied pro forma. In *Committee for Responsible Planning v. City of Indian Wells* (1989) 209 CA3d 1005, 257 CR 635, reported at 12 CEB RPLR 156 (July 1989), the court set forth a stringent interpretation of the phrase "significantly impair." The court reasoned that the legislative intent of CEQA — to afford the fullest possible protection to the environment — was comparable to the declared legislative intent about the importance of adopting and maintaining a legally adequate general plan, particularly the housing element. Therefore, the court adopted CEQA's definition of "significant" (Pub Res C §21068), and held that the standard set out in Govt C §65755 should be interpreted to mean a " 'substantial or potentially substantial, adverse change' in the ability of the City to adopt [a] general plan which compiles with state law." 209 CA3d at 1013, 257 CR at 639.

Applying that test, the court upheld the disapproval of a 29-lot subdivision. The court gave special attention to the housing element and upheld the trial court's determination that, because of the limited area available for new housing, it was necessary to prevent development which might frustrate the city's ability to implement a new housing element. A key fact in this case was the city's recent approval of a 4500-room resort complex, which would generate a substantial need for affordable housing for its employees.

The city's efforts to bring the general plan into compliance are excluded from CEQA. However, the city must prepare an "initial study" and, if significant impacts are likely, an "environmental assessment" containing essentially the same information as a draft EIR. The assessment is now reviewable under CEQA. Govt C §65759.

BRINGING THE GENERAL PLAN INTO COMPLIANCE

Statutory Methods

In apparent acknowledgement of the vast number of general plans that are not in compliance, the Planning and Zoning Law provides two methods for dealing with the problem — OPR extensions and interim ordinances. These methods can be viewed as reverse side of the same coin.

OPR Extensions

Under Govt C §65361 a city which intends to either adopt or amend a general plan may apply to the Director of OPR for an extension of time for the preparation and adoption of all or any part of the plan. To do so, the city council must hold a public hearing and then make certain findings which document a valid reasons why the general plan has not been previously adopted or amended. At a public hearing, members of the pubic must be afforded a reasonable opportunity to speak in support of, or opposition to, the extension. The notice of the hearing must be carefully drafted to ensure that it adequately describes the contemplated action while not being so specific as to unduly limit the range of potential options.

The findings must include at least one of the following: (1) necessary data to be supplied by another agency has not yet been provided; (2) recruiting difficulties have left the city short of necessary staff or consultants; (3) a natural disaster has required reassignment of staff or reevaluation of the general plan; (4) local review procedures require extended public review; (5) the plan is being jointly prepared and coordinated with other agencies; or (6) "[o]ther reasons exist that justify the granting of an extension, so that the timely preparation and adoption of a general plan is promoted." The term of the extension is for a "reasonable" period of time, but not to exceed one year. A second one-year extension may be granted by OPR if the city can demonstrate substantial progress in adopting or amending the general plan in question.

The most important result of obtaining an extension is that, during the extension period, the city is not subject to the requirement that a complete and adequate general plan be adopted or that the city's decisions be consistent with the general plan. The city is, therefore, allowed to approve development projects even though inadequacies of the general plan are being corrected. The city also enjoys an immunity from lawsuits contesting the approvals based on challenges to general plan adequacy or consistency. This immunity, however, is limited to lawsuits concerning those elements for which an extension has been sought and applies only to those elements.

The importance of the housing element is again apparent in that the extensions for its preparation and adoption are not granted unless (1) they are requested by a new city or county which cannot meet the adoption-within-thirty-months requirement of Govt C §65360, and (2) the Director of HCD has been consulted. Govt C §65361(b). In granting an extension, OPR may attach conditions which could restrict the city's ability to approve projects. These include requiring consistency with the general plan provisions which are under study.

Interim Ordinances

Government Code §65858 provides for the adoption of interim ordinances to deal with situations in which a development application has been submitted which may be in conflict with a general plan or other land use proposals that the city is studying or intends to study during a reasonable period of time. If properly adopted, an interim ordinance preserves the status quo by prohibiting a use of land that may be inconsistent with what is being studied.

There are two alternative procedures for adoption. The first requires no notice or hearing, but requires adoption by a four-fifths vote. An interim ordinance adopted in this way is effective for forty-five days, and can be extended twice after proper notice and hearing — the first period for a maximum of ten months and fifteen days, the second period for a maximum of one year. Both extensions require a four-fifths vote. The second alternative requires proper notice and hearing and, again, a four-fifths vote. This interim ordinance is effective for forty-five days and can be extended once for a period of twenty-two months and fifteen days, after proper notice and hearing and a four-fifths vote.

A key requirement is that the city council make certain findings, including a finding that there is "a current and immediate threat to the public health, safety or welfare," and that approvals would result in a "threat to public health, safety or welfare." Govt C §65858(c).

The requirements of Govt C §65858 must be strictly followed, inasmuch as the section preempts any conflicting local ordinances. *Bank of the Orient v. Town of Tiburon* (1990) 220 CA3d 992, 1004, 269 CR 690, 697, reported at 13 CEB RPLR 170 (Aug. 1990).

(Note that the U.S. Supreme Court's seminal regulatory taking case involved an interim ordinance adopted under §65858. See *First English Evangelical Lutheran Church v. County of Los Angeles* (1987) 482 US 304, reported at 10 CEB RPLR 120 (July 1987). On remand, the California court of appeal found that the interim ordinance had not resulted in a taking. *First English Evangelical Lutheran Church v. County of Los Angeles* (1989) 210 CA3d 1353, 258 CR 893, reported at 12 CEB RPLR 180 (Aug. 1989).)

City Problems in Bringing General Plan Into Compliance

In addition to the obvious technical planning problems involved in bringing a general plan into compliance, a city faces many practical problems, including the following:

1. *Problem identification.* Often members of the public, city council, or staff members do not have sufficient understanding of the concept of the general plan or the legal issues involved to realize that a compliance problem exists.

2. *Time constraints.* It is sad but true that the staffs of most cities are forced to focus on short-term goals with the result that incredible time pressure is imposed on individual projects. This circumstance can preclude consideration of more permanent (and time-consuming) solutions to general plan problems.

3. *Lack of "problem tracking."* Many recurring problems are not identified or dealt with properly because there is no adequate "tracking" system. This results from a lack of communication among planners themselves and among planners and the city's legal staff.

Developer involvement

To what extent should a developer's attorney become involved in the process of bringing a general plan into compliance while processing a development application? The answer to this question becomes clear when one recalls the fact that at least seventy percent of the general plans in California

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are not in compliance with the law: It is *essential* that a developer's attorney become involved in the process and that, in the first instance, they do their own evaluation of whether the general plan is in compliance.

When it comes to avoiding or defending a legal challenge, the developer's interest and that of the city will probably be the same. The best course of action is to be conservative and resist the normal inclination to gloss over procedural niceties and hurry the process along. The biggest single reason for litigation in this area is a misguided attempt to cut corners procedurally in an effort to meet a too-tight deadline.

Developer's counsel should work extensively with city staff and other officials. This would include a willingness to provide needed legal analysis (avoiding, of course, stepping on the toes of the agency legal counsel) and a willingness to fund needed planning and other consulting services. In order to avoid either the appearance of bias or adverse public reaction, the inclination to preordain a particular result must be avoided.

Contact with elected officials and members of appointed boards can be very useful. These contacts, however, must avoid any violations of the Brown Act (the California Open Meetings Act (Govt C §§54950–54961)). Additionally, although an attorney is generally prohibited from having contact with a party which he or she knows is represented by another attorney (without consent), this rule does not apply to communications with a public officer, board, committee, or body. Cal Rules of Prof Cond 2–100.

Citizen Involvement and the Use Of Initiatives and Referendums

Citizen involvement in land use planning has significantly increased in recent years. In addition to city staff, planning commissioners, and city council members, a developer must also deal with neighbors, special interest groups, and other concerned citizens. Developers should be aware that most "ultimate" decision makers are elected officials and that elected officials ignore at their own peril the wishes of their constituents.

One of the results of increased citizen involvement in land use decisions has been a concomitant increase in the use of initiatives and referendums. An extensive discussion of those devices is beyond the scope of this article, but some background is essential in order to understand their relationship to general plans. Initiative and referendum are the proceedings which permit a direct popular vote on proposed legislation or recently enacted legislation. The powers of initiative and referendum were adopted in California in 1911 as a state constitutional enactment (Cal Const art II, §§8–11). The constitutional provision which deals most specifically with the application of initiative and referendums are used to repeal ordinances and resolutions.

The procedures for initiatives and referendums are found in the Elections Code (e.g. municipal initiative at Elec C §§4000–4021; municipal referendum at Elec C §§4050–4095). They cover such topics as circulation of the petitions, duty of the council to submit, number of signatures required, date of elections, etc.

Although the California Constitution places some limitations on the use of initiative and referendum, most limitations are the result of court decisions. They are based on the general principle that the power of the voters to adopt or repeal is governed by the same substantive limitations that restrict the city council's power. These limitations include restrictions against violations of constitutional law, conflict with state general law, impairment of an essential government function, and invasion of a duty imposed solely on the council as an agent of the state or involving an administrative (quasi-judicial) function as opposed to a legislative function.

The initiative and referendum powers apply only to legislative acts. Courts have designated certain land use decisions as being administrative (variances, use permits, subdivisions, etc.) and others as being legislative (zoning, etc.). Under California law, the adoption or amendment of a general plan or a specific plan is a legislative act subject to enactment by initiative or repeal by referendum. *Midway Orchards v. County of Butte* (1990) 220 CA3d 765, 269, CR 796, reported at 13 CEB RPLR 173 (Aug. 1990); *Yost v. Thomas* (1984) 36 C3d 561, 205 CR 801, reported at 7 CEB RPLR 175 (Nov. 1984).

Although it is undoubtedly true that initiatives and referendums must comply with general substantive law, an exception is made in connection with certain procedural requirements such as notice, hearing, and findings. *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 C3d 582, 596, 135 CR 41, 48. Another procedural requirement that does not apply to initiatives and referendums is CEQA. *Northwood Homes, Inc. v. Town of Moraga* (1989) 216 CA3d 1197, 1206, 265 CR 363, 369, reported at 13 CEB RPLR 79 (Apr. 1990); *Stein v. City of Santa Monica* (1980) 110 CA3d 458, 168 CR 39, reported at 4 CEB RPLR 13 (Jan. 1981).

The case of *Building Indus. Ass'n v. City of Camarillo* (1986) 41 C3d 810, 226 CR 81, reported at 9 CEB RPLR 125 (Aug. 1986), is perhaps the best illustration of the reasons why certain procedural requirements are inapplicable to the initiative and referendum process. *Camarillo* involved a growth control ordinance adopted by initiative. At issue was the applicability of Govt C §65863.6 (which requires the city to balance, with appropriate findings, housing needs against public service needs before adopting a growth control ordinance) and Evid C §669.5 (which shifts the burden of proof that a growth control ordinance is necessary to promote public health, safety, and welfare to the city). The court concluded that Evid C §669.5 applies to initiative measures while Govt C §65863.6 does not. According to the court, procedural requirements governing city council action do not apply to initiatives any more than the procedural aspects of initiative law apply to city council enactments of ordinances. The court held that Evid C §669.5 applied, however, because it places no procedural barriers on the ability of the electorate to legislate through the power of initiative.

As stated above, the general rule is that the voters have no greater power than does the legislative body to enact legislation. Under this general rule, initiative and referendum legislation may be attacked on the ground that it was an improper exercise of the police power. *Arnel Dev. Co. v. City of Costa Mesa* (1981) 126 CA3d 330, 337, 178 CR 723, 727, reported at 5 CEB RPLR 35 (Mar. 1982). Perhaps the most interesting substantive requirement applicable to land use initiatives and referendums is that the measure must be consistent with general plan laws. This requirement, as discussed above, involves (1) consistency with state general plan law, (2) internal consistency, and (3) consistency of subordinate land use decisions with the general plan. These issues

have been discussed in several court decision. The issue of inconsistency between the general plan and a subordinate land use regulation was before the court of appeal in *deBottari v. City Council* (1985) 171 CA3d 1204, 217 CR 790, reported at 9 CEB RPLR 14 (Jan. 1986). In that case, the court held that a proposed referendum which would have rejected a zoning ordinance was invalid because, if passed, it would result in zoning scheme that was inconsistent with the city's general plan.

One of the most recent cases in this area may become a seminal case in land use planning. In *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 C3d 531, 277 CR 1, the California Supreme Court invalidated a voter-initiated growth control measure that conflicted with the city of Walnut Creek's general plan. The court first determined that the initiative most closely resembled a zoning ordinance and as such was subordinate to the city's general plan. The court went on hold that state planning and zoning law dictated that a zoning ordinance that conflicts with a general plan is invalid when passed (void ab initio), and that a court could not overcome that flaw with a compliance decree. The court expressly disapproved any statement to the contrary in *Building Indus. Ass'n v. Superior Court* (1989) 211 CA3d 277, 297, 259 CR 325, 338, reported at 12 CEB RPLR 181 (Aug. 1989).

Lesher may be as important for what it left unsaid as for what it said. The questions, hinted at by the court but left unresolved, is whether the statutory scheme of general plan preparation can co-exist with the statutory scheme for initiatives and referendums. For example, an initiative can only be amended by a subsequent initiative; therefore, general plan amendments by initiative may interfere with the city council's power to amend all or part of the general plan. 52 C3d at 539, 277 CR at 4.

Within two weeks of the decision in *Lesher*, the court of appeal decided *Marblehead v. City of San Clemente* (1991) 226 CA3d 1504, 277 CR 550, reported at 14 CEB RPLR 127 (Apr. 1991). In this case, the initiative tied future growth to the ability to meet specific service levels for transportation and other public services. Unlike the initiative in *Lesher*, the San Clemente initiative explicitly called itself a general plan amendment. The initiative contained a provision that "the general plan of the city shall be deemed to be amended to contain these concepts" and directed the city to revise the general plan and zoning ordinance within six months to achieve consistency.

The court of appeal held the San Clemente initiative unconstitutional because, instead of actually amending the specific general plan provisions, it merely directed the city council to amend the general plan. In reaching this result the court relied on *American Fed'n of Labor v. Eu* (1984) 36 C3d 687, 714, 206 CR 89, 107, which held that an initiative which seeks to do something other than enact a statute is not within the initiative power reserved by the people.

Due Diligence for Developers' Attorneys

At this point, readers should have reached one firm conclusion: Due diligence for a client seeking to purchase and develop property does not end, but only begins, with a legal audit of the jurisdiction's general plan.

The general plan audit should be conducted by an experienced land use

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lawyer or planner well versed in statutory and judicial standards of adequacy. It is best for the novice not to attempt a general plan review until he or she has become conversant with standard planning concepts and tools. The OPR General Plan Guidelines provide an excellent reference and starting point for understanding how a general plan is put together, how it is supposed to work, and what it must contain to be legally adequate.

The practitioner must also ascertain whether applicable zoning ordinances are consistent with the general plan as required by Govt C §65860. Proposed subdivision maps, planned unit developments (PUDs), capital improvements, and permits must also be reviewed for consistency with general plan policies. Where consistency problems are identified, care must be taken to initiate general plan amendments, rezonings, and other appropriate legislative actions to lay the groundwork for a legally defensible approval. These applications should be followed up diligently, as they are not covered by the Permit Streamlining Act (Govt C §§65920–65963.1) and will not be "deemed approved" if the city fails to act. *Landi v. County of Monterey* (1983) 139 CA3d 934, 189 CR 55, reported at 6 CEB RPLR 103 (July 1983).

It is not sufficient simply to review existing policies and ordinances. Proposals for future changes in policy can also set traps. For example, petitions for initiatives or referendums which could severely restrict development potential may be circulating in the community. Similarly, pending litigation challenging other approvals or ordinances may ultimately have a direct impact on the property's use. These potential changes must be discovered and analyzed.

It might seem obvious, even insulting, to mention that those proposing development should be careful about describing their project accurately to the community. However, the issue is worth consideration. In a recent decision the court of appeal permitted a fraud action to go forward against a developer when the development approved and built was alleged to be different from that described to the neighbors. *Lacher v. Superior Court* (1991) 226 CA3d 767, 277 CR 73, reported at 14 CEB RPLR 127 (Apr. 1991). One might have expected that a governmental approval would preclude such an action. However, in this case, the homeowners alleged that they did not object to the project because they had been misinformed. The appellate court upheld their right to sue for the claimed misstatements, whether intentional or negligent.

Finally, and perhaps most important, is a knowledge of the political atmosphere of the community. Many problems can be avoided by determining early in the process the orientation and prevailing philosophy of the city council and the citizens. If the practitioner is not a member of the community, or is unfamiliar with its attitude toward development, he or she can gather important data through interviews with the city's planning staff, subscriptions to local newspapers, and discussions with local business leaders and attorneys. When salient issues emerge — e.g. traffic congestion, school overcrowding, or sewer capacity limitations — the road to successful development can be smoothed significantly with special attention to those community concerns. The development least likely to be challenged is one that is sensitive to the issues dearest to the hearts of its neighbors.

APPENDIX

Consistency Provisions In State Law and Legal Precedents

Note: The following material has been reprinted from General Plan Guidelines (rev Dec. 1990), published by the Office of Planning and Research.

Agricultural Preserves

- *Government Code Section 51234:* Requires that agricultural preserves established under the Williamson Act be consistent with the general plan.
- *Government Code Section 51282:* Requires a city or county, when approving a Williamson Act contract cancellation, to make a finding that the proposed alternate use is consistent with the general plan.

Building and Housing Regulations

- *Elysian Heights Residents Association, Inc. v. City of Los Angeles (1986) 182 Cal.App.3d 21, [227 CR 226]:* Holds that state planning law does not require scrutiny of building permits for consistency with the general plan, even though a building permit must comply with a charter city's zoning ordinance.
- *Government Code Section 65567:* Provides that no building permit may be issued that is inconsistent with an applicable open-space element.

Capital Improvements

- *Government Code Sections 65401 and 65402:* Require planning agencies to review and report on the consistency with the applicable general plan of proposed city, county, and special district capital projects, including land acquisition and disposal.
- *Government Code Section 65103(c):* Requires planning agencies to review annually their city or county capital improvement programs and other local agencies' public works projects for consistency with the general plan.
- *Friends of B Street v. City of Hayward (1980) 106 Cal.App.3d 988, [165 CR 514]:* Interprets state law as requiring consistency of governmental capital facilities projects with the general plan.

Development Agreements

- *Government Code Section 65867.5:* Requires development agreements to be consistent with the general plan.

Housing Authority Projects

- *Health and Safety Code Section 34326:* Declares that all housing projects undertaken by housing authorities are subject to local planning and zoning laws.

Integrated Waste Management

- *Public Resources Code Section 41701:* If a county determines that the existing capacity of a solid waste facility will be exhausted within fifteen years or if the county desires additional capacity, then the county-wide siting element of the county's hazardous waste management plan must identify an area or areas, consistent with the applicable general plan, for the location of new sold waste transformation or disposal facilities or for the expansion of existing facilities.
- *Public Resources Code Section 41702:* An area is consistent with the city or county general plan if:
  (1) The city or county has adopted a general plan.
  (2) The area reserved for the new or expanded facility is located in, or coextensive with, a land use area designated or authorized by the applicable general plan for solid waste facilities.

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CLSA PUBLICATION ORDER FORM	CLSA Member Price	Non-member Price	Quantity	Total Amount
LS Roster with both alphabetical and numerical sections (1992 publication)	$ 5.00	$ 10.00		
Pre-'82 CE Numerical Listing (1992 publication)	$ 6.00	$ 12.00		
LS Act and Board Rules (1992 publication)	$ 5.00	$ 10.00		
Subdivision Map Act (1992 publication)	$ 6.00	$ 12.00		
Binder with index tabs for LS Roster, Pre-'82 CEs, LS Act & Board Rules, Subdivision Map Act, and Misc. Statutes *(text of Misc. Statutes will be available at later date)*	$ 6.00	$ 6.00		
1992 Complete Package including LS Roster, Pre-'82 CE Numerical Listing, LS Act & Board Rules, Subdivision Map Act, and Binder	$ 22.00	$ 38.00		
California Coordinate Projection Tables – NAD '83	$ 6.00	$ 12.00		
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Standard Contract – Agreement for Prof. Services	$6.00 / pad of 25	$12.00 / pad of 25		
Land Surveying for the Land Owner and Real Estate Professional	$ 3.00	$ 6.00		
Easement And Related Land Use Law in California, Second Edition *by Donald E. Bender, J.D., L.S.*	$ 20.00	$ 30.00		
NGS 1983 California Coordinates Data Disk *(3 disk set)*	$35.00 / set of 3	$70.00 / set of 3		
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DAYTIME TELEPHONE	AUTHORIZED SIGNATURE

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(3) The adjacent or nearby land use authorized by the applicable general plan is compatible with the establishment or expansion of the solid waste facility.

- *Public Resources Code Section 41703:* Except as provided in subdivision (a) Section 41710, any area or areas identified for the location of a new solid waste transformation or disposal facility shall be located in, coextensive with, or adjacent to a land use area authorized for a solid waste transformation or disposal facility in the applicable city or county general plan.
- *Public Resources Code Section 41711:* A tentatively-reserved area shall be removed from the countywide siting element if a city or county fails or has failed to find that the area is consistent with the general plan.
- *Public Resources Code Section 41720:* The countywide siting element submitted to the California Integrated Waste Management Board shall include a resolution from each affected city or the county stating that any areas identified for the location of a new or expanded solid waste transformation or disposal facility pursuant to Section 41701 is consistent with the applicable general plan.

Interim Classroom Facilities

- *Government Code Section 65974(a)(5):* Specifies that when local governments obtain the dedication of land, the payment in lieu thereof, or a combination of both, for interim elementary or high school classroom facilities, such facilities must be consistent with the general plan.

Large-Scale Urban Development Projects

- *Health and Safety Code Section 56032:* Requires that comprehensive development plans for large-scale urban development projects be consistent with the general plan.

Local Coastal Programs

- *Public Resources Code Section 30513:* Requires the zoning ordinances of the Local Coastal Program to conform to the certified coastal land use plan (a portion of the general plan).

Low- and Moderate-Income Housing

- *Government Code Section 65589.5(d):* A city or county may disapprove a low- or moderate-income housing project if the jurisdiction finds that the development is inconsistent with the general plan land use designation, as specified in any element of the plan.

Mineral Resources

- *Public Resources Code Section 2763:* Requires that city and county land use decisions affecting areas with minerals of regional or statewide significance be consistent with mineral resource management policies in the general plan.

On-Site Wastewater Disposal Zones

- *Health and Safety Code Section 6965:* Requires a finding that the operation of an on-site wastewater disposal zone created under Health and Safety Code Sections 6950 et seq. will not result in land uses that are inconsistent with the applicable general plan.

Open-Space

- *Government Code Section 65566:* Requires that acquisition, disposal, restriction, or regulation of open-space land by a city or county be consistent with the open-space element of the general plan.
- *Government Code Section 65567:* Prohibits the issuance of building permits, approval of subdivision maps, and adoption of open-space zoning ordinances that are inconsistent with the open-space element of the general plan.
- *Government Code Section 65910:* Specifies that every city and county must adopt an open-space zoning ordinance consistent with the open-space element of the general plan.
- *Government Code Section 51084:* Requires cities and counties accepting or approving an open-space easement to make a finding that preservation of the open-space land is consistent with the general plan.

Park Dedications

- *Government Code Section 66477:* Enables local governments to require as a condition of subdivision and parcel map approval the dedication of land or a payment of fees for parks and recreational purposes if the parks and recreational facilities are consistent with adopted general or specific plan policies and standards.

Parking Authority Projects

- *Streets and Highways Code Section 32503:* Specifies that parking authorities, in planning and locating any parking facility, are "subject to the relationship of the facility to any officially adopted master plan or sections of such master plan for the development of the area in which the authority functions to the same extent as if it were a private entity."

Planning Commission Recommendations

- *Government Code Section 65855:* Requires that the planning commission's written recommendation to the legislative body on the adoption or amendment of a zoning ordinance, include a report on the relationship of the proposed adoption or amendment to the general plan.

Project Review Under CEQA

- *Title 14, California Code of Regulations, Section 15080 (Refer to* CEQA Guidelines*):* Requires examination of projects subject to the provisions of the California Environmental Quality Act for consistency with the general plan.

Redevelopment Plans

- Health and Safety Code Section 33331: Requires every redevelopment plan to conform to the adopted general plan.

Reservations of Land Within Subdivisions

- *Government Code Section 66479:* Specifies that reservations of land for parks, recreational facilities, fire stations, libraries, and other public uses within a subdivision must conform to the general plan.

Special Housing Programs

- *Health and Safety Code Section 50689.5:* Specifies that housing and housing programs developed under Health and Safety Code Sections 50680 et seq. for the developmentally disabled, mentally disordered, and physically disabled must be consistent with the housing element of the general plan.

Specific Plans

- *Government Code Section 65359:* Requires that a specific plan be reviewed and amended as necessary to make it consistent with the applicable general plan.
- *Government Code Section 65454:* Specifies that a specific plan may not be adopted or amended unless the proposed plan is consistent with the general plan.

Street, Highway, and Service Easement Abandonments

- *Streets and Highways Code Section*

8313: Specifies that prior to vacating a street, highway, or public service easement, the legislative body must consider the applicable general plan.

Subdivision

- *Government Code Sections 66473.5 and 66474:* Specify that findings of consistency with the general plan are determinative in the approval or denial of a tentative subdivision or parcel map.
- *Government Code Section 66474.61:* Requires that subdivision and parcel maps be denied in cities of more than 2,800,000 persons if they are not found to be consistent with the general plan.
- *Government Code Section 66427.2:* Requires that the condominium conversions be consistent with the general plan if the plan contains definite objectives and policies directed to such conversions.

Transmission Lines

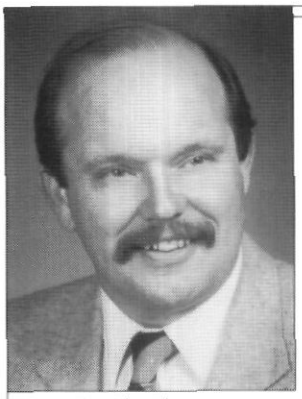
- *Public Utilities Code Section 12808.5:* Requires cities and counties approving electrical transmission and distribution lines of municipal utility districts to make a finding concerning the consistency of the lines with the general plan.

Use Permits

- *Neighborhood Action Group v. County of Calaveras (1984) 156 Cal.App.3d 1176, [203 CR 401]:* Provides that use permits (but not exclusively such permits) must be consistent with the local general plan. While state statutes do not expressly require such consistency, it follows that such consistency is nevertheless required, since use permits are struck from the mold of local zoning, and zoning must conform to the adopted general plan.

Zoning

- *Government Code Section 65860:* Requires that zoning ordinances in counties, general law cities, and charter cities with a population of over 2,000,000 be consistent with the general plan. ⊕



David J. Slawson

Governor Appoints Land Surveyor Member And Public Member To the State Board of Registration

GOVERNOR Pete Wilson has appointed the Land Surveyor Member and the Public Member to the State Board of Registration for Professional Enginners and Land Surveyors.

David J. Slawson is President of the civil engineering firm of Winchester Associates, Inc., a position he has held since 1980. Slawson has also served as a planning commissioner for the city of Mereno Valley since 1986, and is a member of CLSA. In 1990, Slawson received an executive certificate in management from the University of California, Riverside.

Mim Scott, Senior Vice President for the Newland Group, Inc. a nationwide developer of master-planned communities. Throughout her twenty-year career, she has overseen numerous development projects. Scott, 64, is a graduate of Ohio University at Athens, where she received bachelors of arts degrees in psychology and economics. She is a member of the Greater San Diego Chamber of Commerce and the Golden Eagle Club. ⊕

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Be Ambiguous Clearly

By Lloyd J. Cook, P.L.S.

THE MOST enduring obstacle in the natural world is between one person's thoughts and another's. Imagine a day without communication. No conversations, letters, notices, reports, telegrams, books, or information exchanges between any living soul. Undeniably, communication is necessary for our everyday existence.

Effective communication skills are essential to positive and rewarding activities in your family, profession, or recreation. Ineffective communication, on the other hand, will promote inadequate understanding and deficient relationships. Your success is directly related to how well you can speak and present your ideas to others. Fabulous ideas and all the knowledge in the world will be lost if one cannot communicate it to others. Research shows that the number-one fear of mankind is speaking in front of an audience! We can overcome this fear.

Toastmasters International is a nonprofit, educational organization of Toastmasters Clubs throughout the world. As of February 28, 1991, Toastmasters International had 7,413 clubs and 169,783 members throughout the world!

Toastmaster membership provides these benefits:

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Research shows that people who can express themselves effectively advance further and faster in their careers than those who have difficulty speaking. If you can't speak with confidence, you may be keeping yourself from achieving your career goals!

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The Toastmasters program is ideal for busy people. It doesn't involve formal classroom training. Instead, learning takes place in the supportive atmosphere of a club. As a member of a Toastmasters Club, you progress at your own pace. Your assignments can be scheduled around your work responsibilities. And you'll see immediate result, as your confidence starts to build.

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THE TOASTMASTERS CLUB

Each Toastmasters Club provides its members with a professionally-prepared program. Meetings are conducted by the members themselves in a friendly atmosphere that encourages self-improvement.

Club meetings include "Table Topics," which allows members to practice "on-the-spot" speaking — the type of speaking often needed in daily business. Prepared talks provide experience in presenting effective speeches that inform, persuade, inspire, and entertain. Prepared speeches are based on projects in the Toastmasters Communications and Leadership manual. The manual takes a step-by-step approach to speech organization and presentation. By the time members complete the manual, they've learned how to prepare and present a dynamic speech.

Each meeting also includes open evaluation, in which the speaker learns the audience's reactions to his or her presentations. Evaluation also requires the audience to practice listening critically and analytically. The business portion of the meeting lets members develop confidence in leadership situations as well as polish parliamentary skills.

SUCCESS/LEADERSHIP

The Toastmasters program offers its clubs outstanding opportunities in corporate training. They will help you build your thinking power and learn to listen effectively, in addition to teaching you how to conduct a meeting and master the art of constructive evaluation. The presenters will learn how to train, while the participants will develop the strong communications and leadership skills that are vital to the workplace.

THE MISSION OF THE CLUB

The mission of a Toastmasters club is to provide a mutually-supportive and positive learning environment in which every member has the opportunity to develop communications and leadership skills — which in turn fosters self-confidence and personal growth.

As with any organization, you get out of it what you put in. I have been an active member since May 1990, and am very impressed with the program. The clubs are full of fantastic, positive people who make new friends, improve themselves, and help others. In my area, Los Angeles, there are hundreds of clubs throughout the community! Some meet at 6:00 a.m., some at lunchtime, others in the evening. There are clubs at City Hall, restaurants, churches, title companies, prisons, hospitals — just about anyplace there are people. One new club was formed this year on a battleship, the *USS Missouri* out of Long Beach!

I joined a club that meets every Wednesday, from noon to 1:00 p.m., just one block from my office! Other club meetings are anywhere from forty-five minutes to two and a half hours long. Toastmasters offers you the best program available at a very reasonable cost. A $12.00 initiation fee provides you with a complete kit of educational materials. Annual International dues are only $24.00, which include the monthly magazine subscription.

Plan to be a guest at a club in your area. Check out the program and become an active member. Remember, Toastmasters is opportunity!

Contact Toastmasters International World Headquarters for a free, current list of clubs in your area. Write to Toastmasters International, P.O. Box 9052, Mission Viejo, CA 92690-9052, or call (714) 858-8255. ⊕

The "5–Minute" Survey

By Jeremy Evans, P.L.S.

FRED HENSTRIDGE, P.L.S., has a favorite story he tells when the subject of survey planning comes up. It goes something like this:

Pablo Picasso was commissioned to create a painting for a particular celebration somewhere in Europe. When the day came to begin, he sat down in the studio and began to stare at the canvas. He pondered and thought for over thirty hours before he finally stood up, walked to the canvas and began painting. Five minutes later he announced that he was finished, signed his name and walked away. The officials of the celebration were outraged! There was no way that they were going to pay him for a painting that took five minutes to create. Picasso scolded the officials stating that the painting actually took over thirty hours to create; that during the time he was staring at the canvas he had planned in detail exactly how the painting was going to look and how he was going to do it. It has simply taken five minutes to put this plan on canvas!

In survey literature we hear a lot about planning our work carefully before undertaking a project, but I'm afraid we don't practice what we preach very well. In surveying it seems there is always a rush to get the project "in the field" and when the field work is done to get it "out the door." We spend all our time working and worrying about getting the survey to the client. In reality, the tighter the schedule the greater percentage of time we should spend in planning (in detail) exactly how we're going to do the work and who is going to do it. This planning will allow the survey to be completed in the most efficient manner possible.

This planning effort should not be restricted to just one person either. Pre-job meetings are a great place to plan surveys and get input form all the team members. The purpose of the pre-job meeting is to determine the most efficient way to get the work done without sacrificing quality. I know! I know! We're all the greatest surveyors who ever lived and we all know everything there is to know about surveying; but just for the sake of discussion, the Project Manager, Technical Manger, Project Surveyor, and Party Chief should meet prior to every project going in the field. (These people may all be the same person in a smaller company.) This meeting can be as simple as meeting at someone's workstation to agree on a typical "off the shelf" survey, or as detailed as meeting in the manager's office and going over every aspect of the survey in detail (technology, methodology, staffing, etc.) Technology and procedures are changing rapidly and there are always several ways to do any survey project. When a survey is planned with this amount of detail, a work plan and schedule should be produced and given to every member of the project team so the project is carried out as efficiently as possible. Once your plan is in place, simply put it on mylar! (Or digitally on a disk!)

So next time that you have a tight schedule for getting a project done, stare at your desk or computer screen for a while and plan your survey in detail. When the boss comes around and wants to know what you are doing, tell him the survey will be done in five minutes! ⊕

Copyright Protection for Surveyors

By Mike Huey, Esq.
Akerman, Senterfeit, and Eidson Attorneys at Law

IN OCTOBER OF 1976, President Ford signed into law the Federal Copyright Act of 1976, which can be found at Title 17, United States Code. The Copyright Act, which became effective Jananuary 1, 1978, provides copyright protection to original works of authorship fixed in any tangible medium of expression from which they can be perceived, reproduced, or otherwise communicated. Included among the several areas which are defined as works of authorship are pictorial, graphic, and sculptural works. It is under this category that maps and surveys are protected by the Copyright Act.

Pictorial, graphic, and sculptural works include two-dimensional and three-dimensional work of fine, graphic and applied art, photographs, printed and art reproductions, maps, globes, charts, technical drawings, diagrams, and models. However, a document is only considered a pictorial, graphic, or sculptural work to the extent that it incorporates those features that can be separately identified from the utilitarian aspects of the article. For instance, while a survey might be protected by a copyright, use of the survey for any purpose, such as locating a building on a site plan, would not be so protected. Thus, unless the copyright owner could show that the map or survey had been reproduced without his permission — or that one of the other privileges of the copyright owner had been violated — the owner of the copyright would have no remedy under the Federal Copyright Act.

Note also that the law does not provide protection for ideas, procedures, processes, systems, methods of operations, concepts, or principles. A surveyor might find this final rule important in a situation involving the assimilation of certain facts about a piece of property which have been set down in the field book, but which have not been transferred to the survey drawing. Until those facts are fixed in some tangible, illustrated medium they are not proper subjects for copyright.

SCOPE AND DURATION OF COPYRIGHT PROTECTION

The Federal Copyright Act provides that the owner of the copyright is given certain exclusive rights in the copyright work. Anyone exercising any of these exclusive rights, with limited exceptions, has infringed on the owner's copyright. These exclusive rights include the right to: (1) reproduce the copyrighted work; (2) prepare derivative works based on the copyrighted work; (3) distribute copies to the public by sale, rental, lease of lending; and (4) display the copyrighted work publicly.

These exclusive rights are vested in the owner of the copyright upon the creation of the work, and the rights endure for a term consisting of the life of the owner and fifty years after his death. In the case of jointly prepared works, the copyright endures for a term consisting of the life of the last surviving surveyor and fifty years after his death.

ELEMENTS NECESSARY FOR COPYRIGHT

There are three basic elements which are essential for a survey to be eligible for copyright. First, the work must be original. Although copyright protection of maps has been provided by statute in the United States since 1790, courts have traditionally been troubled as to whether collecting and setting forth facts constitutes the necessary originality for copyright. Generally, maps have been subject to the "direct observation rule" (i.e., whether the site was visited and directly observed).

In determining whether a particular map is a proper subject of copyright, courts have ruled that maps are protected by copyright only when the publisher of the map originally obtains some of the information "by the sweat of his own brow." This requirement should present no problem for most survey drawings since they are compiled from information originally gathered by the surveyor's field personnel.

However, the following scenario will illustrate how a problem could arise: Suppose a piece of property was originally surveyed in 1969. In 1976, the surveyor was called to resurvey the property to verify that the original conditions had not changed. If, in fact, the original conditions were the same, and if a new drawing was prepared using the old drawing as a basis, the new drawing would not be a proper subject for copyright since it was not an "original" work, even though it was prepared by the same surveyor.

Although the "direct observations rule" has been criticized by copyright experts and courts alike, it is still a viable doctrine. Thus, when making a survey drawing, make sure that the drawing is prepared through the use of field data collected expressly for the preparation of that drawing.

The second element necessary for work to be a proper subject of copyright is that the work must be fixed in some tangible medium of expression. From that moment on, copyright protection exists. Surveys, of course, are "fixed" when the tangible survey drawings are created.

The final element making a work eligible for copyright protection is the requirement that the work must be an expression, and not merely an idea or a fact which is in the public domain.

This concept of expression can be best illustrated by the following example: While the tangible document, the survey drawing, might be a proper subject for a copyright because it is an "expression" of certain of certain surveyor-obtained facts (such as the topographical features of a particular tract of land), the facts themselves (the field data) are not proper subjects of copyright.

OWNERSHIP OF COPYRIGHT

Copyright in maps and survey drawings is owned by the surveyor or sur-

veyors who prepare the drawings. The copyright to drawings prepared by an employee of the surveyor is owned by the employer. The law is clear on this point. However, if the surveyor commissions an independent contractor to prepare a portion of a drawing or a drawing which will be incorporated into a larger work, the copyright of that portion of the work prepared by the independent contractor belongs to him, rather than to the surveyor, unless the parties expressly agree in a written instrument signed by them that the work is considered a "work make for hire" for copyright purposes.

Moreover, the Copyright Act provides that ownership of copyright is distinct from ownership of the material object. Thus, when a client is given a survey drawing, if that drawing has been properly copyrighted, the surveyor retains ownership of the copyright. This is a departure from the prior Copyright Act and will apply only to drawings completed and copyrighted after January 1, 1978. Even with this protection, it is advisable that the contract between the surveyor and his client clearly reflect the intention of the parties as to ownership of the drawings. The copyright owner may of course, transfer the copyright in whole or in part. The conveyance may be by means of any written instrument signed by the owner of the copyright. Ownership of copyright may also pass by operation of law or may pass as personal property under one's will or by the applicable law where there is no will.

NOTICE OF COPYRIGHT

Whenever plans are published by authority of the copyright owner, a notice of copyright must be placed on all publicly distributed copies from which the work can be visually perceived. Three essential element must be incorporated into the form of notice: (1) the symbol "©," the word "Copyright" or the abbreviation "Copr."; (2) the year of first publication of the survey drawing; and (3) the name or recognized abbreviation of the surveyor.

The notice must be affixed to the copies in such a manner and location as to give reasonable notice of the claim of copyright to one reviewing the drawings. A proper notice of copyright might be as follows:

©1982 John Jones and Associates, Inc.

The omission of copyright notice as set forth above does not invalidate a copyright that a surveyor might have in his drawings if (1) the notice has been omitted for no more than a relatively small number of copies distributed to the public; or (2) registration for the work (as described below) has been made before publication or is made within five years after publication, and a reasonable effort is made to add notice to all copies distributed to the public after the omission has been discovered. Better practice dictates that the copyright notice be set forth on all surveys.

Copyright protection is not affected by the removal, destruction, or obliteration of the notice from publicly distributed copies of a survey drawing.

REGISTRATION OF COPYRIGHT

If you have complied with the notice provisions, you can register your copyright with the United States Copyright Office, Library of Congress, Washington, D.C. 20559. Registration can be accomplished by filing Form VA (for visual arts) along with a $10 fee and a deposit of two copies of the drawing or other item to be copyrighted. Forms can be obtained from the Information and Publications Section of the Copyright Office. Upon receipt of the registration materials and fee, the Register of Copyright will send the copyright owner a certificate of registration under the seal of the Copyright Office. If, for some reason, the drawings cannot be registered, the Register will notify the copyright owner in writing of the fact.

Although registration is not required for protection of your copyright, there are certain benefits to be obtained from registration. First, registration is an absolute prerequisite for bringing suit to enforce a copyright claim. Also, if registration is accomplished before or within five years after first publication of the drawing, it constitutes prima facie evidence of the validity of the copyright and facts stated in the certificate of registration. Registration after the expiration of the five-year period will merely place the burden of proof on the person seeking to claim a copyright protection in the judicial proceeding. A final, very important benefit of registration is that attorney's fees and statutory damages will be awarded for infringements which take place after the effective date of registration.

EXAMPLES OF CONTRACTUAL CLAUSES

1. Surveyor-Client Ownership and Use of Survey. The survey drawings, as instruments of service are and shall remain the property of the Surveyor. The Client shall be permitted to retain copies for information and reference in connection with the property indicated on the survey. The survey drawings shall not be used by the Client for any purpose other than that for which the drawings are prepared, except by agreement in writing and with appropriate compensation to the Surveyor. The parties acknowledge that the Surveyor is the author of the survey drawings for copyright purposes. The Client shall not sell or otherwise distribute any copies, reproducible or non-reproducible, of the survey drawings without the Surveyor's written consent. To do so shall be considered a material breach of this contract.

2. Surveyor-employee contracts. All worked produced by the Employee while he or she is employed by the Employer and all present or future copyright privileges of such work shall be owned by the Employer. The Employee shall not sell, lend, or otherwise distribute copies, either reproducible or non-reproducible, of any survey prepared in the course of his or her employment.

3. Surveyor-consultant contracts. Any work produced by the Consultant pursuant to his employment by the Surveyor shall be owned by the Surveyor and shall be considered a "work made for hire" for copyright purposes. The Consultant shall not sell or otherwise distribute any copy, reproducible or non-reproducible, of any work prepared pursuant to this agreement.

In addition to the contractual causes set forth above, it would behoove the surveyor to add a clause to his title block in order to put the public on notice that the drawings shall not be used for purposes other than that for which they were explicitly prepared. The following language is suggested:

> This drawing is the property of John Jones and Associates, Inc., and shall not be used for any purpose without the written consent of any authorized agent of John Jones and Associates, Inc. John Jones and Associates, Inc. accepts no responsibility for the use of this drawing for any purpose after six months from the date indicated above. All rights reserved. © 1982 John Jones and Associates, Inc.

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THE LAST WORD

Making a Local Education Program Work – Part II

By Paul A. Cuomo, P.L.S.

IN MY LAST article I discussed how a CLSA Chapter provided the impetus for a successful Community College Surveying Program. I stated that the first contact should be made by the local surveying community since the schools do not recognize the need for such a program. Before the school agrees to provide support, you will have to provide curricula including detailed class outlines, a list of instructors, and required textbooks. The minimum program offered should be a two-semester course in Plane Surveying. (Survey 1A, 1B; Plumb Bob 1 & 2; or whatever). These courses should contain lessons in chaining, instrument use, topo surveying, note keeping, safe field practice, mapping standards and procedures, horizontal and vertical curves, traversing, and a smattering of the U.S. Public Land Survey System. Other lessons should include use of the hand-held calculator and EDM and data collectors. Most schools do not have the equipment for this type of class. Besides borrowing things from the local surveying firms, some other sources are local CLSA chapter's education fund, local ACSM section, California Foundations for Land Surveying Education, local vendors (they sometimes give a sizeable education discount), and private donations. Fund raisers, such as golf tournaments, equipments fairs, and seminars could be put on to raise money for the program. With the state budget in such poor shape, these types of activities are becoming the only way a program will be able to support itself.

If you are going to expand the program into higher level classes, I suggest that a boundary control, a land description, and an advanced survey problem class be offered. Another excellent topic is survey mapping and office practice. This is a new class just being developed. (I will expand on these in my next article.)

The biggest obstacle that needs to be overcome is finding capable instructors. The plane surveying courses are the backbone of the program. They provide the necessary background and incentive for the student to move on into the profession. The key to a successful and meaningful experience for the student is how well the instructor is prepared and organized. There are plenty of class outlines and materials available for new instructors to follow. Lack of material is not a problem. I'm sure that a call to Richard Buchholz, Mike Welch, Mitch Duryea, Billy Martin, Hal Walker, Roy Minnick, or a host of others will get you all the class material you will ever need. How well the material is put to use is what really counts. Another key to the success of the plane surveying course is the requirement that the students have a background in trigonometry. This should be a prerequisite and rigidly enforced.

As your program expands you should put an A.A. or Certificate Program in place. A Surveying and Mapping Certificate Program should include twenty-five to thirty units of surveying and surveying related courses and should be chosen from the following list: Plane Surveying 2, Advanced Problems (California Coordinates, Astronomy, Photogrammetry, Geodesy, etc.) Land Descriptions, Boundary Control, U.S. Public Lands, Control Surveying, Survey Office Practice, Route Surveying, Trigonometry, and Map Drafting. There programs are in place now at Rancho Santiago Community College, Community College of San Francisco, Santa Rosa Junior College, and Evergreen Valley College in San Jose.

In my next article I will discuss the development of higher level courses and the needs of the students that attend these programs. ⊕

Copyright . . . .

CONTINUED FROM PAGE 45

INFRINGEMENT OF COPYRIGHT

The copyright owner is entitled to institute an action for infringement of copyright against anyone who exercises the exclusive privileges of the copyright owner as set forth above. The owner of the copyright is entitled to (1) an injunction to prevent further infringement, and (2) damages in the amount of the actual damages proved plus the infringer's profits or statutory damages in the amount of up to $10,000 if the infringement is innocent or up to $50,000 if the infringement is willful. An infringement action must be commenced within three years after the infringement claim accrued.

SPECIAL CONSIDERATIONS

Unpublished and unregistered works which were created before January 1, 1978, can still be registered under the auspices of the Copyright Act of 1976. *Duration of the surveyor's copyright* in such works is slightly different than that expressed above, but in no case will the copyright expire before December 31, 2002. Unregistered works which were created before 1978 but which have been generally published, i.e., distributed to the public-at-large have lost their copyright protection. New or updated copies of works properly noticed, registered and published before 1978 may bear copyright notice that was acceptable either under the old law or that which is required by the new law.

Strong contract language in any contract will give the surveyor a remedy against the other contracting party be it the client, an employee, or consultant. It is suggested that language be added to contracts which cover any indicated situation.

Finally, it is well to note that are other remedies for misappropriation or misuse of surveys. Court actions based upon unfair competition, breach of contract, and restitution are viable remedies through which a surveyor may recover damages.

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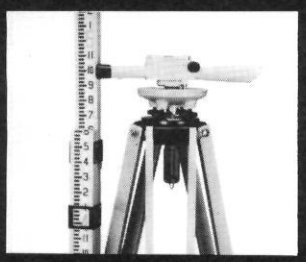

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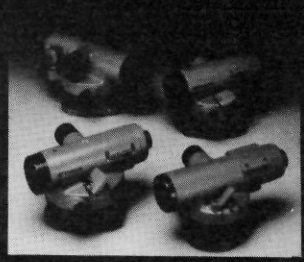

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