Are the courts shaping a new environmental ethic?

Recent court decisions place local developers under environmental impact legislation

by Richard H. Gilluly

"In an era of commercial and industrial expansion in which the environment has been repeatedly violated by those who are oblivious to the ecological well-being of society, the significance of California's Environmental Quality Act of 1970 cannot be understated."—The California Supreme Court, Sept. 1972.

Fruitful as the free enterprise ethic has been for economic growth in the United States, it at times has resulted in damage to the environment by placing growth above all other considerations. Perhaps in no sector has this been more evident than in the real estate business. Developers, especially since World War II, often have been heedless of the environmental impacts of their activities.

Recent court decisions, particularly the one quoted above, promise to establish a new ethic that would place environmental considerations regarding use of land at least on an equal plane with economic considerations.

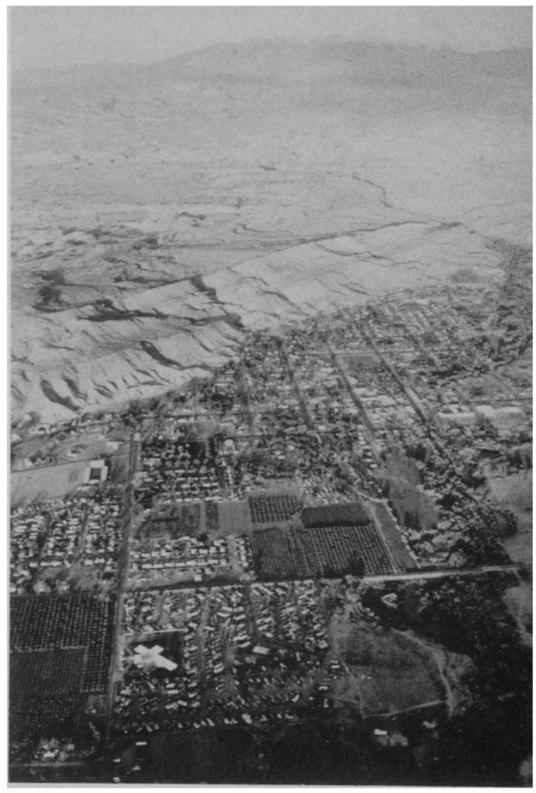
The most startling development on the land use scene is the California Supreme Court decision. The court determined that the California Environmental Quality Act (EQA) applies not only to public works but also to any private development for which any governmental body must issue a permit: that is, virtually any private project.

At issue was a proposed condominium-shopping center complex in scenic Mono County 5,000 feet up in the Sierra Nevada in eastern California. An environmentalist group, Friends of Mammoth, had brought suit saying the development should be subject to EQA and thus that an environmental impact statement must be prepared by the Mono County Board of Supervisors. The plaintiffs asserted "that acute water and sewage problems will be created if [the developers] are permitted to construct the proposed condominium complex." Additional concern was expressed over snow removal problems and the "diminution of open space in general."

The plaintiffs' argument was not that the project necessarily should be halted but merely that it raised environmental questions that should be examined in an impact statement. Such a statement would also consider alternative plans, including no development at all. Although the legal arguments were complex, the essential question was whether EQA applied to private developments. The California Supreme Court decided it did.

This was a radical decision (although one the court claimed was mandated by the language of EQA). The National Environmental Policy Act (NEPA), which is similar to California's EQA, is construed in Council on Environmental Quality guidelines to apply to Federal projects or to projects funded or licensed by Federal agencies. But the California act, most simply put, moves the provisions of NEPA down the governmental hierarchy to state, county and local governments, and these governments are often licensing or permitting agencies for small, private developments. Just as NEPA requires the Federal Power Commission to file an environmental impact statement on a proposed private interstate gas pipeline, EQA by extension requires local governments to file impact statements on local private developments—or, at least, so the California Supreme Court believes.

The national significance of the California decision is hard to gauge. In a more recent case, the three-judge U.S. Court of Appeals for the District of Columbia moved to extend NEPA to a wholly private and local development in a major urban area, Washington, D.C. It is true that in the District of Columbia zoning and planning bodies are Federal agencies. But the preliminary decision may nevertheless be an important reinforcement of the California decision. The appeals court's decision, on Oct. 23, enjoined the D.C. agencies against issuing permits for a new high-rise complex in an area called McLean Gardens. McLean Gardens is a pleasant, tree-shaded, low-rise apartment complex for low- and middle-income citizens. The residents, who are also the plaintiffs, maintain that the high-rise developers and the D.C. agencies failed to consider the "intolerable" increases in automobile traffic, air pollution and sewage requirements that would result from tearing down the old low-density development and putting up a new, high-density one. The Court of Appeals agreed.



EPA-Documerica/David Hiser

Urban spread into agricultural area.

William D. Ruckelshaus, chief of the Environmental Protection Agency, anticipates Federal legislation encouraging states to adopt acts similar to California's EQA. Here is what he told the California League of Cities recently:

". . . There is no way to avoid integral planning of land use with transportation, housing, utilities, farm policy and so on. . . . The only question now is whether it will be rational and well-thought-out or impulsive and highly charged with emotion, whether it will leave a major role for states and local communities or take a more drastic national form."

In California, at least, the Nov. 7 election proved that the people firmly support such regulation. Voters passed Proposition 20, which imposes strict zoning on coastal property as far as five miles inland and also creates statewide and regional commissions that must prepare plans for orderly coastal zone management. □