

ARTICLE

HIGHWAY TO HEALTH: EXPLORING LEGAL AVENUES TO CONNECTING GENERAL PLANS AND PUBLIC HEALTH STANDARDS IN CALIFORNIA

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I. INTRODUCTION

Low-income urban centers in the United States are some of the unhealthiest places to live. Childhood and adult asthma, obesity, heart disease, and diabetes rates are rapidly rising, while access to healthy foods and greenspace to recreate is dwindling.¹ Until very recently, public planning failed to take into consideration many factors and sources affecting the public health of the communities being developed.²

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¹ See AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY & CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTHY PEOPLE 2010, VOL. 1, ch. 8 (2d ed. 2000), available at <http://healthypeople.gov/Document/tableofcontents.htm#volume1>; see also LISA M. FELDSTEIN, PUB. HEALTH INST., GENERAL PLANS AND ZONING: A TOOLKIT ON LAND USE AND HEALTH (2006), available at <http://www.healthyplanning.org/toolkit/finalbook.pdf>.

² LISA M. FELDSTEIN, PUB. HEALTH INST., GENERAL PLANS AND ZONING: A TOOLKIT ON LAND USE AND HEALTH 1-1 (2006) available at

City cores, whether being redeveloped or expanding, are constrained in their planning process by out-of-date zoning laws and plans. Unfortunately, government guidance for general planning comes in the form of antiquated statutory frameworks and vague recommendations that do little to encourage planners, public health professionals, or communities to work together to ensure redevelopment and expansive-development criteria more likely to create healthy communities.³

Not surprisingly, those most affected by planning lacking a public health perspective are the low-income people and people of color who make up the majority of the population in these areas.⁴ These citizens are also traditionally the ones with the least representation in governmental decisionmaking and the least likely to attend public-participation sessions required by some state and Federal laws.

There have been small legislative and local government successes with incorporating into planning processes simple public health criteria like open space requirements, bike lanes, and sidewalks.⁵ However, more sweeping legal victories that force paradigmatic shifts in legislation and planning processes are necessary to force city planners and public health advocates to communicate and collaborate on changing behavior and encouraging growth that facilitates more healthy lifestyles and built environments.

This Comment first gives background on the health crisis facing those living in low-income urban centers. As the general plan for a city or county is the most comprehensive planning document required by California law, this Comment next explains the process surrounding the formulation of general plans, what may and what must be contained in a city or county's general plan, and how courts should broadly interpret mandatory elements in a general plan to include public health standards.

<http://www.healthyplanning.org/toolkit/finalbook.pdf>.

³ GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 8 (Oct. 2003), *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf ("The *General Plan Guidelines* is advisory, not mandatory.").

⁴ MARTHA MATSUOKA, ASIAN PAC. ENVTL. NETWORK (APEN), COMMUNITIES FOR A BETTER ENV'T, ENVTL. HEALTH COAL., PEOPLE ORGANIZING TO DEMAND ENVTL. & ECON. RIGHTS, SILICON VALLEY TOXICS COAL./HEALTH & ENVTL. JUSTICE PROJECT, BUILDING HEALTHY COMMUNITIES FROM THE GROUND UP: ENVIRONMENTAL JUSTICE IN CALIFORNIA 3-5 (Sept. 2003), *available at* <http://cbeal.org/pdf/healthy-communities.pdf>.

⁵ LISA M. FELDSTEIN, PUB. HEALTH INST., GENERAL PLANS AND ZONING: A TOOLKIT ON LAND USE AND HEALTH at 7-3, 7-4 (2006), *available at* <http://www.healthyplanning.org/toolkit/finalbook.pdf>; *see also* City of Richmond [Cal.], General Plan Update *available at* http://www.cityofrichmondgeneralplan.org/Content/10000/About_the_General_Plan.html (last visited Mar. 20, 2008).

2007]

HIGHWAY TO HEALTH

407

Part III addresses the legal obstacles to requiring public health concerns to be considered in planning, and possible strategies for obtaining court-ordered inclusion. Finally, this Comment will detail a possible general planning public-participation success story, including an approach that could avoid litigation all together.

This Comment uses examples from the East Bay area of the Greater San Francisco Bay Area to illustrate the relationship between city planning and public health. However, because statewide legislation and California caselaw are analyzed, the legal devices emphasized in this piece as possible solutions to improving general plans for city growth are applicable throughout the entire State of California.

II. URBAN LIVING HEALTH DISPARITIES: NEGATIVE IMPACTS ON PUBLIC HEALTH FOR LOW-INCOME COMMUNITIES AND COMMUNITIES OF COLOR

A. PUBLIC HEALTH LINKAGE TO THE BUILT ENVIRONMENT

The “built environment” is a term that refers to the “physical form and character of communities.”⁶ Generally, the built environment consists of transportation systems, land-use patterns, and urban design characteristics.⁷ While creative, health-conscious urban planning can result in well-running, healthy urban environments, it is rare today that planners are able to start from scratch and design a city or neighborhood from the ground up.⁸ As a result, many cities or sections of cities were designed decades ago, and their plans do not get the updating they need. Based on these antiquated plans, low-income communities and communities of color experience more of the detrimental health effects associated with urban centers.⁹ While the built environment and land-use decisions are factors that can positively impact public health, this Comment does not suggest that all the health problems associated with urban living are the result of the built environment.

Public health in these communities is affected by many factors in the physical environment and by the land-use and transportation planning

⁶ LAWRENCE D. FRANK, PETER O. ENGELKE & THOMAS L. SCHMID, HEALTH AND COMMUNITY DESIGN: THE IMPACT OF THE BUILT ENVIRONMENT ON PHYSICAL ACTIVITY 217 (2003).

⁷ *Id.*

⁸ *Id.*

⁹ MARTHA MATSUOKA, ASIAN PAC. ENVTL. NETWORK (APEN) ET AL., BUILDING HEALTHY COMMUNITIES FROM THE GROUND UP: ENVIRONMENTAL JUSTICE IN CALIFORNIA 3-5 (Sept. 2003), available at <http://cbeal.org/pdf/healthy-communities.pdf>.

processes. The built environment affects public health indirectly through its influence on human behavior.¹⁰ The health of communities is also directly impacted through the way land-use planning can facilitate exposure of residents to hazardous pollutants.¹¹ The Centers for Disease Control and Prevention (“CDC”) recommends that urban planners address these effects by dealing with the “social determinants of public health.”¹² These CDC factors include, but are not limited to, socioeconomic status, transportation, housing, access to services, discrimination by social grouping, and existence of social or environmental stressors.¹³ Low-income people and people of color residing in urban centers have the most need for improved social determinants of public health because their communities are the least healthy places to live.¹⁴

The City of Oakland, California, is a fitting example to briefly illustrate that those living in urban cores are at the highest risk for poor health. Oakland is located in Alameda County, the seventh wealthiest county, based on per capita income, of California’s 58 counties.¹⁵ Despite this affluence, serious public health inequities¹⁶ exist, and Oakland “bears a disproportionate and greater burden of unfavorable socioeconomic conditions than the [rest of Alameda] county.”¹⁷

These unfavorable socioeconomic conditions correlate to the least healthy areas of Oakland.¹⁸ West Oakland has the highest poverty rate in

¹⁰ See generally *id.*

¹¹ See RAJIV BHATIA, UNIV. CAL. BERKELEY HEALTH IMPACT GROUP, MACARTHUR BART TRANSIT VILLAGE HEALTH IMPACT ASSESSMENT, PUBLIC REVIEW DRAFT, at ch. 1, IS-3 (Jan. 2007), available at <http://ehs.sph.berkeley.edu/hia/projects/projects.htm> (scroll down to “MacArthur BART Transit Village Health Impact Assessment”).

¹² Ctrs. for Disease Control & Prevention & Nat’l Ctr. for Chronic Disease Prevention & Health Promotion, CDC/ASTDR Social Determinants of Health Working Group, Social Determinants of Health, <http://www.cdc.gov/sdoh/> (last visited Mar. 30, 2008) (noting that “[s]ocial determinants of health are factors in the social environment that contribute to or detract from the health of individuals and communities” and discussing a forum for “Addressing Social Determinants of Disparities in Health”).

¹³ *Id.*

¹⁴ MARTHA MATSUOKA, ASIAN PAC. ENVTL. NETWORK (APEN) ET AL., BUILDING HEALTHY COMMUNITIES FROM THE GROUND UP: ENVIRONMENTAL JUSTICE IN CALIFORNIA 3-5 (Sept. 2003), available at <http://cbeal.org/pdf/healthy-communities.pdf>.

¹⁵ U.S. Census Bureau, Census 2000, Summary File 3 (SF 3) (2000), available at <http://factfinder.census.gov/>.

¹⁶ Health inequities are defined as “differences in health that are unnecessary, avoidable, unfair, and unjust.” Margaret Whitehead, *The Concepts and Principles of Equity in Health*, 22(3) INT’L J. HEALTH SERVS. 429, 430-445 (1992).

¹⁷ ALAMEDA COUNTY PUB. HEALTH DEP’T, 2004 OAKLAND HEALTH PROFILE 1 (2004), available at http://www.acphd.org/AXBYCZ/Admin/DataReports/ohp2004_complete.pdf.

¹⁸ *Id.* at 3.

the city and high rates of all causes of mortality, teen births, tuberculosis, diabetes-related hospitalization, and asthma; and parts of Downtown Oakland, East Oakland, and North Oakland, all areas with significant urban growth, have high concentrations of poverty and unfavorable health conditions.¹⁹ To remedy these inequitable health results, the Alameda County Department of Public Health recommends focusing on “supporting and working with communit[ies] as partners to address social and environmental factors associated with good health.”²⁰

B. MODERN URBAN PUBLIC HEALTH PROBLEMS AND THEIR CAUSES

Because land-use and transportation planning decisions can have wide-ranging impacts on health and the environment in urban centers, it is important to clarify what this Comment intends to address when it states that public health factors should be included in general plans for urban growth and (re)development. While urban planning originally focused on the health concerns of sanitation and proper infrastructure, today urban public health policy has evolved into dealing with increases in chronic disease rates and exposures to toxic hazards.²¹

Many modern urban public health issues center on chronic conditions such as diabetes and heart disease.²² These health issues are most prevalent in people with sedentary lifestyles. Sedentary lifestyles are rarely the product of laziness, however, and significant scholarly work exists regarding the relationship between the built environment and exercise.²³ Low-income minority neighborhoods “often lack many safe public places to play and exercise—an essential part of any weight-management equation.”²⁴ For example, in Los Angeles, “low-income and concentrated poverty areas as well as neighborhoods dominated by Latinos, African Americans, and Asian-Pacific Islanders, have dramatically lower levels of access to park resources than white-dominated areas of the city.”²⁵ As the amount of physical activity a

¹⁹ *Id.*

²⁰ *Id.* at 4.

²¹ Wendy C. Purdue, Lawrence O. Gostin & Lesley A. Stone, *Public Health and the Built Environment: Historical, Empirical, and Theoretical Foundations for an Expanded Role*, 31 J.L. MED. & ETHICS 557, 559 (2003).

²² *Id.*

²³ See LAWRENCE FRANK & PETER ENGELKE, HOW LAND USE AND TRANSPORTATION SYSTEMS IMPACT PUBLIC HEALTH ACTIVE COMMUNITY ENVIRONMENTS WORKING PAPER #1 (2000), available at <http://www.cdc.gov/nccdphp/dnpa/pdf/aces-workingpaper1.pdf>.

²⁴ Editorial, *America's Epidemic of Youth Obesity*, N.Y. TIMES, Nov. 29, 2002, at A38.

²⁵ JENNIFER WOLCH, JOHN P. WILSON & JED FEHRENBACH, SUSTAINABLE CITIES PROGRAM, UNIV. OF S. CAL., PARKS AND PARK FUNDING IN LOS ANGELES: AN EQUITY MAPPING ANALYSIS 3

person engages in on a daily basis is linked to his or her physical environment, land-use planning that encourages walking and biking would help with these public health issues plaguing urban centers.

The chronic health conditions mentioned above are aggravated by obesity. In the past thirty years, obesity rates in the United States for adults aged 20-74 have doubled and for children aged 2-19 have tripled.²⁶ A well-planned community must have access to fresh, healthy, affordable food choices rather than fast food restaurants, convenience stores, and other food outlets that sell mostly processed, high caloric options.²⁷ Most low-income, urban centers lack even supermarkets where residents shopping for groceries can make healthy choices about the food they buy.²⁸ In fact, “[i]n many low-income minority neighborhoods, fried carryout is a cinch to find, but affordable fresh produce and nutritious food are not.”²⁹ In Oakland, for example, approximately 85% of food retail stores occupy less than 3,000 square feet, suggesting a predominance of corner-stores without adequate fresh produce selections.³⁰ Instead of just concentrating on the ease of traffic flow through urban centers when analyzing certain elements of general plans, planners should incorporate elements into general plans that concentrate on the health of the communities that live in urban centers; general plans can facilitate the removal of the factors that exacerbate community health problems.

Exposure to toxic hazards, mostly through the air, is also a well-documented public health problem for those living in urban centers. In the nine-county Bay Area, African Americans are three times more likely to live within one mile of a facility classified by the U.S. Environmental Protection Agency (“EPA”) as a Toxic Release Inventory (“TRI”) facility as they are to live more than two and a half miles away from one.³¹ Likewise, Latinos are more than twice as likely to live within one

(May 2002) *available at* http://www.usc.edu/dept/geography/ESPE/documents/publications_parks.pdf.

²⁶ Ctrs. for Disease Control & Prevention, Nat'l Ctr. for Chronic Disease Prevention & Health Promotion, 2003-2004 Obesity Survey, <http://www.cdc.gov/nccdphp/dnpa/obesity/index.htm> (last visited Mar. 21, 2008).

²⁷ Editorial, *America's Epidemic of Youth Obesity*, N.Y. TIMES, Nov. 29 2002 at A38.

²⁸ *Id.*

²⁹ *Id.*

³⁰ SERENA UNGER & HEATHER WOOTEN, MAYOR'S OFFICE OF SUSTAINABILITY, OAKLAND FOOD SYSTEM ASSESSMENT at 6 (2006), *available at* <http://oaklandfoodsystem.pbwiki.com/>.

³¹ RACHEL MORELLO-FROSCH, MANUEL PASTOR & JAMES SADD, CTR. FOR JUSTICE, TOLERANCE & CMTY., UNIV. OF CAL.-SANTA CRUZ, STILL TOXIC AFTER ALL THESE YEARS: AIR QUALITY AND ENVIRONMENTAL JUSTICE IN THE SAN FRANCISCO BAY AREA 6 (Feb. 2007), *available at* http://cjtc.ucsc.edu/docs/bay_final.pdf.

mile of a TRI facility as they are to live more than two and a half miles away from one.³² Some have argued that these correlations are simply a function of income, land use, and market factors,³³ and at least in the Bay Area, there is an income gradient trending downward with increased proximity to TRI facilities, and home ownership, a standard measure of wealth, is lower in the neighborhoods proximate to facilities.³⁴ This statistic demonstrates, however, that race matters more than income when it comes to proximity to toxics-emitting facilities.³⁵ Toxics in the air can contribute to asthma, and Oakland has the highest rates of asthma hospitalizations for children and early teens in Alameda County; for African Americans, the rate is over 900 per 100,000 individuals.³⁶ These neighborhoods also experience significant effects from automobile traffic exhaust emissions, which is specifically addressed in general plans—but to facilitate ease of traffic, not to improve the health of residents forced to breathe the air there.

Access to open space is an issue that touches all of the public health concerns mentioned so far. Greater access to and availability of open space leads to more active lifestyles and cleaner air, meaning lower rates of heart disease, diabetes, asthma, and obesity.³⁷ Typically the communities with the worst access to parks and open space are the ones with the lowest incomes and the highest percentage of people of color.³⁸ In the East Bay, the citizens of the City of Richmond and the neighborhoods of Downtown and West Oakland have the worst access to parks and the parks that are accessible are either poorly maintained or

³² *Id.*

³³ See generally ROBIN SAHA & PAUL MOHAI, EXPLAINING RACIAL DISPARITIES IN THE LOCATION OF LOCALLY UNWANTED LAND USES: A CONCEPTUAL FRAMEWORK (Conference Paper presented at the Annual Meeting of the Rural Sociological Society, Toronto, Canada, Aug. 1997), reprinted in CLIFFORD RECHTSCHAFFEN & EILEEN P. GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY, AND REGULATION (2002); Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994).

³⁴ See RACHEL MORELLO-FROSCH, MANUEL PASTOR & JAMES SADD, CTR. FOR JUSTICE, TOLERANCE & CMTY., UNIV. OF CAL.-SANTA CRUZ, STILL TOXIC AFTER ALL THESE YEARS: AIR QUALITY AND ENVIRONMENTAL JUSTICE IN THE SAN FRANCISCO BAY AREA 6 (Feb. 2007), available at http://cjtc.ucsc.edu/docs/bay_final.pdf.

³⁵ *Id.*

³⁶ OAKLAND CMTY. ASTHMA COAL. FOR YOUTH & CHILDREN, OAKLAND KICKS ASTHMA: A SCHOOL-BASED ASTHMA PREVENTION MODEL FOR OAKLAND 2 (2001), available at http://www.rampasthma.org/OKA_Profile.pdf.

³⁷ See generally LISA M. FELDSTEIN, PUB. HEALTH INST., GENERAL PLANS AND ZONING: A TOOLKIT ON LAND USE AND HEALTH 11-9 (2006) available at <http://www.healthyplanning.org/toolkit/finalbook.pdf>.

³⁸ See Robert García, Erica S. Flores, & Sophia Mei-ling Chang, *Healthy Children, Healthy Communities: Schools, Parks, Recreation, and Sustainable Regional Planning*, 31 FORDHAM URB. L.J. 1267, 1277 (2004).

dangerous because of violence, drugs, and gang activity. As explained below, this lack of open space reveals the inadequacy of the current statutory regime that control general plans in California, and also demonstrates a lack of foresight when linking planning for open space to greater public health concerns.

Now is the time to bring together the lessons from all these examples: there is a need for improved public planning through the incorporation of public health criteria in general plans. These public health issues must be included in urban planning because the way land is used has a direct effect on the health of residents.³⁹ Urban planners and public health officials need to be communicating efficiently to make sure general planning goes beyond ease of traffic flow. Their failure to work together gives rise to serious public health issues for people living in urban areas.⁴⁰ Legal solutions mandating the incorporation of health standards must be used when recommendations and non-binding collaborations fail.

C. URBAN PUBLIC HEALTH AS AN ENVIRONMENTAL JUSTICE PRIORITY

Multiple studies have confirmed that traditionally low-income communities and communities of color bear a disproportionate burden of environmental hazards.⁴¹ Unfortunately, these communities are also historically the most powerless politically and possess the least ability to change the conditions that affect them.⁴² Barriers to public participation can exist simply because low-income people are too busy working and worrying about whether they will be able to live off their next paycheck to attend an information session.⁴³ However, the current legal framework for creating and amending general plans inadequately addresses public participation and often frustrates meaningful and significant community

³⁹ See generally Richard Jackson, Toni Harp & Tom Wright, *Land Use Planning: Why Public Health Must Be Involved*, 30 J.L. MED. & ETHICS 70 (2002).

⁴⁰ LISA M. FELDSTEIN, PUB. HEALTH INST., GENERAL PLANS AND ZONING: A TOOLKIT ON LAND USE AND HEALTH 7-3, 7-4 (2006) available at <http://www.healthyplanning.org/toolkit/finalbook.pdf>.

⁴¹ See generally U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES GAO/RCED 83-168 (1983); COMM'N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

⁴² See Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 KAN. L. REV. 272, 314 (1992).

⁴³ MARTHA MATSUOKA, ASIAN PAC. ENVTL. NETWORK (APEN) ET AL., BUILDING HEALTHY COMMUNITIES FROM THE GROUND UP: ENVIRONMENTAL JUSTICE IN CALIFORNIA 10-12 (Sept. 2003), available at <http://cbeal.org/pdf/healthy-communities.pdf>.

input into planning decisions.⁴⁴

California law requires a planning agency to provide opportunities for community involvement when planning takes place.⁴⁵ Once a planning agency has approved a land-use plan, it is referred to the legislative body of the city or county (city council or board of supervisors) for approval. The legislative body must hold at least one public hearing before adopting the plan.⁴⁶ While the law guarantees opportunities for public participation, it only requires a public forum to comment once to the planning agency and once to the legislative body.⁴⁷

If community members are available at the meeting times of these government entities, there are still boundaries to participation that could easily deter residents from opposing a land-use plan that could degrade their community. Government meetings are large, intimidating environments that community members might feel too overwhelmed to participate in. Further, in order to challenge a land-use plan, one must understand the plan, and even though the plans and amendments to plans will most likely be published in multiple languages, these highly technical documents are not necessarily easily digested by people who are not trained in the language and concepts of urban planning and land-use law.

Typically, the most guidance planners receive from the California government, other than from the necessary public meetings, is from the Governor's Office of Planning and Research ("OPR"). Instead of mandating specific public participation procedures, OPR's California General Plan Guidelines merely describe public participation and its importance for environmental justice; these are suggestions to planners and are not backed by law.⁴⁸ Given these inadequacies, new procedural and participatory approaches may be needed to ensure meaningful input from low-income minority residents affected by planning decisions.

⁴⁴ LISA M. FELDSTEIN, PUB. HEALTH INST., GENERAL PLANS AND ZONING: A TOOLKIT ON LAND USE AND HEALTH 7-5 (2006) *available at* <http://www.healthyplanning.org/toolkit/finalbook.pdf> (observing that while at least one public hearing must be held when general plans are created or amended/updated, most jurisdictions appoint citizens' committees to make recommendations to the planning commission).

⁴⁵ CAL. GOV'T CODE § 65351 (Westlaw 2007).

⁴⁶ CAL. GOV'T CODE § 65355 (Westlaw 2007).

⁴⁷ CAL. GOV'T CODE § 65355 (Westlaw 2007).

⁴⁸ GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 142 (Oct. 2003), *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

III. A FRAMEWORK FOR CONNECTING GENERAL PLANS AND PUBLIC HEALTH

The East Bay communities mentioned above (Richmond, West Oakland, Downtown Oakland) are comprised of predominantly low-income people and people of color.⁴⁹ While community organizing has been successful in some instances to defeat new sitings of uses that would inflict hazardous health effects on these communities,⁵⁰ legal options exist for communities like these to challenge their general plans to make sure that existing land uses and future developments comply with the law and ensure public health protection. To ensure that the communities are protected, it is critical that lawyer-allies of the communities work with community organizations and members to strategize the right path to take for each specific community.⁵¹ Failure to do so would defeat the community empowerment goals of environmental justice.⁵²

A. BACKGROUND AND LEGAL ADEQUACY OF THE GENERAL PLAN

To address the roots of the lack of a public health perspective in local land-use planning, attorneys, environmental justice allies, and public health advocates should focus increasingly on the general plan to achieve their goals. The general plan has detailed requirements codified in the California Government Code, with a significant amount of caselaw addressing its mandatory elements, and therefore presents a promising path to reform.⁵³

In California, a general plan is the basic planning document for a city or county.⁵⁴ Its purpose is to provide the blueprint for development throughout the city, and it should balance the competing needs of residents and development.⁵⁵ Originally, the general plan was simply an advisory document and counties and cities needed to adopt zoning

⁴⁹ MARTHA MATSUOKA, ASIAN PAC. ENVTL. NETWORK (APEN) ET AL., BUILDING HEALTHY COMMUNITIES FROM THE GROUND UP: ENVIRONMENTAL JUSTICE IN CALIFORNIA 5-5 (Sept. 2003), available at <http://cbeal.org/pdf/healthy-communities.pdf>.

⁵⁰ Carolyn Jones, *Neighbors Fight Crematorium Plan*, S.F. CHRON., July 7, 2006, at B-1.

⁵¹ See generally Luke Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992).

⁵² *Id.*

⁵³ See GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 10-12 (Oct. 2003), available at http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

⁵⁴ *Id.* at 10.

⁵⁵ *Id.*

ordinances before they adopted a general plan.⁵⁶ In 1971, however, the California Government Code was amended, and now all land-use plans have to be consistent with a city's general plan.⁵⁷ Although this consistency requirement has been in effect since 1971, it was not until 1990 that the California Supreme Court gave full weight to the statute, holding that the general plan was the "'constitution' for future development."⁵⁸

The current statutory authorization for general plans mandates that each county and city's planning agency and legislative body adopt a "general plan for the physical development of the county or city, and any land outside its boundaries which in the planning agency's judgment bears relations to its planning."⁵⁹ The general plan is the single most important planning document for a city or county and must comply with all statutory mandates.⁶⁰

The mandatory elements of the general plan must meet the requirements contained in state law or the plan will be legally inadequate.⁶¹ Cities and counties need to be extremely careful to follow the exact letter of the statute or else courts will hold their general plans invalid.⁶²

In *Camp v. Board of Supervisors*, the noise element⁶³ of Mendocino County's general plan was deemed invalid because it did not show that there was noise monitoring and designation of noise-sensitive areas.⁶⁴ The court rejected the county's argument that, despite the failure to comply with the statutory requirements, the general plan was sufficient for a quiet, rural county; the court emphasized that the test of compliance

⁵⁶ CAL. GOV'T CODE § 65860 (Westlaw 2007).

⁵⁷ 1971 Cal. Legis. Serv. Ch. 1446 (McCarthy legislation); *see also* DeVita v. County of Napa, 889 P.2d 1019, 1024 (Cal. 1995).

⁵⁸ Leshner v. Commc'ns, Inc. v. City of Walnut Creek, 82 P.2d 317, 321 (Cal. 1990).

⁵⁹ CAL. GOV'T CODE § 65300 (Westlaw 2007). The code provision continues: "Chartered cities shall adopt general plans which contain the mandatory elements specified in Section 65302."

⁶⁰ Citizens of Goleta Valley v. Bd. of Supervisors, 801 P.2d 1161, 1172 (Cal. 1990).

⁶¹ *See* Camp v. Bd. of Supervisors, 176 Cal. Rptr. 620, 632 (Cal. Ct. App. 1981); Twain Harte Homeowners Ass'n v. County of Tuolumne, 188 Cal. Rptr. 233, 252-253 (Cal. Ct. App. 1982); Buena Vista Gardens Apartments Ass'n v. City of San Diego Planning Dep't, 220 Cal. Rptr. 732, 736 (Cal. Ct. App. 1985).

⁶² *See generally* Governor's Office of Planning & Research, State of California 2003 General Plan Guidelines, (Oct. 2003), *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

⁶³ This element is discussed in more detail below. Briefly, however, the noise element "identifies and appraises noise problems within the community and forms the basis for land use distribution." *Id.* at 18.

⁶⁴ *Camp*, 176 Cal. Rptr. at 632.

is not geographic or subjective, but purely statutory.⁶⁵ Likewise, in *Twain Harte Homeowners Association v. County of Tuolumne*, the land-use element in question was held inadequate because it had no standards of population density, and the circulation element failed because it was not shown to be correlated with the land-use element as required by California Government Code section 65302(b).⁶⁶ Finally, in *Buena Vista Gardens Apartments Association v. City of San Diego Planning Department*, the court held that a permit for a planned residential development could not be approved until the city demonstrated that its general plan included housing development programs to provide affordable housing as required by California Government Code section 65583(c)(4).⁶⁷ These cases stand for the proposition that mandatory elements of a general plan must meet state law or the plan will be held invalid.

While some elements of general plans only require cities and counties to consider issues, courts will scrutinize challenged general plans to make sure they comply with the statutory provisions that govern them.⁶⁸ If a city has an inadequate general plan and then attempts a land-use action, the approval for the action is vulnerable whenever the non-complying part of the general plan is relevant to the challenged land-use approval.⁶⁹ An adequate general plan element is a prerequisite to any land-use actions by a city or county planning agency.

B. THE POSSIBILITY OF BROADENING THE MANDATORY ELEMENTS OF GENERAL PLANS

In order to be valid, each general plan must consist of a statement of development policies and must designate policies and parameters for

⁶⁵ *Id.*

⁶⁶ *Twain Harte*, 188 Cal. Rptr. at 255-256 (holding that because the county's land use element lacked the appropriate statement of standards for population density based upon numbers of people and, in fact, no statement relating dwelling units to numbers of people was presented in the general plan, the land use element was inadequate).

⁶⁷ *Buena Vista Gardens Apartments Ass'n v. City of San Diego Planning Dep't*, 220 Cal. Rptr. 732, 740 (Cal. Ct. App. 1985).

⁶⁸ *See Neighborhood Action Group v. County of Calaveras*, 203 Cal. Rptr. 401, 409 (Cal. Ct. App. 1984) (holding that the issuance of a conditional use permit is *ultra vires* if the general plan of the issuing entity does not conform to mandatory statutory criteria that are relevant to the uses sought by the permit). Although use permits are not explicitly made subject to a general plan meeting the requirement of state law, the court implied from the hierarchical relationship of land-use laws that the condition was required. This demonstrates the amount of scrutiny a court will give to a challenged plan.

⁶⁹ *See id.* (holding that the land-use permit was invalid because it violated the general plan).

seven mandatory elements.⁷⁰ The elements required by statute are land use, circulation, housing, conservation, open-space, noise, and safety.⁷¹ OPR must develop and adopt guidelines for the preparation and content of the seven mandatory elements.⁷² The 2003 edition of the General Plan Guidelines was issued by OPR in October 2003 and a 2007 set of Guidelines was planned to be released but was not available at the time this Comment went to print (in 2008).⁷³ The general plan guidelines from the OPR could be revised to include more explicit and specific requirements for environmental justice issues that arise around planning.⁷⁴ The 2003 guidelines mention environmental justice issues in passing but do not mandate its particular consideration.⁷⁵ Although courts have held that the guidelines are advisory, courts have looked to the guidelines for assistance when determining whether a general plan law has been violated.⁷⁷

The following is an examination of each mandatory element in general plans and possible ways to have local officials incorporate public health standards into the mandatory elements, or for advocates to argue to the courts that such standards must be read into the elements.

1. *The Land-Use Element*

The land-use element guides planners, the public, and decisionmakers as to the prevailing pattern of development in the city or county.⁷⁸ It has the broadest scope of all the mandatory elements and serves as the anchor element in a general plan.⁷⁹ It designates the proposed distribution, location, and extent of uses of the land for, *inter*

⁷⁰ CAL. GOV'T CODE § 65302 (Westlaw 2007).

⁷¹ CAL. GOV'T CODE § 65302 (Westlaw 2007).

⁷² CAL. GOV'T CODE § 65040.2 (Westlaw 2007).

⁷³ GOVERNOR'S OFFICE OF PLANNING & RESEARCH, GENERAL PLAN ANNUAL PROGRESS REPORT GUIDANCE 2 (July 11, 2007), *available at* http://www.opr.ca.gov/planning/publications/GP_APR_Guidance_2007.pdf.

⁷⁴ GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 20 (Oct. 2003), *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

⁷⁵ [Include Citation]

⁷⁷ *See, e.g.,* Twain Harte Homeowners Ass'n v. County of Tuolumne, 188 Cal. Rptr. 233 (Cal. Ct. App. 1982).

⁷⁸ GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 49 (Oct. 2003) *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

⁷⁹ *Id.*

alia, “housing, business, industry, open space, including agriculture, natural resources, recreation, and enjoyment of scenic beauty, education, public buildings and grounds, and solid and liquid waste disposal facilities.”⁸⁰ It must also include standards of population density and building intensity.⁸¹ Further, the general plan is not required to identify existing solid-waste sites, but the land-use element must identify future sites.⁸²

The land-use element’s objectives and policies relate directly to other elements and, although all general plan elements carry equal weight, the land-use element is often perceived as being the “most representative of ‘the general plan.’”⁸³ For instance, the land-use element is linked closely with the circulation element because the general plan must reflect both the anticipated level of land development (represented in the land-use element) and the road system necessary to serve that level (represented in the circulation element).⁸⁴ Also, the noise element is to be used “as a guide for establishing a pattern of land uses in the land-use element that minimizes the exposure of community residents to excessive noise.”⁸⁵ When the noise element is inadequate, the land-use element may be invalid as well, emphasizing once again the consistency required with general plans.⁸⁶

Being linked with many other mandatory elements in a general plan makes the land-use element fertile ground for challenges to general plans as having insufficiently drafted land-use elements. As mentioned above, both noise and circulation issues could easily be argued as not being properly addressed in general plans for urban centers. Further, according to the OPR, if during the preparation of the general plan it becomes clear that addressing the distribution of recreational facilities and opportunities is relevant to the area being developed, a discussion and assessment of

⁸⁰ CAL. GOV’T CODE § 65302(a).

⁸¹ See *Twain Harte*, 188 Cal. Rptr. at 252-253.

⁸² *Concerned Citizens of Calaveras County v. Bd. of Supervisors*, 212 Cal. Rptr. 273, 282 (Cal. Ct. App. 1985).

⁸³ GOVERNOR’S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 49 (Oct. 2003), available at http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

⁸⁴ *Id.* at 51. In addition, the land use element should address each of the following issues to the extent that it is relevant: distribution of housing, business, and industry; distribution of open space, including agricultural land; distribution of mineral resources and provisions for their continued availability; distribution of recreational facilities and opportunities; location of educational facilities, location of public buildings and grounds; location of future solid and liquid waste facilities; identification of areas subject to flooding; identification of existing Timberland Preserve Zone lands; and other categories of public and private uses of land. *Id.*

⁸⁵ CAL. GOV’T CODE § 65302(f) (Westlaw 2007).

⁸⁶ See *Camp v. Bd. of Supervisors*, 176 Cal. Rptr. 620, 632 (Cal. Ct. App. 1981).

demand for parks and recreational facilities, including the identification of underserved areas, should be conducted as part of the land-use element.⁸⁷

In urban centers, with large populations plagued by public health issues, it is relevant to have the distribution of recreational opportunities addressed in a general plan.⁸⁸ Failure to take this into account in the context of an open-space poor community would ignore one of the purposes of the land-use element. Because a general plan must show “substantial compliance with the statutory requirements,”⁸⁹ ignoring these issues would run counter to the statutory mandate. The OPR’s guidelines, while only persuasive to some courts, recommend assessing local open-space needs based upon community goals and objectives and the existing space/population ratio.⁹⁰ This recommendation encourages public participation and community empowerment, and if followed, would help promote public health in urban centers because community members voicing their desire for more park and recreation space would necessitate an examination of the current conditions in the community.

2. *The Circulation Element*

The circulation element identifies the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, any military airports and ports, and other local public utilities and facilities.⁹¹ This is basically an infrastructure plan that must correlate to all the other mandatory elements, including the land-use element.⁹² Not solely a transportation plan, the circulation element also addresses the movement of people, goods, energy, water, sewage, storm drainage, and communications. This element affects a community’s physical environment through energy use, air quality impacts, and environmental noise, and it directly relates to housing, open-space, noise, and safety

⁸⁷ GOVERNOR’S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 52-53 (Oct. 2003), *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

⁸⁸ LISA M. FELDSTEIN, PUB. HEALTH INST., GENERAL PLANS AND ZONING: A TOOLKIT ON LAND USE AND HEALTH 3-1-3-3 (2006) *available at* <http://www.healthypplanning.org/toolkit/finalbook.pdf>.

⁸⁹ *Camp*, 176 Cal. Rptr. at 629.

⁹⁰ GOVERNOR’S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 90 (Oct. 2003), *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

⁹¹ CAL. GOV’T CODE § 65302(b) (Westlaw 2007).

⁹² *See* Concerned Citizens of Calaveras County v. Bd. of Supervisors, 212 Cal. Rptr. 273, 279 (Cal. Ct. App. 1985).

elements.

The OPR goes to great lengths to discuss how the circulation plan can be used to address major issues affecting public health in urban centers.⁹³ This discussion includes, *inter alia*, assessing the adequacy of bicycle routes and facilities and the need for new ones, examining trends in bicycle usage, and assessing the adequacy of pedestrian routes and the need for new ones in addition to the already statutorily required element issues.⁹⁴ Assessing the major truck routes through areas covered by the plan and modes of public transportation available to residents should also be considered, according to OPR.⁹⁵

While OPR classifies most of its recommendations for the circulation element as permissive for planners, these planning tools in fact fit neatly into the mandatory circulation element as required by the California Government Code.⁹⁶ In fact, major thoroughfares and transportation routes, two of the factors named specifically in the statute,⁹⁷ would easily cover truck routes, bicycling and walking, and access to public transportation. These points should be raised at planning meetings and should be explored as possible options to challenge a general plan as inadequate for violating the circulation element if it does not include a thorough discussion and provide for sustainable options of automobile movement and pedestrian travel in safe, healthy ways. A circulation element lacking these issues seems like little more than a map of where the roads are in a certain area, and not the blueprint for sustainable growth that it should be.

3. *The Housing Element*

The housing element⁹⁸ has important implications for low-income residents of urban centers because the health of residents can be significantly impacted by the quality of their housing. This element identifies and analyzes existing and projected housing needs and includes

⁹³ GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 57 (Oct. 2003), *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ CAL. GOV'T CODE § 65302(b) (Westlaw 2007); GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 55-56 (Oct. 2003), *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

⁹⁷ CAL. GOV'T CODE § 65302(b) (Westlaw 2007).

⁹⁸ GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 61-63 (Oct. 2003), *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

a statement of goals, policies, and objectives for the preservation, improvement, and development of housing.⁹⁹ In adopting its housing element, a city must consider economic and environmental matters as well as the community's goals set forth in the general plan.¹⁰⁰ The housing element is subject to detailed statutory requirements and must be updated every five years.¹⁰¹

While the housing element has many statutory requirements, it is difficult to imagine where public health criteria could be read into one of the requirements of an effective housing element. However, when a housing element is being updated by a city, the city must describe how it made a diligent effort to achieve public participation from all economic segments of the community in the development of its housing element.¹⁰² While courts have held housing elements invalid for failure to conserve affordable rental housing units,¹⁰³ courts diverge in their application of testing particular circumstances where a housing element is challenged as inadequate.¹⁰⁴ Because there is no uniform way to examine a housing element to determine whether it is legally sufficient, the potential success of a challenge to this element in a public health context is difficult to predict.

4. *The Conservation Element*

The conservation element gives direction in the identification, conservation, development, and use of natural resources including water, forests, soils, waterways, wildlife, and mineral deposits.¹⁰⁵ Its requirements overlap those of the open-space, land use, safety, and circulation elements, and although it may consider issues such as air and

⁹⁹ CAL. GOV'T CODE § 65583 (Westlaw 2007).

¹⁰⁰ CAL. GOV'T CODE § 65580(e) (Westlaw 2007).

¹⁰¹ GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 61 (Oct. 2003), *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

¹⁰² *Id.* at 62.

¹⁰³ *Buena Vista Gardens Apartments Ass'n v. City of San Diego Planning Dep't*, 220 Cal. Rptr. 732, 740 (Cal. Ct. App. 1985).

¹⁰⁴ *See Hernandez v. City of Encinitas*, 33 Cal. Rptr. 2d 875 (Cal. Ct. App. 1994) (rejecting a wide-ranging challenge to virtually every aspect of the city's housing element by stating the mere mention or discussion of an issue was found to be sufficient). *But cf. Hoffmaster v. City of San Diego*, 64 Cal. Rptr. 2d 684, 692 (Cal. Ct. App. 1997) (upholding a narrow challenge to the city's housing element where the city discussed the challenged issues in the case because the court looked at the circumstances behind the city's conclusions in order to give affect to the purpose and intent of the statute).

¹⁰⁵ CAL. GOV'T CODE § 65302(d) (Westlaw 2007).

water pollution, its primary purpose is to focus on natural resources.¹⁰⁶ The goal of this element is to balance the value of the natural resources and the competing land uses that may prevent future access to those natural resources, and to minimize the impact of mining activities.¹⁰⁷

Unfortunately, the emphasis of this element is on “conservation” of traditional natural resources such as energy producing minerals.¹⁰⁸ While this element does serve the important purpose of maintaining flood control, keeping water and beach resources clean, and protecting endangered species, this element’s primitive construction of the word “conservation” weakens the amount of force it could carry. The OPR guidelines mention the assessment of air quality, the effect of plan proposals on future air quality, and the identification of air impacts from vehicle emissions, but, once again, these are only recommendations and no caselaw or opinions of the Attorney General exist on the limits of this element.¹⁰⁹

While one could attempt to argue that this element provides for conservation of land for more green areas and urban parks, the specific language in the statute requiring and describing this element and the OPR guidelines only mentions this element in the context of traditional natural-resource conservation.¹¹⁰ It could be argued that the element is antiquated and open space is in fact a natural resource that needs conserving in the urban environment. Currently, the absence of case law or California Attorney General Opinions addressing the topic suggest that success with this strategy is questionable.

5. *The Open-Space Element*

The open-space element governs the preservation and conservation of “any parcel or area of land or water that is essentially unimproved and devoted to open-space use.”¹¹¹ The open-space element is very broad and is commonly combined with other elements.¹¹² Most importantly, this

¹⁰⁶ GOVERNOR’S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 75 (Oct. 2003) *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

¹⁰⁷ CAL. PUB. RES. CODE §§ 2757-2762 (Westlaw 2007).

¹⁰⁸ GOVERNOR’S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 75 (Oct. 2003), *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

¹⁰⁹ *Id.* at 8 (“The *General Plan Guidelines* is advisory, not mandatory.”).

¹¹⁰ CAL. GOV’T CODE § 65302(d) (Westlaw 2007).

¹¹¹ CAL. GOV’T CODE § 65560(b) (Westlaw 2007).

¹¹² GOVERNOR’S OFFICE OF PLANNING AND RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 82 (Oct. 2003), *available at*

element must specify plans and measures for preserving open space for outdoor recreation and for public health and safety.¹¹³ Cities and counties must “recognize that open space land is a limited and valuable resource which must be conserved wherever possible.”¹¹⁴

As mentioned above, open-space areas available for recreation lead to healthier communities. This element shows strong promise as one that can be challenged as legally insufficient by failing to plan to ensure open space in an inner-city environment. Further, courts have read more substantive enforcement requirements into the open-space element than most of the other elements.¹¹⁵ Mere adoption of an open-space element does not protect a local jurisdiction from a lawsuit challenging the element; the element must also meet the specifications in the California Government Code.¹¹⁶

OPR recommends open space for “public health and safety” and uses those terms to mean safety from earthquake hazards, fire access, and landslide hazards, and not the more modern definition of “public health” referred to in this Comment.¹¹⁸ The Open Space Lands Act (“OSLA”), however, may provide additional grounds to press for more expansive open-space elements in general plans.¹¹⁹ Specifically, the OSLA defines “open space land” as designated in a local, regional, or state level open-space plan as, *inter alia*, open space for outdoor recreation and open space for public health and safety.¹²⁰ The OSLA goes on to explicitly

http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf (providing the following example: open space for the preservation of natural resources and open space used for the management and production of resources encompass the concerns of the conservation element, and open space for public health and safety covers issues similar to those found in the safety element).

¹¹³ CAL. GOV'T CODE §§ 65302(e), 65560 (Westlaw 2007).

¹¹⁴ CAL. GOV'T CODE § 65562(a) (Westlaw 2007).

¹¹⁵ GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 82 (Oct. 2003), *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

¹¹⁶ *Save El Toro Ass'n v. Days*, 141 Cal. Rptr. 282, 287-88 (Cal. Ct. App. 1977).

¹¹⁸ GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 83 (Oct. 2003), *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

¹¹⁹ CAL. GOV'T CODE §§ 65560-65570 (Westlaw 2007).

¹²⁰ CAL. GOV'T CODE § 65560 (b)(3)-(4) (Westlaw 2007). Defining open space as

(3) Open space for outdoor recreation, including but not limited to, areas of outstanding scenic, historic and cultural value; areas particularly suited for park and recreation purposes, including access to lakeshores, beaches, and rivers and streams; and areas which serve as links between major recreation and open-space reservations, including utility easements, banks of rivers and streams, trails, and scenic highway corridors. (4) Open space for public health and safety, including, but not limited to, areas which require special management or regulation because of hazardous or special conditions such as earthquake fault zones, unstable soil areas, flood plains, watersheds, areas presenting high fire risks, areas required

detail the legislature's thinking in enacting the law, stating "that discouraging premature and unnecessary conversion of open-space land to urban uses is a matter of public interest and will be of benefit to urban dwellers because it will discourage noncontiguous development patterns which unnecessarily increase the costs of community services to community residents."¹²¹ Further, "[n]o building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open-space plan."¹²²

Despite OPR's definitions of public health and safety, OSLA's definition of and intent with the open-space element may bolster the position that cities and counties need to have proper open space designations for the general well-being of their residents. In fact, California Government Code Section 65566 requires that local governments prepare open space plans before adopting required open-space-related ordinances.¹²³ OSLA's purpose is to assure consistency between the open-space plan and zoning regulations.¹²⁴ To the extent a general plan fails to provide adequate open space for urban residents (and low-income minority residents in particular), OSLA's policies could be cited in support of a legal challenge to a plan's open space element

6. *The Noise Element*

The purpose of the noise element is to limit the exposure of the community to excessive noise levels and identify and appraise noise problems in the community.¹²⁵ The noise element refers to both mobile and stationary sources of noise.¹²⁶ Local governments must use this element as a guide for their decisions concerning land use and the

for the protection of water quality and water reservoirs and areas required for the protection and enhancement of air quality. *Id.*

¹²¹ CAL. GOV'T CODE § 65561(b) (Westlaw 2007).

¹²² CAL. GOV'T CODE § 65567 (Westlaw 2007).

¹²³ CAL. GOV'T CODE § 65566 (Westlaw 2007).

¹²⁴ See e.g., CITY OF CATHEDRAL CITY, CAL., COMPREHENSIVE GENERAL PLAN, at IV-63 (July 31, 2002), available at <http://www.cathedralcity.gov/Planning/GeneralPlan/documents/pdf/complete.pdf> (discussing "General Plan/Open Space and Conservation Element) on PDF page 241); see also CAL. GOV'T CODE § 65566 (Westlaw 2007).

¹²⁵ CAL. GOV'T CODE § 65302(f) (Westlaw 2007).

¹²⁶ GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 87-88 (Oct. 2003), available at http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

location of roads and transit facilities.¹²⁷ The noise levels from existing land uses must be analyzed to ensure compatibility, especially where residential areas exist.¹²⁸

While the noise element of a general plan has never been judicially challenged, violations could be used to decrease automobile traffic in an area that is prone to congestion.¹²⁹ A violation of the noise element takes place when too much traffic builds up on a highway or main thoroughfare near residences or developments that are sited legally within the general plan. Successfully challenging the noise element of the general plan would result in reducing or re-routing traffic, and this could reduce some of the air pollution that inner-city residents are exposed to regularly. Also, because when a noise element is inadequate the land-use element can be inadequate as well,¹³⁰ the noise element can be used as a vehicle to attack one of the more substantive mandatory elements in the general plan.

7. *The Safety Element*

The safety element establishes policies to protect communities from seismic, geological, flood, and wildfire risks.¹³¹ Other locally relevant safety issues such as crime reduction may also be included in this element.¹³² The safety element also overlaps topics mandated in the land-use, conservation, and open-space elements.¹³³ When preparing a new general plan or undertaking a comprehensive revision of an existing general plan, OPR recommends addressing all these common topics together, and they should be effectively integrated as common issues in the decisionmaking process.¹³⁴

So far, the safety element has only been broadened to include community safety through crime-reduction strategies by OPR. While this does not directly relate to public health, it certainly is relevant to violence faced by many inner-city residents. The expansion of this element beyond geological hazards into the realm of human-created hazards like crime shows some promise that courts could be sympathetic

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 88.

¹³⁰ *Camp v. Bd. of Supervisors*, 176 Cal. Rptr. 620 (Cal. Ct. App. 1981).

¹³¹ CAL. GOV'T CODE § 65302(g) (Westlaw 2007).

¹³² GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 90 (Oct. 2003), *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

¹³³ *Id.*

¹³⁴ *Id.*

to a challenge to a general plan claiming the safety element is not satisfied because there is no place to walk in a community or no area to obtain food safely. This element has not been the subject of a decision by an appellate court in California or an interpretation by the California Attorney General at this point.¹³⁵

C. OPTIONAL OR PERMISSIVE ELEMENTS IN GENERAL PLANS

In addition to the seven mandatory elements, the general plan may include any other elements that address any other subjects that, in the judgment of the city, relate to the physical development of the city.¹³⁶ OPR lists several optional elements that may be considered in general plans. Once an optional element has been adopted by a city, it becomes a part of the general plan and has the same legal force as any other mandatory element.¹³⁷ These optional elements include, but are not limited to, air quality, capital improvements and public facilities, community design, economic development, energy, and parks and recreation.¹³⁸

Because an optional element can be anything that addresses the city's development, it would be possible to get a public health optional element incorporated into a general plan of a city. Giving the public health of residents the same footing in the general plan as the seven traditionally required elements would easily provide citizens who feel their health is not being protected the ability to sue to enforce their rights under the general plan of the city. As discussed earlier, however, those in urban centers are also the least likely to have an active voice in city decisionmaking.¹³⁹ If these strategies are not successful, legal remedies must be explored to safeguard the health of urban residents.

¹³⁵ *Id.* at 92.

¹³⁶ CAL. GOV'T CODE § 65303 (Westlaw 2007).

¹³⁷ See 58 Op. Cal. Att'y Gen. 21, 25 (1975).

¹³⁸ GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 102 (Oct. 2003), available at http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

¹³⁹ MARTHA MATSUOKA, ASIAN PAC. ENVTL. NETWORK (APEN) ET AL., BUILDING HEALTHY COMMUNITIES FROM THE GROUND UP: ENVIRONMENTAL JUSTICE IN CALIFORNIA 10-12 (Sept. 2003), available at <http://cbeal.org/pdf/healthy-communities.pdf>.

2007]

HIGHWAY TO HEALTH

427

IV. LEGAL PATHWAYS TO INCLUDING PUBLIC HEALTH STANDARDS IN
GENERAL PLANS

A. THE NEED FOR CHANGE

Urban centers tend to be not as healthy as surrounding suburban and rural areas.¹⁴⁰ Community design and (re)development exacerbates these problems. Planners focus on traffic flow and not the availability of fresh food. Likewise, lack of open space leads to poor air quality and sedentary lifestyles. Low-income urban centers are plagued with the problems of heart disease, obesity, diabetes, and asthma, all—in part—the results of the ways communities are designed and public health issues ignored. While planning law requires public input, clearly there is still a disconnect between the planners and the public health advocates. This needs to change. While community organizing and grassroots involvement are always the first steps to community ownership of an issue, those strategies should be used in conjunction with the following legal approaches to ensure that results are obtained.

B. AMENDING THE CALIFORNIA GOVERNMENT CODE

One of the most direct ways to incorporate public health criteria as mandatory elements in general planning would be to amend the California Government Code to add extra mandatory elements or incorporate public health issues into already existing elements in the statute. Amending the California Government Code can happen in two ways: either the legislature can propose an amendment on its own initiative, or a court could rule a current section of the California Government Code invalid and thereby force the legislature to amend it to comply with the law.

Convincing the legislature to amend the California Government Code is essentially political activity, and lobbying and community organizing (perhaps in addition to legal action) would be necessary to effect change in this way. This Comment focuses on legal and not political options; therefore, amending the government code will not be the focus of the remainder of the Comment. As explored below, a less lengthy and political way to incorporate public health issues into general

¹⁴⁰ HOWARD FRUMKIN, LAWRENCE FRANK & RICHARD JOSEPH JACKSON, URBAN SPRAWL AND PUBLIC HEALTH: DESIGNING, PLANNING, AND BUILDING FOR HEALTHY COMMUNITIES 198 (2004) (citing Dennis.P. Andrulis, *The Urban Health Penalty: New Dimensions and Directions in Inner-City Health Care*, in INNER CITY HEALTH CARE (1997)).

plans is to challenge individual general plans in court for violating existing California law.

C. UTILIZING SB 115 AND OPR'S ENVIRONMENTAL JUSTICE RECOMMENDATIONS

Senate Bill 115 ("SB 115") is California's first Environmental Justice statute and was signed into law on October 6, 1999, by Governor Gray Davis.¹⁴¹ The law defines Environmental Justice as "the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies."¹⁴² SB 115 holds OPR responsible as the coordinating agency in the state government for environmental justice matters, and it requires OPR to incorporate environmental justice concerns into its general plan guidelines.¹⁴³ SB 115 establishes broad procedural mandates for OPR to recommend to city and county governments drafting their general plans.¹⁴⁴ The 2003 OPR General Plan Guidelines incorporate all these mandated recommendations, and contain recommendations for successful public participation campaigns and community inclusiveness strategies.¹⁴⁵ Specifically, OPR's recommendations for public participation include

¹⁴¹ 1999 Cal. Legis. Serv. Ch. 690. SB 115 was introduced by Senator Hilda Solis. Its provisions are codified in CAL. GOV'T CODE § 65040.12 (Westlaw 2007) and CAL. PUB. RES. CODE §§ 71110-71115 (Westlaw 2007).

¹⁴² CAL. GOV'T CODE § 65040.12(e) (Westlaw 2007).

¹⁴³ CAL. GOV'T CODE § 65040.12(c) (Westlaw 2007).

¹⁴⁴ See CAL. GOV'T CODE § 65040.12(d)(1)-(4). The guidelines must recommend that cities and counties

[p]ropose methods for planning for the equitable distribution of new public facilities and services that increase and enhance community quality of life throughout the community, given the fiscal and legal constraints that restrict the siting of these facilities[;] . . . [p]ropose methods for providing for the location, if any, of industrial facilities and uses that, even with the best available technology, will contain or produce material that, because of its quantity, concentration, or physical or chemical characteristics, poses a significant hazard to human health and safety, in a manner that seeks to avoid over-concentrating these uses in proximity to schools or residential dwellings[;] . . . [p]ropose methods for providing for the location of new schools and residential dwellings in a manner that seeks to avoid locating these uses in proximity to industrial facilities and uses that will contain or produce material that because of its quantity, concentration, or physical or chemical characteristics, poses a significant hazard to human health and safety[;] . . . [and] [p]ropose methods for promoting more livable communities by expanding opportunities for transit-oriented development so that residents minimize traffic and pollution impacts from traveling for purposes of work, shopping, schools, and recreation. *Id.*

¹⁴⁵ See GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 142-48 (Oct. 2003), available at http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

2007]

HIGHWAY TO HEALTH

429

open meetings, community education, design participation by the community, publicity of the process to encourage participation, planning fairs, and open houses.¹⁴⁶

Significantly, SB 115 and the OPR 2003 General Plan Guidelines explicitly recognize that disproportionate environmental burdens occur and need to be addressed by California state agencies.¹⁴⁷ The statutory recognition of these impacts can be an important device for lawyers to emphasize in challenging general plans, and even though SB 115 essentially requires OPR to include purely procedural recommendations for Environmental Justice concerns in the general plan process, these procedural recommendations are still beneficial to Environmental Justice advocates. For example, despite the fact that OPR's recommendations by themselves are inadequate to accomplish appropriate public participation in the general plan process, the Center on Race Poverty and the Environment¹⁴⁸ referenced SB 115 and OPR's Environmental Justice recommendations in comments to Kern County in California when the county was updating its general plan.¹⁴⁹ Connecting these principles with state law and policy recommendations gave the comments greater weight, and Kern County eventually adopted some environmental justice policies in its general plan.¹⁵⁰

Encouraging a city to use SB 115 and OPR's recommendations during the drafting of its general plan can be an effective tool in incorporating public health standards in general plans. Often land-use projects are rushed forward for political considerations without thorough issue evaluation, and SB 115 compliance can cause a delay in general plan adoption until environmental justice and public health issues are examined through a meaningful and legitimate public participation and planning process. The delay caused by a more involved public participation process can result in more informed decisionmaking, leading to healthier choices by planners and city officials. Further, having a more comprehensive public-participation process provides a greater chance that the voices of the communities affected and those of their allies will be heard.

¹⁴⁶ *Id.*

¹⁴⁷ CAL. GOV'T CODE § 65040.12(c)-(e) (Westlaw 2007); GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 142-43 (Oct. 2003), available at http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

¹⁴⁸ Center on Race, Poverty, and the Environment, <http://crpe-ej.org/> (last visited Mar. 31, 2008).

¹⁴⁹ Caroline Farrell, SB 115: *California's Response to Environmental Justice—Process Over Substance*, 1 GOLDEN GATE U. ENVTL. L.J. 113, 123 (2007).

¹⁵⁰ See Kern County General Plan, adopted June 15, 2004, available at <http://www.co.kern.ca.us/planning/pdfs/kcgp/KCGP.pdf>.

While there is no guarantee that cities will use OPR's Environmental Justice recommendations promulgated as a result of SB 115, political pressure and public participation could lead to cities incorporating some of them. In fact, although currently no jurisdiction in California has adopted an optional element in its general plan dedicated to environmental justice concerns, as of 2006, 46 jurisdictions have enacted notice and outreach processes that incorporate environmental justice considerations.¹⁵¹ Once a more thorough public-participation process and the examination of environmental justice concerns begin in a city, it is more likely that public health criteria will be adopted as mandatory elements of a general plan or incorporated as subsections of mandatory elements.

D. LEGAL CHALLENGES TO INDIVIDUAL GENERAL PLANS

One cannot simply challenge a city's general plan because the city did not incorporate every comment it received during its public-participation period into its final plan. Further, problems arising after a plan is adopted and that may not have been discussed or examined previously need to be addressed, even though a city may not be amending its plan currently. One needs a cause of action to challenge a current plan, and the following are promising strategies for Environmental Justice advocates trying to help communities stand up and heal their neighborhoods.

1. *Judicial Review of the Adequacy of the General Plan Under the California Government Code*

Because the approval of a general plan for a city or county is a legislative act, it is subject to judicial review in an action for ordinary mandate.¹⁵² To determine whether the adoption or amendment of a

¹⁵¹ GOVERNOR'S OFFICE OF PLANNING & RESEARCH, THE CALIFORNIA PLANNER'S BOOK OF LISTS: 2006, at 93 (April 2006), *available at* <http://www.calpin.ca.gov/Archives/pdf/2006bol.pdf> (the 46 jurisdictions that have enacted noticing and outreach processes that incorporate environmental justice considerations are Arcata, Blue Lake, Brawley, Brea, Buellton, Burlingame, Crescent City, County of Del Norte, Elk Grove, Goleta, Hercules, Hermosa Beach, Hillsborough, County of Imperial, La Palma, Laguna Woods, Lancaster, Larkspur, Laverne, Lodi, Lompoc, County of Los Angeles, City of Madera, Marysville, City of Merced, Monterey Park, County of Napa, Oakdale, Ontario, Orinda, Oxnard, Paramount, Pleasanton, Rancho Mirage, Rancho Palos Verdes, City of San Diego, San Leandro, Sand City, City of Santa Barbara, Santa Clarita, Solana Beach, County of Stanislaus, Trinidad, County of Tuolumne, Winters, and the County of Yuba).

¹⁵² See Geoffrey L. Robinson, *Handling Administrative Mandamus*, Step 28, CAL. CONTINUING ED. OF THE BAR ACTION GUIDE (Spring 2000). A writ of mandate is the most common method by which California courts compel or set aside actions by local agencies.

general plan is valid, courts generally look to see whether the planning agency or city government acted in an arbitrary or capricious way or in a way that was entirely lacking evidentiary support.¹⁵³ A court accomplishes this by determining whether the plan substantially complies with the statutory criteria in the California Government Code.¹⁵⁴ If a general plan is determined to be inadequate, certain types of municipal actions—like re-zoning and subdivision approvals—can be suspended, and the city must comply with general plan requirements within a set time period.¹⁵⁵

As stated above, a planning agency or city government cannot act in a way that is entirely lacking evidentiary support.¹⁵⁶ This means that any decision it makes must be buttressed by facts justifying that decision. For example, if a general plan for a city that has high obesity and heart disease rates does not take into account the city's lack of open space for recreation, it could be argued that the planning agency ignored the evidence presented to it about the health issues of its residents and thus adopted an arbitrary general plan element. As previously stated, a lack of open space to recreate and safe routes for pedestrian travel lead to sedentary lifestyles and, when combined with limited access to healthy foods, can lead to obesity, heart disease, and diabetes. While there are certainly other factors that can lead to these chronic health problems, land-use decisions are connected to these issues.¹⁵⁷ This could, and should, be an example of a general plan that is disconnected from the facts and figures "on the ground" and, therefore, could be invalidated by a court. This policy would halt building projects that require permits and re-zoning until the general plan supports the evidence gathered during the drafting process.

The above example could be used in almost any scenario where public health information is entered into the record during the public-participation process in order to argue that a proposed mandatory element would ignore or exacerbate the health issue for which evidence was offered. By arguing the health statistics at issue would worsen or remain static, a claimant could show that the planning agency's decision was arbitrary and not based on the facts at hand, meaning the general plan was legally invalid.

¹⁵³ See *Env'tl. Council v. Bd. of Supervisors*, 185 Cal. Rptr. 363, 368-69 (Cal. Ct. App. 1982).

¹⁵⁴ *Id.*

¹⁵⁵ CAL. GOV'T CODE §§ 65754, 65755 (Westlaw 2007).

¹⁵⁶ See *Env'tl. Council*, 185 Cal. Rptr. at 368-69.

¹⁵⁷ See LAWRENCE D. FRANK, PETER O. ENGELKE & THOMAS L. SCHMID, *HEALTH AND COMMUNITY DESIGN: THE IMPACT OF THE BUILT ENVIRONMENT ON PHYSICAL ACTIVITY* 217 (2003).

2. *Challenging General Plans Under the California Environmental Quality Act*

Adopting or amending a general plan or general plan element is subject to review under the California Environmental Quality Act (“CEQA”) and often requires preparation and consideration of an environmental impact report (“EIR”).¹⁵⁸ CEQA’s primary purpose is to inform decisionmakers and the public of potentially significant environmental effects of a government-backed proposal, less environmentally damaging alternatives, and possible ways to reduce or avoid environmental hazards.¹⁵⁹ For general plans, the EIR (for the entire general plan or an amendment thereto) must describe the existing physical environment, existing infrastructure, and the significant environmental effects that may result from the general plan’s policies and proposals.¹⁶⁰ Significantly, when a new general plan or a revision is being considered, the EIR must evaluate the proposed effects on both the existing physical conditions of the environment and the environment that will exist after the general plan is adopted.¹⁶¹ Like all projects that fall under CEQA’s purview, if the EIR does not choose the least environmentally burdensome option among the ones presented, it must propose mitigation measures and explain why the least damaging alternative was not chosen.¹⁶²

Prior to writing the draft EIR, the city or county must send a Notice of Preparation of the EIR describing the draft general plan to a number of state agencies, to receive input from them.¹⁶³ In addition, the city or county must provide at least one “scoping meeting” to receive public input on the scope and contest of the draft EIR.¹⁶⁴ The 45-day review period that follows for a general plan’s draft EIR offers the opportunity to comment on the potential environmental impacts and the adequacy of the environmental analysis contained in the draft EIR. This comment

¹⁵⁸ CAL. PUB. RES. CODE §§ 21000-21177 (Westlaw 2007).

¹⁵⁹ CAL. PUB. RES. CODE § 21000 (Westlaw 2007).

¹⁶⁰ See GOVERNOR’S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 136 (Oct. 2003), *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

¹⁶¹ *Envtl. Planning & Info. Council v. County of El Dorado*, 182 Cal. Rptr. 317, 319 (Cal. Ct. App. 1982).

¹⁶² Guidelines for Implementation of the California Environmental Quality Act, CAL. CODE REGS. tit. 14, § 15091 (Westlaw 2007).

¹⁶³ GOVERNOR’S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 137 (Oct. 2003), *available at* http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

¹⁶⁴ CAL. PUB. RES. CODE § 21083.9 (Westlaw 2007).

2007]

HIGHWAY TO HEALTH

433

period must be used by environmental justice and public health advocates to register objections and identify deficiencies of the EIR's analysis of the general plan. The final EIR must contain the comments received and the agency's responses to those comments.

The general plan EIR need not be as specific as individual project EIRs, but the lead planning agency cannot defer to later tiered¹⁶⁵ EIRs to analyze specific environmental effects of the general plan.¹⁶⁶ In addition to direct impacts of any projects that will occur under the general plan, the EIR must also focus on secondary environmental effects that can be expected to follow from the general plan's adoption.¹⁶⁷ This includes cumulative and growth-inducing effects; envisioning scenarios where a challenge to an EIR for a general plan could be successful is not difficult in this context.

The general plan EIR is "a particularly useful tool for identifying measures to mitigate the cumulative effects of new development."¹⁶⁸ A challenge to an EIR can be employed to raise the issue of cumulative public health/environmental impacts of development that are resulting or will result from current development. For example, if a general plan anticipates the erection or designation of new retail space in an urban center, this proposal would lead to an increase in automobile use both for personal vehicles and trucks delivering goods. The EIR could be challenged as inadequate not just if it fails to identify measures to reduce traffic such as bicycle facilities, but also if it does not address the air pollution impacts that will result from increased automobile emissions in the urban center. This is a cumulative impact that would directly relate both to the physical environment and the public health of the city residents. If the EIR is not sufficient and the requirements of CEQA are not met, the project cannot move forward.

Challenging EIRs for deficient examination of environmental effects can achieve public health benefits as well. This should be used as a strategy to obtain general plans that provide for healthy communities.

¹⁶⁵ "To tier means to cover general matters and environmental effects in an environmental impact report prepared for a policy, plan, program, or ordinance, and then to follow that coverage with narrower or site-specific environmental impact reports that incorporate by reference the discussion in the prior environmental impact report and that concentrate on the environmental effects that are capable of being mitigated or that were not analyzed as significant effects in the prior report." RONALD ROBIE ET AL., CALIFORNIA CIVIL PRACTICE ENVIRONMENTAL LITIGATION § 8:20 (West 2007) (citing CAL. PUB. RESOURCES CODE § 21068.5).

¹⁶⁶ Stanislaus Natural Heritage Project, *Sierra Club v. County of Stanislaus*, 55 Cal. Rptr. 2d 625, 636-38 (Cal. Ct. App. 1996).

¹⁶⁷ *Id.* at 636-37.

¹⁶⁸ See GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA 2003 GENERAL PLAN GUIDELINES 136 (Oct. 2003), available at http://www.opr.ca.gov/planning/publications/General_Plan_Guidelines_2003.pdf.

Of course, this strategy only pertains to when a new or amended general plan is at issue.

3. *California Government Code Section 11135 and General Plans*

Government Code section 11135 (“Section 11135”) bars state agencies and state-funded programs and activities from engaging in various forms of discrimination.¹⁶⁹ This statute protects against discrimination based on race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability.¹⁷⁰ It authorizes a private cause of action for discrimination.¹⁷¹ It provides standing to sue only to a party who is personally injured.¹⁷² Unlike claims under Title VI of the Civil Rights Act of 1964,¹⁷³ which requires a claimant to show intentional discrimination to be eligible for judicial relief,¹⁷⁴ Section 11135 only requires a plaintiff to demonstrate that the purpose and effect of the state action is discriminatory.¹⁷⁵

In an action claiming that a city’s general plan violates Section 11135, plaintiffs should generally be able to establish standing because they should be able to establish injury.. The lack of public health criteria in the general plan can lead to severe community impacts that primarily affect low-income communities and communities of color. Communities of color are impacted disproportionately because they make up the majority of the population in impoverished urban centers.¹⁷⁶ This injury is inflicted upon persons of color who endure an inferior quality of life through fewer opportunities to walk and bike, poor air quality, lack of open space, and lack of access to fresh foods. Further, while standing in federal cases requires a specific injury in fact,¹⁷⁷ standing in California only requires that a plaintiff establish he or she has suffered or is about to suffer a more generalized injury as a result of the action.¹⁷⁸

¹⁶⁹ See generally CAL. GOV’T CODE § 11135 (Westlaw 2007).

¹⁷⁰ CAL. GOV’T CODE § 11135(a) (Westlaw 2007).

¹⁷¹ Greater L.A. Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1113 (9th Cir. 1987).

¹⁷² Blumhorst v. Jewish Family Servs., 24 Cal. Rptr. 3d 474, 480-81 (Cal. Ct. App. 2005).

¹⁷³ Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601-605, 78 Stat. 241, 252-53; see 42 U.S.C.A. § 2000d (Westlaw 2008).

¹⁷⁴ See Sandoval v. Alexander, 532 U.S. 275, 285 (2001).

¹⁷⁵ See CAL. GOV’T CODE § 11135 (Westlaw 2007); Indep. Hous. Servs. of S.F. v. Fillmore Ctr. Assocs., 840 F. Supp 1328, 1357 (N.D. Cal. 1999); Robert García & Erica Flores Baltodano, *Free the Beach! Public Access, Equal Justice, and the California Coast*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 143, 187 (Nov. 2005).

¹⁷⁶ See *supra* notes 19-20 and accompanying text (citing ALAMEDA COUNTY PUB. HEALTH DEP’T, 2004 OAKLAND HEALTH PROFILE 1-6 (2004)).

¹⁷⁷ See Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

¹⁷⁸ Schmier v. Supreme Court, 93 Cal. Rptr. 2d 580, 583-84 (Cal. Ct. App. 2000).

In an action under Section 11135, the more difficult hurdle for plaintiffs challenging general plans could be to establish that their injury is result of a state action or state-funded action.¹⁷⁹ Title 22, Section 98010, of the California Code of Regulations defines state “[p]rogram or activity” as “any project, action or procedure undertaken directly [or indirectly] by recipients of State support. . . .”¹⁸⁰ It could most likely be established that public health disparities are a result of state action, because state law mandates that each city and county have a general plan, which must contain at least the seven mandatory elements defined by statute.¹⁸¹ It is also true that most local planning agencies receive State funds.¹⁸² One could argue that these local planning agencies are subject to Section 11135 because such agencies are created by state law or because such agencies receive state funding, but it is uncertain whether these facts (by themselves) would be sufficient for a court to conclude that Section 11135's requirements apply to all general plans.¹⁸³ This determination may hinge on the judicial interpretation of what constitutes "State support" in this context.

While a generalized injury and a state action may be enough to get a plaintiff past the demurrer stage of litigation, there still remains the need to demonstrate causation that would entitle claimants to injunctive relief, thereby forcing public health considerations into general plans.¹⁸⁴ By itself, data about health disparities between white, more affluent areas and communities of color would not be enough to demonstrate discrimination under Section 11135 because a causal link between the state action and the discriminatory impact must be demonstrated.¹⁸⁵ This connection can be made with public health and medical professionals who study the impact of the built environment on the health of urban

¹⁷⁹ See *Indep. Hous. Servs. of S.F. v. Fillmore Ctr. Assocs.*, 840 F. Supp. 1328, 1352 (N.D. Cal. 1993).

¹⁸⁰ CAL. CODE REGS. tit. 22, § 98010 (Westlaw 2007).

¹⁸¹ See CAL. GOV'T CODE § 65302 (Westlaw 2007). Cities also receive funds raised by the state through tax levies. LEAGUE OF WOMEN VOTERS, GUIDE TO CALIFORNIA GOVERNMENT: ABOUT MUNICIPAL GOVERNMENT (1992), *available at* <http://www.guidetogov.org/ca/state/overview/municipal.html>.

¹⁸² CAL. GOV'T CODE § 65302 (Westlaw 2007); Cities also receive funds raised by the state through tax levies. LEAGUE OF WOMEN VOTERS, GUIDE TO CALIFORNIA GOVERNMENT: ABOUT MUNICIPAL GOVERNMENT (1992), *available at* <http://www.guidetogov.org/ca/state/overview/municipal.html>.

¹⁸³ LEAGUE OF WOMEN VOTERS, GUIDE TO CALIFORNIA GOVERNMENT: ABOUT MUNICIPAL GOVERNMENT (1992), *available at* <http://www.guidetogov.org/ca/state/overview/municipal.html>.

¹⁸⁴ See CAL. GOV'T CODE § 11135 (Westlaw 2007); *Indep. Hous. Servs. of S.F.*, 840 F. Supp. at 1333.

¹⁸⁵ CAL. GOV'T CODE § 11135 (Westlaw 2007); *Indep. Hous. Servs. of S.F.*, 840 F. Supp. at 1333.

residents. As low-income urban centers populated by people of color in California are some of the unhealthiest places to live,¹⁸⁶ the residents of these areas suffer disproportionately high rates of obesity, diabetes, heart disease, and asthma.¹⁸⁷ These dramatic disparities can be connected to the lack of public health concerns in the general plans that dictate the growth in these communities.

With an unambiguous connection drawn between the general plan of a city and the ways it negatively impacts the health of residents of color, discriminatory impact will be evident. While Section 11135 is a relatively new device for environmental justice advocates, obvious health disparities among different racial and ethnic lines in areas of a city could be a compelling way to force general plans to include public health criteria.

V. A POTENTIAL SUCCESS STORY: RICHMOND, CALIFORNIA'S GENERAL PLAN UPDATE

The least complex way to effect change is to avoid litigation altogether. Lawsuits are expensive and tend to increase the acrimony between the parties. This can be especially counterproductive in the planning context, because city planning officials and the community they are planning for should be working together and not arguing in court.

The city of Richmond, California, is in the process of updating its general plan and is employing some ground-breaking public-participation devices aimed at ensuring community involvement, keeping the planning process as transparent as possible, and tailoring the general plan to meet Richmond's needs. These positive steps include hosting community input meetings at least twice a month at times after work hours in various locations in the city, maintaining a website in both English and Spanish that updates the planning process in a timely manner, and being open to incorporating optional general plan elements and expanding mandatory elements definitions to fit community concerns.¹⁸⁸

Richmond's general plan update includes expanding the definition of the mandatory open-space element to include preserving open space to

¹⁸⁶ CAL. GOV'T CODE § 11135 (Westlaw 2007); *Indep. Hous. Servs. of S.F.*, 840 F. Supp. at 1333.

¹⁸⁷ See *supra* notes 19-20 and accompanying text (citing ALAMEDA COUNTY PUB. HEALTH DEP'T, 2004 OAKLAND HEALTH PROFILE 1 (2004), available at http://www.acphd.org/AXBYCZ/Admin/DataReports/ohp2004_complete.pdf).

¹⁸⁸ City of Richmond, General Plan Update, <http://www.cityofrichmondgeneralplan.org/> (last visited Mar. 20, 2008).

2007]

HIGHWAY TO HEALTH

437

enhance the community's health by providing space for outdoor recreation.¹⁸⁹ Further, the Richmond General Plan is going to include the optional elements of economic development, education, public facilities and infrastructure, and arts, culture, and historic preservation.¹⁹⁰ These optional elements will have the same enforceability as the mandatory elements once they are incorporated into the general plan.¹⁹¹

Richmond's strides in incorporating public-input in its planning process have led to some positive developments in the proposed general plan.¹⁹² The community's efforts have a chance to improve not only the public health of the community by increasing space for outdoor recreation, but also the financial and educational health of the area by providing for greater education resources and focusing on economic development.¹⁹³ If successful, Richmond's efforts should serve as a model for future general plan amendment processes in California.

Ideally, all general plan writing and updating would be as conscientious and transparent as Richmond's. While this general plan update is still in process, community members and allies are optimistic that it will truly address the needs of Richmond's residents. No one can know how successful a public-participation process can be, however, until the plan is approved and its effects begin to be felt. Hopefully, the people of Richmond will never have to resort to any of the legal strategies discussed in this Comment.

VI. CONCLUSION

Low-income communities and communities of color that inhabit the inner city are among the least healthy populations, because of lack of access to fresh food, open space to recreate, and clean air to breathe. While the most direct way to address these public health disparities would be to amend the California Government Code to include public health considerations in the existing mandatory elements of general plans, this solution's inherently political nature and susceptibility to powerful lobbies cannot be relied on as the most promising solution.

Instead, when public participation in the general plan process fails

¹⁸⁹ City of Richmond, About the General Plan, http://www.cityofrichmondgeneralplan.org/Content/10000/ABOUT_THE_GENERAL_PLAN.html (last visited Mar. 20, 2008).

¹⁹⁰ *Id.*

¹⁹¹ See 58 Op. Cal. Att'y Gen. 21, 25 (1975).

¹⁹² City of Richmond, About the General Plan, http://www.cityofrichmondgeneralplan.org/Content/10000/ABOUT_THE_GENERAL_PLAN.html (last visited Mar. 20, 2008).

¹⁹³ *Id.*

438 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 1

to create a general plan that meets a community's needs, community activists and environmental justice advocates could use the Government Code requirements for general plans, CEQA or Government Code Section 11135 to persuade courts that general plans are not complying with existing California law and therefore should be amended or rewritten before any additional building or permit-granting can go forward. While the strategies in this Comment are currently untested and possibly overly optimistic, so far existing general plans have failed to provide for healthy communities, and change needs to occur. Planners, public health academics, and practitioners have talked long enough abstractly at each other about what needs to be done. It is time for environmental justice advocates and attorneys to step in and help them communicate to accomplish the goal of healthy urban communities.