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Land Use 101

INTRODUCTION

This paper provides a general overview of the fundamental principles and legal concepts of Land Use and Planning Law. Its purpose is to explain, in general terms, how the Town of Los Gatos regulates land use and to define some commonly used planning terms. We hope you find the paper helpful and that it serves as an easy to use resource for Planning Commissioners.

STATE LAW, LOCAL PLANNING, AND POLICE POWER

State law is the foundation for local planning in California. The California Government Code (Sections 65000 et seq.) contains many of the laws pertaining to the regulation of land uses by local governments including: the general plan requirement, specific plans, subdivisions, and zoning.

Virtually every reference guide on Land Use begins with the premise that a city has the police power to protect the public health, safety, and welfare of its residents. See Berman v. Parker, (1954) 348 U.S. 26, 32-33, DeVita v. County of Napa, (1995) 9 Cal. 4th 763, 782; see also Big Creek Lumber Co. v. City of Santa Cruz, (2006) 38 Cal. 4th 1139, 1159. This right is set forth in the California Constitution, which states "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. at. XI, section 7. The ability to enact ordinances to protect the health, safety, and welfare is important in the land use context because it confers very broad rights to adopt regulations that implement local land use vision and values, so long as laws enacted by a city are not in conflict with state general laws. In Village of Belle Terre v. Boraas, (1974) 416 U.S. 1, the U.S. Supreme Court addressed the scope of such power and stated: "The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." Id at 9.

One seminal land use and zoning case underscoring a city's police power was Wal-Mart Stores Inc. v. The City of Turlock, (2006) 138 Cal. App. 4th 273, 303 where, in response to concerns over the impacts of big box stores, particularly Wal-Mart, the City of Turlock adopted an ordinance prohibiting the development of discount superstores. Wal-Mart challenged the ordinance, stating the city had exceeded its police power, but the Court disagreed. The court found the police power allows cities to "control and organize development within their boundaries as a means of serving the general welfare." Id at 303. The important issue to understand in that case was the language of the ordinance itself. The ordinance did not, and

EXHIBIT 1

legally could not, target specific tenants which were perceived as causing the certain impacts. However, the city could control the use and development standards of property within its community which, in effect, prohibited only a handful of big box retailers, including Wal-Mart.

Another case that highlights the city's police power, especially at the micro-level, is Disney v. City of Concord, (2011) 194 Cal.App.4th 1410. In that case, the City of Concord adopted an ordinance restricting the storage and parking of recreational vehicles in residential yards and driveways. Among other things, the City of Concord's ordinance limited the number of RVs on any residential property to two, required RVs to be stored in side and rear yards behind a six foot high opaque fence, prohibited RVs from being stored on front yards and driveways (with some exceptions), and established maintenance standards for RVs within the public view. James Disney filed suit. His main argument was that the ordinance exceeded Concord's police power. The Court determined that the City of Concord's Ordinance was a valid exercise of the city's police power, where the ordinance had an aesthetic purpose. Citing Metromedia, Inc. v. City of San Diego (1980) 26 Cal.3d 848, 858, the Court stated "It is within the power of the Legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled." Again, as echoed by Village of Belle, supra, a city's police power is not limited to regulating just stench and filth.

Preemption

Although a city's police power is broad, it is not absolute, and cannot conflict with the State's general laws. A conflict exists between a local ordinance and state law if the ordinance "Contradicts or enters an area fully occupied by general law, either expressly or by legislative implication." Viacom Outdoor Inc. v. City of Arcata, (2006)140 Cal. App. 4th 230, 236.

THE GENERAL PLAN, SPECIFIC PLANS, AND ZONING REGULATIONS

There are currently 533 incorporated cities and counties in California. State law requires each of these jurisdictions to prepare and adopt "…a comprehensive, long term general plan for the physical development of the…city, and of any land outside its boundaries…" Gov. Code section 65300. Under Gov. Code Section 65302, each General Plan must include the following elements:

1. Land Use Element;
2. Circulation Element;
3. Housing Element;
4. Conservation Element;
5. Open Space Element;
6. Noise Element;
7. Safety Element;
8. Air Quality Element; and
9. Environmental Justice Element.

Gov. Code Section 65302 also sets forth particular requirements that must be included in each of the nine elements. One of the more scrutinized elements of a General Plan is the Housing Element which, among other things, must show that the agency's land use and zoning designations contribute to the attainment of State housing goals regarding affordable, transitional, and supportive housing.

Government Code section 65583(c) requires the Housing Element to establish a program setting forth a schedule of actions to implement the Housing Element's policies. Over the course of the last ten years or so, we have seen a shift towards more specific program/schedule language required by Housing and Community Development ("HCD") for each Housing Element update.

Adoption and amendment of a General Plan is a "project" under CEQA and therefore, environmental review must be performed. City of Santa Ana v City of Garden Grove (1979) 100 CA3d 521. Adopting or amending the General Plan must be done in accordance with Government Code section 35350 et seq. A general law city may not amend any of the seven mandatory elements of its General Plan more than four times per year. Gov. Code section 65358(b).

Because of the comprehensive nature of General Plan documents, they often take months, if not years, to adopt or significantly update and the legal issues surrounding the adequacy of a General Plan are certainly the subject of treatises beyond the scope of this paper. However, the "take away" is that the General Plan needs to be visionary, but also must give enough guidance and particularity to provide clear context for the subsequent planning decisions and approvals that will flow from and must be consistent with the General Plan (i.e., specific plans, zoning regulations, and map, project, and permit approvals).

Specific Plans

Specific Plans are hybrid documents that act as a bridge between the General Plan and Zoning Regulations for future development of a particular area. Government Code section 65450 states that a city may prepare a Specific Plan "for the systematic implementation of the general plan…" A Specific Plan is adopted in the same manner as a General Plan (Gov. Code section 65453) and is considered a legislative act.

There are no black and white rules governing when a Specific Plan is required. Instead, a Specific Plan is a tool that public agencies and developers use to achieve better specificity on the vision and development potential of a particular tract of land without having to go through extensive site-specific land use analysis and entitlement proceedings. It is "programmatic" in nature and usually deals with major infrastructure, development and conservation standards and includes an implementation program. See Gov. Code section 65451. Often, a specific plan will establish the "look" and "feel" of what future development on the property will be and it can provide a more clear and refined definition of the parameters in which development will be allowed and the responsibilities for major infrastructure area developers will be expected to fulfill. Specific plans can be very useful to agencies in setting realistic development expectations and signaling important big picture limitations or constraints unique to a particular area; they can be very useful to developers in helping to size the potential and costs of development.

Development Agreements

Development Agreements are a unique planning tool authorized by statute pursuant to Government Code section 65864 – 65869.5. A Development Agreement is an agreement between the City and a property owner in which the parties agree to "freeze" all rules, regulations, and policies that are in place as of the execution of the agreement. Gov. Code

section 65866; Santa Margarita Area Residents Together v San Luis Obispo County Bd. of Supervisors (2000) 84 CA4th 221. The Development Agreement structure, because it is a voluntary, arm's length negotiation process between a developer and city, may also allow a city to negotiate developer concessions or contributions that it could not otherwise obtain from a developer through normal exactions or conditions of approval. In some circumstances, Development Agreements can provide both greater flexibility and greater certainty in the development of large or complex projects. However, it should be noted that Development Agreements are legislative acts and subject to referendum, so the flexibility afforded by the tool is also limited by community values.

Zoning

The general plan is a long-range policy document that looks at the future of the community. A zoning ordinance is the local law that spells out the immediate, allowable uses for each piece of property within the community.

The purpose of zoning is to implement the policies of the general plan. Under the concept of zoning, various kinds of land uses are grouped into general categories or "zones" such as single-family residential, multi-family residential, neighborhood commercial, light industrial, agricultural, etc. A typical zoning ordinance describes 20 or more different zones which may be applied to land within the community. Each piece of property in the community is assigned a zone listing the kinds of uses that will be allowed on that land and setting standards such as minimum lot size, maximum building height, and minimum setbacks. The distribution of residential, commercial, industrial, and other zones will be based on the pattern of land uses established in the community's general plan. Maps are used to keep track of the zoning for each piece of land**.**

Variances

A variance is a limited waiver of development standards for a use that is otherwise permitted in that zone. The city or county may grant a variance in special cases where: (1) application of the zoning regulations would deprive property of the uses enjoyed by nearby, similarly zoned lands; and (2) restrictions have been imposed to ensure that the variance will not be a grant of special privilege. A city or county may not grant a variance that would permit a use that is not otherwise allowed in that zone (for example, a commercial use could not be approved in a residential zone by variance). Typically, variances are considered when the physical characteristics of the property make it difficult to develop. For instance, in a situation where the rear half of a lot is a steep slope, a variance might be approved to allow a house to be built closer to the street than usually allowed. Variance requests require a public hearing and neighbors are given the opportunity to testify. The local hearing body then decides whether to approve or deny the variance.

Conditional Use Permits

Most zoning ordinances identify certain land uses which do not precisely fit into existing zones, but which may be allowed upon approval of a conditional use permit (sometimes called a special use permit or a CUP). These might include community facilities (such as hospitals or schools), public buildings or grounds (such as fire stations or parks), temporary or hard-to-classify uses

(such as Christmas tree sales or small engine repair), or land uses with potentially significant environmental impacts. The local zoning ordinance specifies those uses for which a conditional use permit may be requested, which zones they may be requested in, and the public hearing procedure.

As with variances, a public hearing must be held to consider a CUP. If the local planning commission or zoning board approves the use, it will usually do so subject to certain conditions being met by the permit applicant. Alternatively, it may deny uses which do not meet local standards.

Subdivisions

In general, land cannot be divided in California without local government approval. Dividing land for sale, lease, or financing is regulated by local ordinances based on the State Subdivision Map Act (commencing with Government Code Section 66410). The local general plan, zoning, subdivision, and other ordinances govern the design of the subdivision, the size of its lots, and the types of improvements (street construction, sewer lines, drainage facilities, etc.). In addition, the city or county may impose a variety of fees upon the subdivision, depending upon local and regional needs, such as school impact fees, park fees, etc. Developers can contact their local planning department for information on local requirements and procedures.

There are basically two types of subdivisions: parcel maps, which are limited to divisions resulting in fewer than five lots (with certain exceptions); and subdivision maps (also called tract maps), which apply to divisions resulting in five or more lots. Applications for both types of land divisions must be submitted to the local government for consideration in accordance with the local subdivision ordinance and the Subdivision Map Act.

HEARINGS AND DUE PROCESS

The Due Process clause of the Fourteenth Amendment is inextricably intertwined with land use law. Due process requires reasonable notice and an opportunity to be heard by an impartial decision maker for administrative proceedings that affect liberty or property interests. See Gov. Code section 65905(a); Fuchs v County of Los Angeles Civil Serv. Comm'n (1973) 34 CA3d 709. Due process issues can be fairly apparent, for example in the case of an issuance or revocation of a conditional use permit.

State law requires that local governments hold public hearings prior to most planning actions. At the hearing, the council, board, or advisory commission will explain the proposal, consider it in light of local regulations and environmental effects, and listen to testimony from interested parties. The council, board, or commission will vote on the proposal at the conclusion of the hearing.

One of the most important perspectives on Land Use and Planning Law is to understand the basis and procedures by which a city's decisions are challenged. By understanding "which hat" your wearing (legislative or adjudicative/quasi-judicial), you will better navigate the contours of legally defensible decisions and how to develop the administrative record to support your decision. One way to explain the difference between a quasi-legislative decision and a quasi-judicial decision is by taking legislative action, you are being asked to formulate general policies

or rules that will apply to future projects, applications, or factual circumstances of a given type. In contrast, a quasi- judicial/adjudicative decision is one in which a specific project, application, or set of facts is being evaluated for compliance with the policy or rule that you have already developed (the development of law (legislative) versus the application of law to facts (adjudicative).

Administrative Writ of Mandate – the Quasi-judicial Hat.

An adjudicative or quasi-judicial administrative decision may be challenged by Administrative Mandamus when: a hearing in the underlying administrative proceeding is required by law in which evidence is taken and the decision maker is vested with the discretion to determine contested factual issues. Code of Civ. Proc. 1094.5. Review of these decisions is usually limited to the administrative record. Code of Civ. Proc. section 1094.5(a). The scope of review in Administrative Mandamus proceedings is limited to: whether the agency has proceeded without, or in excess of, jurisdiction; whether there was a fair hearing; or whether there was any prejudicial abuse of discretion. Code of Civ. Proc. section 1094.5(b). "Abuse of discretion" is established when: the agency has not proceeded in the manner required by law; the order or decision is not supported by the findings; or the findings are not supported by the evidence. See Leal v. Gourley, (2002) 100 CA 4th 963, 968.

The standard of review for Administrative Mandamus is usually the substantial evidence test, however, when the underlying decision substantially affects a fundamental vested right, the independent judgment test applies. Code of Civ. Proc. section CCP §1094.5(b)-(c); Goat Hill Tavern v City of Costa Mesa (1992) 6 CA4th 1519, 1525. Under the substantial evidence test, a court determines if there is substantial evidence to support the findings and if the findings support the decision. Under this test, the court accords significant deference to the administrative fact-finder. Bedoe v. County of San Diego (2013) 215 CA 4th 56, 61. Courts have consistently refused to substitute judicial judgment for the legislative judgment of the governing body of a local agency. So long as the legislative decision bears a reasonable relationship to the public welfare, it is upheld. See Ass'n. Home Builders, Inc. v. City of Livermore, (1976) 18 Cal. 3d 582, 604. California Hotel & Motel Ass'n v. Indust Welfare Comm'n, (1979) 25 Cal. 3d 200, 211-212 [judicial review is limited "out of deference to the separate of powers between the Legislature and the judiciary [and] and to the legislative delegation of administrative authority to the agency."] Of course, there is a caveat if some sort of heightened scrutiny is involved.

Pursuant to the landmark case of Topanga Assn. For A Scenic Community v. County of Los Angeles (1974), the Planning Commission must explain land use decisions through the adoption of findings. Topanga defined findings as legally relevant sub-conclusions which expose the agency's mode of analysis of facts, regulations, and policies, and bridge the analytical gap between raw data and ultimate decision. Therefore, the findings of the Planning Commission must be relevant to adopted, applicable criteria in statutes, ordinances or policies. In a way, The Planning Commission operates as a court in that the Planning Commission must apply the Town's local land use regulations to a specific application just as a court applies the law to a specific set of facts. Basically, the findings of the Planning Commission are an explanation of how they progressed from the facts through established fixed rule, standard, law, or policies to the decision.

Based upon the forgoing, and as I have explained in meetings, findings such as the proposed modification is a “cost saving/profit increasing strategy” or that “they stand to make millions of dollars” or that the developers must “stick with their commitment” or “uphold the agreement” or that this is a “bait and switch” or “will force visitors, shoppers & residents to find parking elsewhere” or that the developers “are bullies and are ruining our town” are inadequate and improper findings pursuant to Topanga Assn. For A Scenic Community v. County of Los Angeles (1974). Although all of these statements may not lack evidentiary support, they lack legal relevance and even if they are assumed to be correct, those findings simply do not meet the legal requirements set forth in code and case law.

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

CEQA (commencing with Public Resources Code Section 21000) requires local and state governments to consider the potential environmental effects of a project before deciding whether to approve it. CEQA's purpose is to disclose the potential impacts of a project, suggest methods to minimize those impacts, and discuss alternatives to the project so that decision makers will have full information upon which to base their decision. The term "project" is defined broadly in CEQA. It includes all of the actions discussed in this paper -- from annexations to zoning.

CEQA is a complex law with a great deal of subtlety and local variation. The following discussion is extremely general. The basic requirements and administrative framework for local governments' CEQA responsibilities are described in the California Environmental Quality Act: Statutes and Guidelines.

Lead Agency

The "lead agency" is responsible for seeing that environmental review is done in accordance with CEQA and that environmental analyses are prepared when necessary. The agency with the principal responsibility for issuing permits to a project (or for carrying out the project) is deemed to be the "lead agency." As lead agency, it may prepare the environmental analysis itself or it may contract for the work to be done under its direction. In practically all local planning matters (such as rezoning, conditional use permits, and specific plans) the planning department is the lead agency.

Preliminary Review

Analyzing a project's potential environmental effect is a multistep process. Many minor projects are exempt from the CEQA requirements. Typically, these include single-family homes, remodeling, accessory structures, and minor lot divisions (for a complete list refer to California Environmental Quality Act: Statutes and Guidelines). No environmental review is required when a project is exempt from CEQA.

When a project is subject to review under CEQA, the lead agency prepares an "initial study" to assess the potential adverse physical impacts of the proposal.

Negative Declarations, Mitigated Negative Declarations, and EIRs

If the initial study shows that the project will not cause a "significant" impact on the environment or when it has been revised to eliminate all such impacts, a "negative declaration" is prepared. The negative declaration describes why the project will not have a significant impact and may require that the project incorporate a number of measures (called "mitigation measures") ensuring that there will be no such impact. If the Initial Study indicates that there could be significant impacts, but those impacts can be mitigated to a less than significant level, then a Mitigated Negative Declaration (MND) can be prepared. Most projects, especially those involving any sort of construction activity, will include conditions or mitigation measures within the negative declaration calculated to reduce any potential environmental impacts to be less than significant. However, conditions or mitigation measures in the MND will not preclude the need to prepare an EIR if information meeting the fair argument standard is introduced into the record. See Pub. Res. Code section 21064.5; CEQA Guidelines section 15070(b)(2).

If significant environmental effects are identified, then an Environmental Impact Report (EIR) must be written before the project can be considered by decision makers. An EIR discusses the proposed project, its environmental setting, its probable impacts, realistic means of reducing or eliminating those impacts, its cumulative effects, and alternatives to the project. CEQA requires that draft Negative Declarations and EIRs be made available for review by the public and other agencies prior to consideration of the project. The review period allows concerned citizens and agencies to comment on the completeness and adequacy of the environmental review prior to its completion.

If an ND or MND is prepared, the city must provide the public and specified agencies with a notice of intention. Pub. Res. Code section 21092; CEQA Guidelines section 15072. The public review period must be no less than 20 days. Pub. Res. Code section 21092. If the State Clearinghouse is used, the review period is at least 30 days. Pub. Res. Code section 21091(b).

When the decision making body approves a project, it must certify the adequacy of the environmental review. If its decision to approve a project will result in unavoidable significant impacts, the decision making body must not only certify the EIR, but also state, in writing, its overriding reasons for granting the approval and how the impacts are to be addressed.

CONCLUSION

The world of land use law and regulation is comprehensive and the sheer volume of legal concepts, statutes governing land use decisions, and procedural requirements can be daunting. However, land use regulation is at the heart of some of the most significant decisions local governments make and represents the single most powerful tool that communities have to define, establish, and maintain their “sense of place.” If each land use decision can be evaluated starting with the constitutional foundations of the authority to regulate and the various statutes and processes can be viewed as tools to help answer the important questions and order important land use decisions, the process starts to seem less overwhelming. Fundamentally, this paper is presented from the perspective that the law is supposed to make sense and that the objective of the law is good planning. It is our hope that the paper can be used as one of many tools to navigate the legal complexities through that lens.