416 N Franklin Street
Fort Bragg, CA 95437
Phone: (707) 961-2823
Fax: (707) 961-2802

City of Fort Bragg

Meeting Agenda

Special City Council

THE FORT BRAGG CITY COUNCIL MEETS CONCURRENTLY AS THE FORT BRAGG MUNICIPAL IMPROVEMENT DISTRICT NO. 1 AND THE FORT BRAGG REDEVELOPMENT SUCCESSOR AGENCY

Wednesday, March 31, 2021 **6:00 PM** **Via Video Conference**

Special Joint City Council/Planning Commission Meeting

CALL TO ORDER

ROLL CALL

ZOOM WEBINAR INVITATION

You are invited to a Zoom webinar.
When: Mar 31, 2021 06:00 PM Pacific Time (US and Canada)
Topic: Special Joint City Council/Planning Commission Meeting

Please click the link below to join the webinar:
https://zoom.us/j/93303683714
Or One tap mobile :
US: +16699009128,,93303683714# or +12532158782,,93303683714#
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Webinar ID: 933 0368 3714
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TO SPEAK DURING PUBLIC COMMENT PORTIONS OF THE AGENDA VIA ZOOM, PLEASE JOIN THE MEETING AND USE THE RAISE HAND FEATURE WHEN THE CHAIR OR ACTING CHAIR CALLS FOR PUBLIC COMMENT ON THE ITEM YOU WISH TO ADDRESS.

1. PUBLIC COMMENT ON SPECIAL AGENDA ITEMS

Public comments may be made on the matters described in this Special Meeting Notice (Government Code Section 54954.3).

2. CONDUCT OF BUSINESS

2A. 21-130 Planning 101 Training with Scott Porter of Jones & Mayer

Attachments: Fort Bragg - Land Use - CC and PC - 2 hours (March 31 2021)

ADJOURNMENT

STATE OF CALIFORNIA)
)ss.
COUNTY OF MENDOCINO)

I declare, under penalty of perjury, that I am employed by the City of Fort Bragg and that I caused this agenda to be posted in the City Hall notice case on March 29, 2021.

_____

June Lemos, CMC
City Clerk

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- *Such documents are also available on the City of Fort Bragg's website at https://city.fortbragg.com subject to staff's ability to post the documents before the meeting.*

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Text File

File Number: 21-130

Agenda Date: 3/31/2021 **Version:** 1 **Status:** Business

In Control: Special City Council **File Type:** Report

Agenda Number: 2A.

Planning 101 Training with Scott Porter of Jones & Mayer

Land Use Essentials for Council Members and Planning Commissioners

Overview

- Police Power
- General Plans, Specific Plans
- Zoning
  - Zoning by Initiative
  - Non-Conforming Uses
  - Conditional Use Permits, & Variances
- *Due Process / Hearing Procedures*
- Subdivision Map Act
- The Takings Clause
  - Eminent Domain, Regulatory Takings, Exactions

Police Power – Overarching Rule

- A city or county controls every land use decision.
- Except if
  - Federal law controls.
  - California law controls.
  - A special district controls.

Example #1 of Federal Land Use Regulations – ESA

- Endangered Species Act (16 USC 1531 *et seq*.)
- US Fish & Wildlife Service administers ESA.
- Lists threatened or endangered species. 16 USC 1533
- Federal agencies must consult with USFWS for approvals. 16 USC 1536
- Prohibits "taking" listed species, but allows incidental takes. 16 USC 1536, 1538, 153

Example #2 of Federal Land Use Regulation – Navigable Waters

- 33 U.S.C. 402-403. USCOE has jurisdiction over "navigable waters."
- This has dramatically expanded. (33, U.S.C. 1362(7); *See* 33 CFR 329)
  - Waters subject to the ebb and flow of the tide.
  - Waters used for commerce.
  - Waters formerly used for commerce.
  - Waters reasonably susceptible to interstate or foreign commerce.

Example #2, Navigable Waters, cont.

- Section 404 Permits– USCOE regulates "dredged materials" and "fill" into waters of the U.S. Even though USCOE issues the 404 Permits, the EPA can veto any 404 permits.
- Section 401 of Clean Water Act. (33 USC 1341 *et seq*.) – dredging/filling must comply with water effluent requirements of Regional Water Quality Control Board.

Additional Federal Examples

- Telecommunications Act of 1996 (More discussion within Zoning, below)
- National Historic Preservation Act of 1966. (16 USC 470). Advisory council comments on potential impacts.
- Coastal Zone Management Act. (16 USC 1456(c)). CA Coastal Commission Controls.
- National Environmental Policy Act (33 U.S.C. 4321 *et seq*.). Environmental disclosure required.
- Airport Land Use Commissions.
- 1st Amendment – RLUIPA – see *infra*.

Cities or Counties Have Police Power. Special Districts Do Not.

- Cal Const. Art XI sec 7 "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."
- Cities and Counties have equal power. Special Districts obtain limited powers that directly from the state.

But the State Can Preempt.

- Except where preempted, "a city or county's police power is as broad as the police power exercisable by the Legislature itself. *Candid Enterprises, Inc. v. Grossmont Union High School District* (1985) 29 Cal.3d 878, 885.

Examples of State Preemption

- Planning and Zoning Law. (§ 65000)
- California Building Standards Code (Code of Regulations Title 24)
- California Endangered Species Act (Fish & Game Code §§ 2050-2098) [also protects plants].
- Coastal Act (Pub. Res. Code § 30000.)

The Police Power is Very Broad

- Local government has broad discretion over land use issues.

General Plans

General plan as the constitution

- Since 1971, California law has required that a city's zoning and subdivision approvals be consistent with an adopted general plan. *See* § 65300.
- Any subordinate land use action, such as zoning, tentative maps or development agreements that are inconsistent with the general plan are void at the time they are acted upon.

Lesher Communications, Inc.

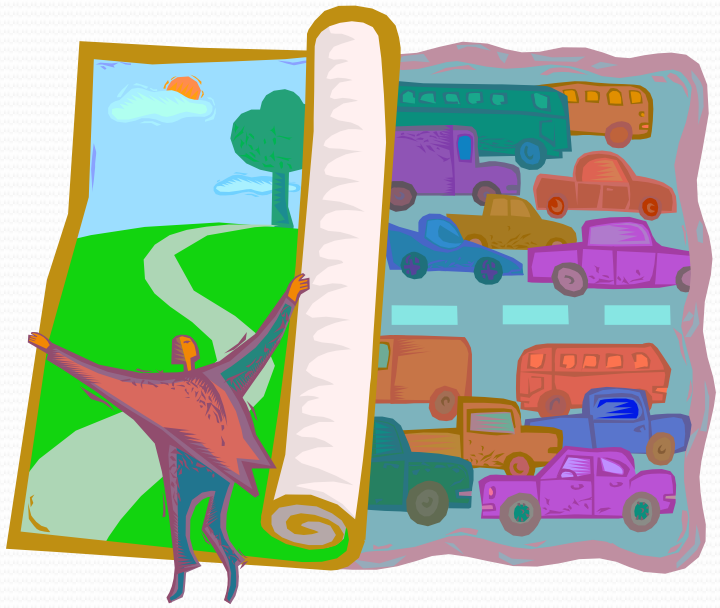
- The General Plan is the "constitution," and zoning amendments must comply. *Lesher Communications Inc. v. City of Walnut Creek* (1990) 52 Cal. 3d 553, 570-71.
- The involved voter initiative was a regulation, not an amendment to the general plan. As such, it was invalid because it did not comply with the General Plan.

Purpose of General Plan

- Identify various goals of community.
- Provides "long-term" basis for decision making. *See* § 65300.
- Provide for citizen involvement in planning process.
- Inform all parties of development rules.

Mandatory general plan elements

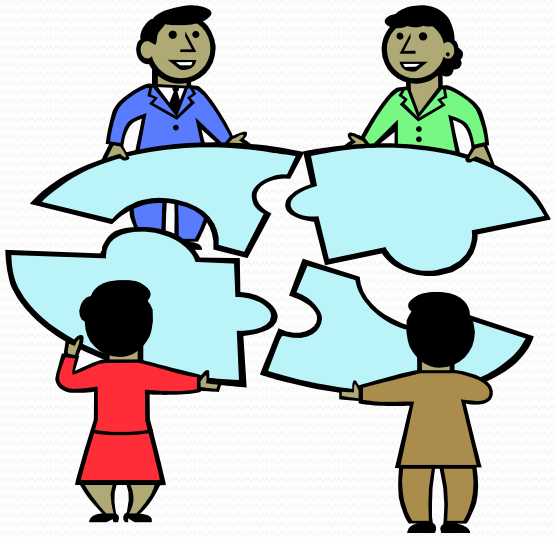
- Land Use
- Circulation
- Housing
- Conservation
- Open Space
- Noise
- Safety



See Gov't Code Section 65301

Permissive general plan elements

- Any subject is appropriate where there is a concern in the community to study and plan regarding an issue that is not included in the mandatory elements
- Permissive elements might include Resource Management, Endangered Species Protection, Air Quality, Growth Management, Artistic Resources, Cultural Resources, Economic Development



Examples of Permissive General Plan Elements

- Administration, Aesthetics, Agriculture, Air Quality, Airport, Archeological, Bicycle, Biological, Child Care, Coastal, Commerce, Community, Cultural, Design, Economic, Education, Emergency, Energy, Environment, Fire, Fiscal, Flood Control, Forestry, Geothermal, Governance, Growth Management, Hazardous Waste, Historic Preservation, Implementation, Military Facilities, Mineral Resources, Parking, Parks & Recreation, Public Facilities, Public Services, Redevelopment, Regionalism, Resource Conservation, Scenic Highway, Seismic, Social Services, Trailways, Transportation, Urban Boundaries, Waste, Water Resources

Policy Objectives and Policies

- General Plans must include Policy Objectives and Policies.
- City of Palm Springs Policy Objective 6.11 “quality service levels of law enforcement and fire protection at reasonable cost to Palm Springs citizens, workers and visitors.”

Examples of Policies

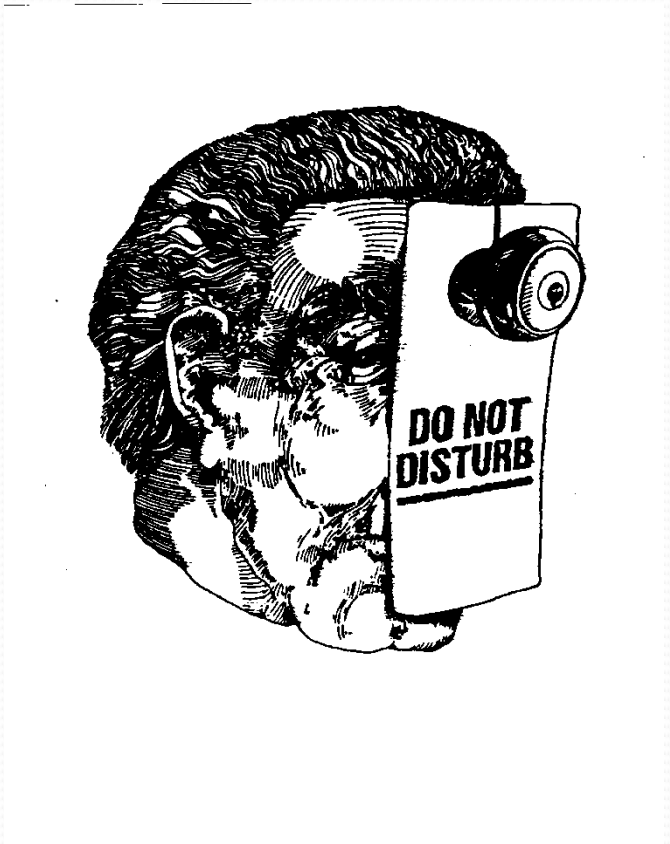
- General. Policy 6.11.10 "The Fire Department shall strive to maintain fire losses at a dollar level not to exceed the 10 year annual fire loss average adjusted by inflation."
- Too specific? Policy 6.11.5 "New developments shall provide ease of access for all emergency vehicles. Minimum street widths shall comply with section 7. All structures shall maintain a minimum five-foot clearance."

Failure to have a legally adequate general plan

- New zoning ordinances are void.
- Land use approvals, including permits are void because the City lacks the power to approve.
- Compliance with the California Environmental Quality Act may be impossible – cannot complete the EIR. *See Guardians of Turlock's Integrity v. City Council* (1983) 149 Cal.App.3d 584.
- New development may be delayed or prohibited

Updates are good

- It is very easy to be tied to old ideas and closed to new ones



Housing Element

Housing Element Adoption

- The housing element must comply with state law with regard to low and moderate income housing requirements
- Housing, according to the Legislature, is “a matter of vital statewide importance” and “the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order.”
- RHNA amounts are allocated by local planning agencies (e.g., SCAG, ABAG)

Affordable Housing Requirements

- State Housing Element Law Requires an update to the housing element on either a 4 or 8 year cycle. § 65588.
- Affordable housing is a matter of "statewide importance."

Regional Housing Need Assessment

- The Housing element must demonstrate that it has "land suitable for residential development" equal to the City's "fair share" of the regional housing need allocation (RHNA).
- There are 4 main income levels: Very low income, low income, moderate income, above moderate income.
- A housing element need only "substantially comply" with state law.

Procedure for Certification of a Housing Element

- California Department of Housing & Community Development (HCD) should be requested certify the housing element.
- HCD issues an advisory compliance report.

Other affordable housing laws

- Density bonus law. §65915 [must provide density bonuses for low and moderate income and senior housing].
- Gov't Code 66300 (SB 330) Replacement Affordable Housing – downzoning, etc.
- Accessory dwellings (ADUs) and Junior ADUs must be allowed. §65852.2, 65852.22.

Specific plans

- A specific plan is a step below the general plan in the land use approval hierarchy
- A specific plan must be consistent with the general plan
- Zoning, subdivisions, public works projects and development agreements must be consistent with any adopted specific plan

Specific plan elements

- Contents
  - distribution, location and extent of the uses of land, including open space
  - location and extent of proposed public and private transportation, sewage, water, drainage, solid waste disposal, energy and other essential facilities to be located within the plan area
  - Standards and criteria for development and conservation of natural resources
  - Program of implementation

More thoughts

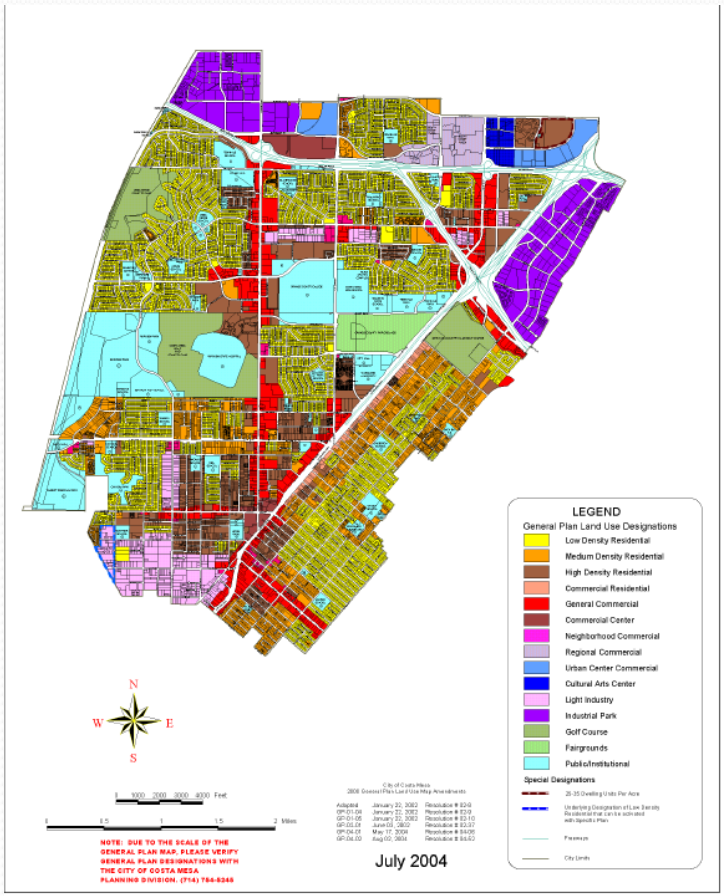
- Developers may wish to avoid the time consuming Specific Plan process.
- A specific plan is different than a "Master Plan" (a term with no official meaning)

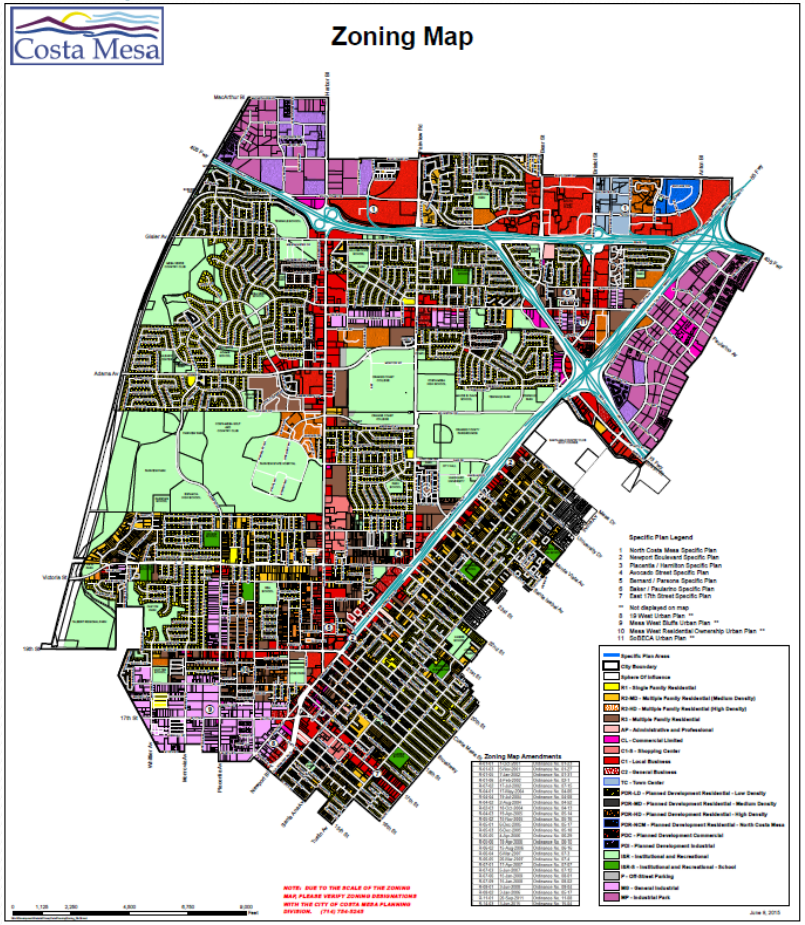
Zoning

What is Zoning?

- Zoning divides a city into districts each of which contains different regulations for development and land use
- Zoning is undertaken by cities through the use of the police power which allows cities to adopt measures that relate to health, safety and the public welfare

Compare: Costa Mesa Land Use Map vs. Zoning Map (15 designations vs. 11 specific plan areas and 24 zones)





Enactment of Zoning Regulations

- Specific property may be re-classified from one zone (A-1) to another (Commercial) by rezoning
- Uses allowed on property may be changed by zoning text amendments

How to Amend Zoning Code

- Gov't Code 65853-65857.
  - Public Hearing / Planning Commission issues written recommendation
  - Public Hearing / City Council enacts ordinance
- Compliance with CEQA required

Zoning By Initiative vs. Referendum

- All zoning ordinances are subject to **referendum**. *Arnel Dev. Co v. City of Costa Mesa* (1981) 126 Cal.App.3d, 336.
- Unclear whether a **referendum** may apply to overturn an ordinance that would have fixed an ordinance that is inconsistent with general plan.
  - A referendum is equal to a zoning ordinance. Thus, it must be consistent with a general plan. *See deBottari v. City Council* (1985) 171 Cal.App.3d 1204, 1213 (4th Dist).
  - But *See City of Morgan Hill v. Bushey* (6th Dist. 2017). Expressly disagreeing with *deBottari*. Held: no legal requirement that existing ordinance remain, even though it would be inconsistent with General Plan. The referendum does not *create* the inconsistency, but merely keeps the illegal status quo. There were other means for the city to lawfully fix the municipal code.

When is Zoning Permissible?

- For general law cities, zoning must be consistent with the general plan, any applicable specific plan.
- Zoning must also be consistent with any Airport Land Use Plan (ALUP) unless overruled by the City on a 2/3 vote. § 21676(b).
- Planning & Zoning law states that if the adoption of a general plan or specific plan creates an inconsistency with existing zoning, the zoning must be brought into conformity within a "reasonable time." GC 65860(c).
  - OPR recommends 6 months for "minor" amendments, and two years for "extensive amendments."

When is Zoning Permissible?

Permissible Regulations

- Types of land uses: residential, commercial, industrial, agricultural, recreation.
- Aesthetics: building height, size, design, signage, fencing, landscaping, etc.
- Planned Unit Development
  - Imposes consistent development standards
  - Allows consolidation of density to maximize open space

Nonconforming Uses

- When property has been developed under zoning regulations that are later changed, the resulting use is called a “legal nonconforming use”
- This frequently occurs when cities annex unincorporated areas where development has occurred under county jurisdiction
- It also occurs as cities upgrade and change their own zoning regulations
- Practice Tip: Ordinances should distinguish between non-conforming uses and non-conforming structures

Non Conforming Uses

Upgrading nonconforming uses

- Legal nonconforming uses are allowed to continue but not be expanded until some new use is requested
- Zoning ordinances usually provide standards for allowing limited expansion or rehabilitation of nonconforming uses under some circumstances
- Nonconforming uses that are abandoned must conform to new zoning requirements

When is Zoning Permissible?
Amortizing Nonconforming Uses

- The City may terminate non-conforming uses so long as a reasonable amortization period is allowed the landowner consistent with the investment involved and reasonable expectations of return on that investment
- The key is determining the value of the investment and what constitutes a reasonable return on that investment

Amortizing Nonconforming Uses (continued)

- The California Supreme Court has noted:
  - "The California cases have firmly declared that zoning legislation may validly provide for the eventual termination of nonconforming uses without compensation if it provides a reasonable amortization period commensurate with the investment involved." *Metromedia, Inc. v. City of San Diego* (1980) 26 Cal. 3d 848

Constraints on Zoning

Free Speech – Adult Businesses, Signs

- The First Amendment limits the police power, as the first amendment limits regulation of free speech.
- Regulation is permissible if it is:
  - Content-neutral "time, place, manner" regulation.
  - Designed to serve a substantial governmental interest
  - Allows for reasonable alternative avenues of communication

Constraints on Zoning
Free Exercise of Religion

- First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."
- RLUIPA – Religious Land Use and Institutionalized Persons Act. 42 USC 2000cc *et seq.*
- Government cannot impose a "impose or implement a land use regulation in a manner that imposes a substantial burden" on religious exercise, unless it is to meet a "compelling governmental interest" and is "the least restrictive means" of furthering that interest.
- A City is strictly liable for any violation

Constraints on Zoning – Federal and State

- Federal
  - Various Shot clocks
  - Eligible Facilities Requests (See 14 USC 1555) - revisions to existing "wireless towers" or "base stations"
    - Deemed approved
  - "Small Wireless Facilities" rulings
    - "materially inhibit" standard
    - Not deemed approved
- State
  - "Deemed approved" remedies.
  - Public Utilities Code 7901, 7901.1

Constraints on Zoning

Other laws

- Sometimes zoning ordinances can be overruled.
- By a 2/3 vote school districts can overrule zoning regulations (except those relating to grading, streets, drainage). Gov't Code 53094, 53097.
- Generally, reservations are not subject to local regulation. Lands outside reservations may be regulated.

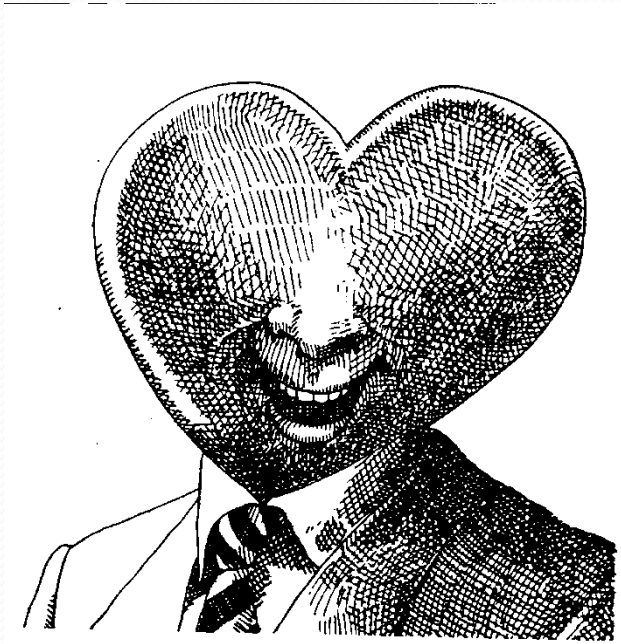
Interim Urgency Zoning Ordinances/Moratorium

- Government Code Section 65858 authorizes cities to adopt interim urgency ordinances to prevent *uses* of property that would violate a pending zoning change. This requires a 4/5 vote.
- This gains a city time to consider potential zoning ordinances.
- The initial urgency ordinance takes effect for only 45 days. It may be extended by 10 months 15 days and again by one year for a maximum effective period of 2 years
- Note: This does not cause land to be "taken." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency* 535 U.S. 302 (2002).

Legislative Actions vs. Quasi-Judicial (Administrative Actions)

- Legislative Actions:
  - General Plan
  - Specific Plan
  - Zone Change
  - Development Agreement
- Quasi-Judicial (Administrative)
  - Conditional Use Permits
  - Variances
  - Subdivisions

CUPs and Variances offer Options



- Variances and conditional use permits offer options that can lead to a happier relationship with a property owner

CUPs, Variances & Non-Conforming Uses. CUPs

- Variances and CUPs run with the land.
- These are quasi-judicial actions.

Variances

What are they?

- A variance is a permit issued to a landowner to construct a structure or engage in an activity not permitted in the zoning regulations applicable to his land
- Variances require a showing of some physical condition affecting the land that makes it impossible for the landowner to enjoy the same benefits allowed others whose property is similarly situated

Variances

When permitted.

- § 65906 provides rules for variances.
- Variances must be consistent with the General Plan and the zoning ordinance.
- Variances must be tailored to the unique circumstances of the property.
- No special privileges allowed.
- Cannot grant variance if it will adversely affect the interests of the public or the neighbors.

Conditional Use Permits

- Local Ordinances Establish rule for issuing conditional use permits (CUPs).
- CUPs add flexibility to established uses in particular zones
- CUPs allow greater governmental review over uses that may be controversial

Change can be difficult

- Sometimes people are reluctant to accept suggestions even from their neighbors

https://www.theonion.com/city-councilman-unearths-magical-zoning-amulet-1819567998

Due Process Clause

- Constitution prohibits the "taking" of "life, liberty and property" without due process of law.

Due Process

Public notice of hearing

- Public Notice of hearing
  - Written public notice to public/applicant
  - Continuing public hearing is acceptable, with time/date certain

Due Process

When is a Public Hearing Required

- Constitutional requirements
  - Often only a few days notice is legally sufficient
- Statutory Requirements
  - Sometimes state laws add process requirements (e.g., 10 day notice for zoning ordinances)
  - City processes may require additional notice

How to ensure "due process"

Fair Hearing – No Bias

- Non-biased decisionmaker
  - *Clark v. Hermosa Beach* – personal animosity prohibited.

"A portion of the trial focused on Benz's personal animosity toward the Clarks, which developed before his election to the Council. For example, according to Mr. Clark, it was fairly common for Benz to run by their windows and yell "loud, obnoxious noises in the morning." ... Mrs. Clark testified that on a Friday night, Benz "walked over to our house and urinated on the house and in the planter. ... [T]he trial court expressly found that Benz had engaged in such conduct."

How to ensure "due process"
Fair Hearing – No Pre-Judging

- No "pre-judging" the decision
  - Listen to *all* of the facts that are presented first, before making any comment.
  - All parties have opportunity to comment on accuracy of the facts as presented.
  - Do not make decisions based upon facts not presented at the hearing

How to ensure "due process"

Fair Hearing – No Pre-Judging

- Advocacy prohibited
  - Cannot assist opponents of project. *Petrovich Development Company, LLC v. City of Sacramento* (2020)
  - Cannot anonymously write newsletter opposed to project. *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 486.
- **But** Free speech rights to speak in general (not specific terms)
  - *City of Fairfield v. Superior Court* 14.Cal.3d 768 (1975).

How to ensure "due process" Hearing procedure (1 of 2)

- Recommended to conduct the "public hearing" as follows:
  - Allow recusals due to conflicts.
  - Hear verbal staff report
  - Questions (not comments) on staff report
  - Public comment portion of public hearing
    - *Ex Parte* disclosures
    - Allow applicant to speak
    - Allow public to speak
    - Allow applicant to speak again

How to ensure "due process" Hearing procedure (2 of 2)

- Deliberation
- Take action (approve, deny, continue).
  - Denial Action may require continuing the public hearing
  - Findings Must Be sufficient

When Findings are Sufficient

- State the exact finding
- Facts supporting the finding
  - Test is “substantial evidence” based on evidence in the “record”
  - More than a “scintilla” of evidence
  - Difference of opinion is permitted
- Logic connecting the facts to the finding

Subdivision Map Act

- Every City must have a subdivision ordinance. Government Code § 66411.
- That Ordinance must not violate the Subdivision Map Act. Gov't Code § 66410 *et seq*.

Maps must be consistent with General Plan

- All map approvals must be consistent with the General Plan & Specific Plan. *See Lesher Communications*.
- All map approvals must also be consistent with the applicable zoning regulations.

What is Subject to the Act?

- Gov't Code 66424 defines Subdivision as:
  - "[T]he division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or contiguous units for the purpose of sale, lease, or financing, whether immediate or future."

What Map is Required

- Subdivisions of less than five parcels generally require parcel maps, whereas divisions of 5 or more require tentative and final maps. (Gov't Code 66426).
- Lot line adjustments are exempt from the Map Act. Gov't Code § 66412(d).

Tentative Map Process

- Certain time limits apply
  - 30 days to make "completeness" determination
  - CEQA Time Frames (depends on document; EIR is 1 year)
  - Automatic approval *<u>might</u>* be required.
- Due Process, Notice and Hearings are required.
  - *Horn v. County of Ventura* 24 Cal.3d 605 (1979).

Vitality of Tentative Maps

- Tentative maps are valid for an initial period of 2 years plus up to 1 year permitted by local ordinance for a total of 3 years. (66452.6)
- Automatic extension of 3 years occurs upon filing of each phased map
- Discretionary extensions may be granted for up to 5 years
- Maps may be extended by enactment of a development moratorium, statutes, or litigation.
- Development Agreements self-expire.

Conditioning a Map Extension

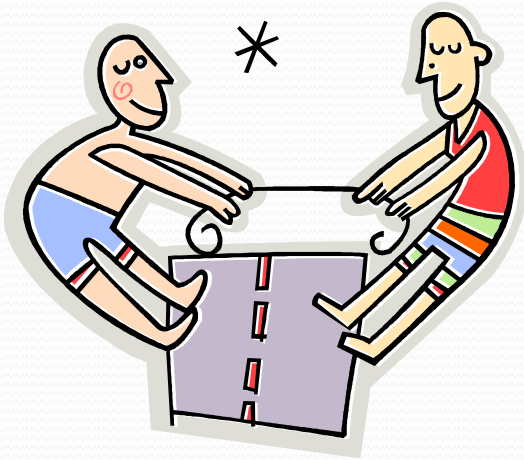
- Extension of a map is discretionary, but that discretion has been held to relate only to questions of time. *See El Patio v. Permanent Rent Control Bd.* 110 Cal.App.3d 915, 928 (1980).
- Once a tentative tract map is approved, the city may not impose substantive new conditions, although a developer may voluntarily agree to new conditions.

Final Maps

- Final map approval is a ministerial act. It confirms that the conditions imposed by the tentative tract map have been met. If those conditions have been met, the City Council must approve the final map.

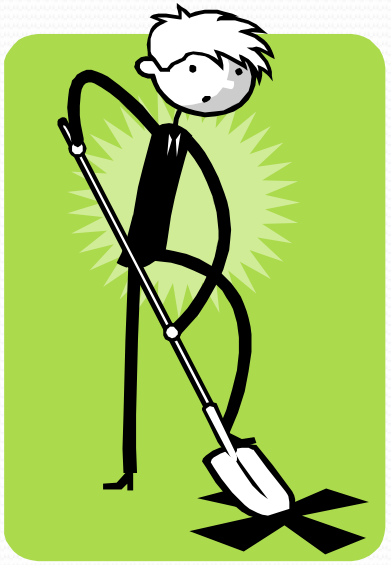
Vested Rights

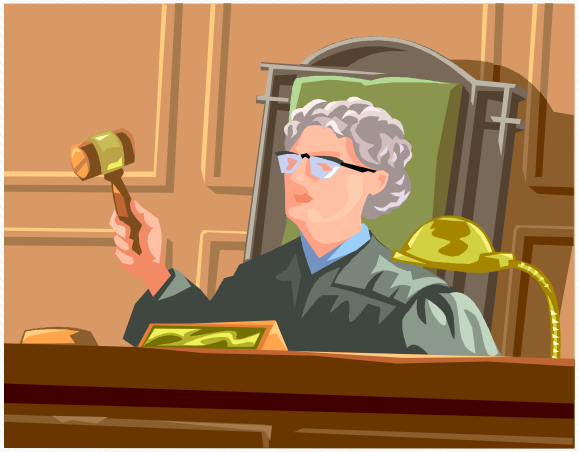
- A developer has no vested right to proceed with development of a project after approval of a final map or parcel map.
- Zoning can still be changed or other police power ordinances can be adopted after final map, CUP, PUD, zoning, rezoning, grading or other permits have been granted



Rights only vest with building permits

- A vested right to develop arises only after building permits have been issued and substantial work has been done in reliance on those permits. *Avco Community Developers, Inc. v. South Coastal Regional Commission* (1976)





Vesting Tentative Maps

- To resolve the issue of vesting rights, a procedure exists allowing a developer to obtain a vesting tentative tract map to assure that regulation enacted after tentative tract map approval will not apply. *See* 66498.1 *et seq*.
- Cities retain the right to impose additional health, safety and general welfare conditions on permits, approvals or extensions of vesting maps

Development Agreements

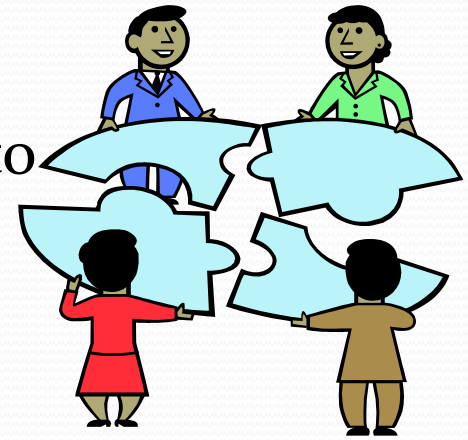
- Development Agreements allow cities and developers to create vested rights and to demand greater contributions to infrastructure needs
- For major developments, a Development Agreement can provide significant commitments to build bigger and better public improvements in exchange for a vesting agreement
- DA's are legislative acts.
  - Subject to referenda.
  - General Procedure: Planning Commission then to City Council.

CEQA Requires Mitigation

- In most cases, CEQA requires mitigation of environmental impacts of a project to less than a significant impact.
- City must issue a determination, based upon a sufficient amount of evidence in the record, whether the conditions are adequate to mitigate the impacts of the project.

When conditions may be imposed

- Whenever a city has the authority to approve or deny a project, it also has the authority to approve it with conditions
- Conditions must relate, however, to the actual impact of the development on the community
- There must be a nexus between the condition imposed and the problem to be solved.



Eminent Domain

- CCP 1240.030 lists the requirements for eminent domain.
- There must be a public interest involved.
- There must be the greatest public good and the least private injury.
- Eminent domain must be “necessary” to the project.
- CEQA applies. Environmental review is required. Generally, the project must be the least environmentally damaging alternative.

Regulatory Taking Rule

Penn Central v. City of New York

- 438 U.S. 104 (1978).
- All analyses of takings require an *ad hoc* decision making process. These factors include:
  - (1) "the economic impact of the regulation on the claimant," and especially "the extent to which the regulation has interfered with distinct investment backed expectations.
  - (2) the "character of the governmental action." Physical takings are most egregious.

Penn Central Factor #1 – Economic Impact on Claimant (Distinct Investment Backed Expectations)

- The question is how much *remains* usable, not how much was lost. *Keystone Bituminious Coal Ass'n v. DeBenedictis* 480 U.S. 470 (1987).
- Must show that the "reasonable investment backed expectations" were materially affected.
- *See Carson Harbor Village, 37 F.3d 468* (9th Cir 1994) – No standing to challenge rent control if the ordinance existed at the time of purchase – no investment backed expectations.

Penn Central Factor #2 – Character of the Governmental Action

- "A physical taking is more onerous than a regulatory taking." *Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987) 480 U.S. 470.
- Permanent barring of all construction is a taking. *Lucas v. South Carolina Coastal Council* 505 U.S. 1003 (1992).
- Landmark Preservation is permissible. (*Penn Central*)

Examples of "No Taking"

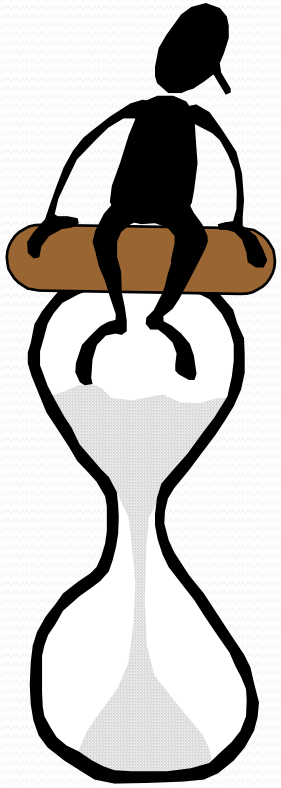
- *Long Beach Equities Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016 [substantially downzoning unannexed land is permissible].
- *Hotel & Motel Ass'n of Oakland* 344 F.3d 959 (9th Cir. 2003) [to avoid prostitution, city can require improvements or permit revocation].

Examples of "No Taking"

- Rent control did not constitute a taking because it "leaves the property owner some economically beneficial use of his property." *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal. 4th 761.
- *Landgate v. California Coastal Comm'n* 17 (1998) Cal.4th 1006. No taking for a regulatory delay.

Examples of "Taking"

- A total temporary inability to rebuild property – distinguished from a request for permits. *First English Church v. City of LA* (1987) 482 US 304
- The unreasonable delay was for the sole purpose of an intent to delay. *Ali v. City of LA* (1999) 77 Cal.App.4th 246.



Exactions

Nollan and Dolan

- An exaction is where the government permits a land use on the condition of a payment or dedication to the government.

2 Prongs To The "Exaction" Test

- The ad hoc determination is unconstitutional unless both:
- Nexus. There must be a "reasonable relationship" between the conditions imposed and the impacts to be mitigated. *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987).
- Rough Proportionality. Also, there must be "rough proportionality" between the exactions and the projected impact. *Dolan v. City of Tigard* 512 US 374 (1994).

Applicability of Exactions Test

- The *Nollan/Dolan* requirement applies only to ad hoc exactions – not generally applicable regulations.
  - *City of Monterey v. Del Monte Dunes.* (1999) 526 US 687.
  - *Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854 [$33,200 generally applicable art fee is permissible];
  - *Blue Jeans Equities W. v. SFO* (1992) 3 Cal.App.4th 164. [Generally applicable $5 per square foot exaction is permissible].

Prong #1 – Nexus

- There must be a nexus between the burdens created by the development and the government regulation. *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 [no nexus -- building height is unrelated to coastal access easement].
- Example of sufficient nexus: *Dolan*. [parking lots creating runoff is related to need for flood control].

Prong #1 – Examples of Insufficient Nexus

- *Rohn v. City of Visalia* 214 Cal.App.3d 1475. [street dedication requirement impermissible without a finding that the project would create more traffic]
- *Surfside Colony Ltd v. California Coastal Commission* 226 Cal.App.3d 1260 [generic erosion finding is insufficient to require an easement – it must be linked to the specific property].

Prong #2 – Rough Proportionality

- There must be "rough proportionality" between the impact and the amount of the exaction. *Dolan*.
- "No precise mathematical computation is required, but the City must make some sort of individualized determination . . ."

Examples of Insufficient "Rough Proportionality"

- *Dolan*. The amount of water runoff was insufficient to require dedicating land.
- *Bixel Assocs. v. City of Los Angeles* (1989) 216 Cal.App.3d 1208 [poor fee study].

Examples of Sufficient "Rough Proportionality"

- *Russ Bld. Partnership v. City and County of San Francisco* 199 Cal.App.3d 1496 (1987) [good fee study].

How Additional Exactions/Fees May Be Obtained

- Consider development agreements.
- Instigate generally applicable fees (complying with Propositions 13, 62 and 218, 26).
- If necessary, do exactions, but with sufficient nexus/fee studies.

Conclusion of Land Use Essentials

- Counties and cities have substantial power and authority to regulate land use and development within their boundaries.
- The rights of private landowners to use their land in the way they see fit must be balanced against the interests of the community and the legacy that will result from every land use decision made.