



# Land Use 101

A Field Guide

By: **Christine Dietrick, City Attorney**  
**Jon Ansolabehere, Assistant City Attorney**  
**City of San Luis Obispo**

## INTRODUCTION

This paper provides a general overview of the fundamental principles and legal concepts of Land Use and Planning Law. This paper will cover: the foundations of city land use authority through the constitutional police power; basis for challenging public agency decisions; the requirements for and relationships between general plans, specific plans, zoning and subdivision regulations and development agreements; basic environmental review requirements under CEQA; vested rights principles; an overview of design, conservation, and historic preservation tools; the general rules governing development fees, exactions and takings analyses; state and local affordable housing requirements; and the requirements for due process proceedings and administrative findings in the land use context. We hope you find the paper helpful and that it serves as an easy to use resource for municipal land use attorneys.

## THE POLICE POWER

Virtually every reference guide on Municipal Law 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. 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. This concept is critical because new practitioners often look to cite to a specific statute as the legal authority to adopt an ordinance when, in fact, a city’s broad land use authority flows directly from the constitution in the absence of a statutory prohibition or preemption of the city’s otherwise regulatory authority.

Land use and zoning regulations are derivative of a City’s general police power. *See DeVita v. County of Napa*, (1995) 9 Cal. 4<sup>th</sup> 763, 782; *see also Big Creek Lumber Co. v. City of Santa Cruz*, (2006) 38 Cal. 4<sup>th</sup> 1139, 1159. This power allows cities to establish land use and zoning laws which govern the development and use of the community. 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. 4<sup>th</sup> 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 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.4<sup>th</sup> 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 “duplicates, 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. 4<sup>th</sup> 230, 236.

**PRACTICE NOTE FOR CHARTER CITIES:** Charter cities enjoy additional constitutional freedom to govern their “municipal affairs” even if a conflict with State law may exist. See Article XI, section 5 of the California Constitution. There is no exact definition of the term “municipal affair” other than those areas expressly stated in section 5. Whether a subject area is a municipal affair (over which a charter city has sovereignty) or one of “statewide concern” (over which the Legislature has authority) is an issue for the courts that depends on the facts and circumstances of each case. Land use and zoning decisions however, have been consistently classified as a municipal

affair and charter cities are exempt from various provisions of the Planning and Zoning Law unless the city's charter indicates otherwise. See e.g. Gov. Code sections 65803, 65860(d); *City of Irvine v. Irvine Citizens Against Overdevelopment*, (1994) 25 Cal. App. 4th 868, 874.

**PRACTICE TIP:** Sometimes, the State or federal government preempts a particular area of law because of potential discrimination or disparate impact concerns. For example, California Health and Safety Code section 1566.3 preempts local zoning with respect to residential facilities serving six or fewer mentally disabled or handicapped persons. Practitioners should be cautious about land use decisions that potentially involve a protected class, not only from an equal protection basis, but from a possible preemption basis as well.

## **WRIT OF MANDATE; HOW CITY LAND USE DECISIONS ARE JUDGED**

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 agency is 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 agency's decision.

**PRACTICE TIP:** One way to explain the difference between a quasi-legislative decision and a quasi-judicial decision is to state something like: "This is a legislative decision. 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)."

### **Traditional Writ of Mandate – the Legislative or Quasi-legislative Hat.**

Traditional Mandamus is the form of an action to challenge a ministerial or quasi-legislative act of a city. *California Water Impact Network v Newhall County Water Dist.* (2008) 161 CA4th 1464, 1483. The statutory authority for this type of action is Code of Civil Procedure sections 1085 *et seq.* A ministerial duty is imposed on a person in public office who, because of that position, is obligated to perform in a legally prescribed manner when a given state of facts exists. *County of Los Angeles v. City of Los Angeles* (2013) 214 CA 4<sup>th</sup> 643, 653. A ministerial duty is one that does not involve any independent judgment or discretion. *Id* at 653. Traditional Mandamus is only available if the person claiming such relief has a "substantial beneficial interest" and "there is not a plain, speedy, and adequate remedy, in the ordinary course of law." Code of Civ. Proc. section 1086. A "substantial beneficial interest" means "a clear, present and beneficial right" to the performance of a ministerial duty. *California Ass'n of Med. Prods. Suppliers v. Maxwell-Jolly* (2011) 199 CA4th 286, 302. This is similar to a standing requirement. Even for a discretionary decision, Traditional Mandamus is available to compel the exercise of that discretion. *Daily Journal Corp. v. County of Los Angeles* (2009) 172 CA 4th 1550, 1555. In other words, Traditional Mandamus may be used to require someone to make a decision. It cannot be used to shape or

otherwise challenge the decision unless that decision constitutes an abuse of discretion. *Saleeby v. State Bar* (1985) 39 C3d 547, 562.

Traditional Mandamus is also available to challenge quasi-legislative acts. *California Farm Bureau Fed'n v. State Water Resources Constrol Bd.* (2011) 51 C4th 421, 428. Judicial review of quasi-legislative acts is usually limited to determining whether the act was arbitrary or capricious; the act was entirely lacking in evidentiary support; or the city failed to follow the procedures required by law. *SN Sands Corp. v. City and County of San Francisco* (2008) 167 CA 4<sup>th</sup> 185, 191.

**PRACTICE TIP:** The standard of review for Traditional Mandamus is low<sup>1</sup>, generally limited to a court's review of whether the city has abused its discretion in exercising its legislative authority, and a legislative body has fairly broad discretion in policy adoption subject to review. Still a record that reflects the agency's reasoning and the need and support for a given action will be a helpful defense no matter what the standard of review.

#### **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 4<sup>th</sup> 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 4<sup>th</sup> 56, 61.

---

<sup>1</sup> 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.

**PRACTICE TIP:** To the greatest extent possible, make sure your city’s resolutions and ordinances relating to entitlements include all necessary findings required by statute or ordinance to support an entitlement or approval and use your findings as an opportunity to “connect the dots” between each finding and the facts in the record supporting that finding. Though not specifically required in most cases, you may also want to consider including similar findings to support controversial legislative actions as a way to tell the City’s story. Although sometimes difficult, don’t let your resolutions become purely template documents with little connection to the underlying decision.

In contrast, under the Independent Judgment standard, the court affords no deference to the factual assessments of the administrative fact finder. *Welch v. State Teachers’ Retirement Sys*, (2012) 203 CA 4<sup>th</sup> 1, 5. In the land use context, when a development approval has been denied in the first instance, it is highly likely that the Substantial Evidence test will be applied. Even if a conditioned permit affects a “fundamental” right, the right may not be “vested” for Independent Judgment purposes. With a vested right, the substantial evidence test applies. *See Break-Zone Billiards v. City of Torrance* (2000) 81 CA 4<sup>th</sup> 1205. The Independent Judgment test usually applies in cases involving classic vested rights, such as the right to continued operation of one’s business. *Goat Hill Tavern, supra*.

## RELEVANT LAWS

Now that we have introduced to you the overarching principles of the police power and discussed the way land use decisions are challenged, there are several statutory schemes with which every land use practitioner should be familiar. These statutes regulate, in one way or another, virtually every land use and planning issue. They include:

1. Planning and Zoning Law, Government Code sections 65000 – 66035;
2. Subdivision Map Act, Government Code sections 66410 – 66499.58;
3. Environmental Quality Act (CEQA), Public Resources Code sections 21000 – 21189.3, 14 CCR 15000 – 15387<sup>2</sup>;
4. Ralph M. Brown Act, Government Code sections 54950 – 54963 – although the Brown Act is not specifically a “land use law,” every practitioner counseling any public agency must be intimately familiar with these open meeting laws;
5. Mitigation Fee Act, Government Code sections 66000 – 66008.

**PRACTICE TIP:** Create a “meeting folder,” including the main provisions of each statute referenced above. We typically have provisions from and/or reference guides on these provisions at every meeting involving a land use issue. American Council of Engineering Companies provides good reference guides that are compact, succinct and easy to transport to meetings.

---

<sup>2</sup> These are also known as the CEQA Guidelines.

## THE GENERAL PLAN, SPECIFIC PLANS AND ZONING REGULATIONS

### The General Plan.

California Planning and Zoning Law requires each city 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; and
7. Safety Element.

Gov. Code Section 65302 also sets forth particular requirements that must be included in each of the seven 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.

**PRACTICE TIP:** Be cognizant of the various components that must be included in each of the elements of the General Plan and make sure that policy discussion at either the Planning Commission or City Council respects State-mandated land use requirements such as affordable housing. These requirements can encounter tension with local objectives to limit growth or constrain development.

**PRACTICE NOTE:** For those public agencies that have an airport within or in immediate proximity to their jurisdiction, additional requirements and referrals for the review and comment by outside agencies are necessary to make sure that a General Plan and any updates are consistent with the jurisdiction’s Airport Land Use Plan. Pub. Util. Code section 21675.

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).

**PRACTICE TIP:** Most public agencies “group” General Plan amendments for various projects quarterly to comply with the amendment limitations of section 65358(b).

**PRACTICE TIP:** The social realities of development may outpace General Plan updates. Careful consideration must be given to make sure that enough flexibility is built into the General Plan to account for planning trends. For example, many cities across California are experiencing a social desire for multi-modal transportation design and development projects are being put forward that advance this method of design. Unfortunately, certain policies and planning frameworks may not be well suited to properly account for this change. For example, traffic impact analysis has historically been analyzed based on Level of Service and trip generation. New methodologies are being put forward, and in some ways mandated, to account for bimodal or multimodal transportation. Policies that too narrowly incorporate traditional or existing methodologies risk becoming quickly outdated, driving a need for frequent revision and undermining the utility of the General Plan as a forward-looking community vision document.

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).

**General Plan Consistency.**

General Plan consistency is looked at in two ways – (1) internal consistency; and (2) vertical consistency.

*Internal Consistency.*

Government Code section 65300.5 requires a General Plan to be “integrated and internally consistent and compatible state of policies...” In *Concerned Citizens of Calaveras County v. Board of Supervisors of Calaveras County*, (1985) 166 Cal.App. 3d 90, the County’s General Plan was found internally inconsistent where one portion of the circulation element indicated that roads were sufficient for projected traffic increases, while another section of the same element described increased traffic congestion as a result of continued subdivision development. However, in *Friends of Aviara v. City of Carlsbad*, (2012) 210 Cal. App. 4<sup>th</sup> 1103 the court found that Housing Element Law’s requirement that a municipality set forth the means by which it will “achieve consistency” with other elements of its general plan manifests a clear legislative preference that municipalities promptly adopt housing plans which meet their numerical housing obligations even at the cost of creating temporary inconsistency in general plans.

*Vertical Consistency.*

As noted above, a General Plan must not only be internally consistent but vertically consistent with other land use and development approvals such as Specific Plans and the agency's zoning and development regulations. *Citizens of Goleta Valley v. Board of Supervisors*, (1990) 52 Cal. 3d, 553, 570. Similar to the horizontal consistency requirements discussed above, the requirement to be vertically consistent has been codified in Government Code section 65860(a), which states,

County or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974. A zoning ordinance shall be consistent with a city or county general plan only if both of the following conditions are met: (1) The city or county has officially adopted such a plan. (2) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan.

In *Leshar Communications, Inc. v. City of Walnut Creek*, (1990) 52 Cal. 3d 531, 540, the California Supreme Court addressed the importance of vertical consistency in the context of a land use initiative measure. In that case, a "Traffic Control Initiative" was placed on the ballot to establish a building moratorium to combat traffic congestion. The measure passed. The problem the Court faced, however, was the fact that the measure created vertical inconsistency between Walnut Creek's General Plan and Zoning Regulations. After carefully looking at the language of the measure, the Court held that: (1) the initiative was not offered as, and could not be construed as, an amendment to the city's general plan, and (2) since the initiative was inconsistent with the general plan in effect when the initiative was adopted, the measure was invalid. In analyzing the effect of Government Code section 65860(c), the Court stated:

We cannot at once accept the function of a general plan as a "constitution," or perhaps more accurately a charter for future development, and the proposition that it can be amended without notice to the electorate that such amendment is the purpose of an initiative. Implied amendments or repeals by implication are disfavored in any case, and the doctrine may not be applied here. The Planning and Zoning Law itself precludes consideration of a zoning ordinance which conflicts with a general plan as a pro tanto repeal or implied amendment of the general plan. The general plan stands. A zoning ordinance that is inconsistent with the general plan is invalid when passed and one that was originally consistent but has become inconsistent must be brought into conformity with the general plan. The Planning and Zoning Law does not contemplate that general plans will be amended to conform to zoning ordinances. **The tail does not wag the dog.** The general plan is the charter to which the ordinance must conform. (Citations omitted) Id at 540-41. (emphasis added)

Subdivision (c) of section 65860 does not permit a court to rescue a zoning ordinance that is invalid *ab initio*. As its language makes clear, the subdivision applies only to zoning ordinances which were valid when enacted, but are not consistent with a subsequently enacted or amended general plan. It mandates that such ordinances be

conformed to the new general plan, but does not permit adoption of ordinances which are inconsistent with the general plan. The obvious purpose of subdivision (c) is to ensure an orderly process of bringing the regulatory law into conformity with a new or amended general plan, not to permit development that is inconsistent with that plan. *Id* at 545-46.

The *Leshar Communications* case illustrates the clear hierarchy between a city's General Plan and Zoning Regulations and the ultimate supremacy of the General Plan as the guiding document. While most land use approvals are not initiative-based and do not run into the same complications as that which occurred in the *Leshar* case, the case underscores the importance of General Plan consistency requirements and highlights the peril of failing to understand or respect those requirements. Depending on the structure of a city's municipal code, it will most often be the Planning Director, Planning Commission and City Council that will have the responsibility to determine whether a proposed land use development is consistent with its General Plan and virtually every planning consideration should begin with this threshold consistency consideration.

**PRACTICE TIP:** Although courts typically defer to a city's interpretation of its own general plan, you should not lean on deference alone in making sure you have a defensible record. Your land use approval records should reflect a consideration of the consistency requirements and include specific findings and evidence to support each of those findings, commensurate with the nature and scope of the approval being granted. Sometimes we see consistency findings that are more or less a regurgitation of the findings themselves, without any articulation of factual, project-specific support. Here is an example of how best to write such findings:

**POLICY:**

2.2.8 Natural Features: Residential developments should preserve and incorporate as amenities natural site features, such as land forms, views, creeks, wetlands, wildlife habitats, and plants.

**AVOID WRITING FINDINGS LIKE THIS:**

The project is consistent with Policy 2.2.8 of the General Plan because it preserves and incorporates natural features as amenities.

**WRITE FINDINGS LIKE THIS WHICH SPECIFICALLY INCLUDES SUPPORTING FACTS:**

The project is consistent with Policy 2.2.8 of the General Plan because it incorporates San Luis Creek into the common area and incorporates "greenbelt" designs into the project by permanently preserving open space buffers around the development site.

### **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.

**PRACTICE TIP:** Where a development application is covered by a Specific Plan, be cognizant of the continuing requirements of the Permit Streamlining Act especially for subsequent projects which are exempt from additional CEQA review, to avoid arguments that a subsequent project is deemed approved based on public review of the Specific Plan. See 81 Ops.Cal.Atty.Gen. 166 (1998).

### *So what is a Specific Plan and what is the point?*

For some, the concept of a Specific Plan is far less familiar and its purpose is not entirely clear. 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, regulation, 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.

**PRACTICE TIP:** Because a Development Agreement is a legislative act and participation is voluntary between the parties, no findings are required to grant or deny such an application, although making findings is usually well advised from a community transparency standpoint. Because these types of arrangements are time and resource intensive, they are often reserved for unique circumstances where there is a specific purpose and underlying need for such an arrangement beyond developer convenience. For example, Development Agreements may be appropriate when a city desires redevelopment of a particular area in a manner that requires up front infrastructure investments beyond a particular developer's "fair share" and a developer desires longer term vesting rights than could be achieved through standard development entitlements so that the developer can obtain financing, among other things.

## **VESTED RIGHTS**

Under the doctrine of vested rights, if a property owner has received a permit from a public agency to do something, such as a building permit or use permit, and then incurs substantial costs in reliance of that permit, then the property owner has the right to rely on that permit regardless of changes in the public agency's land use regulations. See *Avco Community Developers, Inc. v South Coast Reg'l Comm'n* (1976) 17 C3d 785, 793. In *Autopsy/Post Service, Inc. v. City of Los Angeles*, (2005) 129 Cal. App. 4<sup>th</sup> 521, the Court of Appeal held that a property owner did not have vested rights status despite the expenditure of approximately \$225,000 on the purchase of land and construction costs in reliance of the city's issuance of a building permit for an autopsy facility. Specifically, the Court found that substantial evidence supported the trial court's finding that the city's grant of a building permit and owner's reliance on it did not create a fundamental vested right to use building for performing autopsies -- a use prohibited by the zoning law. City staff were questioned and stated they had no knowledge, before the issuance of the permit, that the structure was intended for use as an autopsy facility, the plans approved made no reference to an autopsy facility, the building permit application did not reveal the corporate name as owner or tenant, instead naming an individual as the owner, and product approvals for autopsy tables were issued without reference to the applicant's name or the location where the product would be installed. *Id* at 527.

The Subdivision Map Act has a specific provision which allows a developer to obtain vested rights status with regard to an approved tentative map. Gov. Code section 66498.1(b). Essentially, by placing the word "vesting" on the draft tentative map, a developer obtains the vested right upon tentative map approval to proceed with development in substantial compliance with the ordinances, policies, and standards in place at the time the application for the map was complete (with some exceptions related to health, safety and welfare). Given the numerous statutory extensions (i.e. SB 1185, AB 333, AB 208 and AB 116) the vested status of a tentative map can be significant.

## **THE CALIFORNIA ENVIRONMENTAL QUALITY ACT**

The California Environmental Quality Act ("CEQA") is a comprehensive statutory scheme that requires cities and other public agencies to consider the environmental consequences of their actions before

approving plans or policies or otherwise committing to a course of action on a project. Typically, the city acts as the lead agency for CEQA environmental review for its projects or projects which fall within its jurisdiction. While CEQA has come to be used as a weapon against development in some contexts, it is fundamentally a process and tool to facilitate environmentally informed decision making. In the big picture, the CEQA process forces public agencies and decision makers to ask and evaluate the answers to the following questions:

1. What is the current environmental condition in which the subject property is situated?
2. What environmental impacts are likely to result from the public agencies' approval or decision on a proposed project?
3. Are these potential impacts significant?
4. Are there any alternatives to the proposed project or ways to lessen (mitigate) those impacts of the project so they are not significant?
5. Do those alternatives or mitigation measures render the project infeasible?
6. If so, does the public agency nonetheless want to approve a project with significant environmental impacts because its other benefits outweigh those unavoidable environmental impacts?

**PRACTICE TIP:** Many CEQA determinations are as much art as science and CEQA analysis is very fact dependent, so there won't always be clear and unequivocal statutory language or case law to "answer" your environmental analysis question. However, try to keep in mind that CEQA is supposed to be a tool to guide good decision making and shed light on environmental impacts, not a fog laden maze with traps for the unwary.

Take the time to ensure: 1) that your environmental review documents address the questions above; 2) that the questions have actually been answered; 3) that the answers are reasonable and based on the facts and realities of the proposed project; 4) that all reasonable mitigations have been explored and that those that are reasonable and feasible are required; and 5) that there are clearly understandable and supported reasons for rejecting mitigations and/or proceeding with a project despite significant impacts. The CEQA review process should be a reasoning process and the result of the analysis should, therefore, be reasonable. If you are not convinced that is the case, it is unlikely a court will be. Keep these fundamental concepts in mind during any CEQA analysis as the underlying purpose and intent of CEQA will shed good light on the situation at hand, especially if your situation does not have any good case law or other authority to fall back on.

### **Step 1: Is this a project under CEQA?**

CEQA defines a project as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: (a) An activity directly undertaken by any public agency; (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies; or (c) An activity that involves the issuance to a

person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.” Pub. Res. Code section 21065; CEQA Guidelines section 15378(a). A “project” under CEQA includes not only the more recognizable activities such as public works projects, grading, or other construction activities but the enactment and amendment of zoning ordinances, annexation, the adoption or amendment of a general plan or even the approval of a contract which has the ability to cause a direct physical change in the environment.

## **Step 2: Timing of CEQA compliance.**

CEQA compliance must occur before the public agency approves a project. The term “approves” however, does not mean final approval. Instead, “approval” refers to “the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person.” Or for private projects, “approval occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project. CEQA Guidelines section 15352. The operative phrase in section 15352(a) is “commits the agency to a definite course of action” which can sometimes occur unexpectedly. For example, in *Save Tara v. City of West Hollywood (Waset, Inc.)* (2008) 45 Cal 4th 116, the California Supreme Court disapproved a line of cases and held that a lead agency has no discretion to define “approval” so as to make its commitment to a project before preparation of an EIR. *Id* at 194. Specifically, in that case, the city and two developers entered into an agreement for the development of affordable housing on city-owned land. The agreement was “subject to environmental review,” among other things. The court determined that, in light of all the surrounding circumstances, the city’s agreement with the developer and commitments made foreclosed potential mitigation measures or alternatives that would normally be considered part of the CEQA process. *Id* at 138 - 142. In other words, the city went “too far” and committed itself to a definite course of action notwithstanding the CEQA compliance condition it placed in the agreement with the property owner.

**PRACTICE TIP:** If a project is in the design phase or if a significant amount of money is being requested (or both), make sure that your city is not committing to a definite course of action without complying with CEQA. Ask yourself: by this approval, are we foreclosing any alternatives or mitigation measures?

**Step 3. Is the project exempt?**

If an action or approval is a project under CEQA, it may be statutorily or categorically exempt from CEQA review or may nevertheless fall under the “general rule” or “common sense” exemption. The list of statutory and categorical exemptions can be found under CEQA Guidelines sections 15260 – 15285 and 15300 – 15333, respectively. Some of the more commonly referenced exemptions that we see are:

<u>Statutory Exemptions</u>	<u>Categorical Exemptions</u>
15262 – Feasibility and Planning Studies 15268 – Ministerial Projects 15269 – Emergency Projects 15280 – Lower Income Housing Projects	15301 – Existing Facilities 15302 – Replacement or Reconstruction 15304 – Minor Alternations to Land Use 15305 – Minor Alternations to Land Use Limitations 15306 – Information Collection 15307 – Actions to Protect Natural Resources 15308 – Actions to protect the Environment 15315 – Minor Land Divisions 15317 – Open Space Contracts or Easements 15321 – Enforcement Activities 15332 – In-Fill Development Projects

**PRACTICE TIP:** Note that even if a project is categorically exempt, it may not be exempt if the exception in section 15300.2 applies which states, among other things that “A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances” (CEQA Guidelines section 15300.2(c)) or “...may cause a substantial adverse change in the significance of a historic resource” (CEQA Guidelines section 15300.2(f)). See also (CEQA Guidelines section 15300.2(a), (b), (d) and (e)). Compare with CEQA Guidelines section 15260, which states that the *statutory* exemptions “are complete exemptions from CEQA.” CEQA Guidelines section 15260.

The CEQA Guidelines provide an additional exemption which is commonly referred to as the “catch-all” or “common sense” exemption. Specifically, the CEQA Guidelines state: “[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.”

**PRACTICE TIP:** If staff is claiming an exemption on the “catch-all” rule under CEQA Guidelines section 15061(b)(3), ask staff what evidence they have to make this determination. The safest route is to prepare an Initial Study. Also make sure that staff is not overusing this exemption especially if a project is otherwise statutorily or categorically exempt from CEQA review, which will provide a more specific and supportable action.

**PRACTICE TIP:** If a project is utilizing a statutory or categorical exemption specify the precise facts which make the project exempt.

**Step 4: It's a CEQA Project. Now what do I do? Study, study, study.**

*The Initial Study.* An Initial Study is a preliminary environmental analysis for a project to determine if an Environmental Impact Report (EIR) or a Negative Declaration (ND) is needed. Note that if an EIR will clearly be needed for a project, an Initial Study is not technically required. CEQA Guidelines section 15063(a). However, an Initial Study may nevertheless be a good idea to help frame the scope of the EIR (see section below regarding scoping). The Initial Study must include a description of the project, environmental setting, potential environmental impacts, and mitigation measures for any significant environmental effects. CEQA Guidelines Section 15063(d). In describing the project, the Initial Study must look at "...all phases of project planning, implementation and operation..." CEQA Guidelines Section 15063(a).

**PRACTICE TIP:** Although there is no specific format required for an Initial Study, we recommend that public agencies use, at least as the baseline template, the Initial Study found in Appendix G of the CEQA Guidelines.

If the results of an Initial Study indicate that a project may have a potentially significant impact, an EIR must be prepared.

*So do I need to prepare an EIR? The "Fair Argument" Standard.*

CEQA's fair argument standard is the critical tipping point for many projects and is one of the areas of CEQA that generates a significant amount of litigation and controversy. EIRs are expensive (often well in excess of \$100,000) and take a significant amount of time to prepare, circulate and approve. As a result, an EIR can effectively kill a project, which is why the fair argument standard is welcomed by project opponents in CEQA litigation. The fair argument standard is set forth in Public Resources Code section 21080(d):

"If there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment, an environmental impact report shall be prepared." Pub. Res. Code section 21080(d)

"Substantial evidence" means "...fact, a reasonable assumption based upon fact, or expert opinion supported by fact. Pub. Res. Code section 21080(e)(1). "Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social economic impacts that do not contribute to, or are not caused by, physical impacts on the environment." The meaning of substantial evidence is probably one of the most critical aspects of any challenge to a ND of environmental impact or Mitigated Negative Declaration of environmental impact (MND). As with any controversial project, there are usually some project opponents who simply

voice their opposition to the project and who cite CEQA and raise various environmental concerns. However, their statements may not truly rise to the level of constituting “substantial evidence” within the meaning of CEQA.

**PRACTICE TIP:** Know verbatim the fair argument standard and be able to articulate the tests for any agency body considering an environmental determination. Inevitably, every land use practitioner will come across the situation where a Planning Commissioner asks: “Does this ND or MND violate CEQA?” We recommend that you respond by explaining the fair argument standard and what constitutes “substantial evidence,” and advise the body that it must determine whether that standard has been met in light of the underlying record of information before it. Conclusory statements or speculation do not generally constitute substantial evidence. For example, just because a concerned neighbor says it will be “too noisy” and “will have a significant impact on the environment” doesn’t necessarily make it so. However, the statement of several neighbors supported by a noise expert hired by the neighbors who has produced a study suggesting that the city’s methodology is flawed and it has underestimated the noise impacts should warrant further consideration.

The difficulty in analyzing what constitutes substantial evidence, even where “expert testimony” is invoked, was well illustrated in *Apartment Association of Greater Los Angeles v. City of Los Angeles*, (2001) 90 Cal. App. 4<sup>th</sup> 1162. In that case, the City of Los Angeles adopted a housing code enforcement program. Opponents retained an expert who stated in the administrative record that the enforcement program would require landlords to undertake construction or repair activities “in potentially tens of thousands of apartment and other buildings...use hazardous chemicals to control pests and rodents, and potentially disturb hazardous building materials...” The court found that such expert testimony did not constitute substantial evidence because such opinion was not expert opinion supported by fact and that such statements were simply “argument, speculation, unsubstantiated opinion or narrative.” *Id* at 1176.

**PRACTICE TIP:** In reviewing whether a statement constitutes substantial evidence, be mindful of words such as “may”, “could”, “potentially”, “might” and other similar adjectives and to what facts in the record are asserted to support the statements. Whether such statements constitute “substantial evidence” under CEQA will turn on the nexus between such language and whether the data supports the conclusion.

The fair argument standard should be understood in light of CEQA’s purpose (informed decision making) and preference for environmental protection, which manifests in this standard that created a “low threshold” for requiring an EIR. See *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal. App. 3d 748, 754; *Citizens of Lake Murray Area Assn. v. City Council* (1982) 129 Cal. App. 3d 436, 440; *Mejia v. City of Los Angeles*, (2005) 130 Cal. App. 4th 322, 332. This “low threshold” is sometimes difficult to accept for both city staff and developers considering the substantial costs and delays associated with the EIR process. However, keep in mind that nowhere in CEQA does the cost or delay play into the decision as to whether to prepare an EIR.

*The ND, MND and NOD (A game of Acronym Soup).*

If the Initial Study indicates that the project will not have a significant effect on the environment, then the city can prepare a ND. Pub. Res. Code section 21080(c); CEQA Guidelines section 15070 *et seq.* If the Initial Study indicates that there could be significant impacts, but those impacts can be mitigated to a point of insignificance, then a 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 the fair argument standard discussed above is introduced into the record. See Pub. Res. Code section 21064.5; CEQA Guidelines section 15070(b)(2).

**PRACTICE TIP:** One recurring problem with MNDs are “deferred” mitigation measures which are generally impermissible under CEQA. For example, in *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, the court determined that a mitigation measure that required a developer to “prepare a hydrological study evaluating the project’s potential environmental effects” violated CEQA. That said, requirements for future implementation measures are allowed, provided there are adequate performance standards, timing of implementation, and contingency plans in place. CEQA Guidelines 15121.6.4(a). In short, a future requirement to study a potential environmental impact is not advisable, but a future requirement for specific mitigation of an identified impact is.

**PRACTICE TIP:** Land use approvals are often challenged either on the fair argument standard or under administrative writ of mandate grounds. Keep in mind who the real party in interest is. Although it is the city’s decision that is subject to challenge, it is the property owner’s entitlement that is at stake. Be sure to include in the conditions of approval for every discretionary permit a well-drafted indemnification, hold harmless and duty to defend provision to protect the city from challenge. If a lawsuit is filed, the City will be able to utilize this condition and tender the defense costs to the real party in interest. For subdivision projects, the Subdivision Map Act provides certain limitations on a property owner’s duty to indemnify – see Government Code section 66474.9.

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).

**PRACTICE TIP:** Unless the project is time critical, the best practice is to use the State Clearinghouse to distribute environmental documentation.

**PRACTICE NOTE:** In addition to the lead agency designation, CEQA designates certain other public agencies involved in a project approval as “responsible agencies” and “trustee agencies.” Although participation by each type of agency is important, it is imperative that any trustee agency (e.g., California Fish and Wildlife) be provided notice before the city (as the lead agency) takes action on the project. Otherwise, the city may face a failure to follow procedure argument or the trustee agency can even “take over” the CEQA review.

Once a notice of intention is provided and the ND or MND is approved, the city needs to record a Notice of Determination (NOD). CEQA Guidelines section 15075.

**PRACTICE TIP:** Record the NOD *as soon as possible* in order to trigger the 30-day statute of limitations on the approval of the ND or MND.

#### **STEP 5: The EIR.**

There are several types of EIRs and which type is appropriate depends on the project being approved. For example, a General Plan update would not utilize a “project EIR”; instead, a General Plan update would utilize a Master EIR. Pub. Res. Code sections 21156 – 21158.5.

#### *Scoping.*

One of the most important initial steps of the EIR process is determining the scope of an EIR. CEQA Guidelines section 15083. This process is essentially a consultation between the city, the developer, responsible and trustee agencies, and sometimes the public, to decide what environmental issues an EIR will focus on. The result of the scoping process is usually two-fold – it (hopefully) removes unnecessary analysis of non-issues and focuses attention on real or legitimately perceived real issues.

**PRACTICE NOTE:** Scoping meetings are not always helpful. However, for projects where the concerns focus on specific and fairly narrow potentially significant environmental impacts, a scoping meeting can be very helpful in tailoring the EIR process to a limited set of issues.

#### *Notice of Preparation.*

Once an EIR is “scoped”, a City must prepare a Notice of Preparation (NOP) and send it to all responsible agencies, trustee agencies, Office of Planning and Research and any federal agencies who are providing funding or have any part of the approval process for the project. Pub. Res. Code section 21080.4; CEQA Guidelines section 15082(a). In addition, the NOP must be sent to any interested person who has requested written notice. Pub. Res. Code section 21092.2. If an agency chooses to respond, the response must contain specific details regarding how, in terms of scope and content, the EIR should treat environmental information related to the responsible or trustee agency’s area of statutory responsibility and must identify the “significant environmental issues and reasonable alternatives and mitigation measures that the responsible agency or trustee agency, or [OPR] will need to have explored in the draft EIR.” CEQA Guidelines section 15082(b). If you did your homework in the scoping meeting, responses to the NOP should come as no surprise.

### *Preparing the Draft EIR.*

An environmental consultant will almost always prepare the EIR. Although the project applicant pays for the costs for preparation of an EIR, the EIR must “be prepared directly by, or under contract” with the lead agency. Pub. Res. Code section 21082.1(a); CEQA Guidelines section 15084(a).

The EIR must include the following components:

1. Table of Contents or Index; (CEQA Guidelines section 15122)
2. Summary of the proposed actions and their consequences; (CEQA Guidelines section 15123)
3. Project description; (CEQA Guidelines section 15124)
4. Environmental Setting; (CEQA Guidelines section 15125)
5. Evaluation of Environmental Impacts; (CEQA Guidelines section 15126)
6. Water supply assessment –for certain large projects (although there may be some movement in this area of the law and more projects may become subject to this analysis; (Pub. Res. Code section 21151.9; Water Code section 10911(b))
7. Significant Environmental Effects of the Proposed Project; (CEQA Guidelines section 15126.2)
8. Effects Not Found to Be Significant; (CEQA Guidelines section 15128)
9. Mitigation Measures; (CEQA Guidelines section 15126.4)
10. Cumulative Impacts; (CEQA Guidelines section 15130)

**PRACTICE NOTE:** One interesting concept that has arisen is “urban decay”. CEQA Guidelines section 15131 states that economic or social information may be included in an EIR or may be presented in whatever form the agency desires. Subsection (a) states “[e]conomic or social effects of a project shall not be treated as significant effects on the environment.” Subsection (b) however states “[e]conomic or social effects of a project may be used to determine the significance of physical changes caused by the project.” One situation where this analysis is commonly utilized is with projects involving big box retailers, most notably Wal-Mart. See *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App. 4<sup>th</sup> 1184. The idea behind the analysis is that there will be a physical manifestation of a project’s potential socioeconomic impact. In *Bakersfield Citizens for Local Control*, there were two proposed Wal-Mart projects less than 5 miles from each other. Economic experts warned that such land use decisions could cause a chain reaction of store closures and long term vacancies, thus destroying existing neighborhoods and leaving decaying shells in their wake.

11. Project Alternatives; (CEQA Guidelines section 15130);
12. Inconsistencies with Applicable Plans; (CEQA Guidelines section 15125(d))
13. Discussion on Growth Inducing Impacts; (CEQA Guidelines section 15126.2(d)) and
14. Organizations and Persons Consulted. (CEQA Guidelines section 15129).

The most robust and time consuming discussions usually revolve around items 4, 5, 7, 8, 9, and 10.

### *Recirculation Issues.*

One issue that often comes up is if an EIR needs to be recirculated because the document has been changed or new issues have arisen during the public review process. You may find yourself on the receiving end of the following question: “Do we need to recirculate?” The effect of recirculation should not be taken lightly – it costs money, delays final approval of the environmental document, and opens the document up to additional comments and criticisms. On the other hand, failure to recirculate when necessary exposes the document and CEQA process to challenge.

Recirculation is required in four instances:

1. When there is new information that shows a new, substantial environmental impact;
2. When new information shows a feasible alternative or mitigation measure that clearly would lessen environmental impacts, but it is not adopted;
3. When new information shows a substantial increase in the severity of an environmental impact;  
or
4. When the draft EIR was so fundamentally inadequate and conclusory that meaningful public review and comment were precluded.  
(CEQA Guidelines section 15088.5(a))

**PRACTICE TIP:** When in doubt, recirculate the EIR.

### *Approval of an EIR.*

After the final EIR is complete, the city must make certain findings before it can certify and approve the EIR. Specifically, the city must find that:

1. Changes or alterations have been required in, or incorporated into, the project that mitigate or avoid the significant effects on the environment;
2. Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency; or
3. Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the EIR.

Pub. Res. Code section 21081; CEQA Guidelines sections 15091 – 15094. Item 3 is generally referred to as a “statement of overriding conditions.”

As with a ND or MND, the city should file a NOD in order to trigger the 30-day statute of limitations on the certification of the EIR. Pub. Res. Code sections 21152(a), (c); CEQA Guidelines section 15075(e).

## TAKINGS, DEVELOPMENT FEES AND EXACTIONS

### Takings.

Takings analysis begins with the constitutional premise that no private property shall be taken for public use without the payment of just compensation. U.S. Const. 5<sup>th</sup> Amend.; see also Cal. Const. art. I section 19. A taking can be in the form of a physical taking (i.e. physical invasion of property), *Loretto v. Teleprompter Manhattan CATV Corporation*, (1982) 458 U.S. 419 (State law required property owners to allow cable company to install cable facilities on apartment buildings); denials of all economically beneficial use, *Lucas v. South Carolina Coastal Council*, (1992) 505 U.S. 1003 (regulation barring development on beachfront lots was a taking); partial regulatory takings, *Penn Central Transportation Company v. City of New York*, (1978) 438 U.S. 104 (historic preservation ordinance was not a taking because it did not have any economic impact on the station or interfere with the developer's investment backed expectations as the railroad could continue to earn a reasonable rate of return; and land use exactions, *Nollan v. California Coastal Commission*, (1987) 483 U.S. 825 and *Dolan v. City of Tigard*, (1994) 512 U.S. 374. These last two cases are commonly referred to as *Nollan/Dolan* and were seminal in establishing the appropriate takings analysis for land use exactions. This paper will focus on this last takings analysis.

### ***Nollan/Dolan* and the Test of Reasonableness/Nexus Requirement.**

In California, property development is considered a privilege and not a right. *Associated Home Builders, Inc. v. City of Walnut Creek*, (1971) 4 Cal. 3d 633, 638. However, the *Nollan* and *Dolan* cases have limited the extent in which public agencies may condition development. Specifically, cities may impose conditions on development so long as the conditions are reasonable and there exists a sufficient nexus between the conditions imposed and the projected burden of the proposed development. *Nollan*, 483 U.S. at 834-835. Further, cities must prove that such conditions have a "rough proportionality" to the development's impact. *Dolan*, 512 U.S. at 391. In order to understand what is meant by these limitations, it is helpful to know the development and conditions in the underlying cases.

In *Nollan*, a property owner wanted to build a house within the Coastal Zone. The Coastal Commission imposed a condition on the permit, requiring dedication of a lateral access easement along the property owner's private beach. The rationale for the condition was to assist the public in viewing the beach and in overcoming a perceived "psychological barrier" to using the beach. *Id.* at 435. The *Nollan* court determined that there was no nexus between the identified impact of the project (obstruction of ocean view by the new house) and the easement condition (physical access across the beach).

Similarly, in *Bowman v. California Coastal Commission*, (2014) 230 Cal. App. 4th 1146, the Court of Appeal found no nexus between a request for a permit to rehabilitate a house and a condition imposed by the Coastal Commission for the property owner to dedicate to the public a lateral easement for public access along the shoreline of his property. Specifically, the Court stated: "We agree with appellants that under *Nollan* and *Dolan*, the easement lacks an "essential nexus" between the exaction and the construction. The work occurs within the existing "footprint" of the property." *Id.* at 1151.

In *Dolan*, a property owner applied for a permit to further develop his property. His plans were to increase the size of his plumbing store (by about double) and pave his 39-car parking lot. The permit was approved by the City of Tigard with the condition that the property owner dedicate a portion of his property within the 100 year flood plain for improvement of a drainage facility, and dedicate a 15-foot strip of land adjacent to the flood plain for a pedestrian/bicycle path. The city made numerous findings to support the nexus requirement. The Supreme Court held that even though a nexus between the project and the conditions existed, the degree of the takings was not roughly proportional to the development's impact. The City of Tigard asked for too much in relation to the impact that the development presented.

**PRACTICE TIP:** The *Nollan/Dolan* analysis can be difficult for city staff and the legislative bodies to understand and implement. If the question is asked if a particular condition constitutes a taking under *Nollan/Dolan*, we recommend that you walk the individual or individuals considering the issue through the following questions so the individual or individuals can articulate a response:

1. What is the impact that this project has on this issue?
2. Does the condition serve a legitimate public interest?
3. What is the relationship between the particular impact of the development and the condition? How do they relate to one another?
4. Are the impact and the condition on par with one another?

#### **Development Fees (AB 1600).**

AB 1600, otherwise known as the Mitigation Fee Act, was based on the rationale articulated in *Nollan* and *Dolan*, and sets forth certain requirements that must be followed by a California city in establishing or imposing a development impact fee. The Act is codified at Government Code section 66000 – 66025, and requires, among other things, a city to identify the purpose of the fee, identify how it will be used, demonstrate that a reasonable relationship exists between the purpose of the fee and the type of development project on which the fee is imposed, and demonstrate that there is a reasonable relationship between the need for the service or public facility and the type of development project on which the fee is imposed. Gov. Code section 66001(a)-(b).

**PRACTICE TIP:** For the most part, a city's AB 1600 fees will be established pursuant to fee study. However, it is critical that the public agency also perform the annual and five-year reporting requirements required by Gov. Code sections 66006 and 66001(d), respectively. Failure to report or make the necessary findings could render AB 1600 accounts subject to refund.

Note that these fees are different than other statutorily authorized fees, such as Quimby fees.

## **AFFORDABLE HOUSING**

As noted above, State law requires each city to provide affordable housing to all economic segments. See e.g., Gov. Code section 65008. This paper will briefly touch on some of the various ways affordable housing programs are implemented by the State and at the local level.

**PRACTICE NOTE:** Remember that to further the development of affordable housing within the State, CEQA *statutorily* exempts certain affordable housing projects from environmental review.

### **Anti-NIMBY laws.**

Government Code section 65589.5 requires a city to make certain findings before it can reject or impose certain conditions on an affordable housing project, including emergency shelters, transitional housing and supportive housing. This statute effectively “flips” the development process and creates a presumption in favor of affordable housing that puts the onus on the city to find that the project would have a specific adverse impact on the health, safety and welfare and that there is no feasible method to mitigate or avoid the impact other than by disapproving the project or imposing certain conditions. Gov. Code section 65589.5(j).

### **Second Units, AKA “Granny Units”.**

Government Code sections 65852.1 – 65852.2 sets forth the State’s second units law. The purpose of the law was to promote the development of secondary units and to make sure that any requirements imposed by cities are not so onerous as to unreasonably restrict the creation of such units. Govt. Code section 65852.150. One important component of this statutory scheme is Government Code section 65852.2(a)(b)(3), which states:

This subdivision establishes the maximum standards that local agencies shall use to evaluate proposed second units on lots zoned for residential use which contain an existing single-family dwelling. No additional standards, other than those provided in this subdivision or subdivision (a), shall be utilized or imposed, except that a local agency may require an applicant for a permit issued pursuant to this subdivision to be an owner-occupant.

As a result, most cities’ secondary unit regulations mimic the maximum standards set forth in Government Code section 65852.2(a).

### **Inclusionary Housing.**

Many public agencies have enacted inclusionary housing ordinances which either encourage or require developers to include a certain percentage of affordable housing units within projects. Many inclusionary housing regulations include the ability to pay an “in-lieu” fee to account for fractional affordable housing requirements or as an alternative to a set-aside requirement. Although inclusionary housing programs have, for the most part, withstood judicial scrutiny (see *BIA of Central California v. City of Patterson*, (2009)171 Cal. App. 4<sup>th</sup> 886; *Home Builders Assoc.’n of Northern California v. City of*

*Napa*, (2001) 90 Cal. App. 4<sup>th</sup> 188), fairly recent case law has held that the Costa-Hawkins Act has preempted the field of rental restrictions. *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*, (2009) 175 Cal. App. 4<sup>th</sup> 1396.

In *Sterling Park v. City of Palo Alto* (2013) 57 Cal.4<sup>th</sup> 1193, the California Supreme Court held that in-lieu fees were subject to challenge as exactions subject to the statute of limitations under the Mitigation Fee Act, disapproving *Trinity Park, L.P. v. City of Sunnyvale*, (2011) 193 Cal.App.4th 1014, which held the Mitigation Fee Act did not apply to a below market housing condition and that the Subdivision Map Act's 90-day statute of limitations applied. It also held that since Palo Alto required the developer to grant the city an option to purchase the units, the option was an interest in real property that could qualify as an 'exaction' as well and that the developer could use the Mitigation Fee Act's protest procedures to challenge the option as well. The Court did not reach the issue of whether a pure price control without an option would qualify as an 'exaction.'

**PRACTICE NOTE:** The California Supreme Court, in *California Building Industry Association v. City of San Jose*, (2013) 307 P. 3d 878, will decide whether inclusionary housing requirements need to be justified by a nexus study or can be adopted based on the police power. Given the uncertainty of the standard of review, many practitioners in this area are advising that it seems prudent to complete a nexus study so that the program can continue in the event of an adverse ruling.

#### **Density Bonus Law.**

Government Code sections 65915 – 65918 sets forth the State's Density Bonus Law, which, among other things, provides developers with a density bonus or other development-related concessions if a developer agrees to construct certain housing developments that provide either affordable housing or other similar housing. Gov. Code section 65915(a). This law specifically applies to charter cities. Gov. Code section 65918. The amount of the density bonus and the number of concessions depends on the percentage of units set aside for affordable housing.

**PRACTICE NOTE:** Government Code section 65915 does not set forth the type of concessions that are available under this law and instead states the applicant may submit a proposal for a specific concession and the city shall grant the concession requested unless it makes a written finding based on substantial evidence that the concession, among other things, would have a specific adverse impact (as defined in Government Code section 65589.5(d)(2)) upon public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households.

**PRACTICE NOTE:** It is important to understand that the State's Density Bonus Law is mandatory and that if a developer proposes a project that qualifies for a density bonus and/or

concession(s), the city and reviewing bodies have little ability to otherwise modify the impacts of those bonuses or concession(s).

**PRACTICE NOTE:** There still appear to be differing practices as to whether a developer's inclusionary housing triggers the density bonuses or concessions under Govt. Code sections 65915 *et seq.* If there is still any ambiguity in your city's ordinances, we recommend the city include inclusionary housing within density bonus calculations. See *Latinos Unidos Del Valle De Napa y Solano v. County of Napa*, (2013) 217 Cal. App. 4<sup>th</sup> 1160 (density bonus is mandatory even if the project only includes affordable housing "involuntarily" to comply with a local ordinance).

## **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.

One issue to be aware of is a due process claim arising out of the competing roles of the city attorney as advisor and advocate, for instance the attorney who advised the city on the underlying land use application also advises the body which acts as a later decision-maker in the administrative hearing on the application. See *Nightlife Partners, Ltd. V. City of Beverly Hills* (2003) 108 CA 4th 81 (city violated due process rights of the land use applicant when the lawyer advising the administrative hearing officer on appeal had also advised the City on the original denial of the permit being appealed); *Quintero v City of Santa Ana* (2003) 114 CA4th 810 (due process violated where Board's regular legal advisor appeared before the Board as an advocate, even where separate counsel to the Board was provided); see also *Howitt v Superior Court* (1992) 3 CA4th 1575 (county counsel's office must establish that its attorney who advised county's appeals board was completely segregated from attorney representing the department that terminated the employee, or else county counsel would be disqualified from advising county appeals board).

This line of cases obviously presents some difficult logistical problems for small, in-house municipal legal offices, which require careful thought and planning, and often the retention of outside counsel, where attorneys work closely with staff, as well as acting as advisors to planning commissions and city councils.

## **HISTORIC PRESERVATION**

For many communities such as the City of San Luis Obispo, historic preservation is critical. At the federal level, there is the National Historic Preservation Act that sets forth federal authority for federal historic preservations programs. California has the California Register of Historic Resources, Pub. Res. Code sections 5020 *et seq.*, which is an authoritative listing and guide for cities to implement their respective historic preservation ordinances. There are four different criteria for designation, which are as follows:

1. The resource is associated with events that have made a significant contribution to the broad patterns of local or regional history or the cultural heritage of California or the United States;
2. The resource is associated with the lives of persons important to local, California or national history;
3. The resource embodies the distinctive characteristics of a type, period, region or method of construction or represents the work of a master or possesses high artistic values; or
4. The resource has yielded, or has the potential to yield, information important to the prehistory or history of the local area, California or the nation.

Note that the resource is not always a structure but can be something as simple as a sign, wall or trail. The typical effects of historic designation are protection of the resource from alteration, neglect or impact, the ability to obtain building code alternatives, and potentially property tax reduction under the Mills Act.

## **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. Attached to this paper is a brief “snapshot” of our “go-to” reference guides and websites, which we use in this important subject area.



# “Go-To” Reference Materials

These are the books, websites and other reference materials we have sitting in our office or on our “favorites” tab on our computers. We thought it might be helpful to share with you the references we use, while keeping in mind that everyone works within a limited budget.

Here is what our office looks like in regards to land use materials (in no particular order):

- Copy of our City’s General Plan, Specific Plan, Zoning Regulations, Community Design Guidelines
- Remy, Thomas, Moose and Manley’s Guide to CEQA
- Bass, Bogdan and Rivasplata’s CEQA Deskbook
- Curtin’s California Land Use and Planning Law
- California Municipal Law Handbook, CEB
- ACEC Planning and Zoning
- Michael Durkee’s Map Act Navigator
- CA League of Cities’: Proposition 218 Implementation Guide, Providing Conflict of Interest Advice, The People’s Business, Open and Public IV
- Abbott, Detwiler, Jacobson, Sohagi and Steiner’s Exactions and Impact Fees in California
- CALTrans’s Standard Specifications
- Miller & Starr, California Real Estate (All of ‘em)
- CEB California Civil Writ Practice
- CEB; California Land Use Practice
- CEB California Practice Under CEQA
- Link to the League of California Cities’ City Attorney’s e-Group Listserv
- Link to California Code through [www.legalinfo.legislature.ca.gov](http://www.legalinfo.legislature.ca.gov);
- Link to our City’s Westlaw account.

We use these reference materials on nearly a weekly basis and could not imagine operating without them. Of course, there are numerous other reference guides and materials that are tremendously helpful but the above list just happens to be the ones that we have accumulated over the years and try to keep current.