City Attorneys Department
League of California Cities
Annual Conference
October 1997

Daniel J. Curtin, Jr.
Attorney at Law

PHILOSOPHY OF LAND USE REGULATIONS: SETTING THE STAGE

I. OVERVIEW

A. Police Power. (V-1 to V-7)[1]

[1] *California Municipal Law Handbook*, 1997 Edition, League of California Cities. All references after the main headings are to this excellent book.

The legal basis for all land use regulation is the police power of the city[1] to protect the public health, safety and welfare of its residents. *Berman v. Parker*, 348 U.S. 26 (1954). A land use regulation lies within the police power if it is reasonably related to the public welfare. *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582 (1976).

As Justice William O. Douglas, speaking for the United States Supreme Court, stated:

> The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. 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.

Berman, 348 U.S. at 33.

This statement is recognized by California courts "as a correct description of the authority of a state or city to enact legislation under the police power." *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 861 (1980).

The police power, even though established by common law, is set forth in the California Constitution, which confers on cities the power to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws." Cal. Const., art. XI, § 7.

The California Supreme Court has stated:

> Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. [Citation omitted.] Apart from this limitation, the 'police power [of a county or city] under this provision . . . is as broad as the police power exercisable by the Legislature itself.'

Candid Enterprises, Inc. v. Grossmont Union High School Dist., 39 Cal. 3d 878, 885 (1985).

Thus, a city's police power may only be exercised within its city limits and may not be exercised in conflict with state and federal statutory and constitutional law.

> 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.

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

The police power is broad enough to encompass local concerns such as all types of land use regulations including aesthetic control, sign control, growth control, need for child care facilities, rent control, residential rental replacement, and the like. A city need not go to the State Legislature every time it has a problem; more than likely, the city has that legislative power in its own hands through the exercise of its police power.

---

[1] When the word "city" is used, it also refers to "county;" "city council" also refers to "board of supervisors."

In exercising the police power, the city must act within all applicable statutory provisions so there will be no "conflict with general laws." The city's actions must also meet constitutional principles of due process, that is, they must be reasonable, non-discriminatory and not arbitrary or capricious. *See*, e.g., *G & D Holland Construction Co. v. City of Marysville*, 12 Cal. App. 3d 989 (1970). Of course, a city cannot act where the State has completely occupied the subject matter, that is, where is has preempted the field. *See*, e.g., *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 483-85 (1984).

b. Judicial Review.

Provided the police power regulation is procedurally fair and rationally related to a legitimate legislative goal, the court will not substitute its wisdom for that of the local legislators. "The wisdom of the legislation is not at issue in analyzing its constitutionality." *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 108 (1984).

C. Sufficiency of Standards -- Vagueness and Uncertainty.

A land use ordinance including a zoning ordinance cannot be so vague or uncertain that a person of common intelligence and understanding must guess as to its meaning. If this occurs, due process of law could be violated. *People v. Gates*, 41 Cal. App. 3d 590 (1974); *see also Associated Home Builders*, 18 Cal. 3d at 596 (upholding the general terms of a growth control initiative against a vagueness challenge). However, the California courts have stated that a substantial amount of vagueness is permitted in land use ordinances.

The leading case on this issue is *Novi v. City of Pacifica*, where the court held that the City's land use ordinance, which precluded uses that were detrimental to the "general welfare" and precluded developments that were "monotonous" in design and external appearance, was not unconstitutionally vague, either facially or as applied. *Novi v. City of Pacifica*, 169 Cal. App. 3d 678 (1985). Novi was a developer who sought to construct a 48-unit condominium project. The project was turned down because it would have violated the City's anti-monotony ordinance. Novi argued that the City's ordinance lacked objective criteria for reviewing the element of monotony, and that such criteria are required for aesthetic land use regulations. The court disagreed, stating:

> In fact, a substantial amount of vagueness is permitted in California zoning ordinances: "[I]n California, the most general zoning standards are usually deemed sufficient. 'The standard is sufficient if the administrative body is required to make its decision in accord with the general health, safety, and welfare standard.' (Cal. Zoning Practice (Cont. Ed. Bar), page 147 . . . 'California courts permit vague standards because they are sensitive to the need of government in large urban areas to delegate broad discretionary power to administrative bodies if the community's zoning business is to be done without paralyzing the legislative process.') (Cal. Zoning Practice (Cont. Ed. Bar), *supra*, at 148.)" *People v. Gates*, *supra* [citation omitted].
>
> Here, subdivision (g) of section 9-4.3204 requires "variety in the design of the structure and grounds to avoid monotony in the external appearance." The legislative intent is obvious: The Pacifica city council wishes to avoid "ticky-tacky" development of the sort described by songwriter Malvina Reynolds in the song, "Little Boxes." No further objective criteria are required, just as none are required under the general welfare ordinance. Subdivision (g) is sufficiently specific under the California rule permitting local legislative bodies to adopt ordinances delegating broad discretionary power to administrative bodies.

Novi, 169 Cal. App. 3d at 682.

The appellate court in relying on *Novi*, held that a view protection ordinance was not unconstitutionally vague and stated that such an ordinance supported a building permit denial. *Ross v. City of Rolling Hills Estates*, 192 Cal. App. 3d 370 (1987); *see also Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App. 3d 1579 (1991); *City of Los Altos v. Barnes*, 3 Cal. App. 4th 1193 (1992) (upholding specific land use ordinances as not being unconstitutionally vague); *Briggs v. City of Rolling Hills Estate*, 40 Cal. App. 4th 637 (1995) (upholding a "Neighborhood Compatibility" ordinance protecting privacy as not being invalid on its face as grounds of vagueness).

D. Statutory Framework.

The following state laws outline the legal framework within which a city must exercise many of its land use functions.

1. **General Plan - Government Code[2] § 65300 *et seq*.**
2. Specific Plan - § 65450 ***et seq*.**
3. Zoning - § 65800 ***et seq*.**
4. Subdivision Map Act - § 66410 ***et seq*.**
5. California Environmental Quality Act ("CEQA") Public Resources Code § 21000 ***et seq*.**
6. Other laws and statutes
   a. Ralph M. Brown Act. § 54950 ***et seq*. The Open Meeting Act.**
   b. Development agreements § 65864 ***et seq*.**
   c. Permit Streamlining Act. § 65920 ***et seq*.**

II. TAKINGS FROM *PENNSYLVANIA COAL* TO PRESENT: THE EVOLUTION OF PROPERTY AND GOVERNMENT RIGHTS (V-76 TO V-86)

II. TAKINGS FROM *PENNSYLVANIA COAL* TO PRESENT: THE EVOLUTION OF PROPERTY AND GOVERNMENT RIGHTS (V-76 TO V-86)

A. In General.

Cities have the power to regulate the use of private property, pursuant to their inherent police powers, to prevent public harm and to achieve public benefits. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Berman v. Parker*, 348 U.S. 26 (1954); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). In exceptional cases, cities can even be entitled to destroy or prohibit the use of private property. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

B. Limitations: Fifth Amendment; Due Process.

A city's ability to enact land-use regulations under its police power is limited by the takings clause of the Fifth Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment. The takings clause protects private property rights against governmental action by providing that private property shall not be taken by the government for public use without compensating the owner of the property. *See,* Cal. Const., Art. 1, § 19 for a similar provision. Private property need not be physically seized to constitute a taking; regulation of property, such as land-use regulation, can constitute a taking if it is determined to be excessive.

Also, the due process clauses of the state and federal Constitutions guarantee property owners "due process of law" when the government deprives them of property. (Cal. Const. Art. 1, §§ 7, 15; U.S. Const., 14th Amendment, § 1.) For a discussion of these two independent constitutional protections, see *Kavanau v. Santa Monica Rent Control Board*, 97 Daily Journal D.A.R. 11069, 11071 (August 27, 1997).

C. Federal Constitutional Standard: Takings.

The determination of whether a land use regulation or decision amounts to a taking prohibited by the Fifth Amendment to the United States Constitution has been a difficult task for the courts. The United States Supreme Court itself has candidly admitted that it has never been able to develop a "'set formula' to determine when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few person." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Instead, the high court has observed that "whether a particular restriction will be rendered invalid by the government's failure to pay for any

---

[2] All section references are to the California Government Code unless otherwise indicated.

losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Id*. The question of whether a regulation has gone too far and a taking has occurred has been an ad hoc, factual inquiry. *Id*. The highest court again reiterated this point in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Just recently the California Supreme Court made reference to the U.S. Supreme Court's struggle in articulating a standard for when a regulation "goes too far" and effects a taking. *Kavanau, supra* at 11072

D. Early Efforts: Takings.

1. *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

As Justice Holmes wrote in a 1922 opinion of the United States Supreme Court, "[t]he general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking;" however, he did not tell us how far was too far.

2. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

In *Penn Central*, the court considered the constitutionality of New York City's Landmarks Preservation Law as it had been applied to the Grand Central Terminal of Penn Central Transportation Company.

The Supreme Court affirmed the lower court's ruling that the application of the Landmarks Law did not effect a "taking," holding that "[t]he restrictions imposed are substantially related to the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties. *Penn Central, Id*. at 138.

The Court did not establish a test for determining when a taking has occurred; in fact it admitted that takings analysis proceeds on an essentially "ad hoc" basis. The Court did, however, identify "several factors" that have particular significance. The first factor identified by the Court was the "economic impact of the regulation on the claimant" and, in particular, "the extent to which the regulation has interfered with distinct investment-backed expectations." *Id*. at 124. The second factor was the "character of the governmental action." "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government [citation omitted] than when the interference arises through a public program's adjustment of the benefits and burdens of economic life to promote the common good." *Id*. at 24. This is the distinction drawn between "physical invasion" and "regulatory" takings.

E. *Agins v. City of Tiburon*, 447 U.S. 255 (1979) -- Two-Prong Test.

In the seminal case of *Agins*, the Court was more specific in its articulation of the proper test for a taking. In the *Agins* dispute, the City of Tiburon adopted ordinances modifying existing zoning ordinances (which allowed five units to be built without further land use approval) and placed Agins' property in a more restrictive Residential Planned Development and Open Space Zone. The modified zoning permitted single family dwellings, accessory buildings and open space uses. Density restrictions would have permitted the Agins to build, with city approval, between one and five single family residences on their 5-acre tract, but the Agins never sought approval for development of their land under the zoning ordinance, deciding instead to file suit in state court alleging a taking of their property, contending that the city had "completely destroyed the value of [Agins'] property for any purpose or use whatsoever . . . ." The United States Supreme Court, affirming the decision of the California Supreme Court, held that the ordinances did not constitute a taking. The Court stated that the application of a general zoning law to a particular property becomes a taking if the ordinance either (1) "does not substantially advance legitimate state interests" or (2) "denies an owner economically viable use of his land. The *Agins* Court held that the City of Tiburon's open space ordinances substantially advanced a legitimate governmental goal, that of discouraging premature and unnecessary conversion of open-space land to urban uses and was a proper exercise of the City's police power to protect its residents from the effects of urbanization.

However, in *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th 1060 (1995), the appellate court held that the test is not an either/or, but both prongs of *Agins* must be found for a taking; the statement was recently severely criticized in *152 Valpariso Associated v. City of Cotati*, 56 Cal. App. 4th 378 (1997), stating that the test is clearly an either/or one.

F. First Prong of the Test: Regulations Must Substantially Advance a Legitimate State (Governmental) Interest.

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), the Court acknowledged that the two *Agins'* tests "have become integral parts of our takings analysis." The Court stated that even among those regulations which "substantially advance" a "legitimate state interest," some state interests are more "legitimate" than others; i.e., the more defensible the state's interest is in regulating property, the more likely the regulation will be upheld. The Court cited *Pennsylvania Coal* as recognizing that "the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required."

The Court in *Nollan, infra,* also expanded on the first part of the test. In considering the constitutionality of a California Coastal Commission development permit condition requiring dedication of a lateral access easement along the Nollans' private beach, the Court reiterated the two-part test, finding that the lack of "nexus" between the burdens imposed by the Nollans' development and the condition caused the dedication requirement to fail the first part of the test, i.e., the dedication did not "substantially advance" a "legitimate state interest."

The *Nollan* decision did not address the second part of the takings test; it merely embellished the first part of the test by adding a focus on "nexus" and struck down the permit condition since there was no nexus. The *Nollan* court not discuss the required degree of connection between the exaction imposed and the projected impacts of the proposed development. This was done by the U.S. Supreme Court in 1994 in *Dolan v. City of Tigard,* 512 U.S. 374 (1994). In *Dolan*, the U.S. Supreme Court said it granted certiorari to resolve this question of degree left open by its decision in *Nollan*. In this landmark case in a 5 to 4 decision, the U.S. Supreme Court held for the first time that, in making an adjudicative decision, a city must demonstrate a "required reasonable relationship" between the conditions to be imposed on a development permit and the development's impact.

The Court stated that in evaluating a takings claim under the Fifth Amendment, it must first determine whether an "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. If it finds that a nexus exists, the court must then decide the required degree of connection between the exactions and the projected impact of the proposed development. The Court noted that it was not required to address this question in *Nollan, supra,* because no nexus existed between the condition to dedicate a lateral public easement and a legitimate governmental interest -- diminishing the blockage of the view of the ocean caused by construction of the larger house. The U.S. Supreme Court stated that the absence of a nexus left the California Coastal Commission in the position of simply trying to obtain an easement "through gimmickry," which converted a valid regulation of land use into an "out-and-out plan of extortion."

The Court then coined the term "rough proportionality" as being one which best summarizes what it holds to be required by the Fifth Amendment. The Court then stated no precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

With that in mind, the Supreme Court reviewed the exactions (the two required dedications relating to flood plain and bicycle path easement dedications) and found that the city did not meet its burden to demonstrate the required relationship.

G. Second Prong of the Test: An Owner May Not be Denied Economically Valuable Use of His Land.

Government regulations, by their nature, have an impact on property values. Mere fluctuations in value are "incidents of ownership" and "cannot be considered a 'taking' in a constitutional sense." *Danforth v. United States*, 308 U.S. 271, 285 (1939). The United States Supreme Court has continually "recognized, in a wide variety of contexts, that the government may execute laws or programs that adversely affect recognized economic values." *Penn Central, supra*, at 124. *Also, see*, *Long Beach Equities, Inc. V. County of Ventura,* 231 Cal. App. 3d 1016, 1030 (1991) (a land use regulation is constitutional on its face if it is substantially related to the public welfare, even where a substantial diminution in value is alleged). *See, William C. Haas & Co. V. City and County of San Francisco*, 605 F. 2d 1117 (9th Cir. 1979) (where the court upheld the validity of a zoning ordinance that reduced the value of private property by more than 90 percent, from approximately $2,000,000 to $100,000). On the other hand, such a down zoning will almost surely frustrate the investment-backed expectations of any recent purchaser of the property and probably result in a loss on the investment.

In *Keystone Coal, supra*, the Court looked to the value that was left in the owner's property, not the value that was taken, to determine whether the owners had been deprived of "economically viable use."

However, when the owner of real property is called upon to sacrifice all economically beneficial uses in the name of the common good, i.e., to leave his property economically idle, there is a taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Here, the U.S. Supreme Court dealt with a landowner's taking challenge to a South Carolina regulation barring development of two beachfront lots in a developed subdivision. The state findings stated that new construction in the coastal zone threatened a valuable public resource. The court suggested Lucas was entitled to compensation but sent this case back to the state court for a final determination of the issue. On remand, the state court did find a taking and ordered payment to Lucas.

In summary, the U.S. Supreme Court has identified two discrete categories of regulatory action that constitute a taking. First, a permanent, physical invasion of property no matter how slight effects a taking requiring compensation. *Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982). Second, a regulation that deprives a property owner of "all economically beneficial or productive use of land" effects a taking requiring just compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). *Also see, Kavanau, supra* at 11072.

Until the California Supreme Court decision in *Kavanau, supra*, the California courts have primarily been declaring that to meet the second test of *Agins*, the challenged regulations must serve to deprive the landowner of *all*, or *substantially all*, of the use of the land. *See, Terminals Equipment Co. v. City and County of San Francisco*, 221 Cal. App. 3d 234 (1990); *Moore v. City of Costa Mesa*, 886 F. 2d 260 (9th Cir. 1989); *Long Beach Equities, Inc. v. County of Ventura, supra*.

Then, on August 27, 1997, the California Supreme Court handed down the *Kavanau* decision. In this case, the court considered the inverse condemnation claim of Earl W. Kavanau, a property owner who prevailed in a prior action against the Santa Monica Rent Control Board on the ground that the rent control regulations of the City of Santa Monica violated his right to due process of law. The Court of Appeal had affirmed the trial court's dismissal order rejecting Kavanau's inverse condemnation claim because he had not lost "all use of his property." The California Supreme Court disagreed that a property owner must lose all use of his property in order to have a viable inverse condemnation claim. Nevertheless, the Court concluded that Kavanau was not entitled to maintain an inverse condemnation action because he may obtain a full and adequate remedy for any interim loss flowing from the due process violation through an adjustment of future rents under the rent regulation process.

In *Kavanau*, the Court stated that "a regulation, however, may effect a taking though it does not involve a physical invasion *and leaves the property owner some economically beneficial use of his property*." In *Lucas, supra,* the high court expressly rejected the assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner merely lost the benefit of the Court's categorical formulation. The Court noted that it held in *Agins v. City of Tiburon*, 24 Cal. 3d 266, 277 (1979), "that a zoning ordinance may be unconstitutional . . . only when its effect is to deprive the landowner of substantially all reasonably use of his property." But the regulation at issue in *Agins, supra,* left the plaintiffs a substantial use of their five-acre property, including building as many as five single-family homes on it. The Court said that in order to uphold the regulation, it did not need to limit the protections of the takings clause to total deprivations of "substantially all reasonable use" of property because the case before it did not even approach a total deprivation. On this point, the Court said: "Thus, our holding was dictum. Moreover, *Lucas* makes clear we misinterpreted the federal Constitution, and nothing in our opinion in *Agins v. City of Tiburon* suggests we were interpreting the state takings clause more narrowly than the federal clause. Finally, even if we did intend to interpret the state right more narrowly than the federal right, the federal Constitution would nevertheless apply here to protect Kavanau."

Then, the Court laid down the following principle: When a regulation does not result in a physical invasion and does not deprive the property owner of all economic use of the property, a reviewing court must evaluate the regulation in light of the "factors" the high court discussed in *Penn Central, supra,* and subsequent cases. *Penn Central* emphasized three factors in particular: (1) "[t]he economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action." *Kavanau, supra* at 11072.

Also, the Court noted that subsequent cases, as well as a close reading of *Penn Central*, indicated other relevant factors: (1) whether the regulation "interfere[s] with interest that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes;" (2) whether the regulation affects the existing or traditional use of the property and thus interferes with the property owner's "primary expectation;" (3) "the nature of the State's interest in the regulation" and, particularly, whether the regulation is "reasonably necessary to the effectuation of a substantial public purpose;" (4) whether the property owner's holding is limited to the specific interest the regulation abrogates or is broader; (5) whether the government is acquiring "resources to permit or facilitate uniquely public functions," such as government's "entrepreneurial operations;" (6) whether the regulation "permit[s the property owner] . . . to profit [and] . . . to obtain a 'reasonable return' on . . . investment;" (7) whether the regulation provides the property owner benefits or rights that "mitigate whatever financial burdens the law has imposed;" (8) whether the regulation "prevent[s] the best use of [the] land;" (9) whether the regulation "extinguish[es] a fundamental attribute of ownership;" and (10) whether the government is demanding the property as a condition for the granting of a permit. *Kavanau, supra,* at 11072.

The Court then noted that this list was not a comprehensive enumeration of all the factors that might be relevant to a takings claim and it did not propose a single analytical method for these claims. Rather, the Court simply noted factors that the U.S. Supreme Court had found relevant in particular cases. On this point, the Court concluded "Thus, instead of applying these factors mechanically, checking them off as it proceeds, a court should apply them as appropriate to the facts of the case it is considering." *Kavanau, supra,* at 11073.

H. Remedies for Excessive Land Use Regulation.

1. Damages: *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)

The United States Supreme Court, reversing the California rule, held that the "just compensation clause" of the Fifth Amendment, as applied to the States under the Fourteenth Amendment, mandates a landowner may recover damages if the land use restriction constitutes a "taking" of its property. Prior to *First English*, California courts had held that one who claims unreasonable governmental regulation was not entitled to a damages award and could only seek a court order invalidating the regulation. *Agins v. City of Tiburon*, 24 Cal. 3d 266 (1979). In overturning the California rule, the Court held that the U.S. Constitution requires compensation for any "temporary taking" that may occur while the regulation is in effect prior to the Court's taking determination.

On remand, the California Court of Appeal in *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App. 3d 1353 (1989), thus held no taking had occurred for two independent and separately sufficient reasons:

- **The interim ordinance in question substantially advanced the preeminent state interest in public safety and did not deny the church all use of its property; and**
- The interim ordinance only imposed a reasonable moratorium for a reasonable period of time while the County conducted a study and determined what uses, if any, were compatible with public safety.

In summary, the *First English* case focused solely on the constitutional remedy required once it had been determined that a "taking" had occurred. If there is no taking, *First English* does not come into play. *Tahoe Regional Planning Agency v. King*, 233 Cal. App. 3d 1365 (1991).

2. Due process remedy.

In *Kavanau, supra*, the Court set forth a "due process" remedy:

> . . . we hold that a remedy for the due process violation, if available and adequate, obviates a finding of a taking. In a variety of contexts, the Supreme Court has recognized that the benefits a property owner receives in conjunction with a regulation may offset the burdens and thus satisfy the takings clause. . . . More explicitly,

the court has long held that the special benefits conferred on a property owner's remaining property as a direct result of a taking may constitute just compensation.

Kavanau, supra, at 11075.

The Court then stated that when a due process violation is the sole basis of an asserted taking, a remedy for the due process violation, if available and adequate, is a valuable benefit that satisfies the takings clause. *Id.* at 11075.

3. Trend.

Two 1994 California cases present a good overview of the law of land use taking and indicate a trend back to invalidation rather than compensation as the appropriate remedy especially effecting cities. These cases are *Hensler v. City of Glendale*, 8 Cal. 4th 1 (1994) and *Carson Harbor Village Ltd., v. City of Carson City*, 37 F. 3d 468 (9th Cir. 1994). Both cases show a judicial tendency to invalidate a regulation or give the city the option to rescind the regulation rather than awarding monetary damages against the local government which does not have the resources to pay the damages as would be the case with the federal government. However, even if the city withdraws the regulation, the property owner may have a right to just compensation for the temporary taking while the regulation is in effect. *First English, supra* at 321; *Kavanau, supra* at 11072.

I. Ripeness Issue: When is a "Taking" Claim Ripe for Judicial Determination?

The courts have been very strict with property owners in determining when they can bring an action in court. They require a property owner, first, to receive a final determination from the city and, second, to seek compensation through the procedures the state has provided before a claim of taking is ripe. For a good discussion of these two requirements, *see Levald Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993). This rule generally does not apply when the property owner seeks a declaration that a statute or ordinance controlling development is facially unconstitutional as applied to all property governed and not to a particular parcel of land. *Rezai v. City of Tustin*, 26 Cal. App. 4th 443, 448 (1994). The distinction between facial challenges to regulation and "as applied" challenges is important. A facial challenge presents an issue of law and case-specific factual inquiry is not required; however, neither type of challenge can avoid analysis of both prongs of the *Agins* test. *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th 1060, 1076 (1995).

As to the first requirement for ripeness, the general rule is that a constitutional challenge to a land use regulation is ripe when the landowner has received the agency's " 'final, definitive position regarding how it will apply the regulations at issue to the particular land in question.' " *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986) (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)). In *Williamson County* and *MacDonald*, the Court required the submission and resubmission of development plans or the application for variances before the taking claim would be "ripe" for adjudication unless such a request would be futile.

In *MacDonald*, the Court held that a rejection of one development application (in that case, a subdivision map) did not constitute a taking. The Court reasoned that the County had not reached a final decision as to how the County's land use regulations would be applied and therefore the Court could not determine whether a taking had occurred. In a later case, the Ninth Circuit Court noted: "The Supreme Court has erected imposing barriers in *MacDonald, Sommer & Frates*, 477 U.S. 340 (1986), and *Williamson County*, 473 U.S. 172 (1985), to guard against the federal courts becoming the Grand Mufti of local zoning boards." *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989).

A line of California cases have followed and clarified the final decision rule articulated in *Williamson County* and *MacDonald*. In *Kinzli,* the property owner's takings claim was dismissed by the federal appellate court because there had been no attempts to secure a development permit prior to bringing suit. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir. 1987). Relying on *Williamson County*, the Ninth Circuit Court ruled that an inverse condemnation cause of action is not ripe until the landowner has secured a "final decision" on a permit application and on a request for a variance. This prerequisite could be waived only upon a showing that such requests would be "futile." *Kinzli* held that futility involves the showing that it is "'clear beyond peradventure that excessive delay in such a final determination [would cause] the present destruction of the property's beneficial use.'" *Id.* at 1454. The *Kinzli* court suggested another test for futility, " 'the submission of a plan for development is futile if a sufficient number of prior applications have been rejected by the planning

authority.' " *Id.* at 1454. The *Kinzli* rule simply holds "that a property owner must make use of the development and variance application procedures even when the statute deprives the property owner of all beneficial uses and the application will therefore be denied....[N]o claim will be heard on the merits until rejection of development and variance applications." *Zilber v. Town of Moraga*, 692 F. Supp. 1195, 1199 (N.D. Cal. 1988).

The *Hoehne* court held that:

> The [U.S.] Supreme Court has recognized that land use planning is not an all-or-nothing proposition. A government entity is not required to permit a landowner to develop property to the full extent it may desire. Denial of the intensive development desired by a landowner does not preclude less intensive, but still valuable development. *MacDonald*, *supra*, 477 U.S. at 353. "The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other." *Id*. at 350. The property owner, therefore, has a high burden of proving that a final decision has been reached by the agency before it may seek compensatory or injunctive relief in federal court on federal constitutional grounds.

Hoehne, 870 F.2d at 532-33.

Nevertheless, in *Hoehne* the court held that plaintiffs were not required to apply for a variance, rezoning, conditional use permit or other similar variations because, given the facts of the case, the variance procedures were not available and other applications would have been futile.

> [I]n actually rezoning the tract to further restrict development, the supervisors themselves sent a clear, and we believe, final signal announcing their views as to the acceptable use of the property. [I]t would have been futile for the Hoehnes to seek a General Plan amendment in their favor, because the supervisors had amended the General Plan in a manner clearly and unambiguously adverse to the application of the landowners.

Id. at 534.

A final decision by a city requires at least: "(1) a rejected development plan and (2) a denial of a variance or other similar land use relief such as a conditional use permit." *Kinzli*, 818 F.2d at 1454; *Long Beach Equities,* 231 Cal. App. 3d at 1016. The courts have stated that the term "variance" is not definitive or talismanic; if other types of permits or actions are available and could provide similar relief, they should be sought, although there is no clear authority requiring applications for legislative changes (e.g., rezonings or general plan amendments) in order to ripen a claim.

A 1996 decision of the Ninth Circuit Court of Appeals followed the final decision rule. In *Sinclair*, a property owner claimed that a Community Plan adopted under the County General Plan resulted in a taking because it reduced the number of houses that potentially would be allowed on the property from 300 to 70. *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996). The court held that the claim was not ripe because Sinclair had not yet filed an application to develop the property.

On the issue of final decision, this year the United States Supreme Court unanimously ruled that a landowner seeking to bring a regulatory takings claim need not attempt to sell her transferable development rights ("TDRs") before filing suit. *Suitum v. Tahoe Regional Planning Agency*, 117 S.Ct. 1659 (1997).

Many local governments have adopted TDR policies to preclude claims that restrictions on development "take" the value of property without just compensation. TDRs provide a means by which a property's development rights may be sold or transferred for use on a different property. A landowner who acquires TDRs may be allowed to conduct additional floor area, dwelling units or parking spaces.

Although it determined that a failure to market TDRs presented no bar to a takings suit, the Court did not resolve an important related issue. Should a court view the availability of TDRs as indicating that a development denial falls short of a taking? Or should a court, after finding that denial of development causes a taking, treat TDRs as compensation?

The distinction is significant because, if TDRs are viewed as compensation, they must be worth the full amount that was taken by the development denial.

Bernadine Suitum owned an undeveloped lot in Nevada in a "Stream Environment Zone" designated by the Tahoe Regional Planning Agency. In 1987, the Agency adopted a regional plan that barred development of property in Stream Environment zones but gave owners of such property extra TDRs. The Agency later denied Suitum permission to build a house.

Suitum sued, alleging an unconstitutional taking of her property. The Ninth Circuit Court of Appeals affirmed a trial court ruling that Suitum's action was not "ripe" for judicial consideration. The appellate court held that, because Suitum had not attempted to sell her TRDs, it was not possible to know the economic impact of the development denial.

The Supreme Court reversed the appellate court's decision and held that Suitum could proceed with her suit. The Court noted that a landowner must receive a "final decision" on a development proposal before brining a regulatory takings suit. But, the Court held, there was a final decision in this instance.

The Agency had irrevocably determined that Suitum could not build on her property, the Court observed. Furthermore, the Agency lacked discretion to grant an exception to the development ban. The Court also noted that the trial court could estimate the value of Suitum's TRDs from evidence already presented to it. For these reasons, the Court held, there was no need for Suitum to market her TDRs before the trial court could decide her takings claim.

In a concurring opinion, Justice Scalia argued that the availability of TDRs is irrelevant to deciding whether property was "taken;" TRDs can only compensate, after the fact, for a denial of the right to build.

Justice Scalia observed that if the availability of TDRs dissuades a court from finding a taking, then it may be that no additional compensation is due, regardless of how little the TDRs are worth. But, if TDRs are viewed as a form of compensation, they must be worth as much as the property that was taken. Allowing TDRs to forestall takings claims means "the government can get away with paying much less."

Nevertheless, Justice Scalia's concurrence featured favorable comments on the use of TDRs. "TDRs can serve a commendable purpose in mitigating the economic loss suffered by an individual whose property use is restricted, and property value diminished, but not so substantially as to produce a compensable taking," he wrote. "They may also form a proper part, or indeed the entirety, of the full compensation accorded a landowner when his property is taken."

Further, ripeness must be distinguished from exhaustion of administrative remedies. The test of ripeness is not one of exhaustion of a particular administrative remedy. "Rather, it is a test of whether a developer has exhausted all administrative appeals regarding a particular application for development. The developer must show that it has submitted the appropriate applications necessary to proceed with the particular project and that it has received a final rejection of those applications." *Long Beach Equities,* 231 Cal. App. 3d at 1016.

The second ripeness requirement is that the owner must seek compensation through the procedures the state has provided. *Schnuck v. City of Santa Monica*, 935 F.2d 171, 173-74 (9th Cir. 1991) (In California, since *First English,* there is a procedure available to a plaintiff for seeking compensation from the state.) Unless the attempt is futile, failure to seek compensation in state courts requires dismissal of a federal takings case as unripe. *See Jama Construction v. City of Los Angeles*, 938 F.2d 1045 (9th Cir. 1991).

The problem with this second "ripeness" prerequisite is that it will usually preclude litigation of any taking claim in federal court: The landowner must lose his takings challenge in state court in order to "ripen" his federal constitutional challenge. However, under the full faith on credit clause, the state court judgment will usually be given res judicata effect, precluding litigation of the issue in federal court. *See, e.g., Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993); *see also* Thomas E. Roberts *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 Urb. Law. 479 (1992) (stating: "The ripeness requirement of Fifth Amendment taking claims, coupled with the law of res judicata, precludes claims seeking compensation from state or local action based on the Fifth Amendment from being pursued in federal court."); *but see Fields v. Sarasota*

Manatee Airport Authority, 953 F.2d 1299 (11th Cir. 1992) (describing a procedure for "reserving" federal claims for litigation in federal court).

III. EXACTIONS: DEDICATION AND DEVELOPMENT FEES

[1] See, Dresch and Shiffren, *Who Pays for Development Fees and Exactions?* Public Policy Institute of California, June 1997, for an overview of current issues in levying exactions with emphasis on exactions in Contra Costa County. [3] **(V-61 to V-66)**

A. The Proper Exercise of Police Power.

In attaching conditions to a development approval, whether they be a dedication or the payment of development fee conditions, the city is relying on the exercise of its police power. *California Bldg. Industry Ass'n v. Governing Bd. of the Newhall School Dist.*, 206 Cal. App. 3d 212 (1988). As stated earlier, the courts have long held that land use regulation does not effect a taking if it substantially advances a legitimate governmental interest and does not deny the property owner economically viable use of his land. *Agins v. City of Tiburon*, *supra.*

B. Test of Reasonableness: Privilege or Right.

In general, it is the developer who is seeking to acquire the advantages of development; thus, he/she has the duty to comply with reasonable conditions to ease the burden on the community so long as there is a legal nexus. *Ayres v. City Council*, 34 Cal. 2d 31, 42 (1949); *Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633 (1971); *Nollan,* 483 U.S. at 825.

The California courts have repeatedly held that the dedication of land or the payment of a fee as a condition precedent to development is voluntary in nature. Even though the developer cannot legally develop without satisfying the condition precedent, he/she voluntarily decides whether to develop or not to develop. *Trent Meredith, Inc. v. City of Oxnard,* 114 Cal. App. 3d 317 (1981); *see also Russ Bldg. Partnership v. City and County of San Francisco*, 199 Cal. App. 3d 1496, 1505-06 (1987), (stating that city transit fees imposed on new office space "are not compulsory but are exacted only if the developer voluntarily chooses to create new office space"; fees are "condition[s] for the privilege of developing a particular parcel").

There is no single, precise rule that is applied by the courts to determine whether or not a dedication or a fee condition is reasonable and thus valid. This is done on an ad hoc basis looking at the facts of each case. The determination depends on the size of the development, the demand for services, the burden that will be created by the development, and its overall effect on the city and the surrounding community. It is a balancing test that examines whether there has been a proper exercise of police power in a reasonable manner so no taking of property occurs. As the U.S. Supreme Court stated in determining the required legal nexus, "no precise mathematical calculation is required but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan,* 512 U.S. at 391.

For some time there has been a great deal of controversy over whether development is a privilege or a right. In California the courts have repeatedly stated there is no right to develop. Examples of such statements are: no right to subdivide (*Associated Home Builders*, 4 Cal. 3d at 633); development is a privilege (*Trent Meredith*, 114 Cal. App. 3d at 317); no right to go out of business (*Nash v. City of Santa Monica*, 37 Cal. 3d 97 (1984)); no right to convert an apartment to a condominium (*Griffin Development Co. v. City of Oxnard*, 39 Cal. 3d 256 (1985)); no right to convert residential hotel units to other uses; it is a "privilege" (*Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal. App. 3d 892 (1986)); transit fees are "condition[s] for the privilege of developing a particular parcel" (*Russ,* 199 Cal. App. 3d at 1506).

---

[3] See, Dresch and Shiffren, *Who Pays for Development Fees and Exactions?* Public Policy Institute of California, June 1997, for an overview of current issues in levying exactions with emphasis on exactions in Contra Costa County.

However, in *Nollan*, the United States Supreme Court stated in part: "But the right to build on one's own property-even though its exercise can be subjected to legitimate permitting requirements cannot remotely be described as a 'governmental benefit.' " *Nollan,* 483 U.S. at 3147. Even assuming one has a right to build *something* on one's own property, *Nollan* cannot be read as recognizing any right to build a particular project. This was pointed out in 1990 by the Ninth Circuit Court of Appeals:

> [Plaintiff] relies in particular on footnote 2 of *Nollan*, where the Court, in responding to Justice Brennan's dissent, said that "the right to build on one's own property-even though its exercise can be subject to legitimate permitting requirements-cannot remotely be described as a 'government benefit.' " Lakeview argues that the reference to building on one's property is a "right" and not a "benefit" is somehow inconsistent with the doctrine that a "right" to build a *particular project* vests only after substantial work is performed in reliance on a government permit. [Emphasis in original.]
>
> There are two difficulties with this argument. First, the *Nollan* case dealt only with a property owner's right to build a single-family house, traditionally among the most minimally-regulated uses [footnote omitted]. Second, and more important, the *Nollan* court's reference to a landowner's abstract "right" to build in no way suggests that a landowner has an unconditional right under the taking or deprivation clauses of the federal Constitution to build any particular project he chooses. The sentence quoted from the *Nollan* footnote is qualified by its reference to "legitimate permitting requirements." The footnote does not imply that a permitting requirement is "illegitimate" simply because it disallows a previously permitted use. It is well established that there is no federal Constitutional right to be free from changes in land use laws.

Lakeview Development Corp. v. City of South Lake Tahoe, 915 F.2d 1290, 1294-95 (9th Cir. 1990).

In *Saad,* the court rejected Saad's "right to build" argument based on footnote 2 of *Nollan* when the City denied a use permit for a home because it would impair the view and have a towering effect on the neighborhood. *Saad v. City of Berkeley*, 24 Cal. App. 4th 1206 (1994).

To date, the California courts have not changed their position that development is a privilege not a right. For example, in a 1988 appellate court decision rendered after *Nollan*, where the court struck down a school district fee as being an invalid special tax, the court again stated the principle that "[t]ypically, a development fee is an exaction imposed as a precondition for the privilege of developing the land." *California Bldg. Industry Ass'n v. Governing Bd. of the Newhall School Dist.*, 206 Cal. App. 3d 212, 235 (1988). The court said the fee is "triggered by the voluntary decision of the developer [to proceed with his development.]" *Newhall*, 206 Cal. App. 3d at 236 (citing *Russ,* 199 Cal. App. 3d at 1505). In *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152 (1996), the court held that a denial of a fair hearing on a development application did not violate the owner's procedural or substantive due process rights since the owners had no protected property right or interest in an application for a specific residence.

Whether development is a privilege or a circumscribed limited right, it is clear from California cases and *Nollan* and *Dolan* that a property dedication condition will be upheld if it substantially furthers a legitimate governmental interest (e.g., view protection, open space, streets, parks), the condition furthers the same governmental purpose advanced for regulating it and the required nexus exists. Also the condition cannot deny an owner economically viable use of its land.

As stated, a city's ability to enact land use regulations, to require dedications or to impose fees under its police power is limited by the takings clause of the Fifth Amendment of the United States Constitution, as made applicable to the states by the Fourteenth Amendment. The takings clause protects private property rights against governmental action by providing that private property shall not be appropriated (taken) by the government for public use without compensating the owner of the property. Private property need not be physically seized to constitute a taking; regulation of property, such as land use regulation, can constitute a taking if it is determined to be excessive. *Nollan,* 483 U.S. at 825.

C. Nexus Requirement.

1. In general.

The major legal issue involving exactions is not whether the dedication or the payment of a fee as a condition precedent to development can be required but to what extent and in what amount the dedication or fee can be imposed. As a general rule, the courts will uniformly uphold the constitutionality of a city's ordinances, regulations or imposition of conditions requiring dedication or payment of a fee as a condition of land use approval, where the following conditions are met:

the city is acting within its police power;

the condition substantially furthers a legitimate governmental interest;

the condition furthers the same governmental purpose advanced for imposing it: "the essential nexus";

·The condition has the required degree of connection or nexus: "rough proportionality"; and

the owner is not denied economically viable use of its land.

The principal areas of dispute are the third and fourth tests -- the nexus or connection rule.

As a general rule, California case law has always required a nexus. *Ayres v. City Council*, 34 Cal. 2d 31 (1949). In 1971, the California Supreme Court in *Associated Home Builders, Inc. v. City of Walnut Creek*, *supra*, broke whatever direct nexus theory for dedications in land use permit approval that might have previously existed in California. The court disavowed that a dedication requirement may be upheld only if the particular subdivision creates the need for dedication. The court stated that in the absence of a more restrictive statute, dedication can be required based on a general and broad public welfare measure standard; however, there still must be a nexus. The nexus test of *Walnut Creek* will no doubt be continued to be followed in practice in California after *Dolan;* however, the burden will be on the city to justify the exaction. See, in particular, *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 866 (1996).

2. The Mitigation Fee Act (Government Code section 66000 *et seq.*).

The Mitigation Fee Act (Assembly Bill No. 1600 ("AB 1600") (Chapter 927, Statutes of 1987)) added §§ 66000 *et seq*. to the Government Code. Section 66001(a) requires that any city which establishes, increases or imposes a fee as a condition of approval of a development project on or after January 1, 1989, shall do all of the following:

(1) Identify the purpose of the fee.
(2) Identify the use to which the fee is to be put (e.g., public facilities must be identified).
(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.
(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

These four requirements presumably create the proper "type" nexus between the fee and the type of development upon which it is imposed. As the State Supreme Court noted "The Act thus codifies, as the statutory standard applicable by definition to nonpossessory monetary exactions, the 'reasonable relationship' standard employed in California and elsewhere to measure the validity of required dedications of land (or fees imposed in lieu of such dedications) that are challenged under the Fifth and Fourteenth Amendments." Citing *Ayers* and *Associated Home Builders*. *Ehrlich, supra* at 865. The *Ehrlich* court also stated that although the Act predated the formulation adopted by the high court in *Dolan*, the Court believed the Act's "reasonable relationship" language should be construed in light of *Dolan's* "rough proportionality test. *Ehrlich, supra* at 866.

3. Ad hoc impact fees subject to *Nollan/Dolan*: *Ehrlich*.

In a substantial victory for local governments, the California Supreme Court in March 1996 in *Ehrlich v. City of Culver City, supra*, upheld the right of a city to impose a "recreational mitigation fee" on a developer for replacing private tennis courts and a sports facility with townhouses. In addition, the court upheld Culver City's art in public places ordinance. This long-awaited decision held that the U.S. Supreme Court's heightened scrutiny test under *Nollan, supra,* and *Dolan,*

supra, applies only to infrequently used individual, ad hoc development fees, not to generally applicable, legislatively determined fees. Further, the court held that for ad hoc fees, the *Nollan* and *Dolan* test applies to monetary exactions as well as dedications of property.

4. Impacts of *Ehrlich*.

Nollan/Dolan higher scrutiny test is only applicable to impact fees done on an individual ad hoc basis in a discretionary permit granting process and not to general legislatively formulated fees.

Nollan/Dolan is not applicable to legislative acts applicable to a general class; e.g., transit fees imposed on downtown office developers (*Blue Jeans, supra*), housing fees imposed on non-residential developers (*Commercial Builders, supra*) and art fees (*Ehrlich, supra*).

If a developer wants to challenge an individually applied fee either statutorily or constitutionally, it must follow the statutory framework of the Mitigation Fee Act (new name for AB1600 fees), Government Code § 66000 *et seq.* In other words, the challenger must file a written protest, pay the fee under protest and bring suit within a 180-day time framework.

A city could legally charge a mitigation fee as a condition of a land use change (e.g., general plan, specific plan or zoning) if the discontinuation of the previous private use has public consequences as long as *Nollan/Dolan* test has been met.

An ordinance enacted for aesthetic purposes alone is well within the scope of the city's police power; e.g., public art fees.

CA972260.023

DANIEL J. CURTIN, JR.

Daniel J. Curtin, Jr. was born in San Francisco, California in 1933. He graduated from the University of San Francisco in 1954 and from its School of Law in 1957. Mr. Curtin has served as assistant secretary of the California State Senate, Counsel to the Assembly Committee on Local Government, and Deputy City Attorney of Richmond. In 1965, he was appointed City Attorney of Walnut Creek and served until 1982.

Mr. Curtin is immediate past Chair of the Land Development, Planning & Zoning Section of the International Municipal Lawyers Association (formerly National Institute of Municipal Law Officers). He serves on the Council, the governing body, of the State and Local Government Law Section and is CLE Director of the State and Local Government Law Section of the American Bar Association. He is past Vice-Chair of the Executive Committee of the Real Property Law Section of the State Bar of California. Mr. Curtin has also served as president of the City Attorneys' Department of the League of California Cities, as a member of the Board of Directors of the League, and as regional vice president of the National Institute of Municipal Law Officers (NIMLO).

In recognition of his extensive contributions to NIMLO and to the entire municipal law community, as well as his years of leadership and service to the legal profession, Mr. Curtin was honored in 1992 with NIMLO's Charles S. Rhyne Award for Lifetime Achievement in Municipal Law. In 1988, he was the recipient of the American Planning Association's Distinguished Leadership award for 20 years of writing, teaching, encouraging and supporting planning ideas. In 1972, he was named Honorary Life Member of the California Park and Recreation Society in recognition of his exceptional service to the field of parks and recreation.

Mr. Curtin is the author of numerous publications on California land use and subdivision law, including “Curtin’s California Land Use & Planning Law,” published annually by Solano Press and “California Subdivision Map Act Practice,” published by California Continuing Education of the Bar, supplemented annually. He is a frequent lecturer for the University of California Extension and Continuing Education of the Bar (CEB) and was an adjunct professor for the University of San Francisco Law School teaching Land Use Law. Mr. Curtin's practice emphasizes local government and land use law, representing both private and public-sector clients. He is a partner in the Walnut Creek office of the law firm McCutchen, Doyle, Brown & Enersen.

Preface

This paper is meant to set the stage for a debate on the philosophy of land use regulation. Even though many of the land use principles set forth in the paper are well known to most local government attorney practitioners, I believe it is best to reiterate them again especially to remind all of us of the importance of the police power of the city. Further, this paper can be of assistance to the dedicated nonlegal city staff and to the policy makers -- the Councilmembers and Planning Commissioners -- who desire to consult this paper.

It is the city who exercises the police power but only in a manner not in violation of the California and Federal Constitutions. One city might desire very strict land use controls; e.g., enforcement of an anti-monotony ordinance (*Novi v. City of Pacifica*, 169 Cal. App. 3d 678 (1985)) or prohibition of renting of one's own home for more than thirty days (*Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App. 3d 1579 (1991)). Another city might want to encourage commercial growth by reducing impact fees or collecting the impact fees out of sales tax proceeds from a contemplated commercial development. These decisions are properly left to the city council.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE