

Land Use 101

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Topics to be covered

- General plans, specific plans, zoning regulations and design, conservation, and historic preservation tools
- Subdivisions
- Vested rights and development agreements
- Development fees, exactions and takings analyses
- Affordable housing
- Due process proceedings and administrative findings
- Basic requirements under CEQA

General Overview of Land Use Authority

Foundational concepts
of Land Use Authority:

Constitutional police power

Broad and elastic, but not unlimited

Police Power

“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

Constitutional Authority

- No statute grants land use regulation authority
- Rather a city can regulate as it sees fit in the absence of a prohibition or preemption of the city's broad constitutional authority

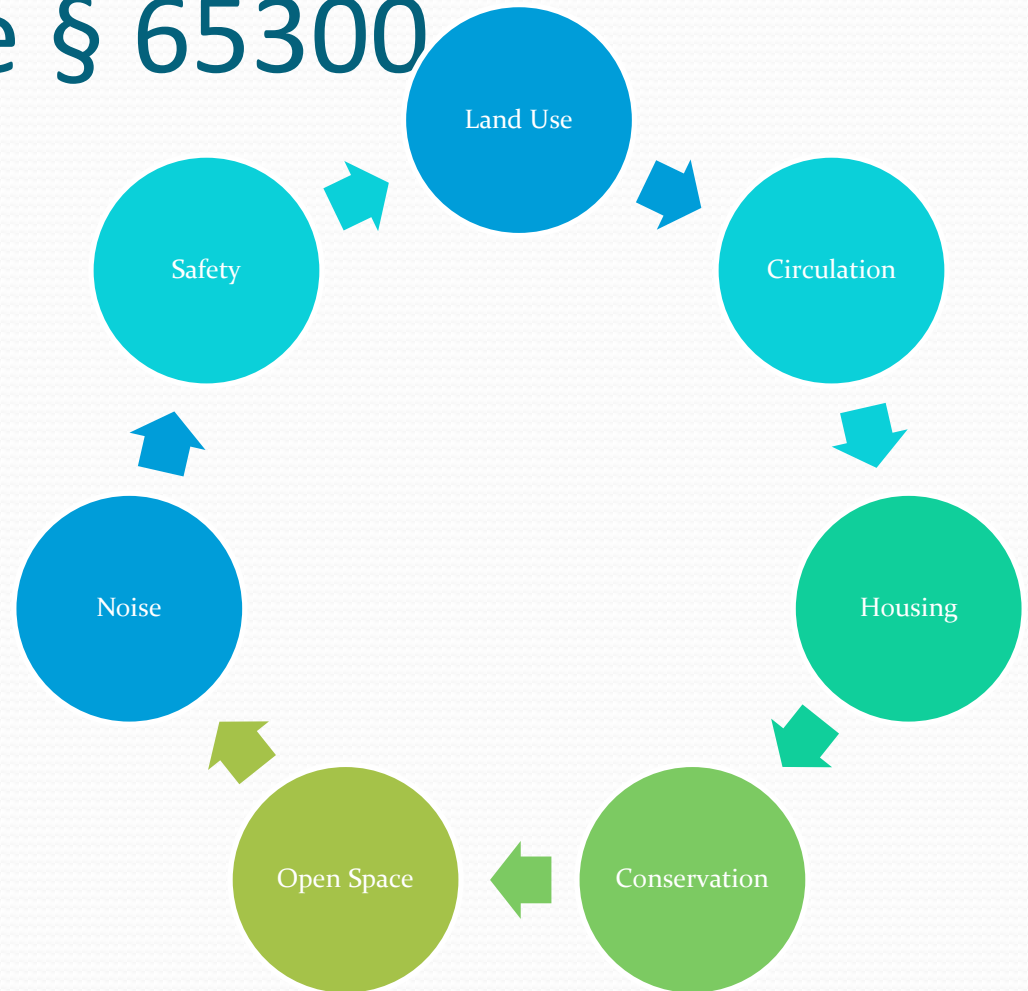
General plan, specific
plans and zoning regs,
oh my!



General Plan

Gov't Code § 65300

7 Elements
required in the
General Plan
(others are optional,
like Air Quality or
Historic Resources)



General Plan

Constitution for Development

Internal Consistency

Harmony among the policies set forth in the elements of the Plan

Vertical Consistency

Consistency between a city's General Plan, Specific Plans, and Zoning Regulations and permitted projects, with the General Plan as the guiding document

General Plan

- **Caution:** Some elements get more scrutiny than others.
- Land Use and Circulation Elements required to correlate (because the Circulation Element sets out the transportation plan for planned land in the Land Use Element)
- Numerous requirements apply to Housing Element adoption or amendment; review by the State Department of Housing and Community Development (HCD) and certification are required.
- When HCD certifies, City gets a rebuttable presumption of validity if challenged (not so for self-certification).
- If invalid, jeopardizes decisions, because approvals require General Plan consistency. If your plan is invalid, your projects can't move forward.

Specific Plans

- Bridge between the General Plan and Zoning Regulations; can remain fairly big picture or begin to look more like a zoning ordinance.
- A tool to more accurately define the “look” and “feel” of future development.
- Next tier toward implementing the General Plan.

Zoning Regulations: Gov't Code § 65800

- GC expressly provides that cities may regulate via zoning ordinances; provides minimal standards, but expresses intent of minimal interference with local land use regulation.
- Zoning ordinances and maps divide the City into zones and define the allowable and conditional land uses and standards within those zones.
- GC Zoning Regulation provisions do not apply to a charter city, but there are numerous express applications to charter cities, so don't assume and always check your own charter and ordinances.

Zoning Regulations

- General law cities' ordinances must be consistent with the General Plan (many charters or ordinances also require).
- Presumed to be valid if reasonably related to community welfare.
- Subject to 90 day challenge period, and will be upheld unless proved to be arbitrary, capricious or an abuse of the police power.
 - even for charter cities that may not be subject to General Plan consistency requirements, inconsistency creates a presumption that a zoning provision does not relate to the public welfare; makes the ordinance subject to challenge as an abuse of the police power.

Zoning Regulations

Variances and Use Permits

- Administrative, discretionary approvals that allow for deviation from zoning regulations where a property is uniquely situated or where a use may be acceptable only under certain conditions.
- Considered a “quasi-judicial” action-requires due process.
- Requires findings to support variation or relief from otherwise applicable rules (variances) or additional conditions (conditional use permits).
- Once issued, permits/property rights granted run with the land (transfer with the property from owner to owner)
- Must be consistent with the General Plan.

Design, Conservation and Historic Preservation

- Achieving aesthetic objectives and preservation of scenic, natural and historic resources is a permissible basis of regulation.
- Cities can require discretionary design or architectural review so long as it is reasonably related to the public health, safety and welfare (broad latitude is given).
- General regulation of land use, not subject to higher scrutiny test in *Nollan/Dolan* (later).
- All are OK: “no monotonous development”; “respect the existing privacy of surrounding community”; “not in character”; “protect character and stability”.
- Design review approval is usually processed through an ARC.

Design, Conservation and Historic Preservation

- Historic preservation has some special privileges.
- Federal: National Historic Preservation Act
- State: California Register of Historic Resources (PRC § 5020.1)
- Local: Cities have the police power to protect property of historic and aesthetic significance and define standards unique to the community.
 - How?
 - Historic resource designations; historic design guidelines; historic districts; anti-neglect and maintenance ordinances.

Subdivisions

- Subdivision Map Act – Gov't Code § 66410 et seq., governs the process for division of land into separate parcels for lease, sale or financing.
- Requires adoption of local ordinance, which can include provisions additional to, but not in conflict with, SMA.
- Common approvals : subdivision maps (tentative & final, where 5 or more parcels), parcel maps (where 4 or fewer parcels), lot line adjustments (affecting fewer than 4 existing parcels), and certificates of compliance (which validate parcels lawfully created prior to the adoption of the Subdivision Map Act or not recorded).
- Through Map Act and local ordinance cities can impose significant conditions on subdivisions and parcel maps.

Permit Streamlining Act

- Gov't Code § 65920 et seq. acts as a “time clock” on the review and processing of discretionary land use permits.
- Applications “deemed approved” if timelines are not met!
- Does not apply to legislative acts or to a CEQA action.
- Public notice of the application must be given. Gov't Code § 65956.
- Shorter deadlines apply to subdivisions under the Map Act: Gov't Code §§ 66452.1 –66452.2.

Vested Rights

- Generally, cities can change land use rules discussed previously and require property owners to follow the new rules for development.
- Except where “vested rights” are established to protect investment-backed property expectations and/or provide developers with greater certainty.

Vested Rights

- Vesting Maps – Gov't Code § 66498.1 *et seq.* (Subdivision Map Act)
 - Vested rights status from an approved tentative map
- Substantial hard costs in good faith reliance on a validly issued permit; the *Avco* rule
 - *Avco Community Developers v. South Coast Regional Comm'n*

Vested Rights

- Development Agreements – Gov’t Code § 65864 et seq.
 - City may enact local ordinance; a legislative contract between the city and developer.
 - Locks in development standards, fees.
 - City may seek “non-nexus “ benefits.
 - Approval is subject to referendum.
 - Findings not required (but could be handy).
 - It is a project subject to CEQA; you are committing to something that is likely to change the environment.

Takings & Exactions

Constitutional limit of constitutional land use authority.

5th Amendment - “nor shall private property be taken for public use, without just compensation.” (*also* Cal. Const. Art. I, § 19)

- Physical taking
- Denial of economically beneficial use
- Partial regulatory taking
- Land use exactions

Takings & Exactions

A government action is a taking of private property if:

- It lacks a legitimate public purpose (but see, *Lingle v. Chevron USA, Inc.*, where the court discounted public purpose analysis).
- It denies the property owner any viable economic use of his or her property (in these cases a variance is typically required to permit some reasonable economic use).
- It lacks legally sufficient “nexus” to the impacts of development or does not reflect “rough proportionality” between the demands on the private property owner and the impacts of development. See *Nollan /Dolan*.

Takings & Exactions

Understanding and fair implementation of *Nollan/Dolan* analysis:

1. What is impact of this project?
2. Does it serve a legitimate public interest?
3. How do the impact and the condition relate to one another?
4. Are the impact and the condition (fee, exaction) proportional?



Affordable Housing

Statutory limits on authority

- Lack of housing deemed a “critical problem” in California.
- Legislature has determined that the problem warrants multiple interventions, including prohibitions on barriers to housing, incentives for affordable housing, and ensuring infrastructure support for housing.

Affordable Housing

Statutory limits on authority

- Density Bonus Law, Gov't Code § 65915 (mandatory concessions must be granted if a developer proposes to build affordable housing)
“Housing Accountability Act,” Gov't Code § 65589.5 (applies to both affordable and other housing projects)
- Water & sewer priority, Gov't Code § 65589.7
- “Least Cost Zoning,” Gov't Code § 65913.1
- Second units, Gov't Code § 65852
- Growth management policies/ordinances that limit number of housing units are subject to scrutiny and require findings of necessity to protect health, safety & welfare.
- But, take note of *CBIA v. City of San Jose*, *Sterling Park v. Palo Alto* and *Palmer/Patterson* cases in the inclusionary housing context.

Due Process

Clear
application to
administrative
proceedings:

- Reasonable notice of action
- Opportunity to be heard
- Impartial decision maker

Harder to
navigate:

- Ensuring that attorney is not serving dual role to staff and review bodies along the process

Writ of Mandate

How decisions are judged:



The diagram consists of two chevron-shaped boxes pointing to the right. The first box is dark blue and contains the text 'Legislative/Quasi-legislative'. The second box is light blue and contains the text 'Traditional Mandamus'. The boxes are connected by a white arrow pointing from the first to the second.

Legislative/
Quasi-legislative

Traditional
Mandamus

- To challenge a ministerial or quasi-legislative act or failure to perform a duty
- If the claimant has a “substantial beneficial interest”
- If there is no other “plain, speedy, and adequate remedy, in the ordinary course of law”

Writ of Mandate

How decisions are judged:



Quasi-judicial

Administrative
Mandamus

- Usually limited to the administrative record
- Limit of scope:
 - Proceeded without or in excess of jurisdiction
 - Hearing was unfair
 - Abuse of discretion

The Role of Findings

- Sometimes statutorily required, often required by ordinance (e.g., variance provisions findings both statutory and local).
- Always required where there is a adjudicatory/quasi-judicial decision being made (*Topanga* rule: Where due process hearings are required, findings required for “quasi-judicial” decisions).
- Not normally required for legislative acts, unless specifically required by ordinance or statute – still often helpful and well advised on controversial actions.
- Helps articulate reasoning and creates a clear map of the record judicial review.
- Record MUST contain evidence to support findings; conclusory findings without support won't get you there.
- Supporting facts can come in through staff reports, powerpoints, written and oral testimony, MND or EIR, exhibits, etc.
- Best opportunity for the city to define the question and frame its arguments supporting its conclusion.

Other Rights of the Public

- Brown Act
- Public Records Act
- Conflicts of interest prohibitions
- CEQA

California Environmental Quality Act

- Public Resources Code § 21000 et seq.; 14 CCR § 15000 et seq. (the “State CEQA Guidelines”).
- A practice area unto itself, but try to remember the basic purposes:
 - Identify and evaluate potential adverse environmental impacts.
 - Prevent significant, avoidable damage to environment.
 - Foster informed public participation.
 - Ensure informed and transparent governmental decision making.



California Environmental Quality Act

- Applies to all discretionary decisions regarding projects involving government action, including land use approvals and public works projects.
- CEQA does not apply to :
 - Ministerial actions (e.g. building permits)
 - Decisions with no possibility of adverse impact
 - Project denials
 - Preliminary actions that don't commit to project and preserve ability to impose mitigation measures or adopt project alternatives.
- Requires that the decision maker consider the environmental consequences of an action *before* action is taken.
- CEQA contains a “substantive mandate” not to approve projects with significant environmental effects if “feasible alternatives or mitigation measures” can lessen or avoid those effects.
- Fertile ground for litigation.

California Environmental Quality Act

Know your exemptions:

- **Statutory** (absolute, granted by Legislature) CEQA § 21080.01 et seq.; Guidelines § 15260 et seq. (e.g. specific projects, emergency projects).
- **Categorical** (determined by the Resources Agency) CEQA § 21084; Guidelines § 15300, et seq. (e.g., existing facilities, replacement or reconstruction).
 - **Note:** Don't skip the analysis of categorical exemptions, as even a "clean fit" may not apply if significant effect on environment is possible due to "unusual circumstances"; consider potential impacts on adjacent historic resources or districts.

California Environmental Quality Act

- If not exempt, the city must complete an “Initial Study” to determine if adverse changes in environment will result from the project, whether changes are potentially significant and, if so, what type of CEQA document to prepare.
- Initial Study template is available in the appendix to the Guidelines; answer the questions thoughtfully and thoroughly and connect the dots that lead to your conclusions.



California Environmental Quality Act

CEQA options:

- Negative Declaration (ND) or Mitigated Negative Declaration (MND) where the Initial Study shows no significant impacts likely to result from the project or concludes that any impacts can be reduced to less than significant by requiring proper mitigation.
- Environmental Impact Report (EIR) is required if “significant” impacts are identified that are not reducible through readily apparent mitigation measures.
- EIRs are time consuming and expensive, but so are lawsuits:
 - “Fair Argument” test applies to challenges to ND/MND; courts defer to the city under a “Substantial Evidence” test in EIR legal challenges.

Questions?

