SECTION 9

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THE POLICE POWER

The legal basis for all planning and land use regulation is the "police power." This power emanates from the Tenth Amendment to the United States Constitution and entitles states to take actions to protect the public's health, safety, and welfare. In turn, the California Constitution grants the same power to cities and counties, but limits the grant to the extent that local regulations may not conflict with state law.[1]

The police power is "elastic," meaning that it can expand to meet the changing conditions of society. Thus, actions that might not have been thought of as part of the general welfare a century ago (like actions to curb sprawl, perhaps) can fall within its purview today. Zoning and other forms of land use regulation are within the broad scope of the police power.[2] The U.S. Supreme Court expressed it this way:

> *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.*[3]

Courts have found that a wide variety of local concerns fall within the police power, including socio-economic balance, aesthetic values, residential character, and growth management.[4]

However, the police power is not unlimited. There are several constitutional limitations that affect the extent to which local agencies can use the police power. As mentioned above, local agencies cannot adopt regulations that conflict with state law. Other constitutional limitations include takings, equal protection, and freedom of speech, to name a few. These restrictions are outlined in more detail in the following sections.

PREEMPTION

A local agency may not take actions that conflict with state or federal law. Federal clean water and endangered species laws, for example, sometimes restrict the scope of local zoning ordinances. Likewise, the state Planning and Zoning Law imposes minimum planning standards with which local agencies must comply. This is known as preemption—the principle of law through which federal or state regulations supersede those of a city or county. When a conflict occurs, the local ordinance is invalid.

1 Cal. Const. art. XI, § 7; *Miller v. Board of Public Works*, 195 Cal. 477 (1925).

2 *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582 (1976).

3 *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4-6 (1974).

4 *See Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848 (1980); *Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App. 3d 1579 (1991); *DeVita v. County of Napa*, 9 Cal. 4th 763 (1995).

The extent to which local regulation may be preempted varies. In some cases, the Legislature has signaled a strong preference for statewide uniformity. In other cases, the paramount need for local control prevails. For example, the Planning and Zoning Law serves only as a minimum standard with which local agencies must comply, reserving in cities and counties the maximum degree of control over local zoning law.[5] Thus, local agencies retain a great deal of control over most zoning decisions. An exception is the extent to which local agencies may adopt temporary moratoria on development.[6] Here, the Legislature has adopted detailed procedures—including time limits, findings requirements, and supermajority voting requirements—with which local agencies must comply. As a result, local agency discretion in this area is much more limited.

Just because there is a state law on a subject does not necessarily preempt all action. There is often room for additional local action, particularly if the local ordinance is *more restrictive*. In other words, state and federal laws often act as a legislative minimum in the absence of a clear indication that the state or federal statute was intended to "occupy the regulatory field" entirely. For example, state law requires that a general plan include seven mandatory elements. However, cities and counties are free to adopt other elements beyond those seven—such as an agricultural protection or economic development element—that address specific local concerns.

Preemption and Charter Cities

There are actually two kinds of cities: charter and general law. Charter cities have "local constitutions"—called charters—that describe the organization and fundamental policies of the city or county. The state constitution grants charter cities authority over "municipal affairs" even when they conflict with state law.[7] In the land use context, the most important municipal affair is the power to develop internal procedures, such as those to process and approve legislative and adjudicative actions. As a result, charter cities are exempt from *some* of the procedural requirements in the Planning and Zoning Law. In other instances, however, such as the laws governing the adoption of moratoria (mentioned above), the

Legislature has made it clear that charter cities and general law cities have the same authority.[8] In recent years, the state Legislature has increasingly limited charter city authority, particularly in the area of affordable housing.

TAKINGS AND PROPERTY RIGHTS

The Takings Clause of the U.S. Constitution limits the police power, not by prohibiting certain actions but by requiring compensation when those actions impinge too far on private property rights. You are probably familiar with the principle that if land is condemned for a public road, the local agency taking the land must pay the owner the fair market value of the land taken. This form of taking is called eminent domain. The same general principle applies when a regulation—such as a zoning ordinance—has the same effect as physically appropriating land. This is known as a regulatory taking. An example would be a regulation that zoned an individual's parcel as a public park. The regulation would have the same effect as a taking because it would prevent the owner from excluding others and putting the land to economic use.

You are most likely to encounter the takings issue when you are denying a project or contemplating a new zoning ordinance that will limit the use of property. The issue may also be raised when you are imposing fees or

5 Cal. Gov't Code § 65800; *DeVita v. County of Napa*, 9 Cal. 4th 763, 782-783 (1995).

6 Cal. Gov't Code § 65858.

7 Cal. Const. art. XI, § 5(a).

8 Cal. Gov't Code § 65858.

requiring a dedication of property as a condition of development. Unfortunately, there is a great deal of misunderstanding about the relationship between property rights and planning regulations. The Takings Clause is often misunderstood to be a prohibition against any regulation that decreases property value or prevents the owner from "doing what they want with their land." In reality, compensation is required only in a very limited set of circumstances.

Most land use ordinances will not rise to the level of taking. The Constitution permits property to be extensively regulated, and courts have recognized that land use ordinances are often as likely to add value to a property as they are to decrease value. Our land use system cannot treat all properties equally.

Nevertheless, some regulations may rise to the level of a compensable taking. For example, regulations that wipe out all or almost all of a property's economic value may be held a taking. A regulation that permanently places an object on or uses a property may also be held a taking. However, these instances are comparatively rare. In the majority of cases, local regulations have been upheld against such claims. The following are some rough rules that help explain why most regulations do not rise to the level of a taking:

- **Claims Usually Fail When Economically Viable Uses of Property Remain.** Claims based on the notion that a regulation denies economical uses of property will fail when the property retains some economically viable uses. Zoning land for agriculture, for example, allows for an economic use and will generally survive a takings claim even when the owner claims the regulation is costing millions in lost development value. The Takings Clause does not guarantee that owners will be compensated for the most speculative use of land.[9]
- **Reasonable and Proportional Conditions on Development are Permitted.** Conditions on development will not cause a taking when they are reasonably related and proportional to the harm or impact likely to be caused by the development.[10] Moreover, conditions that are imposed by ordinance instead of on a case-by-case basis are even less likely to be held a taking.[11]
- **Landowners Must Seek A Variance Before Suing.** Courts are reluctant to require compensation unless they are absolutely sure that a regulation or condition will be applied in a way that amounts to a taking. Thus, landowners must usually file two applications and seek one variance before courts will entertain a claim. The variance procedure guarantees that the local agency has an opportunity to take corrective action in those circumstances where a regulation unfairly affects a particular parcel.[12]
- **"Automatic" or Per Se Takings Are Rare.** Regulations that cause 100 percent devaluation in property or cause a permanent physical presence on property will be found to be a taking in most circumstances, but such regulations are rare. It might seem that imposing a condition on development—such as the requirement to create a park or a bike path—is equivalent to a permanent physical occupation. The reason why this is not the case is that the condition is based on the development application, which is *voluntarily* sought by the developer.[13]
- **Fairness Matters.** Courts are often concerned about the extent to which the landowner was treated fairly by the local agency. Thus, it is always good to design efficient, straightforward processes that are consistent with the general plan in order to set appropriate development expectations.[14]

These are only rules of thumb. There are exceptions. The ultimate determination of whether an action is a taking will turn on the facts of each case. For this reason it is extremely important to consult with planning staff and agency counsel when the takings issue arises.

SUBSTANTIVE DUE PROCESS & VESTED RIGHTS

The substantive due process doctrine prohibits governmental action that arbitrarily or unreasonably deprives a person of life, liberty, or property. For planning commissioners, this issue arises most frequently in the context of property when an

[9] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

[10] *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 324 (1994); *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996).

[11] *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643 (2002).

[12] *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

[13] *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982); *Yee v. City of Escondido*, 503 U.S. 519 (1992).

[14] *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

application has proceeded far enough through the approval process that the right to develop has attached. When this occurs the right to develop is said to have vested. Once a right vests, it cannot be affected by subsequent changes in local ordinances.

Generally, a right to develop will not vest until the last permit necessary for construction has been issued *and* substantial expenditures have been incurred in reliance on the permit. Until that time, a proposed development is vulnerable to changes in the general plan, zoning, and other local regulations.

However, there are some misunderstandings about this rule:

- **Zoning Does Not Confer A Right to Develop.** Some people misinterpret zoning regulations to mean that the level of development will be allowed automatically. Zoning confers no such right—it is merely a designation used for planning by local agencies. As such, it is always subject to any change the governing body sees fit.[15]
- **Initial Approval Does Not Necessarily "Lock In" Development.** Developers may argue that a preliminary approval—such as a tentative map approval—automatically exempts them from other ordinances that affect the development. Such conditions are not generally locked in, however, until the last permit is issued.[16]
- **Later Elements of Phased Projects May Be Subject to Different Rules.** The rules of vested rights offer less protection to developments involving multiple discretionary permits to be granted over an extended period of time. For example, a developer may spend large sums on acquisition, engineering, architectural, and planning costs for a four-phase development, but may only hold permits for phase one. To be protected from future changes in local regulations throughout the entire project, the developer would need to obtain vested rights for each phase. The vesting of rights for phase one does not vest rights for the entire project, nor does it guarantee that additional phases will even be approved.[17]

Given the uncertainty associated with changing regulations, developers will often seek to "lock in" their development plans. The main way to do this is to enter into an agreement with the local agency to assure that no future regulations will affect the development. However, a local agency cannot bind itself from exercising its legislative power in the future.[18] There are two exceptions. State law allows development applications to vest upon the filing of a vesting tentative map (see page 47) or upon entry into a development agreement (see page 48) with the local agency.

PROCEDURAL DUE PROCESS: NOTICE & HEARINGS

A local agency must afford procedural due process before depriving a person of a property right or liberty interest. This typically means providing the person with notice of the impending action and an opportunity to be heard before taking the action. In the context of land use and zoning, local agencies can meet this requirement by complying with the state laws that delineate specific notice and hearing procedures.[19] The purpose of the notice and the hearing requirement is not merely to go through the motions—but to offer the affected person a meaningful opportunity to rebut the evidence that is serving as the basis of the decision.

Procedural due process requirements apply mostly when a local agency is acting in its quasi-judicial capacity—that is, applying ordinances to specific properties as part of a land use application. When the local agency is acting legislatively, due process controls are more lenient because the legislative process provides its own set of guarantees. However, state law requires specific notices for a number of legislative acts, such as rezonings and general plan amendments.

DISCRIMINATION & EQUAL PROTECTION

The equal protection doctrine requires that similarly situated persons be treated in an equal manner. However, absolute equality is not required. Inherently, land use regulation is a system of classifying property.

[15] *Stubblefield Construction Co. v. City of San Bernardino*, 32 Cal. App. 4th 687 (1995); *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal. 3d 785 (1976).

[16] *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal. 3d 785, 791, (1976).

[17] *Court House Plaza Co. v. City of Palo Alto*, 117 Cal. App. 3d 871 (1981); *Lakeview Development Corp. v. City of South Lake Tahoe*, 915 F. 2d 1290 (1990).

[18] *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal. 3d 785 (1976).

[19] *See for example* Cal. Gov't Code §§ 65090-65096.

Nearly every regulation will affect different properties differently. What is significant for the equal protection analysis is the extent to which a regulation makes an arbitrary or discriminatory classification that affects a fundamental right. A classification must not be arbitrary and related to some difference that has a legitimate governmental interest.

Courts will analyze equal protection claims under one of two tests: strict scrutiny or rational basis. Most land use regulations will be judged under the rational basis test. Thus, if a regulation is reasonably related to a conceivable legitimate government purpose, it will be upheld. For example, special regulations for historic districts are rationally related to preserving community character and judged under the rational basis standard even though they treat historic properties differently.

Strict scrutiny is applied when a regulation abridges a fundamental right or applies only to a suspect class. Suspect classes are limited to race, national origin, and personal decisions relating to marriage, procreation, family relationships, and child-rearing. In these cases, the government must show that there is a "compelling interest" for the classification. For example, a regulation that prohibited landlords from renting units to non-traditional couples would be more likely to be judged under the stricter standard.

There are three things to watch out for when the equal protection issue arises:

- **Developers Claiming Protected Status.** One tactic developers sometimes use is to argue that a regulation unfairly singles them out. However, courts have ruled that developers are not a suspect class and development is not a fundamental interest.[20]
- **Single Property Owner Unfairly Treated.** Sometimes, landowners will bring an equal protection claim when they feel that they have been singled out. Such claims may prevail when the local agency has intentionally treated a specific landowner differently and the different treatment was motivated by ill will. This issue can be related to spot zoning issues as well.[21]
- **Regulations that Affect Low-Income Households.** One possible challenges to an ordinance is that it discriminates against lower-income households, of which racial minorities constitute a disproportionate percentage. Although courts have been more willing to entertain such claims in recent years, ordinances based on sound social or economic policies that are not intended to discriminate will generally be upheld.[22]

FIRST AMENDMENT: SIGNS, ADULT USES & FREE SPEECH

Most land use decisions that touch on the speech issue involve sign, news rack, and adult business regulation. Regulating these uses poses difficult legal and philosophical issues. You must balance the competing goals of having a beautiful (and smut-free) community with the right to sell public wares and convey ideological messages.

When analyzing free speech rights, courts first classify the type of speech being regulated. Courts have drawn a distinction between political speech (expressing one's views or engaging in expressive activities) and commercial speech (providing information about goods and services). Regulations that affect political speech will be more strictly scrutinized. Most zoning regulations, however, affect commercial speech.

Courts have applied the following general rules in evaluating such regulations:[23]

- **Time, Place and Manner.** Zoning regulations that control the time, place, and manner of speech without prohibiting the speech or activity outright will generally be upheld. In the case of adult businesses, for

[20] *Candid Enterprises, Inc. v. Grossmont Union High School District*, 39 Cal. 3d 878, 890 (1985).

[21] *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

[22] *Associated Home Builders Etc., Inc. v. City of Livermore*, 18 Cal. 3d 582 (1976); *Construction Industry Association v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975).

[23] *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

example, zoning can be used to limit the location (place), business hours (time), and even some types of performances (manner), but cannot totally prohibit such businesses from a community.

- **Content Neutral**. The restrictions must be content neutral. For example, with certain exceptions, it is generally acceptable to regulate the size of a business sign but not what message is written on the sign.
- **Substantial Governmental Interest.** The interest in regulating the activity must be substantial. Many adult business regulations are predicated on limiting secondary impacts (like crime) that are associated with such businesses rather than the "moral" nature of the speech activity itself. Courts have determined that this is a sufficient rationale to justify a regulation, provided that it is not too onerous.
- **Alternative Avenues of Communication.** There must be a location where the speech or activity may take place. For example, some local agencies set distance limitations (such as 1000 feet) between adult businesses and schools. The condition, however, must leave some places within the community where the activity can take place.

These are all just general rules and courts often apply them on a case-by-case basis. If you have concerns in this area, it is always advisable to consult with your agency's counsel.

RELIGIOUS USES

In the past, a generally applicable land use regulation was not deemed to substantially interfere with religion. Thus, a local agency could require that a new church facility meet city parking requirements even if the condition would make the building substantially more expensive and thus infeasible.

However, Congress adopted a more stringent test when it passed the Religious Land Use and Institutionalized Persons Act (RLUIPA).[24] Under RLUIPA, a government may not impose a land use regulation in a manner that imposes a substantial burden on religion unless the government demonstrates that the condition furthers a compelling governmental interest. In addition, the

condition must be the least restrictive means of furthering that interest.

One issue that makes RLUIPA problematic for local agencies is that the term "substantial burden" is not defined. This uncertainty makes it easier for religious groups to challenge zoning ordinances as they apply to religious buildings. The extra costs associated with a landmark preservation ordinance, for example, could be determined to be a substantial burden on a congregation (although the law remains uncertain on this point).

The type of ancillary activities and uses that are included in the term "religious exercise" is another unresolved issue. A planner might make the assumption that religious exercise merely means worship services. A particular church, on the other hand, may apply for a permit to include a school or even a homeless shelter on church premises on the grounds that providing such services is a natural extension of its religion.

Because of the uncertainties associated with RLUIPA, local agencies must be flexible when dealing with applications from religious groups. However, they must also be careful not to favor religious groups or they may face lawsuits alleging the endorsement of religion in violation of the Establishment Clause of the U.S. Constitution. (The Constitution also prohibits governments from favoring any religion). When making decisions related to religious uses, cities and counties should maintain detailed records that show findings of either substantial burden or compelling government interest depending on the outcome of the vote.

[24] 42 U.S.C. §§ 2000cc and following.