

Land Use and Natural Resources: Point of View

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Most economists agree that the only thing they know for sure about the aftermath of September 11th and the current economic crisis is that they know nothing for sure. The apparent consensus among the pundits is that long-term interest rates probably should not come down significantly and that the current recession should end in about two years when the current oversupply of information technology ceases.

With those assumptions, what does the near term look like for development and land use and natural resources? First, as for non-infrastructure type developments that are planned to be completed in the next two years, it will be a difficult time during which cost-containment is essential. Mid-priced housing, however, should continue at a relatively strong pace since the baby boom generation (those born between 1946 and 1954) remains in its prime earning years although it may have lost some of the accumulated wealth that previously fueled its lifestyles and retirement hopes.

Since, in California, most large projects take at least two years to navigate through the land use planning and natural resource approval processes, now is the time for those who are capable to begin the process of bringing those projects online. It is assumed that the iron law of demographics will drive economic growth as the highly compensated baby boom generation continues to fuel the U.S. economy during its inevitable march to retirement at the end of the decade. At that time, the U.S. economy will face the demographic precipice that has strangled the Japanese economy for over ten years.

Will the current economic crisis and the aftermath substantially affect the land use approval process that all developments must face in California? There is no evidence that the entitlement process will be made any easier to stimulate economic development. In fact, as we point out below, just the opposite may occur. However, any economic development package fashioned in Washington should include a public works component that encourages the development of infrastructure projects (primarily transportation).

Let us look at two of the key influences on development and planning in California: federal and state judicial decisions and new California legislation.

Federal and State Judicial Decisions

No radical change in the approach of the courts on these issues is envisioned as both the Republicans and Democrats will struggle to balance the racial and ethnic membership of the courts by appointing relatively moderate jurists. During the past decade, the U.S. Supreme Court has striven mightily to create a 5th amendment takings jurisprudence while the California courts have steadfastly ignored their rulings.

In layman's terms, in California, the deference that the court will give to an administrative decision and the arcane rules governing when a court agrees to rule on the merits of the regulations ("ripeness" is the technical term, although by the time a land use case is heard it is anything but ripe) limits the aggrieved party's (usually the landowner) ability to overturn arbitrary and capricious actions of an administrative agency or local government. Realistically, the ripening process often takes so long that only the wealthiest and most committed landowners get far enough to have their hearing in court. Even where that struggle bears fruit, in California at least, the courts will first seek a way to return the issue to the offending agency to give it another opportunity to correct its mistakes. The entire Federal jurisprudence on 5th amendment takings has had insignificant effect in California. The *Nollan v. California Coastal Commission* decision, that appeared to prevent regulatory seizures of property, permits any clever bureaucrat to attain his goals as long as the findings (reasons) are clear as to whether the impact of the development directly relates to the exaction.

The *Dolan v. City of Tigard* case, that appeared to prevent complete regulatory taking of all economic use, can be circumvented simply by allegations of ephemeral potential developments remaining to the developer and can be curtailed further by the need for ripeness before they can be effectively challenged (as opposed to being returned to the agency to try again).

Even the most recent opinion, *Palazzolo v. Rhode Island*, that attempts to close the "ripeness" loophole, is full of loopholes itself because the U.S. Supreme Court concluded that the outcome turned on the particular facts of that case. Thus, insofar as takings are concerned, little change is expected in the near term.

On another judicial front, a surprising reorientation is occurring. In contrast to the complexities facing landowners in seeking redress for a constitutional taking, the courts have been willing to review the consistency of an administrative decision with the law under which it acts. Although the courts generally give deference to the decisions of an administrative agency, they appear to pay lip service to this principle in land use and natural resource cases. Originally, in California cases involving the California Environmental Quality Act ("CEQA"), the courts did not hesitate to agree with opponents to a project that the administrative agency had failed to follow the letter and spirit of the law. With time, the consultants and developers learned how to prepare competent environmental documents and now the courts appear to be giving deference to administrative agencies where the project has been approved.

However, the Courts recently may have become more willing to challenge the actions of administrative agencies and local governments where they have sought to impose so called "environmental" restrictions on potential development, finding that the government failed to follow required procedures. For example, in 1997, a trial court upheld our firm's challenge to San Jose's Urban Growth Boundary ("UGB") on grounds that the city failed to comply with the procedural requirements of CEQA when it adopted a negative declaration for the proposed UGB and related amendments to the General Plan.

Recent California Legislation

On the legislative front, Governor Davis has recently signed measures that would strengthen environmental protection and in some cases, create more obstacles for developments in California. In October 2001, the governor signed bills that would force a closer link between planning and water availability and close a loophole that previously allowed ancient subdivision maps to be enforced; and place a \$2.6 billion parks bond on the March ballot.

The three-package water bills consist of Senate Bills ("SB") 221, 610, and 672. SB 221 requires developers of 500 or more homes to obtain proof of water availability prior to obtaining tentative map approval, while SB 610 focuses on the early stages of project approval by forcing water agencies to prepare Urban Water Management Plans. The last measure, SB 672, integrates regional and state needs and encourages the use of new technologies.

SB 497 amends the Subdivision Map Act that exempted landowners from local zoning laws if they obtained a "certificates of compliance" through old property records and used lot line adjustments to reconfigure old lots' location and size to increase their value. SB 497 would change that by requiring lot line adjustments to be compatible with General Plans and Local Coastal Plans and subdividers of five or more parcels to prepare subdivision maps for simple lot line adjustments. Opponents claim that the new bill will hurt small landowners whose property value will be severely depreciated, small subdividers whose slight adjustments to property lines will be made more time-consuming and expensive, and innocent purchasers who were playing by the rules as they existed when the land was sold.

On the other hand, in what may prove to be relief to developers of several highly controversial developments stymied by land use controversies, the park bond measure under SB 1602, known as "The Clean Water, Clean Air, Safe Neighborhood Parks and Coastal Protection Act of 2002," was signed by the Governor. It contains a wide variety of land purchases and restoration activities that would be funded by the \$2.6 billion bond if the California voters approve the initiative in the March ballot. The money would go to state parks, urban parks and local recreation programs, historical and cultural resources preservation, wildlife conservation habitats, and beach and river protection, urban forestry, agricultural land preservation, and programs to reduce air pollution in parks.

In the midst of the current economic crisis, the State Government has made real estate development in California not any easier but instead has made the land use entitlement process in California more complicated and challenging.

End Notes

1. 483 U. S. 825 (1987).
2. 512 U. S. 374 (1994).
3. 121 S.Ct. 2448 (2001).
4. Similarly, in June 2001, the National Association of Home Builders sued the Secretary of the Interior and Director, U. S. Fish and Wildlife Service, for violating the Endangered Species Act ("ESA") in designating areas as "critical habitat" for the California red-legged frog without satisfying ESA's definition of a "critical habitat" and for violating the National Environmental Policy Act by neglecting to disclose the scientific basis for its underlying conclusions. © 2002, Sheppard, Mullin, Richter & Hampton LLP.