

## **Land Use 101 – The Basics of Land Use Law for the General Practitioner** by **Michael G. Colantuono**

Each City and County must have a **General Plan** – Gov’t Code § 65300 et seq.

Mandatory elements: Land Use, Circulation (Traffic & Utilities), Housing (state-mandated affordable housing program), Conservation (natural resources), Open Space, Noise, Safety

Optional Elements: Common optional elements are Air Quality and Historic Resources Preservation

All Land Use Actions (and public works decisions) must be consistent with the General Plan

**Specific Plans** are authorized by Gov’t Code § 65450 et seq.

Must be consistent with General Plan

Can be plan-like, ordinance-like, or a blend of the two

Commonly used to tailor land use requirements for a particular subdivision or planning area (such as an historic old town or a redevelopment area)

**Zoning Ordinances** are authorized by Gov’t Code § 65850 et seq.

Typically divide city or county into *use districts*, such as single-family residential, multi-family residential, commercial, industrial, etc. This approach is called “Euclidian zoning” after *Euclid v. Ambler Realty Co.* (1926) 47 S.Ct. 114, which upheld such zoning as a valid exercise of the police power and not as an infringement on *Lochner*-era notions of freedom of contract. Modern zoning devices such as mixed-use districts, planned unit developments, and specific plans allow more flexibility in mixing uses within a site.

Typically divide uses of land into *expressly permitted uses*, which require no discretionary approval (although a building permit or other ministerial approval is typically required), *conditionally permitted uses*, which require a conditional use permit or other discretionary approval (such as a church in an R-1 zone), and *expressly forbidden uses* (such as a rock quarry in an R-1 zone).

*Variances* allow exceptions to zoning laws to account for unique circumstances of a property, such as an odd shape. In addition to findings required by ordinance, state law specifies findings to be made. Gov’t Code § 65906.

Many *other discretionary permits* are created by local ordinance and commonly include condition use permits (CUPs), unclassified use permits, use permits, standards modifications, and a hundred other names specified by each local ordinance. Each permit is entirely a creature of local ordinance, although due process and other general administrative law principles apply.

*Legal non-conforming uses* (NCUs) arise when zoning ordinance provisions change making a use illegal that was lawful when established. The typical zoning ordinance restricts reinvestment in NCUs in an effort to “amortize” them out and replace them with conforming uses. Such rules rarely work well, especially as to residential property, and more modern ordinances allow more flexibility.

*Findings* are statements by a decision-maker as to why an approval or disapproval reflects the criteria for decision established by the statute or ordinance. *Topanga Ass’n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506.

**Redevelopment** is authorized by the Community Redevelopment Law, Health & Safety Code § 33000 et seq. It is intended to eliminate blight by encouraging reuse of property in need of redevelopment. It can be politically controversial and is a practice area unto itself. It is mentioned here because property within a redevelopment project area must also comply with the land use requirements of the redevelopment plan. Modern plans cross-reference the General Plan, allowing easy compliance with both. Older plans have stand-alone rules that can conflict with the General Plan and zoning ordinance.

**Subdivision Map Act** – Government Code § 66410 et seq. Regulates the division and redivision of land into separate parcels for lease, sale or financing. This is a complex process subject to a host of statutory and case law. Common approvals are: subdivision maps (which create 5 or more parcels), parcel maps (which create four or fewer parcels), lot line adjustments (which affect fewer than 4 parcels), and certificates of compliance (which validate parcels lawfully created prior to the adoption of the Subdivision Map Act or which are otherwise not reflected on a recorded map). Each such approval is governed by the standards of the Map Act and local ordinance and all but the last two are discretionary approvals subject to conditions of approval which can be quite significant.

### **Vested Rights**

Ordinarily, local governments can change land use rules and prevent the use of entitlements previously granted (rezoning a map before it is constructed, *e.g.*). Several types of vested rights have developed to protect investment-backed expectations in this setting:

- *Development Agreements* – Gov’t Code § 65864
- Substantial hard costs in good faith reliance on a validly issued permit (the “foundation” rule): *Avco Community Developers v. South Coast Regional Comm’n* (1976) 17 Cal.3d 785.
- *Vesting Maps* – Gov’t Code 66498.1 et seq.

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**Takings** The police power is limited by the federal and state Constitutions, including the takings clause of the 5<sup>th</sup> Amendment. A government action is a taking if:

- It lacks a legitimate public purpose (*but see, Lingle v. Chevron USA, Inc.*, 125 S. Ct. 314 (2004)).
- It denies the property owner any viable economic use of his or her property. *Palazzolo v. Rhode Island* (2001) 121 S. Ct. 2448. In these cases a variance is typically required.
- 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. *Nollan v. California Coastal Comm’n* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374.

**California Environmental Quality Act (CEQA)** Public Resources Code § 21000 et seq.; 14 CCR § 15000 et seq. (the “State CEQA Guidelines)

A practice area to itself

Applies to all discretionary decisions of government, including land use approvals and public works decision

Requires that the decision maker consider the environmental consequences of an action before action is taken.

Four ways through the CEQA maze:

- non-project
- categorical exemptions
- negative declarations, typically “mitigated” (“neg. dec.’s”)
- environmental impact reports (EIRs)

Where a federal permit is required (as for construction in a wetland or a navigable waterway), compliance with the *National Environmental Policy Act (NEPA)*, 42 USC 4321 et seq. is also required. An *Environmental Impact Statement* is a gargantuan task and can take years. More common is a “*finding of no significant impact*” or “*FONSI*.” Often CEQA and NEPA processes are coordinated and combined documents are prepared, such as an EIR/EIS or an EIR/FONSI.

Many agencies adopt *local CEQA guidelines*.

CEQA is a very fertile field for litigation.

**Permit Streamlining Act** Gov’t Code § 65920 et seq.

Sets deadlines for action on land use permits and grants automatic approval (“deemed approved”) if action is not timely taken.

Does not apply to legislative action or to a CEQA action. *Land Waste Management v. Contra Costa County Board of Supervisors* (1990) 222 Cal.App.3d 950; *Eller Media v. City of Los Angeles* (2001) 87 Cal.App.4<sup>th</sup> 1217

Notice of the application must be given. Gov’t Code § 65956.

**Deadlines:**

- determine whether application is complete: 30 days; Gov't Code § 65943.
  - complete initial study under CEQA: 30 days; 14 CCR §15102.
  - complete negative declaration under CEQA: 180 days; Public Res. Code § 21151.5(a).
  - complete EIR: 1 year; Public Res. Code § 21151.5(a).
  - action on non-project, categorically exempt project, or project subject to neg. dec.: 60 days after adopting neg. dec. or determining project is exempt; Gov't Code § 65950(a)(3), (a)(4).
  - action on project for which EIR is prepared: 180 days after certifying EIR; Gov't Code § 65950(a)(1), (a)(2)
- One extension of up to 90 days with applicant's consent: Gov't Code § 65957.  
Shorter deadlines apply to subdivisions under the Map Act: Gov't Code §§ 66452.1 – 66452.2.

**The Applicable Law:**

- The federal and state Constitutions
- City Charter (Grass Valley is a charter city, Nevada City and Truckee are general law cities) and State law
- Municipal Codes
  - [www.mynevadacounty.com](http://www.mynevadacounty.com) "Land Use Code"
  - [www.cityofgrassvalley.com](http://www.cityofgrassvalley.com) Charter and Title 17 (Land Use) of Municipal Code
  - [www.nevadacityca.gov](http://www.nevadacityca.gov) (Municipal Code not yet available)
  - [www.townoftruckee.com/planning.html](http://www.townoftruckee.com/planning.html) (General Plan, Development Code and much more)

**The Leading Hornbooks:**

James Longtin, *Longtin's California Land Use* (Local Government Publications, 1987 & 2005 Supp). [www.longtinslanduse.com](http://www.longtinslanduse.com)

Curtin & Merritt, *California Subdivision Map Act and the Development Process* (CEB, 2005). [www.ceb.com](http://www.ceb.com)

Kostka & Zischke, *Practice under the California Environmental Quality Act* (CEB, 2005). [www.ceb.com](http://www.ceb.com)

Thomas, Moose & Manley, *Guide to the California Environmental Quality Act* (Solano Press 1999). [www.solano.com](http://www.solano.com) (This is broadly respected and often cited by the courts. It is commonly referred to as "Remy & Thomas" after its initial authors.)